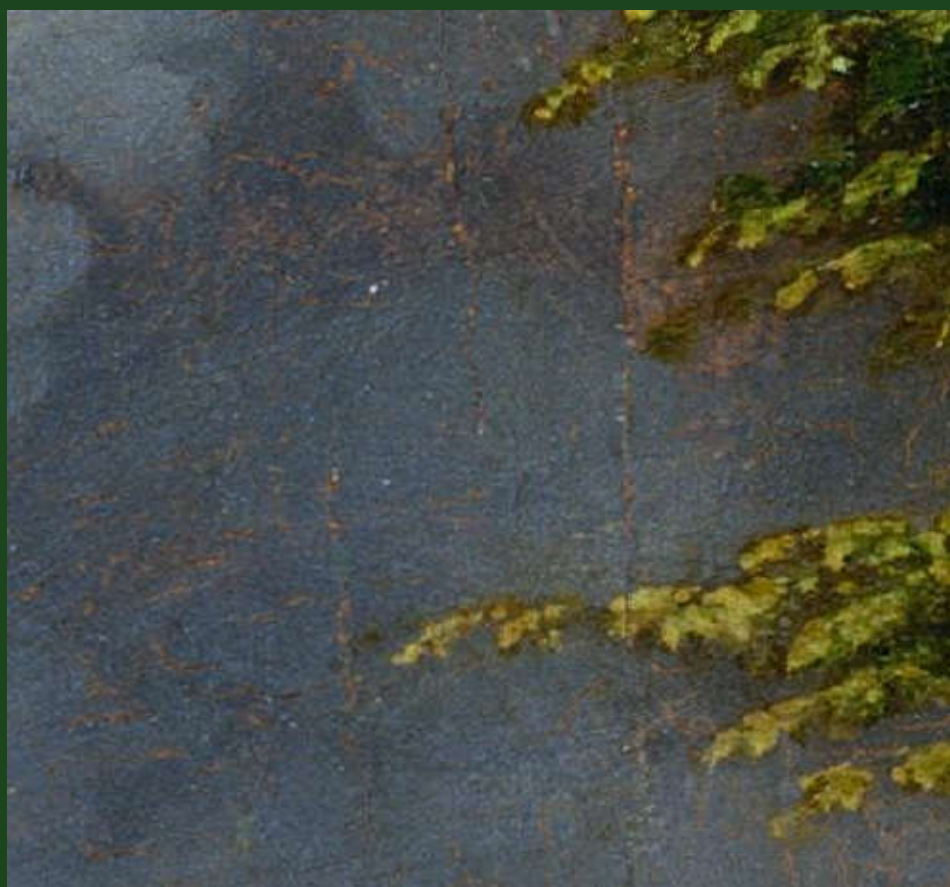


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Hard Cases

Do Adopted Children Have a Right to Know Their Biological Siblings?

Annalisa Cocco*

Abstract

The Court of Cassation, with decision no 6963 of 20 March 2018, ruled on the adoptee's right to know his/her origin. The Court held that when the adoptee asks for information about his/her biological history, he/she has the right to know not only the identity of the parents, but also that of any adult biological sibling. The latter must be consulted and asked to consent to the disclosure of their identity to the petitioner. The procedure must ensure maximum confidentiality and respect for the dignity of the subjects who are involved in the process. This article examines the arguments chosen by the Court to uphold the existence of the right of the adoptee to the knowledge of one's biological origin, with regard as well to kinship with one's siblings. Moreover, the work highlights the constitutional principles related to personal identity and to the full development of personality, as recalled by the Court in the decision.

I. Corte di Cassazione 20 March 2018 no 6963: The Case

The question submitted to the scrutiny of the Supreme Court arises from the petition of a subject who was adopted and then, having reached adulthood, asked to contact his biological sisters, who were adopted by other families. After the Juvenile Court of Turin had rejected two petitions, the Court of Appeal of Turin upheld the decision by the Court of first instance, denying the disclosure of the personal particulars of the sisters. The appellant argued that the International Convention on the Rights of the Child, passed on 20 November 1989 and ratified by Italy on 5 September 1991, required a jurisprudential approach to the matter in which the Juvenile Court balanced the adoptee's right to family bonds and the right to privacy of the biological siblings.

According to the Court of Appeal, however, Italian national legislation (Art 28, paras 4 and 5 of legge 4 May 1983 no 184) states that an adoptee's right to know one's origin is limited to biological parents. In contrast, in the present case, the biological sisters' right to privacy prevails over the adoptee's interest in a relationship with them because the law does not expressly provide for the right of the adoptee to know his/her siblings. The Court of Appeal also pointed to the Italian legislature's introduction of a type of offense (Art 73, legge no

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184/1983) for providing undue information suitable for tracing a minor who has been adopted. Therefore, according to the appellate judge, the request for access to the identification information of the biological sisters must be rejected. The Court of Appeal maintained that even a hearing aimed at verifying the consent of the sisters to the disclosure of their identity could be harmful for them, because it would damage the delicate balance that they have built over the years with their adoptive families.

