

THEMIS COMPETITION 2016

International cooperation in civil matters

***Filiation, genetics and the judge:
conciliating family stability and the right to biological truth***

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SUMMARY

INTRODUCTION	2
I. What place should be granted to biological evidence in filiation law? Various existing responses.	4
A. European legislation considers scientific evidence differently	4
1. The conditions for ordering evidence	5
2. The modalities for obtaining expert evidence	6
B. European judges proceed with a concrete appreciation of genetic evidence.....	7
1. Divergent positions of national courts	8
2. Case-by-case treatment by the ECHR.....	9
II. Should the right to biological truth be better regulated? Ensuring a balance of interests.	12
A. Scientific evidence is necessary but may be destabilizing.....	12
1. Positive effects of genetic evidence	12
2. Detrimental effects of scientific truth	13
B. Judges have a crucial role in regulating genetic identification	15
1. By refusing an expert report for legitimate reasons	15
2. By promoting the child's best interests	16
CONCLUSION.....	19
BIBLIOGRAPHY	19

INTRODUCTION

Family law is in perpetual motion, as it is directly linked to the evolution of societies. For many centuries, family law, and more specifically filiation, depended on moral virtues that were not contested, such as marriage, the prohibition of sexual encounters outside marriage and the *patria potestas*. Only the fidelity of the spouse, which was guaranteed by the repression of adultery, could ensure the safety of future generations. This vision is illustrated by two Latin sayings, which attest to the longevity of this problem: « *mater semper certa est* » and « *pater est quem is nuptiae* », in other words, while maternity results from childbirth, paternity is based on marriage. As for today, it is increasingly common for children to be born or brought up in families where they may be biologically unrelated to one or both of the parents. Since the 1960s, the traditional family has undergone major social developments resulting in an increase in births outside wedlock and in family breakdown¹. At the same time, the progression of individualism in European societies has led individuals to wanting to know where they come from, no matter what the consequences for the family structure may be. As underlined by Jean Carbonnier, it now seems that the most important point is not so much marriage, as the child's link to its parents: in other words the « biological truth »².

From the 1950s onwards, due to technical progress, scientific evidence has emerged progressively and become widely used in filiation cases. At first, comparative blood tests allowed the absence of parentage to be proved in the case of incompatible blood groups, without asserting real paternity³ however. With the discovery of deoxyribonucleic acid (DNA), which stores all biological information, it became possible to find out the parentage of each individual with virtually no risk of error. Genetics now appear essential, being the “only lasting mark” in a world where the individual is totally disconnected⁴. Such scientific revolutions undoubtedly have a major impact on family structures, and thus on filiation law.

An important question thus emerges: does biomedicine revolutionize affiliation or does it only amplify the issues or allow the expression of societal changes?

¹STEINER (E.), « *The Tensions Between Legal, Biological and Social Conceptions of Parenthood in English Law, Report to the XVIIth International Congress of Comparative Law* », *Electronic Journal of Comparative Law*, vol. 10.3 2006.

² CARBONNIER (J.), *Flexible droit-Pour une sociologie du droit sans rigueur*, éd.LGDJ, 2001, p.94 : according to this author, « *justice should stop at the bedroom door* »

³ BOITTIAU (A.), *Empreinte génétique et droit de la filiation*, 1989.

⁴ Le BRETON (D:), *Les incidences de la biomédecine sur la parenté - Approche internationale*, Bruxelles, Bruylant, 2014, p.476

Indeed, technical advances such as blood testing or in-reproductive technologies have created deep societal and legal questions. The issues of surrogacy, adoption or sperm donation today trigger burning debates. Yet, we have decided to focus our presentation on the impact of biological evidence on filiation resulting from carnal intercourse; the *copula carnalis*.

The mutation of the traditional forms of family, accelerated by the use of biological evidence in filiation cases, concerns all European countries. Each country has thus established rules on proceedings in order to verify biological filiation. There are no universally adopted standards. On the contrary, the various legal systems differ considerably according to their political, social and cultural traditions. Moreover, the European Court of Human Rights (ECHR) has been requested to give its opinion in a certain number of cases on a particularly sensitive issue: the right to biological truth, or in other words the right of each individual to know his origins. The Court relates this specific right to the protection of private and family life, conferred by Article 8 of the European Convention on Human Rights as early as the 1980's⁵. According to the Court, "*people trying to establish their ancestry have a vital interest, protected by the Convention, to get the information they need to uncover the truth about an important aspect of their personal identity*"⁶. Article 8 thus protects the right to identity of each individual, under which figures the "*establishment of the details of his identity as a human being and the vital interest, protected by the Convention, to obtain the information necessary to discover the truth about an important aspect of his personal identity, as for example his parents' identity*"⁷.

