

RESEARCH QUESTIONS IN FAMILY LAW DERIVED FROM A COMPARATIVE SYNTHESIS OF GENERAL TRENDS AND DEVELOPMENTS

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PRELIMINARY REMARK

This contribution summarizes the debates among the authors of this volume at the expert meeting which took place in Utrecht from 27th – 28th June 2008.¹ The meeting was aimed at enabling in-depth discussions of the issues that are addressed in the various contributions. The authors of this comparative synthesis all belong to the Utrecht Centre for European Research into Family Law (UCERF)² under whose auspices the expert meeting was organised.

1. ORGANIZATION AND STRUCTURE

The objective of the expert meeting was to identify similarities and differences based on the provided information, to explain, compare and evaluate the information provided. Each author prepared a 10-minute presentation of his/her article focussing on what he or she considered to be the most interesting or controversial issues of his or her paper. Furthermore, in order to stimulate debate, the authors were asked to prepare statements³ and, if possible, to merge these statements into their presentation. The statements were submitted in advance. As a result, the expert meeting consisted of interactive sessions with ample time for

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² See www.ucerf.nl.

³ Included at the end of this contribution.

discussion. The papers on similar topics were grouped together in three consecutive sessions:

- (1) (Compulsory) arrangements regarding children
- (2) Registration schemes for same-sex couples: new jurisdictions
- (3) The effectiveness of the *pater est* rule consisting of
 - (a) Children of cohabiting couples and the right to know
 - (b) Assisted reproduction and the position of the known sperm donor.

The contents of all the contributions to this volume have been briefly summarized and compared in the introductory contribution “What comparative family law should entail” by Katharina Boele-Woelki.⁴ The grouping of the articles and presentations in specific topics has not been used in writing this joint contribution. During the preparation of the expert meeting and more importantly during our discussions we noticed that some general notions, aspects and developments can be discerned which apply to all topics that have been addressed. These aspects that mark the current debates in family law around the globe at the dawn of the 21st century are grouped under the following headings: terminology and characterization (§2), constitutional framework (including religion) (§3), the role of the State (§4), party autonomy (including contracts) (§5), legal reform: by the legislature or by the courts? (§6) and the necessity of empirical research (§7). The many questions that under the different aspects have been raised illustrate the need for more research in (comparative) family law.

2. TERMINOLOGY AND CHARACTERIZATION

Apples and oranges are not comparable. In the field of comparative legal studies this old adage indicates that legal notions and concepts must be comparable. The search for the *tertium comparationis* refers to the problem of comparability which should have a certain quality. This quality depends on the presence of common elements in the rules, concepts or institutions to be compared whereby their structure, function and consequences are generally considered to be decisive. According to Zweigert/Kötz in particular, the function is the starting point and the basis of all comparative law. In their view different legal systems can only be compared if they solve the same factual problem, that is, answer the same legal need. In other words, the institutions of different legal systems can only be meaningfully compared if they perform the same task, if they serve the same function. This is the *tertium comparationis*.⁵

⁴ See pp. 1–24.

⁵ K. Zweigert & H. Kötz, *Introduction to Comparative Law*, 1998, p. 34.

In the field of comparative family law problems of comparability are also apparent. What is for example the meaning of the terms “parenthood” and “parentage” within the different jurisdictions? Which distinction can be drawn between rights and duties attached to the different concepts? More specifically – in the case of assisted reproduction – the question arises who is considered to be a surrogate mother, an egg donor or a sperm donor? Does a man who donates his sperm in a licensed clinic belong to the same legal category as a man who donates his sperm from the comfort of his own home? It is essential to know exactly who belongs to the different categories and which requirements must be fulfilled in order to categorize and distinguish the one from the other.

