

The Past Future of Adoption: The Impact of Biotechnology on an Old Institution

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I. *Mission Creep: Unintended Effects of Biotechnology on Adoption*

At first glance, adoption – one of humanity’s oldest institutions¹ – has little to do with modern biotechnologies. However, a second glance reveals notable interdependencies. This paper deals with the unintended effects of biotechnologies on adoption and, as the title suggests, with the factor of time. As I would like to demonstrate, the past has already anticipated the future.

The starting point is a striking coincidence in the development of Swiss law: in 1992, individuals conceived by means of reproductive technologies were granted the fundamental right to know their origins.² This was made concrete in 2001 with the Reproductive Medicine Act, and as a result, in 2003 the same right for adoptees was formally enshrined in written law.³

It is astounding to think that the Law should first acknowledge the right to know one’s origins in reproductive and genetic technology law and only later in adoption law, given that the significance of knowledge of one’s origins has long been a serious issue for adoptees, even back when genetic and reproductive technologies were still mere science fiction. The central question for analysis here is thus: how is it to be explained that the right of adoptees to discover the identity of their biological parents has only been recognized in the wake of the much younger reproductive medicine generation?

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1 On the history of adoption see *Clausdieter Schott*, *Kindesannahme – Adoption – Wahlkindschaft, Rechtsgeschichte und Rechtsgeschichten* (2009).

2 Cf. art. 24^{novies} old Federal Constitution of the Swiss Confederation (Cst) and art. 119(2)(b) of the current Cst.

3 See art. 27 Swiss Federal Act on Medically Assisted Reproduction (Reproductive Medicine Act, RMA) and art. 268c Swiss Civil Code (SCC). Nowadays, a child has a general right to know his or her origins and not only in the case of adoption or heterologous insemination: the Swiss Federal Supreme Court decided in the Decision of the Swiss Federal Supreme Court DFSC 134 III 241 that this right is also applicable to children whose filiation from the father is based on marriage with the mother (art. 252(2) SCC). Note that in 2012, the Obergericht (2nd instance) of the canton of Lucerne decided that the husband too has a right to know whether he is the biological father, even if he previously unsuccessfully challenged legal paternity: OGer LU, no. 3B 12 33 of 18th September 2012, published in *Luzerner Gerichts- und Verwaltungsentscheide (LGVE)* 2012, I, no. 6; see further below, III.B.2; with this judgement the parental generation of rights to know about genetic truth is addressed.

II. On the Suppression of the Question of Origins

The significance of the question of origins for adoptees is made clear in what is probably the oldest written source concerning adoption, the Codex Hammurabi, dating from the eighteenth century B.C. According to which, should an adoptee mention the secret fact that he was adopted, he would have his tongue cut out; should he search for his biological parents, he would be blinded.⁴ The classical legend of Oedipus also tells the story of an adopted son whose search leads to the loss of his sight.⁵

It is informative to move on from this point, fast forward to the twentieth century and take a look at what has happened in the near past and present day. In 1973, *confidential full adoption or closed adoption* was introduced in Switzerland. Through this measure, the institution of simple adoption was replaced as it was regarded to be unfavourable on account of the manner in which the child remained legally tied to both the family of origin and the adoptive family. The notion of confidential full adoption brought into effect at the time remains in force today, as art. 267 et seqq. of the Swiss Civil Code (SCC) testify.⁶ *Full adoption* cuts the legal bond between the child and his or her biological parents and replaces it with one to the adoptive parents, art. 267 SCC.⁷ It thus brings forth significant effects with regard to the constitution and dissolution of status: the adoptee becomes, legally, the child of the adopters (art. 267[2] SCC), while the previous filial relation expires (art. 267[2] SCC). Moreover, Switzerland opted in 1973, in contrast to other states, for the exclusivity of full adoption (monism).

This total change of family is safeguarded by the *secrecy of adoption*, which enshrines the right of adoptive parents to remain anonymous with respect to the biological parents. It may seem appropriate that the adoption secret is classified, in art. 268b of the SCC, under the procedural provisions, given that a non-disclosure obligation is imposed on all parties involved in the adoption process. The scheme and wording of the article mask, however, the true scope of secret adoption: it is rather the registry process that reveals that secrecy in adoption has, in Switzerland, still further-reaching effects. The original record of birth is blanketed with a cover sheet detailing the adopted child's new first- and surnames. An *extract* from the birth register is made on the basis of the cover sheet. In the modern electronic system, the same is achieved by means of the user interface. The adoptee is thus, by a legal act, reborn into the adoptive family and appears in the extract as a descendant of the adoptive parents. As a result, closed adoption accomplishes a *clean break*: it completely separates the biogenetic and adoptive families.⁸

4 See *Geraldine van Bueren*, Children's Access to Adoption Records – State Discretion or an Enforceable International Right? *The Modern Law Review*, Vol. 58 (1995), 37 et seq., 39.