Nowadays, with this rise of the "right to biological truth", the question of scientific evidence has become essential in filiation law. It may seem beneficial that everyone is now able to have easy access to the truth about his origins. However, large-scale or even systematic expert evidence would undoubtedly have a major detrimental impact, calling into question the very foundations of filiation law, and weakening families. Indeed, scientific truth challenges a number of conflicting interests. If the interests of the child should be of high priority, those of the biological father, of the legal father or of society as a whole must also necessarily be taken into account. In this respect, the role of the judge remains essential, as he has to ensure a fair balance of interests and preserve the stability of family structures.

Therefore, the fundamental question is to know how the judge can allow access to the emerging right to biological truth without weakening family stability.

⁵Article 8 of the European Convention on Human Rights provides a right to respect for one's "private and family life, his home and his correspondence, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society".

⁶ ECHR, *Jäggi v. Suisse*, July 13, 2006, n° 58757/00

⁷ ECHR, *Odièvre v. France*, February 13, 2003, n° 42326/98

The following developments will firstly highlight the diversity of situations with regards to the place granted to biological evidence in filiation cases (I). The report will then focus on how the courts dealing with filiation litigation regulate the right of each individual to know his origins by using scientific evidence (II).

I. What place should be granted to biological evidence in filiation law?

Various existing responses.

The introduction of scientific evidence has led European countries to establish new regulations, and judges to define the boundaries for the use of DNA evidence. On reading different European legislation, domestic judgments or ECHR rulings, an important diversity concerning the place granted to genetic evidence by the legislator (A) and the judge (B) in filiation cases may be noted.

A. European legislation considers scientific evidence differently

Before the development of biological evidence, filiation had to be proved in different ways: presumption, recognition, possession of status. Contesting established filiation thus required strong factual elements. With scientific progress, it became possible to find out the truth about the filiation link between a child and its parents. Such an upheaval necessarily involved a modification in legislation, in order to regulate the use of scientific evidence in court cases. Over the past years, each European country has developed its own vision of filiation law in light of scientific developments; either by rejecting “genetic absolutism”, or by admitting it while setting out the rules governing it. Some countries, such as Belgium or the United Kingdom, demonstrate a great openness towards biotechnological advances. In other legal systems, such as the German one, the principle of biological truth transcends the field of filiation, governing the legal organization of kinship. In other countries, a more traditional set of rules still governs the rules of filiation. Hungary faces a reaffirmation of the traditional family model that combines biological truth with marriage, while Greece keeps the principle of carnal parentage for children born in wedlock, ensuring the establishment of filiation through the presumption of paternity.

What are the current conditions for ordering genetic expert evidence (1) and the ways of implementing it (2)?

1. The conditions for ordering evidence

Biological evidence has gradually become a right throughout Europe, with most countries now accepting the principle according to which an individual has the right to ask for genetic expert evidence. This was not always the case. In France for example, the principle of the freedom of evidence gave judges a discretionary power for decades regarding proof of parentage and research into biological evidence. Either party could request genetic identification and the judges could decide freely if such a measure was appropriate or not. They could even order an expert report of their own free will. Therefore, the importance given to biological truth depended on the goodwill of the judge in charge of the case, which undoubtedly led to a certain inequality between litigants. Case-law of 28 March 2000 from the *Cour de cassation*, France's supreme court, restricted the almighty role of the judge, limiting judicial power in the field of biological evidence. The Attorney General asked the Court of Cassation to adopt the position of many European countries by stating that the discretionary power of judges regarding the assessment of an investigative measure ceases when the refusal to order a measure impedes the establishment of a law or when it is the only way to adduce evidence. Thus, from an option left to the judge's discretion, the expert report is now compulsory. Nowadays, in most legal systems, genetic evidence should be granted when requested through court action. For instance, article 372 of the German Code of Civil Procedure states that the judge must investigate and order a search by an expert into true parentage: the discovery of truth binds the judge. This evolution consequently facilitates actions in the field of filiation. In terms of filiation law, access to scientific evidence is now a right widely guaranteed.

However, the procedures regulating the implementation of such expert evidence vary from country to country, especially concerning limitation periods. The time-limit governing the filing of some court actions to establish or contest filiation is sometimes short, but sometimes much longer, and in certain countries even non-existent. The statute of limitations has important implications in the establishment of biological truth, as the right to biological evidence is purely a procedural right, which can only be exercised if the court action is admissible. It cannot be usefully activated if the court action is time-barred or blocked by any other obstacle linked to substantive law. Therefore, the absence of any possible court action constitutes a just motive to reject the request for a biological expert report. Some countries aim at ensuring the stability of filial relationships by locking filiation cases into a strict time-period, thus limiting legal litigation when contesting paternity.

In France for instance, article 333 alinea 2 of the Civil Code introduces a 5-year time-limit when the child's title, confirmed by a birth certificate, is corroborated by a continuous, peaceful and

unambiguous possession of status. Such legal provisions, introduced by the 4 July 2005 Act, rely on the idea that a title and possession of status concurring for five years should characterize the existence of a private and family life deserving legal protection. On the other hand, the new Romanian Civil Code prefers a more liberal orientation as regards court actions in filiation, since it implies that legal proceedings to establish paternity may be filed by any interested person and may not be time-barred throughout the life of the child. The action for contesting filiation may be brought in a case when lineage is established by a birth certificate, which is not in accordance with the possession of status.