Another example which illustrates the necessity of carefully differentiating between different concepts and notions can be provided when looking at the relatively new phenomenon that the child resides on an alternating basis with both parents after their divorce. Can we talk about a shared or alternating residence when there is a division of care on a 40/60 or even 30/70 basis or must it always be on a 50/50 basis? When does alternating residence start and under which circumstances can we only speak of a contact arrangement? What is the conceptual difference between the one (alternating residence) and the other (a main residence in combination with a contact right)? Do financial factors also play a role? Arguably, the more time the child spends with a parent the lower the amount of child maintenance that this parent has to pay. In addition, geographical aspects might be of importance when considering the proximity of the parents’ residences within the framework of joint parental responsibilities. The personal situations of the parents can differ significantly. Is it the distance or practical travelling time that is decisive when one of the parents wants to relocate with the child against the will of the other parent? Or is it only important that the moving parent has sufficient funds to allow the child to travel regularly? It should be kept in mind that in the United States, for instance, people easily move and travel over long distances, whereas in Denmark 80% of divorced parents remain in the same city after the dissolution of their marriage. This probably affects the way in which a legal system deals with the subject of alternating residence and requests for relocation.

Also in the field of formal relationships the name given to the couple’s relationship can be misleading. Does marriage include same-sex couples? Does a registered partnership exclude different-sex couples? Is a same-sex marriage the same as a same-sex registered partnership? Is the essential element the protection or non-protection rather than the name? What is exactly in the name? Is the naming of a legal relationship important? From a strategic point of view it may sometimes be advisable to provide a “weaker” name to an institution in comparison to the institution of “marriage” in order to get the bill through Parliament, even if the

institution at stake is similar to a marriage or entails many rights which are akin to marriage, such as, for instance, in the United Kingdom. The same development is noticeable in Hungary, where only the making available of the registration scheme for both same-sex and different-sex couples has gradually customized society with homosexuality. A different approach is applied in South Africa where there is no difference between a marriage under the Marriage Act and a marriage under the Civil Union Act. The dissolution of both relationships is called a divorce and the Divorce and Maintenance Acts apply in both cases. More generally and in view of the principles of equality, one might argue that the name of the formal institution which couples choose is essential. Moreover, the symbolic and emotional meaning of being married instead of being in a partnership or civil union should not be underestimated.

3. CONSTITUTIONAL FRAMEWORK (INCLUDING RELIGION)

The influence of constitutional rights as adopted in international, European or national legislation is of significant importance in the field of family law. In particular, the legal recognition of same-sex couples and the request of one parent against the will of the other parent to move with the children to another country demonstrate how difficult the balancing of interests and rights can be. In view of several constitutional rights the legal recognition of same-sex relationships is either prohibited or promoted. In particular, the constitutional protection of marriage naturally entails a more restricted approach. It limits the freedom to enact legislation recognizing lifestyles other than marriage. This can be clearly demonstrated in Hungary, Italy and Portugal where the marriage is protected by the constitution triumphs over the principle of equality. South Africa represents the other side of the spectrum. There a careful balancing has taken place between two constitutional rights: the freedom of religion, on the one hand, and the prohibition of discrimination on the basis of sexual orientation, on the other. As a result there is no difference between the Marriage Act and the Civil Union Act. The adopted two-track system for different and same-sex couples has only been enacted to accommodate religious concerns.

The right of the free movement of persons or, within the American setting, the right to travel, raises many questions if a request for relocation is to be decided. Recently, it has been confirmed by the European Court of Justice⁶ that national legislation which places certain nationals of the EU Member State concerned at a

⁶ ECJ 14 October 2008, Case C-353/06 (Grunkin-Paul, Standesamt Niebüll).

disadvantage simply because they have exercised their freedom to move and to reside in another Member State is a restriction of the freedoms conferred by Article 18(1) of the EC Treaty on every citizen of the Union. Not only legislation can be considered to constitute an infringement of the free movement right, but also courts have to take this right into account. It is arguable that a prohibition on relocating forms an obstacle to the right to free movement.⁷ How should the rights of mothers, fathers and children be balanced? Do the courts pay too much attention to the rights of the parents and too little to the rights of children? Are children heard? Does the child have a right to have contact with both parents? Also if one of the parents does not desire any contact? Do parents have a right to an equal amount of contact? Do they have the right to work wherever they want? Do they have the right to start a new family? In the last-mentioned case does the prohibition on any relocation infringe the right to marry as guaranteed in Article 12 of the Convention on Human Rights?

