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The Emergence of the Right to Identity in Ireland: Addressing the 'Historic Wrongs' or Ignoring the Privacy Interests?

Research dissertation presented in partial fulfilment of the requirements for the degree of LLM in International Human Rights Law

(QQI)

Law School, Griffith College Dublin

Giorgi Gvimradze

2023

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List of Abbreviations

BITA	Birth Information and Tracing Act
Commission	Mother and Baby Homes Commission of Investigation
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Court	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
CRC	Convention on the Rights of the Child
HCCH	Convention on Protection of Children and Co-operation in Respect of in Intercountry Adoption
CRC	The United Nations Convention on the Rights of the Child
CtRC	The United Nations Committee on the Rights of the Child
CoE	Council of Europe

Abstract

This thesis assessed the compatibility of Irish legislation on the right to identity of adopted persons with the obligations deriving from the European Convention on Human Rights (hereinafter 'ECHR'). The analysis took into account the existing socio-legal context of Ireland regarding the adoption practice. The peculiarities related to the right to identity were discussed - the interests protected by it and threats coming out from its realisation. Accordingly, the development of the European Court of Human Rights' (hereinafter 'ECtHR' or 'Court') case-law was also observed in detail. As a result, relevant conclusions were drawn regarding the scope of the obligations arising from the ECHR. Finally, the author argued that Ireland's Birth Information and Tracing Act (hereinafter 'BITA') is incompatible with the ECHR obligations due to the absolute nature of the right to identity. Consequently, recommendations were presented to align Ireland's legal framework with the ECHR.

Introduction

On 30 June 2022, Ireland passed the Birth Information and Tracing Act (BITA) which grants an unfettered right to have access to birth information for any adopted person who reaches the age of 16. Minister for Children, Equality, Disability, Integration and Youth of Ireland Roderic O'Gorman, speaking about the reasons for the adoption of the act, said that:

> For decades in this country, adopted people have failed in being denied clear access to their identity information [and] with this bill, we are restoring to adopted people the information that so many of us take for granted as part of our own, personal stories.[1]

Notably, Ireland has an infamous historical experience with adoption, which was one of the leading accelerators of BITA implementation. The report published by the Commission in 2021 revealed severe violations of the rights of mothers and children that occurred across the country between 1922 and 1998.[2] These grave violations manifested in the forced placement of pregnant women in Mother and Baby Homes, the practice of forced adoption, the shocking number of infant mortality and other severe forms of human rights violations.[3] The Taoiseach Micheál Martin, at the time of publishing the Commission report, characterised this experience in the following words:

> As a society we embraced judgmental, moral certainty, a perverse religious morality and control which was so damaging. What was so very striking was the absence of basic kindness.[4]

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[1] 'Irish Adoptees to Get Right of Access to Birth Certificates' (*BBC* 12 January 2022) <https://www.bbc.com/news/world-europe-59949969> accessed 1 August 2023.

[2] Tomas Doherty, 'Mother and Baby Homes Report: 9,000 Children Died in 'Shameful Chapter of Irish History'' (*breakingnews.ie* 12 January 2021) <https://www.breakingnews.ie/ireland/live-mother-and-baby-homes-report-lays-bare-decades-of-abuse-1063121.html> accessed 12 August 2023.

[3] Máiréad Enright, 'Mother and baby home adoptions may have been legal but that does not make them right' (*The Irish Times* 16 January 2021) <https://www.irishtimes.com/opinion/mother-and-baby-home-adoptions-may-have-been-legal-but-that-does-not-make-them-right-1.4459471> accessed 1 August 2023; 'Mother and Baby Homes Report: Main Findings and Recommendations' (*The Irish Times* 12 January 2021) https://www.irishtimes.com/news/social-affairs/mother-and-baby-homes-report-main-findings-and-recommendations-1.4456560> accessed 1 August 2023.

[4] Rory Carroll, 'Ireland Publishes Report on 'Appalling' Abuse at Mother and Baby Homes' (*The Guardian* 12 January 2021) <https://www.theguardian.com/world/2021/jan/12/ireland-report-appalling-abuse-mother-baby-homes> accessed 1 August 2023.

Thus, the BITA was implemented under this context, aiming to restore the relationship between mother and child. Nevertheless, what the author of this paper finds problematic is that unrestricted access to birth information raises concerns about the privacy interests of biological parents. However, the implementation of the BITA by the government was perceived as an entirely positive event and less emphasis was placed on the threats arising from it – according to Minister O'Gorman:

> [The government] have finally found a way to provide a clear right for each person to full and unredacted access to all of his or her information where available. Now, as all affected persons will be able to avail of these new provisions, allowing unfettered access to their birth information, we will be able to see the positive, real-world impact of the work we have undertaken on this act.[5]

However, Ireland is obliged to fulfil the ECHR requirements, which include protecting the right to privacy. The primary aim of this paper is to ascertain the compatibility of BITA with the requirements of the ECHR. The interests served by reconciling the right to identity cannot be questioned, especially given the needs arising from Ireland's historical experience. Adopted persons have significant disadvantages in terms of personal development and in order to eliminate those, the state must ensure that appropriate measures are taken for full the realisation of their identity.

This paper does not question this substantial interest achieved by the BITA. Instead, it focuses on privacy right, which is restricted due to it. In particular, biological parents' right to protect their personal data may, in some cases, outweigh the interest of the right to identity. Thus, parents' right to private life also requires prevention of its violation. The extent to which BITA achieves this goal will be assessed in this paper.

In accordance with the above, the research question of the dissertation is:

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[5] 'Act Addresses 'Wrongful Denial' of Identity Rights' (Law Society of Ireland 12 September 2022) <https://www.lawsociety.ie/gazette/top-stories/2022/september/act-addresses-wrongful-denial-of-identity-rights-by-state> accessed 1 August 2023.

'How adequately does Ireland fulfil its ECHR obligations when resolving the conflict between the right to identity of adopted persons and the right to privacy of biological parents?'

When answering the research question, the privacy rights of any parent will be taken into account, regardless of their sex or gender identity. However, the paper will be mainly focused on the privacy interests of single parents who have to experience the physiological and mental difficulties of pregnancy on themselves. The reason behind this is that, as it will be demonstrated in the following chapters, the unique interests, which might be threatened by the realisation of the right to identity, in the majority of cases, exist in relation to the above-mentioned persons. However, this does not exclude the possibility of the existence of such interests in relation to other categories of parents. Thus, for the purposes of this paper, the private life of parents in general will be considered.

To move on to the structure of the dissertation, the paper consists of 4 main chapters, an introduction and a conclusion. The first chapter is devoted to the socio-legal context of Ireland. It first identifies the BITA rules, whose problematic nature is demonstrated in subsequent chapters. A substantial part of this chapter is devoted to the Mother and Baby Homes. It then presents the grave violations committed against children and single mothers in these institutions. The impact of this historical experience on the implementation of BITA is also demonstrated. Finally, the first chapter analyses the case-law of the Irish domestic courts on the mentioned human rights issue that preceded BITA's enactment.

Chapter 2 concerns the origin of the right to identity and its foundations in international documents. It also describes, on the one hand, what interests the right to identity serves to protect and, on the other hand, what threats its full realisation causes. In particular, the impact of the right to identity on the prevention of genetic diseases and incestuous relationships is reviewed. Also, it demonstrates the risks caused by the right to identity regarding abortion and infant abandonment.

Chapter 3 of the paper is entirely devoted to identifying the obligations of the ECHR in relation to the issue under consideration. It examines the origins of the conflict between

the right to identity and privacy in the ECtHR jurisprudence and its subsequent development. It also demonstrates the differences between paternity and maternity cases in terms of protecting different kinds of interests. Finally, this chapter summarises the ECtHR's approaches to the relevant issue.

Finally, Chapter 4 assesses the compatibility of the BITA with the ECHR. To this end, it first determines the expected scope of the margin of appreciation granted to Ireland. It then considers the extent to which the Irish legal framework ensures a fair balance between competing rights. It also provides recommendations for modifying the BITA to guarantee its compliance with the ECHR so that the interests protected by the right to identity are also ensured.

In response to the research question, the paper will use three methodologies: doctrinal analysis; comparative analysis and socio-legal research. The doctrinal analysis will be essential in order to determine the human rights issue and the scope of conflicting interests. Comparative analysis will be helpful to get acquainted with the rules operating in several jurisdictions and the different value systems that are the basis of various legislative frameworks. Finally, socio-legal research has a key role in this dissertation as it will be necessary to understand the Irish socio-legal context, which is a prerequisite for drawing flawless conclusions.

There are several reasons why Ireland was selected as a case for this paper. First of all, BITA is novel legislation that sets an exceptionally strict and absolutist approach to resolving the conflict between the right to privacy and the right to identity. Moreover, as already mentioned, the specific historical context of Ireland makes this topic even more engaging.

Chapter 1

Historical, Social and Legal Reality of Adoption in Ireland

1.1 Introduction

The modern international human rights law system is based on the belief that there are fundamental human rights that any state must respect.[6] However, this certainly does not mean that the scope of the application of human rights is identical in all societies. A particular society's cultural background and social needs are crucial to resolve the conflict between human rights. This is particularly relevant for the application of human rights, as their enforcement depends broadly on the specific social and political context, 'parochialism is a necessary component of human rights enforcement that requires contextualization and hence some form of vernacularization or adaptation to the local circumstances'.[7] Thus, the states have an obligation to, on the one hand, ensure the proper protection of human rights and, on the other hand, to apply them in such a way that the needs of a particular society are adequately addressed.

Therefore, in order to answer the question of whether the legislation of a particular country is in compliance with the requirements of any international or regional human rights protection instrument, it is necessary, first of all, to examine the socio-legal context of the said country. Consequently, the purpose of this chapter is to demonstrate the specific socio-legal reality of Ireland. For this purpose, first of all, the current legislation will be analysed, and the main focus will be directed to the problematic issues from the perspective of human rights law. After that, the historical and social factors that prompted the relevant legislative changes will be discussed.

1.2 Birth Information and Tracing Act – Prioritising the Right to Identity over the Right to Privacy

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[6] U.N. Charter 1945 art 55.

[7] Moeckli D and others (eds), *International Human Rights Law* (3rd edn, Oxford University Press 2018), 36.

The BITA gave a new life to the right to identity of adopted persons in Ireland. Based on it, adopted persons have the possibility to request and receive birth information, early life information, care information and medical information related to themselves.

Under the new law, an adopted person (applicant) who has reached the age of 16 has the right to request information about his or her birth. Subject to several conditions, a relevant body is obliged to provide the relevant person with a copy of his or her birth certificate.[8] Along with this, the applicant can also request the birth information that relates to him or her and/or a photograph or other image of his or her mother or father contained in a record.[9]

For the purposes of the law, 'birth information' means:

> (a) the date, place and time of his or her birth; (b) his or her sex; (c) his or her forename and surname; (d) the forename, surname, birth surname, address, occupation, date of birth, civil status and, where applicable, former surname of his or her mother; (e) the birth surname of his or her mother's mother; (f) the forename, surname, birth surname, address, occupation, date of birth, civil status and, where applicable, former surname of his or her father; (g) the birth surname of his or her father's mother.[10]

Consequently, an adopted person has a guaranteed right to access his or her birth information, which includes detailed and comprehensive data about his or her biological parents. Based on the information mentioned earlier, the applicant can identify his or her parent without any significant effort. In addition, an applicant also has access to his or her parents' address, which means that he/she can make face-to-face contact with them. To summarise, according to the law, if certain conditions are satisfied, the applicant is given unlimited and comprehensive access to the private life of his or her biological parent. Interference with private life with such intensity requires balancing mechanisms that ensure sufficient protection of the right to privacy of biological parents.

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[8] Birth Information and Tracing Act 2022 (BITA 2022) s 6(2).
[9] BITA 2022, ss 9(1) and 10(1).
[10] BITA 2022, s 2(1).

As already mentioned, the realisation of the adopted person's right to identity may come into conflict with the biological parent's right to privacy. The law gives applicants access to sensitive details of their biological parents' personal lives. In order to prevent the violation of the right to privacy, the law provides for a special mechanism – 'Contact Preference Register'.[11] Its purpose is to keep records regarding adopted persons and their biological parents and to ensure that these persons are connected to each other in such a way that their rights are not violated.

Under the Contact Preference Register system, biological parents have the opportunity to

> … specify in the statement, whether one or more of the following applies: (a) he or she is seeking to have contact with the specified person; (b) he or she is willing to be contacted by the specified person; (c) he or she is not willing to be contacted by the specified person; (d) he or she is seeking information in relation to the specified person and, if so, the nature of the information; (e) he or she is not willing to have contact with the specified person but is willing to provide information if requested by a specified person.[12]

The law envisages the provision of birth certificate and birth information to the applicant unconditionally if four prerequisites are met - the relevant parent: (a) has not made a statement in the Contact Preference Register; (b) has made a statement that he or she is seeking to have contact with the applicant or is willing to be contacted by the applicant; (c) has made a statement that he or she is not willing to be contacted by the applicant, and an information session has already taken place; (d) is deceased.[13] The relevant body will not release relevant information only in case when the relevant parent 'is not willing to be contacted by the applicant and no information session has taken place'.[14]

Thus, the applicant can obtain his or her birth information without any condition in cases where the relevant parent expresses no explicit denial. In such cases, it is less problematic to give priority to the right to identity because there is no active counter-act of the second

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[11] BITA 2022, s 38(2).
[12] BITA 2022, s 28(11).
[13] BITA 2022, ss 7(1)(2), 8(2)(3), 9(4)(5)(6) and 10(4)(5).
[14] BITA 2022, ss 7(1)(4), 8(2)(4), 9(4)(7) and 10(4)(6).

party to the release of information. Therefore, this paper will not focus on this part of the law.

