Governing (trans)parenthood – The tenacious hold of biological connection and heterosexuality

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I have only thought that I am a man without sperm, and there are many men who are and who can be fathers ... [To be legally registered as a father] is important for me. It is so important, in fact, that I haven’t been able to think of anything else.¹

[P]regnant men engender a critical re(conceive)ing of the idea that sex is biologically determined, that pregnancy is necessarily sexed as female, and that one’s sex, gender identity and identification as mother/father neatly align.²

In states like Argentina, Portugal, Sweden, Denmark, Malta, Ireland and Norway, laws have recently been amended or new laws enacted to facilitate change of legal gender. Most importantly, the requirements of sterilisation or infertility have been abolished.³ At the core of these reforms, especially since 2012⁴ on, are the fundamental human rights principles of individual autonomy, integrity, non-discrimination and dignity. If not yet a global trend, the recent legal reforms represent a paradigm shift in law’s conception of gender.

Concepts of legal gender are being constructed in response to legal claims brought by transgender⁵ litigants.⁶ In the case of the UK, Alex Sharpe is concerned that ‘the body has been privileged in legal (re)constructions of sex, or, more particularly, the (binary) categories male and female’.⁷ This describes the situation under earlier Norwegian administrative practice on change of legal gender, but also, as will be demonstrated, under recently reformed Norwegian law. Before 2016, transgender people in Norway, who sought correction of their legal gender and wanted biological children, had to conceive or beget children before completing the legal gender recognition process. In many states, surgical removal of reproductive organs served as a precondition for correction of legal gender, considered necessary in order to rule out legal men giving birth and legal women begetting children.⁸ However, in an increasing number of states, including Norway, this has changed: both legal men and legal women can give birth to children as a result of new gender recognition laws

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¹ Informant interviewed in 2015 in conjunction with my doctoral project. The informant was registered in Norway as female at birth and has a female personal identification number. He identifies as a man. Note, all interview translations are by the author.


³ I use legal or registered gender to refer to gender specific national identity numbers or insurance numbers, gender according to birth certificates and passports.


⁵ Transgender, trans or trans* have emerged as umbrella terms for trans identities. For the purpose of this chapter, I use transgender to refer to people whose birth-assigned gender mismatches their gender identity, and wish to, or have, changed their legal gender.


⁷ Ibid 108.

that base correction of legal gender on self-declaration, repealing earlier requirements of surgical interventions. By way of this change, assumed reproductive capacity, or its absence, is no longer a decisive element in legal gender categories. It breaks — at least to some extent — the strong medico-legal link that previously characterised gender recognition practices. In the aftermath of these new rules, new questions emerge for human rights bodies, activists and NGOs. How, for example, should law deal with the diversity of legal genders it now recognises? Is a legal woman always a ‘woman’ for legal purposes?

This leads to the question of how current Norwegian law governs and should govern parenthood in relation to transgender parents. Informed by Michel Foucault’s concept of ‘governmentality’, I see law as one of many ‘tactics’ used to govern and order the population. Rather than being the most significant tactic, law interweaves with others, such as the media and politics, which, seen as a whole, govern the population and construct what is understood as legitimate and illegitimate parenthood. Particularly important to my argument is how, according to Foucault, the ‘legal complex’, understood as inter alia statutes, legal codes, legal institutions, texts and norms, is permeated by non-legal forms of knowledge and expertise, such as the medical. This is a point of departure for my thinking of how law works in governing gender. Legal parenthood has been based on the biological two-sex model, reconstituting conventional norms of binary gender and (hetero)sexuality. I examine how gender emerges as a ‘problem’ for law when transgender litigants claim legal recognition of their gender identity, especially in the context of parenthood. When the ‘problem’ of gender emerges before and under law, gender as biology and medical ‘truth’, referred to as ‘biologic’ by Sharpe, is questioned.

By focusing on the legal recognition of transgender people and laws that regulate the field of reproduction and parenthood in Norway, I examine how law works as a tactic in governing parenthood and gender by promoting certain forms of living arrangements, gender identities and kinship relations while dismissing others as invalid or irrelevant. This provides a window into what law is doing and why law matters. This leads to the question of whether it is necessary for law to apply gendered parental categories (mother, father and co-mother) at all, or whether terms referring to functions, like being pregnant or giving birth, should replace the current parental categories and thereby remove legal concepts that do not match the identity or functions of all the people they are supposed to apply to.

