Belgian Advisory Committee on Bioethics

Opinion no 38 of November 13th, 2006 on genetic testing to determine descent after death

Request for an opinion of May 26th, 200,
from Mr A. De Decker, Chairman of the Senate,
on the bill for amendment of article 331octies of the Civil Code to limit genetic testing after death with a view to determine descent, submitted by Mr Philippe Mahoux (Senate 3-30/1-SE 2003).

The request was declared admissible on the plenary meeting of June 14th, 2004 (final meeting of the second mandate) and referred to the next Advisory Committee, which was established on April 21st, 2005.

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I. Short presentation of the bill

The objective of this bill[1] is to restrict the possibility of genetic identification as part of a determination of descent if the person concerned has deceased.

This issue relates to two different domains: to cope with death (respect for the deceased and next of kin, the integrity of the mortal remains, …) and to determine descent (the right of the child to have his descent established and to know his origin). The author of the bill claims that genetic identification creates discrimination between the deceased as well as between the descendants. According to him there is a discrimination between the deceased that have been cremated and those that have been buried with respect to the possibility of being subjected to genetic testing. This would consequently entail an inequality in the treatment of the descendants as to the possibility of bringing their search to know their descent to a favourable conclusion. This practice indicates that there is a possibility that the will not to be subjected to genetic identification, expressed during a person's lifetime, will not be respected.

For these reasons the bill proposes that "*a prohibition is included in the Civil Code to perform genetic examination after death in order to determine descent, unless the person involved has previously, during his lifetime, given his express consent to do so*" (Parl. Doc. Senate 3-30/1-SE 2003, p. 2).

This bill proposes to complete article 331*octies* of the Civil Code ("*The courts can, even officially, order a blood test or any other test by approved scientific methods*") as follows: *"… with the exception of genetic examination after death, unless that examination is expressly authorized by the deceased*".

II. Judicial aspects

The judge before whom an action for affiliation is pending (whether or not an action to dispute or an action to affirm a legal status is concerned) can order a blood test or a genetic test, but he cannot force the defendant to submit to this, because this would mean a violation of his right to respect for his physical integrity. However, if he refuses, the judge has the right to take his position into account and to deduce the inevitable consequences. In practice this will lead to a presumption of the merits of the claim for affiliation, a presumption that nevertheless must be confirmed by the other case elements.
In an important arrest of December 17th, 1998, the Court of Cassation reminds that "*the prohibition of constraint against people and of the interference with the realm of a person's personality constitutes a general principle of justice. This prohibition entails that every physical constraint whatsoever on a person, especially to force him into an action or to submit to physical or psychological examination, is forbidden*". However, the Court continues, "*the right to physical integrity is not unlimited and should be explained in the light of other fundamental rights. Thus, the above-mentioned general principle of justice does not prohibit the assessment laid down in article 331octies of the Civil Code, as far as the person is not forced to subject to that*

[1] This bill resumes the text of a proposal submitted in the Senate on April 14th, 1999 (Parl. Doc. Senate, no 2-19/1-SE 1999).

assessment". In that case, the arrest concludes: "*The judge can assess the refusal to subject to a blood test. From the refusal he can deduce a de facto presumption without legitimate reason*".[2]

Genetic testing on a person generally conflicts with his right to respect for his physical integrity, which is a fundamental personality right and the source of all medical rights. However, this right is not absolute and may conflict with other interests, thus creating a conflict of values that has to be settled (whether or not this arbitration is imposed by the law or left to the judge). As a matter of principle, the infringement of the physical integrity of an individual is forbidden, but it can sometimes be legitimate, depending on the context and the aim pursued.