The main issue that requires in-depth research and careful consideration is the case when the relevant parents explicitly refuse to transfer information containing their personal life to the applicant. The BITA regulates this conflict between two human rights by the 'information session' mechanism, which plays a decisive role in solving the dilemma as it aims to protect the privacy rights of parents.[15]

Section 17 of the BITA provides for a mandatory information session in the event that the relevant parent has recorded in the Contact Preference Register that he or she does not wish to be contacted by the applicant. At the information session, an applicant is informed that he or she has the right to receive his/her birth certificate and birth information. Most importantly, the applicant is informed that: (i) the parent concerned has exercised his or her entitlement to state that he or she is not willing to be contacted by the relevant person, and (ii) the making of that statement by the parent constitutes an exercise by him or her of his or her right to privacy.[16] A relevant person aged between 16 and 18 years may be accompanied by a person of his or her choosing during the information session.[17]

It should be noted that the information session requirement is the only mechanism aimed at regulating the conflict between the right to identity and the right to privacy. In addition, the information session is not followed by any legal responsibility that excludes the applicant from receiving relevant information. As soon as the information session is held, the applicant is able to proceed to obtain the birth information and birth certificate without hindrance.[18]

Thus, it is clear that under the BITA, the right to identity of adopted persons enjoys greater protection than the right to privacy of the relevant parents. The applicant can obtain relevant information in case of making certain efforts regardless of the will expressed by

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[15] Irish Human Rights and Equality Commission, 'Submission on the General Scheme of the Birth Information and Tracing Bill 2021' (2021), 18.
[16] BITA 2022, s 17(2).
[17] BITA 2022, s 18(2).
[18] BITA 2022, ss 7(1)(c), 8(2)(c), 9(4)(c) and 10(4)(c).

the parent. On the other hand, information containing the private life of parents can be released without their consent. The specific historical context of Ireland mainly dictates such regulation, and the purpose of this act was to correct 'historic wrongs'.[19] Said historical context will be discussed in more detail in the next chapter of the paper so that this sensitive issue can be investigated in depth.

1.3 Socio-historical Context in Ireland Behind Birth Information

1.3.1 Mother and Baby Homes – General Overview

From the 1920s to the 1990s, Mother and Baby Homes operated in Ireland, providing housing and support for women who became pregnant out of wedlock and their children. By that time, maternity out of wedlock in Ireland was considered 'a sinful act contravening the religious morality of the time and bringing shame to the family and the whole nation'.[20] Consequently, single mothers were regarded as:

> … sinners, fallen women, strumpets, prostitutes, brazen hussies, Jezebels riddled with venereal diseases, tramps and sluts, while illegitimate babies were similarly vilified as bastards, weaklings, runts of the litter and the spawn of Satan.[21]

This public opinion was largely due to the strong influence of the Roman Catholic Church on the society, which steadily gained control over various state institutions after Ireland gained independence in 1922.[22] This is clearly demonstrated by the fact that the Irish Constitution of 1937 was heavily influenced by the then Christian teaching, according to which 'sex outside marriage was regarded as morally wrong'[23] and the only legitimate form of sexuality for women was reproduction within marriage.[24]

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[19] Ailbhe Conneely, 'Automatic Right to Birth Data in New Legislation' (*RTE*, 12 January 2022) <https://www.rte.ie/news/ireland/2022/0112/1273168-adopted-birth-certs/> accessed 10 June 2023.
[20] Elena María Cantueso Urbano and María Isabel Romero Ruiz, 'Irish Mother and Baby Homes' Fostered Children Reconstructing Their Past in Phyllis Whitsell's *My Secret Mother* (2015) and *A Song for Bridget* (2018)' (2021) 49 CIF 107, 109.
[21] Paul Jude Redmond, *The Adoption Machine: The Dark History of Ireland's Mother and Baby Homes and the Inside Story of How Tuam 800 Became a Global Scandal* (Merrion Press 2018), 24.
[22] ibid, 27.
[23] Joan Perkin, *Women and Marriage in Nineteenth-Century England* (Routledge 1989), 20.
[24] Cantueso Urbano, Romero Ruiz (n 20) 109.

Therefore, women who became pregnant out of wedlock were transferred to Mother and Baby Homes, the purpose of which was to provide assistance to pregnant women during pregnancy and childbirth. After giving birth, single mothers were sent to Magdalene Laundries to 'reform' them.[25] Their children would be placed in industrial schools until they were adopted. The practice of Mother and Baby Homes was so widespread that in 1967, 97% of children born out of marriage were placed for adoption.[26]

Many circumstances indicate that the conditions in those institutions were not appropriate. The most shocking and transformative evidence of human rights violations was found at the Tuam Mother and Baby Home in County Galway, where mass grave and infant remains were found in a septic tank.[27] These findings prompted the state to investigate the deaths and human rights violations in Mother and Baby Homes in Ireland. The government of Ireland established a special Commission whose final report was submitted on October 30 2020, where various human rights-violating practices were found.

One of the most shocking facts revealed by the Commission was the very high rate of infant mortality (first year of life) in Irish Mother and Baby Homes. According to the report, a total of about 9,000 children died in the institutions under investigation (15% of all the children in the institutions).[28] Illegitimate babies were four to five times more likely to die than legitimate babies in Ireland in the 1920s.[29]

As for the single mothers, according to the Commission report, their placement in Mother and Baby Homes was not done through coercion by the church or the state, they simply

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[25] ibid.
[26] Deborah McNamara, Jonathan Egan and Padraig McNeela, ''My Scar is Called Adoption': The Lived Experiences of Irish Mothers Who Have Lost a Child through Closed Adoption' (2021) 45(2) AAF 138, 140.
[27] 'Tuam Babies: Excavation of Chuildren's Mass Grave to Begin in 2019' (*BBC* 29 December 2018) <https://www.bbc.com/news/world-europe-46708762> accessed 30 June 2023.
[28] Department of Children, Equality, Disability, Integration and Youth, 'Executive Summary of the Final Report of the Commission of Investigation into Mother and Baby Homes' (2021) (Executive Summary of Final Report), 12.
[29] Redmond (n 21) 39.

had no other choice.[30] However, this conclusion has been criticised as oral evidence from survivors suggests otherwise.[31] For example, Mary Fitzgerald recalls being forced into a Mother and Baby Home after she became pregnant as a result of being raped at age 13. According to her statement, her parents wanted Mary to stay with them, but the priest opposed it, and Mary was forcibly placed in a relevant institution.[32]

It is clear that in Irish Mother and Baby Homes, there have been systematic violations of the human rights of both single mothers and their children. According to the Commission report, there was no 'gross abuse' of children and women and there were only a small number of complaints of physical abuse.[33] It was also found that vaccine trials were carried out in the institutions on children without the consent of their parents, although no harm as a result of vaccination was proven.[34]

Regardless of how complete and accurate the report of the Commission regards the facts of human rights violations, the facts mentioned in the report clearly show that there was a grave violation of single mothers' and their children's rights in the institutions.

1.3.2 Adoption Practice in Mother and Baby Homes

For the purposes of this paper, one aspect related to Mother and Baby Homes is particularly important - the practice of adoption. As already mentioned, the mother and her child were separated after the birth of the child, and then the child was adopted. The adoption procedure served three goals simultaneously: a. single mothers would be protected from the social stigma associated with having a child out of wedlock; b. children

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[30] Executive Summary of Final Report (n 28) 8.
[31] 'Mother and Baby Homes Report Not the Full Truth, A Betrayal of Survivors' (*Amnesty International* 4 June 2021) <https://www.amnesty.ie/mother-and-baby-homes-report-not-the-full-truth-a-betrayal-of-survivors/> accessed 30 June 2023.
[32] Mick Heaney, 'Joe Duffy et al Do What the Mother and Baby Home Commission Could Not' (The Irish Times 15 January 2021) <https://www.irishtimes.com/culture/tv-radio-web/joe-duffy-et-al-do-what-the-mother-and-baby-home-commission-could-not-1.4458277> accessed 30 June 2023.
[33] Executive Summary of Final Report (n 28) 15.
[34] ibid, 248.

would be protected from the stigma of 'illegitimacy'; and c. the interests of couples who could not give birth themselves would be met.[35]

According to the Commission's report, after the legalisation of adoption in Ireland in 1953, the adoption mechanism became the most popular way for children to escape from Mother and Baby Homes. The report indicates that adoption was possible only with parental consent, which provided a two-step procedure for adoption - a. an agreement to place a child for adoption; and b. consent to the adoption order. The Adoption Board (established by the 1952 Adoption Act)[36] was also required to make sure that the mother was fully aware of the decision. In addition, the mother had the right to withdraw her consent at any time before the child's adoption, although they were not always properly informed about this right.[37]

In relation to adoption, the Commission report does not indicate that there was any coercion. Yet, as it is mentioned with regard to placement in an institution, some mothers 'had no alternative, because of family circumstances and/or insufficient means to support a baby'.[38] Accordingly, the Commission recognised the problematic nature of the adoption procedure. However, it indicated that 'at least from the 1970s/1980s, there were adequate procedures in place for ensuring that a mother's consent was full, free and informed'.[39]

It should be noted that there are contrasting findings from the report in academic sources, which describe cases when mothers in Mother and Baby Homes were forcibly separated from their children. The adoption process was imposed - from the moment single mothers were placed in Magdalene Laundries, they lost their own children.[40] As Finnegan mentions:

[35] Simon McCaughren and Judy Lovett, 'Domestic Adoption in Ireland: A Shifting Paradigm?' (2014) 38(3) AAF 238, 239.
[36] Valerie O'Brien and Sahana Mitra, 'Research on Adoption in Ireland 1952-2017' (2018), 34.
[37] Executive Summary of Final Report (n 28) 253.
[38] ibid, 254.
[39] ibid.
[40] Redmond (n 21) 14; Cantueso Urbano, Romero Ruiz (n 20) 115.

> Regardless of whether passion, seduction or abuse had been the cause of pregnancy; and irrespective of whether the infant had survived, grieving, post-natal mothers were compelled to suffer in silence, and to submit, without murmur to the anguish of their loss.[41]

According to some sources, before the legalisation of adoption in Ireland in 1953, there was a black market in adoptions, and Mother and Baby Homes were involved in the business of sending illegitimate Irish children to America.[42] There are also strong indications that children's deaths were being faked in these institutions in order to sell them on the black market.[43] After the legalisation of adoption, the practice of adoption continued again, this time through legal means. The conditions of single mothers were still inadequate until the enactment of The Social Welfare Act of 1973, which provided allowances for single mothers.[44]

It is clear that the problematic nature of adoption in 20th-century Ireland was very acute. Whether the adoption was forced or the mothers had no alternative, in any case, it was a gross violation of the rights of mothers and their children. The forced separation of the mother and newborn from each other causes significant trauma for both of them. As Cantueso Urbano and Romero Ruiz note:

> Being incarcerated against their will and deprived of their children left a profound wound on them difficult to heal. As far as illegitimate children are concerned, their identities were torn apart once they were separated from their birth mothers and their past was concealed.[45]

1.3.3 Public Demand for Ensuring Adopted Persons' Right to Identity

Prior to the adoption of the BITA, Irish law did not provide for the right of an adopted person to receive information about his or her identity. In such conditions, many of them were struggling to find their birth mother. Therefore, the Commission's report includes a

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[41] Frances Finnegan, *Do Penance or Perish: Magdalen Asylums in Ireland* (Oxford University Press 2004), 28.
[42] Cantueso Urbano, Romero Ruiz (n 20) 112.
[43] Redmond (n 21) 109.
[44] Executive Summary of Final Report (n 28) 249.
[45] Cantueso Urbano, Romero Ruiz (n 20) 110.

recommendation for creating an effective mechanism for adopted persons to exercise their right to identity. The Commission noted that:

> … adopted people should have a right to their birth certificates and associated birth information. A person's right to his or her identity is an important human right and should only be denied in very exceptional circumstances.[46]

In addition to the Commission, the CtRC also expressed its concerns regarding 'the lack of a comprehensive legal framework that ensures that children who have been adopted have access to information regarding their origins and services for family tracing'.[47] While McCaughren and Lovett also pointed out how important it is to protect the right to identity of adopted persons, they also emphasised the need for the birth mother's right 'to veto it if she does not want her identity disclosed'.[48]

Given that there was such a controversial experience with adoption in Ireland's history, and there was no effective mechanism in the legislation to connect a birth mother with her child, there was solid social pressure for a modification of legislation. This social demand led to the adoption of the BITA in its current form. The historical context in the recent past in which mother and newborn were separated from each other without free and informed consent, in itself required the implementation of legislative amendments, based on which the mechanism of establishing contact between mother and child would be ensured and, in this way, 'historic wrongs' would be corrected. Consequently, this socio-historical context should be taken into account when discussing and making relevant conclusions in the subsequent chapters of the paper, because, without a complete understanding of this unique historical experience of Ireland, it will be impossible to make precise conclusions.