Accordingly, in his appeal to the Court of Cassation, the petitioner set out the terms of the question to be solved. He asked the Court to clarify whether the legislature enshrined the right to family bonds only with reference to the identity of biological parents, or also in relation to any biological brothers and sisters. The question according to the petitioner is, therefore, whether a systematic interpretation of national and supranational rules can be implemented, supported also by the principles developed by jurisprudence, with the purpose of enhancing the family bond in its entirety, including subjects that are not explicitly mentioned in any legislative provision. The supra-national standards referred to are Arts 7 and 8 of the Convention on the Rights of the Child, which provide for the rights of the child to preservation of his/her identity and his/her name and family relationships. For an adoptee, identity may consist mainly of researching his/her origin and gathering information about his/her biological family. Furthermore, Art 30 of the Hague Convention of 29 May 1993 requires that each State must carefully preserve information on the origin of the minor, ensuring access to such information to the extent permitted by law. Regarding domestic law, the petitioner asserted that the Court of Appeal had misinterpreted paras 4 and 5 of Art 28, legge no 184/1983 ('Right of the child to a family'), and that the bonds with the sisters should have been included in the family bonds deserving protection. Finally, concerning the sisters' right to confidentiality and privacy, the petitioner claimed that his right should prevail, having been recognized by constitutional and conventional rules. On the other hand, the prejudice arising from hearing or questioning the sisters was merely hypothetical. Their privacy, moreover, could be protected by means of a preliminary inquiry aimed at ascertaining their reaction to the request of a biological brother, revealing their identity only if they expressly allow it.

The Court of Cassation, answering the question submitted to its judgment, accepted the appeal and returned the case to the Court of Appeal of Turin, instructing the Court of Appeal to give a new judgment on the facts. The appellate judge, in particular, was instructed to abide by the principle of law that the adoptee has the right to know his origin, accessing the relevant information, including not only the identity of his biological parents, but also the identity of any adult sibling. This right can be exercised by means of a judicial procedure suitable to ensure the utmost confidentiality and the utmost respect for the dignity of the persons involved in the process. The exercise of the right of the adoptee is

precluded only if the sibling denies the consent to the disclosure of his/her identity.

II. The Evolution of the Adoptee's Right to Personal Identity

The right to personal identity has been described by the Court of Cassation itself as the interest 'to avoid any alteration, misunderstanding, obfuscation, challenge',¹ coming from the outside, of one's intellectual, political, social, religious, ideological and professional heritage. It is the result of a lively jurisprudential history which began in Italy in the mid-nineteen-seventies² and continued over time thanks to the contribution of European judges and lawmakers. Identity, as an essential trait of human personality, is included in the hermeneutic meaning of Art 2 of the Italian Constitution and therefore falls within the set of rights that the State deems inviolable for every person. The interest 'to be oneself'³ is expressed in a variety of situations of everyday life: from the protection of one's name,⁴ to the safeguarding of one's image, of one's pseudonym, of honour and reputation, according to the different circumstances distinguishing any specific actual case.

In the hypothesis of an adopted individual, in particular, personal identity is emphasized mainly as the interest in reconstructing his/her biological history, and is expressed in the desire to know those who formed the original family. With respect to this specific case, the Italian legislature has foreseen (in the law regulating adoption: legge no 184/1983, 'Right of the child to a family') that any adopted person, on reaching twenty-five years of age, can access 'information concerning his/her origin and the identity of his/her biological parents'. If the person is less than twenty-five years old such access is granted only if there are serious and proven reasons that might affect the psychophysical health of the adoptee. While in the first case the right to know one's origin is

¹ Corte di Cassazione 22 June 1985 no 3769, *Foro italiano*, I, 2211 (1985).

² Pretura di Roma 6 May 1974, *Foro italiano*, I, 1806 (1974); Tribunale di Roma 27 March 1984, *Foro italiano*, I, 1687 (1984); Corte costituzionale 3 February 1994 no 13, *Foro italiano*, I, 1668-1670 (1994); Corte di Cassazione 7 February 1996 no 978, *Foro italiano*, I, 1253-1255 (1996). See also G. Bavetta, 'Identità personale' *Enciclopedia del diritto* (Milano: Giuffrè, 1970), XIX, 953; G. Natoli, 'Sul diritto all'identità personale. Riflessioni introduttive' *Diritto dell'informazione e dell'informatica*, 560 (1985); A. Scalisi, *Il valore della persona nel sistema e i nuovi diritti della personalità* (Milano: Giuffrè, 1990), 180; A. Cerri, 'Identità personale' *Enciclopedia giuridica* (Roma: Treccani, 1995), XV, 1-7; G. Pino, 'Il diritto all'identità personale ieri e oggi. Informazione, mercato, dati personali', in R. Panetta ed, *Libera circolazione e protezione dei dati personali* (Milano: Giuffrè, 2006), 258; F.D. Busnelli, 'La persona alla ricerca dell'identità' *Rivista critica di diritto privato*, 7-22 (2010).

³ Corte costituzionale 3 February 1994 no 13, *Foro italiano*, I, 1668-1671 (1994), stated that the 'right to be oneself, understood as respect for the image of a person participating to associate life, acquiring ideas and experiences, ideological, religious, moral and social opinions and beliefs that differentiate and at the same time qualify the individual'.

⁴ L. Tullio, 'The Child's Surname in the Light of Italian Constitutional Legality' 3 *The Italian Law Journal*, 221-236 (2017).

undoubtedly prevalent over the right to privacy of biological parents, in the second case, the Juvenile Court must ascertain that the access to the information does not entail a serious disturbance to the psychophysical balance of the petitioner. The assessment of the judge shall not consist, in any case, in balancing the interests of the adoptee and those of the biological parents. The inquiry shall be limited to the personal sphere of the petitioner, aiming to avoid any damage to a sound development of his/her personality.

The same law on adoption provides, however, an exception to the right of the adoptee to know his/her origins, that is the hypothesis of 'anonymous birth' (Art 28, para 7, legge no 184/1983). Within Italian legislation, although Art 30 of the Constitution states the duty of parents to 'support, teach and educate their children', Art 30 of decreto del Presidente della Repubblica 3 November 2000 no 396 allows a woman to give birth to her child in anonymity. Under this decree, when filling in the declaration of birth to be handed over to the registrar for registration of the child in the town where he/she was born, the mother can prevent her personal details from being included in the declaration. The identity of the mother can be revealed only one hundred years after the date of the document (Art 93, decreto legislativo 30 June 2003 no 196).