The European Court of Human Rights had the opportunity to solve this conflict of values by referring to an extensive interpretation of the concept 'private life', which, in accordance with the jurisprudence of the Court, includes "*the right of any person to establish and develop relations with his fellow men*". In an arrest of February 7th, 2002 the Court judges that article 8 of the European Convention on Human Rights (ECHR) applies to paternity proceedings and clearly includes the right to know his origin and *"to establish details of their identity as individual human beings"*, giving prevalence to the right of the child to know his origin over the interest of the alleged father in the respect for his physical integrity (§ 64).[3]

Unlike in criminal cases, where law and order intervene, in civil cases only private interests are at stake. The consent of the person concerned is therefore always required. However, that is by no means universal: in Germany biological examination to determine descent can be carried out under constraint.[4] The authorization of genetic examination under constraint when merely a question of descent is at stake, would lead to a modification of the very nature of kinship. Kinship would thus leave the realm of private law and fall under social law and order, which is the only body authorized to justify that the requisite of consent is ignored. This course was never seriously supported.

After the death of the alleged parent the obstacle of the requirement of consent disappears. It is therefore generally accepted in jurisprudence that the judge can order a genetic test on the mortal remains of a deceased person. He is thus left to decide on the conflicting values. It is generally believed that the right to collect the certified elements in support of paternity proceedings, and therefore the right to know one's origin, have priority over the respect for the mortal remains and for the next of kin of the deceased. That is also the case in France.[5]

The bill Mahoux aims at completing the text of article 331*octies* to prohibit genetic examination

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[2] Cass., December 17th, 1998, *Pas.*, 1998, I, 1233, *R.W.*, 1998-1999, p. 1144, note Swennen, F., *J.D.J.*, 1999, no 185, p. 44, note Jacqmain, J., *J.L.M.B.*, 1999, p. 1681; in the same sense: Cass., May 25th, 1999, unpublished: "*The judge can assess the refusal of a person to subject to a blood test or any other test by approved scientific methods and can deduce from the refusal a de facto presumption without legitimate cause. Refusal of subjection to a genetic test without any legitimate reason is equal to a de facto presumption, which, together with other facts and circumstances related to the file, reinforces the presumption of paternity*".

[3] European Court of Human Rights February 7th, 2002, *Mikulic v. Kroatia*, *J.C.P.*, 2002, I, 157, no 13, obs. Sudre, F., *J.C.P.*, 2003, I, 148, obs. Rubellin-Devichi, J.; *adde* Van Grunderbeeck, D., *Beginselen van personen- en familierecht. Een menselijke benadering*, Antwerp/Groningen/Oxford, Intersentia, 2003, p. 420, no 566.

[4] Frank, R., *L'examen biologique sous contrainte dans le cadre de l'établissement de la filiation en droit allemand*, *R.I.D.C.*, 1995, p. 905.

[5] *Cf.* the jurisprudence cited by Leleu, Y.-H., *o.c.*, p. 499, note 101.

on a person to determine descent after death in order to find out whether one is a descendant of that person, unless the deceased has during his lifetime given his express consent to do so.

So we are talking about a special hypothesis here: either the action for a descent test is brought after the death of the alleged parent, or the alleged parent dies during the examination process before the judge has made a final decision. Remember that this action can be brought – by a child and by each of his parents (art. 332*ter* Civil Code) – within a period of 30 years counting from the date of birth; some authors claim that the limitation of an action brought may even be interrupted during the minority of the child, to allow the child to be able to react until the age of 48.

This situation recalls – as confirmed by the explanatory notes of the bill – the famous precedent of 'the case Yves Montand', in which case consent was given to exhume the corpse of the deceased[6] to determine a possible biological relationship with Aurore Drossard[7], which was not confirmed.

These explanatory notes recall that the Belgian jurisprudence sometimes authorizes exhumation to solve an existing conflict of interests by giving priority to the right of the child to have his paternal descent established over the respect due to the dead, over the integrity of the mortal remains and over the moral right of next of kin. The proposed text intends to stop this jurisprudence, except for those undoubtedly rare cases in which the person involved has given his express consent during his lifetime.

At the moment, in the absence of a legal directive, it is up to the judge before whom the action is pending, to solve the existing conflict of values, on the basis of a number of essential parameters, which may be different in each individual case. He has to determine case by case which of the interests that are judicially worth protecting should prevail.