1.4 Development of the Irish Domestic Courts' Case-law regarding the Right to Identity

[46] Executive Summary of Final Report (n 28) 7.
[47] United Nations, Committee on the Rights of the Child, 'Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland' (CRC/C/IRL/CO/3-4, 1 March 2016), 45.
[48] McCaughren, Lovett (n 35) 248.

In addition to the socio-historical background, it is crucial to review the development of the conflict between the right to privacy and the right to identity in the case-law of the Irish domestic courts. Based on Ireland's specific historical experience with adoption practices, Irish courts have had to consider the circumstances under which disclosing confidential information about a birth mother to her child is justified. Thus, it is essential to analyse the courts' reasoning according to which the relevant state authorities were guided in resolving the conflict of the aforementioned rights.

The Supreme Court of Ireland first recognised the right to identity for adopted persons in 1998 in *O'T (I) v B*.[49] The plaintiffs were two persons who had been *de facto* adopted in 1941 and 1951 before the adoption was legalised in Ireland. Thus, they were adopted informally by The Rotunda Girls Aid Society. Both of them requested access to their birth mother's identity and contact information for the purposes of the declaration of parentage.

According to the case, both applicants carried out a meeting with Father Gerard Doyle, who had access to the claimants' birth parents' identification documents. The applicant IO'T was informed that his mother's name was Bridget and she was from County Limerick. Her address was also indicated in the records, but Bridget could not be contacted at that address. Father Doyle contacted the plaintiff MH's mother and informed her about the situation, but she responded that she could not cope with the situation and asked her not to call him again. The plaintiffs then requested to release their mothers' personal data, which was refused by the Society on the grounds that the information was confidential and its release would violate the parent's right to privacy. They then applied to the courts through various legal procedures to obtain the relevant information, which they claimed, was part of their right to identity. Based on the fact that there was no case-law regarding the right to identity and its definition was an issue of constitutional importance, Circuit Court Judge stated the case to the Supreme Court in order to *inter alia* define the scope of the right to identity.

[49] *O'T (I) v B* [1998] WJSC-SC 11911, [1998] 4 JIC 0306 (SC).

The central question to which the Supreme Court had to answer was formulated as follows:

> If the right of a natural child to know the identity of his or her natural parent is not one of the unenumerated rights which have been ascertained and declared, whether such a right is an unenumerated right guaranteed by the Constitution.[50]

Chief Justice Hamilton delivered the majority opinion:

> Though not specifically guaranteed by the Constitution, the right to privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and is subject to public order and morality. The right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother and her child, which relationship is clearly acknowledged in [previous case-law]. The existence of such right is not dependent on the obligation to protect the child's right to bodily integrity or such rights as the child might enjoy in relation to the property of his or her natural mother but stems directly from the aforesaid relationship. It is not, however, an absolute or unqualified right: its exercise may be restricted by the constitutional rights of others, and by the requirement of the common good.[51]

The Supreme Court, while recognising the protection of the right to identity by the Constitution, explained that it is certainly not an absolute right and can be limited on the grounds of protecting the birth mother's right to privacy. It also indicated that in order to set a fair balance between the said interests, it is necessary to examine the individual circumstances of the case and make a final decision based on it.

The Supreme Court non-exhaustively formulated the circumstances that a particular judge of a case should take into account when resolving a conflict between rights:

> (i) the circumstances giving rise to the natural mother relinquishing custody of her child;

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[50] ibid.
[51] ibid.

> (ii) the present circumstances of the natural mother and the effect thereon (if any) of the disclosure of her identity to her child;
> (iii) the attitude of the natural mother to the disclosure of her identity to her natural child, and the reasons therefor;
> (iv) the respective ages of the natural mother and her child;
> (v) the reasons for the natural child's wish to know the identity of her natural mother and to meet her;
> (vi) the present circumstances of the natural child; and
> (vii) the views of the foster parents, if alive.[52]

The Supreme Court, in this case, recognised that the right to identity is guaranteed by the Constitution but clarified that it is not absolute and that the conflict between it and the right to privacy must be resolved by balancing the interests. Accordingly, the court ruled out the possibility of automatically giving priority to any interest. According to the Supreme Court, it is reasonable to solve the conflict of interests by taking into account the individual circumstances of the case because, according to it, various factors that could be of significant importance cannot be exhaustively listed.

A case-by-case basis approach was subsequently applied in the case-law after rendering the above-mentioned judgment by the Supreme Court. In *South Western Area Health Board v. In the Information Commissioner*,[53] after examining the individual circumstances of the case, The High Court of Ireland held that the release of the birth mother's identifying information was not permissible. The court took into account that the mother did not want to reveal her identity, and she had a reason for that - she had a family whose unity could be threatened if the requested information was given to her son. In addition, during the adoption, the mother was promised her privacy would be protected. Thus, her son was only given access to information based on which it was not possible to identify his mother. The court weighed the interests of both parties and ruled that, in this particular case, disclosure of the mother's identity was likely to limit her rights more severely than her offspring's rights would be limited by denying access to the personal information of her mother.

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[52] ibid.
[53] *The South Western Area Health Board v The Information Commissioner* [2005] IEHC 261, [2005] 2 IR 539 | (HC).

Thus, following the Supreme Court's decision in *O'T (I) v B*, the right of adoptees to have access to the personal data of their birth parents was ensured depending on the circumstances of the individual case. However, after the publication of the Commission's report in 2020, the demand to create a more effective mechanism for the realisation of the right to identity of adopted persons increased even more. Adopted people and their advocates supported unfettered right to information.[54] In its report, the Commission also emphasised the need for unrestricted access to birth information for adopted people.[55] However, Attorney General Séamus Woulfe opposed this approach, stating that giving absolute rights to adoptees was against the Constitution and the Supreme Court case-law.[56] Accordingly, the implementation of such a legislative amendment required holding a referendum.

As already noted in the case of *O'T (I) v B*, the Supreme Court held that neither the right of adoptees to access information nor their parents' right to privacy are absolute rights and their limitation is permissible. Consequently, a compromise version was eventually developed, reflected in the BITA, which implies almost unlimited access to information for adoptees. The only balancing mechanism designed to protect the parent's right to privacy is the information session requirement, which formally excludes the absolute nature of the right to identity, but in fact, provides unlimited access to relevant information to adopted persons.

1.5 Concluding Remarks

This chapter provided a legal and socio-historical overview of the Irish experience of adoption. The analysis of the legislation in force in Ireland demonstrated that the law gives adopted persons almost unlimited access to their birth parents' personal data. An analysis of Ireland's historical experience regarding adoption has made it clear why Irish

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[54] David Kenny, The Journal, 'It's Finally Time to Admit that the Government's Legal Advice on Adoption is Wrong' <https://www.thejournal.ie/readme/mother-and-baby-homes-commission-5324898-Jan2021/> accessed 24 July 2023.

[55] Department of Children, Equality, Disability, Integration and Youth, 'Recommendations of the Final Report of the Commission of Investigation into Mother and Baby Homes' (2021), 5.

[56] Jennifer Bray, The Irish Times, 'Way Cleared for Law Releasing Birth Data to Adopted People' <https://www.irishtimes.com/news/politics/way-cleared-for-law-releasing-birth-data-to-adopted-people-1.4072396> accessed 24 July 2023.

legislation was amended in such a revolutionary manner. After publicising the facts of severe violations of the rights of mothers and children in Mother and Baby Homes and, especially, the large-scale practice of forced adoption of newborns, public demand for restoring contact between mothers and children increased significantly. Consequently, the government addressed this issue by implementing the BITA.

As it was shown, The Supreme Court of Ireland was a major obstacle to implementing the BITA as the court considered that the appropriate mechanism for resolving the conflict between the right to identity and the right to privacy would be balancing interests on a case-by-case basis. Ultimately, the government enacted the legislation, which, arguably, does not conflict with Supreme Court case-law and, at the same time, serves the interests of society.

Chapter 2

Theoretical Basis and Practical Implications of the Right to Identity

2.1 Introduction

Having reviewed the relevant circumstances for the discussion on the right to identity in Ireland, it is necessary to examine the scope of this right in general. The purpose of this chapter is to review how this right emerged at the international level, to what extent it operates in various international acts, and finally, what impact it has on different aspects of right-holders' life and personal development.

2.2 International Recognition of the Right to Identity

2.2.1 International Covenant on Civil and Political Rights (ICCPR)

It is difficult to say precisely when the right to identity gained recognition in international law. Although the 1966 International Covenant on Civil and Political Rights (ICCPR) does not explicitly recognise the right to identity, it distinguishes two rights, the combination of which ensures the protection of the right to identity.[57]

Article 17 of the ICCPR guarantees the right to privacy:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.[58]

Article 24, paras 2 and 3 of the ICCPR, reinforces the guarantee of registration, naming and citizenship of a child:

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[57] Samantha Besson, 'Enforcing the Child's Right to Know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 IJLPF 137, 141.
[58] ICCPR 1966 art 17.

2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.[59]

Thus, Article 24 reinforces the right to birth registration, which can be considered as the basis of the right to identity as the birth registration of the child makes it possible to preserve the identity of the child to which she later has access.[60]

2.2.2 Convention on the Rights of the Child (CRC)

The right to identity received the most important recognition at the international level in 1989 when the CRC explicitly recognised the right to know one's origins.[61]

In this regard, the CRC contains two relevant articles:

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.[62]

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.[63]

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[59] ibid, art 24(2)(3).
[60] Besson (n 57) 141.
[61] CRC 1989 art 7.
[62] ibid.
[63] ibid, art 8.

It is evident that the wording in the CRC does not guarantee the absolute nature of the right to identity. Initially, implementation of the right to identity in the CRC was initiated by the Argentine delegation, as Argentina experienced the disappearance of children, which was carried out under the regime of the Argentinean junta during the 1970s and 1980s.[64] Many of these children were killed, some were adopted, and the Argentine government felt it necessary to trace them.[65] For this purpose, the Argentine delegation promoted the creation of an international mechanism to ensure the restoration of this right for children whose right to identity had been violated.[66]

It should be noted that the initial draft version of Article 7 of the CRC provided for the right to identity of an absolute nature. However, during the drafting process, some of the states expressed objections to this. Finally, Article 7 was formulated according to the compromise version, and the words 'as far as possible' were added to this article. Additionally, in paragraph 2 of the same article a reservation was also added that states fulfil their obligations 'in accordance with their national law and their obligations under the relevant international instruments', which meant that the idea of the absolute nature of the right to identity was rejected.[67]

2.2.3 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (HCCH)

Later the right to identity was also reflected in the HCCH in 1993, where obligations arising from the right to identity were explicitly emphasised. Article 30 of the HCCH indicates the obligation of the contracting states to ensure 'that information held by them concerning the child's origin, in particular information concerning the identity of his or

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[64] Lorenzo Tondo, Elena Basso and Sam Jones, 'Adopted by Their Parents' Enemies: Tracing the Stolen Children of Argentina's 'Dirty War'' (*The Guardian* 16 January 2023) <https://www.theguardian.com/global-development/2023/jan/16/tracing-stolen-children-of-argentina-dirty-war> accessed 15 August 2023.

[65] Unicef, 'Implementation Handbook for the Convention on the Rights of the Child' (2007), 113.

[66] Anastasija Jumakova 'Content of the Child's Right to Identity within the Scope of the Convention on the Rights of the Child and the Latvian National Framework' [2020] ROK 223, 227.

[67] Marianne Blower Blair, 'The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination' The Impact of Family Paradigms' (2001) 22(4) MJIL 587, 647.

her parents, as well as the medical history, is reserved'[68] and the said information is accessible for the child 'under appropriate guidance, in so far as is permitted by the law of that State'.[69]

2.2.4 The United Nations Committee on the Rights of the Child (CtRC)

2.2.4.1 Medically Assisted Fertilisation

The CRC recognises the right of the child to have access to information about his or her origin, which includes the personal information of the birth parents. In addition, the CtRC has repeatedly condemned the practice in various countries, based on which it was possible for children born through medically assisted fertilisation to have no access to the identity of their biological parents.[70] The CtRC called on States to create mechanisms to ensure children's right to identity. Thus, the CtRC does not interpret the CRC to authorise States to continue this practice.

