

The equality of the (non) trans-parent: women who father children

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Parents mostly become parents by having sex and thus conceive a child, which is born about nine months later. This fact of life is reflected in the Dutch law on affiliation (*afstammingsrecht*) just like it is in most parts of the world. Biology may not be destiny but it is often the easiest way into (legal) parenthood. These days there seems to be a new exception to this rule, and that exception is the trans woman who begets a child after having changed her legal sex. It is this exceptional and, as will be seen, quite ‘non-transparent’ legal position of the female ‘father’ that is explored and assessed in this contribution.

The issue and corresponding terminology will be discussed in more detail in section 1. Next (section 2) the possibilities for people – trans* and cis* – to acquire legal parenthood will be explored. In section 3 the parental status of trans women who father children will be compared to that of other groups. Several factors seem to influence people’s possibilities to acquire legal parenthood: biological affiliation, cis/trans status, the presence and sex of a partner, the legal status of the relationship with that partner, and last but not least the presence of a ‘third party’ like an ex-partner, a sperm donor or a surrogate mother.¹ People’s legal status as male or female for the acquisition of legal parenthood seems to have lost some if not much of its decisiveness. The outcome of this comparison will be briefly assessed in terms of human rights generally and of women’s human rights in particular. Some attention will be devoted in this regard to the concerns expressed in the 1990s by feminist legal scholars, among whom was Titia Loenen. They expressed doubts regarding the developments in the area of family law,

1 Thanks to our colleague Evelien Verhagen (Molengraaff Instituut, UCERF) for pointing out this latter aspect.

including affiliation law that appeared to strengthen the position of biological fathers – often to the detriment of the liberties and autonomy of the mothers involved.² The note will be concluded with a tentative answer to the question of whether the concurrence of human rights and equality for women (both cis and trans) results in family law trouble once again.

1. Women who father children: the issue and some definitions

Cis people are people who feel comfortable with the sex that was assigned to them at birth. The term ‘cis’ indicates the opposite of ‘trans’, that is, people who do not transition/cross. Thus, transsexuals are people who at birth were registered as male or female because of their physical characteristics, but who later in life feel that, even though they may look male, they really are female or the other way around. Trans women are therefore people who transition from male to female. Trans* is used as an umbrella term to indicate the larger group of people who, for one reason or another, do not entirely fit the male/female binary.³

Trans* may decide to change their legal sex if they live in a country that allows a legal sex change.⁴ In the Netherlands, up to 1 July 2014, trans* who wanted to change their legal sex were required to physically adapt as much as possible to match their ‘new’ sex, and to make sure that they were incapable of ever having a(nother) child. The latter is commonly referred to as the ‘sterilisation requirement’. Both conditions have now been dropped. Since

2 E.g. LOENEN 1995, at p. 94.

3 The asterisk in cis* and trans* is derived from internet practices where one can add it at the end of a search term to indicate that one is looking for any word starting with your search term (e.g. trans) regardless of how it ends (*: transgender, transsexual etc.): Thus cis* and trans* are intended as inclusive terms, referring to anyone who identifies in one way or another as such.

4 In the Netherlands this has been possible since 1986: Art. 1:28-c BW. However, the possibility is not always a blessing. See *Volkscrant* 22 June 2000, ‘Man vindt vrouwenleven veel te zwaar’ (Man finds a woman’s life to be too cumbersome), recounting the story of an Iranian trans woman who, after transitioning, found no relief but instead learned that she could not face the severe restrictions imposed on women in Iran.

1 July 2014 trans men are allowed to give birth to children, and trans women may impregnate cis women and trans men.⁵

The Dutch legislator anticipated the possibility of pregnant (trans) men and (trans) women ‘fathering’ children. In a first draft of the bill to drop the sterilisation requirement, it was proposed that trans men who would become parents one way or another would still be registered as the mothers of those children and trans women would become fathers, despite them being legally male and female respectively. This is in line with the principle laid down in Article 1:28c(2) of the Dutch Civil Code (*Burgerlijk Wetboek*, BW) that provides that legal sex changes do not affect already existing family relationships. Thus, a trans man who is already the mother of one or more children will remain their mother, at least for all legal purposes.⁶ Trans women remain the father of their already existing children.

