

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?

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1. Introduction

The informational interest persons may have in knowing their genetic parentage acquired a fundamental rights dimension almost two decades ago.¹ Thus, since 1989, Article 7-1 of the UN Convention on the Rights of the Child (CRC) recognises 'as far as possible, the right to know and be cared for his parents'.² In Europe, that same year saw two cases of tremendous importance for the progressive international and national recognition of individuals' interest in knowing the truth about their genetic descent as a fundamental right,³ on the basis of the right to 'private life'⁴ and the 'personality right' respectively.⁵ Meanwhile, in legal scholarship, this 'right to know' has now also gained broad recognition.⁶ As a fundamental right to 'know the biological truth', this recognition not only echoes the legal emancipation of the child that pervades the CRC,

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- 1 Key publications from this 'early period' in this development towards constitutionalisation include: R. Frank, 'Recht auf Kenntnis der eigenen Abstammung', 1988 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, pp. 113-120; E. Haimes, "'Secrecy': what can artificial reproduction learn from adoption?", 1988 *International Journal of Law and the Family*, pp. 46-61; B. Hassenstein, 'Der Wert der Kenntnis der eigenen Abstammung', 1988 *FamRZ*, pp. 120-123; K. O'Donovan, 'A right to know one's parentage?', 1988 *International Journal of Law and the Family*, pp. 27-45; K. O'Donovan, 'What shall we tell the children?', in R. Lee & D. Morgan (eds.), *Birthrights, law and ethics at the beginning of life*, 1989, pp. 96-114; D. Hodgson, 'The international legal protection of the child's right to a legal identity and the problem of statelessness', 1993 *International Journal of Law, Policy and the Family*, pp. 255-270; G. Stewart, 'Interpreting the child's right to identity in the UN Convention on the Rights of the Child', 1992 *Family Law Quarterly*, pp. 221-233; G. Van Bueren, 'Children's access to adoption records: state discretion or an enforceable international right', 1995 *Modern Law Review*, pp. 37-53.
- 2 The delegations of the United States and Germany insisted upon the insertion of the words 'as far as possible' in response to the original draft submitted by a few Muslim countries. UN Doc. E/CN.4.1989/48, 18-22. For a commentary on the UN Children's Right Convention, see in particular: S. Detrick, *A commentary on the United Nations Convention on the Rights of the Child*, 1999.
- 3 ECtHR, *Gaskin v. United Kingdom*, Appl. no. 10454/83, 7 July 1989; in Germany, by the Federal Constitutional Court (*Bundesverfassungsgericht*, *BVerfGE*) on 31 January: *BVerfGE* 79, 256 = *FamRZ* 1989, 255, on reference from the Amtsgericht Hamburg, 3 March 1987.
- 4 *I.e.* pursuant to Art. 8 of the European Convention on Human Rights.
- 5 The 'personality right' (*Persönlichkeitsrecht*) is protected in the German Federal Constitution or Basic Law (*Grundgesetz*) under Art. 1 I in conjunction with Art. 2 I. The basis of the right to know one's origins (*Recht auf Kenntnis der eigenen Abstammung*) is derived from the right to informational self-determination (*Recht auf informationelle Selbstbestimmung*) which is an aspect of this right. A 'personality right' is also regarded as the basis of the right to know one's origins in such jurisdictions as The Netherlands – 'implicit' in the Dutch Constitution in the *Valkenhorst II* case of the Dutch Cassation Court (*Hoge Raad*), 15 April 1994, 1994 *NCJM-Bulletin* no. 6, p. 652, and in Portugal, from which a 'right to one's personal history' (*direito à historicidade pessoal*), protected under Art. 26 of the Portuguese Constitution, is derived.
- 6 O'Donovan 1988, *supra* note 1; Stewart 1992, *supra* note 1; Hodgson 1993, *supra* note 1; Van Bueren 1995, *supra* note 1; L. LeBlanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights*, 1995; M. Freeman, 'The new birthright? Identity and the child of the reproductive revolution', 1996 *International Journal of Children's Rights*, pp. 273-297; J. Fortin, *Children's Rights and the Developing Law*, 2003; J. van Raak-Kuiper, *Koekoekskinderen en het recht op afstammingsinformatie*, (PhD thesis Tilburg University), 2007.

but also reflects developments towards greater certainty and availability of scientific parentage tests.⁷

Although there are now many uses of DNA identity tests, both media and legal interest in the West has concentrated to a great extent on their use in ascertaining paternity. Thus, as far as the ‘paternity palaver’ in the American popular media is concerned, legal sociologist Dorothy Nelkin has distinguished three repeated claims found in the media: that ‘real’ relationships depend on shared DNA, that uncertain paternity as a result of infidelity is so rampant that there are real reasons for suspicion and that accordingly there is a burning need, on both economical and emotional grounds, for persons to know the biological truth.⁸

For children, circumstances under which the issue may become relevant may range from displacement, adoption, artificial insemination and surrogacy. For reasons of brevity, this article shall not elaborate upon the disparities between legal and genetic parentage, but focus interest on the scope of the right to know in the context of socio-legally constructed paternity.⁹ In discussing socio-legally constructed forms of paternity, it should be borne in mind that ‘biology’ is but one ‘fundament’ next to the ‘intention’ to base legal parentage upon.¹⁰ This contrasts with adoption and artificial insemination, situations wherein the establishment of legal paternity will as a rule only reflect the latter ‘fundament’.¹¹ Paternity testing may confirm or shatter an identity; this applies to both a child and a legal father.¹² The fundamental right discourse, however, has only recently been acknowledged as extending to the informational interests of fathers as well, however, in particular biological fathers without parental status, whatever their motives may be.¹³ This may be partly due to the fact that ascertaining biological ties to expose a mother’s ‘infidelity’ may still be perceived by courts as an interest less worthy of legal protection than a child’s personal identity-related concern.

Uncertain paternity has traditionally been considered a ‘male problem’. In an alternate historical perspective on the establishment of paternity, nature in the pre-DNA age still forced ‘informationally underprivileged’ men to learn how to trust women not to deceive them about their paternity status.¹⁴ Thus, a lack of clarity still existed about the true mechanism of fathering in some scientific circles until the 19th century.¹⁵ This contrasts sharply with the contemporary ubiquitous availability of scientifically accurate DNA paternity tests,¹⁶ notably via the internet,

7 C. Forder, ‘Het recht op afstammingsinformatie: “wilde speculations”’, 1998 *Ars Aequi*, pp. 87-90.

8 D. Nelkin, ‘Paternity Palaver in the Media; Selling Identity Tests’, in M. Rothstein *et al.* (eds.), *Genetic ties and the family; the impact of paternity testing on parents and children*, 2005, p. 4.

9 This definition accordingly precludes further discussion on the contexts of donor insemination (or adoption). For reasons of brevity, the current discussion centres on paternity in different-sex families.

10 M. Vonk, *Children and their parents; a comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, 2007, p. 267.

11 It may be tentatively suggested that legislation oriented solely towards the realisation of the informational interest without loss of status may accordingly also be easier to realise in these specific contexts.

12 D. Scott-Jones, ‘Paternity testing, family relationships, and child well-being’, in M. Rothstein *et al.* (eds.), *Genetic ties and the family; the impact of paternity testing on parents and children*, 2005, p. 50.

13 I. Schwenzer, ‘Tensions between legal biological and social parentage’, in I. Schwenzer (ed.), *Tensions between legal, biological and social parentage*, 2007, p. 7. Key publications regarding the reinforcement of the legal position of the biological father: P. Lødrup, ‘Challenges to an established paternity: radical changes in Norwegian law’, 2003 *International Society of Family Law*, pp. 354-361; A. Roth, ‘Vaterschaftsanfechtung durch den biologischen Vater’, 2003 *NJW*, pp. 3151-3160; N. Dethloff, ‘Redefining the position of fathers in German family law’, 2005 *International Survey of Family Law*, pp. 253-266; A. Nuytinck, ‘Vernietiging door verwekker van erkenning door niet-verwekker Hoge Raad 24-11-2004, *JOL* 2004, *RvdW* 2004, 125’, 2005 *Ars Aequi*, pp. 733-738.

14 W. Marsiglio, ‘Artificial reproduction and paternity testing’, in M. van Dongen *et al.* (eds.), *Changing Fatherhood: an interdisciplinary perspective*, 1995, p. 171.

