

CHAPTER 1 INTRODUCTION

*Children are not made for the family,
but the family is made for children.¹*

1.1. SETTING THE SCENE

This is a book about children and their parents. It will be obvious to any observer that there are many different kinds of children and at least about as many different kinds of parents. Whereas everybody was once a child and has parents, not every child becomes a parent. Sometimes this is out of choice and sometimes because, for whatever reason, it just does not happen. Moreover, there are those who become parents against the odds, for instance because they are infertile, single or homosexual. There are many different disciplines that study children and their parents, such as sociology, psychology, child studies and gender studies, to name but a few. This study concerns a *legal* question with regard to the parent-child relationship in two jurisdictions, namely how the law assigns parents to children.

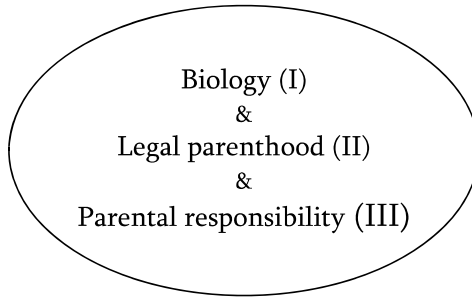
In times past, when the contemporary foundations for the legal rules relating to parenthood were given shape, the existence of a legal relationship between parent and child was determined by whether the child's parents were married. Married men were presumed to be the biological fathers of their wives' children. Since most children were born within marriage, and those born outside marriage had no legal parents,² or only one parent, biology, relationship status and the

¹ Variation on ANTOKOLSKAIA (2006) p. 25 where she argues that 'according to the old trans-personalistic way of thinking, the individual was subservient to the family, and the family was in turn subservient to society at large. In contrast the modern personalistic perspective can be paraphrased by the saying: "family is made for man, not man for the family."' This saying is in turn a variation on the phrase 'The Sabbath was made for man, not man for the Sabbath' from Mark 2:27.

² See for instance HOLTRUST (1985) p. 201-203 and HOLTRUST (1993) p. 48 for **The Netherlands**. Under **English** law an unmarried mother did have parental power with regard to her child (*Barnardo v. McHugh* [1891] AC 388).

legal status of the child were strongly intertwined.³ Married fathers were attributed with parental power with regard to their children, which gave them complete control over their children's lives until the late 19th century.⁴

Figure 1: The three legal dimensions as one



The situation for the married father was like that depicted in Figure 1, he was (presumed to be) the child's biological and legal parent and he was the sole holder of parental responsibility. These three aspects of the parent-child relationship are referred to in this study as the three legal dimensions of the child's family circle: I. biological/genetic parenthood, II. legal parenthood and III. parental responsibility. In Figure 1 these three dimensions overlap completely.

Married mothers were biological and legal parents, but did not automatically become holders of parental responsibility with regard to their children until the late 20th century, despite the fact that they were expected to raise and care for

³ See ANTOKOLSKAIA (2006) p. 443-454; DE BOER (1993) p. 1-9; HOLTRUST p. 37-63; CRETNEY (2003) p. 543-565.

⁴ Custody of Children Act 1891 in **England**, see CRETNEY (2003) p. 628-670 for more information; in **The Netherlands** the 1905 Children Acts. 'The shift in thinking about the legal relationship between parents and children has mostly taken place around the end of the eighteenth and the beginning of the nineteenth century, when from different corners of **Dutch** society a call came to limit the power of the father in order to protect the interests of the child. It was no longer accepted that a father had unlimited power over his children, in which everything was allowed. The power of fathers is more and more the subject of close scrutiny and it falls to the government to intervene in the family when this is necessary'. BRUNING (2001), p. 9 [translation by VONK].

the children concerned.⁵ Figure 1 depicts the contemporary position of the child's birth mother, regardless of her relationship status and her genetic link with the child. In contrast, demographic trends such as the increasing number of children born outside marriage⁶ and other developments such as the advancement of assisted conception techniques seem to have weakened the position of the biological father. The position of the unmarried biological father is by no means similar to that of a married father; he will not have access to legal parenthood and parental responsibility automatically, he will need to undertake certain actions and may or may not succeed. In short, the three legal dimensions of Figure 1 do not automatically overlap for an unmarried father.