5 Sophokles, see *Helm Stierlin/Josef Duss-von Werdt* (eds.), *Adoption und Kinderlosigkeit*, *Familiendynamik, Interdisziplinäre Zeitschrift für systemorientierte Praxis und Forschung*, Vol. 18 (1993), 357 et seq.

6 There is, after all, a legal draft that provides partial relaxation of closed adoption. However, there is no current indication that Switzerland is going to fundamentally change the system itself: see <https://www.bj.admin.ch/bj/de/home/gesellschaft/gesetzgebung/adoptionsrecht.html> (last access: 6 October 2015).

7 See more extensively: *Monika Pfaffinger*, Art. 267 et seqq., in: *Andrea Büchler/Dominique Jakob* (eds.), *Kurzkommentar ZGB* (2012).

8 Regarding this procedure see: *Michelle Cottier*, Austausch von Informationen im Adoptionsdreieck, in: *Michelle Cottier/David Rüetschi/Konrad W. Sahlfeld* (eds.), *Information & Recht* (2002), 31 et seq.; on the British context see: *Jill Marshall*, Concealed Births, *Adoption and Human Rights Law: Being Wary of Seeking to Open Windows into People's Souls*, *Cambridge Law Journal*, Vol. 71, No. 2 (2012), 325 et seqq.

The institution of secret adoption thus represents, in other words, a *concept*: it should facilitate a mode of life as though no child were ever born illegitimately (the stigma of illegitimacy was – and remains in some quarters – the primary reason for giving a child up for adoption), or given up by his or her mother, and as though no marriage should ever remain childless. Moreover, secret adoption should also enable a mode of life within the adoptive family as though they were an entirely “normal” family. Precisely this notion should in no way be disrupted by the biological mother.⁹ The (legally) logical consequence of this repressive strategy is that no provision is made for access to information or for contact between the family of origin and the adoptive family – or, at least, no such provision was made initially.

Despite our prior historical experience, we have had to realize all over again the fact that, even in the twentieth century, adoptees do indeed search for their biological parents. Initially, attempts to discover information about their biological relatives and their own history were made via official channels; such requests were, however, mostly refused. As a consequence, adoptees, particularly in the US, formed “self-help groups” which lobbied for the relaxation of closed adoption. These movements have been examined in the field of human sciences since the end of the 1970s. The search for one’s biological parents was seen in the context of *identity formation* as the search for oneself. Human sciences also rapidly pointed out problems with closed adoption.¹⁰ Thus it was in the common law countries where, already in the 1970s, the burdensome consequences of secret adoption started to come to light.¹¹ At the same time that strong arguments were, in these states, being put forward to question the concept of secret adoption, Switzerland had just begun the process of first introducing it.

In Switzerland, discussion began in the 1980s as to whether closed adoption should be qualified by giving adoptees the right to discover the identity of their biological parents. It was here, in the field of adoption, that the discussion of the right to know one’s origins began.¹² Such debates were continued, however, in the field of reproductive medicine.¹³ In

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- 9 For a pioneering take on these coping strategies and the issues associated with them see: *Arthur D. Sorosky/Annette Baran/Reuben Pannor*, *The Adoption Triangle* (1987), 34, with reference to the tale according to which Hera had her adopted son, Hercules, fall from her robes so as to give the impression that he was her biological child; *Julie Berebitsky*, *Like Our Very Own: Adoption and the Changing Culture of Motherhood, 1851 – 1950* (2000); *Nigel V. Lowe*, *English Adoption Law: Past, Present and Future*, in: Sanford A. Katz/John Eekelaar/Mavis MacLean (eds.), *Cross Currents* (2001), 307 et seqq.; *van Bueren* (fn. 4), 41; *Barbara Yngvesson*, *Negotiating Motherhood: Identity and Differences in “Open” Adoptions*, *Law & Society Review*, Vol. 31, No. 1 (1997), 31 et seqq.; *Christopher Bagley*, *International and Transracial Adoptions. A Mental Health Perspective* (2000), 328; *Cottier* (fn. 8), 31 et seqq.
- 10 For a general overview of this development and scientific evidences see: *Pfaffinger*, *Geheime und offene Formen der Adoption. Wirkungen von Information und Kontakt auf das Gleichgewicht im Adoptionsdreieck*, Dissertation (2007), 166 et seqq.
- 11 *Fernando Colón*, *Family Ties and Child Placement*, *Family Process*, Vol. 17, No. 3 (1978), 289 et seqq.; *Arthur D. Sorosky/Anette Baran/Reuben Pannor*, *Identity Conflicts in Adoptees*, *American Journal of Orthopsychiatry*, Vol. 45, No. 1 (1975), 18 et seqq., 20; *Wayne E. Carp*, *Family Matters. Secrecy and Disclosure in the History of Adoption* (1998); *Anne E. Crane*, *Unsealing Adoption Records, The Right to Know Versus the Right to Privacy*, *Annual Survey of American Law* (1986), 645 et seqq.; *Stephanie Charlesworth*, *Ensuring the Rights of Children in Inter-Country Adoption: Australian Attitudes to Access to Adoption Information*, in: John Eekelaar/Petar Šarčević (eds.), *Parenthood in Modern Society. Legal and Social Issues for the Twenty-First Century* (1993), 251 et seqq.
- 12 See *Thomas Cottier*, *Die Suche nach der eigenen Herkunft: Verfassungsrechtliche Aspekte (Wirkungen des Rechts auf Akteneinsicht und der Garantie der persönlichen Freiheit)*, supplement to *Zeitschrift für Schweizerisches Recht*, Vol. 6 (1987), 86 et seqq.