15 K. Albrecht & D. Schultheiss, ‘Proof of paternity: historical reflection’, 2004 *Andrologia*, p. 33.

16 M. Anderlik, ‘Assessing the quality of DNA-based parentage testing: Findings from a survey of laboratories’, 2003 *Jurimetrics Journal*, pp. 291-314. A probability of 99,9 % is attainable on the basis of an examination of the DNA of the putative father and the child.

which does not fail to spark renewed legal debates on both the respective weight that should be attached to 'fundamentals' of legal paternity, as well as the significance of 'knowing' in itself.

Notwithstanding greater scope for scientific certainty, across the world's various parentage law systems, legal presumptions of paternity remain *de rigueur*.¹⁷ Best known is the so-called marital presumption rule, which holds that the mother's husband is the legal father of the child.¹⁸ Outside marriage, the establishment of paternity in most civil law traditions requires a voluntary acknowledgement. Since a prior (scientific) establishment of the biological truth is not a prerequisite, parentage law systems accordingly offer leeway for the creation of father-child relationships primarily based on a social reality and/or the man's 'intention' to be the child's parent. Most parentage law systems also foresee in procedures for both child and parents to deny an established paternity that is not in accordance with biological truth, albeit often subject to procedural time-constraints for reasons of legal certainty. If paternity has been denied effectively in court, this will result in the revocation of the legal relationship between the socio-legal father and the child.¹⁹ An (unmarried) biological father, who is not a sperm donor may, in principle, in most systems also be forced to assume paternity by the child and/or the mother.²⁰ Such a judicial determination of paternity may also present itself as an alternative after the presumptive father's death if paternity could somehow not be established during his life, for example, because another man's paternity had to be denied first. In that respect, the scientific significance of reliable DNA-based paternity testing after the putative father's death can scarcely be overstated.

This contribution is intended, above all, as an attempt to identify – or 'uproot' – recurrent legal issues regarding the material scope of the right to know. On the basis of a concise, historical overview of the relevant case-law of the European Court of Human Rights (ECtHR), it is submitted that although this process has been far from linear, there has been a progressive recognition of the right under the case-law of the European Court of Human Rights in accordance with Articles 8 and 14 of the Convention, but some contradictions and ambiguities remain. Attention will also be briefly drawn to salient features of the legal discourse in Germany, the European jurisdiction in which the issue's fundamental rights implications, have without doubt most intensively been discussed at least in legal scholarship and, more debatably, also at the governmental level. In particular, the current scholarly debate in Germany which has recently resulted in the enactment of a legislative proposal²¹ foreseeing in the creation of an 'exclusively informational' procedure for the legal father to ascertain his biological fatherhood, without this necessarily resulting in the revocation of his legal child-parent relationship, will be of interest for comparatists. Finally, some evaluative, concluding remarks shall be made on the legal discourse as it now stands. First, however, it seems appropriate to highlight some of the most compelling questions affecting the right to know as a legal concept.

17 Schwenzler 2007, *supra* note 13, p. 7.

18 Commonly accepted to derive from the adage found in Roman law, *pater is est quem nuptiae demonstrant*, Paulus, *Digest* 2, 4, 5.

19 Therefore the German law proposal foreseeing in a 'solely informational' procedure warrants attention from a comparative law perspective. See below.

20 Schwenzler 2007, *supra* note 13, p. 7.

21 *BT-Drucksachen* 16/651, 16/6449 and 16/5370. Passed in the Bundestag on 20 February 2008, entering into force on 1 April 2008. Text available in PDF: <http://www.bmj.de/files/3060/Gesetz%20zur%20Klärung%20der%20Vaterschaft%20unabhängig%20vom%20Anfechtungsverfahren.pdf>

2. Towards a definition of the legal concept of the right to know one's biological origins: an on-going story

In the wealth of social science and legal literature that deals with access to information on genetic descent, it has remained a contentious issue whether (all) children should be able to know the truth irrespective of the circumstances of their birth.²² Nonetheless, it seems safe to say that the justifications for providing such information have by now become widely accepted and understood. Two strands of thought have been important in this principled, moral recognition. Firstly, in the medical sense, in the prevention of hereditary diseases and incestuous relationships, and secondly, in the psychological sense, to enable a child to further develop her or his narrative identity.²³ In that latter sense, the moral basis underlying the fundamental right to know one's origins for all children has drawn especially on social science literature from the 1970s regarding the experiences of some adoptees, who, deprived of this information, may feel 'deracinated' or cut off from an essential part of themselves.²⁴ Still, the question at what age and how a child should 'ideally' be told has only been researched to a limited extent and not in a manner which analyses the right's scope across the aforementioned different contexts.²⁵

Notwithstanding the broad acceptance of the basic moral justifications, cumbersome issues concerning the material scope as a result of fundamental rights-level recognition remain. If the right is clearly not to be regarded an 'absolute right' on the basis of the UNCRC, it is nonetheless twenty years after ratification far from clear what enforcement 'as far as possible' could actually entail. To name but one example, the right to know is not exclusively guaranteed as a negative right that protects one's interests against active violations by State authorities, but also as a positive right offering protection against a passive omission of the State by preserving and opening access to birth data.²⁶

There are further problems concerning the right's conceptual definition and moral basis. Thus, as a derivative of an individual's private life or 'personality right', the right to know has been understood as a (moral) claim to informational self-determination.²⁷ In that connection, it remains circumspect whether the right to know – as a right involving 'free' moral choice – could

22 Disparities between socio-legal and biological parentage may vary from adoption, artificial insemination through an artificial donor, high and low technology surrogate motherhood, to socio-legally constructed forms of paternity. Social science studies concerning adoption: H. Sants, 'Genealogical bewilderment in children with substitute parents', 1964 *British Journal of Medical Psychology*, pp. 133-141; D. Schechter *et al.*, 'Emotional problems in the adoptee', 1964 *Archives of General Psychiatry*, p. 109. In the field of socio-legally constructed paternity: L. Van Kampen *et al.*, 'Onbekendheid met de biologische vader als een belemmerende factor in de identiteitsontwikkeling: een empirische exploratie', 1990 *Nederlands Tijdschrift voor de Psychologie*, pp. 283-288; on artificial insemination: R. Cook *et al.*, 'Disclosure of donor insemination: parental attitudes', 1995 *American Journal of Orthopsychiatry*, pp. 549-558; on drawing analogies between artificial insemination and adoption, in legal literature: E. Gibson, 'Artificial insemination by donor: information, communication and regulation', 1992 *Journal of Family Law University of Louisville School of Law*, pp. 1-43; Freeman 1996, *supra* note 6, p. 291; T. Helms, *Die Feststellung der biologischen Abstammung: eine rechtsvergleichende Untersuchung zum deutschen und französischen Recht*, (PhD thesis Freiburg), 1999, pp. 186-187.

23 O'Donovan 1988, *supra* note 1, pp. 29-30; Freeman 1996, *supra* note 6, p. 277.

24 J. Triseliotis, *In Search of Origins: the experiences of adopted people*, 1973; R. Hoksbergen & H. Walenkamp, *Adoptie uit de kinderschoenen*, 1983; Freeman 1996, *supra* note 6, p. 277; I. Cohen, 'Wagners Siegfried', 1998 *Psychologie*, pp. 29-31.

25 H. Colpin, 'Opvoeding na kunstmatige voortplanting: de literatuur over kansen en risico's', 1992 *Gezin: tijdschrift voor primaire leefvormen*, p. 71, who suggests that if a child knows little about his biological father and is informed at a relatively late age, the more likely it will be that the child develops identity-related problems. F. Hajal & E. Rosenberg, 'The family cycle in adoptive families', 1991 *American Journal of Orthopsychiatry*, p. 78. These authors suggest that informing children about their origins should not be a single event, but involves an ongoing dialogue and changing requirements as the child develops.

26 S. Besson, 'Enforcing the child's right to know her origins contrasting approaches under the Convention on the Rights of the Child', 2007 *International Journal of Law, Policy and the Family*, p. 144.

27 Federal Constitutional Court (*Bundesverfassungsgericht, BVerfGE*) on 31 January: BVerfGE 79, 256 = *FamRZ* 1989, 255. Note, however, that the term 'informational self-determination' may also be inept in view of the 'fixed' character of the information, which links one generation to the next.

also encompass a right *not* to know.²⁸ As a possible conceptual gain of such an encompassing interpretation, the present author suggests that the legal discourse could in future move beyond utility-orientated assessments of the social and biological fundamentals underlying the establishment of legal parentage. As such, in an autonomy-based view on the right to know, it may be preferable if legislatures looked beyond the traditional 'social' and 'biological' dichotomy as appropriate fundamentals for establishing legal parentage, and instead departed from the idea that the informational interest represents a constitutional legal value for the person concerned having regard to the child's (progressive) autonomy. At the same time, it must be conceded, that notions of '(progressive) autonomy' and 'informational self-determination' may become empty constitutional shells as long as the concerned individual remains ignorant of the underlying disparity. This prompts the question of enforceability as to who should be held accountable for 'telling'.