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[6] Paris, November 6th, 1997, *D.*, 1998, jur., p. 122, note Malaurie, Ph., *J.C.P.*, 1998, I, 101, no 21-3, obs. Rubellin-Devichi, J., *Dr. fam.*, 1997, p. 4, obs. Catala, P., *Gaz. Pal.*, December 12-13th, 1997, p. 14, note Garé, Th., *D.*, 1998, summary, p. 161, obs. Gaumont-Prat H. and p. 296, obs. Nevejans, N., *Defr.*, 1998, p. 314, obs. Massip, J., *J.T.*, 1998, p. 812, note Denies, N.: "Article 16-11 of the Civil Code prescribes that the identification of a person through his genetic fingerprint can only be pursued within the scope of measures of enquiry or investigation ordered by the judge before whom the action is pending with the aim to determine kinship or to be granted a subsidy, and such identification requires the express consent in advance of the person involved. Since the consent of the deceased can no longer be asked and since the eligible parties have communicated that they do not oppose a genetic analysis after the exhumation of their father if this would be deemed necessary, it is in these circumstances, whereas it is in the fundamental interest of the parties to reach biological certainty to the greatest degree possible, wise, within the provisions of the enacting terms of this arrest, to order an additional analysis that is entrusted to three experts to proceed to a genetic identification of the deceased after exhumation, if this is still possible, in order to determine whether or not he could be the father of the child" (translation).

[7] Paris, December 17th, 1998, *D.*, 1999, jur., p. 476, note Biegnier, B.: "The perfect conformity of all results of the genetic analyses, which are all but one exactly identical for all common markers used by the four experts separately, and which all lead to the exclusion of paternity of the deceased, already clearly demonstrates in itself their reliability and the unfoundedness of the criticism they are subjected to. Nor the statements produced, which had already been judged inadequate as sole proof of the alleged paternity, nor the existence of a supposed resemblance between the child and the deceased, are such that the scientific results of the genetic analyses carried out, which are accurate and devoid of any uncertainty, and which precisely exclude that paternity, are brought under discussion again"(translation).

III. Ethical aspects

The reconstruction of the story of one's origin can enable man to understand himself and to develop in a constructive way. However, this story can include multiple socio-affective and biological elements in mutually divergent proportions. Descent is based on a complex combination of varied elements, ranging from exclusively affective and social descent (adoption), over the biological certainty of procreation under medical supervision, to the re-established family. One aspect of this complexity is that descent, from a human point of view, is first and foremost a relationship and not a state. It implies at least three individuals, each of them (and partly together) developing a personal life on different levels: intimate life, life as a couple, family life, social life, … Each level comprises in itself and in relation to the other levels possibly conflicting dimensions (rights and duties, private and public life, personal and shared interests, etc.). Each individual, imprisoned in and at the same time made by this network, gets to know his descent in his own way and on the basis of what he is told or not told. Uncertainty about one's descent can lead to questions at certain moments in life. The possibility to demand a DNA-test to determine descent, even on material from the body of a deceased person or on material that was previously taken and preserved, can offer an answer to these questions.
When minors are concerned, we can refer to article 7 § 1 of the Convention on the Rights of the Child, signed on November 20th, 1989 in New York and ratified by Belgium on December 16th, 1991. This provision prescribes that the child has "*as far as possible, the right to know and be cared for by his or her parents*". In § 2 it is stipulated that the States Parties should ensure the implementation of these rights in accordance with their national law, suggesting that they have a large scope of appreciation. Nonetheless, the States Parties commit themselves, in accordance with articles 2 and 4 of the Convention, to respect and ensure the rights set forth in this Convention to each child within their jurisdiction, but also to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention. As such, a legal ban on the biological determination of descent undoubtedly violates the above-mentioned right, which is recognized by this supranational instrument.

The bill Mahoux, which is submitted to the Committee, uncovers two problems related to taking samples from a deceased person or the use of previously taken and preserved material: the problem of discrimination and the problem of consent, entailing respect for the private life and the physical integrity of people. Both issues should be analysed and a comparative assessment should be made between the interests of the deceased and the right of the descendant to know his origin. To these two questions we add the question of the legal time limits.

A. The question of a possible discrimination

The proposal formulates the first problem as follows: "*On the one hand there is a discrimination with respect to death. People that are cremated can no longer be subjected to a test. On the other hand, this discrimination leads to a second discrimination, as the children that institute the proceedings are not treated on equal terms*". Obviously this is not the case for previously taken and preserved samples.

