

FOUNDATIONAL FACTS, RELATIVE TRUTHS

EUROPEAN FAMILY LAW SERIES

Published by the Organising Committee of the
Commission on European Family Law

Prof. Katharina Boele-Woelki (Utrecht)

Prof. Frédérique Ferrand (Lyon)

Prof. Cristina González Beilfuss (Barcelona)

Prof. Maarit Jänterä-Jareborg (Uppsala)

Prof. Nigel Lowe (Cardiff)

Prof. Dieter Martiny (Frankfurt/Oder)

Prof. Walter Pintens (Leuven)

**FOUNDATIONAL FACTS,
RELATIVE TRUTHS**

*A comparative law study on children's right
to know their genetic origins*

RICHARD J. BLAUWHOFF



intersentia

Antwerp – Oxford – Portland

Distribution for the UK:

Hart Publishing Ltd.
16C Worcester Place
Oxford OX1 2JW
UK
Tel: + 44 1865 51 75 30
Fax: + 44 1865 51 07 10

Distribution for the USA and Canada:

International Specialized Book
Services
920 NE 58th Ave Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Tel.: +1 503 287 3093
Fax: +1 503 280 8832
Email: info@isbs.com

*Distribution for Switzerland and
Germany:*

Stämpfli Verlag AG
Wölflistrasse 1
CH-3001 Bern
Switzerland
Tel: + 41 (0)31 300 63 18
Fax: + 41 (0)31 300 66 88

Distribution for other countries:

Intersentia Publishers
Groenstraat 31
BE-2640 Mortsel
Belgium
Tel: + 32 3 680 15 50
Fax: + 32 3 658 71 21

This volume is based on the dissertation defended by the author at Utrecht University on 15 May 2009.

Typesetting: G.J. Wiarda Institute for Legal Research, Boothstraat 6, 3512 BW Utrecht.

Richard J. Blauwhoff

Foundational facts, relative truths. A comparative law study on children's right to know their genetic origins

ISBN 978-90-5095-913-1

D/2009/7849/29

NUR 822

© 2009 Intersentia

www.intersentia.com

Behoudens uitzondering door de wet gesteld, mag zonder schriftelijke toestemming van de rechthebbende(n) op het auteursrecht c.q. de uitgevers van deze uitgave, door de rechthebbende(n) gemachtigd namens hem (hen) op te treden, niets uit deze uitgave worden veelevoudigd en/of openbaar gemaakt door middel van druk, fotocopie, microfilm of anderszins, hetgeen ook van toepassing is op de gehele of gedeeltelijke bewerking. De uitgevers zijn met uitsluiting van ieder ander onherroepelijk door de auteur gemachtigd de door derden verschuldigde vergoedingen van kopiëren, als bedoeld in artikel 17 lid 2 der Auteurswet 1912 en in het KB van 20-6-'64 (Stb. 351) ex artikel 16b der Auteurswet 1912, te doen innen door (en overeenkomstig de reglementen van) de Stichting Reprorecht te Amsterdam.

No part of this book may be reproduced in any form, by print, photo copy, microfilm or any other means, without written permission from the publishers.

ACKNOWLEDGEMENTS

Looking back on the past four years, I can affirm, like so many researchers before me, that the writing of a dissertation can be a formative experience, not just academically but also personally. When I applied for a position as a Ph.D researcher at the Molengraaff Institute for Private Law in December 2004, I was lured by the comparative and human rights aspects of the research proposal because of my background in international and European public law. The subject matter, which the ‘right to know one’s origins’, also had a definite romantic sound to it. At the same time, the research topic still seemed very elusive and unfathomable. As far as I could tell, the research topic had to do with an individual search for one’s distant past and introspection. I also knew that once I would set myself such a task I would really want to finish it. This sense of commitment proved important for writing this book. But I questioned how one would be able to discuss such personal issues from a legal perspective.

Thus, back in 2004, I felt some apprehension at first. Indeed, ‘at root’, I wondered whether I would be able to combine academic distance with a personal interest in the topic. Soon after I started to immerse myself in the research topic, this initial apprehension and discomfort waned. I took an active interest in family law and I discovered that I could develop my own ideas about this research topic.

Four years later, I can still not claim this book to be fully my own. By this I mean that I will remain deeply indebted to a number of persons. First of all, I would like to thank my supervisor Katharina Boele-Woelki who, right from the very beginning, expressed her confidence in my ability to bring this research to a successful end. Your strong ideas about what comparative law should entail, provide but one example of how you manage to keep a broad horizon and an open mind while also insisting upon high standards for comparative law research. Moreover, your ability to combine a firm commitment to your own ambitions with an honest interest in all of your individual Ph.D candidates inspires admiration.