1992, a constitutional right to know one's origins was introduced for the first time in the course of the debate over reproductive medicine. Subsequently, this was made concrete with the Reproductive Medicine Act, which came into force in 2001. Only by way of this legal change in the field of reproductive medicine were consequences brought about for adoption law: the Federal Council succinctly maintains in the documents pertaining to the Reproductive Medicine Act that this right must also be granted to adoptees.¹⁴ However, the right to knowledge of one's origins for adoptees did not come into effect on a formal legal level until 2003,¹⁵ this notwithstanding the fact that the significance of knowing one's origins for adoptees has been acknowledged for centuries.

III. The Concept of the Natural Family and its Erosion

This paper presents *two hypotheses* that attempt to explain this power of influence that biotechnologies have on adoption law. First, biotechnologies erode the idea of a natural order of the family (on this see A. and B.1.), which is considered as such even in law. This power of substantial determination leads to my second hypothesis: biotechnology is "politically, socially, economically and scientifically" much more penetrative than the concerns of adoptees (on this see B.2.).

A. The Concept of the Nature of Family

To begin, it seems fitting to take a look at the construction of the nature of the family, before then proceeding to look at its deconstruction by current biotechnologies. References to "naturalness" or, in contrast, to "artificiality" are the common threads running through the discussion of family law. The natural law theorist *Pufendorf* described family as follows: "Within the family, nature creates the link between the social order and parental rights. Nature works on parents to stir up their Diligence, wisely implant[ing] in them a most tender affection towards these little Pictures of themselves."¹⁶

A commentary on the Swiss Civil Code from 1943 describes the make-up of the family illustratively: "Through the child, marriage expands into a family. Like the relationship between spouses, the relationship between parent and child forms a companionship, a moral and natural connectedness, a mutual belonging."¹⁷ This so-called *natural family* consists (or consisted) of the inseparable binary pairs of man and woman, marriage and reproduction, reproduction and (sexual) intimacy, biology and care.¹⁸ Together, they supply the basis in assuming natural legitimation for the family, with nature prompting nurture. If we follow *Eugen Huber*, author of the SCC, this is the natural order of the family and therefore the model with which legislators should comply.¹⁹ By contrast, other forms of solidarity were, and often still are, considered artificial, second best or merely pathological deviations from the natural

13 For a comprehensive analysis of the genesis of the fundamental right to know one's origins see: *Samantha Besson*, Das Grundrecht auf Kenntnis der eigenen Abstammung. Wege und Auswirkungen der Konkretisierung eines Grundrechts, *Zeitschrift für Schweizerisches Recht*, Vol. 1 (2005), 39 et seqq.

14 Botschaft Fortpflanzungsmedizinengesetz, BBl 1994 V 205, 233 and 271.

15 See *supra*, I, art. 268c SCC.

16 Cited in *Mary R. Anderlik/Mark A. Rothstein*, DNA-Based Identity Testing and the Future of the Family: A Research Agenda, *American Journal of Law and Medicine*, Vol. 28 (2002), 215 et seqq., 222.

17 *August Egger*, Das Familienrecht, zweite Abteilung: Die Verwandtschaft, Art. 252–359, in: *August Egger et al.* (eds.): *Kommentar zum Schweizerischen Zivilgesetzbuch*, II. Band, Das Familienrecht (1943), 1 et seq.

18 On the situation in Switzerland generally see: *Andrea Büchler*, Sag mir, wer die Eltern sind ... Konzeptionen rechtlicher Elternschaft im Spannungsfeld genetischer Gewissheit und sozialer Geborgenheit, *Aktuelle Juristische Praxis* (2004), 1175 et seqq.

family²⁰ – which is to say, from a familial order defined as natural that is, however, by no means a reflection of a pre-programmed, immutable and eternally valid universal law of nature. Despite being a construction, this notion of the natural family nonetheless remains influential to the present day as a structure that is seen as being quasi-ordained by nature and God.