The provision of the legal institution of anonymous birth was justified by the Italian legislature's desire to counter abandonment of newborns and illegal abortion practices. Therefore, its rationale is based on the principles of protection of life and human health, with regard to both the woman and the yet unborn baby. This decree, however, has been the subject of several jurisprudential interventions aimed at curbing the risk of an absolute obliteration of the right of the adoptee to know his/her origins. The judgment of the European Court of Human Rights (ECtHR) concerning the 'Godelli case'⁵ has played a pivotal role. Being first denied access to information by both the Court of Trieste and the Court of Appeal, the petitioner turned to the European Court of Human Rights claiming a violation of Art 8 of the European Convention on Human Rights (ECHR) (Right to respect for private and family life). Eventually, the Court accepted the request.

The ruling of the European Court appeared as a pilot judgment against the Italian State, aimed at pointing out the need to revise the legislation related to maternal anonymity. According to the ECtHR, in particular, Italian regulation

⁵ Eur. Court H.R., *Godelli v Italia*, Judgment of 25 September 2012, *Famiglia e diritto*, 537-543 (2013), see also G. Currò, 'Diritto della madre all'anonimato e diritto del figlio alla conoscenza delle proprie origini. Verso nuove forme di contemperamento' *Famiglia e diritto*, 544-553 (2013); J. Long, 'La Corte europea dei diritti dell'uomo censura l'Italia per la difesa a oltranza dell'anonimato del parto: una condanna annunciata' *Nuova giurisprudenza civile commentata*, 110-117 (2013); C. Ingenito, 'Il diritto del figlio alla conoscenza delle origini e il diritto della madre al parto anonimo alla luce della recente giurisprudenza della Corte europea dei diritti dell'uomo' *Giustizia civile*, 1608-1619 (2013); A. Margaria, 'Parto anonimo e accesso alle origini: la Corte europea dei diritti dell'uomo condanna la legge italiana' *Minori giustizia*, 340-359 (2013).

of access to information on origin is clearly favourable to the right to anonymity of the mother,⁶ while it has sacrificed in an absolute and pre-emptive way the right of the adoptee to retrace his/her biological origins. The ruling includes comparative references to other jurisdictions (Austria, Luxembourg, Russia, Slovakia, Spain, Hungary, etc).

In particular, France was presented as an exemplary model for Italy. The ‘Odièvre Case’⁷ is an opportunity to analyse the French system, where a National Council for Access to Information about Personal Origin was introduced in 2002. This body has taken on the task of putting in contact, at the request of the parties, the adoptees with their biological mothers. In the opinion of the European Court, France, unlike Italy, was able to balance the interests at stake, because it gave women the right to give birth in anonymity, yet granted as well the adopted children the right to obtain information on their origin. In the ‘Odièvre case’ the Court held that the French State did not violate Art 8 of the ECHR, because the petitioner had obtained useful information for the reconstruction of biological history in compliance with the mother’s desire for anonymity.

With regard to the ‘Godelli case’, on the other hand, the European Court ruled that Italy had infringed on the right to respect for the petitioner’s private and family life. The Strasbourg Court emphasized that Art 8 of the ECHR not only prohibits undue State interference in the private life of citizens, but also aims to oblige the State to enforce any act in a matter that is conducive to the enjoyment of private and family life. The right to personal identity, which gives rise to the right to know one’s ancestry, is an integral part of the notion of private life. It is true that States reserve for themselves a discretionary power in the implementation of the principle of protection of the privacy of citizens, but, according to the Court, Italy did not balance the interests at stake (right to privacy of the mother *versus* right to personal identity of the child). On the

⁶ Eur. Court H.R., *Godelli v Italia* n 5 above, para 39: ‘The system did not provide for access to the file, even with the mother’s agreement. Accordingly, the child’s interest in knowing his or her origins was entirely sacrificed, without any balance being struck between the competing interests and without any possibility of weighing up the interests at stake. Italian law accepted the mother’s decision as a blanket ban on any request for information made by the applicant, regardless of the reason for or the legitimacy of that decision. A refusal by the mother was irreversibly and in all circumstances binding on the child, who had no legal means by which to contest her birth mother’s unilateral decision. The mother could thus, at her own discretion, bring a suffering child into the world who was condemned, for life, not to know its origins. A blind preference was given to the mother’s interests alone’.

⁷ Eur. Court H.R., *Odièvre v France*, Judgment of 13 February 2003, with note by A. Renda, ‘La sentenza Odièvre c. Francia della Corte Europea dei diritti dell’uomo: un passo indietro rispetto all’interesse a conoscere le proprie origini biologiche’ *Famiglia*, 1109 (2004); S. Piccinini, ‘La Corte europea dei diritti dell’uomo e il divieto di ricerca della maternità naturale’ *Giustizia civile*, I, 2177-2193 (2004); J. Long, ‘La Corte europea dei diritti dell’uomo, il parto anonimo e l’accesso alle informazioni sulle proprie origini: il caso Odièvre c. Francia’ *Nuova giurisprudenza civile commentata*, II, 283-311 (2004); R. Hernández, ‘La constitucionalidad del anonimato del donante de gametos y el derecho de la persona al conocimiento de su origen biológico’ *Revista Jurídica de Catalunya*, 105-134 (2004).

contrary, it has enacted a decree that disproportionately favours maternal anonymity, stating that the anonymity shall be safeguarded for such a long time (one hundred years) that the petitioner is virtually barred from accessing any information. Italy has not sought to establish a balance between the interests of the parties and has exceeded the discretionary power granted by the Convention.

