

Non-traditional Kinship and the Law: Socio-Legal Perspectives

Academia Belgica, Rome

17 - 18 May 2018

Program

17 May 2018

2:00 PM Welcome Address by the Conveners, **Frederik Swennen** (University of Antwerp, Belgium) & **Mariano Croce** (La Sapienza, Italy)

Session 1. Interdisciplinary perspectives

2.15 PM **Keynote 1**

Family Law's Instincts
Alison Diduck (UCL, UK)

This paper offers a reflection on the received canon of the common law and family law's place within it, or indeed, outside it. I aim to provide another challenge to the idea that the problematic principles of the liberal law of the market can be extended justly to family law. My point of departure is Lord Sumption's speech delivered to the Royal College of Surgeons in June 2016 wherein he defines for us family law's and the common law's 'instincts', and after suggesting they are opposed, makes a case for a melding or at least meeting of the two. He criticises what he sees as family law's unenlightened insularity from the progressive common law, and he relies throughout upon a number of assumptions about both the common law and family law to do so. His is not a particularly controversial perspective however, it is the orthodox, liberal one that has become simply 'obvious'. My aim is not only to contest this view; feminist and other critical scholars have been doing that for a generation. My aim is to challenge its seeming obviousness or apparent reasonableness as an argument for the continued homogenisation of family law. Drawing upon critiques of autonomy and work on vulnerability, I suggest that the complex family law subject sits particularly uncomfortably in the orthodox frame of the common law with its enthusiastic endorsement of liberty, autonomy and choice.

2.45 PM **Are “non-traditional forms of kinship” really “non-traditional” and really “forms of kinship”? Considerations from a historical-anthropological perspective**
Harry Willekens (University of Hildesheim, Germany)

If the concept of „non-traditional kinship“ is to make sense, it can only be as the opposite or other of „traditional kinship“. We are confronted today with a number of (relatively) new ways of creating legal ties between children, parents and more remote kin (such as same gender parenthood, multiple parenthood, surrogacy, the use of medical techniques to organize reproduction). To understand these (apparently) new phenomena, it would be helpful to know what precisely is new about the “new”, whether this “new” is radically or only trivially new, and whether this “new” has anything to do with kinship as the concept is commonly understood in the social sciences.

Using historical and anthropological sources, I aim to defend the following theses in this paper:

1. What is “new” about the developments of the last decades is not so much that new forms of kinship have emerged, but that kinship as a social institution has been atrophying under the combined pressure of capitalism (which has created openings for material survival and prosperity independent of kinship ties) and of the state (which has started doing the things which kin groups had been doing for many thousands of years, thus depriving kinship of its monopolies). What remains of kinship is a complex legal form with little social substance –and if that is true, it is no wonder that kinship opens itself up to novelties which used to be unthinkable as long as kinship was still socially significant.
2. If kinship as a social institution is crumbling, the same cannot be said of parenthood. Even if parents tend to be partly substituted for by the state and the market, there appears to be a limit to this process. But parenthood as a social institution has dramatically changed: no longer are the parents the representatives of the economic and reproductive interests of the kin group, they have become the caretakers of the vulnerable; no longer can children be regarded as economic assets of the kin group (as workers, as insurance for the elderly, as pawns in the creation of ties between kin groups), they have now become cost factors for their parents, valuable from an emotional point of view, but luxuries from an economic perspective. As a result of these social changes, the older rules of establishing parenthood are in the process of being replaced by other rules, more adapted to the new logic of care in parent-child relations. One (rather unexpected) consequence of this is that the biological tie has become much more important in establishing parental status than it used to be (as long as kinship served a variety of essential social functions, the pressing social need of having the “right” kinsperson in the “right” position led to a relative disregard of biological ties).
3. Returning to the difference between the radically and the trivially new, the true innovations in the law of parenthood of the past half century (innovations for which no precedent can be found in the historical and anthropological record) are the introduction of the equality of the parents and of same gender (or indeterminate gender) parenthood. For all other “novelties” precedents can easily be found. But the equality of the parents was unthinkable as long as kinship was a central social institution, for this equality entails the risk of constant decision blockades and deferrals. Once this equality had been introduced, however, and once it had become clear that the parents of today are caretakers of children, not any longer managers of resources, there was no compelling reason anymore for barring persons from the parental status because of their “wrong” gender.