The debate on the constitutional dimensions of family law shows that an interdisciplinary cooperation between family law and (European) constitutional law experts is indispensable in order to provide clear answers. This should by and large be encouraged.

4. THE ROLE OF THE STATE

Another aspect which was reflected upon in the discussions on the contributions to this volume concerned the role of the State. How much State interference is desirable and in which cases? Who is to be protected? It has been submitted, for instance, that the State should be clear concerning its role with respect to the determination of paternity, more particularly that an unambiguous distinction is made between the social, genetic and legal elements of parentage. In many jurisdictions the question of what is the purpose of extending rights to fathers remains unanswered: Is it to ensure that all social fathers are protected, that the child is protected or that a firmer basis is provided for child support? More specifically, what is the State trying to achieve with child support: is it a commitment or attention to biology?

Also in the field of formal relationships the role of the State is not always clear. It is generally acknowledged that the *rationale* behind marriage cannot be limited to the idea of the protection of the weaker spouse. One must also consider the inseparable element of status in examining the institution of marriage. However,

⁷ However, the prohibition only lasts until the child reaches the age of majority.

should the status issue not be separated from the protection issue? Should the State not provide couples with many choices as to how to regulate their relationships? And even if they do not agree on anything that they should still be protected? In some countries this idea has been advanced but in a global world it might be difficult to have this kind of broad range of solutions because it is uncertain whether and how they will be recognized abroad. The question remains, however, why we always need to decide not to protect a certain group of persons (e.g. same-sex couples, social parents, known donors) in order to protect another group.

Finally, what is the role of the State if there are conflicts between parents concerning care and legal arrangements relating to children? It is generally presumed that parents solve their own problems. What happens, however, if they continue to disagree? Should the State assist parents in making decisions by providing alternative dispute resolution mechanisms? More specifically, is mandatory mediation the solution for relocation issues? Is increasing State interference in post-divorced families a general trend which is to be welcomed?

All in all it became clear that in respect of the debated topics the role of the State is sometimes questionable and not always clearly defined or not identifiable. Tension is also apparent in relation to the following aspect: the freedom of the parties to determine and agree on the rights and duties deriving from their relationship.

5. PARTY AUTONOMY (INCLUDING CONTRACTS)

Who determines the rules of family law – more distinctively the rights and duties within family relations? Generally, two aspects are decisive. First, which hierarchy of legal sources is to be taken into account and, second, in which area is party autonomy permitted? In respect of the legal sources the well-known common law/civil law divide is to be respected. How much weight is to be given to court decisions and how are statutory provisions to be interpreted? This topic is further elaborated under the next aspect which addresses the question of legal reform. Who is responsible for legal reforms: the legislature or the courts? In respect of the second aspect it is generally acknowledged that family law is – apart from property aspects and arrangements regarding children – to a very large extent mandatory law; hence party autonomy plays a relatively insignificant role. However, in some areas of the topics that were discussed agreements between the parties are gradually gaining legal importance. At least it is passionately debated what role party autonomy should play with respect to genetics. Should it really be the case that the paternity of a child rests only upon the will of the father? Should

the State not be able to test everyone? On the other hand, at present perhaps not enough party autonomy is given to the biological father: why can he not deny his paternity in The Netherlands? In addition, should it not be possible to deny maternity? Moreover, in particular written contracts on parenthood in three-parent relationships not only raise legal questions (are they enforceable?) but also moral and ethical ones.

The discussions about the possibility of persons to determine, among themselves, their rights and duties within a family relationship also expose another outlook. What should happen if the parties do not agree in areas where they are encouraged to agree, such as the exercise of parental responsibilities after divorce? For example, the parents do not agree on the shared residence of the child, they cannot communicate with each other, but the court or the legislature imposes an alternating residence as the legal norm. Should the lack of an agreement on shared residence not be interpreted as an agreement that the child is to reside with one of the parents? Or – to provide another example – if the rationale behind marriage is the protection of the weaker party, it is arguable that in all cases the weaker party should be protected even when he or she has economically taken the wrong decisions. In this case should protection be imposed against the will of the other spouse? More generally, have a cohabiting couple always jointly made a choice not to marry? If one partner does not want to acquire that legal status and the protection it entails, the other has no choice.