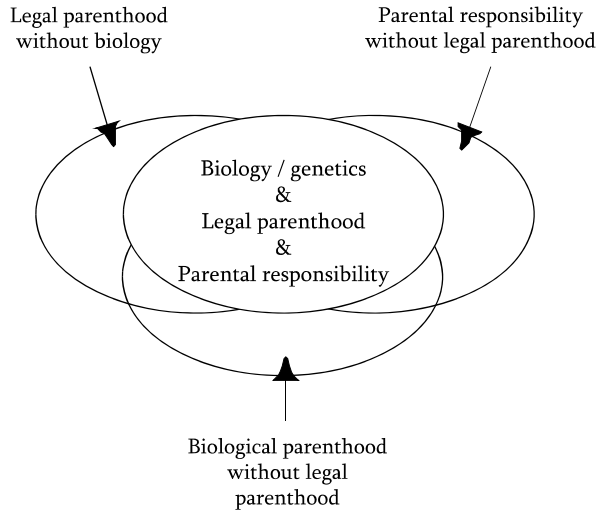
Other trends, such as the fact that donor insemination has become more or less accepted,⁷ and increasing acceptance of the fact that some same-sex couples are raising children together,⁸ contribute to the fact that the three legal dimensions no longer necessarily overlap. There are, for instance, parents with parental responsibility who are not legal parents, legal parents who are not biological parents and biological parents who are not legal parents.

⁵ In **England** a married woman only acquired parental responsibility over her children automatically after the introduction of the Guardianship Act 1973 (see for the historic developments: CRETNEY (2003) p. 566-576). In **The Netherlands** automatic joint parental responsibility for the married mother was introduced in 1947. For a historic overview of the law regarding parental responsibility in **The Netherlands** see JEPPESEN (2008) forthcoming.

⁶ **England**: in 2005 (2006 figures not yet available) 42% of children were born out of marriage. Of this group of extramarital children 80% were registered on the joint information of the parents. In 2000, five years earlier, almost 40% of children were born out of marriage. (Birth Statistics Review of the Registrar General on births and patterns of family building in England and Wales, 2005 Series FM1 no.34) to be found at www.statistics.gov.uk. **The Netherlands**: in 2006 37% of children were born outside marriage, five years earlier in 2001 this was only 27%. Information on the recognition of extramarital children is not available; in principle the child can be recognised by the mother's male partner on the occasion of registering the birth (or at a later date). CBS 2007 Statistisch bulletin 63e jaargang, no.7, 15 februari 2007 www.cbs.nl.

⁷ Developments in this field in **The Netherlands**: TAKES (2006) p. 25-50 and **England**: CRETNEY (2003) p. 540-544 and RICHARDS (2006) p. 53-72.

⁸ It is very likely that the children in the latter group are far less numerous than the number of children born outside marriage; however, for the individual child this makes no difference with regard to the necessity to regulate the legal status of all these groups of children.

Figure 2: The three legal dimensions diverging (some examples)

The law in **England** and **The Netherlands** has adapted to these changes to some extent, but has on the other hand adhered to a number of established concepts. For instance, the principle that a child can have only two legal parents has remain unchanged,⁹ even though this may not always be the case in the perception of the child or the parents involved. Questions to be answered by the comparison and analysis of the two legal systems are for example: does the child's relationship with these 'surplus' parents warrant the recognition and protection of the law, and if so, are the existing possibilities for establishing parent-child relationships sufficient or are new models required? Or to rephrase a question asked by John Dewar¹⁰ in the context of relationships: the decreased importance of heterosexual (life-long) marriage as the principal family unit raises questions about what techniques we use to render other parents-child relationships visible in law, and, once visible, what consequences we attach to them.

⁹ I will use the term parent as a generic term, which includes all the adults who are either part of the child's family unit or have some kind of parental relationship with the child outside the family unit, this may be a genetic link, a gestational link or a social link on the basis of parental responsibility.

¹⁰ Variation on the following words by John Dewar 'The decreased importance of marriage raises questions about what techniques we use to render relationships visible in law, and, once visible, what consequences we attach to them.' DEWAR (2000) p. 66.

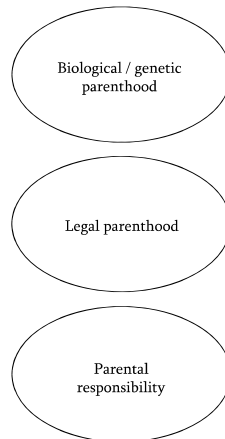
1.2. THE THREE (LEGAL) DIMENSIONS OF THE CHILD'S FAMILY CIRCLE

It is relevant at this point to take a closer look at the three legal dimensions of the child's family circle, namely: *biological parenthood*, *legal parenthood* and *parental responsibility*.