However, at some point in the legislative process the legislator decided to change perspective and take the *new* sex of the (trans) parent as the starting point for determining parental status regarding children born *after* a legal sex change. It was felt to be confusing for children to have a mother who, according to her birth certificate, for all legal purposes would be the child’s father.⁷ This argument is not watertight as will be seen later on.

One exception to the general rule of the ‘new’ sex was deemed necessary: the trans man who gives birth to a child will be regarded as the child’s legal mother. This is because of one of the core principles of Dutch affiliation law: the *mater semper certa est rule* (the mother is always certain). If the person giving birth to a child would *not* automatically become the child’s mother, the child might not have any legal parent, since there is not always a (legal)

5 Wet van 18 december 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek en de Wet gemeentelijke basisadministratie persoonsgegevens in verband met het wijzigen van de voorwaarden voor en de bevoegdheid ter zake van wijziging van de vermelding van het geslacht in de akte van geboorte (Act of 18 December 2013 amending Book 1 of the Civil Code and the Act on the municipal registration of personal identity information relating to changes in the conditions for and competence regarding changes in the registration of sex on the birth certificate), *Stb.* 2014, 1.

6 Compare the similar situation in ECtHR, *P.V. v. Spain*, 30 November 2010 (Appl.no. 35159/09), which regarded a trans woman who was, legally speaking, the father of her child born prior to her legal sex change.

7 *Kamerstukken II*, 2012/13, 33351 no. 6, at p. 10. See also: FORDER and VONK 2013, at p. 2451.

co-parent. That is considered undesirable, also in light of the UN Children's Rights Convention (1989).

The law, however, is less straightforward regarding the legal status of trans women who are the biological parent of a child. These trans women/impregnators are not 'anonymous donors' as meant in Article 1:198(1)(b) BW. Therefore, they cannot derive legal parenthood from their status as the wife or registered partner of the birth mother. The female begetter and her partner cannot even pretend to have been assisted by an anonymous donor, since such claims must be proven by an official declaration of a sperm bank. Thus trans women fathering children are not entitled to *automatically* acquire legal co-motherhood on the basis of their legal ties to the birth mother, as other women (both cis and trans) in a same-sex relationship can (since 1 April 2014).⁸ Neither do they fall within the scope of Article 1:199 BW which lists the different ways for men to attain legal fatherhood, since the idea of trans* people's original legal sex was dropped. A literal argument could be made to still achieve that same result, based on the wording of Article 1:199 BW, since the article provides that: '*Father of a child is the man ...*'. Trans women obviously are not men, but that may not be decisive since Article 1:198 BW regarding motherhood similarly states: '*Mother of a child is the woman ...*'. This is no longer true since 1 July 2014, when it was established that legal males who give birth to a child will be regarded as the child's mother. Trans men are legally male and they are still considered to fall within the scope of Article 1:198 BW. Therefore, an argument excluding trans women from the scope of Article 1:199 BW might fail, because it seems clear that at least motherhood, and therefore possibly also fatherhood, is no longer exclusively reserved for women. Thus, the opposite may arguably be true as well, and fatherhood can no longer be considered as the exclusive domain of men. However, there is no need to engage in this kind of argument, since the legislator has clearly indicated that the legal road to parenthood for female

8 Wet van 25 november 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het juridisch ouderschap van de vrouwelijke partner van de moeder anders dan door adoptie (Act of 25 November 2013 amending Book 1 of the Civil Code regarding legal parentage of the female partner of the mother other than by adoption), *Stb.*, 2013, 480.

begetters leads through Article 1:28c(3) BW, which in turn refers to chapter 11 of book 1 BW (affiliation law).

The way to attain legal parenthood for female begetters is mapped out in the next section.

2. Different roads to legal parenthood for cis* and trans* and for same-sex couples

There are several roads to legal parenthood. For women the options used to be much more limited than for men, but women have caught up in the past few years, especially since the introduction of easier options for the female partners of birth mothers, most recently in 2014.⁹

The classic way is for a (cis) man and a (cis) woman¹⁰ to marry and have children. The woman becomes a parent by giving birth to the child, the man by being married to the woman. Thus, (cis) fathers do not need to be the biological father to *automatically* become a legal father.