The term 'discrimination' has two important meanings in everyday speech: on the one hand it can signify distinction and on the other hand segregation. The fact that there are differences between

people or situations does not necessarily mean that there is an intention to favour some people above others or that there is an obligation to eliminate those differences. What does ‘discrimination with respect to death’ mean then? It undoubtedly means that each person experiences the last moments of his life in a different way. However, this is not the issue here. This formulation actually refers to the possible consequences of a different treatment of the body after death: if the corpse is buried, DNA-material can be taken, whereas this is not possible when the body is cremated. Everyone is free to decide what happens with his body after death: one may wish that nothing is left of the body so that no examination whatsoever is possible, or one may wish that the corpse remains and can be subjected to examination, even if this is against the will of the deceased. In the latter case the ethical question arises whether there is a risk that the will of the deceased with respect to the use of his corpse will not be respected. This question is discussed in the reflection on the concept ‘consent’.

‘Discrimination with respect to death’ also poses the question of the definition of death. This bill includes the possibility to exhume a corpse to submit it to genetic testing. It should also question the possibility to perform genetic testing on sample material taken from people that are declared brain dead and are not yet buried or cremated. At present one is declared death if cerebral death is certified. This new definition of death allows us to take organs from what is then defined as mortal remains. This new definition of a deceased person should be included in the ethical reflection discussed here.

Let’s return to the second type of discrimination brought up by the bill: for the descendants the difference in the treatment of the mortal remains of the deceased creates a difference as to the possibility of taking steps to bring an action for affiliation. The descendants may regret no longer being able to establish their descent, but this impossibility cannot be called discrimination. The choice between burial or cremation is usually based on considerations unrelated to the eventuality of a descent test (e.g. philosophical and religious belief, economic and hygienic motives). The descendants are confronted with the actual situation, which is not necessarily such as to make them abandon their intention to know their origin. Moreover, it is technically possible to get round this actual situation: family ties with the deceased can be established without taking sample material from his corpse. A comparative genetic test can be performed on the basis of DNA from other relatives (grandparents, aunts and uncles, brothers and sisters, etc.). Besides, it is also possible to carry out a DNA-test on hair samples of the deceased, e.g. found on a brush, even after cremation. A judge can also decide that the demand for a descent test is sufficiently motivated to order genetic examination on material that was taken prior to the death of the cremated or buried deceased and was preserved in a laboratory.

The members of the Committee therefore conclude that the use of the term ‘discrimination’ is not relevant to describe the difference in the treatment of the mortal remains (burial or cremation) or the (im)possibility for the relatives to have as yet a genetic test performed on material from the mortal remains.

B. The question of consent

Reflection on the issue of consent raises the question of respect for someone’s privacy after death.

Before proceeding to the analysis of the different situations that may occur, we wish to indicate that some members of the Committee believe that respect for someone's personal life should continue to exist after death. In their opinion genetic testing on a deceased person is only allowed if the deceased has given his explicit consent during his lifetime or did not explicitly oppose to this. That is also the line of thought of the current medical approach, which prescribes to keep one's duty of professional confidentiality after the death of the patient. Elements from his private life, which he had confided to his doctor, cannot be communicated to third parties. This also includes possible indications with respect to biological paternity.
Article 9 § 4 of the Law of August 22nd, 2002 on the rights of the patient grants, under strict conditions, the right to have access to the medical file of a deceased person "*to the husband or wife, the legally cohabiting partner and the relatives in first and second degree […] through mediation of a professional medical practitioner appointed by the applicant […] insofar as their request is sufficiently motivated and specified and the patient was not expressly opposed to it*".
There are three main reasons why access to the medical file can be granted:

- verification of a genetic family tie (e.g. due to risk of hereditary disease);
- contestation of a will (lack of lucidity);
- presumption of medical malpractice causing death.

Only those documents of the file that provide an answer to the particular question for information are submitted to them.
Other members of the Committee argue that the respect for the private life of the deceased is less imperative after death. As far as descent is concerned, they believe that from an ethical point of view the right of a child to verify his biological relationship with a deceased parent prevails over the right of the deceased to secrecy.