The chapter unfolds in three sections. The first presents the legal backdrop against which the rights of transgender people have emerged, and subsequently how international and European human rights law, as well as Norwegian law, are constructing gender. In the second section, I look at the establishment of parenthood under the Act Relating to Children and Parents 1981

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9 For an overview of legal reforms, see Jens M Scherpe (ed), The Legal Status of Transsexual and Transgender Persons (Intersentia, 2015).
10 Michel Foucault introduced the notion of ‘governmentality’ in his lecture at the Collège de France in February 1978. Michel Foucault, ‘Governmentality’ (Pasquale Pasquino trans, 1978) in Graham Burchell, Colin Gordon and Peter Miller (eds), The Foucault Effect: Studies in Governmentality with Two Lectures by and an Interview with Michel Foucault (University of Chicago Press, 1991) 87.
11 Ibid 87–104.
13 Michel Foucault, Seksualitetens Historie I: Viljen til Viten (Espen Schaaning trans, Pax, first published 1976, 1999 edn) [trans of: Histoire de la sexualité I: La volonté de savoir].
and how the rules apply to transgender parents. The continuing operation of biologic is clearly apparent, working as a constant reminder of the ‘otherness’ of parents whose gender identity differs from their birth-assigned gender. Section three provides a more thorough discussion of how law works to govern parenthood and why law matters. I argue that, even though law does not preclude transgender parents, parenthood is regulated in such a way that transgender people appear as other to the norm. I conclude by suggesting that it would be beneficial to gender-neutralise parenthood under the law as a way of covering all gender identities, including those that the law currently marginalises or does not recognise at all.

The road to legal men giving birth and its legal framework: The ambiguous scope of gender

Against the backdrop of universal human rights, the rights of transgender people have only recently started to be recognised. Legal developments have focused on rights related to legal recognition of preferred gender identity, and on expanding coverage of anti-discrimination provisions to include the grounds of gender identity/expression. In this section I provide a brief overview of these developments, starting with the jurisprudence of the European Court of Human Rights (ECtHR), turning then to the work of international human rights mechanisms and finally to describing the recent developments in Norwegian law.

The European Court of Human Rights — acknowledging gender as social yet holding on to biology

Because transgender people have brought claims to the ECtHR, its jurisprudence has played a crucial role in developing and clarifying the obligations of states parties under the European Convention on Human Rights (ECHR), to protect and respect transgender people’s human rights. In these cases, gender explicitly emerges as a problem for law by way of appearing as a question. Most complaints have been tried as a matter of the right to respect for one’s private life under article 8. Nevertheless, it is now uncontested that gender identity falls within the proscribed grounds of discrimination under article 14, which prohibits discrimination in the enjoyment of all ECHR rights and freedoms. Article 8, by contrast, only protects individuals against arbitrary interference with their privacy or family life by public authorities, although it does place positive obligations on states to ensure that everyone’s right to private life is respected. According to the ECtHR, respect for human dignity and human freedom constitute the very essence of the ECHR, and the notion of

17 See, eg, Identoba v Georgia (European Court of Human Rights, Chamber, Application No 73235/12, 12 May 2015) [96]. Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 2000, ETS No 177 (entered into force 1 April 2005) sets forth a general prohibition of discrimination, see article 1. To date Norway has signed, but not ratified, the optional protocol.
18 Van Kück v Germany, (2003) VII Eur Court HR 1, [70].
personal autonomy is an important principle in the interpretation of article 8.\textsuperscript{19} The right to respect for private life covers the personal integrity of a person and encompasses issues such as personal identity and personal development.\textsuperscript{20} States parties have a positive obligation to take measures to ensure that transgender people can live in accordance with their gender identity by amending identity documents that refer to gender.\textsuperscript{21} However, state’s obligations beyond the question of mere correction of gender understood as binary have not been explicitly clarified.

In 1997, when the first and so far only case on transgender parenthood brought to the ECtHR was heard, the ECtHR had not yet identified any obligation on states parties to legally recognise transgender people’s gender identity. In \textit{X, Y and Z v UK},\textsuperscript{22} the United Kingdom refused to register X (post-operative female-male ‘transsexual’)\textsuperscript{23} as the father of Z (conceived by donor insemination and born to his partner Y). The ECtHR found the UK not to be in contravention of the applicants’ right to respect for family life under article 8 because of the state’s interest in maintaining a coherent system of law, arguing that it would lead to inconsistency if somebody who was not legally a man was registered as a father and that such a change to the law could have negative implications for children. The question now is whether the ECtHR will, in future cases, find that states are obliged to register transgender parents in alignment with their legal gender when gender recognition laws are based on self-determination.

