Free Market of the DNA Tests and the Best Interest of the Child

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Legal sources

The Republic of Croatia is sovereign state from 1991, member of the UN from 1992. Croatia becomes the member of the Council of Europe in November 1996. Convention on the protection of the human rights and fundamental freedoms from 1950 became the part of internal legal system. Convention for the protection of Human rights and Dignity of Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine with Additional Protocol on the Prohibiting of Cloning Human Beings recently becomes part of the Croatian legal system (Official Gazette of the Republic of Croatia - Narodne novine Republike Hrvatske 13/2003).

According to the Croatian Constitution, international treaties which are ratified and published, are the part of the internal legal order and are over the national acts in force (The Constitution of the Republic of Croatia Official Gazette of the Republic of Croatia - Narodne novine Republike Hrvatke, 41/2001 consolidated version and 55/2001 corrections).

In the Croatian legal system, there is only one specific article in the Act of the criminal procedure related to the use of the DNA technology in the criminal cases. On that ground the Minister of health in 1999 pronounced Rules of implementation on taking biological tissues for the DNA testing (Official Gazette of the Republic of Croatia - Narodne novine Republike Hrvatske 107/1999). In all the other situations, for example in the cases of parentage testing, identifications of the war victims, medical practice or scientific researches, specific legal norms related to the protection of the human rights are missing.

DNA fingerprinting implications

Thanks to modern genetics it is possible to make DNA testing using sampling kits. Obtained results are than returned home by post. The test results may deeply determinate the status of the child but without the informed consent of the child.

Advances in genetics pose some problems that should be discussed in the wider societal context. Paternity testing is not medically motivated genetic screening. DNA fingerprinting implications in the paternity/maternity suits are the clear example of delicate balance between public and private interests concerning the use of new genetics and the protection of the human rights. The protection of the principle of respect for individual autonomy and the right of the child to know genetic roots should be seriously respected. The private use of DNA tests is a clear example of violation of the children's right to be informed and to express his/her consent. Genetic privacy should be based on the genetic counseling and on the informed consent. In the case of private use of DNA tests, it is evident that only informed consent of a single parent exists. So, the child and the other parent are treated as objects.

Through the jurisprudence of the European Court of Human Rights (art.8) of the European Convention on Human Rights, everyone has the right to the respect for his private and family life. Private life includes also protection of privacy interests in physical and moral integrity, the freedom to develop one's personality and the establishment and maintenance of personal relationships.

In theory, the future implications of the cheep genetic tests advertised and accessible on the free market are not yet taken well enough in the consideration. The aim is to establish a genetically correct paternity. The impact of genetic technologies needs to be examined in the context of the evolution of the Family law including the evaluation of the best interest of the child through psychological point. The phenomena of the new genetics raise complex social problems, particularly those relating to the privacy. Genetic privacy is protected if it is based on the free and informed consent. The law should resolve the confrontation of the genetic confidentiality and parenthood as genetic, biological and in the same time as social and psychological fact.

What is the best interest of the child?

The best interest of the child regarding biological origins should be compared with the legal status of the adopted child. Parenthood is a social fact usually based on the blood relationship. The UN Convention on the Rights of the Child (art.7) assures the child to have the right to know and to be cared for by his/her parents. Adopted child still has the explicit right to be informed about the fact that he/she is adopted and to obtain the information on his/her biological identity. The Croatian Family Act is very precise in protecting the right of the child to be informed about his/her origins. In the adoption procedure a Social Welfare Centre will inform the adopters with the right of the adopted child to be informed about his/her biological origins. The Social Welfare Centre will counsel the adoptive parents to tell the child that he/she is adopted before the age of seven. If the child is older they should tell this immediately (FA art.124). It seems that implementation of this norm is not easy because Social Welfare Centre has only the right to advise the adoptive parents to tell the child about the adoption. The adopted child has a right to access the records on adoption when she/he obtain the major age.

Conclusions

- Genetics tests are very strong weapon especially when the previous genetic counseling is missing.
- A clear conflict of principles and rights caused by new popular use of genetic tests is evident.
- The delicate balance between privacy and the right to know should be protected by national legislation.
- The doctrine of privacy in modern times is a weak one.
- The child has the right to know, to be “those who know who they are”. The legal system of the modern so called welfare state should protect the rights of the child even in the situation when the right to know was realized through private use of the DNA tests.