This order is one that adoption could not counteract effectively. Adoption law had to conform to this so-called natural family order: as early as the Digests, the motto is “Adoptio naturam imitatur”.²¹ In Switzerland it was thought to be a bold step to acknowledge parenthood based solely on social connections and lacking in corporeality.²² The legislator intervened, however, by fabricating the natural unity of biogenetic and social relatedness with the fiction of birth in the adoptive family (see II.). With this legal sleight of hand, along with the clean break noted above, the numerous instances of unnaturalness in adoption cases were supposed to be healed.²³ The concept of confidential full adoption (closed adoption) aims at suppressing the missing biological link between child and parents, the non-compliance of marriage, biology and relationship. By allowing only married couples to adopt children,²⁴ Swiss adoption law protects this congruence, or rather the appearance of congruence, and the unity of marriage – biology – relationship. The congruent family – that is, the family that upholds and embodies this unity – is the natural family. Confidential full adoption thus helps to preserve this appearance of a congruent or natural family.²⁵

Although the lack of correlation between social and biological parenthood has been inherent to the concept of adoption for centuries, *adoption itself* was thus *not in a position to erode the image of the natural family in the law*. Neither the institution itself, nor later claims by adoptees and human scientists, nor again the practice of recognizing adoption as a distinct family form exerted enough pressure on legislators. Even legal scholars’ criticism of the registry process – which was said to be akin to “juridical artificial insemination” that “legislates away” the biological parents – echoed without consequence. In Swiss law, adoption remains the institution which (only) imitates a so-called natural family order.²⁶

19 Eugen Huber, *Recht und Rechtsverwirklichung. Probleme der Gesetzgebung und der Rechtsphilosophie* (1925), 223 et seq., 263 et seq., and 322.

20 On the nature of the family see among others: Ulrich Beck/Elisabeth Beck-Gernsheim, *Das ganz normale Chaos der Liebe* (1990), 135 et seqq.; Duss-von Werdt, „Entflechtungen“. Von woher und wohin Ehe und Familie sich zurzeit entwickeln. Ein Essay, *FamPra.ch*, Vol. 3 (2006), 562 et seqq., 567 et seqq.; with further references: Michi Knecht, *Die Politik der Verwandtschaft neu denken. Perspektiven der Kultur- und Sozialanthropologie*, Zentrum für transdisziplinäre Geschlechterstudien der Humboldt-Universität zu Berlin (ed.), *Bulletin Texte*, No. 26: *Warum noch Familie?* (2003), 52 et seqq.; Signe Howell, *Adoption of the Unrelated Child: Some Challenges to the Anthropological Study of Kinship*, *Annual Review of Anthropology*, Vol. 38 (2009), 149 et seqq.

21 Inst.1.14.1; see generally also: Jorge Grau Rebollo, *Parentesco y adopción. Adoptio imitatur naturam. Nature vs nurture?*, *Quaderns-e* 03/2004a, http://www.antropologia.cat/antiga/quaderns-e/03/03_02.htm (last access: 22 September 2015).

22 See Robert Zuegg, *Adoptivkinder aus fernen Ländern. Eine Studie zum präventiven Kinderschutz in der Schweiz* (1996), 31.

23 On the “as if born”-concept see: Sorosky/Baran/Pannor (fn. 9); Jeannie House, *The Changing Face of Adoption: The Challenge of Open and Custom Adoption*, *Canadian Family Law Quarterly* (1995/1996), 333 et seqq.; Christa Hoffmann-Riem, *Elementare Phänomene der Lebenssituation. Ausschnitte aus einem Jahrzehnt soziologischen Arbeitens* (1994), 83 et seqq.

24 In 2014 there was, after all, a draft presented that provides partial relaxation on this restriction, see fn. 6.

25 See generally Cottier (fn. 8), 31 et seqq.; more detailed: Pfaffinger (fn. 10), 116 et seqq.

26 See generally Pfaffinger (fn. 10), 139 et seqq. and 150 et seqq.

B. Two Eroding Waves

1. *The first wave: the demographical one*

In the 1970s the concept of the natural family and that of the traditional family were hit by what we might poetically call the *first demographical eroding wave*. Shifting gender roles, rising divorce rates, remarriages, and legal equality for children born both in and out of wedlock gnawed at the concept of the “natural family” and challenged family law.²⁷ From here on, adoption was manifestly no longer the only “anomaly” in the nature of the family. Yet even this demographically determined diversification of familial structures did not lead to a revision of adoption law.

Only the *second wave*, which might be called the *biotechnological wave*, changed that. Before light is shed on this point, however, a modern pharmaceutical invention, which is linked with both the above-mentioned demographical and the biotechnological wave and which had some interesting unintended effects on adoption, deserves consideration first – namely, the birth control pill. Along with other factors, the introduction of the pill led to the shift from *national adoption to international adoption*. In its beginnings during the two World Wars, international adoption was purely a humanitarian measure.²⁸ Only at the end of the 1960s did it become a means for childless couples in western countries to fulfill their desire for children by turning to developing countries.²⁹ Birth rates and the number of adoptable children in industrial nations also sank drastically at the end of the 1960s, due to the development of effective contraception and legalized abortion.³⁰ The consequent shift to international adoption acted as a catalyst for raising awareness of how important it is for adoptees to know about their origins. In the case of children whose origins are visibly foreign, imitating a biological family was clearly an artificial act. Nevertheless, even the shift from national to international, inter-racial and inter-cultural adoption did not directly lead to a revision of closed adoption.