- I. The first dimension concerns the biological and/or genetic parenthood of the child. In the overall majority of cases this dimension will contain two parents: a biological father and a birthmother, but since the introduction of IVF this dimension may contain an additional mother, namely a genetic mother.
- II. The second dimension: *legal parenthood* may only contain two parents in both **England** and **The Netherlands**; these parents may or may not be the child's biological or genetic parents.
- III. The third dimension: parental responsibility may consist of only two parents in **The Netherlands** and more than two parents in **England**, these parents may be legal parents or non-legal parents.

The position of purely social parents without any legal recognition is not included in this diagram.¹¹ However, if room for the visualisation of the position of purely social parents is to found, it may be included in the third dimension.

Figure 3: The three legal dimensions separated



¹¹ In both jurisdictions social parents without a legal status do have the obligation to act in the child's best interests. Social parents who have entered into a formalised relationship with one of the child's legal parents also become financially co-responsible for the child concerned.

By disentangling these three legal dimensions, one may gain an insight into the meaning of the different dimensions in the attribution of legal parent-child relationships.¹² After all, legal parents are not necessarily biological/genetic parents and holders of parental responsibility are not necessarily legal parents. If the points of access to the different dimensions can be distilled from the law, it becomes possible to assess whether other parents who meet the same criteria may also have access to dimension II and III.¹³ For instance, presence in the biological parenthood dimension is not the *only* means of access to the legal parenthood dimension; a husband will, for instance, become a legal parent by virtue of his marriage to the mother at the time of the child's birth without being a biological parent.¹⁴ Moreover, some biological parents, such as sperm donors, never become legal parents. Their place may be taken by a non-biological parent who then becomes the child's legal parent. The same is true with regard to parental responsibility; legal parents are no longer the only parents who may have access to the legal parenthood dimension. Under certain circumstances social parents may acquire parental responsibility, for instance by court order.

The advantage of clearly distinguishing between the three dimensions may be that both the existence of biological parents and non-biological parents may be recognised in law. For instance, where in the past insemination with donor sperm in a marriage was covered up with a complete replacement of the biological father by the legal father, nowadays, this replacement is no longer complete. With a view to the interests of the child in knowledge about his or her genetic history, the child has been given the right of access to identify information about the sperm donor. Furthermore, it may also open the possibility for the legislature in a jurisdiction to abandon the concept that a child may only have two legal parents, since legal parents are not necessarily biological parents. Moreover, it may make it possible for a jurisdiction to recognise the three-partite legal parenthood of a child from a foreign jurisdiction.¹⁵

¹² BAINHAM (1999) p. 31: 'If we therefore want to ask the question 'what is a parent?' we need to ask further questions about whether we are seeking to establish genetic parentage, invest someone with the status of a legal parent or merely give to that person the legal powers and duties which are associated with raising a child and are encapsulated in the legal concept of 'parental responsibility.'

¹³ BAINHAM (2003) p. 31: 'Perhaps [...] there needs to be a re-evaluation of the circumstances in which it is appropriate to allocate to individuals the status that goes with these distinctive concepts.'

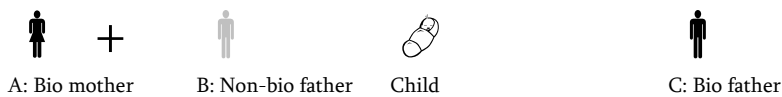
¹⁴ There are, however, differences in the strength of the husband's legal parenthood if it is not based on biology between the two jurisdictions, these differences will be extensively discussed in the relevant chapters.

¹⁵ E.g. Court of Appeal for Ontario, *AA v BB*, 2007 ONCA 2.

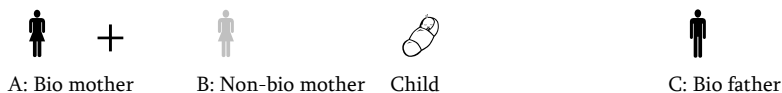
1.3. RESEARCH QUESTION

In recent years, there has been a substantial amount of attention being given to the legal position of adults in same-sex relationships, but far less attention has been paid to the legal position of children growing up in these families. At first it was assumed that no children would be growing up in such families. For instance, the **Dutch** registered partnership introduced in 1998 was aimed at regulating the legal relationship between couples who could or would not marry, and not the legal position of children born into or growing up in these partnerships.¹⁶ However, it has since become clear that children do grow up in non-traditional relationships, with different-sex parents or same-sex parents, be it children who are born during the relationship with the help of a third procreational party or children from a previous relationship.