2.2.4.2 Baby Boxes – Anonymous Abandonment

The CtRC takes a stricter approach to safe haven 'baby boxes' where a mother can give birth and leave her baby anonymously. The CtRC called on Austria and the Czech Republic to end this practice[71] and make efforts to adopt alternative measures such as anonymous birth at hospitals to prevent abandonment or death of newborns. However,

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[68] HCCH 1993 art 30(1).
[69] ibid, art 30(2).
[70] U.N. Comm. on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland, paras. 31–32, CRC/C/15/Add.188 (Oct. 9, 2002); U.N. Comm. on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Denmark, U.N. Doc. CRC/C/15/Add.33 (Feb. 15, 1995), 11; U.N. Comm. on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Norway, U.N. Doc. CRC/C/15/Add.23 (Apr. 25, 1994), 10.
[71] United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Sixty-first session, 17 September–5 October 2012, Consideration of reports submitted by States parties under Article 44 of the Convention, Concluding observations: Austria CRC/C/AUT/CO/3-4, Civil rights and freedoms (Arts. 7, 8, 13-17, 19 and 37 (a) of the Convention), 29-30; United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Fifty-seventh session, 30 May–17 June 2011, Consideration of reports submitted by States parties under Article 44 of the Convention, Concluding observations: Czech Republic CRC/C/CZE/CO/3-4, Family environment and alternative care (Arts. 5, 18 (paras. 1-2), 9-11, 19-21, 25, 27 (para. 4) and 39 of the Convention), 49-50.

the CtRC considers the implementation of anonymous birth acceptable as a last resort to achieve the stated goals. At the same time, it obliges states to keep a confidential record of the parent and provide access to it later by the child. Furthermore, the CtRC encourages states to address the root causes of child abandonment by implementing various social programs such as 'the provision of family planning as well as adequate counseling and social support for unplanned pregnancies and the prevention of risk pregnancies'.[72]

The CtRC considers the practice of anonymous abandonment through baby boxes inconsistent with the CRC and urges the states to replace it with anonymous birth in hospitals as a last resort. In addition to the fact that babies born in baby boxes are deprived of the opportunity ever to receive information about their own identity, this practice has additional problems. In particular, it is argued that baby boxes do not provide adequate care for the child's and the parents' health, and there is a high risk and threat of third-party pressure on women to force them to abandon the child.[73] Furthermore, birth parents do not receive proper psychological support when using baby boxes, which increases the possibility of repeating this experience.[74] This can be understood as the fact that the state does not take sufficient measures to combat the causes of child abandonment, which the CtRC urges states to do.

2.2.4.3 Anonymous Birth

Although the CtRC called on Austria to promote anonymous birth practice at hospitals as a last measure aimed at reducing cases of child abandonment, it also emphasised that even in the case of anonymous birth in the hospital, a confidential record of the identity of the parent should be kept, which the child will have access to later.[75] Thus, the CtRC does not consider the practice of anonymous birth in accordance with the CRC. The reason behind this is that in such a case, the birth parent does not reveal her identity during

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[72] United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Sixty-first session, 17 September–5 October 2012, Consideration of reports submitted by States parties under Article 44 of the Convention, Concluding observations: Austria CRC/C/AUT/CO/3-4, Civil rights and freedoms (Arts. 7, 8, 13-17, 19 and 37 (a) of the Convention) (Concluding Observations: Austria), 30.
[73] Nataša Hadžimanović, 'Confidential and Anonymous Birth in National Laws – Useful and Compatible with the UN Convention on the Rights of the Child?' [2018] CDC 1, 12.
[74] ibid.
[75] Concluding Observations: Austria (n 72) 30.

childbirth, and therefore the relationship between her and the child cannot be restored in the future.

In this case, the CtRC criticised Austria for not having an appropriate legal framework to ensure that the birth parent's personal data were stored in order to establish contact between parent and child in the future if so desired. Accordingly, the CtRC indicated to Austria that in case of abandonment of the child by the birth parent in the hospital, the legislation should provide a mechanism for setting the possibility of contact between the him/her and the child.[76]

Thus, the CtRC's conclusions clearly indicate that the legal framework that allows a parent to give birth and abandon a child and does not ensure the storage of personal data of the birth parent and the child, thus, excluding the chance of contact between them even if there is consent from both parties, is contrary to the CRC.

2.2.4.4 Confidential Birth

France and Luxembourg, whose legislation the CtRC also assessed,[77] have different experiences with anonymous birth. In contrast to Austria, the legislation in these countries ensured that records of the birth parent's identity were kept during anonymous births. Yet, the child did not have access to this information without parental consent. The CtRC did not consider such a legal framework to be appropriate and reiterated its recommendation, according to which, states should take all necessary measures to enforce the child's right to know his or her biological parents and siblings. In addition, the CtRC urged states to remove the requirement of biological mother's consent for disclosing her

[76] ibid.
[77] United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Concluding observations on the fifth periodic report of France adopted by the Committee at its seventy-first session (11-29 January 2016), 29 January 2016, CRC/C/FRA/CO/5; the concluding observations on the combined third and fourth periodic reports of Luxembourg, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013), CRC/C/LUX/CO/3-4, 29 October 2013.

identity and to take necessary steps to neutralise the grounds that lead to the use of confidential birth by parents.[78]

Thus, it is clear that the CtRC condemns all forms of anonymous birth and supports the practice of confidential birth, which implies the right of the child to receive information about her origins, including the identity of his parents, even in the absence of the birth parent's consent.

This means that the CtRC prioritises the child's right to identity over the parent's interests and promotes the system that ensures the child's right to unrestricted access to birth parents' identity. Although, as already mentioned, the CRC text was formed due to compromise and its wording leaves the states a wide margin of appreciation, the CtRC sees this discretionary power within limited boundaries and considers any form of anonymous birth inconsistent with the CRC.

2.3 Right to Identity – Protected Interests and Threats

There are still many questions regarding the scope of the right to know one's biological origins. This issue is of sensitive and complex nature and is characterised as 'one of the hardest issues to have arisen' after the 1990s.[79] Despite the ongoing discussion regarding the scope of the right, there is already a consensus on the necessity for the existence of the said right as 'there is a burning need, on both economic and emotional grounds, for persons to know the biological truth'.[80]

First of all, it should be noted that both children and adults enjoy the right to identity. Article 24 of the ICCPR and Articles 7 and 8 of the CRC specifically recognise the right to identity in the context of children, however, this does not preclude the extension of said

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[78] United Nations, Convention of the Rights of the Child, Committee on the Rights of the Child, Concluding observations on the fifth periodic report of France adopted by the Committee at its seventy-first session (11-29 January 2016), 29 January 2016, CRC/C/FRA/CO/5, 33.
[79] Besson (n 57) 138.
[80] Richard J. Blauwhoff, 'Tracing Down the Historical Development of the Legal Concept of the Right to Know One's Origins Has 'to Know or not to Know' ever Been the Legal Question?' (2008) 4(2) ULR 99, 100.

right to adults. Due to the specific nature of the issue, the emphasis here is on the obligation to register a child at birth, while the CRC focuses on children's rights. However, the right to private life enshrined in Article 17 of the ICCPR and Article 8 of the ECHR extends to adults as well, and it is from this right that the right to identity derives in documents where such a right is not explicitly stated. Thus, both children and adults enjoy the right to identity.

As for the obligations arising from the right to identity, it is widely accepted that the right has positive and negative obligations.[81] The right to know one's origins not only protects a person from interference in self-determination by the state, but also imposes a positive obligation on it to ensure the preservation of birth information and subsequent access to it.[82] Thus, the right to identity imposes on the state the duty to develop a legal framework that ensures the availability of birth information to the right-holders.

As for the concept of identity, its complete definition is an unfulfilled task. Article 8 of the CRC lists specific types of information that are part of identity: ''nationality', 'name' and 'family relations' are included in the concept of 'identity', but they are not exhaustive, the content of identity is much broader'.[83] Thus, identity is an open concept[84] and it is impossible to determine all the aspects that will fall within its scope in advance. However, birth information and, specifically, the record of the identity of the parents clearly fall within this scope.

2.3.1 Protected Interests

In general, the right to identity has two types of legitimate basis - firstly, for a medical purpose, it prevents hereditary diseases and incestuous relationships, and secondly, in the psychological sense, it allows the child to develop her own narrative identity.[85] It is self-evidently true that access to a proper medical history plays a key role in the prevention

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[81] Besson (n 57) 144.
[82] Blauwhoff (n 80) 102.
[83] Jumakova (n 66) 230.
[84] ibid.
[85] Blauwhoff (n 80) 102.

and treatment of certain illnesses. 'Specific information brings a degree of certainty about future ill health or even the mode and manner of one's own death'.[86]

Therefore, access to the biological parents' complete medical history allows a person to take appropriate preventive measures to avoid possible severe health consequences caused by hereditary diseases. Thus, in the context of the right to health, the right to identity is of crucial importance. Prevention of incestuous relationships is also of the utmost importance because the formation of an incestuous relationship due to insufficient information may bring significantly harmful medical and psychological consequences.[87]

As for the importance of identity in terms of psychological development, it is apparent that it has an essential role in personal development. It is characterised as a '(moral) claim to informational self-determination' by the Federal Constitutional Court of Germany.[88] At the same time, studies demonstrate that questions often arise in adopted children about their biological origins during adolescence or post-adolescent age.[89] Thus, it is clear that an adopted person naturally has a particular interest in her biological origins because self-exploration is a part of human curiosity. Accordingly, 'the knowledge of origins represents a *condicio sine qua non* for the formation of the personal identity of the adopted person'.[90]

To sum up, the right to identity uniquely contributes to the personal development of a human being. On the one hand, it ensures the prevention of threats to human health. On the other hand, it plays a major role in human self-determination and full-fledged mental development. Nonetheless, the full realisation of this right does not bring only positive results, it may have a negative impact not only on the interests of other persons but also on the right-holders themselves and, paradoxically, it also has the potential to harm the same interests that are protected by itself.

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[86] Brigitte Clark, 'A Balancing Act? the Rights of Donor-conceived Children to Know their Biological Origins' (2012) 40(3) GJICL 619, 650.
[87] Shirley Davis, CPTSD Foundation, 'Incest and Genetic Disorders' <https://cptsdfoundation.org/2022/04/18/incest-and-genetic-disorders/> accessed 24 July 2023.
[88] Blauwhoff (n 80)102.
[89] Valentina Colcelli, 'Anonymous Birth, Registration, And the Right of The Child to Know their Origins in the Italian Legal System. A Brief Commentary' (2013) 1(2) JCLS 1, 2.
[90] Alice Margaria, 'Anonymous Birth: Expanding the Terms of Debate' (2014) 22 IJCR 552, 558.

2.3.2 Threat to the Life and Health of the Birth Parent and the Newborn

In jurisdictions where birth parents do not have the ability to give birth anonymously or have no safeguards in place to ensure that their identity is not revealed to their children in the future, they are forced to find other ways to avoid parental status and responsibility. In such cases a mother who wants to achieve this goal is often in such a mental condition that she is ready for the most radical decision, which can be manifested in abortion, infanticide, child abandonment, that puts the life and health of the newborn and the parent in great danger.[91] Accordingly, by limiting the right to identity and giving the birth parent an effective right to refuse to reveal his/her identity to the newborn, the child's and parent's right to health and life is protected.

Thus, it is incorrect to state that by guaranteeing anonymity to the birth parent, only the interests of the child are harmed and important legitimate objectives are not protected. Giving priority to one of the conflicting rights in itself has considerable negative consequences in both ways. Accordingly, there is no ideal solution to this dilemma, it is impossible to develop such a legal system that, according to the predetermined hierarchy of interests, will ideally resolve this conflict in all cases. As Besson notes,

> … abstract hierarchies of rights are rare however, and, even when they exist, they cannot solve conflicts of rights between rights of equal weight or rights which only conflict with each other in concrete cases and not in others.[92]

Thus, solving the problem by establishing a hierarchy between conflicting rights cannot be considered an adequate measure because, in an individual case, the interests of one side can freely outweigh the interests of the other side and *vice versa*. At the same time, it is not clear why priority should be given to the child's right to identity because, as Troiano rightly notes,

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[91] Stefano Troiano, 'Understanding and Redefining the Rationale of State Policies Allowing Anonymous Birth: A Difficult Balance between Conflicting Interests' (2013) 4 IJJF 177, 187.
[92] Besson (n 57) 147.