2. *The second wave: the biotechnological one*

It was *only biotechnology* that could play the starring role in the main act of recognizing the right to know one’s origins. Both artificial reproduction technologies (ARTs) on the one hand, and the possibility of proving genetic descent by DNA testing on the other, have *deconstructed* what was previously taken for granted as the so-called natural family. *Biotechnology has, according to the first hypothesis, the power to determine substance.*³¹

27 On this process of change see: Rüdiger Peuckert, *Familienformen im sozialen Wandel* (2012).

28 Ingrid Baer, *Adoptees Searching for their Origins: A New Development Seen From an International Standpoint*, in: John Eekelaar/Petar Šarčević (eds.), *Parenthood in Modern Society. Legal and Social Issues for the Twenty-First Century* (1993), 241 et seqq.

29 René A. Hoksbergen, *Changes in Attitudes in Three Generations of Adoptive Parents: 1950–2000*, in: Peter Selman (ed.), *Intercountry Adoption. Developments, Trends and Perspectives* (2000), 86 et seqq., 89.

30 Johannes H. A. Van Loon, *Report on Intercountry Adoption, Preliminary Document No. 1 of April 1990*, in: Permanent Bureau of the Hague Conference on Private International Law (ed.), *Proceedings of the Seventeenth Session, 10 to 29 May 1993, Tome II, Adoption – Co-Operation* (1994), 11 et seqq., 39; Jean-Marc Bischoff, *Introduction comparative, Revue internationale de droit comparé*, Vol. 37, No. 3 (1985), 703 et seqq.

31 Groundbreaking on the implications of biotechnologies on the law: Alain Pottage, *The Socio-Legal Implications of the New Biotechnologies*, *The Annual Review of Law and Social Science*, Vol. 3 (2007), 321 et seqq.

On the one hand, assisted reproduction technologies diversified the taken-for-granted binaries of sex/procreation, nature/culture, biology/sociality.³² ARTs are *deconstructive* in that they introduce insecurity into kinship relations. The more opportunities there are to fragment family and parenthood, the clearer the law's task presents itself: *to assign legal parenthood*. This renders legal parenthood an artifact, which in no way reflects a natural order.³³ ARTs reveal that law of descent does not uphold the natural, but is rather a matter of convention. Adoption did not have this subversive effect on social and legal norms. Furthermore, ARTs have an unintended effect on adoption, as they have led to a certain marginalization of the alternate formation of family through adoption. Adoption was once regarded as a "natural solution" to infertility. With the possibilities presented by ARTs, adoption moved from second to third best option.

Here, on the other hand, the *second source of the biotechnological erosion* of the family needs to be elaborated upon, for ascertainable knowledge about genetic descent also challenges the nature of the family and family law.³⁴ For a long time, family law took little account of biological facts. Indeed, it frequently could not, since proving the knowledge of these biological facts was often impossible.³⁵ Thus the law used assumptions and fictions from which unknown biological facts were to be deduced – as exemplified in the famous and notorious presumption of paternity, where the biological uncertainty of fatherhood is deduced from the social certainty of marriage, thus assigning legal paternity. When, as is the case today, it can be easily proven that the husband is not the genetic father, but the legal concept of presumption is still upheld with a strictly limited rebuttal of the husband's paternity (for Switzerland see art. 255 et seqq. SCC), the system shows a second face. Much as is true of the fiction of the birth of the adopted child to the adoptive parents, the fiction of paternity also *simulates* naturalness. Both protect the appearance of the natural family even against, or regardless of, better knowledge about the lack of correlation between genetic and social parenthood. By doing this, they reveal their *institutional nature*.

The knowledge that is made available by using DNA testing heavily challenges this simulation of naturalness or the protection of the appearance of a natural family via legal fiction. For thirty years, genetic parentage and the "unnaturalness" of lacking unity of biological, genetic and social parenthood has been perfectly scientifically verifiable. As such, law can no longer ignore the knowledge that modern technology can generate with regards to genetic truth; instead, it has to ask itself how it will deal with this knowledge. Thus it was merely a question of time until the Obergericht (high court) of the canton Lucerne saw itself confronted with precisely one of these questions in 2012: it was the first Swiss court to recognize the right of a male party to know whether he was the biological father of a child – and this after, moreover, he had already unsuccessfully challenged his legal paternity through mar-

32 Marcia C. Inhorn/Daphna Birenbaum-Carmeli, Assisted Reproductive Technologies and Culture Change, *The Annual Review of Anthropology*, Vol. 37 (2008), 177 et seqq., 178.

33 Norbert Roulant, Cultural Dimensions of Kinship, in: John Eekelaar/Petar Šarčević (eds.), *Parenthood in Modern Society. Legal and Social Issues for the Twenty-First Century* (1993), 5 et seqq.; Büchler (fn. 18), 1175 et seq.