In practice three situations can arise.

a) Explicit consent with the genetic descent test

In the first situation an individual has during his lifetime given his explicit consent for a post mortem genetic descent test. In the bill 'Mahoux', which demands an "*explicit and firm consent, given in advance during the lifetime of the person concerned*", this is the only situation in which a post mortem genetic descent test is authorized.
There can be different motives for the consent, which is explicitly expressed by the individual: either he allows the descendant to order a genetic test to find confirmation of what the deceased has already told him in all sincerity, but the descendant still doubts; or the descendant receives information about his descent which the deceased has, for several reasons, not communicated; or the consent to take sample material is inspired by the hope that the mother will inform the descendants.
This step is paradoxical from a relational point of view, on the part of the parent as well as on the part of the descendant: it can be compared to a relational action and at the same time shows that there is a relational shortcoming. It expresses the desire to come up to the expectations of the other or to take a stand vis-à-vis the other. However, this step also indicates that the dialogue has not taken place or that a crucial question has not been asked: "Is there a biological relationship between us?" Explicit consent, given by an individual during his lifetime, without being asked by a descendant, may create doubt in the mind of the descendant: "What message about my descent did he/she want to give me with his/her explicit consent?"

In general we can also assume that a man who is aware that he has had several partners, will accept that sample material is taken from his corpse for genetic examination to avoid that possible descendants remain in a state of uncertainty. Even if in this situation the descendants may be confronted with psychological problems, if explicit consent is given, there is no intrusion on his private life from an ethical point of view.

b) Explicit refusal of the genetic descent test

In the second situation someone refuses during his lifetime to give his explicit consent for a genetic descent test after his death. This refusal deserves respect as expression of his freedom of opinion and his right to decide over his own body, even after death. However, the refusal can cause an ethical problem if it is deliberately meant to deprive a descendant of his right of inheritance. This could be the case if a parent suspects that a child is born from one of his old loves and he wishes to leave his inheritance solely to his legally recognized children. His refusal to give consent to a genetic descent test on his mortal remains after his death would then deprive his descendant of the possibility to have his descent confirmed and to enjoy his right of inheritance.
In certain cases the legal father who is aware that he is probably not the biological father of the children he has raised, could refuse to give consent to a DNA-test after his death, if he wants to prevent that it is discovered that he has no biological ties with his children. For the same reason a mother who has always carefully concealed from her children that they were born after egg donation or intervention of a surrogate mother, may refuse a post mortem descent test.

Nonetheless the question is how we should weigh up the protection of the private life and the physical integrity of an individual on the one hand and the right of the descendant to know his origin after the death of his begetter on the other hand.
Some members believe that this refusal should be completely respected.
Other members are of the opinion that the respect for one's private life and physical integrity should make way for the interests of the living. The protection of private life cannot justify a refusal to give consent: a person may want that certain aspects of his past are not known during his lifetime. However, should this be kept secret after his death? Actions from the past – especially if a child is born from them – fall outside the protected sphere of private life after the death of that person. The will to conceal certain things during his lifetime which in the first place concern other people, should no longer be respected once the person in question has deceased. This right to privacy is outweighed by the right of a descendant to reconstruct his life history by integrating the information about his genetic descent. This line of reasoning can also be followed if different people want to know their kinship with a deceased person to verify whether they are brothers and sisters or not (e.g. in case of an early separation).

Finally it should be mentioned that, if the refusal of a genetic descent test is taken into account, the question is whether this refusal should be limited in time, which would permit scientific historical research (cf. the case of the alleged descendants of the successor to the throne of Louis XVI).