I would further like to thank all of my direct colleagues Bente, Christina, Christine, Ellen, Ian, Merel, Nora, Pia and Vesna for having contributed so much to creating a stimulating and friendly working environment. Among my direct colleagues, I would like to thank Wendy Schrama above all for her numerous invaluable comments and suggestions. Furthermore, a special thanks goes to Machteld Vonk for sharing her insights into parentage law and her legal expertise in the area of donor insemination and surrogacy. I also want to thank Peter Morris for editing my English and Titia Kloos and Willemien Vreekamp for making my manuscript camera-ready with such efficiency.

As I spent a considerable amount of time abroad over the past four years, I would also like to thank professor Frédérique Ferrand of the Université Jean Moulin Lyon III for her comments on French law. In addition, I would like to thank Professor Tobias Helms of the Philipps-Universität Marburg took much time to discuss developments in German law and gave me such a cordial welcome during my stay in Marburg and also commented on my manuscript. In addition, I would like to thank professor Guilherme de Oliveira of the Universidade de Coimbra for his time during my research period in Portugal. In Coimbra, I would also like to thank doctor Rafael Vale e Reis and his wife Carla Barbosa for their valuable comments and Portuguese hospitality. Moreover, I would like to thank doctor Willem Breemhaar, judge at the Leeuwarden Court of Appeal and professor Gerard René de Groot of Maastricht University and professors Jenny Goldschmidt and Jaap Sijmons of Utrecht University for their comments on my manuscript.

I would further like to thank my friends, both here in the Netherlands and abroad, for their enduring friendship which adds colour to my life. Without them this would surely have been a much more solitary enterprise. In particular, I would also like to thank my ‘paranymphs’ Christoph Jeloschek and Eline Veltkamp for their long-standing loyal friendship and kindness.

Last but very from least, I am fortunate to have found ‘true’ parents in Martin and Daphne and to have a sister like Fiona. Now closing a long chapter, ‘in a sense even before the book unfolds itself’, I am glad to be able to cherish fond memories and to be able to rely on strong and solid bonds.

TABLE OF CONTENTS

Acknowledgements	v
List of abbreviations	xvii

PART I: UNKNOWN ORIGINS

Chapter I.

Unknown origins and the biological truth	3
1. Untold truths	3
1.1. Truth, truthfulness and legal empowerment	3
1.2. Origins of a right to know one's origins?	5
2. Disparities between parental status and the biological truth	8
3. A legal right with ethical implications, a moral right with legal implications	9
4. Justifications of a right to know one's origins	10
4.1. Marriage and biology as legal determinants of parentage	11
4.2. The utility of parent-identifying information	15
4.3. Justifications for a right to information and its social efficaciousness	15
4.3.1. The psychological rationale for providing parent-identifying information	16
4.3.2. Various concepts of personal identity	19
4.3.3. Medical rationale	21
4.3.4. The prevention of persons entering into the prohibited degrees of consanguinity	22
4.4. Ethical justifications based on the notion of autonomy	23
4.4.1. Autonomy as a value protecting a right to informational self-determination or decisional privacy	23
4.4.2. Informational self-determination and children	24
4.5. The distinction between sincerity and accuracy	26
4.5.1. Sincerity and accuracy	26

4.5.2. The requirement of an investigative investment in respect of autonomous individuals	28
5. Methodology and structure	29
5.1. Research questions	29
5.2. Comparative method	30
5.3. The choice of jurisdictions	32
5.3.1. Example of a comparison: the prohibited degrees of consanguinity	34
6. Terminology	35
7. Limitations	36
8. Structure of the book	38

PART II: THE CONSTITUTIONAL LEGAL FRAMEWORK

Chapter II.

The international protection of children's right to know one's origins 43

1. Outline	43
2. The United Nations Convention on the Rights of the Child	44
2.1. Historical note	44
2.2. Addressees	45
2.3. Relevant legal principles	45
2.4. Identity rights protected under the United Nations Convention on the Rights of the Child	47
2.4.1. The legal background of Article 7(1) UNCRC	47
2.4.2. Article 7(1) UNCRC: 'the right to know and be cared for by one's parents as far as possible'	50
2.4.3. Article 8: a broad conceptualisation of a child's identity	52
3. The Universal Declaration of the Human Genome and Human Rights	54
4. International implementation mechanisms	55
4.1. Enforcement of the UNCRC	55
4.2. Other international implementation mechanisms	56
5. Concluding remarks	57

Chapter III.