There is thus an important diversity when it comes to the conditions for granting DNA expert evidence. The modalities for obtaining genetic identification are just as heterogeneous, proving the delicate place of genetic evidence in filiation law, depending on the country.

2. The modalities for obtaining expert evidence

European countries have different views regarding both the use of extrajudicial evidence and the consequences of the refusal of some to bend to requests for genetic testing.

Legislation across Europe differs as regards the acceptability of an extrajudicial expert report. Some legal systems limit the possibility of carrying out a search into the identification of an individual through genetic information, in order to avoid abuse prone to violating fundamental human rights and family peace. In France for instance, article 16-11 of the Civil Code forbids the use of genetic testing prior to any court action. This article lists the limited cases in which the identification of a person through DNA testing may be sought: for an action concerning questions of parentage or the award or discontinuation of parental support. Hence, any biological identification measure has to be decided by a judge as a means of inquiry and must be executed by persons registered on a list of sworn court experts. Yet, this is not the case in all countries. Many European legal systems allow free biological testing, the only condition being the consent of the interested parties. In Spain, Belgium or the United Kingdom for example, tests can be bought freely over the Internet and carried out privately and confidentially. According to the result, the applicants will be in a position to decide whether they wish to take action or not. Similarly in Switzerland, it is possible to proceed with genetic testing before any court action. A man claiming to be the father of a child or wishing to be sure of paternity can thus ask for a private expert report and then acknowledge the child if the results ensure he is the father. The formal consent of everyone interested is once again logically required in this case.

Once an expert report has been requested, a sensitive issue remains: what if the individual

refuses to comply with a court order to undergo a DNA test? Once again, European countries respond differently to this issue, which can be particularly tricky due to the principle of non-violation of the human body, which is likely to prohibit any enforcement of genetic tests in civil cases. Some legislation nevertheless enables authorities to physically compel an individual to submit to this measure. Article 18 of the Italian Code of Civil Procedure thus forces the individual to submit to this measure as soon as the examination is safe, and provides for the use of force for tests to be carried out in case of repeated refusal. Other countries have opted for a more balanced position, giving the person the freedom to refuse to take a biological test but stating that the court will be in a position to take this failure into account in its decision. With this in mind, the English Family Law Reform Act of 1969 specifically states that the court will draw inferences if a person fails to take a biological test. Under French law, a defendant in a paternity suit may also refuse to respond to a summons to submit to a DNA test in order to establish whether he is the father. Yet, such non-compliance may have heavy consequences. The judge is free to reach conclusions, taking into consideration the fact that a party has obstructed the establishment of certain facts, and may resolve the question of paternity through the assessment of other relevant evidence, such as witness statements establishing the existence of intimate relations during the period of conception. This legal provision was criticized by a French individual before the ECHR in a recent case⁸, in which the applicant, respondent in a paternity suit, complained about the fact that the domestic courts had inferred his paternity from his refusal to submit to court-ordered genetic testing. The Court found Article 8 had not been violated, considering that the domestic courts had not exceeded their margin of appreciation in giving priority to the child's right to respect for private life over that of the applicant. The ECHR recognizes⁹ more generally that a legal system may not have any procedural measure to compel the alleged father to comply with a court order to undergo DNA tests, but stresses that the interests of an individual seeking to establish paternity must be secured. The Court thus condemned Croatia, whose authorities were unable to prevent the procedure for declaration of paternity from being hampered by the alleged father's refusal to undergo DNA tests to establish paternity, tests which were scheduled six times.

We can thus conclude that there is considerable diversity in European legislation concerning the use of genetic evidence. But what of judicial assessment?

B. European judges proceed with a concrete appreciation of genetic evidence

⁸ ECHR, *Canonne v. France*, June 25, 2015

⁹ ECHR, *Mikulic v. Croatia*, February 7, 2002 “the procedure available did not strike a fair balance between the right of the applicant to have her uncertainty as to her personal identity eliminated without unnecessary delay and that of her supposed father not to undergo DNA tests ».

The question of access to biological truth is often raised before national courts and the ECHR. However, neither national Courts (1) nor the European Court (2) give a similar place to biological testing in filiation cases, reflecting a case-by-case appreciation by judges.

1. Divergent positions of national courts

Judges throughout Europe will not have the same answer to certain questions raising the issue of whether DNA evidence should be granted for a court action. Such diversity in appreciation depending on the court referred to shows the lack of unity on a European scale as to the place that should be given to genetic evidence in filiation law. This is particularly noticeable when it comes to the sensitive issue of post-mortem evidence in civil proceedings concerning parentage, in which various interests are at stake. Indeed, post-mortem identification brings about a conflict opposing the right of a child in search of its identity to prove its filiation on the one hand, and the respect due to the deceased and the interests of his heirs on the other.