3:15 PM Closer Than You Think: A Philosophical Reflection on Non-traditional Kinship and the Law

Andrea Nicolini (University of Verona, Italy)

"Community" comes from the Latin word *communitas*, which is composed of *cum*, meaning “with,” and *munus* a word that has three meanings: “duty,” “debit,” and “gift.” As Marcel Mauss argued in his *Essay sur le don*, a gift is never free, but instead imposes a servitude that can be avoided only by reciprocating the gift. *Communitas* therefore – although with different nuances – means to be tied to something to which we are obliged, something that demands a credit from us. Every form of community requires people to give up some of their time, their energy, and their freedom in order to join the group. Why do people choose to submit to this payment? Why do they renounce their sovereignty in order to be part of a community? Durkheim explains this need with the term “effervescence” and describes it as an overwhelming force that cannot be resisted and that is able to bind people together in a common feeling of belonging. Comparing the notion of effervescence with that of *jouissance*, I want to argue that inside human beings coexists two different forces, both overwhelming, that drive them in opposite directions: effervescence connects people with feelings of togetherness; *jouissance* creates monads, separate and distinct, monads that cannot communicate anymore, monads that no longer need to interact with each other. Comparing effervescence with *jouissance* allows me to explore society's psychological reactions to nonmonogamous forms of kinship that are not regulated by society – such as polygamy and polyandry.

The intention of my paper is to argue that these forms of kinship, since they offer different relational models from the regulated heterosexual couple, will always be perceived as external and threatening to the sense of belonging in a community if they are not regulated by the law.

3:30 PM Queer Constructions of Bonds
Marie Springborn (Humboldt-Universität zu Berlin, Germany)

Queer intimacies that might not conform to blood ties, coupledom, institutional security and/or societal regulations seem to be impossible to describe within existing categories and narratives. Structures of power might influence these bonds, might be able to strengthen or weaken them. Growing up with a single mum and coming out as queer, reflections about bonds successively became an important motive in my life. Solidarity and commitment, but also distance, autonomy, and sometimes loneliness are recurring topics which circle around it. Gender, class, racialization, sexualities, relationship constructs, trauma, the wish for children – between systemic contexts and individual lived realities spans the following question: how are these heterogeneous, intangible, these queer bonds named and lived within a society that normalizes and limits modes of relating severely? Due to structural and interdependent forms of exclusion and inequality queers have always been forced to negotiate bonds and shape togetherness beyond juridical security and societal acceptance. These perspectives of queer subjects have not been recorded yet extensively in German research contexts. Literature is mainly centered on gay couples with or without children and often work within a binary notion of gender. However, if societal institutions want to face and support heterogeneity as a part of human relationalities queer ideas of constructing bonds will have to take up more space. In my work, I am asking how inter-human bonds are defined, lived, and perceived by people who identify as, respectively live queer. Which problems do they encounter and which impact do different and interdepending axes of power have on their bonds? In my opinion, these questions can only be answered by queer people. To enable a co-construction of knowledge rather than a gathering of knowledge about the other I am conducting problem-centered and dialogic interviews with queer identified participants.

3:45 PM Discussion

Session 2. The Horizontal Family

4:45 PM Keynote 2

Intimacy and couple relationships in the 21st century
Jacqui Gabb (The Open University, UK)