In connection to that question, it has been suggested that 'parents', whether socio-legal parents or biological, hold 'procreational responsibility' to tell children about their parentage. This concept has also been found useful in explaining why intentional and biological parents may be held responsible as parents for the child during her or his life.²⁹ According to Vonk, procreational responsibility before conception means, from the point of the child's right to know, ensuring that this information is available.³⁰ Still, it must readily be acknowledged that problematic situations remain in which the 'responsibility' argument may be difficult to sustain from an ethical – let alone, legal or procedural – perspective; suffice it to think of children born from legally incapable biological parents such as teenage pregnancies, children born out of incestuous relationships or rape, or from a gamete swap in a fertility clinic.³¹

Nonetheless, in the present author's view, procreational responsibility of parents may in most situations be regarded as a (meta-juridical, moral) justification for vesting primary legal responsibility on the (socio-legal) parents to tell.³² From the viewpoint of legal enforcement, speaking in terms of responsibility may, however, have limited value. As such, in adoption, the public authorities already play an important role in the registration and disclosure of birth data. Moreover, in adoption by same-sex parents and of children ethnically different from the adoptive parents, the underlying disparity cannot be cloaked. Freeman refers to a child's 'right not to be deceived about one's true origins' with a corresponding duty incumbent upon socio-legal parents.³³ However, if it really were up to the socio-legal parents to tell, the enforcement of the right may sometimes become illusory. Thus, there is some social scientific evidence which suggests that in artificial insemination the majority of (different-sex) socio-legal parents are not

28 In defence of a personal autonomy-based, right not to know: G. Pennings, 'The right to privacy and access to information about one's genetic origins', 2001 *Medicine and Law*, pp. 1-16; C. Bohnert, 'Zur Zulässigkeit privater Vaterschaftstests', 2002 *Familie, Partnerschaft und Recht*, pp. 383-391; M. Wellenhofer, 'Die prozessuale Verwertbarkeit privater Abstammungsgutachten', 2005 *FamRZ*, pp. 665-668.; R. Zuck, 'Der heimliche Vaterschaftstest; Was kann der Gesetzgeber tun?', 2005 *Zeitschrift für Rechtspolitik*, pp. 117-119.

29 Vonk 2007, *supra* note 10, pp. 252-253.

30 *Ibid.*, p. 252.

31 C. Forder, *Legal establishment of the child – parent relationship constitutional principles in Dutch, English and German law having regard to the European Convention on the Protection of Human Rights and Fundamental Freedoms and other applicable international instruments*, (PhD thesis Maastricht), 1995, p. 132. Nonetheless, the Dutch Cassation Court (*Hoge Raad*), in the *Valkenhorst I* case, argued that the child's right prevailed on the basis of such a 'responsibility' argument, coupled with the child's 'vital interest in knowing', although the child had been born in wedlock and subsequently taken into care by a charitable religious foundation at a time when considerable stigma was still attached to non-marital births. *Hoge Raad* 15 April 1994, *NJ* 1994, 608. In the *Valkenhorst II* case, the mother also claimed that she did not wish to provide the information because she had been raped by the biological father. *Hoge Raad* 13 January 1997, *NJ* 1997, 451.

32 S. van de Goor, *Recht op afstammingsvoorlichting, moderne voortplantingstechnieken en het belang van het kind*, Nederlandse Gezinsraad Instituut voor Primaire Levensvormen 1988; E. Siberry Chestney, 'The right to know one's genetic origin: can, should or must a state that extends its right to adoptees extend an analogous right to children conceived with donor gametes?', 2001 *Texas Law Review*, pp. 364-391.

33 Freeman 1996, *supra* note 6, pp. 290-291.

inclined to tell the ‘truth’.³⁴ Since in socio-legally constructed paternity the underlying disparity may very well not be so apparent either, some parents may also wish to ‘pass themselves off’ as being the biological parents.

Furthermore, although the right to know involves a ‘fixed’ aspect of narrative identity,³⁵ on closer examination, references to ‘*the* objective biological truth’ may also be seen as inept. This ineptness can be appreciated from the – apparent but nonetheless often overlooked – basic fact that the individualised narrative concerning the circumstances of conception necessarily precedes us. As such, an objective biological truth is unfathomable. Enabling children to accede to a birth certificate, a biological parent’s name or the result of a DNA test may fall short of enforcing their right to know their ‘origins’.³⁶ Paradoxically, then, our primary truth concerning our ‘fixed’ identity will remain ‘unknowable’, even for those of us who ‘know’. The deeper question may therefore be what ‘knowing’ could actually involve: perhaps in discussing the rights’ conceptual scope, a further definition is required because, admittedly, rather facetiously, ‘to know or not to know’ is not the question, as there are different types of information on genetic descent and degrees of familiarity.

In that respect, in determining the breadth of information, a distinction between the right to know in the strict, legal and a broader, ethical sense may have conceptual value. A rigorous division into ethical and legal discourses on the right’s material scope may, however, be untenable, suffice, in that regard, to consider that the conceptual dividing line between the ‘right to know’ and the ‘right to contact’ with the biological parent may be narrow. Anyone searching for meaningful ‘answers’ regarding his or her personal identity will not be interested in disclosure of birth data alone, but also in meeting their biological parent (at least) once.³⁷ The release of closed birth records for adoptees and paternity testing may be understood as a means of enforcing the right to know in a strict, legal sense. A broader interpretation of the material scope is quite conceivable, though. From a more decidedly ethical perspective, the right to know *latu sensu* might be conceived of as a moral entitlement not to be left to one’s own imagination as far as the *story* surrounding the circumstances at conception and birth. In shifting attention to questions of procedural enforceability, then, it would appear that a realisation of the right to know in the broad, ethical sense must inevitably be preceded by an enforcement of the right to know *strictu sensu*. As a corollary, it is ventured, a discussion on the negative and positive obligations as regards the disclosure of birth data and scientific parentage testing, may do sufficient justice to the theme in a discourse centered on *legal* enforceability. In that respect, it should also be added that enforcement *strictu sensu* need not necessarily signify a less profound appraisal of the information that the persons may be looking for; thus, the evidence of a parentage test and access to the information on a birth record might be conceived of as something more ‘personal’ than an individualised story of the circumstances surrounding a person’s conception, which, as cynics might add in an attempt to trivialise the objective value – if there is one – of the ‘biological truth’, involves a story so universal that it may be better learnt in biology class than in philosophy class or in court.

34 M. Trommelen *et al.*, ‘Bereidheid tot donatie van sperma bij opheffing van de anonimiteitswaarborg’, SWOKA Instituut voor strategisch consumentenonderzoek 1999, pp. 30-31.

35 S. Wilson, ‘Identity, genealogy and the social family; The case of donor insemination’, 1997 *International Journal of Law, Policy and the Family*, pp. 270-297.

36 M. Dovy, *L’enfant et le droit de savoir: l’accès à ses origines familiales*, (PhD thesis Lyon), 2002, p. 397.

37 Helms 1999, *supra* note 22, p. 180. According to Besson 2007, *supra* note 26, p. 145, the right to know one’s parents does *not* encompass a right to meet them (or to be with them), thereby denying such an extensive interpretation of the right to know and the right to contact.

For adoptees, the right to know *strictu sensu* has now been ensured for considerable time in many jurisdictions by opening up access to birth records.³⁸ Following a Swedish example in 1985, laws allowing the disclosure of the identity of the anonymous sperm donor may also be found in a number of other jurisdictions.³⁹ In distinguishing between medical, non-identifying and identifying data concerning the donor, the Dutch donor information (donor insemination) act offers an interesting example of a legislative attempt at categorisation of information concerning biological parentage. Thus, this law suggests that enforcement in the child's interests may require a gradual process of disclosure, rather than revealing 'the whole story' at once. Whereas medical data may be claimed at any time from the public foundation that registers the data, non-identifying data, regarding the donor's physical description and professional and social background, may be claimed later.⁴⁰ At the age of sixteen, identifying data such as name and physical address may be claimed.⁴¹ Disclosure will in principle only be refused by the foundation if the donor's interests prevail.⁴²

3. Development of the right to know one's origins under Article 8 *private life and family life* of the European Convention of Human Rights

3.1. Phase I. Towards the recognition of the right to know one's origins

In tracing the emergence of a 'right to know' under Article 8 of the Convention, roughly three phases may be distinguished. It is defensible to take the decision *Gaskin v. United Kingdom*⁴³ as a starting point, as it was interpreted as bearing relevance for the issue throughout Europe.⁴⁴ This is not without irony, as the applicant in the *Gaskin* case, seeking the obtainment of information concerning his early childhood in childcare institutions from the Liverpool City Council to help him reconstitute his 'basic identity' and overcome psychological problems, knew who both of his biological parents were.