As a result it is discernible that contracting in family relations has unquestionably increasingly gained more importance and acceptance. In which areas should party autonomy be permitted and why? What are its possibilities and limitations? These fundamental questions indisputably need further (comparative) research.

6. LEGAL REFORM: BY THE LEGISLATURE OR BY THE COURTS?

Who can determine which rules are to be applied in family relations? Primarily the answer depends on the legal system in question. Generally, it is known that in all civil law systems family law is codified, but also in common law systems family law issues are to a very large extent regulated by statute. Whereas the common law courts adhere to the notion of precedents, the civil law courts do not act so very differently. In both systems legal reforms are either initiated by the courts or by the government. However, the courts often decide that the legislature should take action because the current law for instance violates international obligations or because it does not provide answers to new developments in society. This can be

demonstrated in the field of the recognition of same-sex relationships and also in respect of alternating residence and relocation. Regarding the latter only in a few jurisdictions have statutory rules been enacted.⁸ So far the courts have dealt with any problems. The different legal standards provide judges with wide discretion. Due to the fact that the best interests of the child are too vague as a useful criterion in relation to both situations the outcomes are often inconsistent and unpredictable. Is it then not up to the legislature to formulate clear rules? Would, for instance, mandatory mediation be a step forward in relocation cases?

The (non-)recognition of same-sex relationships shows a different pattern. In many jurisdictions the courts decided that it was beyond their competence to legally recognize same-sex relationships. It should be the task of the legislature to introduce a new institution or to make marriage available to such relationships. It is striking to see that in this respect the courts in both the common law and the civil law systems have decided in a similar way. The courts paved the way for legal reform and, as a result, in the last twenty years or so more and more national legislatures have adopted legislation which is aimed at providing a legal status for same-sex couples.

Legal reform should preferably not be undertaken without empirical research. In the next section attention is finally paid to this fundamental requirement.

7. NECESSITY OF EMPIRICAL RESEARCH

In respect of many issues it has been submitted that we simply do not know how family relations work in practice. After a relationship has broken down, for instance, the parents increasingly agree on an alternative residence for the child; however, reliable data are not available. We do not know how often parents agree to care for the child on an alternating basis and how often such an arrangement is ordered by the courts, if this possibility exists. What are the legal arrangements? Which aspects are taken into account? How many children are affected? Why do the parents “share” the child? Is it considered to be convenient to be one week “on”

⁸ In France and Belgium the alternating residence of the child after a divorce between the parents should be the first option to be investigated by the courts. The CEFL Principles regarding Parental Responsibilities (Principle 3:20(2) and 3:21) and the ALI Principles on Family Dissolution (§ 2.08(1) and § 2.17(1)) also provide guidelines on alternating residence and relocation. Recently the Dutch Advocate General – who, according to the Dutch system, prepares the decision of the Dutch Supreme Court by analyzing the case in the form of a conclusion – referred to the CEFL Principles (Dutch Supreme Court 25 April 2008, LJN: BC5901). It concerned a request by a divorced mother to move with the children to Switzerland. The parents had joint parental responsibilities and the father objected.

and one week “off” duty? Does the arrangement cause difficulties in the long run? Is the child heard before the alternating residence is agreed upon and practised? How do parents communicate? Are all decisions always taken together? Which decisions are considered to belong to daily matters and which are important? Is there a relationship between an alternating residence and maintenance, and if so, which? Under which circumstances is the alternating residence changed into residence with one of the parents? How do children experience an alternating residence? What are the decisive factors which cause problems, if any? Is a shared residence in the best interest of the child? Actually, we have no idea how children experience an alternating residence or a relocation.

The necessity of sociological research has also been demonstrated in respect of the legal recognition of same-sex relationships at least in those jurisdictions where there is a possibility to choose between different types of relationships. Why do same-sex couples opt for a registered partnership or a marriage? Why do they not formalize their relationship? The latter question indisputably also applies to heterosexual couples. Another example concerns non-marital cohabitation. If, within such a relationship, a child is born, how often does the biological father recognize the child? In addition, how often do legal fathers, together with the birth mother, request parental responsibilities via the courts in those jurisdictions where this is necessary to acquire the status of the holder of parental responsibilities?