Regional protection of children's right to know their genetic origins 59

1. Outline	59
2. Substantive law	59

2.1.	The Council of Europe	59
2.2.	European Union data protection law	63
3.	The case law of the European Court of Human Rights	64
3.1.	Gaskin: access to an ‘independent authority’	64
3.2.	The state’s ‘margin of appreciation’ in paternity proceedings	67
3.3.	A father’s rights to know the ‘truth’?	69
3.4.	The informational interest of a birthparent in adoption	72
3.5.	A State’s ‘margin of appreciation ‘in relation to donor anonymity’	73
3.6.	Mikulić: a ‘vital interest’ in receiving information	75
3.7.	Haas: the relevance of an ideological motive	79
3.8.	Odièvre: anonymous birth and discreet birth	81
3.9.	Evans: withdrawal of consent to IVF treatment and the ‘right to a genetically-related child’	85
3.10.	Jäggi: the post mortem identification of biological fathers by an adult searcher	91
4.	Concluding remarks	95

Chapter IV.

The protection of the right to know one’s origins in national constitutional law 101

1.	Outline	101
2.	Germany	101
2.1.	Early modern history	101
2.2.	Towards recognition of a constitutional right to know one’s origins and a mother’s duty to tell	105
2.3.	Recognition of the right to know on the basis of the personality right	110
2.4.	Early doctrinal debates on the feasibility of the creation of an ‘isolated’ procedure	113
2.5.	The 1996 Parentage Law Reform Act	114
2.6.	Extra-judicial paternity tests and recognition of the father’s constitutional right to know his progeny	115
2.7.	Verification of the (non-)existence of biological ties within the legal family before German courts	115
3.	France	117
3.1.	Early modern history	117
3.2.	The creation of a National Council for Access to Personal Origins (CNAOP)	120

3.3.	The 2005 reform of parentage law	121
4.	The Netherlands	121
4.1.	Early modern legislative history	121
4.2.	The 1998 reform of Dutch parentage law	123
4.3.	The Valkenhorst I case	125
4.4.	The Valkenhorst II case	130
5.	Portugal	136
5.1.	Early modern history	136
5.2.	Constitutional legal recognition of a right to know one's origins	138
6.	Comparison and evaluation	141

PART III: TOWARDS A LEGAL FRAMEWORK FOR A COMPARATIVE ANALYSIS
OF THE RIGHT TO KNOW

Chapter V.

A search for guiding principles 145

1.	Outline	145
2.	Constitutional rights theory	146
2.1.	Perspectives on the balancing of constitutional rights	146
2.2.	Balancing the right to information in the national constitutional order	149
3.	State obligations	151
3.1.	The boundaries between positive and negative obligations of the state	151
3.2.	The distinction between positive and negative state obligations	151
4.	Principles	152
4.1.	Decisional privacy as an aspect of autonomy	152
4.2.	Responsibility	154
4.2.1.	Procreational responsibility	154
4.2.2.	Procreational responsibility and reproductive freedom	157
4.2.3.	State responsibility, subsidiarity and proportionality	157
4.3.	Equality	159
4.3.1.	Equality in general	159
4.3.2.	Equality and the circumstances upon conception and birth	161
4.3.3.	Equality and age	162
4.3.4.	Equality and gender	164
4.3.4.1.	Utility and rights in gender thinking	165

5.	Conflict	166
5.1.	Public interests	166
5.2.	Private interests: the privacy of the parent	167
5.3.	Private interests: a parent's right to corporal integrity	168
5.4.	Third party interests	168
5.5.	Concurrence of a parent's and child's informational needs	168
6.	Selection of evaluative criteria	169

PART IV: THEMATIC COMPARISON

Chapter VI.

The identification of the birthmother	173	
1.	Outline	173
2.	Birth registration	173
2.1.	Requirements	173
2.2.	Comparison and evaluation	176
3.	Mater semper certa	177
3.1.	Roman legal logic and biological fact	177
3.2.	The establishment of maternity	177
3.3.	Comparison and evaluation	182
4.	Foundlings	182
4.1.	Specific legislation concerning foundlings	182
4.2.	Comparison and evaluation	184
5.	Anonymous and discreet birth	184
5.1.	Definitional issues	184
5.2.	The distinction between 'anonymous', 'secret' and 'discreet birth'	185
5.3.	Broad regional patterns	186
5.4.	The Southern European origins of the babyklappe (baby-hatch)	187
5.5.	Early history of anonymous birth in France and Portugal	188
5.6.	Anonymous birth in twentieth century France	191
5.7.	The Loi Royal and the foundation of the CNAOP	194
5.8.	Enforcement of the right to know one's origins before the CNAOP	195
5.9.	Anonymous birth in contemporary Germany	196
5.10.	Anonymous birth in the Netherlands and in Portugal	197