34 On the implications of genetics on law and especially family law: Ruth Deech, *Family Law and Genetics*, *The Modern Law Review*, Vol. 61 (1998), 697 et seqq.; Pottage (fn. 31), 336 et seqq.

35 For a historical approach see: Regina Ogorek, „Zwar sagt die Mutter, dass ich von ihm bin – aber ich weiss es nicht“. Zur Verwertbarkeit heimlicher DNA-Analysen im Vaterschaftsanfechtungsverfahren, in: Rainer Maria Kiesow/Regina Ogorek/Spiros Simitis (eds.), *Summa. Dieter Simon zum 70. Geburtstag* (2005), 459 et seqq.

riage.³⁶ With its recognition of a right to know genetic paternity, the verdict manifestly carries forward a trend that grants recognition to the technologies and expectations of an information society. New demands for genetic knowledge have since continually been raised, whereby it was, in Switzerland, often the courts that advanced such developments, upon which the legislator adopted and concretized the law. From this we can see how in Switzerland the discourse proceeded from the child and its right to know its parentage – today this applies generally and not only for children that have either been conceived via heterologous insemination or else adopted.³⁷ In twenty-first century Switzerland, the discourse has now turned to the parental generation, initially with the demands of the husband to know whether he is “l’auteur de l’œuvre”³⁸.

In this respect, DNA testing not only plays the role of revealer of genetic truth; it also unveils what the law does with family and with life. If biogenetic paternity is precisely verifiable, the legal presumption of paternity *no longer serves as proof*. Another feature of these devices of family law then comes to light: the *institutionalizing aspect*.³⁹ Such devices safeguard the so-called natural family model, or, at least, its appearance. This again makes clear that law of descent is not a reflection of a naturally determined family order. Legal parenthood is a choice. How this particular choice will be sidelined is still unresolved. However, what is clear is that legal parentage is negotiable and negotiated.⁴⁰ In cases where legal parents are “evidently” not the genetic parents, the right to ascertain genetic origins (perspective of the child) or parentage (for the parents) is an important step – if only as a probable transitional stage on the way to recognizing new family structures in law. Yet how are such developments affecting the order of the family?⁴¹

36 The third division of the Lucerne Obergericht decided this on 18 September 2012, FamPra.ch, Vol. 1 (2013), 220 et seqq.; see further Pfaffinger, *Vaterschaft auf dem Prüfstand. Das Recht des Ehemanns auf Kenntnis der eigenen Vaterschaft im Zeitalter der Genetik*, FamPra.ch, Vol. 3 (2014), 604 et seqq.

37 On the genesis of the right to know one’s origins, the interaction between case law, jurisdiction and constitutional law on the one hand, and between the law of reproductive medicine and adoption law on the other: Besson, (fn. 13), 39 et seqq.; see also art. 119(2)(g) Cst.; on recognition also for adoptees: Botschaft Fortpflanzungsmedizinengesetz (fn. 14), 233 and 271; art. 268c SCC; DFSC 128 I 63 = FamPra.ch, Vol. 3 (2002), 584 et seqq.; on general recognition, including for children living in marriage or in non-marriage relationships: DFSC 134 III 241 = FamPra.ch, Vol. 3 (2008), 674 et seqq.; OGer LU, FamPra.ch, Vol. 3 (2009), 784 f.; with further references: Ingeborg Schwenzer, Art. 252 ZGB, N 15a, in: Heinrich Honsell/Nedim Peter Vogt/Thomas Geiser (eds.), *Basler Kommentar Zivilgesetzbuch I* (2014).

38 See the analysis of the case law of the European Court in: Judith Wyttenbach, *Welche Väter für das Kind? Der Europäische Gerichtshof für Menschenrechte und die Vielfalt von Elternschaft*, AJP, Vol. 2 (2014), 149 et seqq.; see in particular ECHR decision Ahrens vs. Germany, app. no. 45071/09 and Kautzor vs. Germany, app. no. 23338/09; see further Anayo vs. Germany, app. no. 20578/07.

39 For a deeper analysis on this point see: Pfaffinger (fn. 36), 608 et seqq.

40 Cf. numerous contributions in: John Eekelaar/Petar Šarčević (eds.), *Parenthood in Modern Society. Legal and Social Issues for the Twenty-First Century* (1993); Ingeborg Schwenzer, *Familie und Recht. Ausgewählte Beiträge aus 25 Jahren* (2010); Ingeborg Schwenzer, *Ein Familienrecht für das 21. Jahrhundert*, in: Brühler *Schriften zum Familienrecht*, Vol. 15, Siebzigster Deutscher Familiengerichtstag 2007 (2008), 27 et seqq.; illustrative also the title of John Dewar, *The Normal Chaos of Family Law*, *The Modern Law Review*, Vol. 61, No. 4 (1998), 467 et seqq.; Büchler (fn. 18), 1175 et seqq.

41 On the influence of the possibilities of genetic testing on family law see for instance: Anderlik/Rothstein (fn. 16), 215 et seqq.