Consider for instance the following case: a couple in a non-marital registered relationship (A and B) have decided to start a family. However, because the birth mother's partner cannot provide the necessary genetic material, either because the partner is infertile or because the partner is a woman, they make use of donor sperm donated by a sperm donor (C).



or



Many questions are raised by this case concerning the responsibilities and rights of the three parties involved with regard to each other and the child. For instance, can the child establish a legal relationship with at least two or even all three parents involved? Does it make a difference whether the couples use an unknown donor from a clinic or, for instance, from a family member?

¹⁶ See BOELE-WOELKI et al. (2007) p. 5-9 for events leading up to the introduction of the registered partnership.

The example reveals some of the complexities involved in assigning parents to children in atypical family relationships, in particular where there are more than two candidates to fulfil the position of a parent in the child's life. Therefore, this study focuses on the legal position of children born into families where only one of the parents is genetically or biologically related to the child; this includes children born into same-sex families as well as different-sex families. Two jurisdictions will be included in this research: **England**¹⁷ and **The Netherlands**.

This study aims to answer the question of what are the implications for children *born into* these families if their current legal position is assessed on the basis of the notion that

- a child's family situation deserves legal protection;¹⁸ and
- a child should have the possibility to acquire two legal parents.¹⁹

These two notions are derived from the presumption that it is inherent in the legal systems of the two jurisdictions that children in so-called typical families *do* have the opportunity to acquire two legal parents (legal parenthood) and that their family situation *is* adequately protected (parental responsibility). These presumptions will be tested in Chapter 3 on the legal position of children and parents in families where both parents are genetic and biological parents (a typical family). Subsequently, the legal position of children and parents with regard to legal parenthood and parental responsibility in a number of other family types will be described and compared, namely step-families, surrogate families and, finally, families with one biological parent and one non-biological

¹⁷ **English** law is a formal 'term of art' that describes the law in force in England and Wales. See the England and Wales Interpretation Act 1978, Schedule 1. Hereinafter, references to **England** will mean England and Wales.

¹⁸ The ECtHR has established that there may be family life between a child and a non-biological parent *X.Y.Z. v. United Kingdom*; it is however, unclear what the exact position of the ECtHR is concerning the relationship between same-sex parents with regard to family life. In *Karner v. Austria* the court stated that 'Where the Contracting States' margin of appreciation was narrow, [...] the principle of proportionality between the means employed and the aim sought to be realized did not merely require the measure chosen to be suitable for realising the aim; it also had to be shown that it was necessary to exclude homosexual couples from the scope of the legislation in order to achieve that aim.' See *M v. Secretary of State for Work and Pensions* [2006] UKHL 11 and WIKLEY (2006) p. 542-547 for the position under **English** law. See FORDER (2002) p. 992-995 for a discussion of **Dutch** case law on the question whether there can be family life between same-sex partners and their children. Also FORDER & SAARLOOS (2007) p. 65-74.

¹⁹ This is inherent in both legal systems. A child may not always automatically acquire two legal parents, but in both jurisdictions there is the possibility to have the legal parenthood of a biological parent established. This notion is confirmed in the Children's Convention in article 7 which concerns the child's right to know and be cared for by his or her parents.

parent (atypical families). The aim of studying the different family categories is to place the legal position of a child born into a family with one biological parent and one non-biological parent in a larger perspective, so as to obtain knowledge about all possible solutions available in the two jurisdictions at present.