It was not until 2002, in \textit{Christine Goodwin v UK}, that the ECtHR ruled decisively in favour of transgender people seeking legal gender recognition.\textsuperscript{24} Goodwin, a post-operative male-female transgender person, argued inter alia that the ECHR required the UK to modify her birth certificate to recognise her preferred gender. The ECtHR agreed, finding no decisive reason for chromosomes to be determinative when establishing a ‘transsexual’s’ legal gender.\textsuperscript{25} Thereby, gender was acknowledged as a social construct and it was accepted that legal gender is not always synonymous with biological gender. Yet, Goodwin’s case, and others that have since been considered by the ECtHR, have all involved people who have undergone or intend to undergo gender-confirmation surgery. Furthermore, in the rulings, ‘transsexualism’ has been treated as a medical condition for which gender-confirmation\textsuperscript{26} treatment has been understood as providing relief. The ECtHR’s analysis has been carried out along this medical pathway. Thus, in these cases, the ECtHR has not raised concern about the legitimacy of requiring gender-confirmation surgery.\textsuperscript{27} So, even though the ECtHR has claimed to recognise gender as a social category, in practice it has not distinguished it from biology or medical science. Therefore the biological two-sex model continues to provide the basis for legal gender.

\begin{itemize}
\item \textsuperscript{19} \textit{Goodwin v the United Kingdom} (2002) VI Eur Court HR 1, [90].
\item \textsuperscript{20} Torkel Opsahl, \textit{Internasjonale Menneskerettigheter En Innføring} (Institutt for Menneskerettigheter, 2.nd edn, 1996) 44–6; \textit{Pajić v Croatia} (European Court of Human Rights, Chamber, Application No 68453/13, 23 February 2016) [61].
\item \textsuperscript{21} \textit{Goodwin v the United Kingdom} (2002) VI Eur Court HR 1.
\item \textsuperscript{22} \textit{X, Y and Z v The United Kingdom}, (1997) II Eur Court HR 143.
\item \textsuperscript{23} In its case law the ECtHR uses the term ‘transsexual’ to refer to most of the transgender applicants. Many consider this term to be offensive and pathologising trans identities. See above n 5.
\item \textsuperscript{24} \textit{Goodwin v the United Kingdom} (2002) VI Eur Court HR 1.
\item \textsuperscript{25} Ibid [82].
\item \textsuperscript{26} Gender reassignment surgery is another term often used. However, I use \textit{confirmation} as this term reflects that the purpose of the surgery is to confirm and not \textit{reassign} a person’s gender.
\item \textsuperscript{27} See, eg, \textit{Goodwin v the United Kingdom} (2002) VI Eur Court HR 1.
\end{itemize}
In 2015, in *YY v Turkey*, the ECtHR found that a refusal by Turkish courts to authorise access to gender-confirmation surgery for a transgender person, on the ground that he was not permanently infertile (a condition of court authorisation), encroached on his right to respect for his private and family life under article 8. The core question for the majority was whether the non-procreation requirement was necessary in order to protect the health of transgender people. Since Turkish authorities failed to justify the requirement in light of article 8, the ECtHR ruled that Turkish authorities violated the applicant’s privacy rights, finding that freedom to establish gender is an essential part of the ECHR. Although not dealing with the question of medical intervention as a precondition for correction of legal gender directly, but entry to gender-confirmation surgery which leads to correction of registered gender, the consequence of the ruling is a move in the direction of separating reproductive capacity from the biological basis of gender categories. Yet the ECtHR seems reticent to take a clear stand about whether gender is biologically or socially determined.

The Council of Europe Commissioner for Human Rights, the Committee of Ministers and the Parliamentary Assembly have all recommended that states abolish sterilisation and other harmful procedures as criteria for legal gender recognition, based on the view that requiring gender-confirmation surgery as a precondition to altering legal gender violates the human rights of transgender people, including the right to bodily integrity and self-determination. If followed, the recommendations will foster a construction of gender that will have significant implications in many different areas of life. Yet, even though the recommendations are clear, they fail to address how states are to implement the changes. For example, do they now have an obligation to protect pregnant or breast-feeding legal men from sex/gender discrimination and an obligation to recognise transgender people’s gender identity in relation to registration of parenthood?