Paradoxically, the newly recognized demands of biologically founded rights to knowledge of genetic parentage or paternity, as they are being driven by new biotechnological possibilities, undermine the construct of the natural family and its biological foundation.⁴² They open rifts in the premise of the natural family and cleave the unity of marriage – biology – relationship. In effect, the recognition of rights to knowledge of genetic parentage or parenthood leads – without tarnishing legal parenthood – to a strengthening of social parenthood. These developments, accelerated significantly by new biotechnological possibilities, thus dovetail harmoniously with further social processes: families and family law are not today limited to either the matrimonial unitary family or to biologically founded relationships. The natural family and the exclusive familial ideal of the matrimonial unitary family with gender-stereotypical role expectations are also coming under pressure from individual life decisions (divorce, patchwork families etc.). This erosion process is, however – as this essay shows in reference to Switzerland – being guided by the shaping power of other contexts – of biotechnologies but also of the economy.

We now move to the paper's *second hypothesis*. A result of this subversive power of substantial determination is that biotechnologies both *attract enormous economic and scientific capacities and engage the interest of society much more intensively, broadly and unsettlingly* than the concerns of adoptees and their families, as exemplified by Dolly the clone sheep's rise to media superstardom. The dangers and opportunities presented by genetic technology and reproductive medicine were given cinematic treatment, inter alia, in the Oscar-nominated film *Gattaca*. Biotechnologies are a key symbol of our time.⁴³ The way they were received in Swiss society was shown in a popular initiative launched in 1987 entitled "Against the abuse of reproductive and genetic technologies on people", commonly known as the "Beobachter Initiative" because it was launched by the widely read Swiss newspaper *Beobachter* ("The Observer"). This constitutional initiative in the field of reproductive and genetic technology, started by the populace, was the first attempt to give legal status to the right to know one's origins. In 1992, the people accepted the counter proposal from the Federal Council and Parliament. The subsequent development has already been outlined above: Article 24^{Novies}(2)(g) is the first written constitutional guarantee that enshrines the right to know one's origins, and it was consolidated in the form of the Reproductive Medicine Act (art. 24[2][1][d]; 27[2]). In its message regarding the Reproductive Medicine Act, the Federal Council stated that the right to know one's origins must also apply to adoptees without further debate.⁴⁴

IV. Brief Summary

Before concluding with a critique and a vision, a brief summary is first appropriate. An unusual genesis in Swiss Law has been detailed: the original forerunner to the right to knowledge of one's origins, the adopted child, was overtaken by a newcomer, the reproductive medicine generation.

Central to the reasoning was the image of the "natural family," with its genetic, biological, social and legal unity – which the law supposedly only traced – and the erosion of this construct. Neither experiences within the field of adoption, nor the demographical erosional wave of the 1970s could shake this image or the concept of closed adoption based upon the so-called natural family. Two hypotheses were formed with regard to the decisive power of

42 Pfaffinger (fn. 36).

43 Inhorn/Birenbaum-Carmeli (fn. 32), 186.

44 Cf. fn. 14.

influence enjoyed by biotechnologies: first, ARTs and DNA fingerprinting cause a fragmentation of family order. Biotechnologies divide the image of the nature of the family: they break up the bipolarities of natural – artificial, normal – pathological, or, in Habermas’s terms, of the made and the grown.⁴⁵ Biotechnologies mutate our concept of family, as well as our view of what family law achieves. They reveal that legal parenthood is not the embodiment of natural order, but a choice. No wonder that this power of definition has a broader impact. This provided the basis for the second hypothesis: that biotechnologies attract enormous resources – the initial attempt to gain the right to information regarding origins and parentage by means of a popular initiative illustrated this. The future had its roots already in the past – even though, as the history of adoption shows, the demand to know one’s origins has been suppressed for centuries by society as well as by law. Only in the course of the regulation of biotechnologies has the right to know one’s origins also gained recognition for adoptees. These rights to knowledge of genetic origin and parenthood, recognized in the light of new biotechnological possibilities, have in effect strengthened the importance of social parenthood. The core message to adoptive parents and men who have been assigned legal paternity through marriage is as follows: you are and will remain the legal parents, even if you are not the biological parents. Social parenthood provides a sufficient basis for legal parenthood and requires no buttressing from a simulated genetic parentage. Thus there is a move away from the tendency to supplant the absence of biological parentage with numerous burdens for the parties involved.

V. Critique and Vision

The mission creep of biotechnologies on adoption law has been simultaneously positive and negative. In the recognition of the right to know one’s origins in adoption law, which was apparently an afterthought to the ruling on biotechnologies, we can see a kind of awareness of the significance of origins for adoptees. Unfortunately, it ignores fundamental differences between starting a family by means of ARTs and adoption.⁴⁶ The situations faced by sperm donors and biological mothers putting their children up for adoption are hardly comparable. For adoptees, genetic descent is of secondary importance. To be sure, constant access to and the exchange of information regarding genetically determined, or partly determined, risks of illness would be relevant. Precisely this kind of exchange of information is not, however, safeguarded in the concept of secret full adoption and in the right to knowledge of one’s genetic origins. Of further significance are questions such as “why could my parents not keep me?”, “how do they live?”, “would they like to know how I live?”, “do they miss me?”, or “do I have any siblings?” And, on the part of the biological parents: “how is our child?” All such questions remain unanswered by a *geneticized* right to know one’s origins.