In both jurisdictions the law is in a transition from a parent-centred family law to a child-centred family law. In line with this transition the focus must shift from the differences between the parents to the equivalent nature of the needs and rights of the child. In this context it may be relevant to consider the following quote from NUSSBAUM:

'Human beings have a dignity that deserves respect from laws and social institutions. This idea has many origins in many traditions; by now it is the core of modern liberal democratic thought and practice all over the world. The idea of human dignity is usually taken to involve an idea of equal worth: rich and poor, rural and urban, female and male, all are equally deserving of respect, just in virtue of being human, and this respect should not be abridged on account of a characteristic that is distributed by whims of fortune. Often, too, this idea of equal worth is connected to an idea of liberty: to respect the equal worth of persons is, among other things, to promote their ability to fashion a life in accordance with their own view of what is deepest and most important.'²⁰

It is in essence the dignity of the child, in this case the child born into an atypical family that deserves respect. This respect is best expressed in the law not by stressing the fact that the child's legal position *vis-à-vis* his or her parents *cannot* be the same as that of the overall majority of children because his or her parents are not the same as those of the overall majority of children, but by departing from the notion that *all* children should have the most favourable legal position in life.²¹

²⁰ NUSSBAUM (1999), p. 5.

²¹ RAWLS (1971) p. 302. In Rawls' theory of justice social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged. See for the implications of Rawls' theory of justice in parent-child relationships DWYER (2006) p. 106-122 for the theoretical underpinnings of relationship rights for adults and p. 123-169 for the relationship rights of children.

This research does *not* deal with the question whether children should grow up in same-sex families;²² the point of departure is the fact that children *are* born into and *do* grow up in same-sex families. Studies undertaken in this field so far shows that children do fare well in same-sex families.²³ As in most families, the well-being of the children depends on the parents and their willingness to invest in their children.²⁴

Solutions to the possible problems found with regard to the position of children born into families with one biological parent and one non-biological parent will be sought within the possibilities offered by the concepts in the existing system in the two jurisdictions. On the one hand, because this system works sufficiently well for the overall majority of children, and, on the other, because this is likely to be the most feasible approach to strengthening their position within their family.

1.4. METHODOLOGY

1.4.1. COMPARATIVE METHOD

Use has been made of a functional (problem-solving) comparative approach.²⁵ The functional approach has been chosen because it allows for comparison at the most detailed level, namely at the level of the different family forms that will be defined in Chapter 2. The comparison is in part successive in order to provide detailed information about both jurisdictions (Chapter 3). Once the brunt of this information has been provided, the comparison becomes largely simultaneous (Chapters 4 to 8).²⁶

²² NUSSBAUM (1999) p. 15 'The traditional Western heterosexual family – consisting of a male breadwinner, female homemaker, and several children - is rapidly becoming less common in The United States [as is the case in **England** and **The Netherlands**]. (Of course in many parts of the world it has never existed, and one dividend of thinking about feminism internationally is that one comes to see the many different ways in which children have been cared for with good results.)'

²³ See BOS (2004) p. 11-30 for an overview of scientific publications on lesbian families and family functioning, and more recently BOS et al. (2007) p. 38-48. Also GARTRELL et al. (1996) 272-281, GARTRELL et al. (1999) p. 362-369, GARTRELL et al(2000) p. 542-548 and GARTRELL et al. (2006) p. 175-192 for a longitudinal study of children in lesbian families.

²⁴ BOS et al. (2007) p. 38-48.

²⁵ SCHWENZER (2003) p. 143-158 and ODERKERK (1999) p. 67-88.

²⁶ KOKKINI-IATRIDOU (1988) p. 187-190.

The aim of studying this subject in a comparative manner is to uncover and analyse the differences and similarities and the strengths as well as the weaknesses of the approaches taken under **English** and **Dutch** law towards biological parenthood, legal parenthood and parental responsibility. The ultimate aim of such a comparison and analysis is to evaluate what the jurisdictions may learn from each other.

In order to be able to conduct a comparison the objects to be compared must be sufficiently similar to make comparison useful. The objects to be compared are, on the one hand, the factual family situations in the two jurisdictions and how the law regards these families. On the other hand, the legal institutions legal parenthood and parental responsibility form part of the comparison. These instruments themselves are not the object of the comparison since the aim of the comparison is not the content of legal parenthood or parental responsibility, but its aim is rather to discover what role these two concepts play in the recognition of the legal position of children in atypical families.

The comparative method includes description, comparison and explanation,²⁷ but may also include, as ÖRÜCÜ recommended, conceptualisation and evaluation.²⁸ In a recently introduced methodological blueprint for comparative legal research,²⁹ ÖRÜCÜ distinguishes five stages of comparative research:

1. conceptualization
2. description
3. identification of similarities and differences
4. analysis and explanation
5. evaluation.

This approach has, in broad terms, been applied in this book. The structure of the book illustrates the research stages described above.