Following the judgment of the European Court of Human Rights, the Constitutional Court promptly took action to amend the national legislation in a manner consistent with the inviolable rights of the adoptee. With ruling no 278 of 22 November 2013,⁸ the Court invalidated Art 28, para 7 of legge no 184/1983, in particular the passage barring the judge from contacting the anonymous mother at the request of the adopted child for a possible withdrawal of anonymity, through a process regulated by law and ensuring maximum confidentiality. With this ruling, the Constitutional Court overturned its previous rulings on the issue.⁹

The Court, for the first time, officially conferred legal dignity on the need of adopted persons to know their biological origin, maintaining that this represents a trait of the human personality which can deeply affect the entire social life of the individual.¹⁰ The unlawfulness was not found in the right to anonymity – which remains an important right of the pregnant mother, protecting her own and the child's health – but in the irreversibility of such anonymity.

Legislation establishing an irrevocable right of anonymity clashes with the inviolable rights of the human being (Art 2 of the Italian Constitution), since it actually and substantially 'expropriates' any future choice from the woman concerned and the any tool for asserting the fundamental right to personal identity from the child. It is therefore necessary to balance the interests between the inviolable right of the child to retrace his/her personal identity and the right to privacy of the mother who has opted to give birth anonymously.¹¹ This balancing must be carried out by the judge through a confidential hearing of the

⁸ Corte costituzionale 22 November 2013 no 278, *Famiglia e diritto*, 11-15 (2014), see also: T. Auletta, 'Sul diritto dell'adottato di conoscere la propria storia: un'occasione per ripensare alla disciplina della materia' *Corriere giuridico*, 473-487 (2014); J. Long, 'Adozione e segreti: costituzionalmente illegittima l'irreversibilità dell'anonimato del parto' *Nuova giurisprudenza civile commentata*, I, 289-296 (2014); A. Ambrosi, 'Interesse dell'adottato a conoscere l'identità della madre biologica versus interesse della madre all'anonimato: un nuovo punto di equilibrio' *Studium iuris*, 667-675 (2014); B. Checchini, 'Anonimato materno e diritto dell'adottato alla conoscenza delle proprie origini' *Rivista di diritto civile*, 709-725 (2014); G. Finocchiaro, 'Il segreto sulle origini perde il carattere irreversibile ma la donna può decidere se restare nell'anonimato' *Guida al diritto*, 49-50, 20 (2013); G. Casaburi, 'Il parto anonimo dalla ruota degli esposti al diritto alla conoscenza delle origini' *Foro italiano*, I, 8-19 (2014).

⁹ Corte costituzionale 25 November 2005 no 425, with note by S. Marzucchi, 'Dei rapporti tra l'identità dell'adottato e la riservatezza del genitore naturale' *Giurisprudenza italiana*, 1800-1805 (2006). See also L. Balestra, 'Il diritto alla conoscenza delle proprie origini tra tutela dell'identità dell'adottato e protezione del riserbo dei genitori biologici' *Famiglia*, 161-170 (2006).

¹⁰ V.M. Petrone, *Il diritto dell'adottato alla conoscenza delle proprie origini* (Milano: Giuffrè, 2004), 50-55; M.G. Stanzone, *Identità del figlio e diritto di conoscere le proprie origini* (Torino: Giappichelli, 2015), 67.

¹¹ Consiglio di Stato 27 October 2006 no 6440, *Foro amministrativo*, 2889 (2006).

biological mother.

Moreover, rejecting an access request filed by an adoptee merely on the basis of an anonymous birth is also an infringement of Art 3 of the Constitution (principle of equality and non-discrimination), because the same application filed by another adoptee not born of an anonymous mother would certainly have been accepted (Art 28, para 5, legge no 184/1983).

With this ruling the Supreme Court has assigned the lawmakers the task of introducing specific provisions aimed at verifying the continued desire for anonymity of the biological mother. After this ruling, however, the ‘Godelli case’ and other similar cases were settled by the Court, giving prominent value to the right of the adoptee to build their personal identity knowing their biological origin. The hypothesis in which the biological mother was deceased at the time the petition was filed was also addressed.

The Supreme Court upheld the adoptee’s right to access to information about his/her origin and the identity of the biological mother, stating that it can be effectively asserted even if the mother is dead and it is impossible to verify her continued desire for anonymity,¹² ignoring the term of one hundred years from the date of the certificate of live birth or the medical record, provided that the processing of personal data is in compliance with privacy laws and does not harm any right of third parties.¹³

However, these rulings concerned only the mother of the adoptee. Therefore, the matter recently submitted to the Supreme Court is a *quid novi* in the discipline of protection of the adopted person, because it extends the range of such protection to the biological brothers and sisters, who belong to the original family, but were never expressly mentioned in any legislative provision.

III. The Legal Argument of the Supreme Court

The question submitted to the Court, as preliminarily described by the petitioner, concerns the interpretation of national and international rules regulating the protection of the bonds related to the adoptee’s family of origin. It is unclear, in particular, whether the legislature intended to disclose the whole family composition to the adoptee or to reveal only the identity of the subjects expressly mentioned in the relevant provisions (that is, the parents).

Resolving this issue, the Court referred to the fundamental principles of protection of the human person stated in the Constitution and enhanced by the

¹² T.A. Auletta, *Riservatezza e tutela della personalità* (Milano: Giuffrè, 1978), 217, affirms that the interest in personal privacy ceases to exist when all the relatives within the fourth degree of kinship die.

¹³ Corte di Cassazione 21 July 2016 no 15024 and Corte di Cassazione 9 November 2016 no 22838, with note by E. Andreola, ‘Accesso alle informazioni sulla nascita e morte della madre anonima’ *Famiglia e diritto*, 15-32 (2017).

most recent jurisprudence on the matter. On the other hand, the Court ascribed very little importance to the literal wording of the legislative provisions, bringing their global meaning back to the values expressed in the general system of regulations.¹⁴ The ruling of the Court is therefore a systematic and axiological interpretation of the rules concerning the protection of the personal identity of the adoptee.