**International law — combating Sterilisation — yet blind to its consequences**

In international human rights law, sex/gender has also been traditionally understood in binary male/female categories. While there has been some progress in the context of women’s rights towards understanding gender as a social category, it remains moored on a biological base, understood as ‘sex’. More recently, human rights treaty bodies and many of the Special Procedures of the UN Human Rights Council (and its predecessor the Commission on

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28 *YY v Turkey* (European Court of Human Rights, Chamber, Application No 14793/08, 10 March 2015).
31 See ibid 646.
32 Pending cases before the Court on gender-confirmation surgery and transsexualism as preconditions for correction of registered gender: *AP v France* (Application No 79885/12, 5 December 2012), *Garçon v France* (Application No 52471/13, 13 August 2013) and *Nicot v France* (Application No 52596/13, 13 August 2013).
Human Rights) have explicitly recognised that discrimination on the basis of gender identity is prohibited by the non-exhaustive anti-discrimination clauses in international human rights instruments.\textsuperscript{36} Yet, little attention has been paid to specific human rights obligations with respect to gender identity, let alone transparenthood.

Several human rights treaty bodies have now expressed concern about requiring medical intervention as a precondition for correction of registered gender, recommending that states abolish such requirements. In its Concluding Observations to Belgium (2014), Finland (2014) and Slovakia (2015), the Committee on the Elimination of Discrimination against Women recommended that sterilisation, as a requirement for legal gender recognition, be abolished.\textsuperscript{37} Also in 2015, the Committee against Torture recommended that China (Hong Kong) remove preconditions, such as sterilisation, for legal gender recognition.\textsuperscript{38} However, trans-specific issues have yet to be adequately addressed by international human rights treaty bodies.\textsuperscript{39}

As early as 2001, two of the Human Rights Council’s Special Procedures made reference to human rights abuses suffered by transgendered people, in the context of the question of torture and extrajudicial, arbitrary and summary executions.\textsuperscript{40} Since then, other Special Procedures have raised the issue within mandates covering human rights defenders, health and minority issues.\textsuperscript{41} In 2013, and again in 2016, the Special Rapporteur on Torture recommended that states abolish and outlaw sterilisation as a requirement for legal gender recognition because it constituted torture and/or other cruel, inhuman and degrading treatment.\textsuperscript{42} If states follow these recommendations and bring domestic law into compliance with international human rights law by adopting gender recognition acts based on self-determination, legal gender will be detached from reproductive capacity. Legal men will for example, like in Norway, be able to give birth. However, none of these bodies have made recommendations about how they should be implemented in practice or what effect legal gender should have on parenthood.

\textsuperscript{36} Anne Hellum, ‘Vern mot Diskriminering på grunnlag av seksuell legning, kjønnsidentitet og kjønnsuttrykk – religiøse kjønnsdogmer i møte med internasjonal og norsk rett’ in Reidun Førde, Morten Kjelland and Ulf Stridbeck (eds), Festskrift til Aslak Syse 70 år (Gyldendal, 2016) 191.

\textsuperscript{37} UN Committee on the Elimination of Discrimination against Women (CEDAW), Concluding Observations on the Seventh Periodic Report of Belgium, 59\textsuperscript{th} sess, UN Doc CEDAW/C/BEL/CO/7 (14 November 2014) [45]; UN CEDAW, Concluding Observations on the Seventh Periodic Report of Finland, 57\textsuperscript{th} sess, UN Doc CEDAW/C/FIN/CO/7 (10 March 2014) [29]; UN CEDAW, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Slovakia, 62\textsuperscript{nd} sess, UN Doc CEDAW/C/SVK/CO/5-6 (25 November 2015) [37].

\textsuperscript{38} UN Committee against Torture, Concluding Observations on the Fifth Periodic Report of China with respect to Hong Kong, China, 56\textsuperscript{th} sess, UN Doc CAT/C/CHN/HKG/CO/5 (3 February 2016) [29].