To date, these and many other questions remain unanswered. Qualitative and quantitative empirical/sociological research is therefore needed, preferably research that is undertaken in different jurisdictions where the results are comparable. This kind of research should be carried out with the assistance or even guidance of legal scholars and lawyers in order to determine whether the rules of family law still reflect the needs of society or whether and how they should be adjusted to societal changes.

FINAL REMARKS

The expert meeting in which, besides the authors, also a few other family law experts participated was positively evaluated. With no more than 30 participants it provided an excellent opportunity to really exchange and express ideas, opinions and concerns. The two-day meeting was mostly composed of extensive and passionate discussions. The authors were all well prepared and familiar with the views of their colleagues expressed in the respective contributions. In addition, the mix of experienced and young, but advanced family law experts also turned

out to be stimulating. All in all, the Utrecht debates on family law around the globe were successful from both a professional and a personal perspective.

Annex: Statements of the authors participating in the expert meeting

KATHARINA BOELE-WOELKI: *What comparative family law should entail*

1. It is impossible to enter into a discussion about conclusions and recommendations, if a comparative study (in the field of family law) does not indicate the aim of the comparison, if it does not systematically present differences and similarities, if explanations for these are not provided and if the criteria which determine the evaluation are not specified.
2. It is a dangerous endeavor to pick and choose solutions, examples and arguments at random and present them merely with the intention to promote ideological or political ideas.
3. Comparative family law should include its international dimension.

ANNA SINGER: *Active parenting or Solomon's justice?*

1. Alternating residence provides the child a natural and unstrained contact with both parents when they are living apart from one another.
2. A possibility for the court to decide on alternating residence is a good way to emphasize that the parents have a joint responsibility for their child also after separation.
3. Court decisions on division of maintenance costs between the parents when the child has alternating residence would destroy the basis for cooperation between the parents.
4. Alternating residence is in effect dividing a child between two parents thereby reaching an equitable solution to an unsolvable problem.

CHRISTINA JEPPESEN DE BOER: *Parental relocation: Free movement rights and joint parenting*

1. The trend is that the possibilities for the resident parent to relocate are limited.
2. Strictly speaking, "the child's right to two parents" requires both parents to live in close proximity.

THERESA GLENNON: *Divided parents, shared children: Conflicting approaches to relocation disputes in the USA*

1. Most US states use a version of a “best interests of the children” test to determine whether to permit a residential parent to relocate. Is a “best interests” test the right approach in the context of parental relocation? Does this focus give adequate protection to the interests of residential parents living their own lives? Should courts have the authority to block relocation, or should they simply determine which parent a child should live with after a relocation occurs?
2. Several US states and the ALI Principles for Family Dissolution use a different legal standard for relocation cases where the second parent has a substantial amount of contact with the child. Should the legal approach to relocation disputes change depending on the extent of the non-moving parent’s involvement in the children’s lives? What would be the possible beneficial and detrimental effects of this change?
3. The social science literature highlights some of the risks of divorce for children, but split in their emphasis on the importance of the relationship with the primary caregiver and the secondary caregiver. What can we learn from the social science literature on children and divorce, and is that literature useful in shaping legislative and judicial policy concerning relocation?
4. Scholars (including myself) have argued for three major shifts in the approach to relocation disputes: (1) the requirement of mandatory mediation; (2) judicial consideration of relocation by the other parent; and (3) the provision of compensatory funding by the parent who opposed relocation to the parent who is prevented from relocating. Do these proposals have merit, and should they be adopted?

PIERRE DE VOS: *A judicial revolution? The court-led achievement of same-sex marriage in South Africa*

1. The prohibition of discrimination on the basis of “sexual orientation” in a country’s Constitution must – as a matter of logic, constitutional law and ethics – inevitably and inexorably lead to the extension of full marriage rights to same-sex couples.
2. When legal reform is considered in the field of family law regarding the protection of same-sex couples and their children, it is important to note that full equality require the extension of all the rights and duties as well as the status associated with traditional “marriage” to same-sex couples. This means that the provision of legislation that provides for “domestic partnerships” only – even when such partnerships attract all the legal consequences of marriage – will not be sufficient.
3. When courts are called upon to adjudicate on highly controversial matters such as the extension of full marriage rights to same-sex couples they run the

risk of creating damaging their own reputation. It is therefore better for such law reform to be led by democratically elected legislatures.