It is certain that France takes a restrictive stance on this issue. Following a controversial decision by the Court of Appeal of Paris¹⁰ authorizing the exhumation of a famous actor, the legislator of 6 August 2004 modified the legal provisions. Article 16-11 alinea 2 of the Civil Code now forbids identifying a deceased individual through DNA testing unless that person gave his express consent to the performance of such a measure of inquiry when he was still alive. Such provisions protecting posthumous private life *de facto* prevent post-mortem genetic identification, as there is no latitude given to the judge to appreciate the circumstances of each specific case. The Constitutional Council¹¹ was thus requested to state if the conditions for the performance of genetic testing on deceased persons for the purposes of filiation cases violated the constitutional right to privacy and the right to conduct a normal family life. Considering that “*the legislator intended to prevent exhumations in order to ensure respect for the dead*”, the Council states that the legal regime regulating post-mortem inquiries, in particular the requirement for explicit consent of the deceased individual, is in accordance with the French Constitution.

However, all European constitutional courts do not share this appreciation, as a decision of the Spanish Constitutional Tribunal¹² shows, providing for preconditions for post-mortem identification. Contrary to the French Constitutional Council, the Spanish judge states that there is no need to submit

¹⁰ Court of Appeal of Paris, November 6, 1997, *Yves Montand* case

¹¹ Constitutional Council, September 30, 2011

¹² Spanish Constitutional Tribunal, January 17, 2005

such an inquiry to the prior consent of the alleged father during his lifetime. Indeed, “*the deceased person, as a distinct legal reality, must be subject to a specific legal protection*”, as certain rights, such as the right to family intimacy or the right to physical integrity and dignity do not survive the death of their owner. Thus, the Tribunal indicates that it must be possible to proceed with DNA identification of the corpse of a deceased individual in order to scientifically ascertain a filiation link each time the applicant can make a legitimate request through a “*principio de prueba*”, meaning the simple probability of his allegation.

The ECHR does not provide any harmonisation for the different national responses to the question of post-mortem genetic identification. At first glance, the ECHR also seems to promote post-mortem genetic identification. For instance, the Court condemned¹³ the Swiss courts for refusing an applicant the exhumation of his alleged father for DNA identification. In that case, the Court stressed that the right to know the identity of its genitor is of superior interest to the child and should thus prevail over the deceased individual’s right to rest in peace, the latter only benefitting from temporary protection linked to the length of cemetery plots, stating that the “*interference is relatively minimally intrusive*”. Similarly, the ECHR condemned France in another case¹⁴ for refusing to proceed with a post-mortem inquiry in a case where the alleged father had shown the desire to establish filiation but the positive results of a DNA test were not taken into account by the court of appeal due to an alteration in his mental faculties when he agreed to be tested. As the alleged father died during proceedings, the applicant had no possibility of asking for further genetic examination of the corpse to prove filiation. The stringency of French legislation was thus analyzed by the Court as a violation of Article 8. However, the inclination of the Court for post-mortem identification is not complete. In another decision¹⁵ concerning a Spanish individual who requested the exhumation of a grandparent for DNA sampling, the ECHR exercised its concrete control to state that the distance in the degree of relationship justified denial for exhumation.

These diverging answers from national and European courts on the very same issue prove that the problem is still far from being solved. It confirms our analysis of the existence of real diversity between courts concerning the place to be granted to genetic identification in civil proceedings.

2. Case-by-case treatment by the ECHR

¹³ ECHR, *Jäggi/Switzerland*, July 13, 2006

¹⁴ ECHR, *Pascaud/France*, June 16, 2011

¹⁵ ECHR, *Menendez Garcia/Spain*, 2009

The ECHR has taken a stance in many decisions on the place of biological evidence in filiation law. Analysis of the Court's jurisprudence shows that it does not have a clear position regarding both the admissibility of court actions in matters of filiation and the weight that has to be given to biological truth. Indeed, while it sometimes acknowledges that a short time-period is detrimental to human fundamental rights and promotes biological truth, it also states that procedural limitations are acceptable regarding the need to stabilize family ties.

The ECHR seems to push for an extension of legal action in the matter of parentage, thus favoring biological evidence. In several cases, it condemned the position of national courts, which did not allow applicants to contest or establish filiation for procedural reasons, even though they could provide biological evidence. Firstly, the Court clearly considers that a man must be able to contest his paternity even outside time limitations if such contestation is in accordance with the wishes of everyone interested, in particular the child whose filiation is called into question. In a case against Russia¹⁶, the Court thus concluded that there was violation of Article 8 because the national law established an inflexible time-limit of only one year to contest paternity after the husband learnt or should have learnt of the registration of the birth, which would run irrespective of the putative father's awareness of the circumstances casting doubts over his paternity. Similarly, in other cases¹⁷ in which the legal father had the biological evidence that he was not the parent of the child, but could not contest his paternity because a judgment rendered several years previously had declared him to be the father, the Court stressed the importance to be given to biological reality when everyone is favorable to the contestation of paternity. Secondly, the ECHR judges that a very short time-limit may violate Article 8. For instance, it considered¹⁸ that legislation forbidding a husband from contesting his paternity due to a 6-month time-limit from the birth of a child did not provide a fair balance between the general interest of protecting the legal certainty of family links and the right of the applicant to obtain a reassessment of the legal presumption of paternity while genetic evidence revealed he was not the father. The Court finally insists on the necessity of opening civil proceedings regarding filiation cases. It thus considers¹⁹ that a putative father should not be deprived of access to the courts to bring his paternity claim, in a case where no paternity procedures have been directly available to the applicant wishing to establish paternity.