Drawing on our award-winning study, *Enduring Love?*, I will show how couples experience, understand and sustain their long-term partnerships. The study included an online survey (n=5445) and multiple qualitative methods (n=50 couples), using these to examine the ways that parenthood, generation, gender and sexuality, shaped couple relationships. Extant research has well-documented the measures of relationship satisfaction relationship and their correlation with relationship maintenance behaviours; our study pointed to the value of hitherto unnoticed *everyday gestures* in consolidating the relationship dynamic. We use the concept of 'relationship work' to open up understanding of the form and value of these ordinary gestures in sustaining partnerships over life course. Relationship work here is more than the drudgeries of domesticity; it offers couples the opportunity to embrace and nurture their relationships – emotionally, practically, and symbolically. Sexual intimacy is an important component of the relating practices that couples do rather than a distinctive form of relationship work. What counts as sex and the in/significance of sexual intimacy varied from one couple to the next, and sex was experienced through a diverse range of modalities. However, we found no correlation between differences in desire and diminished ratings of relationship satisfaction. Different levels of desire for sex are taken for granted, something that requires us to think again about what constitutes a 'normal' and/or 'healthy' sex life. Sexual intimacy is typically experienced as an embodied form of 'deep knowing' alongside other forms of intimate communication. Across the dataset, it was the personal meanings of all forms of relationship work that were most valued. Knowing gestures and familiar relationship practices demonstrated intimate depth of understanding and investment in the long-term couple relationship.

5:15 PM By the Authority Vested: Colonial Legacies and the Everyday Life of Marriage Law in Post-Apartheid South Africa

Michael Yarbrough (City University of New York, USA, University of Johannesburg, South Africa)

This paper examines everyday struggles over relationship recognition and marital status in post-apartheid South Africa. Uniquely among the world's jurisdictions, South Africa has recently extended state recognition to two forms of marriage: same-sex marriages, and marriages formed under African systems of customary law. In this paper I present comparative ethnographic research conducted among LGBT-identified South Africans and in an isiZulu-speaking community that observes customary law, tracing how everyday struggles over marital and relationship status play out for these two groups in the wake of these similar legal reforms. I emphasize that the desires and pressures found in both sets of struggles are often quite similar, frequently structured around a tension between more extended-family versus more couple-focused understandings of marriage. Nonetheless, LGBT South Africans are much more likely to mobilize state law and legal discourses in these daily struggles than are residents of the isiZulu-speaking community. I argue that this reflects the different position of LGBT people and of same-sex relationships in local communities at the point of post-apartheid transition. Whereas African communities developed new practices of marital formation and recognition that adapted to the exclusion of customary marriages from colonial state law, similar adaptations to the colonial and apartheid repression of same-sex sexuality either remained very marginal or were themselves transformed by the post-apartheid spread of LGBT identities as the dominant mode for organizing such sexuality. My argument thus shows how colonial legacies can continue to shape everyday life even after post-colonial reforms, in ways shaped not just by the law itself nor by characteristics of the affected group as such, but instead by complex interactions between the colonizing state and colonized peoples.

5:30 PM Discussion

18 May 2018

Session 3. Interdisciplinary perspectives

9:30 AM Keynote 3

Who are my significant family members? Family inclusiveness, kinship, social class and cumulative advantages

Eric Widmer (University of Geneva, Switzerland)

The issue of family diversity is usually tackled by stressing the variety of household structures and living arrangements that have developed in recent decades. The increase of single parent households, stepfamily households and all kinds of non-nuclear households have increased the interest of scholars for families beyond the nuclear family. Interestingly, however, many researchers empirically stick for the most part with a definition of family which equates it to household membership or to a limited set of dyads, mostly partnerships and parent-child relationships. This presentation holds that the states of household structures and marital/parental relationships are not good enough indicators for approaching family diversity. Instead, one may wish to use lay family definitions for approaching family contexts that matter. Using a generalist sample of respondents from age 18 to 90 living in Switzerland, it was possible to investigate kinship ties and economic resources as two critical factors shaping such lay definitions of family. The results of the study show that the inclusiveness of family definitions to a large extent depends on such factors therefore making family definition critical for cumulative life course dis/advantages.

10:00 AM Intergenerational Family Dependence and the State: Contradictions in family policy and law

Elena Moore (University of Cape Town, South Africa)