ORSOLYA SZEIBERT: *Same-sex partners in Hungary: Cohabitation and registered partnership*

1. From deliberate progress concerning the legal consequences of unmarried partnership during family law recodification to the approval of Act on Registered Partnership
2. Registered partnership for same-sex and different-sex partners: is it a marriage-like institution or rather registered cohabitation?

IAN CURRY-SUMNER/SCOTT CURRY-SUMNER: *Is the union civil? Same-sex marriages, civil unions, domestic partnerships and reciprocal benefits in the USA*

1. The name given to a registration scheme, although ultimately a political decision, is more determinative in the United States than in Europe when analysing the legal nature of the registration.
2. Despite the overall appearance of diversity, those jurisdictions to have enacted registration schemes for same-sex couples display remarkable uniformity.

TALIA EINHORN: *Same-sex family unions in Israeli law*

1. In Israeli law, key areas of family law (e.g., marriage, divorce and maintenance), are governed by orthodox, religious law, which does not recognize same-sex marriages at all and, furthermore, opposes such relationships, as well as any of their legal consequences. Consequently, the legal problems encountered by same-sex couples in Israel are more complicated than those encountered in other democratic, developed countries.
2. The above statement notwithstanding, Israeli law has shown much flexibility in adapting a very traditional legal framework to the exigencies of modern life. The Israel Supreme Court has applied to such spouses the rules applying to “reputed spouses” (extra-marital cohabitation) which, although not conferring status, emulate in many respects the rules applying to lawfully married couples. In addition, it used principles borrowed from private international law, requiring the Ministry of the Interior to enter as married in the population registry same-sex spouses married abroad, and as adopted – children adopted by same-sex couples abroad. In order, however, to achieve a coherent and complete system defining the rights and obligations of same-sex spouses, the Court’s decisions must be supplemented by legislation, a challenge which

has to be met by the Knesset, in the interests of all Israeli citizens and residents.

MATTEO BONINI-BARALDI: *Family vs solidarity: recent epiphanies of the Italian reductinist anomaly in the debate on de facto couples*

1. Is an informal procedure at the population registry a proper way for ensuring recognition of same-sex couples in the public sphere, with legal validity towards third parties?
2. It is necessary to emancipate from the binary logic which – in the Italian constitutional system – opposes the ‘family’ and ‘social formations’, a logic which descends from a limited reading of the constitutional text approved by the Constitutional Court.
3. “Solidarity” is not a fair substitute for “marital/conjugal life.”
4. It does not make sense to pick and choose a few rights and to subordinate their exercise to a certain duration over time, sometimes three, sometimes nine years, solely on the grounds of the gender combination within the couple.
5. It is crucial to motivate whether a prevailing State interest exists, which could justify the *prima facie* violation of a fundamental freedom.
6. The question to be addressed should be: is it possible to demonstrate a rational or even necessary link between the objective served by the *status quo*, and current exclusion of same-sex couples from marriage? When this discussion will finally become of public domain in Italy, perhaps the answers will follow, more easily than expected]

ROSA MARTÍNS: *Same-sex partnerships in Portugal: from de facto to de jure?*

1. Act 7/2001 establishes a minimum of protection of same-sex partners. However it makes no mention of the issues concerning the ownership of assets and to the regime covering the consequences of possible mingling of ownership of movable assets during the lifetime of the relationship, nor of the recognition of inheritance rights. These questions should be object of reflection when maintaining, modifying or creating a new legal regime for same-sex relationships.
2. Article 36(1) 2nd part, Constitution of the Portuguese Republic enshrines not only a right to marry, but also includes an *institutional guarantee* of marriage. From this *institutional guarantee* follows a protection that amounts to a ban on the legislature modifying the concept and the legal regime governing marriage in a manner leading to its abolition or even to detracting from its main features.