It stresses that a situation that makes a legal presumption prevail over a biological and social reality without benefitting anyone is not compatible with the obligation of Member States to guarantee

¹⁶ ECHR, *Shofman/Russia*, 2005

¹⁷ ECHR, *Paulik v/ Slovakia*, October 10, 2006, n°10699/05 and ECHR, *Ostace/Romania*, 2014

¹⁸ ECHR, *Mizzi/ Malta*, January 12, 2006, n°55339/00

¹⁹ ECHR, *Rozanski/Poland*, May 18, 2006

effective respect of their citizens' private and family life.

Yet, the Court also protects the legal certainty of family relations, and will in certain cases consider that procedural limitations are compatible with fundamental human rights. Despite scientific evidence, it sometimes puts forward the desire of a child to maintain filiation or not as an obstacle to the contestation of filiation: respect for family life does not always require biological reality to prevail. The ECHR generally states that “*the need to ensure legal certainty and finality in family relations as well as to protect the interests of the child justifies the introduction of a time-limit or other limitations on the institution of (paternity) proceedings*”²⁰. In a recent case²¹, the ECHR considered that the inadmissibility of a court action to contest paternity on the basis of biological evidence due to a 12-month time-limit was justified by the general interest of protecting the legal certainty of family relations. It indicated that the domestic courts properly identified the conflicting interests at stake, by giving greater weight to the interests of the child to have its filiation link maintained rather than to the applicant's interest in disproving his freely acknowledged paternity. The interests of the child can thus justify that the legal father may see his action declared as inadmissible, even though he can provide evidence of the non-conformity of his filiation link with the biological truth. In another decision²², the Court concluded in non-violation of Article 8 in a case in which the applicant complained that he could not start a procedure to contest his presumed paternity on the basis of DNA evidence. The Court underlined that there was nothing arbitrary or disproportionate in the decisions of the national courts, which gave greater weight to the interests of the child than to the eventual interest of the applicant to check a biological fact. Thus, it clearly favors the interests of the alleged daughter not to be deprived of her filiation, since the latter did not express the wish to see paternity verified.

The study of ECHR jurisprudence thus shows that the results of the Court's control are necessarily unpredictable, as it takes into account all the subtleties of the case submitted to it. It grants tremendous importance to factual circumstances, trying to conciliate the conflicting interests at stake in each particular dispute. This paramount consideration of the Court strikes a fair balance between competing interests.

This is particularly well expressed by Judge Lorenzen, who, when speaking of conflicting interests, states in his concurring opinion in the Shofman case: « *the biological reality is only one of them, and*

²⁰ ECHR, *Rasmussen/Denmark*, 2006

²¹ ECHR, *A.L./Poland*, 2014 “ *the authorities struck a fair balance in the present case between the general interest of the protection of legal certainty of family relationships and the applicant's interest in having his acknowledgment of paternity reviewed in the light of the biological evidence*”.

²² ECHR, *Yilik/Turquia*, December 6, 2006

it may, in the circumstances of a given case, be outweighed by for instance the interests of the child, the child's mother or society in preserving the stability of the legal status of persons ».

Beyond its general growing importance in European filiation law, genetic evidence is very differently accepted by European countries. Regarding this statement, the question of the regulation of genetic evidence may be raised.

II. Should the right to biological truth be better regulated? Ensuring a balance of interests.

As we have seen above, scientific research has had an important impact on filiation law. As it is necessary for a person to know his origins, such evidence can become destabilizing and have consequences on family stability (A). Therefore, it is essential that judges keep regulating genetic identification in filiation cases (B).

A. Scientific evidence is necessary but may be destabilizing

The assertion of the right to know one's biological parentage by national and European laws brings undeniable positive aspects. However, the power of scientific evidence can also weaken filiation and the legal certainty of family relations, thus threatening social peace.

1. Positive effects of genetic evidence

With the discovery of DNA, biological evidence became the "guru of proof" in only a short space of time. This prominent place occupied by scientific evidence is easily understandable, as it significantly facilitates court actions in matters of parentage. Not only do applicants have easy access to biological evidence, but biological evidence is also very powerful, as it determines the outcome of a case by allowing individuals to have certainty concerning their filiation. It is thus a positive development, both for the individuals whose filiation is verified and for their genitors.