A few years after *Gaskin*, the Court decided in the paternity case of *M.B. v. United Kingdom*.⁴⁵ In this case, the presumptive biological father erroneously presumed that the mother would separate from her husband, the legal father, and come to live with him. Following the end of the extra-marital affair and the child's birth, the mother refused, however, to enter into a parental responsibility agreement with the applicant. The High Court decided that no order for tests determining paternity should be made, on the grounds that the applicant had never even seen the child and in view of the breakdown of the extra-marital relationship. Primarily, the High Court considered it unfair to expose a child to the risk of loss of the presumption of legitimacy. The High Court was therefore reticent to order a test 'at the behest of a stranger to the marriage' to satisfy that 'stranger's own desire to know the truth'. The man argued that the English courts

38 Van Bueren 1995, *supra* note 1, p. 46. As this author suggests, this may fall short of enforcing the child's right to know (in a strict sense), notably as a corollary of the problem of 'false' birth certificates.

39 In The Netherlands, the 2002 Artificial Insemination (donor insemination) Act (*Wet Donorgegevens kunstmatige inseminatie*) identification of the donor's name and address is permitted when the child reaches the age of sixteen and in the United Kingdom at the age of eighteen following an amendment in 2005 of the Human Fertilisation and Embryology Act (HFEA) 1990. In Austria, Finland, Norway, Switzerland, and the Australian states of Western Australia and Victoria donor anonymity has also been waived, E. Bernat, 'Between rationality and metaphysics: the legal regulation of assisted reproduction in Germany, Austria and Switzerland: a comparative analysis', 1993 *Medicine and Law*, pp. 493-505; A. Lalos *et al.*, 'Legislated right for donor-insemination children to know their genetic origin: a study of parental thinking', 2007 *Human Reproduction*, pp. 1759-1768.

40 Art. 3(1) under (a) and (b) Dutch Artificial Insemination (donor insemination) Act.

41 Art. 3(3) Dutch Artificial Insemination (donor insemination) Act.

42 Art. 3(4) Dutch Artificial Insemination (donor insemination) Act.

43 ECtHR, *Gaskin v. United Kingdom*, Appl. no. 10454/83, 7 July 1989.

44 Forder 1998, *supra* note 7, p. 87.

45 ECtHR, *M.B. v. United Kingdom*, Appl. no. 22920/93, 6 April 1994.

had infringed his rights under Article 8 ECHR by denying him the truth about an aspect of his personal identity, which, incidentally, would mirror the child's interests in 'knowledge that would enable her to avoid marrying within the prohibited degrees of relationship and relevant to her health'. In that respect, the presumptive biological father contended that Article 14 ECHR had been infringed, since the husband could assume parental responsibility by virtue of his marriage, whereas for him this had become impossible. In Strasbourg, the Commission concluded, however, that requirements of legal certainty and security of family relationships allowed States to apply a general presumption of paternity according to which a married man is regarded as the father of his wife's children and to require good cause before allowing the presumption to be disturbed. This case may accordingly be regarded as an early, unsuccessful attempt by a biological father to 'extrapolate' a child's right to know her or his origins in the pursuance of his *own* – but not necessarily, 'selfish' – interests in the establishment of paternity.

Only shortly after *M.B. v. UK*, the Court was confronted with another case concerning the rights of a biological father. In *Kroon and Others v. The Netherlands*,⁴⁶ the case revolved around the impossibility under Dutch parentage law prior to the 1998 reform to challenge the paternity of the mother's (Moroccan) husband, whose whereabouts had been unknown for a prolonged period. Although the mother did not cohabit with the biological father, they had maintained a stable relationship from which a child, Samir, was born. Under Dutch parentage law as it then stood, the possibility for the mother of a 'legitimate' child to deny the paternity of her husband was only open, however, in respect of a child born within 306 days of dissolution of the marriage. The applicants complained that under Articles 8 and 14 ECHR it was not possible for the mother to have entered in the Dutch register of births any statement that the missing husband was not Samir's father. This situation, accordingly, effectively prevented the biological father from establishing legal familial ties with Samir. The ECtHR addressed this situation under reference to a triple formula, holding that 'respect for family life' requires that 'biological and social reality prevail over a legal presumption (1) which, flies in the face of both established fact (2) and the wishes of those concerned without actually benefiting anyone (3)'.⁴⁷

Debatably, then, this situation contrasted critically with *M.B. v. UK*, where the biological father in that case could neither substantiate the existence of a 'social reality' nor did his wish reflect a consensual wish of all parties concerned. In the *Keegan* case, which involved a biological father's opposition to an adoption order, the Court ruled that the rights of the biological father under Article 8 had been violated, however.⁴⁸ The Commission drew support from the fact that the period of in *Keegan* the couple had lived together for eleven months. As Forder has suggested, the relevant and important distinction between *M.B. v. UK* and *Keegan* seems to have been that in the latter case the conception was planned, whereas in the former case it was not.⁴⁹

Following *Kroon*, another paternity claim under Article 8, involving a rebuttal of the marital presumption rule, arose in *Ibrahim Yildirim v. Austria*.⁵⁰ The presumptive father in *Ibrahim Yildirim v. Austria*⁵¹ contended that his impossibility to rebut the marital presumption under Austrian law was tantamount to a violation of the requirements of the *Kroon* formula. As in *Kroon*, the legal father had been missing for years on end. However, in this case it could not be held that this presumption did 'not benefit anyone', as the child had received child support.

46 ECtHR, *Kroon and Others v. The Netherlands*, Appl. no. 18535/91, 27 October 1994.

47 ECtHR, *Kroon and Others v. The Netherlands*, Appl. no. 18535/91, 27 October 1994, para. 40.

48 ECtHR, *Keegan v. Ireland*, Appl. no. 16969/90, 26 May 1994, para. 44.

49 C. Forder, 'Biologisch ouderschap: vaders met of zonder keurmerk', 1997 *NJB*, pp.19-21.

50 ECtHR, *Ibrahim Yildirim v. Austria*, Appl. no. 34308/96, 19 October 1999.

51 ECtHR, *Ibrahim Yildirim v. Austria*, Appl. no. 34308/96, 19 October 1999.

In that connection, the ECtHR affirmed that, once the period within which the applicant can deny paternity has come to an end, greater weight may be accorded to the interests of the child than to the legal father's interests in disproving paternity.

It was the decision in *Mikulić v. Croatia*,⁵² however, which truly marked a transition in the Court's approach to the establishment of paternity in at least two significant ways. From the perspective of the realisation of the informational interest, it was significant that it was expressly recognised that the determination of parentage was an important issue in the development of individual identity. From the perspective that states are under an obligation to devise an equitable parentage law system, it was important in that certain procedural and temporal safeguards, setting significant restrictions to the discretion of the State in paternity proceedings, were now expressly built into the Court's line of argumentation. The ECtHR concluded that no fair balance had been struck in securing the right of the child to have her uncertainty as to her personal identity eliminated without unnecessary delay.

The applicant was a child born out of wedlock and was two months old when her mother filed a suit against the Zagreb Municipal Court so as to establish paternity of the putative father. Before the Croatian courts, the putative father had refused on no fewer than six occasions to undergo testing by invoking the *exceptio plurium concubentium*, thereby suggesting that the mother had sexual relations with a man other than the him at the time of the applicant's conception. The applicant alleged that the paternity proceedings had not been concluded within a reasonable time. The ECtHR, reiterated that particular diligence is required in cases concerning civil status and capacity.⁵³ The ECtHR underlined that the applicant's right to have her paternity established (or denied) and to have her uncertainty as to the identity of her natural father eliminated, fell within the ambit of Article 6 (1) ECHR. As a consequence, Croatia was required to act with particular diligence in ensuring the progress of the proceedings.⁵⁴ Furthermore, the ECtHR took note of the fact that the proceedings had been pending for over four years during which it had been impossible to adjourn a single hearing because of the applicant's conduct. The Croatian Government's submission that this delay was ascribable to the persistent refusal of the man to undergo testing, did not prevent the Court from concluding that Article 6(1) ECHR had been violated. In addressing the applicability of 'family life' under Article 8 ECHR, the Court reiterated that paternity proceedings also fall under that provision's scope. Clearly, the Court could not, however, base this on an applicant's wish to institute paternity proceedings aiming at the dissolution of existing family ties,⁵⁵ since the presumptive father was actually intent on eluding the establishment of his paternity by repeatedly refusing to undergo DNA tests.