1.4.2. STRUCTURE OF THE BOOK

The book consists of four parts. **Part I: *It's all in the family***, contains two chapters. Chapters 1 and 2 provide an introduction to the research, and an overview and categorisation of the family types with which the book is concerned. Chap-

²⁷ KOKKINI-IATRIDOU (1988) p. 187-190.

²⁸ The stages as such were not introduced in this article for the first time by ÖRÜCÜ. See for instance ÖRÜCÜ (2004) p. 52-58, in particular p. 56: 'Traditional black-letter-law oriented comparative law research [...] would regard description as the final stage of the inquiry. Even the conceptualization stage might be suspect.'

²⁹ ÖRÜCÜ (2007) p. 37-40.

ter 2 embodies *stage 1* by conceptualising the objects of comparison with the help of a framework designed for this purpose: *The family tree*. This framework distinguishes between categories of families and allows for further conceptualization. This framework determines the structure of the rest of the book.

Furthermore, Chapter 2 explains that in order to assess the legal position of a particular group of children within the family that raises them, it is essential to look beyond that particular family type and to include other relevant family types in the research. The research will concern two aspects of the legal parent-child relationship, namely the establishment of legal parenthood and the attribution of parental responsibility. It is essential to look at both these aspects in order to assess the legal position of children born into families with one biological parent and one non-biological parent.

Part II: *Typical families* consists of one chapter which describes and discusses the position of children in different-sex families where both parents are the child's biological parents. The legal position of these families is the point of reference for the description of the legal position of the atypical families.

Part III: *Atypical families* covers three types of atypical families. In all these families the child concerned will have more than two parents, not in the sense of legal parents, but in the sense that he or she has two or three genetic and/or biological parents and one or more non-biological parents. Chapter 4 discusses the legal position of parents and children in families that have formed after a relationship breakdown or the death of one of the parents. In everyday language these families are often referred to as step-families. In Chapter 5 the position of parents and children in surrogate families where both the commissioning parents³⁰ are genetically related to the child is discussed. Subsequently, Chapter 6 is concerned with those families where one of the parents is genetically related to the child and the other is not. This includes different-sex and same-sex families. The distinguishing factor between these families and the earlier mentioned step-families is the fact that in this family the child is born during the relationship.

The three family categories are not discussed in the order in which they are represented in the Family Tree in Chapter 2. The sequence is determined by a

³⁰ In order to avoid confusion the term commissioning parents will be used, despite the slightly mercenary connotation, because the term intentional parent is used in a much broader sense in this book.

number of factors. The secondary families are discussed first, because these were the first of the atypical families to receive some kind of legal recognition. Subsequently, the surrogate genetic families are discussed because a substantial amount of the material covered is relevant for the last family category discussed in Part III, namely the partially genetic primary families.

The chapters on the different family categories discussed in Part II and Part III embody *stages 2 and 3* of the methodological blueprint. These chapters contain the descriptions of the families and answer the question of whether and how parents may acquire the status of a legal parent or parental responsibility. The identification of differences and similarities (the comparison) takes place in the chapters themselves at two levels: internally and externally. The internal comparison looks at the similarities and differences of the legal position of children *within* the jurisdiction and the external comparison looks at the similarities and differences *between* the jurisdictions.³¹ Both the internal and the external comparison yield relevant information for the countries concerned.

Part IV: *All other things being equal* consists of Chapter 7 and Chapter 8. The first of these chapters contains an analysis of the means by which the law attributes legal parenthood and parental responsibility. This analysis is performed on the basis of a number of *fundamentals* and *connecting factors* which are found in the law itself or form the foundation for the law. By approaching the law in this manner with the factual situation in the different family as the starting point it becomes possible to evaluate whether the law protects the legal position of children in families with one biological parent and one non-biological parent. The analysis in Chapter 7 embodies *stage 4* of the comparative research. It focuses on the *fundamentals* and *connecting factors* for the attribution of the status of legal parent and for the attribution of parental responsibility as they can be deduced from the present legal system. Such an analysis on the level of *fundamentals* and *connecting factors* is relevant both for the internal and the external comparison.

Chapter 8 will return to the research question and by means of the introduction of a new concept of legal parenthood, *procreational responsibility*, to amend possible indiscrepancies found in the two jurisdictions. This chapter concerns *stage 5* of the blueprint, answering the research question, evaluating the results and proposing improvements.