\textsuperscript{40} Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GAOR, 56\textsuperscript{th} sess, Agenda Item 132(a), UN Doc A/56/156 (3 July 2001) [17]; Asma Jahangir, Report of the Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions, UN ESCOR, 57\textsuperscript{th} sess, Agenda Item 11(b), UN Doc E/CHN.4/2001/9 (11 January 2001) [50].


\textsuperscript{42} Juan E Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GAOR, 31\textsuperscript{st} sess, Agenda Item 3, UN Doc A/HRC/31/57 (5 January 2016) [72 e]; Juan E Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GAOR, 22\textsuperscript{nd} sess, Agenda Item 3, UN Doc A/HRC/22/53 (1 February 2013) [88].
The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (‘Yogyakarta Principles’) also do not address these matters directly. Adopted in 2007 by a group of LGBT human rights experts and advocates to provide guidance in interpreting existing human rights law, the Principles are not legally binding, but as more formal bodies rely on them, their potential to guide legal developments increases. The Yogyakarta Principles clearly state that the universal right to recognition before the law includes the right to have your self-defined gender legally recognised without the requirement of medical interventions. Yet, while recognising that transgender people have the right to found a family, and that no family should face discrimination because of the gender identity of any of its members, they are, as the soft law mentioned above, silent about parental categories for LGBT people as a matter of legal recognition. Therefore, even though the Principles are clear on self-declared gender and the right to non-disclosure of gender identity, they do not directly address the problem of heteronormative and cisnormative domestic parenting laws.

Norwegian law – self-declared binary gender

Returning to Norway, the binary gender-specific national identity number is based on physical sex characteristics at birth. Before 2016, a person’s national identity number could be changed on the condition of completed gender-confirmation treatment, including hormonal therapy, real-life-experience living as the preferred gender for a minimum of 12 months and removal of testis or ovaries. Since this administrative practice was established in the 1970s, Norway was one of the first states to provide for correction of legal gender. By implication, at this point the law recognised gender as social. Yet, clear-cut boundaries between male and female bodies were maintained, as no other genders were recognised and a correction was reliant on alignment of the body with biological sex. Gender assignment at birth continued to be based on physical sex characteristics and the gender binary.

As a result of amendments to Norway’s anti-discrimination legislation in 2013, the prohibition of discrimination was extended to include gender identity and gender expression. In 2014, the Equality and Anti-discrimination Ombud concluded that the Ministry of Health and Care Services violated this legislation when requiring a diagnosis of transsexualism, hormonal therapy and gender-confirmation surgery for correction of legal

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44 Yogyakarta Principles, principle 3.
47 Cis is a term used to refer to people who self-identify with their birth assigned gender.
gender. This determination increased the pressure to abolish medical requirements for change of legal gender. The Norwegian Parliament then adopted the Act on Change of Legal Gender 2016 (‘Gender Recognition Act’), which entered into force on 1 July 2016. The Act provides for change of legal gender from the age of 16 based on self-declaration. For children between the age of 6 and 16, parental consent is required. If only one parent gives their consent, children at this age may change their legal gender if the County Governor, by way of an administrative decision, finds correction of legal gender to be in the best interests of the child. Legal gender therefore develops from biological determination at birth to self-declaration for people who have reached the age limits prescribed by the Act. Hence, gender recognition breaks the biological link between legal gender and parenthood, which had earlier seemed logical, as reproductive capacity is no longer tied to legal gender. However, the Act relies on the gender binary by way of providing only two gender options. The Act also does not challenge the role of physical sex characteristics for gender assignment at birth. This means that biology continues to serve as the basis of legal gender orthodoxy, but that law accepts gender as social for people over the age of 6. By constructing gender, the Act shapes contemporary norms about gender, which play a powerful role in governing expressions and practices of gender. The Act grants ‘authenticity’ to certain forms of gender identity and the distinction between ‘normal’ and ‘abnormal’ emerges — a distinction which medical science previously constructed, before gender appeared as a problem for law. As pointed out above, it can be questioned whether law fully recognises gender as social, or if biology still plays a decisive role also in other relations – for example, in relation to parenthood.