Thanks to genetic identification, everyone can nowadays know for sure who their parents are. This is of course very important for the construction of their identity. The role of filiation in personal identity is regularly stressed by the ECHR:

"The Court has held that 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.”²³. It is important for a child not to be locked into a filiation link corresponding to no sociological or biological reality, with no affective link with its father. Biological evidence gives each person the possibility to know his genetic parentage, and to possibly contest legal paternity which does not correspond to reality. Besides this important psychological aspect, filiation also entails important financial consequences. By proving the identity of his father before a court, the child will have a *locus standi* to ask for maintenance and will be entitled to inherit from his father. In this respect, genetic evidence is a precious tool for a child to obtain financial support from his biological father.

Another important consequence of the right to biological evidence to determine parentage lies in a renewal of the relationships between mothers and fathers. A better equilibrium between the respective rights of both parents is guaranteed. Historically, maternal filiation was the only one that could be determined with certainty, and the father had to rely on the mother’s declaration that the child was his. Today, thanks to scientific evidence, the father can also be sure of parentage. Such evolution undoubtedly reinforces equality between both parents. Nevertheless, biological evidence can also be used as a threat or a means of pressure. For instance, in the context of a couple’s separation, a mother may threaten the legal father with depriving him of any contact with the child by proving that he is not the biological father, or the father may threaten the mother with a refusal to make any financial contribution by proving that he is not the biological father. This risk is nevertheless limited by the legal framework restricting the use of biological evidence.

2. Detrimental effects of scientific truth

However, the extension of biological evidence can also have worrying aspects, as extensive use of scientific evidence may weaken family structures, and more generally threaten the legal certainty of social order. Systematic expert evidence would thus have disastrous effects on the primary organization of European societies, as two French law Professors underline: “*it would be unimaginable to submit all children to such checks; this forensic parentage would be contrary to all principles of our law and simply contrary to human dignity*”.²⁴

The right to biological evidence leads to a weakening of filiation. Scientific evidence erects the biological criterion as the decisive factor of filiation, thus weakening sociological filiation. If the

²³ ECHR, *Mikulic/ Croatia*, February 7, 2002, n°53176/99

²⁴ MALAURIE (P.), FULCHIRON (H.), *La famille*, 2ème éd., 2006 : « *inimaginable de soumettre tous les enfants à de tels contrôles; cette police scientifique des filiations serait contraire à tous les principes de notre droit, et, tout simplement, à la dignité humaine*”.

result of a biological expert report is taken into account by the applicants, the reality of family life can be ignored by a court. ECHR jurisprudence is very favorable to biological evidence, even if it upsets factual situations. In a case against Slovakia, the legal father who contested his paternity was 74 years old and his daughter 40 when the ECHR condemned the national authorities for not allowing the legal father to bring a court action to contest paternity.²⁵ This type of case is not unusual, considering the fact that the possibility to proceed with biological identification is quite recent. The role of the judge who answers favorably to this type of request is, in our view, questionable, as all filiation may thus be endangered. The possibility of challenging established filiation by using genetic evidence also raises the vivid issue of legal certainty. Major legal consequences, such as legacy, are deduced from the filiation link. Dissolving or creating a parentage link can have important practical consequences in the settlement of inheritance: should a new distribution between heirs be carried out? Reading the factual situations leading to legal action in the matter of parentage, it seems that legacy is often an important motivation for applicants²⁶. In this respect, it seems to us that establishing filiation a few years after the death of the father is not desirable.

How far could it go? In a case of 13 November 2014, the first Civil Chamber of the Court of Cassation rejected for procedural reasons, in the instant case the absence of involvement of the heir of the deceased, a man's request for the exhumation of his alleged father who had died in 1953, on the basis of his fundamental desire to know his genetic ancestry. Yet, the censure intervened under Article 8 of the Convention and the Court indirectly confirmed the existence of an original court action "tending to the acknowledgment of genetic parentage by DNA testing", and not filiation itself. This decision was seen by many as an opening in French positive law to the reception of the "right to identity" promoted by the ECHR. In parallel to filiation law, an autonomous right to identity seems to progressively appear, the interest of which could well be to preserve the stability of filiation while giving individuals the right to know important elements of their personal history.

Should European states allow the contestation of filiation established over several decades? This question deserves deep thought. A distinction between an action aimed at establishing filiation or one contesting it should be made. The possibility to contest filiation should have more safeguards than the establishment of filiation: psychologically and practically, the consequences of the loss of the legal father can be heavy. It seems to us that the position of the ECHR in favor of biological evidence is sometimes questionable, as an extended right to biological expert reports and a broad

²⁵ ECHR, *Paulik / Slovakia*, October 10, 2006

²⁶ ²⁶ I.g. ECHR, *Pascaud / France*, June 16.,2011

opening of action in the matter of parentage is likely to create legal insecurity in filiation.