First of all, the Court reasserts that the right to know one's ancestry is an essential expression of the right to personal identity. The balanced development of individual and social personality is achieved above all through the construction of exterior and interior identity. This last trait seems to be more complex, because it may imply the knowledge and acceptance of a biological ancestry which is different from the juridical one. The Joint Sections of the Supreme Court have issued another pronouncement concerning the same question,¹⁵ that is the access to identification information of the biological mother of an adopted person; in that case, the Court clarified the immediate enforceability of ruling no 278/2013 of the Constitutional Court, qualifying it as an 'additive ruling of principle', whose effects are independent of the subsequent intervention of lawmakers aimed at defining more precisely the implementation of the process for the interpellation of the biological mother. The Joint Sections of the Supreme Court, in order to guarantee the immediate effectiveness of the constitutional ruling, stated that it is possible to resort to the procedure normally used to search for the origin of the adult adoptee where the mother did not opt for anonymity. This is a chamber proceeding: a confidential interrogation, which can be performed only once, takes place. The biological mother is asked whether she intends to remain anonymous or to allow her identity to be revealed to the child who asked for it. In any case, the procedure must guarantee both the maximum confidentiality and secrecy of the woman, and the maximum respect for the psychophysical balance of the child.

In light of this ruling of the Joint Sections, the Court considers that the confidential chamber proceeding is a constitutionally and conventionally adequate way to implement the right of the adoptee to know their origins, even in cases which are different from those provided for in Art 28, para 7 of legge no 184/1983. This implies that the same procedure can also be used to disclose the identity of members of the biological family other than the parents. The arguments used to affirm the petitioner's right to know his biological sisters seem to be extrapolated from the wording of Art 28, para 5, legge no 184/1983, a rule complying with the principle of protection of human personality, as stated in the Constitution (Art 2).

The judges questioned whether the wording chosen by the legislature ('origin

¹⁴ P. Perlingieri, 'Interpretazione assiologica e diritto civile' *Corti Salernitane*, 465-495 (2013).

¹⁵ Corte di Cassazione-Sezioni unite 25 January 2017 no 1946, with note by N. Lipari, 'Giudice legislatore' *Foro italiano*, I, 492-493 (2017).

and identity of biological parents’) contains an *hendiadys* or expresses two distinct areas of the right to information of the adoptee. In the first case, knowing one’s own origin would be satisfied by the knowledge of the biological parents, otherwise, we should assume that the parents are only a part of the ‘origin’ that the adoptee has the right to know. Therefore, it would also be necessary to protect the adoptee’s interest in information about any biological sibling. If we opt for the latter hermeneutical option, this raises the question of whether the legal status of family members other than the biological parents, especially siblings, should be considered in a similar or different way as that of the parents. With regard to the biological mother, the adoptive child has a prevailing right to know his/her identity (Art 28, para 5, legge no 184/1983), if the mother has not opted for anonymity. Does this right apply to biological siblings or is it necessary to balance different interests, as in the case of a mother who has opted for anonymity?

The Joint Sections preferred an interpretation that they have defined as ‘extensive’, elaborating a broad and inclusive concept of ‘origin’ of the adoptee. The wording chosen by the lawmakers is interpreted to be highlighting two distinct areas of the right of the adoptee to information. This interpretation is a wider guarantee of the ‘personal values’ stated by the Constitution: the reference to ‘origin’ includes, in addition to biological parents, also the closest relatives, such as siblings, even if they are not expressly mentioned in the law. The nature of the right to personal identity and the essential function that is acknowledged of the discovery of personal biological ancestry are thought to be of great value by the judges. It is therefore thought that this hermeneutical interpretation favours the ‘full development’ of the person, in accordance with the Art 3 of the Constitution.

With regard to the possibility of considering siblings in a similar or different position with respect to biological parents, the Court has ruled that the members of the family other than those expressly considered by law must be treated in a different way from those enumerated in Art 28, para 5, legge no 184/1983. The legislature carried out a general *ex-ante* evaluation of the pre-eminence of the right of the adoptee; but this solution cannot be automatically extended to the right to know the identity of siblings. This is due essentially to the difference of their position compared with that of their parents. Art 30 of the Constitution assigns to the parents both the right and the duty to maintain, teach and educate their children. In addition, with regard to siblings who have been adopted by other families, it cannot be ruled out that complete and unsolicited information about their biological origin may give rise to negative consequences for their personal balance.

Therefore, in the opinion of the Court of Cassation, the right of the adult adoptee has to be considered a prevailing right only with regard to biological parents. Concerning the adoptee’s siblings, in contrast, there is a need to balance the interests of the persons involved. Such a balance can be achieved through

the same procedure described by the Constitutional Court (ruling no 278/2013) and the Joint Sections of the Supreme Court (ruling no 1946/2017) as the most suitable for questioning the subjects involved in the process.

Although the legislation does not explicitly bar brothers and sisters of the adoptee from revealing their personal details, as it did for the biological mother who opted for anonymous birth (Art 93, decreto legislativo no 196/2003), they still enjoy a right to be asked permission before allowing access to information regarding their identity. In this case, subjective legal positions of equal rank and homogeneous content are compared, and the lawmakers have not ruled on this matter. Moreover, the personal situation of the petitioner and of his siblings are completely identical, as the latter have also been adopted.

The Court also adds an important clarification concerning the juridical bonds that could arise from the consent of the biological sisters to the disclosure of their identity to the petitioner. No degree of kinship will be established between them. This allows the avoidance of unwanted consequences in the legal sphere of third parties, for instance concerning succession rights in case of a sibling receiving an inheritance from an adoptive parent.

In conclusion, the petitioner's appeal is upheld and the Court states a principle of law: the adopted person has the right to know his/her origin, accessing information concerning himself/herself, including the identity of biological parents and of any adult sibling, provided that the disclosure process is in compliance with a due level of confidentiality.