In the 1990s the position of biological fathers was strengthened, especially in relation to single mothers and lesbian couples. Whereas female couples at the time could not (and still cannot really)¹¹ rely on the European Court of Human Rights to protect their status as a (legal) parent, biological fathers received a warmer reception.¹² Biological fathers may claim affiliation in court when the birth mother refuses to consent to his recognition of the child (Art. 1:204(3) BW). Depending on the individual case, the biological

9 Much has changed since Titia Loenen listed the different categories of parents in 1995. See LOENEN 1995, at p. 93. On the developments regarding legal parenthood of female same-sex couples see e.g. VONK and BOS 2012.

10 Note that these people do not *per se* have to be cis: a trans woman and a trans man who have not had any surgery on their reproductive organs may achieve a similar situation, depending on the domestic legal framework. See e.g.: “‘We have the parts so we use them’: Transgender couple who BOTH changed sex prepare to explain to their two children how their father gave birth while their mom provided the sperm”, *MailOnline*, 11 August 2014, available at: www.dailymail.co.uk/news/article-2721891/Transgender-couple-prepare-telling-children-father-actually-mother-vice-versa.html#ixzz3GDfYrXtv (last visited 19 December 2014).

11 Cf. ECtHR, *Gas & Dubois v. France*, 15 March 2012 (Appl.no. 25951/07). Currently pending: *Bonnaud & Lecoq v. France* (Appl.no. 6190/11), filed 8 January 2011. Bonnaud and Lecoq, a lesbian couple, both had a child and now wish to be granted parental authority in respect of their partner’s child.

12 See LOENEN 1995, at p. 94.

father's claim may even override a concurring claim for legal parental status by the birth mother's partner who together with the mother wished for the child to be conceived and born. The only unassailable obstacle to a claim to legal parenthood by biological fathers is the presence of a husband who is in a formal legal relationship with the mother and who was already married to the mother when the child was born: Article 1:204(1)(e) BW prevents recognition if a child already has two (legal) parents.

Other ways to obtain legal parenthood are adoption and recognition of parentage. Recognition was not possible for women prior to 1 July 2014. The possibilities for male couples, especially cis males, to become the legal parents of a child are much more restricted than those for two females. Two men (with the exception of fertile trans men) are dependent on a woman to give birth to a/their child. In the Netherlands that woman, regardless of her intentions regarding the child, will automatically be qualified as the legal mother, as explained above. This means that only one of the partners in a male couple can easily obtain legal fatherhood, for example by recognising the child. Moreover, this is only possible if the birth mother is not in a formal relationship (a marriage or registered partnership) with a man, because in that case the husband will automatically be granted parental status. It does not matter for the recognition whether it is the biological father (if the child was indeed conceived with the sperm of one of the partners) or the other partner who acknowledges the child. The second partner, the partner who does not recognise the child, can only obtain legal parenthood by adopting the child.¹³

There are some legal peculiarities for trans parents. One of these is that trans parents can be a mother and father at the same time. A trans man, for example, who gives birth to a child and thus becomes a mother, can simultaneously become the legal father of a child born to his wife (even if this was accomplished with the help of an anonymous donor). The deletion of

13 Unless the legal parenthood of the non-biological father would be contested, for instance by the child, in which case the way to legal parenthood for the biological father would be open. However, since his partner would then lose his status as a legal parent, that would not solve the couple's problem.

sterilisation as a requirement for legal sex changes has increased the number of situations in which this may happen. However, also prior to 1 July 2014, a trans person could be the legal father of one child and the legal mother of another. Only, at the time, this could not happen simultaneously. It was only possible with regard to children born before and after their parent's legal change of sex. The children born after the legal change of sex would normally not be biologically related to their trans parent, because of the sterilisation requirement. Still, even before 1 July 2014 it was possible for trans women to be biologically related to their child born after a sex change if the child was conceived with sperm collected and frozen prior to the sterilisation. For trans men this was more complicated, since even a conception with their eggs harvested prior to their sex change would result in the (surrogate) birth mother being identified as the child's legal mother.