> If one accepts the idea that a hierarchical order can be established between values inherent to the person, there can be no doubt that the conflict between the preventive protection of human health and life and the after-the-fact protection of the fundamental, yet less vital, interest in personal identity must be resolved … by giving prevalence to interests of undoubtedly higher rank among the values of constitutional significance inherent within human beings.[93]

Nevertheless, solving this dilemma by establishing a hierarchical order between rights cannot be considered a fair mechanism. However, it should be well understood that the guarantee of anonymity truly saves lives. In some instances, this is the tool that frees the birth parent from parental obligations and ensures the safe delivery of the newborn. Sometimes it is the optimal solution taking account of the given circumstances. In the ECtHR's case of *Godelli v. Italy*, which will be discussed in more detail in the next chapter, the only dissenter Judge Sajo also emphasised the importance of anonymous birth in the safe birth of a child and explained that:

> 'the possibility of giving birth anonymously with an absolute guarantee of anonymity must have allowed the applicant to be born and to be born in circumstances that do not endanger her health and/or the health of the mother'.[94]

At the same time, we must face the reality that unintended pregnancy exists and sometimes it is the result of violence, rape and other traumatic sexual relations[95] that have a severe psychological impact on the parent who gives birth. Moreover, during armed conflicts, 'pregnancies have occurred and babies have been born as a result of rapes in conflict'.[96] In such cases, the pregnant woman experiences critical emotional suffering, and, in some instances, this may be compounded by social pressure for being pregnant outside of marriage. In such circumstances, the natural feeling might be to avoid parenthood, in which case, there may be two legal ways to do so - abortion and anonymous birth. Therefore, in a state where abortion is allowed, it is not clear why anonymous birth should not be allowed even in extreme cases. By legalising abortion and altogether banning anonymous births, we are forcing pregnant people in the most

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[93] Troiano (n 91) 192.
[94] Dissenting Opinion of Judge Sajo on the Case of *Godelli v. Italy* App no. 33783/09, (ECHR 25 September 2015).
[95] Hadžimanović (n 73) 2.
[96] Jill Marshall, 'Secrecy in Births, Identity Rights, Care and Belonging' (2018) 30(2) CFLQ 167, 184.

traumatic situations to have abortions, which is not, in any sense, a more ethical act than giving birth anonymously. As Judge Greve rightly noted in her concurring opinion regarding the case of *Odièvre v. France*, 'no society should in the name of the promotion of human rights be forced to leave a woman with abortion as the only apparent safe option'.[97]

Consequently, anonymous birth may be the most righteous act given the specific circumstances of an individual case. In this regard, it should be noted that some women do not wish to undergo an abortion for personal or religious reasons.[98] Additionally, parents do not use the possibility of anonymous birth in ordinary situations. As already mentioned, they are often victims of sexual violence. According to the psychoanalytic study conducted by Bonnet in France in 1987-89, it was revealed that most of the interviewed women learned about their pregnancy at the stage of pregnancy when they no longer had the right to have an abortion (10 weeks). Due to their traumatic sexual experience, they ignored the signs of pregnancy.[99] Thus, they had the most challenging experience of pregnancy and were unable to have an abortion. Consequently, if there was no possibility of anonymous birth, they would be doomed to the responsibility of parenthood, which they are unlikely to handle well, given their mental condition.

Giving birth in the conditions of such a traumatic experience of a newborn creates a lot of problems in terms of the relationship between the parent and the newborn. Birth parents who spent all or part of their pregnancy in a state of denial may have violent impulses towards their newborn. As Bonnet describes the mental state of these women:

> These women generally discovered the presence of the fetus when the mechanism of denial had become less efficient. They had difficulty articulating their anguish and stupefaction upon discovering the existence of the fetus. Then they began to have fantasies of violence toward the unborn child. These were manifested by phrases such as: 'I hate it,' 'I don't want it,' 'I want it to disappear,' 'I don't love it,' 'I want it to die...' Their pregnancies became so unbearable that some requested abortions, thinking

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[97] Concurring Opinion of Judge Greve on the Case of *Odièvre v. France* App no. 42326/98, (ECHR [GC] 13 February 2003).
[98] Marshall (n 96) 181.
[99] Catherine Bonnet, 'Adoption at Birth: Prevention against Abandonment or Neonaticide' (1993) 17(4) CAN 501, 505.

> they had miscalculated the dates. But since they had gone beyond the legally accepted term, they were refused by family planning centers. It was so difficult for some women to handle the idea of being pregnant that they even requested therapeutic abortions.[100]

Therefore, we must ask ourselves how reasonable it is to force birth parents to take responsibility for the newborn in such situations. To what extent are there guarantees for the parent's and newborn's life and health? Is the birth parent ready to give the newborn proper care and love? If the parent is not ready for all this, giving birth to a child anonymously should not be considered an irresponsible act of abandoning the child but as a unique maternal act for protecting the newborn's life 'from the risk of violence or neglect, and giving it the chance to be loved by others'.[101]

Thus, a complete ban on anonymous birth threatens many valuable interests. Although it hinders the self-determination of the child, the negative aspects arising from it may be alleviated if the child is appropriately informed about his birth. Psychological support of the child and assurance that he is an independent individual and has all the opportunities to be happy and to become a full-fledged member of society significantly reduces the negative consequences of not having complete information on biological origins. At the same time, under conditions of proper support, children may realise that 'their mothers did not abandon them despite their distress but instead gave them access to the love of adoptive parents – as a substitute for the love that they could not give them'.[102]

Furthermore, anonymous birth does not exclude the possibility of establishing contact between the child and the birth parent in the future. In order to ensure this possibility, a parent who gives birth anonymously should be required to indicate her personal information in exchange for a guarantee that this data will not be given to her child without her consent. Such a system leaves out the possibility of re-establishing the relationship and, at the same time, gives the parent the opportunity to avoid the responsibility of parenthood. Although the birth parent is assured that her personal information will not be disclosed without her consent, this does not mean that future

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[100] ibid, 505.
[101] ibid, 509.
[102] Hadžimanović (n 73) 22.

contact is impossible or even highly unlikely. Quite the opposite – there is a high probability that birth parents may change their mind and proactively express the desire to have contact with their own child. It is argued that a very small proportion of parents who give birth anonymously choose to remain anonymous for the whole life.[103] As time passes, parents are given the opportunity to reconsider the traumatic experience without any anxiety. After that, most of them express a desire to establish contact with their child. Thus, for some parents, anonymous birth is an invaluable 'time-out' that ensures prevention of neonaticide and child abandonment.[104]

Thus, in some cases, giving the birth parents a guarantee about the anonymisation of their personal information may be a life-saving mechanism for the newborn. At the same time, when the parent overcomes the traumatic experience, there is a high probability that the child's right to identity will no longer be restricted as well.

In addition to the theoretical justification, the effectiveness of anonymous birth was also confirmed empirically as a result of a 2013 study, which examined the effect of the introduction of anonymous birth in Austria in 2001 in reducing neonaticide. As a result of the study, it was determined that after the implementation of anonymous birth, police-reported neonaticide cases significantly decreased. In particular, the rate of police-reported neonaticides was 7.2 per 100,000 births in Austria prior to the passage of the law and 3.1 per 100,000 births after the passage of the law.[105] Thus, the

> … data demonstrated a significant decrease in the number of police-reported neonaticides in Austria after the implementation of anonymous delivery. Even though underlying factors associated with neonaticide are complex, the findings could indicate an effect of anonymous delivery in the prevention of this crime.[106]

The credibility of this conclusion was once again approved by another study in 2015.[107]

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[103] ibid, 24.
[104] ibid.
[105] Klier CM and others, 'Is the Introduction of Anonymous Delivery Associated with a Reduction of High Neonaticide Rates in Austria? A Retrospective Study' (2013) 120(4) BJOG 428, 429.
[106] ibid.
[107] Grylli C and others, 'Anonymous Birth Law Saves Babies - Optimization, Sustainability and Public Awareness' (2016) 19 AWMH 291.

To sum up, while the right to identity ensures personal self-determination and prevents hereditary diseases and incestuous relationships, the practice of anonymous birth ensures the life and health of the parent and newborn. Accordingly, taking into account the vital interests on both sides, establishing an abstract hierarchy between the conflicting rights cannot bring fair results. Thus, it is necessary to develop a balancing mechanism that, at least in extreme cases, will give parents the opportunity to give birth anonymously when this is the safest and optimal decision.

2.4 Concluding Remarks

This chapter of the paper dealt with the right to identity and discussed the problematic aspects of it from human rights perspective. First, it was shown how the right to identity emerged in international law. The most significant recognition of it was found in the CRC, where it was explicitly mentioned for the first time. The analysis of the CtRC's observations demonstrated that despite the soft wording of the CRC in terms of imposing obligations on the member states, the CtRC significantly limits the discretionary power of the states and urges them to develop such a legal framework that ensures the full realisation of the right to identity.

In the second part of this chapter, the scope of the right to identity was discussed and, on the one hand, the interests secured as a result of its enforcement and, on the other hand, the threats that may follow were evaluated. As a result, it was argued that in order to make a fair decision, it is necessary to balance the interests by taking into account the circumstances of the individual case as both the right to identity and the possibility of giving birth anonymously provide the crucially important interests for the personal development of a human being.

Chapter 3

The European Court of Human Rights (ECtHR) and the Right to Identity

3.1 Introduction

The primary aim of this paper is to examine the compatibility of the BITA with the requirements of the ECHR. After introducing the historical and socio-legal context of Ireland and discussing the characteristics of the right to identity, this chapter will be devoted to the examination of the obligations directly derived from the ECHR. For this purpose, the dynamics of the ECtHR's case-law development regarding the right to identity will be discussed. Accordingly, the origin of this right in the Court's case-law and the subsequent stages of its development will be reviewed. Finally, it will be concluded how the Court currently sees the scope of this right and what requirements it imposes on the member states.

3.2 Foundations of the Right to Identity in the Case-law of ECtHR – Paternity Claims

The Right to Identity derives from Article 8 of the ECHR (right to privacy):

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[108]

The ECtHR first recognised the right to identity in *Gaskin v. UK*.[109] In this case, the applicant sought information about her childhood from Liverpool City Council's childcare institution, where she spent her childhood. She believed she was the victim of

[108] ECHR 1950 art 8.
[109] *Gaskin v. The United Kingdom* App. no. 10454/83 (ECHR 7 July 1989).

ill-treatment there. Consequently, she wanted to find out under what conditions she grew up in order to overcome the mental problems stemming from this experience.

The Court declared that 'persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development'.[110] However, it was also added that 'confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons'.[111] Finally, the Court found a violation of Article 8 of the ECHR on the grounds that the system in effect in the UK at that time did not provide the applicant with access to information even in case the contributor to the records either was not available or improperly refused consent. Accordingly, the Court did not find the violation merely on the basis that the disclosure of confidential information to the applicant was conditional upon the consent of the contributor. Rather, it was declared inconsistent with the ECHR because the system did not ensure the release of information even when the contributor's refusal of consent was not present.

The European Commission of Human Rights discussed the admissibility of the case regarding the recognition of maternity in the case of *M.B. v. UK*.[112] In this case, the applicant had a sexual relationship with a married woman (Mrs. F). When the applicant found out that his sexual partner was pregnant, he believed that she would divorce her husband and start living with him. However, Mrs. F informed her husband about the pregnancy, and they decided to continue living together and raising the child. The applicant applied to the court to grant a DNA test to confirm paternity. The High Court rejected the applicant's request as it considered that questioning the presumption of the child's legitimacy was not in the best interests of the child.

The applicant claimed that the domestic courts violated Article 8 of the ECHR, as he had been restricted in his ability to establish the truth about an aspect of his personal identity and, at the same time, had violated the child's interests to avoid incestuous relations and

[110] ibid 49.
[111] ibid.
[112] *M.B. v. The United Kingdom* App. no. 22920/93 (ECHR 6 April 1994).

to have information about her health. The Commission stated that there is a legitimate interest in legal certainty and security of family relationships, which allows states to adopt the presumption that a married man is considered the father of his wife's child, and to disturb this presumption, it is necessary to have an appropriate interest. Therefore, domestic courts may see a greater interest in the security of the family where the child lives than in the applicant's interest in establishing the biological fact of parentage.[113]

In this case, the Commission did not see a good cause to question the presumption of legitimacy and declared the case inadmissible. It should be noted that the court discussed the child's right to know, but the applicant argued based on his own interests. Therefore, it was straightforwardly decided what was in the best interest of the child under this particular circumstances. In case the holder of the right to know one's origins demanded a DNA test for the purpose of determining her biological origins, significantly different reasoning would be applied.

In this regard, an essential development in the Court's case-law was the case of *Kroon and Others v. The Netherlands*,[114] where the Court established a criterion to challenge paternity. In this case, the child's biological father wanted to establish paternity, but considering the child's mother was married to another person, the law did not allow the child's biological father to be acknowledged. The Court stated that ''respect' for 'family life' requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone'.[115] Thus, the Court emphasised that in this case, both biologically and socially, the father of the child was the applicant, as there was a family bond between him and the child. In addition, the person recognised as the child's parent had not had a relationship with the child and his mother for a long time. Thus, nobody was interested in maintaining the legal presumption of paternity. In the Netherlands, the legislation in force at that time excluded the possibility of challenging the presumption in such a case, which was known to be incompatible with Article 8 of the ECHR.

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[113] ibid, 2.
[114] *Kroon and Others v. The Netherlands* App. no. 18535/91 (ECHR 27 October 1994).
[115] ibid, 40.

The Court discussed the right to identity from the child's perspective in *Mikulić v. Croatia*,[116] where the Court emphasised the particular importance of establishing paternity in terms of the personal development of a human being. The plaintiff was born out of wedlock. Two months after his birth, the mother filed a civil suit against the alleged father to establish paternity. The putative father refused to take a DNA test for four years and, based on *exceptio plurium concubentium*, claimed that the mother had sexual relations with another man at the time of the applicant's conception.

The Court first found a violation of Article 6 (1) of the ECHR because the state failed to ensure that the necessary measures were taken to conduct the procedures in a timely manner. Regarding the right to identity directly derived from Article 8, the Court explained that 'persons in the applicant's situation have a vital interest, protected by the ECHR, in receiving the information necessary to uncover the truth about an important aspect of their personal identity'.[117] Although the existence of this vital interest was already recognised by the Court in the Gaskin case, in this case, the Court recognised the possession of information about one's origins as an important part of personal identity. Finally, the Court also found a violation of Article 8, as the legislation failed to provide for the establishment of paternity through an alternative means of DNA testing.