³¹ CURRY-SUMNER (2005) p. 258.

1.4.3. TERMINOLOGY

One of the problems encountered when discussing the legal recognition given to children and their families is the fact that there is no specific terminology for all the different family forms and their members. Moreover, the meaning of the existing terminology is sometimes ambiguous. In order to avoid unclarity, a number of the terms used in this book will be defined in this section.

First of all, the term *parent* will be used as a generic term, which means that it includes all the adults who are either part of the child's resident family or have some kind of parental relationship with the child outside the *resident family*, this may be a genetic link, a gestational link or a social link based on parental responsibility. A child's *resident family* is the family in which the child spends the majority of her or his time. A child may have more than one resident family if (s)he spends a substantial amount of her or his time in two different families.

- *Legal parent*: a parent who has been attributed with the status of legal parent either on the basis of a presumption, by court order, registration, recognition or adoption. Under both **English** and **Dutch** law a child may only have two legal parents.
- *Full parental status*: a parent has so-called full parental status if (s)he is both regarded as the child's legal parent and has parental responsibility over the child.
- *Third procreational party*: a person who either donates gametes to be used by others or a person who offers her gestational services to others; a doctor or a clinic is not regarded as a third procreational party.
- *Relational status*: instead of marital status the term relational status will be used in order to include other relational statuses besides married or unmarried.

Family-specific terminology will be defined in the respective chapters. For readers with a common law background, it is important to keep in mind that the way the term 'legal parent' and in particular the term 'legal father' is used, may not always correspond with the way the term is most commonly used in **English** law. However, in comparative law it is necessary to create a set of terms of art

which can be used to wholly abstract each legal system from its own environment in order to be able to compare it with another system.³²

1.5. CHOICE OF JURISDICTIONS

The choice of jurisdictions has been limited to two jurisdictions: a civil law jurisdiction (**The Netherlands**) and a common law jurisdiction (**England**). The comparison between a common law jurisdiction and a civil law jurisdiction with respect to parent-child relationships is potentially interesting, because the approach to such relationships in the law may differ. Furthermore, **English** law forms the basis for other common law jurisdictions, such as **Canada** and **New Zealand**,³³ which have introduced progressive legislation with regard to the legal consequences of assisted conception and the status of children in same-sex families.³⁴

In addition, having regard to the notion of comparability, it is advisable to choose jurisdictions that have to some extent adapted their provisions with regard to parent-child relationships to accommodate different-sex and same-sex families of which one of the partners is not a biological parent. At the start of this research in the autumn of 2002 non-biological parenthood in different-sex families was far more widely accepted than same-sex parenthood in Europe at that time.³⁵ Only very few countries had undertaken action to regulate the legal position of children in same-sex families.

England seemed an interesting jurisdiction in this field, because on the one hand the Children Act 1989 contained provisions for the attribution of parental

³² See on the on the importance of the conceptualisation of the legal notions to be compared ÖRÜCÜ (2004) p. 52-58.

³³ For instance in **New Zealand** the Status of Children Act 1969 includes regulations on the legal status of the various parties involved in assisted conception with donor material. See CAMPBELL (2007) for a comparison between the legal position of children conceived with donor material in the **Canadian** common law and civil law jurisdictions. Both jurisdictions allow for a child to have two mothers, however, 'before any Canadian common law jurisdiction, Quebec (which is a civil law jurisdiction) officially recognised the possibility of two women to be named as a child's 'natural' mother's.' (p. 13)

³⁴ Court of Appeal for Ontario, *AA v BB*, 2007 ONCA 2.

³⁵ See for instance GLOVER (1989). The Glover Report on reproductive technologies to the European Commission. p. 13-20 and p. 149-153: 'We are divided whether reproductive technology should be made available to people other than infertile heterosexual couples. But we agree that the birth of a child should not be associated with criminality; and consequently we agree that no use of these techniques by individuals or couples should be illegal.'

responsibility by means of a residence order to persons who are not legal parents but have taken care of the child for a particular period of time. On the basis of this provision a same-sex partner was granted a residence order with regard to the child of her female ex-partner.³⁶ Furthermore, **English** law contained very specific provisions with regard to children conceived by means of assisted conception techniques with donated genetic material embodied in the Human Fertilisation Act 1990 (HFEA 1990). It seems likely that the structure of the so-called status provisions in this Act might offer interesting starting points for regulating the position of children in same-sex families conceived with assisted conception techniques.