IV. Comparative Considerations

The case involves various legal aspects because it mixes different existential human needs, concerning the individual as a human being and at the same time as an adopted child.

Within Italian family law, the most recent legislative and jurisprudential interventions have been directed at undermining the old concept of predominance of parents over children. This, indeed, was the legacy of a patriarchal culture in which children were subordinate to their parents, and especially subject to their father. Over time, attention has been focused more on children's needs and rights. This led to important reforms¹⁶ (legge 19 May 1975 no 151; legge 8 February 2006 no 54; legge 10 December 2012 no 219; decreto legislativo 28 December 2013 no 154) diminishing the parental authority and turning it into 'parental responsibility', and abolishing any distinction among children. The emphasis has been placed also on the continuity of emotional relationships for children involved in adoption procedures (legge 19 October 2015 no 173), stating that the

¹⁶ A. Gorassini, 'La famiglia vista dal figlio', in A. Busacca ed, *La famiglia all'imperfetto? Corso di diritto civile 2015-2016* (Napoli: Edizioni Scientifiche Italiane, 2016), 33-38.

judge shall take into account the relationships already established with persons who have been given custody of the child.

In the specific area of adoption, indeed, the main change that has shown a new focus of protection is the change of the title of the legge no 184/1983, from 'Regulation of the adoption and custody of minors' to 'Child's right to a family'. The change was made effective with the legge 28 March 2001 no 149, which also officially established the right of every child to grow up and be educated within his/her family.

The very concept of 'adoption' in Italy has changed over the years. From a 'strong' model of adoption, based on the strictest silence, a 'weak' adoption model has been implemented, expressly recognizing the right to be informed of one's condition (Art 28, para 1, legge no 184/1983). The choice of timing of the so-called disclosure is entrusted to the best judgment of the adoptive parents; in other countries the Anglo-American model of 'open adoption', in which the ties between the adoptee and the family of origin are never completely severed, is in force. The absolute protection of the mother who gives birth anonymously is in force only in a minority of European countries. In Spain, for example, the Tribunal Supremo stated in 1999 that the rules regarding maternal anonymity should be disregarded, as they are contrary to the Constitution, because this clashes with the right of the children to search freely for their origin.¹⁷ This inviolable right can be inferred from both the Spanish Constitution and the UN Convention on the Rights of the Child. In the Netherlands, the fundamental right of the child to develop his/her personality in a full and free way, including knowing the identity of his biological relatives, was decreed in 1994.¹⁸ In Bulgaria and Croatia the children can appeal to the judicial authorities to search for their mother; in Hungary, Latvia and Portugal a minimum age is established for accessing birth certificates.¹⁹ Ireland and the United Kingdom have set up a procedure providing for a rapprochement between the biological mother and the child. In England, the Children's Act of 1989 introduced an Adoption Contact Register to allow contact between the adoptee and the natural parents and, in any case, admitted the child's right, once of age, to access any information on his/her pre-adoptive history.²⁰ In Germany, § 1591 BGB states that: 'the mother of a child is the woman who gave him/her birth'. The attribution of maternity is thus a legal effect that arises from the mere fact of childbirth, independent of the woman's will. The right of the child to know his origin is not opposed to any right of the mother to give birth in anonymity, because the former is considered a fundamental right of the person, prevailing over the latter. The German legal

¹⁷ R. Hernandez, n 7 above, 105.

¹⁸ Supreme Court of the Netherlands 15 April 1994, *Nederlandse Jurisprudentie*, 608 (1994).

¹⁹ G. Canotilho and V. Moreira, *Constituição de República Portuguesa Anotada* (Coimbra: Coimbra Editora, 3rd ed, 1993), 58.

²⁰ E. Urso, 'L'adozione nel diritto anglo-americano fra problemi attuali e possibili opzioni per una riforma' *Rivista critica di diritto privato*, 745-768 (1996).

system is the only one in which the right to know one's origin has acquired such an unrestricted rank. The Swedish system, on the other hand, presents a further peculiarity because it is based on a compulsory constitution of the *status filiationis*. According to that system, any child born of an unmarried woman is automatically recognized by the State as a child of the woman and her partner. In case of non-recognition by the latter, an administrative procedure is started, with the purpose of identifying the father and establishing, even coercively, the relationship of filiation.

In France and in Italy filiation does not take place directly with birth: it requires an act of recognition, and in both countries women have the right to opt for anonymous birth. However, the procedure for accessing the documents related to the child's origin is different.²¹

From the jurisprudential point of view, the *favor veritatis* concerning filiation seems to be more and more prevailing over the *favor legitimitatis*, which previously appeared untouchable,²² provided that it includes the maximum protection of the interests of the minor. At the same time, there have been cases in which the biological truth has been sacrificed because it did not meet the existential needs of the child.²³ The decisive criterion for decisions on every case involving children is the so-called 'best interest of the child',²⁴ enshrined in Art 3 of the Convention on the Rights of the Child and constantly reaffirmed by the judges. By virtue of this principle, the solutions resulting in an improvement of the psychophysical well-being of the child must be favoured; the guarantee of the maximum protection of the right to personal identity also complies with this principle. For the same reason, the stability of family relationships is encouraged as much as possible, because they contribute to strengthening the human personality and building its roots. Moreover, the relationship between grandparents and

²¹ Para II above.