Intergenerational financial support has been critical for the survival of many low-income households in South Africa both historically and in contemporary society. Culture, in combination with necessity, leads wider kin members to assume a great deal of financial responsibility for dependents. Current social and legal structures do not always support diffuse patterns of dependency across generations. An analysis of court cases reveals that the state through the framework of the law attempts to accommodate new demands but other state institutions, notably a social insurance system (Road Accident Fund) has different practices and does not reflect the same understanding of dependency. The findings reveal that the court found practices of intergenerational financial support amongst diffuse kin relations and the courts found that the social security system (Road Accident Fund) was obliged to continue these following the death of a breadwinner in a road accident. The Road Accident Fund contested this responsibility by disputing the legal obligation of the deceased to support the kin member, based on very narrow definitions of legal responsibility. Although the state, through the Courts, are actively promoting intergenerational interactions and diffuse patterns of kin dependency, the findings show that another state institution bases policies on certain assumptions about how families are structured and operate and tries to reinforce these assumptions even when they are not practiced by the groups affected. Whilst the lack of coherence in policy and law undermines any strong sense of agreed social norms about family dependency, it also cause practical problems for people having to come to court to ‘win’ their case and may result in a lack of take-up of certain social security benefits for those who don’t go to court.

10:15 AM Discussion

Session 4. Parenthood

11:00 AM Fatherhood and Assisted Reproductive Technologies in the Jurisprudence of the European Court of Human Rights

Alice Margaria (Max Planck Institute of Social Anthropology, Germany)

Over the last fifty years, a series of demographic and sociological shifts have resulted in an increasing split of biological families into different households, marriages and cohabitations. This process of disaggregation has proved to be a profoundly gendered phenomenon: it signified and continues to signify, to a great extent, a fragmentation of fatherhood. This paper deals with one specific dimension of this phenomenon: the impact of assisted reproductive technologies (ART) on the legal regulation of fatherhood. By offering radical possibilities for the fragmentation of the traditional father figure into different constituent parts, these techniques urge reflections/decisions upon what kind of tie makes someone a legal father.

Apart from being at the core of national legal debates and jurisprudence, ART has led to an increasing number of applications before the European Court of Human Rights (ECtHR). These cases certainly represent precious opportunities for the Court to adjust the definition of fatherhood to present-day family realities. This paper assesses to what extent the Court has seized the occasion and, more specifically, whether its understanding of fatherhood remains attached to a traditional ideology of the family and/or takes into consideration the realities of fragmenting fatherhood.

Through a systematic case-law analysis, this paper argues that the definition of fatherhood endorsed by the Court is made of both change and continuity. On the one hand, the existence of a biological link between the father and his child is restated as necessary for granting legal fatherhood. Moreover, the Court seems to express a preference for the bi-parental family model – intended as the presence of two carers – and, accordingly, to support a marital or pseudo-marital understanding of fatherhood. This case-law is also emblematic of the enduring resistance of a heteronormative view of fatherhood, which presupposes alignment of biological sex, sexuality and gender identity. On the other hand, these conventional features are not sufficient to make someone a legal father, but need to be accompanied by instances of paternal interest and participation in the child’s life. This paper will therefore show that the Court has become fond of the ideology of ‘new fatherhood’: rather than abandoning a conventional understanding of fatherhood, it tends to simply add the ‘new’ element of care to it.

11:15 AM Three-parent babies born – Mitochondrial donation and the law
Lina Oplinus (KU Leuven, Belgium)

Situations in which more than two persons are involved in the conception or in the upbringing of children are omnipresent. However, newspaper headings introducing the legal acceptance of three-parent babies in the UK (2015) or the birth of such babies in Mexico (2016) and Ukraine (2017) raised a lot of concern.

The particularity is that those babies have three genetic parents, which has never occurred in the past. The mothers of those children carry a defect in a small part of their DNA, the mitochondrial DNA, resulting in incurable, life-threatening diseases for their offspring. In order to prevent those illnesses, researchers developed techniques to create embryos that consist of the DNA of three persons: male DNA, maternal DNA and mitochondrial DNA of a female donor to replace the defect mitochondrial DNA of the mother. Those techniques raise concern because they alter the human germline and add a third ‘parent’.

My conference presentation will address two legal questions surrounding mitochondrial donation. The first question is if and under which conditions the techniques to create three-parent babies are allowed. Those techniques influence family formation by adding a third person, the mitochondrial DNA donor, to the conception process. The second question deals with the legal status of that donor. The research is oriented towards legislation in Belgium and the UK. The UK was the first and still is the only country which explicitly regulates mitochondrial donation since the amendments to the Human Fertilisation and Embryology Act in 2015. Although Belgium plays a pioneering role in artificial reproduction techniques, mitochondrial donation has not been subject to explicit legislation. Several legislative documents need to be combined in order to evaluate the legality and consequences of the three-parent baby techniques. Those national legislations will be read together with the relevant European and international law instruments.