The recognition of the right to knowledge of the genetic origins of adoptees is an element in an erosion process. Characteristically, such processes do not, however, unfold strategically, but tend rather to be slow and piecemeal. What this means in the context of adoption is that, despite the recognition of the right to know one’s parentage, the problematic concept of the exclusion of origins is not overcome. As long as the significance of the origin family is

45 Jürgen Habermas, *The Future of Human Nature* (2003); see also Pottage (fn. 31), 321 et seqq.

46 On similarities and differences between ARTs and adoption, see: Erica Haimes, “Secrecy”: What Can Artificial Reproduction Learn from Adoption?, *International Journal of Law and the Family*, Vol. 2, No. 1 (1988), 46 et seqq.; further: Helen J. Riley, *Confronting the Conspiracy of Silence and Denial of Difference for Late Discovery Adoptive Persons and Donor Conceived People*, *Australian Journal of Adoption*, Vol. 7, No. 2, 1 et seqq.

suppressed in its relational aspect, the natural family remains influential as an excess construct. Only in this way can we explain the incongruity by which one first attempts to eliminate the significance of the origin family with a legal scratch of the pen, then later suddenly recognizes the existence of biological parents by the right to knowledge of one's origins, while still upholding the fiction of birth to the adoptive parents. The natural family thus remains a powerful structural order.

It is desirable for adoption to finally be awarded its due place as a type of family form in its own right; so that it cannot only step out of the shadow of the so-called natural family but also escape the shadow and light of the mighty biotechnologies. The right to know one's origins may well be the first step on the way to acknowledging the relevance of the family of origin.⁴⁷ Having only been acknowledged in the wake of the ruling on biotechnologies and amid adherence to closed adoption, adoption is, however, once again relegated to a shadowy existence, the shadow of genetic essentialism. Adoption is complex – only when it is no longer forced to adapt to nature and biotechnology but rather recognized as a separate, independently-valid family structure, will it unfold the full extent of its wealth.⁴⁸ It will find expression in an open and differentiated recognition of the various realities of familial relationships.⁴⁹ Legally, the path will lead via the recognition of semi-open and open adoption, which understand adoption as a life-long process in the adoption triangle and thus enable continuity. These forms overcome claims to exclusivity and strategies of suppression and appear to better protect the welfare and interests of the child, as well as those of both the adoptive and the biological parents.⁵⁰

47 Further steps to open adoption may be taken with the draft revision of adoption law presented in 2014 (cf. fn. 6).

48 See also *Marie-Thérèse Meulders-Klein*, Préface, *Isabelle Lammerant*, L'adoption et les droit de l'homme en droit comparé (2001), XIII; *Pfaffinger* (fn. 10), 477.

49 On existent open adoptions: *Carol Amadio/Stuart L. Deutsch*, Open Adoption: Allowing Adopted Children to "Stay in Touch" with Blood Relatives, *Journal of Family Law*, Vol. 22 (1983–1984), 59 et seqq.; *Deborah R. Silverstein/Jack Demick*, Toward an Organizational-Relational Model of Open Adoption, *Family Process*, Vol. 33, No. 2 (1994), 111 et seqq.; providing an overview on the evolution and context of open adoptions in the USA as well as in Europe, and proposing the recognition of plurality in Swiss adoption law: *Pfaffinger* (fn. 10), 166 et seqq.; in 2014 there is a legal draft that suggests partial relaxation of closed adoption; on open adoption see recently: *Thomas M. Creal/Richard P. Barth*, Patterns and Predictors of Adoption Openness and Contact: 14 Years Post Adoption, *Family Relations*, Vol. 58, No. 5, 607 et seqq.; *Sandra Ferreira*, Open Adoption: Creation Permanency and Continuity, *Australian Journal of Adoption*, Vol. 8, No. 1, 1 et seqq.; *Leigh Gaddies*, Comment, Open Adoption, *Journal of the American Academy of Matrimonial Lawyers*, Vol. 22 (2009), 499 et seqq.; on open adoption by same-sex couples see: *Abbie E. Goldberg et al.*, Lesbian, Gay, and Heterosexual Couples in Open Adoption Arrangements: A Qualitative Study, *Journal of Marriage and Family*, Vol. 73 (2011), 502 et seqq.; *Susan M. Wolfgram*, Openness in Adoption: What We Know So Far – A Critical Review of the Literature, *Social Work*, Vol. 53, No. 2 (2008), 133 et seqq.

50 With further references: *Pfaffinger* (fn. 10), 469 et seqq.