JUDGMENT NO. 278 YEAR 2013

In this case the Court considered a challenge to legislation which provided that the choice to remain anonymous made by a biological mother whose child had been adopted retained irrevocable status for 100 years. The lower court argued that, should the child subsequently wish to contact his or her biological mother, the latter should be contacted in order to establish whether she still wished to remain anonymous. The Court ruled the provision unconstitutional on the grounds that it was excessively rigid, as requirements of secrecy differing from case to case must be treated in a more nuanced manner, and the child's right to health (vis-a-vis for instance the possibility of genetic testing) must also be taken into account.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 28(7) of Law no. 184 of 4 May 1983 (Right of the child to a family), initiated by the Catanzaro Children's Court acting on an application filed by R.M. by the referral order of 13 December 2012, registered as no. 43 in the Register of Referral Orders 2013 and published in the Official Journal of the Republic no. 11, first special series 2013.

Considering the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Paolo Grossi in chambers on 9 October 2013.

[omitted]

Conclusions on points of law

1.– The Children's Court of Catanzaro raises, with reference to Articles 2, 3, 32 and 117(1) of the Constitution, a question concerning the constitutionality of Article 28(7) of Law no. 184 of 4 May 1983 (Right of the child to a family), as replaced by Article 177(2) of Legislative Decree no. 196 of 30 June 2003 (Personal Data Protection Code), "insofar as it does not allow an adopted person to be granted access to information

concerning his or her origins without having previously ascertained whether the biological mother still wishes her identity not to be disclosed".

The contested provision is claimed to violate: Article 2 of the Constitution as "a violation of the right to search for one's own origins and thus the right of adopted children to their personal identity"; Article 3 on the grounds of the "unreasonable difference in treatment between adopted children born of women who state that they do not wish their identity to be disclosed, and the adopted children born of parents who have not stated their wishes and on whom adoption was, by contrast, imposed"; Article 32 due to the fact that it is impossible for the child to obtain information relating to family medical history, also as regards genetic risks; and Article 117(1) in relation to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and implemented by Law no. 848 of 4 August 1955, as interpreted by the European Court of Human Rights in the judgment of 25 September 2012 in the case of *Godelli v. Italy*, which held that the relevant Italian legislation violated Article 8 of the Convention in that it did not strike an adequate balance between the competing interests of the parties.

2.– The President of the Council of Ministers intervened in the proceedings and observed that the question of constitutionality, which had already been ruled groundless by judgment no. 425 of 2005 in relation to Articles 2, 3 and 32 of the Constitution, was also groundless in relation to Article 117(1), considering that the protection of anonymity also safeguards the life of the newly born child and the health of the woman and that, contrary to the position stated by the Strasbourg court, Italian legislation had "settled the different interests involved in a balanced and proportional manner".

3.– The question is well founded insofar as set out below.

4.– As the lower court and the state representative correctly noted, the question of the right to anonymity of the mother and the right of the child to know his or her origins in order to protect his or her fundamental rights have already been considered in judgments both of this Court and of the European Court of Human Rights.

These are particularly delicate questions as both involve constitutional values of primary standing and each implies its own respective form of manifestation, so much so that – as is evident – the scope of protection for the mother's right to anonymity cannot

in practice fail to affect the satisfaction of the opposing aspiration of the child to know his or her origins, and vice versa.

In the proceedings concluded by judgment no. 425 of 2005, this Court was called upon to rule upon an entirely analogous question to that which has now been raised once again by the referring court: also in that case, the remedy sought did not consist in the mere negation of the right of a mother who had declared at the time the child was born that, for the purposes of the documentation held by the civil registrar, she did not wish her identity to be disclosed pursuant to Article 30(1) of Presidential Decree no. 396 of 3 November 2000 (Regulations on the review and simplification of the rules governing civil status, pursuant to Article 2(12) of Law no. 127 of 15 May 1997), nor did it seek to strike any kind of balance between the rights referred to above – which were potentially in conflict as regards the satisfaction of each; on the contrary, it sought exclusively to introduce into the law – which was entirely silent on this matter – the ability to ascertain whether the biological mother still wished her identity not to be disclosed.

However, in that case the Court recalled that the goal of the legislation, which is now once again contested in relation to this issue, was to ensure on the one hand that the birth should occur under optimal conditions both for the mother and for the child, and on the other hand to "dissuade the mother from making irreparable decisions, which would have been much more serious for the child". The irrevocable effect of this choice was justified on the grounds that it reinforced the corresponding objectives, by ensuring that anonymity could not entail for the mother "the risk that, at an uncertain future time, she could be approached by the judicial authorities following a request by a child which she had never known, who was now an adult, in order to decide whether to confirm or revoke that declaration of intention made in the distant past".

The essential core of the choice made at the time can be grasped with ease in the supposed exact overlap between the right to anonymity, considered in itself, and the enduring and mandatory protection of confidentiality, or if you will of secrecy, which the exercise of that right inevitably entails. This essential core – it is important to stress – must be reasserted, precisely in the light of the values of primary standing which it seeks to uphold.

The basis in constitutional law of the mother's right to anonymity is rooted in the need to safeguard the mother and the newly born child from any turmoil associated with a broad range of personal, environmental, cultural and social situations that would be liable to create risks for the mental and physical health or the very safety of both, whilst at the same time ensuring a framework for the birth to occur in the best possible conditions.

Therefore, safeguarding life and health are the interests of primary standing present within the backdrop of a systemic choice which, considered in itself, seeks to favour natural parentage.