Crucially from the perspective of the child's right to know, the Court stated that persons in the applicant's situation had a 'vital⁵⁶ interest, protected by the Convention, in receiving information necessary to uncover the truth about an important aspect of their personal identity.' Although these words echoed *Gaskin*, they were now applied in a rather different socio-legal context. Thus, the Court came to expressly acknowledge that disclosure of information concerning one's parentage has potentially strong formative implications for an individual's sense of identity.⁵⁷

52 ECtHR, *Mikulić v. Croatia*, Appl. no. 53176/99, 7 February 2002.

53 ECtHR, *Bock v. Germany*, judgment of 29 March 1989, Ser. A no. 150, p. 23, para. 49.

54 ECtHR, *Mikulić v. Croatia*, Appl. no. 53176/99, 7 February 2002, para. 44.

55 ECtHR, *Rasmussen v. Denmark*, Appl. no. 8777/79, 28 November 1984, para. 33.

56 ECtHR, *Mikulić v. Croatia*, Appl. no. 53176/99, 7 February 2002, para. 64.

57 ECtHR, *Gaskin v. United Kingdom*, Appl. no. 10454/83, 7 July 1989, para. 39.

As a requirement of proportionality, the availability of an alternative means to enable an ‘independent authority’ to proceed speedily also echoed *Gaskin*, but applied in the distinct context of a judicial determination of paternity.⁵⁸ Notably, this requirement of efficiency left States a margin of appreciation to decide how paternity may be established. This measure of State discretion could also be inferred from the Court’s statement to the effect that ‘it must be borne in mind that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing.’⁵⁹ In that respect the Court took note of the variety of solutions that the States Parties to the Convention to address the legal problem of a presumptive father’s refusal to comply with court orders to undergo testing.⁶⁰ The lack of (any) procedural measures under Croatian law to compel the presumptive father failed to meet proportionality requirements under both Article 6 and Article 8 of the Convention. Thus, it may be deduced from *Mikulić* that enforcement of the right to know (*strictu sensu*) does not require compulsory testing even though the legitimacy of such a legislative choice was also not expressly denied either. As a consequence, it can be stated that according to the Convention adverse inferences may also be drawn against a presumptive father persistently refusing to undergo testing to meet the proportionality and procedural efficiency requirements.

In *Haas v. The Netherlands*, the Court was faced with a claim under Article 8 involving the refusal of the courts to examine and recognise his claim to the estate of the deceased presumptive father over that of his nephew.⁶¹ The applicant acknowledged that his interest in identifying his father, under the notion of *family life*, derived from his wish to claim inheritance rights. This frankness proved imprudent from a procedural point of view, since the Court refuted his claim under Article 8 because, in apparently regarding his claim foremost in terms of a less benign pecuniary motivated interest, it did not ‘serve to resolve any doubts he may have on his personal identity’, all the more so since he was ‘convinced in his own mind’ who his father was.⁶²

3.2. Phase II. Recognition expressis verbis of the right to know one’s origins as an aspect of private life

In the case of *Odièvre v. France*,⁶³ the Court reacknowledged its *Mikulić* formula regarding the existence of a ‘vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one’s personal identity, such as the identity of one’s parents’⁶⁴ under Article 8 ECHR. Nonetheless, the factual context between both cases contrasted sharply, the present claim being geared towards a disclosure of the identity of the birthmother of the applicant, who had been born under the French tradition of anonymous and secret birth (*accouchement sous X*). This tradition was defended by the French Government in the pursuance of perceived public interests as the prevention of infanticide and clandestine abortions. The applicant, Pascale Odièvre, born in 1965, had been adopted at the age of three. A full adoption order took effect in February 1969, in favour of Mr. and Mrs. Odièvre, whose surname replaced the applicant’s surname, which was that figuring on the child’s original birth certificate. The applicant maintained that her request for information about strictly personal aspects of her history and childhood fell within the ambit of Article 8 ECHR, not only as part of

58 ECtHR, *Mikulić v. Croatia*, Appl. no. 53176/99, 7 February 2002, para. 64.

59 ECtHR, *Mikulić v. Croatia*, Appl. no. 53176/99, 7 February 2002, para. 64.

60 ECtHR, *Mikulić v. Croatia*, Appl. no. 53176/99, 7 February 2002, para. 64.

61 ECtHR, *Haas v. The Netherlands*, Appl. no. 36983/97, 13 January 2004, para. 43.

62 ECtHR, *Haas v. The Netherlands*, Appl. no. 36983/97, 13 January 2004, para. 42.

63 ECtHR, *Odièvre v. France*, Appl. no. 42326/98, 13 February 2003.

64 ECtHR, *Mikulić v. Croatia*, Appl. no. 53176/99, 7 February 2002, paras. 54, 64.

her 'private life', but also under the notion of 'family life' with her natural family, with whom she hoped to establish emotional ties.

It was not until the *Odièvre* case that the Court first came to acknowledge *expressis verbis* that 'people have a right to know their origins', that right being derived from a wide interpretation of the scope of the notion of private life'.⁶⁵ 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*. Unlike in *Mikulić* it was unprecedented in the Court's case-law that the question of knowing one's genetic descent in *Odièvre* it could, however, not be said to have been subsumed into the legally more consequential issue of establishing legal parentage. However, in this sharply criticised case,⁶⁶ a slight majority of the judges decided in favour of 'a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions.' In that respect, attention was drawn to the fact that the applicant was already a 38 year old adult and to the – further unspecified – interests of third parties, including those of the adoptive parents, who, incidentally, had lent their moral support to the applicant's claim. In assessing the breadth of the French Government's margin of appreciation, the Court had suggested that anonymous birth was not an isolated phenomenon in Europe, even though this argument can hardly be sustained by fact.⁶⁷ In striking a balance between the applicant's right and the countervailing interests, reference was also made to the new French law permitting mothers to waive their anonymity upon an application to a public organ charged *inter alia* with the centralisation of the identifying information regarding the mothers. As an argumentative non-starter, Judge Ress' added that '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.'⁶⁸ As a result, and without acknowledging it, in Besson's view, the Court unduly gave the mother's right absolute priority thereby violating the child's right's 'inner core'.⁶⁹

3.3. Phase III. The Jäggi and the Phinikaridou cases

In two decisions from 2006, *Ebrü*⁷⁰ and *Jäggi*,⁷¹ the Court followed a more extensive interpretation, perhaps partly in response to the criticism on the *Odièvre* case.⁷² Just like *Odièvre*, the *Jäggi* case involved a primarily informational identity-motivated claim rather than an interest in the establishment of legal parentage *per se*. The applicant, Andreas Jäggi, had been born in Geneva in July 1939. A person known as A.H. had been mentioned as the father by his mother before the civil status registrar. In old Swiss law, A.H. had been in a position to lawfully obstruct the paternity suits that had been lodged against him in January 1948 by claiming that other men

65 EctHR, *Odièvre v. France*, Appl. no. 42326/98, 13 February 2003, para. 44.

66 See, notably, T. Callus, 'Tempered Hope? A qualified right to know one's genetic origin', 2004 *Modern Law Review*, pp. 658-669; B. Mallet-Criout, 'Droit d'accès aux origines personnelles: l'embarras de la Cour européenne des droits de l'homme', 2003 *Recueil Dalloz*, pp. 1240-1245; Besson 2007, *supra* note 26, p. 151.

67 ECtHR, *Odièvre v. France*, Appl. no. 42326/98, 13 February 2003, para. 19. In Europe, anonymous birth is only sanctioned under law in Italy, Luxembourg, the Czech Republic and Hungary, although it is condoned by the public authorities in Germany, Austria and Switzerland. For a comparative law approach to the phenomenon, see R. Frank, 'Rechtliche Aspekte der anonymen Kindesabgabe in Deutschland und Frankreich', 2001 *FamRZ*, pp. 1340-1349.

68 Concurring Opinion of Judge Ress joined by Judge Küris, ECtHR, *Odièvre v. France*, Appl. no. 42326/98, 13 February 2003.

69 Besson 2007, *supra* note 26, p. 151.

70 ECtHR, *Ebrü v. Turkey*, Appl. no. 60176/00, 30 May 2006. This case shall, for reasons of brevity, not be dealt with here, primarily because the legal issues differed little from the *Mikulić* case. In the *Ebrü* case, pursuant to Art. 6 and Art. 8 of the Convention, the Court concluded that the inability of the Turkish courts to settle the paternity issue in a timely manner had left the applicants in a prolonged state of uncertainty as to the child's individual identity.