11:30 PM “One is not born, but rather becomes a woman” – when giving birth? Queering of German kinship law by transgender parents
Theresa Anna Richarz (University of Hildesheim)

Mother is the woman who gives birth to a child; father is primarily the man, who is married to the mother. These are the basic principles of parentage law in Germany. A “queering” of those binary categories has long been impossible - non-binary people such as intersex* and transgender persons were prevented from reproducing. But the legal status of transgender people in Germany improved one Federal Constitutional Court decision at a time until ultimately in 2011 the Court ruled that the obligation to be permanently infertile in order to change from one legal sex to another violates the general right to privacy. Consequently, transgender people are not required to adjust their bodies to the norms of the other sex anymore and a person registered as “male” can bear a child and a “female” registered person donate sperm. The paper sheds light on how this recognition of the reproductive autonomy of transgender persons “clashes” with the current jurisdiction of the Federal Court of Justice on trans*parenthood and analyzes the prevailing understanding of parenthood and family in German law.

Facing the clear legal wording of “mother”, “woman”, the Court stated that only the specific biological contribution to reproduction determined the legal parental role (thus denying to register a trans*man as the father of a child due to giving birth to it). Furthermore it declared it to be mandatory that “a child will at all times be assigned a mother and a father”. These statements have to be seen in the context of recent technological and social developments like egg donation or the newly implemented same-sex marriage act which challenge the present family law. Can the Court’s decisions be read as signs of a “(re=)naturalisation” of kinship? How can the concept of reproductive autonomy help to also ensure that the resulting families and all of their members are legally recognized and protected?

11:45 AM Recognising Gay Male Parenting: Surrogacy and Collaborative Co-Parenting
Philip Bremner (University of Sussex, UK)

Legislators are increasingly being confronted with the need to recognise gay male parenting in the context of surrogacy arrangements. Closely related to this is the recognition of families that gay men create through reproductive collaborations with female friends (which I refer to as collaborative co-parenting). In this article, I consider the ways in which different legal frameworks recognise or fail to recognise these two types of gay male families. I explore how courts and legislators should respond to the increase in numbers of gay men who conceive and raise children from birth in these ways. In doing this I argue for a more inclusive approach to the legal recognition of parent-child relationships premised on the idea of recognising family diversity rather than on the promotion of a heteronormative conception of the family.

The Law Commission of England and Wales has rightly decided to review the law of surrogacy in its Thirteenth Law Reform Programme. The Law Commission has specifically identified the need for reform of the legal recognition of parenthood following surrogacy and notes the salience of this for male couples in particular. It has also highlighted the strong potential for a future law reform project on birth registration which would likely involve a more thoroughgoing consideration of rules on the ascription of parental status. The present paper contributes to these discussions by promoting a flexible approach to parental status that can accommodate the plurality of parent-child relationships that exist in modern families.

12:00 AM Surrogacy as an option to provide filiation to same-sex couples

Marcos Vinicius Torres Pereira (University Jean Moulin Lyon 3, France; Federal University of Rio de Janeiro, Brazil).

As same-sex couples conquer full recognition as families, they search to have children that are connected to the couple. If adoption is an accessible means to raise up children together, some couples search assisted reproductive technologies that give them a chance that their child have at the least the genetic material of one of the spouses/partners. This way, assisted reproductive technology is the ideal solution for these couples, including surrogacy as the only choice for gay couples. However, many countries do not allow it and refuse to recognize children born abroad from surrogacy arrangements. The theme is controversial and has been examined by the European Court of Human Rights in some important cases, such as the *Mennesson Case* and the *Paradiso Case*, involving, respectively, France and Italy.