However, within this perspective, the child's right to know his or her own origins – and to access information relating to his or her parents – represents a significant element within the constitutional system ensuring protection for the person, as has also been recognised in various judgments of the European Court of Human Rights. Moreover, the related need to know constitutes one of the aspects of the personality that can condition the intimacy and the very social life of a person as such. All of these elements fall to be regulated by the legislation which Parliament is called upon to enact, in the manner and according to the arrangements deemed most appropriate. These arrangements must also have the goal of ensuring that the exercise of this right does not conflict with rules – such as those regulating the mother's right to anonymity – which as mentioned above affect requirements aimed at protecting the supreme interest of life.

5.– However, the aspect which is afforded specific significance here – and on which the judgment of the Strasbourg Court of 25 September 2012 in *Godelli v. Italy* invites reflection, according to the account provided by the referring court itself – revolves around the question, which is so to speak "diachronic" (i.e. liable to evolve through time), of the protection assured to the mother's right to anonymity.

With the provision under examination, the legal system appears in fact to provide for a kind of "crystallisation" or "setting in stone" of the choice: in fact, once the choice to remain anonymous has been made, the relevant expression of intention is deemed to have irreversible status, and essentially ends up "expropriating" the holder of the right from any further option. That right is ultimately transformed into a kind of mandatory constraint, which ends up having an expansive effect beyond the holder of the right, thereby projecting the bar on its removal precisely onto the child, to whom it was

originally intended to apply the requirement of secrecy as to the person who gave birth to him or her.

All of this is vividly sculpted by Article 93(2) of Legislative Decree no. 196 of 2003, according to which "Any certificate of attendance at the birth or medical file that includes personal data enabling a mother to be identified who has declared that she does not wish her identity to be disclosed, exercising the right provided for under Article 30(1) of Presidential Decree no. 396 of 3 November 2000, may only be issued as a full copy to an interested party, according to law, one hundred years after the document was created".

However, if the foundation for this system is sought after – which applies the "bond" of anonymity for a period of time which theoretically exceeds that of a human life – it is concluded that it is based on a supposed need to prevent disruption to the mother having regard to the exercise of her "right to be forgotten" and, at the same time, the need to safeguard *erga omnes* the confidential status of the identity of the mother, who is evidently deemed to be exposed to risk whenever attempts may be made to contact her in order to verify whether or not she wishes to remain anonymous.

However, neither requirement may be regarded as decisive: the former cannot as the risk of disruption for the mother corresponds to a countervailing risk for the child of being deprived of the right to know his or her origins; the latter cannot, since the degree to which confidentiality is protected is ultimately dependent upon the various arrangements provided for under the relevant legislation, as well as the experience of their application.

In general terms, the choice to remain anonymous entailing an irreversible renunciation of "legal parenthood" cannot however reasonably also imply a definitive and irreversible renunciation of "biological parenthood": if this were the case, it would end up introducing into the legal system a kind of prohibition aimed at precluding at root any possibility of a reciprocal *de facto* relationship between mother and child, the results of which would be difficult to reconcile with Article 2 of the Constitution.

In other words, whilst the choice to remain anonymous legitimately prevents the establishment of "legal parenthood", which inevitably creates stability for the future, it does not appear to be reasonable that such a choice must necessarily and definitively exclude also a relationship of "biological parenthood": this is because, as regards the

latter, the choice may be revocable (on the initiative of the child), precisely because it reflects the reasons why the choice was made and may be maintained.

6.– The legislation under examination is therefore objectionable on the grounds of its excessive rigidity.

Moreover, this was also essentially concluded on the same grounds by the European Court of Human Rights in the Godelli judgment, referred to above.

As mentioned above – and as will be clarified below – that case held that Italian law did 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", in contrast to the position under French law, which was examined in this respect in the judgment of 13 February 2003 in the Odièvre case.

However, it is easy to observe as regards the above issue that Article 93 of Legislative Decree no. 196 of 2003 expressly provides in paragraph 3 that "non-identifying" information contained in the birth attendance certificate or the medical file may be disclosed at any time (within the time limit of one hundred years if designated as secret), subject solely to compliance with the "appropriate precautions to prevent the mother from being identifiable" in order to protect her confidential status.

It is evident that the apparent – and significant – generic or elastic nature of the formula "appropriate precautions" comes up against the obvious – yet not insurmountable – difficulty in establishing with precision abstract rules aimed at satisfying requirements of secrecy, which may vary in line with specific individual circumstances. It is equally evident that protection must also be assured to the child's right to health, having regard also to modern diagnostic techniques based on genetic testing.

The violation thus lies in the fact that the decision to maintain secrecy is irreversible. For the reasons set out above, since this violates Articles 2 and 3 of the Constitution, it must consequently be removed.

The grounds for challenge raised in relation to the further principles, therefore, require no discussion.

It will be for Parliament to introduce appropriate legislation in order to enable the enduring wishes of the biological mother not to disclose her identity to be confirmed,

whilst at the same time putting in place rigorous safeguards to protect her right to anonymity, according to procedural choices which adequately limit the arrangements governing access, including by the competent offices, to information containing details of her identity for the purposes of the verification referred to above.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that article 28(7) of Law no. 184 of 4 May 1983 (Right of the child to a family), as replaced by Article 177(2) of Legislative Decree no. 196 of 30 June 2003 (Personal Data Protection Code) is unconstitutional insofar as it does not allow the court – according to a procedure regulated by law ensuring the utmost confidentiality – the possibility to consult the mother – if the latter has declared that she does not wish her identity to be disclosed pursuant to Article 30(1) of Presidential Decree no. 396 of 3 November 2000 (Regulations on the review and simplification of the rules governing civil status, pursuant to Article 2(12) of Law no. 127 of 15 May 1997) – upon request by the child with a view to revoking such a declaration.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 18 November 2013.