3. Even though men and women are considered to be citizens with equal rights and duties, the fact is that their real position before society and the labour market is quite unequal. This difference between sexes has a great influence in the legal regime of marriage.
4. The Portuguese legislature should seek to solve the legal problems raised by same-sex cohabitation and therefore seek to create a specific legal regime, paying special attention to the specific features these relationships, which could take the form of registered partnerships.

WENDY SCHRAMA: *Family function over family form in the law on parentage? The legal position of children born in informal relationships*

1. Thirty years after the Marckx decision of the ECHR the relationship status of the parents of a child is still too important in the Dutch parentage law system. The difference between children born in and outside a formalised relationship in parentage law should be reduced.
2. The *pater est* rule, which is limited to the birth of a child during a marriage in the Dutch parentage law system, should be extended to children born to unmarried cohabiting couples.

RICHARD BLAUWHOFF: *Tracing down the historical development of the legal concept of the right to know one's origins: has 'to know or not to know' ever been the legal question?*

1. *Time/legal certainty:* An (adult) child's right to know is not contingent upon the passage of time, so a countervailing interest of the parent in privacy and in the prevention of 'stale claims' should not warrant legal protection either.
2. *Enforcement:* Only an exclusively informational judicial procedure can guarantee the right's procedural effectiveness. It acknowledges that a minor's interests in 'knowing' are distinguishable from status concerns while leaving disclosure to an 'independent authority' (rather than the parents alone).
3. *Enforcement/concept:* Giving principled precedence to the child's right to know necessarily involves compulsory DNA parentage testing since legal presumptions fall short of 'knowing'.
4. *Conceptual boundaries:* The right to know ends, where the right to establish contact with the biological parent begins.

NANCY MAXWELL: *The Kansas case of K.M.H.: US law concerning the legal status of known sperm donors*

In the United States the general rule is that biological fathers are presumed to be the legal parents of any children they conceive through sexual intercourse with

unmarried women. What should be the law concerning legal parenthood when unmarried women use known sperm donors to create children through assisted reproduction, particularly when U.S. case law indicates that these individuals are completely ignorant of the law and its consequences? (Or as stated at the end of my article: “Perhaps this is the ultimate question that legislators should consider when drafting statutes that add or subtract potential legal parents—what will be the law’s impact on all interested parties when individuals continually create children through assisted reproduction, completely ignorant of the law and its consequences?”)

Which factors should be relevant when a court considers the legal parentage of a known sperm donor?

1. A party alleges an oral agreement concerning the sperm donor’s parentage
2. There is a written agreement concerning the sperm donor’s parentage
3. The parties used a licensed physician to perform the insemination
4. The amount of contact between the child and the sperm donor
5. The sperm donor “openly and notoriously” recognizes the child as his
7. The mother “openly and notoriously” recognizes the child as the sperm donor’s child
6. The perception that a child should have more than one parent
7. The perception that a child should have two different-sexed parents
8. The sperm donor’s offer to financially support the child
9. The mother’s acceptance of the sperm donor’s financial support
10. The sperm donor being named as the “father” on the child’s birth certificate
11. The sperm donor filing as a putative father in a Putative Father Registry
12. The mother signing legal documents acknowledging the sperm donor as the father

MACHTELD VONK: *The role of formalised and non-formalised intentions in legal parent-child relationships in Dutch law*

1. The increased recognition of the rights of biological fathers on the one hand and of female same-sex families on the other hand creates tension between biological and social parenthood. Could this dilemma be solved by allowing a child to have three legal parents?
2. If surrogacy is not expressly forbidden in a jurisdiction, the transfer of parental rights from the surrogate mother to the commissioning parents should be properly regulated. The terms of a surrogacy contract may play a role in such a transfer of parental rights.

3. Common law is better equipped to adapt to new developments such as artificial insemination and surrogacy than civil law, because judges do not have to wait for the legislator to find solutions for legal questions that have not yet been addressed. What is the “value” of such casuistic judgements for a civil comparative lawyer who is looking for solutions in a common law system?