Thus, at this stage, the ECtHR's discussion of the right to identity was limited to the context of paternity cases. The Court's case-law developed by that time is pivotal to the extent that the right to access information regarding one's childhood, including the identity of one's parents, was recognised for the first time as a significant interest in one's personal development. Additionally, in the *Mikulic* case, the Court emphasised the need for a paternity determination mechanism. According to the Court, regardless of what measures states take to compel the putative father to take a DNA test or whether they take such measures at all, the ECHR requires that there be some way to establish paternity. The Court's case-law at this stage of development was focused on cases where the issue of paternity was involved. At the next stage, where the mother's interest in renouncing

[116] *Mikulić v. Croatia* App. no. 53176/99 (ECHR 7 February 2002).
[117] ibid 64.

her parental status is involved, the Court's case-law becomes much more complex, as many other sensitive interests are introduced that did not naturally exist in previous cases.

3.3 Informational Identity Claim in Maternity Cases

The ECtHR's landmark and, at the same time, heavily criticised case[118] regarding the right to identity is *Odièvre v. France*.[119] Unlike the cases discussed above, the issue in this case concerned the establishment of the mother's identity for informational purposes. The applicant was born by means of an anonymous birth (*accouchement sous X*) and was subsequently adopted. The legal basis of *accouchement sous X* can be found in a decree issued by the French government which dates back to 1941. Based on it, pregnant women were given the right to give birth secretly, and moreover, any person refusing to admit such women to a hospital was subject to imprisonment.[120]

The applicant in the *Odièvre* argued that access to information about her origins fell within the scope of Article 8 of the ECHR. The French government claimed that anonymous birth prevented infanticide, abortion and child abandonment. Accordingly, the legislation protected the life and health of the mother and child. The Government presented the evidence based on which three main categories of women who choose to give birth anonymously were identified: a. young women who were not yet independent; b. young women still living with their parents in Muslim families originating from North African or sub-Saharan African societies in which pregnancy outside marriage was a great dishonour; c. isolated women with financial difficulties.[121] Furthermore, on the women's motivations for choosing to give birth anonymously, the government explained that behind the above-mentioned reasons, there are sometimes more disturbing circumstances, such as rape or incest, but women refuse to reveal this information.[122]

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[118] Besson (n 57) 151.
[119] *Odièvre v. France* App. no. 42326/98 (ECHR [GC] 13 February 2003).
[120] Nadine Lefaucheur, 'The French 'Tradition' of Anonymous Birth: The Lines of Argument' (2004) 18 IJLPF 319, 322.
[121] Odièvre v. France (n 119) 36.
[122] ibid.

In *Odièvre* case, the Court, for the first time, recognised *expressis verbis* that 'people have a right to know their origins',[123] however, 'this is somewhat ironic since this effectively did not amount to more than a principled recognition of the right, as the Court concluded that France had not violated the applicant's right under Article 8 private life'.[124] At birth, the mother's data was stored, and the child could later request access to her own mother's identifying information. However, the system allowed access to this information only if the mother gave her consent, that in itself was a decisive detail in evaluating the system's effectiveness. The Court also mentioned that the state enjoyed a wide margin of appreciation due to the sensitive and complex nature of the issue. Therefore, France did not overstep the scope of its discretionary powers when balancing interests.

Dissenting Judges indicated the incompatibility of the absolute protection of the mother's will with the ECHR and underlined that the mother:

> … has a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance. This, therefore, is not a multilateral system that ensures any balance between the competing rights. The effect of the mother's absolute 'right of veto' is that the rights of the child, which are recognized in the general scheme of the Convention ... are entirely neglected and forgotten.[125]

Besson also points to the problem of absolute protection of the mother's will and notes that the problem with French law is that giving absolute priority to the right of the parent precludes any balancing mechanism to protect the rights of the child. As a consequence, by declaring such a system in accordance with the ECHR, the Court legitimised the absolute prioritisation of parental rights, thereby violating the child's right's inner core.[126]

Concerning the above remarks, it should be noted that the Court did not consider the absolute protection of the mother's will to be a violation of the ECHR, considering that the removal of the absolute protection may damage the whole idea of the anonymous birth system. This degree of protection can be decisive in the mother's decision whether to give

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[123] ibid, 44.
[124] Blauwhoff (n 80) 109.
[125] Joint Dissenting Opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää on the Case of *Odièvre v. France* (n 119), 7.
[126] Besson (n 57) 151.

birth to the child anonymously or, for example, to have an abortion. When answering the above argument, Judge Greve views the issue from an interesting perspective: 'Persons who seek disclosure at any price, even against the express will of their natural mother, must ask themselves whether they would have been born had it not been for the right to give birth anonymously'.[127]

It would be wrong to say that the absolute protection of the mother's will does not raise important problematic issues regarding the child's right to private life. Needless to say, there might likely be a system that would balance the conflicting interests in a more optimal way. Nonetheless, it is difficult to say unequivocally that this system does not fall within the margin of appreciation. Thus, studying the further development of the Court's case-law will give us the opportunity to make more accurate conclusions.

3.4 Reality after the *Odièvre* Case – Response to the Criticism?

To observe the development of the Court's case-law after the *Odièvre* case, it is necessary to consider the *Jäggi* case. Like in the *Odièvre* case, the applicant was an adult who wanted to take a DNA test on the putative father to determine whether he was his biological father. This request was rejected by the domestic courts, and the applicant appealed to the ECtHR, alleging that the right to identity under Article 8 of the ECHR had been violated.

While weighing the interests, the Court emphasised that 'the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life'.[128] It is also noteworthy that, unlike the case of *Odièvre*, the Court noted that the applicant was an adult (67 years old) and 'has been able to develop his personality even in the absence of certainty as to the identity of his biological father, [but] it must be admitted that an individual's interest in discovering his parentage does not disappear with age, quite the reverse'.[129] Finally, the Court found a violation of Article 8, as the applicant

[127] Concurring Opinion of the Judge Greve on the Case of *Odièvre v. France* (n 97).
[128] *Jäggi v. Switzerland* App. no. 58757/00 (ECHR 13 July 2006), 37.
[129] ibid 40.

was not given the opportunity to exhume the deceased person and take a DNA sample to determine paternity.

It is argued that in this case, the Court drastically changed its approach to the right to identity because of the criticism regarding the *Odièvre* case.[130] This claim is based on the fact that part of the reasoning of the dissenting judges in the *Odièvre* case became the Court's majority opinion in the *Jäggi* case. In particular, in *Jäggi* case, the Court shared the position[131] expressed in the dissenting opinion that:

> … certain aspects of the right to private life are peripheral to that right, whereas others form part of its inner core ... the right to an identity, which is an essential condition of the right to autonomy ... and development ... is within the inner core of the right to respect for one's private life.[132]

The ECtHR in *Jäggi* gave more weight to the right to identity than in *Odièvre*, but this does not mean that the Court has reversed its final conclusion in *Odièvre*. The Court has generally indicated the need for greater protection of the right to identity, but there are fundamental differences between the two cited cases.

It is worth noting that, unlike the *Odièvre* case, in the *Jäggi* case the applicant's right to identity clashed with the deceased person's right to privacy. In order to take a DNA sample, it was necessary to exhume the corpse, which meant a high-intensity interference with the right. Nevertheless, comparing the rights of deceased and living persons with each other might lead to inaccurate conclusions. The Court itself indicated the less problematic nature of the deceased person's private life stating 'the private life of a deceased person from whom a DNA sample was to be taken could not be adversely affected by a request to that effect made after his death'.[133] Accordingly, in the two cases discussed above, there were essentially different interests against the right to identity.

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[130] Besson (n 57) 151; Blauwhoff (n 80) 110.
[131] *Jäggi v. Switzerland* (n 128) 37.
[132] Joint Dissenting Opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää on the Case of *Odièvre v. France* (n 119), 11.
[133] *Jäggi v. Switzerland* (n 128) 42.

Another momentous case where the right to identity was violated is *Phinikaridou v. Cyprus*.[134] In this case too, the applicant tried to establish paternity. The applicant was born out of wedlock, his mother abandoned him, and Mrs Maria Phinikaridou took up his upbringing. The applicant knew the identity of his biological mother and had some level of contact with her. Before her death, the biological mother disclosed the identity of her biological father to the applicant, after which the applicant applied to the court for recognition of paternity. His request was rejected on the grounds that the statutory time limit for submitting a request for establishing paternity had expired.

The ECtHR declared that the existence of a time limit *per se* is not incompatible with Article 8 of the ECHR. However, the Court took into account the fact that when the applicant heard about the putative father, the time limit had already expired. In addition, there was no other alternative mechanism or the possibility of granting an exception to the general rule that would have given the applicant the opportunity to establish paternity. Because of this inflexibility of the system, the Court found a violation of Article 8 and stated that the problematic nature of the system is manifested in the fact that the time-limit had an absolute nature and did not allow any exceptions even in case it is evident that the applicant did not have any realistic opportunity to apply to the court at any earlier stage. At the same time, the Court underlined that this mechanism was the only way to recognise paternity.[135] Accordingly, the Court noted that eliminating any opportunity for the applicant to seek judicial determination of paternity makes the right protected by the ECHR illusory.[136] Thus, the Court considered the protection of the father's personal life and legal certainty of family life by imposing an absolute ban on the right to identity to be a violation of Article 8.

Although, unlike the *Jäggi* case, the right to identity in the *Phinikaridou* case was opposed by the interest of protecting the privacy of a living person, this case is still fundamentally different from the *Odièvre* case. First, the Court in the *Phinikaridou* case found the violation of the right to identity due to the elimination of all opportunities for the applicant

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[134] *Phinikaridou v. Cyprus* App. no. 23890/02 (ECHR 20 December 2007).
[135] ibid, 62.
[136] ibid, 64.

to establish paternity, rather than prioritising the right to privacy of the parent over the right to identity in general.

Another important detail that should be considered when comparing the *Odièvre* case to the *Jäggi* and *Phinikaridou* cases is that the latter ones concerned the recognition of paternity. In contrast, the applicant's request in the *Odièvre* case was related to the identification of the biological mother. This difference means that the restriction imposed on the right to identity in the mentioned cases served different legitimate purposes. In theory, both biological parents' right to privacy can be equally affected by the right to identity of an adopted person. However, there are salient differences between them. Protection of the mother's right to private life simultaneously also protects the interests of prevention of abortion, prevention of child abandonment, and the life and health of the mother and child. When protecting the father's private life, these interests either do not exist at all or might exist in exceptional cases and with less degree of interference.

It should be noted that the decision to avoid parental responsibility is mainly made by single women who have been abandoned by their partners, have gone through traumatic experiences and are not ready to raise a child alone.[137] There are several common reasons for child abandonment:

> They are afraid of a negative reaction from their families, they have financial problems, or the child's father is absent. These mothers are often young, did not intend to become pregnant, and they do not accept their pregnancy. Many of these women have significant personal problems, other children, or live in a violent environment. In some cases the pregnancy is even due to an incestuous or other kind of unpleasant or traumatic sexual encounter.[138]

Protection of the right to private life of such mothers has the effect of preventing abortion and abandonment of newborns. In relation to the child's father, this preventive effect is not tangible and direct because they do not go through the physical and emotional experiences that mothers do. Men can avoid parental responsibility by disappearing

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[137] Annette R. Appell, 'Safe Havens to Abandon Babies, Part II: The Fit' (2002) 6(1) Adoption Quarterly 61, 62.
[138] Hadžimanović (n 73) 2.

without experiencing severe physical or mental consequences or the same degree of societal pressure as women. Women are not physically able to find such an easy solution. Thereby, 'Some commentators, drawing upon feminist literature, regard the right of the mother to anonymous birth as an extension of the woman's right to abortion'.[139]

In addition, there is not the same social pressure on fathers to have children out of wedlock as on mothers. Therefore, in general, the mother's private life is affected more intensively than the father's interests due to the realisation of the right to identity.

Consequently, in order to consistently assess the development of ECtHR case-law, the following relevant case that needs to be discussed is *Godelli v. Italy*,[140] which concerns the request to establish the identity of the biological mother. Consequently, it has a fundamental similarity with the *Odièvre* case, and the different circumstances that existed in the *Jäggi* and *Phinikaridou* cases and did not allow for clear conclusions are not present in the *Godelli* case, which makes the comparison between the latter and the *Odièvre* case more intriguing.

The applicant was born in 1943 and was abandoned by his mother after giving birth. Her birth record included the following information: 'Today, 28 March 1943, at 7.30 a.m., a woman, who did not consent to being named, gave birth to a baby girl'.[141] First, she was placed in an orphanage and then adopted. At the age of 10, the applicant was informed that she was adopted, but she did not get information from the adoptive parents about the identity of her biological parents. Then the applicant discovered another adopted girl living in the same village, born on the same day as herself. The applicant suspected that this girl was her twin sister, but the girls' adoptive parents forbade them to have contact with each other. The applicant indicated that she had a difficult childhood because of this experience.