So how then, does the female 'father' become the legal parent of a child? For those taking their first steps in Dutch affiliation law, this may be a somewhat bewildering experience. Despite appearances, the starting point is not Article 1:28c(3) BW, but title 11 BW on affiliation law as such. Article 1:198 BW (the second provision of title 11) is applicable to trans women. They do not give birth to their child as meant in paragraph a, nor are they part of a couple that have made use of an anonymous sperm donor as mentioned in paragraph b, so these are not applicable. However, paragraph c (newly introduced to simplify the acquisition of legal motherhood for the co-mother in lesbian couples) states that 'the mother of a child is the woman *who has recognised the child*'. The legal concept of recognition is dealt with in Article 1:204 BW. This provision does *not* state that trans women can recognise their biological child, though. Article 1:204 BW only lists the situations in which the recognition of a child is legally void, for example when this is done by someone under 16 years of age. Therefore, the article's applicability has to be inferred by applying an *a contrario* argument: since there is nothing in this provision to suggest that recognition by a trans woman/begetter would be legally void, the recognition must be legal.

Instead of recognition, trans women, just like other women in a same-sex relationship, may opt for adoption. Although the legal procedure to adopt

is more expensive, time-consuming and cumbersome, it has been pointed out that it may be preferable in certain circumstances. This is especially so in the case of migration, since adoption may be more readily accepted by the authorities abroad than recognition by (legal) females.¹⁴

3. The legal position of the trans woman who fathers a child compared

The good news for the trans woman/begetter is that she, different from other co-mothers in a (legally formalised) lesbian relationship, does not have to compete for the right to recognise the child with the biological father of the child (the known donor). Biological fathers may ask the court for permission to recognise the child, even if the birth mother would prefer her female partner to become the child's legal parent. The court will grant permission, unless it would harm the relationship between the mother and child or would otherwise not be in the child's best interests (Art. 1:204(3) BW). However, no such competitor exists in the trans woman/begetter's case.

Her position is also strong in comparison with the position of the known donor or ex-partner, who – just like the trans woman/begetter – fathered the child. They may have to compete for the right to recognise the child with the mother's (new) partner. The decisive difference here is not sex, biology, sexual orientation or cis/trans status, but the presence of a third party.¹⁵

However, there are two noteworthy differences between the trans woman/begetter and other parents. The first difference is that cis men will automatically become a child's father if the child is born within a formal relationship, *even* if use has been made of the sperm of a known donor. In an informal relationship, the cis man can recognise the child (although he might have to compete with the claims of a known donor). The trans woman, on the other hand, will not automatically obtain legal parental status. If she is married to

14 In the case of co-mothers who are not biologically related to their child there may be additional reasons to opt for adoption. Recognition may be challenged by the known sperm donor, as well as by the child itself later in life. This is not possible in the case of adoption. See for a discussion e.g.: www.babybytes.nl/encyclopedie/encyclo.php (last visited 19 December 2014).

15 The contribution of a 'third party', however, is not always decisive. The use of donor sperm by a cis male/cis female (or trans male) couple does not affect the male partner's parental status at all. Likewise, the use of anonymous donor sperm by female couples is no obstacle for the female partner of the co-mother to automatically obtain legal parenthood (within a formal relationship).

or in a registered partnership with the birth mother, she can recognise the child. If the relationship is informal, she will have to adopt her own child. A second difference becomes clear when the position of the trans woman/begetter is compared to the position of trans and cis women who are not biologically related to the child with whom they wish to establish legal ties. The latter group may acquire *automatic* legal motherhood if they are in a formal relationship with the birth mother and the child was conceived with the sperm of an unknown donor. This is remarkable, because the underlying rationale of Dutch affiliation law is based on biological affiliation. Even though biological links do not always have priority over other relational aspects such as social parenthood, biological ties are generally considered to be important.¹⁶ This is reflected, for instance, in Article 1:204(3) BW, according to which the court may override the birth mother's refusal to consent to the recognition of her child by the person who fathered the child or donated semen. Despite the importance attached to biological relationships, current affiliation law 'privileges' trans women who are not biologically related to their child by granting them *automatic* legal parenthood (if they are in a formal relationship with the birth mother), over trans women who *are* biologically related to their child, since they will have to recognise their own child.¹⁷

It is true that the recent legislative changes to make the acquisition of legal parenthood easier for co-mothers, reflect an apparently similar unintended incentive to make use of an anonymous donor instead of a known donor.¹⁸ A major difference, however, is that in the case of trans women who father a child, there is no third party. Contrary to the biological principle underlying affiliation law, the biological ties of the trans woman/begetter work to her disadvantage instead of in her favour.