B. Judges have a crucial role in regulating genetic identification

By enshrining the right to biological evidence, it might seem at first glance that both national laws and European jurisprudence limit the role of the judge in legal action in the matter of parentage. Not only because the choice of the investigation measure is limited, as a biological expert report must be ordered in most European judicial systems if the case involves a filiation question, but also because the judge has limited discretion to appreciate the probative value of scientific evidence which *de facto* cannot be rebutted by any other traditional filiation evidence. Nevertheless, the judge retains a real discretionary power, which enables him to influence considerably the outcome of court actions in filiation matters. The court is entitled to refuse an expert report for legitimate reasons (1) and its role in balancing the interests at stake remains crucial (2).

1. By refusing an expert report for legitimate reasons

The right to biological evidence appears as the essential corollary of the consecration of the right to know one's genetic parentage. The enshrinement of biological evidence seems to leave only a thin discretion to the judge in legal actions in matters of parentage. Yet, the courts maintain the possibility of refusing to order a biological expert report if they consider that “legitimate reasons” justify such a refusal. This criterion of legitimacy may be used at their discretion when they determine whether expert evidence should be ordered. The judge determines case-by-case whether the reasons raised by the applicants constitute a legitimate reason not to order the report: the Court of Brandenburg in Germany considers for instance that the alleged father cannot refuse a court-ordered saliva or blood test by invoking his religious freedom²⁷.

Firstly, the judge will be able to refuse a biological expert report if the court action is inadmissible. Under French law, paternity can no longer be contested if the title of birth of a child is corroborated by a continuous, peaceful and unambiguous possession of status²⁸. Similarly, genetic evidence will not be ordered if the action cannot permit the establishment of a filiation link. This is the case in the hypothesis of incest; the paternity of the biological father cannot be legally recognized if the parents had an incestuous relationship, so the judge will consider that there is a legitimate reason not to conduct a biological inquiry.

²⁷ OLG Brandenburg, January 8, 2010 , 9 UF 139/09

²⁸ Article 333, French Civil code

The refusal to order a biological report can also be based on the merits of the case. According to UK legislation, there is a right to order biological tests, yet a court will refuse to order tests to be carried out²⁹ in some cases. A man cannot seek a declaration that he is or is not the father simply out of curiosity, since there must be some other application to which parenthood is relevant. For instance, the applicant must be seeking to have contact with the child or be financially responsible in the case of litigation. The French Court of Cassation also refuses to order biological reports if the action is not motivated by serious reasons. In a case where the legitimate son of a man contested the acknowledgement of paternity by his father of a natural daughter sixty years previously, the court thus considered that the action was only motivated by a strictly financial purpose. In this light, it confirmed the refusal of the trial judge to order a genetic report³⁰. In such situations, the court conserves a discretionary power in determining the merits of the action.

Finally, judges retain the possibility of refusing a biological report if they can settle the question of filiation without one. If the applicants have already undergone a blood test, the result of this test is sufficiently convincing. The French Court of Cassation has already refused to order further genetic reports in such a situation.³¹

Therefore, even if genetic evidence is very often ordered these days in legal actions on matters of parentage, the judge holds an important discretionary power in order to determine whether such evidence should be ordered. The judge also has an important role to play in maintaining stability of family structures and promoting the child's best interests.

2. By promoting the child's best interests

The growing place occupied by the concept of the child's best interests in European legislation gives the judge important discretion in allowing access to biological truth.

The child's best interests is a modern principle, which finds its sources in both international and national legal texts. The International Convention on the Rights of the Child, ratified by all European countries, provides in Article 3 that: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative*

²⁹ Family Law Reform Act 1969, Section 20

³⁰ Court of Cassation, Civ 1^{ère}, September 30, 2009, n°08-18.398

³¹ Court of Cassation, Civ. 1^{ère}, June 12, 2001, n°98-21.796

bodies, the best interests of the child shall be a primary consideration.”³² National laws and ECHR jurisprudence also recognize the necessity to respect the best interests of children, under different designations. Historically, this notion of the child’s best interests did not occur in the matter of filiation. The 1989 English Children Act defines a “welfare principle”³³, establishing that this principle applies exclusively when the court is asked to determine any question that concerns a child’s upbringing or the administration of its property. The French Civil Code also refers to the “superior interests of the child”, but in the matter of parental authority, not in the field of filiation. However, the principle that we will designate as the child’s best interests has gradually become crucial regarding access to biological truth, as the numerous decisions of the ECHR systematically referring to this notion³⁴ show.