In 2006, the applicant applied to the Trieste Register Office to request information about her origins, which was refused on the basis that her biological mother, when she gave

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[139] Stefano Troiano (n 91) 190-191.
[140] *Godelli v. Italy* App. no. 33783/09 (ECHR 25 September 2012).
[141] ibid, 6.

birth, did not give permission to reveal her identity. The applicant applied to the domestic courts for the same request, but her efforts were unsuccessful as her mother's wish to remain anonymous was strictly respected by the courts.

The ECtHR found a violation of Article 8 in the *Godelli* case, but it would be wrong to claim that the Court changed its opinion developed in the *Odièvre* case. Instead, it focused on the differences between the systems in force in Italy and France at the time. The point is that the system operating in Italy did not allow information about the mother's identity to be released even if the mother changed her mind and expressed her desire to have contact with her child. In addition, the system in force in Italy did not provide non-identifying information for the child as well. As a result, in discussing the differences between the two systems, the Court noted:

> Unlike the French system examined in Odièvre, Italian law does not attempt to strike any balance between the competing rights and interests at stake. In the absence of any machinery enabling the applicant's right to find out her origins to be balanced against the mother's interests in remaining anonymous, blind preference is inevitably given to the latter ... where the birth mother has decided to remain anonymous, Italian law does not allow a child who was not formally recognized at birth and was subsequently adopted to request either access to non-identifying information concerning his or her origins or the disclosure of the mother's identity. Accordingly, the Court considers that the Italian authorities failed to strike a balance and achieve proportionality between the interests at stake and thus overstepped the margin of appreciation which it must be afforded.[142]

Consequently, in light of the Court's reasoning, the *Godelli* case should not be interpreted in such a way that the Court found the practice of anonymous birth inconsistent with the ECHR. As Troiano rightly notes, in the *Godelli* case, the Court did not question the reasonableness of the Italian system for granting the possibility of anonymous birth given its key role in protecting the health of the parent and the child. It only condemned the Italian law because it 'lacked some corrective measures that followed from the justification'.[143]

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[142] ibid, 57-58.
[143] Stefano Troiano (n 91) 195.

To sum up, the finding of a violation of Article 8 of the ECHR in the *Godelli* case was predictable as the Italian system failed to ensure the basic requirements of the right to identity. In particular, it was impossible to request information even if the mother expressed her desire to do so. This restriction does not serve any legitimate interest and cannot be considered a reasonable measure. Also, restricting access to non-identifying information posed a significant threat to the life and health of the adopted person because information about possible hereditary diseases was unavailable, which is the most critical aspect of the right to identity, and its realisation does not have any negative impact on the personal life of the biological parent.

Another ECtHR case that is worth mentioning is *Çapın v. Turkey*,[144] where the dispute again concerned the recognition of paternity. It is interesting, in the sense, that the Court emphasised the prioritisation of the best interests of the child when it comes to the recognition of paternity.

The applicant was born out of wedlock and placed in an orphanage where he spent 18 years and then went to the United States to work. He later discovered that the man he thought was his father was not actually his biological parent. Due to the circumstances, the applicant suspected that his biological father was İsmail S. As a result, he applied to the court to establish paternity. His request was rejected mainly on the grounds that he did not timely apply to the court to establish paternity.

The ECtHR once again pointed to the legitimate grounds for limiting paternity appeals to the court. However, the Court was not satisfied with how the domestic courts had balanced the conflicting interests. As a result, it found a violation of Article 8. One particular line of argumentation of the Court draws special attention in this case. The Court noted that 'In proceedings for establishment of paternity, where a careful balancing exercise is required, the best interest of the child should be given priority'.[145]

[144] *Çapın v. Turkey* App. no. 44690/09 (ECHR 15 October 2019).
[145] ibid, 77.

In this reasoning, the Court's explicit reference to prioritising the best interests of the child when resolving the conflict of interest deserves attention. This statement can be understood in such a way that in the case of a conflict between the right to identity and the right to privacy, the Court gives preference to the former in advance. However, it should be noted that the Court made this clarification in a case related to the recognition of paternity. It would be wrong to extend this reasoning to maternity cases, as it is clear that the Courts perceive the two issues differently. This was evident from the review of the Court's case-law, which clearly indicates that, *ceteris paribus*, the child's right to identity is given priority over the father's right to private life.

Thus, a review of the ECtHR's case-law shows that the vast majority of cases considered by the Court regarding the right to identity concern the recognition of paternity. In two cases (*Odièvre; Godelli*), the Court had the opportunity to consider the conflict between the right to identity and the right to privacy of the mother. In the first case, the Court did not consider the practice of anonymous birth in France inconsistent with the ECHR. In the second case, it only highlighted the shortcomings of anonymous birth in Italy and therefore found a violation of the right to identity.

Thus, *prima facie,* the Court prioritises the right to privacy over the right to identity only in exceptional cases. Nevertheless, from a careful analysis of the case-law, it becomes clear that this is not the case. Although Mulligan correctly notes in a statistical sense that the *Odièvre* case is exceptional in the Court's case-law as 'in the majority of these identity cases, the applicant successfully persuaded the ECtHR that there had been a breach of Article 8',[146] there is a reason behind this. In particular, as already mentioned, most of the cases considered by the Court concerned the establishment of paternity. These cases cannot be compared to *Odièvre* because, as already noted, the protection of the mother's privacy serves other important legitimate purposes that are not relevant to paternity cases.

The only case comparable to the *Odièvre* case is the *Godelli* case, where the Court found a violation of the right to identity only because the system was flawed. Therefore, the fact

[146] Andrea Mulligan, 'Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements' (2018) 26 Med L Rev 449, 462.

that the *Odièvre* case is an exception to the ECtHR's case-law does not in itself indicate anything of fundamental importance. None of the Court's decisions since *Odièvre* indicate that the Court has changed its opinion on the scope of the mother's right to privacy.

This detail is relevant to this paper insofar as its purpose is to discuss the compatibility of the legal framework in Ireland with the ECHR. In Ireland, however, access to the right to identity is often contrasted with the mother's right to privacy in relation to adoption due to the country's specific socio-historical context. As already mentioned, the goal of the BITA implementation is to fix 'historic wrongs'.[147] This historical experience is related to Mother and Baby Homes, which was discussed in the first chapter of the paper. It described the practice of forced placement of women in institutions and forced adoption of children born by women who became pregnant out of wedlock. Accordingly, the goal of the legislative changes is primarily to restore contact between mother and child. Therefore, when discussing the compatibility of the Irish legislation with the ECHR, special attention should be paid to the ECtHR's case-law regarding the determination of maternity.

3.5 Concluding Remarks

This chapter of the paper discusses the relevant case-law of the ECtHR regarding the right to identity and competing interests. The development of ECtHR case-law has been divided into three stages. In the initial stage of the emergence of the right to identity, the Court was limited to hearing cases that involved recognition of paternity. The Court generally refused to question the 'legitimacy' of the child on the grounds of protecting the security of a family. However, in the presence of proper grounds, the Court considered it justified to challenge paternity.

The second phase was devoted to the discussion of the *Odièvre* case, which was revolutionary in many ways. It was the first case where the court discussed the recognition of motherhood. Accordingly, this case involved much more complex and sensitive issues

[147] Conneely (n 19).

than its predecessors. In addition, the Court in this case assessed the compatibility of anonymous birth with the ECHR. The Court, for the first time, explicitly recognised the right to know one's origins but did not consider the practice of anonymous birth in France, which completely excluded the release of the mother's identifying information without her permission, to be a violation of the right to identity. The Court considered it reasonable to restrict the right to identity in a strict form on the grounds of protecting the life and health of the mother and newborn, which resulted in widespread criticism of the Court.

After the *Odièvre* case, the cases heard by the court became more diverse. Nevertheless, the Court has only had to consider the compatibility of anonymous births with the Convention only once in the *Godelli* case. In this case, the Italian model of anonymous birth was declared inconsistent with Article 8 of the Convention, but there were fundamental differences between the two systems. Thus, an analysis of the decision showed that the Court did not change the legal position expressed in the *Odièvre* case. Therefore, claims that, in response to the criticism expressed to the Court due to *Odièvre*, the Court fundamentally changed the approach, cannot be considered accurate.

Chapter 4

Compatibility of the BITA with the ECHR

4.1 Introduction

After getting to know the socio-legal context in Ireland, analysing the content of the right to identity and discussing the ECtHR's case-law regarding this right, the last chapter of this paper will be devoted to finding out whether the BITA is in compliance with the requirements of the ECHR. In particular, it will be demonstrated that this level of prioritisation of the right to identity over the right to private life of parents does not fall within the margin of appreciation granted to the member states of the CoE. In addition, possibilities for modifying the legal framework to set a fair balance between the conflicting interests and to bring the legislation into line with the requirements of the ECHR will be presented.

4.2 Margin of Appreciation

In order to discuss compliance of the BITA with the ECHR, the estimated scope of the margin of appreciation must first be determined. The concept of margin of appreciation is the room to manoeuvre given to member states within which they are obliged to fulfil the obligations under the ECHR:

> The margin of appreciation, typically described as a 'doctrine' rather than a principle, refers to the room for manoeuvre the judicial institutions at Strasbourg are prepared to accord national authorities in fulfilling their Convention obligations.[148]

The ECtHR established the concept of margin of appreciation in its case-law for the first time in *Handyside v. UK*, where the Court emphasised the diverse moral values of various societies that exist within Europe, especially in the era 'era which is characterised by a

[148] Greer S, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation' (2010) 3 UCL Hum Rts Rev 1, 2.

rapid and far-reaching evolution of opinions on the subject'[149] and the need to take them into account while discussing various human rights issues.[150]

Thus, when determining the margin of appreciation, the Court attaches great importance to the existence of a uniform European conception of morals. In addition, according to the Court, 'where the case raises sensitive moral or ethical issues, the margin will be wider ... There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights'.[151] Accordingly, the Court, taking into account all the above-mentioned factors, makes a decision to grant the state a narrow or wide margin of appreciation. However, it should be noted here that this issue is decided by the Court on a case-by-case basis, taking into account the individual circumstances of the case, as it is a 'context dependent' approach.[152]

Thus, first of all, it should be determined to what extent there is a consensus among the member states of the CoE regarding the conflict of interests in question. In the *Godelli* case, the Court itself reviewed the legal frameworks of CoE member states regarding the right to identity, and it became clear that member states have fundamentally different regulations in this regard and that states are still far from reaching a consensus on this issue.[153]

In addition to the above, the discussed issue is sensitive in its nature. The practice of anonymous birth and evasion of parental responsibility raises moral and ethical concerns. In addition, rights protected by the ECHR stand on both sides of conflicting interests. Along with all this, it should be noted that the first chapter of the paper described the complex and specific historical experience that led Ireland to adopt this legislative reform. All these circumstances clearly indicate that, in the event of the ECtHR's consideration of the BITA's compatibility with the ECHR, Ireland would most likely benefit from a

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[149] *Handyside v. The United Kingdom* App. no. 5493/72 (ECHR 7 December 1976), 48.
[150] ibid.
[151] *Evans v. the United Kingdom* App. no. 6339/05 (ECHR [GC] 10 April 2007), 77.
[152] Hassnain Naqvi, 'The Application of margin of appreciation doctrine in freedom of expression and public morality cases limits free speech/expression in the UK' (2010) 1 GISLJ 54, 55.
[153] *Godelli v. Italy* (n 140) 28-32.

wide margin of appreciation. Therefore, conclusions on this issue should be drawn by taking this factor into consideration.

4.3 Balancing the Competing Interests

Even assuming that the ECtHR would use a wide margin of appreciation in the case of adjudication on this issue, the necessity of the mechanism for balancing the interests cannot be questioned. In the *Phinikaridou* case, the Court stated that 'apart from weighing the interests of the individual *vis-à-vis* the general interest of the community as a whole, a balancing exercise is also required with regard to competing private interests'.[154] Thus, the Court does not favour giving absolute priority to any of the conflicting rights. Consequently, first, it must be determined whether the BITA gives absolute priority to the holder of the right to identity.

Before proceeding directly to an assessment of the rules contained in the BITA, it is necessary to discuss the ways Irish law offers to a parent who wishes to be free from parental responsibility. According to Ireland's Adoption Act 2010, after the adoption procedure is completed, the child is considered to be a child of the adopters, born in their wedlock. Moreover, biological parents lose all parental rights and are free from parental obligations.[155] Therefore, an alternative mechanism for anonymous birth can be considered the adoption institute in Ireland, which gives the parent opportunity to avoid parental responsibilities and have a temporary guarantee of anonymity. On the one hand, adoption helps to protect the health of the child and the birth parent, as, in some cases, having the guarantee that the parent will be free from parental responsibility, even temporarily, can play a critical role in saving the life and health of the parent and newborn. On the other hand, the adoption institute cannot completely replace anonymous birth because adoption is usually a longer and more complicated process, which can be a decisive factor if we consider the parent's critical mental state when making this decision.

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[154] *Phinikaridou v. Cyprus* (n 134) 53.
[155] Adoption Act 2010 s 58.

However, it should be clarified that this paper does not seek to argue that the legalisation of anonymous birth is necessary to bring the Irish legal framework into line with the requirements of the ECHR. Rather, it focuses on the rights of parents who placed their children for adoption under the Adoption Act and do not wish to have contact with them. Accordingly, in the following part of the paper it will be analysed to what extent the Irish legislative framework ensures the protection of the private life of parents who have renounced parental responsibility through adoption.