16 The landmark decision for human rights law was the decision in the *Marckx v Belgium* case, ECtHR, *Marckx v Belgium*, 13 June 1979 (Appl.no. 6833/74).

17 However, the possibility of recognition is an advantage as compared to the situation faced in 2012 by the trans parent who could only adopt her own (fathered) child. The Court of Appeal in Leeuwarden found that this contravened Article 8 ECHR and decided that the trans woman should be registered as the child's 'parent' (not the father or mother). See *Gerechtshof Leeuwarden*, 23 December 2010, ECLI:NL:GHLEE:2010:BO8039.

18 The incentive is 'perverse' since it is contrary to the principle underlying affiliation law, i.e. that children have the right to know from whom they are descended.

Compared to the situation of (cis) men who father a child within a formal relationship, trans women are worse off as well, since these men will automatically become the legal father of their child. The same is even true for men (cis or trans) who are not biologically related to their child: Article 1:199(a) BW provides that the man who is in a formal relationship with the birth mother will automatically be regarded as the child's legal father.

From the perspective of children's human rights, the anomalous position of trans women who father a child seems to contravene the idea behind Articles 7 and 8 of the Children's Rights Convention. These provisions attach much importance to biological relationships.¹⁹ Although Dutch affiliation law does not prevent the establishment of legal ties between a child and its trans parent, it does make it unnecessarily difficult.²⁰ Also Article 8 of the European Convention on Human Rights protects the right to have one's biological ties recognised, as the Court of Appeal in Leeuwarden pointed out in 2012.²¹

Secondly, it is generally held to be in a child's best interests to have two legal parents to look after him. The trans woman/begetter, however, will first have to recognise or adopt before a legal relationship with her child will be established, despite their biological relationship. This does not seem to serve the best interests of the child as protected by Article 3 of the Children's Rights Convention.

Regarding the position of the adults involved, one could argue that this discriminatory treatment of trans women who father children, as compared to men, violates Article 23(2) in combination with Article 26 (equality before the law) of the International Covenant on Civil and Political Rights (ICCPR). This seems to be reflected in Principle 24 of the so-called Yogyakarta Principles, where it is emphasised that discrimination on the basis of gender identity regarding the right to found a family is incompatible

19 See e.g.: VAN DEN BRINK 2006, at chapter 4.

20 The same can be said about the perverse incentive built-in in the legal situation of female couples to make use of an anonymous donor. However, that is not the issue here.

21 Gerechtshof Leeuwarden, 23 December 2010, ECLI:NL:GHLEE:2010:BO8039, at paras. 21-23.

with human rights law.²² One might likewise argue that the differential treatment of trans women violates Article 16, and paragraph 1d in particular, of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This seems an especially valid argument since the adoption of CEDAW General Recommendation No. 28,²³ in which document the monitoring body stressed the relevance of the convention for discrimination on the basis of gender identity.

However, as mentioned in the introduction, in the past feminist legal scholars tended to worry about the increasing formal equality granted to parents in situations related to parental rights regardless of sex (m/f) and regardless of their share in caring activities and/or responsibilities. Thus, the question arises whether arguments supporting trans women's parental rights on grounds of their biological affiliation, may not be detrimental to the position of (birth) mothers.