71 ECtHR, *Jäggi v. Switzerland*, Appl. no. 58757/00, 13 July 2006.

72 Besson 2007, *supra* note 26, p. 151.

might have also fathered the child. This procedural mechanism, known as the *exceptio plurium*, was preserved in Swiss law until 1976, which, incidentally, also happened to be the year that A.H. died. Following the initial 1948 proceedings Jäggi was placed in a foster family. Jäggi maintained that A.H. had had regular contact with him and that he received small sums of money from him during his childhood. Shortly after the death of his presumptive father, Jäggi provided a private laboratory with blood samples of himself and A.H. As the lease on the grave of A.H. drew to an end, Jäggi successfully filed for the acquisition and prolongation of the rights on the tombstone in 1997. The Court plainly referred to the applicant's 'right to know his genetic descent' linking it to an encompassing 'right to identity' also protected under Article 8 ECHR.⁷³ In performing its proportionality test between the various rights involved and favouring the applicant's right, the Court came to quite a different result, however, than in *Odièvre* by taking the applicant's adult age into account. Thus, the Court pointed out that the 'interest an individual may have in knowing her or his (genetic) descent does not decrease as one ages, *but rather on the contrary*'.⁷⁴

Aware of the emotionally and culturally charged dimensions of *post mortem* determination of paternity, the Court juxtaposed the 'right to know' and the 'right to respect for the dead', but did not delve into the nature of that latter right, apart from observing that it has a 'temporary nature'.⁷⁵ The Court accordingly seemed to shy away from taking in any ethical position on the rights of dead persons, perhaps wisely so, by drawing attention rather to the fact that the lease on the tomb would expire by 2016, which would indicate that the respect for the dead lacked any lasting character.⁷⁶ Still, and curiously enough for a secular court, the Court followed the Swiss proceedings in attaching some weight to the fact that the relatives had not demonstrated any objections of a religious or philosophical kind. According to the dissenting opinion, the Court thereby unduly considered the fact that exhumation may very well also displease – indeed even appall – surviving close relatives, regardless of their moral convictions.⁷⁷

The Court acknowledged that an exhumation could affect the living memory that close relatives may have of a deceased parent, if only because the procedure could strike them as something particularly morbid. As in *Odièvre*, the Court mentioned the possible interests of third parties, notably close relatives, in opposing a claim, but again, did not specify them further. As a *post mortem* paternity case, it was somewhat infelicitous following that rationale, to then go on and state that 'testing is not particularly intrusive'.⁷⁸ It remains circumspect whether the Court thereby also intended to claim that DNA paternity testing would be even less intrusive on a living putative father; this may be plausible, since this procedure doubtlessly involves a less contentious and emotionally charged situation than exhumation of a corpse. Even if this were so, it might sit uneasily with *Mikulić*, because the Court therein seemed to suggest that the use of physical compulsion in parentage testing, in view of the required infringement on the person's physical integrity, formed only one among many solutions for States to meet their obligations under Article 8.⁷⁹

73 ECtHR, *Jäggi v. Switzerland*, Appl. no. 58757/00, 13 July 2006, para. 25.

74 ECtHR, *Jäggi v. Switzerland*, Appl. no. 58757/00, 13 July 2006, para. 40.

75 ECtHR, *Jäggi v. Switzerland*, Appl. no. 58757/00, 13 July 2006, para. 41.

76 ECtHR, *Jäggi v. Switzerland*, Appl. no. 58757/00, 13 July 2006, para. 41.

77 See the dissenting opinion of Judge Hedigan, to which Judge Gyulumyan also subscribed, ECtHR, *Jäggi v. Switzerland*, Appl. no. 58757/00, 13 July 2006.

78 ECtHR, *Jäggi v. Switzerland*, Appl. no. 58757/00, 13 July 2006, para. 41.

79 That states have been offered such relative leeway, may also be inferred from the case ECtHR, *Szarapó v. Poland*, Appl. no. 40835/98, 23 May 2002, para. 42. Thus, presumably, for states to comply with the requirements of *Mikulić* and *Szarapó*, adverse inferences could in a paternity case also be drawn against the putative father to the effect that his paternity could be established upon a (persistent) refusal to undergo testing. This solution is chosen in countries such as England, France, Italy and The Netherlands. See *inter alia* the various country

If the recognition of the applicant's claim in the *Jäggi* case is partially ascribable to the fact that it was of little consequence for the establishment of his legal parentage and appeared sufficiently 'ideologically motivated',⁸⁰ the Court's approach may for similar reasons have been more restrictive in some other recent paternity cases.⁸¹ In *Phinikaridou* case, the Court established that 'a comparative examination of actions for judicial recognition of paternity reveals that there is no uniform approach in this field', while adding that a 'significant number of states do not set limitation periods for children' and recognising a 'tendency towards greater protection of the right of the child to have its paternal affiliation established'.⁸² The Court also drew attention to the fact that 'it had not been shown how the general interest in protecting legal certainty of family relationships or the interest of the presumed father and his family outweighed the applicant's right to have at least one opportunity to seek judicial determination of paternity'.

It appears particularly significant that the Court drew a distinction '*between cases in which an applicant has no opportunity to obtain knowledge of the facts and, cases where an applicant knows with certainty or has grounds for assuming who his or her father is but for reasons unconnected with the law takes no steps to institute proceedings within the statutory time-limit*'.⁸³ Accordingly, the Court seemed to suggest that in a situation wherein an (adult) child remains passive while having more than an inkling of who his biological father could be, but fails to undertake procedural action, such an (adult) child should not be in a position to postpone paternity proceedings until he or she deems it fit. Perhaps this is because it would be akin to a calculating form of procedural inertia that the law need not condone. Conversely, the claim would be 'meritorious' if the expiry of a procedural time-limit to establish paternity were attributable to objective factors beyond her or his subjective control. Thus, a legal system may under circumstances have to interpret the time-limit it sets in the interests of legal certainty in a more flexible manner, because a child should be given a 'real' opportunity to ascertain paternity.⁸⁴ Furthermore, the *Phinikaridou* case is interesting in having recognised of what may be coined to be a form of 'procreational privacy' under certain circumstances as the claim becomes 'estopped' in the course of years.⁸⁵ The Court accordingly stated that 'a presumed father's interest in being protected from stale claims concerning facts that go back many years cannot be denied', in connection to the prevention of 'possible injustice if courts were required to make findings of fact that went back many years.'⁸⁶

To this author, in distinguishing between degrees of (un)certainty as regards the identity of one's biological father with a view to the determination of the viability of the claim and the suggestion that it is legitimate to enquire into the legal nature of the applicant's motives in seeking the information, the Court may have taken an overtly restrictive view on the scope of the right to know. Moreover, it may also be impracticable for courts to determine whether the motives of the applicant relate primarily to the establishment of legal parentage and the consequences thereof, such as inheritance, or bearing an ideological dimension. The reasons for a child

reports in A. Spickhoff *et al.* (eds.), *Streit um die Abstammung: ein europäischer Vergleich*, 2007.

80 Compare, *mutatis mutandis*, ECtHR, *Haas v. The Netherlands*, Appl. no. 36983/97, 13 January 2004.

81 ECtHR, *Shofman v. Russia*, Appl. no. 74826/01, 24 November 2005; ECtHR, *Phinikaridou v. Cyprus*, Appl. no. 23890/02, 20 December 2007.

82 ECtHR, *Phinikaridou v. Cyprus*, Appl. no. 23890/02, 20 December 2007, para. 58.

83 ECtHR, *Phinikaridou v. Cyprus*, Appl. no. 23890/02, 20 December 2007, para. 63.

84 For the possibility of an effective claim to deny paternity by the legal father under Art. 8 in conjunction with Art. 6 of the ECHR, see also: ECtHR, *Mizzi v. Malta*, Appl. no. 26111/02, 12 January 2006, para. 134.

85 Contrast this with the mother's right to give birth anonymously in France considered reconcilable with the margin of appreciation accorded to the French state under Art. 8 of the Convention in *Odièvre v. France*, Appl. no. 42326/98, 13 February 2003.