Another interesting feature of **English** law was the fact that the Children and Adoption Bill was before parliament at the time the jurisdictions were selected. This Bill proposed to make partner adoption and joint adoption possible for same-sex couples.³⁷ Although this would not change the fact that the parenthood of a same-sex partner could *not* be acquired in the same manner as that of a non-biological different-sex parent, adoption by a same-sex partner would introduce the notion that a child can have two legal mothers or two legal fathers. Furthermore, in 2001 and 2002 attempts had been made to introduce Bills that would allow same-sex couples to register their partnership.³⁸

In 1998, **The Netherlands** had introduced a new formalised relationship, open to both same-sex and different-sex couples: the registered partnership.³⁹ Only three years later marriage was opened up to same-sex couples.⁴⁰ At first instance, entering into a registered partnership had no consequences with regard to any children growing up in the relationship. However, as of January 2002 registered partners of the same sex and of different sex and married couples of the same-sex have now been attributed with parental responsibility by operation of law over

³⁶ See *Re C (A Minor) (Residence Order: Lesbian co-parent)* [1994] Fam Law 48 and *G v F (Contact and Shared residence)* [1998] 2 FLR 799.

³⁷ See HERRING (2003) p. 587-592 and BRIDGE & SWINDELLS (2004) p. 45- 49 and p. 195-197.

³⁸ CURRY-SUMNER (2005) p. 203-210, and WOELKE (2006) p. 2-6.

³⁹ For information on the events leading up to the introduction of registered partnership see: CURRY-SUMNER (2005) p. 117- 121 and BOELE-WOELKI et al. (2007) p. 5-14.

⁴⁰ See for more info on the introduction of same-sex marriage, FORDER (2000), 239-277; FORDER (2001); p. 301-320; SCHRAMA (2002), p. 277-303. For the position in **England** on same-sex marriage see *Wilkinson v. Kitzinger (No 2)* [2007] 1 FLR 295. Also CURRY-SUMNER (2006) p. 2-10 and KIRBY (2007) p. 413-422.

children born into their relationship.⁴¹ In 2001 it became possible for same-sex couples to adopt each other's children regardless of their relationship status.⁴²

Furthermore, there seemed to be an interesting difference between the jurisdictions with regard to the recognition of social parenthood in general. The existence of the concepts 'child of the family' in **English** law and the possibility to grant legal recognition to a person who has a child in his or her care by means of a residence order, point towards an interpretation of the child's interests in connection with non-biological parents that was not as obvious in **Dutch** law at that time. All these factors together led to the choice of these two jurisdictions, with the aim being to compare them and to find how they might both benefit from such a comparison.

1.6 RECENT DEVELOPMENTS

Shortly before the closing date of this research project, 1 July 2007, interesting developments took place in both jurisdictions. In **England** the Human Tissue and Embryos (Draft) Bill (hereafter referred to as the Tissue Bill 2007) was published on 17 May 2007. The Bill proposes far-reaching and monumental changes to the present provisions on legal parenthood in cases involving assisted conception and surrogacy regulated in the Human Fertilisation and Embryology Act 1990 (HFEA 1990). These proposals will in particular have consequences for the legal position of same-sex couples and cohabiting couples. Furthermore, the Tissue Bill proposes amendments to some of the parental responsibility provisions in the Children Act 1989 (CA 1989) to reflect the new approach to same-sex parenthood. The law in force in **England** on 1 July 2007 is the focus of the comparison, however, the proposals made in the Tissue Bill will also be discussed.

In **The Netherlands** The Minister of Justice and the Minister of Youth and the Family have recently installed a commission to investigate possibilities for the automatic attribution of the status of legal parent to the birth mother's female

⁴¹ Wet van 4 oktober 2001 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het gezamenlijk gezag van rechtswege bij geboorte tijdens een geregistreerd partnerschap, *Staatsblad*, 2001, 468.

⁴² Some other countries, such as **Denmark** and **Sweden** had also made headway in adapting the law to accommodate same-sex families, mainly by allowing step-parent adoption by a same-sex partner. **Denmark**: LUND-ANDERSEN (2003) p. 17-21 and **Sweden**: SAVOLAINEN (2003) p. 38-39.

partner.⁴³ Hopefully this study may contribute to the commission's investigations.

⁴³ *Dutch Second Chamber* 2006-2007, 30 551, no. 8 and 9.