This argument was mainly targeted at post-divorce situations, in which fathers claimed equal contact and decision-making rights regarding their children, which impacted significantly on the day-to-day situation of the mothers who continued to act as the primary care-providing parent. In such decisions, the fact that many of these men claiming equal rights had never previously embraced caring activities, when they could easily have done so, hardly seemed to play a role. Thus, the significance and value of caring for children – primarily undertaken by women – was ignored.²⁴ The concern underlying this discussion is that formal equality in the distribution

22 The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007) were drafted by a group of international experts. As a non-legal document it is not binding, and cannot even be regarded as soft law. However, it has been explicitly endorsed by an increasing number of countries, including by the Netherlands. See for example: (DUTCH) MINISTRY OF FOREIGN AFFAIRS 2007, at p. 54: 'The government regards the Yogyakarta Principles as a guideline for its policy'. The Yogyakarta Principles can be found at: http://www.yogyakartaprinciples.org/principles_en.pdf (last visited 5 December 2014).

23 CEDAW COMMITTEE, 2010, 'General Recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women', UN Doc. CEDAW/C/GC/28.

24 On the importance of a realistic valuation of caring tasks during marriage and afterwards, see e.g. TIGCHELAAR 1999.

of parental rights, may disadvantage women because it tends to neglect caring activities in the past, which however did influence women's career opportunities, financial situation etc.

Is that at stake here? It does not seem likely that a similar devaluation of female care-providing activities would result from a strengthening of the legal position of trans women who father children. In a worst case scenario the position of the female partners of trans women would be levelled down to the position of the female partners of men. Of course, it is desirable that caring activities are acknowledged and taken into account in situations regarding family life, and especially in the case of conflict. However, it seems disproportionate to start or stimulate such a development by making the acquisition of parental status more difficult for trans women than for other biological parents.

4. Conclusion

In the previous sections it has been shown that trans women who father children (after their legal sex change) are not treated equally compared to other people who father a child within a formal relationship. This seems to contravene both the equality principle as laid down in many human rights treaties, as well as the importance attached to biological ties by human rights bodies and instruments.

Since it seems unlikely that a legislative change to improve trans parents' position will be disadvantageous to the status of women (or primary carers) generally, there seems no reason not to change the law in this respect.

However, if the reader of this brief article, while trying to follow the intricacies of Dutch affiliation law, has experienced the same bewilderment as we did when trying to figure this out, the reader may agree that legislative changes may be desirable for more reasons than 'just' the position of trans women fathering children. The law seems to be in serious need of simplification and accessibility, without, of course, losing sight of important aspects such as caring activities, biological ties and social parenting. In 2002, one of Titia Loenen's Ph.D. candidates, Annelies Henstra, proposed a revamping of the law relating to affiliation and parentage by taking as a starting point the

question what a parent should be.²⁵ From this perspective, responsibility still seems to be an important factor for a new conception of the law in which biological and social parenthood may both be accommodated. Since trans women who father children may be assumed to be as responsible or irresponsible as any other category of parents, this might be a good idea from their perspective as well. It is to be hoped that the *Staatscommissie herijking afstammingsrecht* (the State Commission on the recalibration of affiliation law) will take these issues into account while rethinking affiliation law.²⁶ And while doing that, they might at the same time look into the possibilities to neutralise the very sex-specific and dichotomous terminology used in affiliation law, which leaves no room for any other kind of parents than just fathers and mothers.²⁷

25 HENSTRA 2002.

26 Regeling van 28 april 2014, nr. 512296, houdende instelling van een staatscommissie Herijking ouderschap, *Stcr.* 2014, 12556.

27 The dichotomous construction of sex as male or female is increasingly criticised. Thus, it may not be too far-fetched to expect that at some point in the future a new category of parents – being neither male nor female – may come into being. Illustrative of these developments is the research commissioned by the deputy minister of Security & Justice and carried out by VAN DEN BRINK & TIGCHELAAR regarding the possibilities and consequences of leaving people's legal sex undetermined in official records. See the deputy minister's letter of 4 December 2013 to the chairperson of the *Tweede Kamer* ('Lower House'), ref.no. 458792. The research report be published early March 2015, M. VAN DEN BRINK and J. TIGCHELAAR, *M/V en verder. Seksregistratie door de overheid en de juridische positie van transgenders* [M/F and beyond. Sex registration by the government and the legal position of transgenders], Juridische Uitgevers, 2015. The research report, with a summary in English, will be made available online in March 2015, at www.wodc.nl.

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