86 ECtHR, *Phinikaridou v. Cyprus*, Appl. no. 23890/02, 20 December 2007, paras. 51 and 53. These interests were also acknowledged in: ECtHR, *Mizzi v. Malta*, Appl. no. 26111/02, 12 January 2006, para. 83, and ECtHR, *Shofman v. Russia*, Appl. no. 74826/01, para. 39.

to choose not to cut legal ties with the socio-legal father may, after all, stem from a variety of legal and affective reasons. Especially in a situation wherein a biological father is not yet in sight following the expiry of the procedural time-limit for denying paternity, a child may, moreover, also find it appropriate to postpone the undertaking of judicial action. Furthermore, it may be considered unjust that the expiry of a procedural time-limit in establishing legal parentage necessarily results in a loss of the child's right to ascertain her or his biological fatherhood, whatever the degree of certainty as regards his identity the child may have, certainly if a court recognises that knowing may become more important as one matures.⁸⁷ In connection to that latter argument, as we shall see, the recent law proposal in Germany provides a singular example of a legislative attempt to bridge the gap between ideology and parentage law concerns.

4. Ramifications of the scholarly and legal debate of the right to know one's origins in Germany

4.1. The singular historical-legal context of the debate on the scope of the 'right to know' in Germany

It goes beyond the scope of this article to give an overview of the constitutional development of the right to know in Germany. However, it is clear, from a comparative perspective that Germany has been a frontrunner in this development.⁸⁸ The right is based on the personality right doctrine⁸⁹ as well as §1618a, German Civil Code, incorporating a reciprocal duty of care for parents and children, which, at least theoretically, would involve a duty of the mother to inform the child on her or his genetic descent.⁹⁰

In Germany, persons may, except in case of medical necessity, in principle be obliged to comply with a court order to undergo parentage testing.⁹¹ Controversially, this article stems from the national-socialist period, but this historical fact has not been considered to undermine its contemporary legitimacy, as it serves fundamental rights-related rather than eugenic or racist public policy concerns. Still, as Frank points out, 'on an international comparative level, it is a fascinating phenomenon that nearly all legal systems rank bodily integrity higher on a scale of values than biological truth, German law constitutes the exception.'⁹²

Following the latest German parentage law reform in 1998, paternity is established in accordance with the marital presumption rule,⁹³ recognition⁹⁴ or a judicial determination of paternity.⁹⁵ Paternity may be denied by the man whose paternity has been established on the basis of marriage or recognition, by the mother, the child and since 2003 also the man who claims under oath that he had sexual intercourse with the mother during the conception period.⁹⁶

This latter party, as the 'biological father', may deny an established paternity only if the child does not have a factual social-family relationship with his or her legal father,⁹⁷ and subject to the time-limit of two years from the day that he knows of circumstances speaking for his

87 ECtHR, *Jaggi v. Switzerland*, Appl. no. 58757/00, 13 July 2006, para. 40. See above.

88 BVerfGE 79, 256 = *FamRZ* 1989, 255. See also Spickhoff *et al.* 2007, *supra* note 79.

89 The personality right is inferred from Art. 2 I in conjunction with Art. 1 I Federal Constitution (*Grundgesetz, GG*). Also see above.

90 German Civil Code (*Bundesgesetzbuch, BGB*). On this duty, see in particular R. Frank & T. Helms, 'Der Anspruch des nichtehelichen Kindes gegen seine Mutter auf Nennung des leiblichen Vaters', 1997 *FamRZ*, pp. 1258-1263.

91 Pursuant to §372a German Civil Procedural Code (*Zivilprozessordnung, ZPO*).

92 R. Frank, 'Compulsory physical examinations for establishing parentage', 1996 *International Journal of Law, Policy and the Family*, p. 210.

93 §1592 I German Civil Code.

94 §1592 II German Civil Code.

95 §1592 II German Civil Code.

96 §1600 (1) German Civil Code.

97 §1600 (2) German Civil Code.

paternity.⁹⁸ As the socio-legal father will usually have such a factual relationship, it is presumed that this extension of the number of claimants in paternity proceedings may not be so significant.⁹⁹

As a further feature of the German legal debate, from around the turn of the century, extra-judicial forms of testing entered the 'paternity market', provoking a much larger debate at the governmental and academic level than elsewhere in Europe.¹⁰⁰ An all-out ban on such forms of testing was first proposed, but so far this has not taken effect. German courts have, however, insisted on a requirement of preliminary indications of non-paternity to admit a paternity suit, thus aimed at thwarting 'frivolous' claims, as well as in the interests of legal certainty. This procedural requirement was re-acknowledged in two Federal Constitutional Court cases.

Finally, debate on the creation of an informational procedure for the verification of genetic descent has so far been confined largely to Germany. It is acknowledged that this must be accounted for, to some extent, as an response to the scholarly criticism on the insistence on preliminary indications of non-paternity, which are unique from a comparative law perspective.

4.2. The new German law: is an 'exclusively informational' procedure a legal panacea?

In its 1989 landmark decision, the Federal Constitutional Court had called on the legislature to enquire as to how the child's right to know could best be effectuated. This appeal of the Federal Constitutional Court to the legislature descended into a debate on the desirability and legal feasibility of a so-called 'isolated' procedure,¹⁰¹ in which solely the biological link would be established without a loss of status. In a case which followed in 1990, a child sought identification of his biological father.¹⁰² The child maintained that he was not interested in breaking off the relationship and thus contact with his legal father, but that his interest derived from his wish to fill up narrative gaps in his personal history. His claim was found inadmissible as the relevant statutory time-limits for a status procedure had expired.¹⁰³

In response a number of authors warmed to the idea of a 'solely informational' procedure.¹⁰⁴ Such a qualified procedure was already believed to exist in relation to adoptees, without this seemingly provoking any problems in the child's relationship to its socio-legal parents. Thus, the registration of data concerning the biological parents also served adopted children's informational needs without calling into question their status.¹⁰⁵ Rauscher dismissed this analogy, however, since the nature of adoption is *ab initio* fundamentally different.¹⁰⁶ Justifiably he pointed out that whereas adoption is geared 'openly' towards the creation of a legal relationship with parents other than the biological parents, a characterisation of a socio-legally constructed relationship based on a 'false' presumption of paternity as such would be untenable.¹⁰⁷

98 §1600b German Civil Code.

99 Dethloff 2005, *supra* note 13, p. 258.

100 See in particular: C. Rittner & N. Rittner, 'Rechtsdogma und Rechtswirklichkeit am Beispiel so genannter heimlicher Vaterschaftstests', 2005 *NJW*, pp. 945-948; M. Wellenhofer, 'Die prozessuale Verwertbarkeit privater Abstammungsgutachten', 2005 *FamRZ*, pp. 665-668.

101 In German 'isolierte Abstammungsfeststellungsklage'.

102 High Regional Court (*Oberlandesgericht, OLG*) Oldenburg, 17 July 1990, 1991 *FamRZ*, pp. 351-352.

103 In 1998, the High Regional Court of Hamm reached a similar conclusion in a case which involved a child's 'purely informational' interest. High Regional Court (*Oberlandesgericht, OLG*) Hamm, 7 August 1998, *FamRZ* 1998, p. 1365.

104 D. Mutschler, 'Emanzipation und Verantwortung – zur Neuordnung des Abstammungsrechts', 1994 *FamRZ*, p. 65; more skeptical: J. Gernhuber & D. Coester-Waltjen, *Familienrecht*, 2006, pp. 587-588.

105 D. Coester-Waltjen, 'Künstliche Fortpflanzung und Zivilrecht', 1992 *FamRZ*, p. 369.

106 T. Rauscher & J. von Staudinger, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einföhrungsgesetz und Nebengesetzen 4. Buch. Familienrecht*, 2004, § 1592, no. 4, pp. 227-228.