6.	Anonymous birth: multidisciplinary aspects	198
6.1.	Reproductive health data	198
6.2.	Anonymous birth as a public policy instrument to protect reproductive health	200
6.3.	Criminological and psychological aspects	201
6.4.	Contemporary relevance of the historical tradition	203
7.	Anonymous birth: the legal perspective	205
7.1.	Introduction to a legal comparison	205
7.2.	Implications for birth registration	205
7.3.	Implications for fathers' rights and adoption	207
7.4.	Comparison and evaluation	210
Chapter VII.		
The identification of the father		213
1.	Outline	213
2.	Fatherhood and substantive parentage law	213
2.1.	Establishment of paternity on the basis of the mother's marriage	213
2.1.1.	The marital presumption rule	213
2.1.2.	The scope of the marital presumption outside marriage	215
2.1.3.	Comparison	220
2.1.4.	Evaluation	221
2.2.	Establishment of paternity in respect of men who are not married to the mother	222
2.2.1.	Recognition	222
2.2.2.	Comparison and evaluation	228
2.3.	The judicial determination of paternity	229
2.3.1.	Relevant substantive law	229
2.3.2.	Comparison	235
2.3.3.	Evaluation	237
2.3.4.	Digging up the past: the 'post mortem' judicial determination of paternity	237
2.3.5.	Comparison	242
2.3.6.	Evaluation	242
3.	The denial of paternity	243
3.1.	Denial proceedings	243
3.2.	Comparison	250
3.3.	Evaluation	252

4.	The legal position of the biological father without parental status	252
4.1.	Introduction	252
4.2.	The rights of the biological father whose paternity has not been established	253
4.3.	Comparison	257
4.4.	Evaluation	258
Chapter VIII.		
Procedural issues in parentage proceedings		261
1.	Outline	261
2.	Evidence	263
2.1.	Overview	263
2.2.	Comparison	269
2.3.	Evaluation	270
3.	Minors and legally incapacitated adults	272
3.1.	Relevant law	272
3.2.	Comparison and evaluation	275
4.	Enforcement outside the courts	275
4.1.	Extrajudicial parentage tests	275
4.2.	Comparison	281
4.3.	Evaluation	281
5.	The informational procedure in Germany	282
5.1.	Background	282
5.2.	Critical appraisal	284
Chapter IX.		
The identification of the birthparents in adoption		289
1.	Outline	289
2.	France	290
2.1.	Historical note	290
2.2.	Basic legal criteria	290
2.3.	Access to information	292
3.	Germany	293
3.1.	Historical note	293
3.2.	Basic legal criteria	293
3.3.	Access to information	294

4.	The Netherlands	296
4.1.	Historical note	296
4.2.	Basic legal criteria	298
4.3.	Access to information	300
5.	Portugal	302
5.1.	Historical note	302
5.2.	Basic legal criteria	303
5.3.	Access to information	304
6.	Comparison	305
7.	Evaluation	306

Chapter X.

The right to information in the contexts of artificial reproductive technologies and surrogate motherhood 309

1.	Outline	309
2.	Forms of treatment	310
2.1.	Surrogacy	310
2.2.	Artificial reproductive technologies	311
3.	Legislative history	313
4.	Surrogacy	321
4.1.	Relevant law	321
4.2.	Comparison	330
4.3.	Evaluation	330
5.	Heterologous assisted conception	332
5.1.	The status of the socio-legal father in heterologous ART	332
5.2.	Comparison	337
5.3.	Evaluation	337
6.	Donor anonymity	339
6.1.	Secrecy and heterologous donor insemination	339
6.2.	Promoting openness	341
6.3.	Double-track systems: a compromise solution?	345
6.4.	Empirical studies	345
6.5.	Analogies with adoption	348
6.6.	Relevant law	350
6.7.	Comparison	357
6.8.	Evaluation	357
7.	Post-mortal artificial insemination and embryo transfer	361
7.1.	The Blood case	361
7.2.	Relevant law	361

7.3. Comparison	363
7.4. Evaluation	364

PART V: CLOSING REFLECTIONS

Chapter XI.