²² Corte di Cassazione 17 August 1998 no 8087, with note by V. Carbone, 'Riaffiora il contrasto tra *favor legitimitatis* e *favor veritatis*' *Famiglia e diritto*, 427 (1998); C. Cossu, 'Filiazione legittima' *Rivista di diritto civile*, II, 177 (1995); Corte di Cassazione 24 March 2000 no 3529, with note by A. Di Sapia, 'L'azione di contestazione dello *status* di figlio legittimo tra verità, giochi interpretativi, prospettiva normativa ed orizzonte della domanda' *Diritto della famiglia e delle persone*, 135-137 (2001); Corte costituzionale ordinanza 12 January 2012 no 7, *Giurisprudenza costituzionale*, 45-47 (2012); G. Casaburi, 'Le azioni di stato alla prova della Consulta. La verità non va (quasi mai) sopravvalutata' *Foro italiano*, I, 21-26 (2018).

²³ Eur. Court H.R., *Paradiso and Campanelli v Italia*, Judgment of 27 January 2015, with note by G. Casaburi 'La Corte europea dei diritti dell'uomo e il divieto italiano (e non solo) di maternità surrogata: una occasione mancata' *Foro italiano*, III, 117-126 (2015), in which the judges recognized a 'strong *de facto* relationship between the child and the intended parents, so that to disregard this relationship could jeopardize the best interest of the child'; see also Eur. Court H.R. (GC), *Paradiso and Campanelli v Italia*, Judgment of 24 January 2017, with note by E. Falletti, 'Vita familiare e vita privata nel caso Paradiso e Campanelli di fronte alla Grande Camera della Corte di Strasburgo' *Famiglia e diritto*, 729-739 (2017).

²⁴ E. Lamarque, *Prima i bambini. Il principio del best interest of the child nella prospettiva costituzionale* (Milano: Franco Angeli, 2016), 13; V. Scalisi, 'Il superiore interesse del minore ovvero il fatto come diritto' *Rivista di diritto civile*, 405-434 (2018).

grandchildren has recently been attributed great importance, allowing the former the right to take legal action to assert their right to visit and maintain a steady relationship with their grandchildren.²⁵

The European Court of Human Rights has recognized that childhood is a crucial age for the individual because it shapes ‘the fundamental programming of personality’.²⁶ Consequently, protecting the correct development and growth of the individual indirectly achieves the main objective of the ECHR, which is guaranteeing respect for human dignity and freedom.²⁷ Ignorance of one’s biological origin, in these terms, becomes an obstacle to ‘personal development’ because it causes ‘mental and psychological suffering’.²⁸ The knowledge of one’s origin cannot be linked just to the best interest of the child because it undoubtedly concerns adult life. It can be considered a part of his/her personal identity.²⁹

Within this legal and jurisprudential frame the ruling of the Supreme Court no 6963 of 20 March 2018 represents the epilogue of a path aimed at the maximum enhancement of human personality. The Italian legislature, especially in recent years, has recognized the importance of personal family bonds: thus, denying the petitioner the right to access information about his biological sisters, from whom he had been separated during childhood due to the adoption process, would have been unreasonable. The decision acknowledges the constitutional foundation of the right invoked, relating it to legal principles that have been asserted both in national and international jurisprudence. Therefore, it grants the access to information despite the fact that there is no legal provision expressly providing for it.

V. Conclusion

The case discussed is an illustrative example of what Ronald Dworkin called ‘hard case’, that is a case not foreseen or regulated specifically by any legal provision. Therefore, it has to be solved by means of the principles of law.³⁰ This argumentative procedure, grounded on principles, has been indeed used by the Supreme Court of Cassation in the analysis and solution of the question. The

²⁵ Case C-335/17 *Neli Valcheva v Georgios Babanarakis*, Judgment of 31 May 2018, available at www.curia.europa.eu.

²⁶ Eur. Court H.R., *Maumousseau and Washington v France*, Judgment of 6 December 2007, available at www.echr.coe.int.

²⁷ Eur. Court H.R., *Christine Goodwin v United Kingdom*, Judgment of 11 July 2002, available at www.echr.coe.int.

²⁸ Eur. Court H.R., *Odièvre v France* n 7 above; Eur. Court H.R. (GC), *Jäggi v Switzerland*, Judgment of 13 July 2006, available at www.echr.coe.int.

²⁹ S. Trotter, ‘The Child in European Human Rights Law’ 3 *Modern Law Review*, 461 (2018); J. Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford: Stanford University Press, 1997), 7.

³⁰ R. Dworkin, ‘Hard Cases’, in *Id*, *Taking Rights Seriously* (London-New York: Bloomsbury Academic, 1977, reprinted in 2013), 105.

Court could not enforce in a certain and unambiguous way Art 28, para 5 of legge no 184/1983, because it does not explicitly state that the adoptee can access information concerning his/her siblings. The judges have focused on the legal principles that the law aims at implementing.³¹ Therefore, they asked whether these principles could be deemed relevant to the specific case³² and, having ascertained their enforceability, they decided to accept the appeal of the adoptee.

Indeed, it is true that the rule does not expressly mention any member of the original family other than biological parents; however, the provision undertakes the function, in the legal system, of providing protection to the inviolable rights of the adoptee. By conceding to the adoptee the right to access information about the biological parents, the lawmakers intended to grant the person raised in an adoptive family the possibility to know his/her 'origin'. The principles that stand out in this situation are those concerning the psychophysical health of the individual, personal identity, information, the prohibition of discrimination, and respect for private and family life. All these principles derive both from the Constitution and from other European and international sources that are part of the Italian legal system (ECHR, Nice Charter, Hague Convention, Convention on the Rights of the Child). This demonstrates that the system of rules is not only composed of mere regulations and that the principles are equally binding for those who have to interpret them.³³

A decision on the case confined within the rigid boundaries of the wording of the law would not have allowed the extension of the right to information to include information regarding the siblings of the adoptee. At the same time, an argument based on the principles that inspire the Italian legal system would not justify such a limitation of the petitioner's right to personal identity. This is how the Court came to a decision deriving from an analogous³⁴ interpretation of the

³¹ See P. Perlingieri, 'Il primato della politica', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 283-291; P. Perlingieri, 'I principi giuridici tra pregiudizi, diffidenza e conservatorismo' *Annali SISDiC*, 1-24 (2017); P. Perlingieri, 'Legal Principles and Values' 1 *The Italian Law Journal*, 125-147, 132 (2017), according to whom legal principles 'express choices, assert value judgments and provide guidelines that are not extraneous to the legal system'.