107 *Ibid.*

Regarded by some as a threat to the time-worn principles of parentage law, the ‘isolated’ procedure also met with skepticism in the parliamentary debate on the children’s law reform.¹⁰⁸ In particular, it was fathomed that, as a ‘third parent’, the biological parent’s position would remain ambiguous with a view to the child’s integration within her or his socio-legal family. In that connection, it was feared, too, that the socio-legal father’s paternity, once bereft of its legal façade of biological truth, would be downgraded to a pitiable *Zahlvaterschaft*.¹⁰⁹

Following a decision of the Federal Constitutional Court in 2007 the debate on an ‘exclusively informational’ procedure revived in earnest.¹¹⁰ In the decision, the federal legislature was called upon to foresee in the creation of a legal procedure by the end of March 2008 for the enforcement of the father’s constitutional right to know his progeny.¹¹¹ In October 2007, the Federal German Government submitted a legislative proposal regarding ‘the ascertainment of paternity independent from proceedings involving a denial of paternity’.¹¹² Its Preamble affirms the aim of promoting ‘dialogue within the family and society, to protect the family as a social institution and to prevent the intervention of courts as much as possible.’¹¹³ The initial law proposal received sharp criticism for a number of reasons.¹¹⁴ At a dogmatic level, the double-track character in itself was presumed to irretrievably provoke ‘serious frictions’ in parentage law.¹¹⁵ In more concrete terms, the insistence on preliminary requirements of non-paternity in the status procedure would be difficult to reconcile with the ease of access to the biological truth in the new procedure, causing frictions if the evidence used in the new procedure were admitted in a subsequent status procedure.¹¹⁶

In defiance of such criticisms, however, as of the 1st April 2008, §1598a (1), German Civil Code accords mother, father and child a temporally unrestrained right to have their biological parentage relationships¹¹⁷ ascertained by a (private) laboratory that meets publicly sanctioned scientific standards. The mother and the legal father may now require the extraction of a genetic sample of the child before the court while the child may require such samples from both legal parents with a view to verification of the biological link accordingly. If any of these three family members refuses to co-operate, consent may be replaced by the family court.¹¹⁸ However, the court may refrain from ordering a test if it considers that this may not be in the child’s interests.¹¹⁹ A rather extreme example is: a child in puberty suffers from an eating disorder and there is a risk that her or his health will worsen upon disclosure of the biological truth, possibly even entailing a risk of suicide. In such a case, the court should have to waive its competence to order the

108 *BT-Drucksachen* 13/4899, p. 56.

109 *Zahlvaterschaft* = ‘a fatherhood based on the handing out of money to the child’.

110 Federal Constitutional Court (*Bundesverfassungsgericht, BVerfGE*), 13 February 2007, 2007 *FamRZ*, p. 441.

111 Art. 2.1 in conjunction with Art. 1.1 Federal Constitution (*Grundgesetz, GG*). *Recht des rechtlichen Vaters auf Kenntnis seiner Nachkommenschaft (Nachwuchses)*.

112 Entwurf eines Gesetzes zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren, 4 October 2007, *BT-Drucksachen* 16/6561.

113 ‘Die hier vorgeschlagene Regelung (...) soll den Dialog in der Familie und der Gesellschaft fördern, die Familie in ihrem sozialen Bestand schützen und die Einschaltung von Gerichten möglichs vermeiden’, in: *BT-Drucksachen*. 16/6561, p. 10. The use of the word ‘dialogue’, interpreted in accordance with its Greek etymology, would suggest an ongoing process of communication and deliberation. As such, this choice of words was considered particularly inept in a humorous if merciless commentary on this law proposal written by D. Schwab, ‘Abstammungserklärung leicht gemacht; Neuer Dialog in der Familie’, 2008 *FamRZ*, p. 23.

114 R. Frank & T. Helms, ‘Abhandlungen: Kritische Bemerkungen zum Regierungsentwurf eines “Gesetzes zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren”’, 2007 *FamRZ*, pp. 1277-1281; Schwab 2008, *supra* note 113, pp. 23-27.

115 Frank & Helms 2007, *supra* note 114, p. 1278 ‘(...) solche Zweigleisigkeit (...) zu gravierende Friktionen im Abstammungsrecht führen wird (...)’.

116 *Ibid.*

117 Ascertaining biological motherhood is therefore also possible but is likely to be more rare.

118 §1598a III German Civil Code.

119 §1598a III German Civil Code.

'purely informational' test. Crucially, too, the legal regime to lodge status proceedings remains largely the same.

Accordingly, once the biological link has been disproved in the new procedure,¹²⁰ a subsequent denial of (legal) paternity within the previously already applicable procedural time-limits of two years for the legal parents will remain open. However, if the new procedure is first pursued, or if the person has been threatened not to deny paternity, the beginning of the statutory time-limit is deferred to that moment. A legal father or mother may therefore not 'calculatingly' await an opportune moment to deny paternity when they already know that the man is not the child's biological father. For the child, the period within which paternity has to be denied will not begin until six months after becoming a legally capable adult.¹²¹

The current law is its omission to reinforce the biological father's right to know. This was considered justifiable since he can now already demonstrate a willingness to assume parental responsibilities in the absence of a 'socio-familiar relationship' between the child and his legal father.¹²² As Helms and Frank suggested, this omission fails to pay tribute to the rationale for creating a separate procedure geared towards a principled recognition of the need to clarify genetic descent regardless of concerns associated with legal parentage.¹²³ Both authors acknowledge, however, that if the number of claimants of a constitutional right to know their origins were extended further, it could lead to even more claims.¹²⁴ Connected to such arguments is a weakness of the law which stems from the fact that the child will still not be able to first avail himself of the new procedure with regard to a presumptive biological father before contemplating status proceedings, as the child's right only applies with respect to his legal father and mother. Moreover, conceptual boundaries remain elusive: who can claim a 'right to know'? A half-sister and half-brother and a grandparent and grandchild might also have quite legitimate reasons to find out an important part of their biological legacy.¹²⁵

Whereas a child may prefer to retain a legal relationship with the socio-legal father after his biological link has been disproved, it may be more circumspect whether legal fathers will content themselves with the negative results in the new procedure on the assumption that most legal fathers will not wish to uphold parental status in the absence of a biological link.¹²⁶ As private laboratories may conduct testing, the legal father may moreover be prevented from claiming expenses from the state in the new procedure; in order to obtain a substantiated 'initial suspicion' to deny his legal paternity the legal father may therefore first have to 'reach into his own pocket'.¹²⁷ A distinction between 'rich' and 'poor' fathers in denying paternity could accordingly not only become imminent, but the court may still see fit to order a new, judicial test.

5. Concluding remarks: the legal narrative of the right to know, a story to be continued

The 'right to know' has gained progressive recognition under Article 8 ECHR in the context of socio-legally constructed paternity. The ECtHR has, however, also recognised the presumptive father's (conditioned) right to what may be coined a time-related right to 'procreative' privacy as well as the rights of third parties such as those of relatives. It falls within the margin of

120 According to the law proposal the biological link is not disproved in 80% of the reported cases.

121 § 1600b V German Civil Code in conjunction with §210 German Civil Code.

122 *BT-Drucksachen* 16/6561, pp. 12 and 19.

123 Frank & Helms 2007, *supra* note 114, p. 1279.

124 Frank & Helms 2007, *supra* note 114, p. 1279; also Schwab 2008, *supra* note 113, p. 23.

125 Frank & Helms 2007, *supra* note 114, p. 1279.

126 *Ibid.*

127 *Ibid.*, p. 1280.

appreciation of states to establish paternity in an efficient manner. The German doctrinal idea of an ‘exclusively informational’ procedure for establishing genetic descent appears alluring since, at least in the abstract, in its realisation of the right to know *strictu sensu*, it could leave the fundamentals of intention and social reality immanent in parentage law, intact. The new German law shows, however, that there are disadvantages that are not easily ignored. Nonetheless, as long as the informed consent may be obtained from all the persons involved, including that of a (sufficiently adult) child and that of the mother, there would appear little reason to deny that the informational interest could also be realised outside courts. For that reason alone, an all-out ban on extra-judicial tests seems disproportionate. Drawing a sharp distinction between extra-judicial tests as such and ‘covert’ forms of extra-judicial testing which dispense with consent requirements is therefore necessary. In situations in which parties have not agreed or could not agree on resorting to paternity testing, the legislature faces tougher choices. Leaving aside the possibility of DNA testing and registration of the child’s biological father following birth, enforcement of the ‘right to know’ *strictu sensu* in the context of a ‘false’ socio-legally constructed paternity might be achieved either through the creation of an ‘exclusively informational’ procedure. If this latter course is chosen, this might very well mean that a legislator must also ‘have the courage to point out to whoever seeks to ascertain relationships of biological parentage, that he must content himself with the realisation of his right to know his genetic descent and not seek advantages deriving from the establishment of legal parentage’.¹²⁸ This prompts further enquiries into the ‘inner core’ of the right to know: could it not involve a right to trust rather than to identify who one’s father if necessary with physical compulsion?¹²⁹ Thus, conceived as a right ‘not to be deceived’ about a vital part of our identity, for most it may still be sufficient to believe rather than to know the ‘truth’.

128 ‘(...) muss man auch den Mut aufbringen, denjenigen, der die Klärung der genetischen Abstammungsverhältnisse erzwingt, darauf zu verweisen, dass er sich mit der Befriedigung seines Rechts auf Kenntnis der eigenen Abstammung zufrieden geben muss und statusrechtlich hieraus keine Vorteile ziehen kann’, in: Frank & Helms, 2007, *supra* note 114, p. 1281.

129 Compare §372a German Civil Procedural Code (*Zivilprozessordnung, ZPO*), prescribing in such a duty to co-operate in parentage testing.