Concluding remarks	367
1. Outline	367
2. Principles	367
3. Decisional privacy	368
3.1. Decisional privacy, deception and the right not to know in respect of adults	369
3.2. Contingency	372
3.3. The scope of the right not to know in respect of minors	374
3.4. Initiative and investigative investments	376
4. Responsibility	377
4.1. Contingency: procreational responsibility from a historical perspective	377
4.2. Contingency: procreational responsibility in parentage law	377
4.3. Contingency: procreational responsibility in other situations	381
4.4. Responsibility of the state in its quality of an 'independent authority'	383
4.5. Separate informational procedures as a response to constitutional demands?	384
5. Equality	386
5.1. The principle of equality and differences at the procedural level	387
5.2. Contingency: gender	388
5.3. Contingency: age	389
6. Conflict of interests and rights	391
6.1. Privacy in parentage law	391
6.2. Other private interests	392
6.3. Privacy interests in other contexts	393
6.4. Public rights and interests	394
7. Facilitating access to information	395
7.1. Informal implementation mechanisms	395
7.2. Formal implementation mechanisms: the role of state	398
7.2.1. Non-intrusive state measures	398

7.2.2. Intrusive public measures	399
7.2.2.1. Intrusive public measures in the context of adoption and donor-assisted conception	399
7.2.2.2. Intrusive public measures in other contexts	401
8. Closing reflections	402
Bibliography	405
Table of cases	433
Samenvatting	439
Zusammenfassung	451
Curriculum vitae	461

LIST OF ABBREVIATIONS

AdvermG	Adoptionvermittlungsgesetz (German Mediation in Adoption Act)
Appl. No.	Application Number
AG	Amtsgericht (German local district court)
ART	Artificial reproductive technologies
art./arts.	Article, articles
BDSG	Bundesdatenschutzgesetz (Federal German Data Protection Act)
BGB	Bundesgesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (Federal Appeal Court)
BT-Drucks.	Bundestag Drucksachen (publications of the Federal German Parliament)
BVerfGE	Bundesverfassungsgericht (Federal German Constitutional Court)
CA	Cour d'Appel (French Appeal Court)
Cass.	Cour de Cassation (French Cassation Court)
CDU/CSU	Christlich Demokratische Union (Christian Democratic Union)
CJFA	Centre Juridique Franco-Allemand
CNAOP	Conseil National pour l'Accès aux Origines Personnelles (French National Council for Access to Personal Origins)
DCC	Dutch Civil Code (Burgerlijk Wetboek)
DI	Donor insemination
DIY	Do it yourself
DNA	Desoxyribo Nucleic Acid
EC	European Communities
ed/eds	editor/editors
e.g.	for example
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EschG	Embryoschutzgesetz (German Embryo Protection Act)
EU	European Union
FamRZ	Zeitschrift für das Gesamte Familienrecht

FIOM	Federatie van Instellingen voor Ongehuwde Moeders (Dutch federation of institutions for unmarried mothers)
FPR	Familie, Partnerschaft und Recht
GG	Grundgesetz (German Basic Law or German Federal Constitution)
HR	Hoge Raad (Dutch Supreme Court)
ICCPR	International Convention on Civil and Political Rights
ICSI	intracytoplasmic sperm injection
i.e.	that is; in other words
IVF	In vitro fertilisation
IRCO	Immigrant and Refugee Community Organisation
LG	Landsgericht (German regional court)
LJN	Landelijk jurisprudentienummer (Dutch national case-law reference number_
LPMA	Lei da Procriação Medicamente Assistida (Portuguese Medically Assisted Conception Act)
NCJM-Bulletin	Nederlands Juristen Comité voor de Mensenrechten-Bulletin
NGO	Non-governmental organisation
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
No	Number
NJW	Neue Juristische Wochenschrift
NVOG	Nederlandse Vereniging voor Obstetrie en Gynaecologie (Dutch association for obstetry and gynecology)
OLG	Oberlandesgericht (German regional court of appeal)
Para.	Paragraph
PCC	Portuguese Civil Code (Código Civil Português)
PS	Partido Socialista (Socialist Party) (Portugal)
PstG	Personenstandsgesetz (German Civil Registration Act)
Rb	Rechtbank (Dutch first instance court)
Rdnr.	Randnummer (margin note number)
RG	Reichsgericht (Court of the German Empire)
RoP	Rules of Procedure
SchKG	Schwangerschaftskonfliktsgesetz (German Pregnancy Conflict Act)
SPD	Sozialdemokratische Partei Deutschlands (Social-Democratic Party of Germany)
Stb.	Staatsblad (Dutch official journal)
StGB	Strafgesetzbuch (German Criminal Code)
TGI	Tribunal de Grande Instance (French Court of First Instance)

UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
ZPO	Zivilprozessordnung (German Civil Procedural Code)