c) Explicit consent nor explicit refusal of the genetic descent test

Another possibility is that the question of descent is asked only after the death of the person

concerned. Let's take the case of a man who never knew that a child was born from an old love. Being certain of the paternity of his children with his wife and nobody in the family questioning this, he didn't give explicit consent during his lifetime to perform a DNA-test on his mortal remains. When he came of age, the child born from the old love suspected that the man is his father and wanted to clear things out. Unfortunately the man died before the young man had the opportunity of contacting him. Following the hypothesis presented here, the search for kinship stops here, even if the legal children, the wife of the deceased and the mother of the young man do not oppose the demand to clarify the issue of genetic relationship.
Some members believe that, if there is no explicit consent nor explicit refusal, we are in a situation of implicit consent. By analogy they refer to the implicit consent in the case of organ donation in Belgium: who has not explicitly refused organ donation is supposed to accept it. Likewise, who has never raised an objection to take samples for DNA-analysis to determine descent (or has never raised an objection to the use of already taken and preserved material), can be deemed to accept a possible determination of descent after his death. The question of the value and desirability of such an implicit consent to determine descent is however still open to discussion.
Other members are in favour of absolute respect for the private life of the deceased.

C. The question of the legally stipulated time limits

In addition to the problem of consent there is the problem of limitation in time for descent testing. The law prescribes a period of 30 years as from date of birth, which according to a certain interpretation may be prolonged to 48 years. Some members argue that for psychological and ethical reasons there is hardly any justification for this limitation in time. Think of a case in which a man of 50 years of age waited until his professional career had been sufficiently developed and his children had grown up before he tried to solve the problem of his descent. Based on what criterion could he be prohibited to take these steps if he is already past the age of 30 or 48? The right to know his origin and to build a life of his own applies to every stage in life. Therefore it should be possible to submit the demand to perform a genetic descent test in all of the above cases (cf. 'The question of consent'), without any age limit whatsoever.
Other members of the Committee are in favour of the application of the thirty years limitation.

IV. Recommendations

The ethical issue relates to the right to respect for a person's private life and physical integrity, whether or not the will of the deceased should be taken into account and the right of the descendants to know their genetic origin. The notion of discrimination advanced in the bill has preoccupied the Committee members, but after careful reflection they concluded that the use of this concept is irrelevant here.

It seems hardly appropriate to keep the judge, who naturally weighs values and interests against each other, from doing his job by nearly radically ruling out one of the options in legislation. This would mean that the child demanding the test would not be able to gather the necessary evidence to find out the truth and to develop his identity, which is not in accordance with the best interests of the child.

Some members of the Committee think that post mortem determination of descent can be treated by analogy with the legislation on organ donation. Within that perspective the consent of the person concerned is required. This means that the person must during his lifetime explicitly express his refusal to a genetic sample taking on his mortal remains. This option takes into account the right to respect for the physical integrity of the person concerned (he can explicitly refuse a sample taking or order cremation of his body) and stimulates the voluntary and responsible nature of his decision. This option also requires that the public is thoroughly informed, e.g. about the steps to be taken to express such a refusal.

Other members believe that, once a person has deceased, the right to protection of his private life should make way for the right of the descendant to know his genetic origin (or the right of an alleged descendant to establish a blood relationship with the deceased).

Yet other members think that, even after death, the right to privacy should be unconditionally respected.

Finally, some members of the Committee wish that the demand of the people concerned could be taken into account, without any limitation in time. Other members find it advisable to keep the thirty years time limit.

The opinion was prepared by select commission 2005-4, consisting of:

Joint chairpersons	Joint reporters	Members	Member of the Bureau
G. Evers-Kiebooms M.-G. Pinsart	M.-G. Pinsart M. Roelandt G. Genicot	M. Bonduelle E. De Groot A. De Paepe F. De Smet N. Meunier Y. Oschinsky G. Pennings J.-A. Stiennon C. Van Geet C. Van Vaerenbergh	M. Dupuis

Member of the secretariat: L. Dejager

Experts consulted:

- Mr J.-J. Cassiman, professor at the KULeuven, head of the department ‘Menselijke mutaties en polyformismen’ at the Centrum voor Menselijke Erfelijkheid, KULeuven.

- Mrs Vinciane Despret, psychologist and philosopher, lecturer at the Université de Liège en de Université Libre de Bruxelles.

The working documents of select commission 2005-4 – request for opinion, personal contributions from the members, minutes of meetings, documents consulted – are stored as Annexes 2005-4 at the documentation centre of the Committee and can be consulted and copied there.