While analysing the BITA in the first chapter of the paper, it was found that an adopted person, as she reaches the age of 16, can get complete information about the identity of her parents, including their address. In response, the only mechanism to protect the parent's right to privacy is the 'information session', which is mandatory for an adopted person to attend, and there she is informed whether her parent consented to be contacted or not. The adopted person is also informed that in the absence of consent from the biological parent, she exercises her right to privacy. After the end of this session, the adopted person is allowed to obtain information about her biological parents' identity by ignoring their will. Consequently, the parent knows in advance that no matter what measures she takes or how crucial his/her interest is in remaining anonymous, he/she will be dependent entirely on his/her child's goodwill as long as he/she becomes 16 years old.

Thus, whether the information session mechanism precludes the absolute prioritisation of the right to identity is questionable. The balancing mechanism should be evaluated based on its content rather than in a formal sense. The existence of a balancing mechanism implies that it should provide an opportunity to make an exceptional decision from the general rule as a result of the examination of the individual circumstances of the case. The current legal framework in Ireland does not provide such an opportunity. All possible conflicts between the right to identity and the right to privacy are resolved in favour of the former, and there is no effective mechanism to have any influence on this reality. The legislation provides only a formal rule that does not require any effort from the holder of the right to identity to overcome it. Therefore, the information session mechanism cannot be considered a balancing mechanism between conflicting interests. Consequently, there is a prioritisation of the absolute nature of the right to identity over the right to privacy.

However, Jamie Aspell, comparing the systems operating in France and Ireland, draws attention to the similarities between them:

> While France and Ireland have chosen to prioritize different classes of rights (privacy rights under the practice of anonymous birthing and identity rights under the Birth Information and Tracing Act) both approaches have created opportunities for rights-holders to exercise discretion in a deliberative fashion. Mothers can choose to waive their anonymity under the French system, while adopted persons can choose not to exercise their entitlement to birth information under the Irish system. The competing right is given consideration, even if it is not necessarily realized. This similarity suggests that the Irish legislation may in fact satisfy the balancing of rights required by the ECtHR.[156]

In response to this, it should be noted that the system operating in France provides specific mechanisms that neutralise the negative consequences associated with anonymous birth. In particular, in the case of *Odièvre*, the Court noted that the system granted the possibility of providing non-identifying information to the child,[157] which completely eliminates the risks related to the child's health. As a result, the holder of the right to identity cannot realise only that part of the right, which is related to personal self-determination. Consequently, the system, on the one hand, serves the life and health of the child and parent. On the other hand, it also provides access to genetic information for the child in the future, which contributes to the prevention of possible hereditary diseases.

As for the system in force in Ireland, it does not contain an effective balancing mechanism for resolving conflicts between the rights. No matter how great the interest is in protecting a parent's privacy, the system does not allow for an exception to protect the parent's anonymity. As demonstrated in Chapter 2 of the paper, the protection of parental anonymity helps prevent abortion and child abandonment, an interest that is ignored by Irish law. Accordingly, the system excludes the possibility that, in any case, the interest in protecting the life and health of the parent and the child may outweigh the interest in

[156] Jamie Aspell, 'Ireland's Birth Information and Tracing Act: Reconciling the Right to Identity' (*EJIL* 23 September 2023) <https://www.ejiltalk.org/irelands-birth-information-and-tracing-act-reconciling-the-right-to-identity/> accessed 30 July 2023.
[157] *Odièvre v. France* (n 97) 48.

the adopted person's self-determination, which is a paradoxical approach as it questions the life of the person whose right to self-determination is so thoroughly protected.

The system operating in Ireland is more comparable in its inflexibility to the system operating in Italy assessed in the *Godelli* case. Although the conflict between rights was resolved by the opposing approaches, the Italian system at that time gave absolute priority to the right to private life and completely ignored the interests of the opposite side. This 'blind preference'[158] was the reason why the ECtHR found a violation of Article 8 of the ECHR in the *Godelli* case. The current system in Ireland carries the same content but imposes a different hierarchy of rights.

Thus, the analysis of ECtHR's case-law clearly shows that the Court gives a wide margin of appreciation to states in resolving this dilemma and does not indicate the need to prioritise any of those rights over another. However, according to the Court, the ECHR requires that a system is flexible to some degree and contains an effective balancing mechanism.[159] The Court takes account of the fact that vital and sensitive interests are present on both sides, the resolution of which requires consideration of individual circumstances. This objective cannot be achieved by the BITA.

Even if the conflicting interest with the right to identity was only to ensure the protection of the parent's privacy, some balancing mechanism would still be necessary, as the parent may have an exceptional interest in protecting anonymity. For example, when a child has been conceived as a result of rape or other violent sexual intercourse, for the parent to have contact with his/her own child may be associated with intense emotional suffering. A person who has gone through such a traumatic experience, showed compassion and gave birth to a child anonymously, should not be forced to have contact with their biological child that might remind them of that distressing experience and relive the suffering associated with it. The stereotypical attitude that the parent's desire to remain anonymous in such a case is selfish and irresponsible behaviour could not be tolerated.

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[158] *Godelli v. Italy* (n 140) 57.
[159] *Phinikaridou v. Cyprus* (n 134) 53.

It has been repeatedly noted that the implementation of the BITA aims to address Ireland's troublesome experience with adoption. However, it is doubtful how adequately this goal has been achieved, as giving an absolute character to the right to identity ignores the rights of the many women who have passed through Mother and Baby Homes. It is clear that this historical experience forcibly separated many mothers from their children, and the goal of these legislative changes is to restore these relationships. However, in achieving this goal, it should not neglect the interests of women who do not wish to reveal their identity to their children. The primary victims of Mother and Baby Homes were women, and it is paradoxical to correct the historic wrongs committed against women by ignoring women's rights.

Therefore, it is evident that the implementation of the BITA in this form precludes the possibility of striking a fair balance between the right to privacy and the right to identity. Although Ireland more likely enjoys a wide margin of appreciation from the perspective of the ECtHR when regulating the issue, the implementation of an absolute right, which excludes, in any case, deviation from the general rule in the event of a conflict of two conventional rights, cannot meet the requirements of Article 8 of the ECHR.

4.4 Recommendations

The purpose of this paper is not, and cannot be, to propose a system that ensures the realisation of the right to identity to the same degree as the current legal framework in Ireland. Nor would it be intended to propose a system which, in the author's opinion, would strike the fairest balance between the right to identity and the right to privacy. Instead, given the high likelihood of the BITA being incompatible with the ECHR, a system would be proposed that would protect the parent's right to privacy to the minimum necessary level, sufficient to bring it into line with the requirements of the ECHR.

Scepticism towards anonymous birth and adoption stems from the idea that the child's interests are sacrificed to the birth parent's irresponsible and immature decision. In order to exclude this risk, it is possible to impose an obligation for a birth parent to go through a procedure, where before deciding to give birth to the child anonymously or placing him or her for adoption, psychological support will be provided to assess her mental condition, the reasons for her making this decision will be investigated, and alternative measures

will be offered that do not ignore the child's right to self-determination. Furthermore, if the medical staff is convinced that the anonymous birth or adoption is the last measure to protect the life and health of the child and the birth parent, only in this case should the parent be allowed to make this decision. This procedure ensures that the child's right to self-determination is limited only when it is necessary to protect her life and health. The existence of such a system ensures the interests of both parties.

Suppose the system allows a parent to be guaranteed anonymity after the child's birth or placing him or her for adoption. In that case, the next question arises regarding the degree of protection the parent's anonymity should enjoy. First, of course, the system must ensure that information containing the birth parent's identity is kept confidential so that it can be disclosed in the future. What is particularly important, the legislation should provide for the opportunity at any time to weigh the interests of both parties and resolve the conflict accordingly. From the current legal framework in Ireland, a parent can, at most, get a guarantee of his/her anonymity for 16 years after the birth of a child (through adoption). The legislation is based on the presumption that after 16 years from birth, the parent's interest in protecting her private life cannot, in any case, outweigh the child's interest in self-determination. Such a presumption has no legitimate basis. The birth parent may not be given absolute protection of anonymity in advance. Yet, she should be assured that her right to privacy will be restricted only based on a decision made through a balancing of interests.

In order to determine the appropriate recommendations for modification of the BITA rules, it is also necessary to look at the legitimate aims right to identity serves by giving it an absolute priority and to what degree those interests can be protected in the proposed system. One of the main interests that the realisation of the right to identity provides is the prevention of hereditary diseases, but this aim can be easily achieved by providing relevant non-identifying information to the adopted person.[160]

A more complicated topic is the prevention of incestuous relationships, which cannot be ensured so easily. It is difficult to completely rule out this risk without disclosing the

[160] Troiano (n 91) 200.

biological parents' identity. However, when discussing this issue, two types of relationships should be distinguished - a. sexual act with the purpose of getting pregnant; b. sexual act with the purpose of satisfying a natural urge. Although the prevention of incestuous relationships is a fundamental interest in itself, regardless of whether it brings negative results from the medical point of view or psychologically, the first category of incestuous sexual relationships can have much more severe consequences in the form of genetic disorders.[161] However, such a relationship can also be prevented by providing relevant non-identifying information such as DNA samples. As for sexual relations of the second category, which can only bring psychological consequences, preventing it every time by means of non-identifying information is a practically impossible task. However, given its low probability and lesser degree of harm, it cannot outweigh the interests on the side of privacy.

The realisation of the right to identity also ensures personal development and self-determination. Of course, this interest cannot be sufficiently protected if the adopted person is not given access to the identity of her parents. Without having information about one's origins, the aspect of self-determination of the right to identity cannot be realised. Thus, there will be no mechanism that will give the adopted person a guaranteed right to self-determination. However, the proposed system will grant the opportunity to request access to this information and to demonstrate to the relevant authority her significant interest in receiving this information. Finally, the mechanism of establishing a fair balance based on the individual circumstances of the case will ensure that this interest is limited only in case it is necessary to protect the overriding rights of others.

4.5 Concluding Remarks

There are several factors that most likely will lead to the ECtHR giving a wide margin of appreciation to Ireland in case the Court considers this issue. There is no uniform European approach to this issue. Its resolution raises moral and ethical concerns. On both sides of conflicting interests, there are two conventional rights. Moreover, Ireland's

[161] Davis (n 87).

specific historical experience is another additional factor indicating the need to grant a wide margin of appreciation.

Despite all this, the Irish legal framework does not contain an effective mechanism for balancing interests. It restricts the right to private life so severely that even under conditions of a wide margin of appreciation, it will be difficult for the ECtHR to find arguments that exclude the violation of the right to private life by the BITA. Thus, it is necessary to modify the BITA in such a way that the legislation complies with the requirements of the ECHR, at the same time, the protection of the interests served by the right to identity is guaranteed to the maximum extent.

Conclusion

The primary objective of this paper was to determine the compatibility of the BITA with the ECHR obligations. It was argued that it does not meet the requirements of Article 8 of the ECHR due to its strictness and inflexibility. Of course, this is the author's opinion, derived from the issues discussed in this paper and the conclusions drawn accordingly. The paper demonstrated that taking account of the case-law of the ECtHR, there is no reason to presume that the Court considers the BITA to be compatible with the ECHR. At the same time, weighing the threats and interests protected by the conflicting rights, the author believes that the BITA cannot provide the minimum standard of protection necessary to protect the right to private life.

In order to avoid discussing the dilemma *in abstracto*, a significant part of the paper was devoted to the examination of the socio-legal context of Ireland. However, appalling historical experience cannot be used as a justification for the imposition of overly strict and unnecessary restrictions. The goal of implementing the BITA is to restore the relationship between mother and child that was lost through coercion. However, addressing this historical issue does not necessarily require giving the right to identity an absolute nature. This goal would be achieved even if the legislation provided a minimum guarantee of parental privacy by allowing exceptions in extreme cases. A historical crime committed against one group of people cannot be remedied by ignoring the rights of another group of people.

As for the general interests that the BITA provides protection, three main legitimate goals have been identified: a. prevention of genetic diseases; b. prevention of incestuous relationships; c. self-determination and personal development. The paper argued that the goal of prevention of genetic diseases is feasible without identifying the parent - by means of access to non-identifying information. Complete prevention of incestuous relationships is impossible without identifying the biological parents. However, prevention of incestuous sexual intercourse for the purpose of giving birth (which carries more significant risks from a medical point of view) is also possible using non-identifying information. In contrast, it is impossible to fully realise the aspect of self-determination in the absence of information about the identity of the parents. Therefore, these two aspects remain problematic if parental anonymity is preserved.

According to the paper, the BITA's incompatibility with the ECHR is due to the fact that it does not allow the possibility that the interest of the private life of the parent may outweigh the aforementioned interests. The limitation of the above-mentioned interests does not pose such significant threats that even at the theoretical level, their restriction in favour of privacy has to be excluded. Additionally, it should be taken into consideration that the paper suggests protecting the parent's anonymity only in extreme cases, in an exceptional manner. This basic reasoning underlies the dissertation's conclusion that the BITA is incompatible with the ECHR and needs to be reformed.

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