What are the consequences of granting access to assisted reproductive technology when the parents are same-sex partners or spouses? What are the conditions and restrictions to recognize children born abroad from surrogacy arrangements? If one of the spouses/partners participate with the donation of a gamete to the surrogate mother, will it guarantee the recognition of the filiation for both spouses/partners? Are same-sex couples discriminated on the access to surrogacy when compared to different-sex couples? How can Private International Law rules contribute for the recognition of surrogacy children born abroad and the rights related to parenthood? If European parties are involved, can fundamental European liberties be affected? In the countries that already recognize surrogacy for same-sex couples, do gay couples have the same access to it, as lesbian couples do?

The aim of this work is to discuss the access to assisted reproductive technology for same-sex couples on a legal approach.

12:15 AM Tell me: who is or ought to be your mother, who is or ought to be your father? About altering legal parenthood, social reality and children's identity

Soraya Bou-Sfia (Utrecht University, The Netherlands)

Family laws indicate who one's *legal* parents are. It points out to which family one belongs. However, legal ties do not always correspond to biological/genetic links, nor to social reality. *De jure* parent-child relations do not always reflect *de facto* parent-child relations. The father of a 14-year-old boy is challenging its paternity for the court, because of his presumption that he isn't the biological father of 'his' child. The boy however, sees the man undoubtedly as *his* loving father and wants to keep the status quo. Should the man's paternity remain unaffected? A man and woman became, with the help of a Ukrainian surrogate, parents of two children, according to the Ukrainian birth certificate of the children. Because of public policy ('*mater semper certa est*'), the surrogate mother is however seen as (only) parent of the children. Now what?

In cases concerning severing the established legal parental ties of the child in order to better correspond to the biological facts or the actual family situation, the question rises what is, could and

should be decided on the basis of the legal framework, which includes not only national parentage law but also important international and European children's rights, i.e. the child's right to (preserve his) identity¹. This question is becoming more and more relevant nowadays, since society - wherein traditional families are no longer self-evident and wherein increased technological developments make it possible to become a 'parent' in different ways - is rapidly changing and current parentage laws seems to be in need of (more) flexibility in order to recognise different and new family compositions. We therefore (might) need to rethink the starting points of legal parentage law, taking into account several fundamental children's rights. The Government Committee on the Reassessment of Parenthood acknowledged this as well in its report and suggested a lot of recommendations which can be used as fruit for thought on this highly relevant matter.

12:30 PM Discussion

Session 5. Closed session

14:30 PM Multi-parenthood, kinship terminology and the role of law: a critical analysis
Nola Cammu (University of Antwerp, Belgium)

15:00 PM Panel Feedback
Panel Members: Mariano Croce, Alison Diduck, Jacqui Gabb, Frederik Swennen and Eric Widmer.

16:00 PM End of Seminar

Practical Information

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- Residents of the Academia can reserve a taxi from the airport to the Academia and vice versa with the company Coccia (tel. +39 329 263 4036) for circa €45.

By public transport

From Fiumicino:

- Direct train Fiumicino - Roma Termini "Leonardo Express": 2 trains per hour from 6.37 h to 23.37 h, duration of the journey: 31 minutes, price: €14.
- Omnibus with stops at Roma Ostiense and Roma Tiburtina (Careful, does not go past Roma Termini!): 4 trains per hour, duration of the journey to Roma Ostiense 48 min., price €8.

From Ciampino:

- Bus to Roma Termini: journey time: between 40 and 60 min, price: between €6 - €8, depending on the transport company.
- Bus "linea 1" from the airport to Anagnina (price: €1.20), start of metro line A (price: €1), get off at Flaminio.

From Termini, Ostiense or Flaminio train stations:

By taxi (approx. €10)

By public transport

From Ostiense:

Tram 3 (from "Piramide") get off at Piazza Thorwaldsen, in front of the Galleria di Arte Moderna (journey time approx. 45 min) or metro line B, direction Rebibbia, to Termini + metro line A, direction Battistini, stop Flaminio, enter the park, go left up to the roundabout with the fountain (Piazza del Fiocco), turn left towards Galleria di Arte Moderna, and Via Omero is on the left, just before the stairs (10 min. on foot).

From Termini and/or Flaminio:

Metro line A, direction Battistini, stop "Flaminio", enter the park, go left up to the roundabout with the fountain (Piazza del Fiocco), turn left towards Galleria di Arte Moderna, and Via Omero is on the left, just before the stairs (10 min. on foot).

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