³² U. Scarpelli, 'L'educazione del giurista' *Rivista di diritto processuale*, 1-33 (1968); V. Scalisi, 'Per una ermeneutica giuridica "veritativa" orientata a giustizia' *Rivista di diritto civile*, 1249-1271 (2014); P. Veronesi, '“Valori”, “principi” e “regole”: tra dimensione positiva e metapositiva della Costituzione' *Ars interpretandi*, 37-40 (2014); L. Alexander, 'Cosa sono i principi? Ed esistono?', in Id and K. Kress, *Una critica dei principi del diritto*, Italian translation by M. La Torre and N. Stamile (Napoli: Edizioni Scientifiche Italiane, 2014), 7; N. Lipari, 'Intorno ai «principi generali del diritto»', in Id, *Il diritto civile tra legge e giudizio* (Milano: Giuffrè, 2017), 83-101.

³³ R. Dworkin, 'The Model of Rules I', in Id, *Taking Rights Seriously* n 30 above, 38; see also P. Femia, *Drittwirkung: principi costituzionali e rapporti tra privati* (Napoli: Edizioni Scientifiche Italiane, 2018), 53.

³⁴ G. Zaccaria, 'L'analogia come ragionamento giuridico. Sul fondamento ermeneutico del procedimento analogico' *Rivista italiana di diritto e procedura penale*, 1535-1559 (1989); A. Kaufmann, *Analogie und Natur der Sache: zugleich ein Beitrag zur Lehre vom Typus*, Italian

rule stated in Art 28, para 5 of legge no 184/1983, which the Court has expressly deemed ‘extensive’. The inclusion of subjects other than the parents within the context of the ‘origin’ of the adoptee was intended to provide the maximum guarantee to the right to develop one’s personality, both as an individual and in the social environment where the subject has interests worthy of protection. Likewise, any discrimination in the enjoyment of family bonds between adopted and non-adopted persons has been curbed. However, the ‘reflected’ and unwanted effects of the information on the psychophysical balance of the other persons involved have been reduced to a minimum. Only their consent, in fact, allows the disclosure of identity and every act involving them must take place guaranteeing the maximum confidentiality and respect.

The role of the interpreter, when fulfilling such a hermeneutical operation, is essential.³⁵ The discretionary power, which intimately connotes its own function, allows the making of choices that are far from being mechanistic, inspired by the implementation of the values that underlie the legal system. These constitute, at the same time, the source and the limit of the interpretive activity because they give it a certain degree of elasticity, preventing it from turning into an arbitrary act. This way, the principles mark the path of the interpreters without bewildering them.³⁶ The balancing allows, then, the reconciliation of different competing principles reaching the most reasonable solution for the specific case.³⁷

The ‘origin’ of the adoptee, as stated by law, becomes an autonomous area of information for the adoptee, and it deserves protection from the legal system. Its extension does not seem susceptible to preventive limitations, as there is the need to balance the interests involved from time to time. Thus, the petitioner’s interest in knowing the identity of his biological sisters was considered worthy of protection. It cannot be ruled out that, on the basis of the same principles, in the future, efforts to obtain disclosure of the identity of other members of the

translation by G. Carlizzi, *Analogia e natura delle cose* (Napoli: Vivarium, 2003); P. Perlingieri, ‘Interpretazione assiologica e diritto civile’ *Corti Salernitane*, 477 (2014); L. Tullio, ‘Analogia: tra eguaglianza, ragion d’essere e meritevolezza dell’estensione’, in G. Perlingieri and M. D’Ambrosio eds, *Fonti, metodo e interpretazione. Primo incontro di studi dell’ADP* (Napoli: Edizioni Scientifiche Italiane, 2017), 101-122.

³⁵ P. Perlingieri, ‘L’interpretazione della legge come sistematica ed assiologica. Il broccardo *in claris non fit interpretatio*, il ruolo dell’art. 12 disp. prel. c.c. e la nuova scuola dell’esegesi’ *Rassegna di diritto civile*, 990-1017 (1985); A. Gentili, ‘L’argomentazione nel sistema delle fonti’ *Rivista critica di diritto privato*, 471 (2001); L.M. Cruz, ‘La dinamicità del sistema giuridico: l’attività dell’interprete tra la norma e il caso’ *Rivista internazionale di filosofia del diritto*, 283 (2015).

³⁶ R. Dworkin, ‘The Model of Rules I’ n 33 above, 48, compares the judge’s discretion to the image of ‘the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept’.

³⁷ G. Perlingieri, ‘Ragionevolezza e bilanciamento nell’interpretazione recente della Corte costituzionale’, in P. Perlingieri et al eds, *I rapporti civilistici nell’interpretazione della Corte costituzionale nel decennio 2006-2016, Atti del XII Convegno nazionale della SISDiC* (Napoli: Edizioni Scientifiche Italiane, 2018), 283-322.

original family – different from siblings or parents – may be accepted. This would be consistent with the fundamental necessity to allow the free development of human personality, in accordance with the Italian Constitution and European jurisprudence. This recalls, moreover, the words used by Timothy Endicott to assert that the ‘vagueness’ of the legislative language is not really a defect, because – far from making it indeterminate – it proves that ‘there is more to the law than the mere application of words’.³⁸

³⁸ T.A.O. Endicott, ‘Law and Language’, in J. Coleman et al eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2004), 957.