This principle is brought before the courts in the matter of parentage through two mechanisms. Firstly, the child’s best interests can justify refusing to order a biological expert report. In this regard, the malleability of the principle of the child’s best interests can be noted, as there is little coherence between certain decisions. The child’s best interests either require that the child is allowed to know the biological truth, or commands the protection of family stability by refusing genetic identification³⁵. In France, trial judges regularly refuse to order a biological report asserting that the child’s best interests lie in maintaining family stability³⁶, even though all legal conditions to order the report are present. The Supreme Court systematically censures these decisions, adopting a strict position on the characterization of the legitimate reason to refuse a biological report³⁷. Secondly, the child’s best interests may also paralyze the legal consequences of biological evidence. A filiation link can indeed be maintained even though biological evidence shows that it did not conform to reality. The French Court of Cassation recently implicitly recognized that it may be in the interests of the child to maintain filiation which does not correspond to biological reality³⁸. In another situation, an English court stated that the child’s best interests could be to ignore its origins. In that case, the applicant wanted to get in touch with his alleged son. The genetic evidence confirmed that he was the biological father of the child, but the mother argued that giving this information to their son would not conform with his best interests, considering the fact that he considered her partner as his father and that he was conceived by force. The Court acceded to this argument³⁹. The ECHR does not

³² Convention on the Rights of the Child, Article 3

³³ Section 1 of the Children Act, 1989

³⁴ I.g. ECHR, *Krisztián Barnabás Tóth / Hungary*, February 12, 2013 , n° 48494/06, « The child's best interests may override those of the parents » (point 32)

³⁵ I.g. ECHR *I.L / Roumania*, August 24, 2010, n°4901/04

³⁶ Court of Appeal of Agen, March 6, 2013

³⁷ Court of Cassation, n°29-05-2013

³⁸ Cour of Cassation, n°16-06-2011

³⁹ EWHC *Case J v C 2006 2837 (fam)*

provide any specific guidelines concerning the impact of the child's best interests on the right to know its biological origin. As mentioned above, the Court takes into account the circumstances of every case, trying to conciliate the different interests. The child's best interests is thus a powerful tool, which can be used by the judge to regulate access to biological truth.

However, this use of the child's best interests concept by courts is questionable. Not only because this concept does not have any legal definition but also because, as mentioned previously, many different solutions can be brought to a case in the name of the child's best interests as legislation does not fix clear criteria. This uncertainty necessarily affects the legal certainty and the equality of all citizens before the law. The more appreciation is left to the judge, the more the risk of arbitrary decisions appears. In the filiation field in which biological truth and family stability are primary considerations as they are essential to building an identity, is it safe to leave the determination of which interest shall prevail to the Court's discretion?

Yet, if the judge can use his discretionary power in determining the child's best interests, he also has to ensure a fair balance of conflicting interests. If the child's interests remain essential, many other interests should also be preserved when determining the child's right to know its genetic origin. The interests of the legal father who discovers that he is not the biological father deserve to be taken into account, whether he wants to dissolve the filiation or maintain a link with the child. The interests of the biological father, who wants to establish his paternity legally, should also be protected. Furthermore, the interests of society, which is concerned with family situations, has to be respected. The judge thus has a crucial role to play in social regulation by ensuring an appropriate balance of all these interests. A recent judgement of the ECHR in a paternity case against France is interesting in this respect.⁴⁰ The Court considered that there had been no violation of Article 8 of the Convention in the quashing of the formal recognition of paternity made by the mother's husband at the request of the child's biological father. France allowed a paternity test in a situation where the legal father was the husband of the mother and the biological father of three other children with the mother. The child whose filiation was contested considered him as his father and refused to undergo DNA testing. In spite of all these elements, the Court considered that the child's best interests coincided with the biological father's interests: the issue lies in knowing the truth about his origins. This perspective is in our view questionable: the child's best interests could also be to have the same father as his siblings and to remain legally the son of a man who raised him. Therefore, it appears that the judge retains an important discretionary power regarding the place granted to scientific evidence in filiation law.

⁴⁰ ECHR, *Mandet / France*, January 14, 2016

CONCLUSION

It is undisputable that the reliability of biological evidence has changed filiation law. As evidence became widely scientific and objective, European countries constantly promoted access to this scientific evidence, joining the evolving jurisprudence of the ECHR, which highlights biological truth. Everyone should be able to establish details on their origin as individual human beings. The terms of “filiation”, “family” and “biological expert evidence” used by the ECHR have developed with changes in European society and might very well continue to do so in the light of evolving customs and technological progress. The ECHR has repeated many times in its case law that the notion of “family life” in Article 8 is « *not confined solely to families based on marriage, and may encompass other de facto relationships. When deciding whether a relationship may be said to amount to “family life”, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means* »⁴¹.

However, we note a certain ambivalence on the part of the ECHR. On the one hand, there is the right to know one’s origins which has its roots in the concept of private life. The vital interests of the child, in its development, are also widely recognized by the Convention. On the other hand, more generally, there is the respect for family life which “*requires that biological and social reality prevail over a legal presumption*” and that “*regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole*”⁴².

It is necessary to set limits on absolute scientific truth and work towards a right of responsible parentage which gives way to sociological affiliation. Indeed, the stability and security of family structure involves the inclusion of sociological truth. It is important to pursue the solution of reconciliation for responsible and safe filiation law with the objective of the child's interests. Filiation law must constantly adapt as it is particularly sensitive to societal modifications. And as such, rules must be established so as to limit the dangers of the new norms of society and scientific research. One cannot deny these evolutions but adopting responsible ethics is imperative.

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