Parenthood under Norwegian law: The heterosexual, dualistic and biological norm

Law also governs ways of becoming a family with children, through provisions on assisted conception, egg donation and adoption. In Norway, assisted conception is available to same-sex and different-sex couples as a part of the public health service. It preconditions dual parenthood by way of requiring either marriage or a stable relationship resembling marriage. Conversely, adoption is available to single persons, as well as couples. Norwegian law does not provide for surrogacy or egg donation. In this section, I explore how parenthood is established under the Children Act and how the rules apply to transgender


54Lov om endring av juridisk kjønn [Act on Change of Legal Gender] 17 June 2016, No 46, §§ 2, 4, 5 (‘Gender Recognition Act’).

55Lov om endringer i lov 28. februar 1986 nr. 8 om adopsjon og i lov 30. april 1993 nr. 40 om registrettpartnerskap [Act Amending the Adoption Act and the Act on Civil Partnership] 15 June 2001, No 36. In 2008, the Adoption Act was amended so as to give same-sex couples the right to adopt in general. Lov om endringer i ekteskapsloven, barnelova, adopsjonsloven, bioteknologiloven mv. [Act Amending the Marriage Act, the Children Act, the Adoption Act and the Biotechnology Act] 27 June 2008, No 53.

56Biotechnology Act § 2-15, § 2-18.
parents. The focal point is to examine whether the rules follow a presumed biological link between parenthood and gender, or whether the rules recognise gender as social.

The term ‘legal parents’ means ‘those persons who have established parenthood in a manner recognised by legislation’. Parenthood means the child’s mother, father or co-mother pursuant to the Children Act or the Adoption Act 1986. Mere registration of parenthood in the population register has no legal effect if it does not comply with the rules in these Acts. Legal parenthood entails rights and obligations for the legal parents, and in parallel, it provides rights for the children vis-à-vis their parents. The Children Act is based on the premise that a child is to have two legal parents. In the population register and on birth certificates, parents are not categorised as mother, father or co-mother, but simply registered as an individual who has children. Children are registered with information about their parents that lists their names. In this chapter, focus is given to legal parenthood following from the three categories recognised in the Children Act.

**Motherhood**

Until 1997, motherhood was not regulated by law, but based on the biological principle of *mater semper certa est* (the mother is always certain). However, technological advances in medicine that enabled egg donation generated a need for regulation of motherhood, even though the Act Relating to the Application of Biotechnology in Medicine 1994 did not allow for this. It was still possible that donated eggs could be acquired in a foreign state. As explained in the preparatory work, the Children Act takes the view that a child’s biological kinship with the person bearing the child to delivery should be attributed greater weight than any genetic kinship with another woman or egg donor. Therefore, the biological principle, which says that the ‘woman’ who gives birth to the child is the child’s legal mother, was codified into the Children Act in 1997. This regulates giving birth as an exclusively female function. The determination of legal motherhood moves from egg to uterus, and can be changed only by adoption.

According to the Gender Recognition Act, as a main rule, legal gender shall apply when applying other statutes and regulations. Yet, an exception is made when it comes to parenthood. If it is ‘necessary’ to establish parenthood and parental responsibility pursuant to the Children Act, birth assigned gender shall be applied. Therefore, a legal man who gives birth will be assigned parenthood pursuant to the rules on motherhood. The rationale for this is that the conditions for fatherhood or co-motherhood are not fulfilled. The purpose is to

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59 Adoption Act.
60 Ibid [14.7.4].
61 Children Act § 5; Prop. 105 L (2012–2013) [Proposition to the Storting (bill)] 52–3.
62 Prop. 74 L (2015-2016) Lov om endringer av juridisk kjønn [Proposition to the Storting (bill)] [8.5.3].
67 Children Act § 2.
68 Gender Recognition Act § 6.
ensure that parenthood can be established and to avoid uncertainty about how parenthood is established.69 The rules on motherhood break with the main rule on self-declared and social legal gender. As a consequence, law treats gender identities, which differ from birth assigned gender, as justifying differential treatment under the Children Act. In this way, law does not recognise gender or pregnancy as social. Law continues to govern giving birth as a female function rendering legal men giving birth invisible and not ‘really’ men (or fathers). Motherhood is ‘always’ biology.

Fatherhood

The rules governing paternity are closely linked with regulation of who the child’s mother is. When a child is born in wedlock, the pater est rule applies70 and the legislator assumes the biological likelihood that the husband is the father of the child. That is, the man who is married to the mother at the time of birth is the father of the child, irrespective of whether or not the latter is the biological father.71 At the outset, the rule is based on the biological principle, but it applies as well to assisted conception. The basis for the rules governing paternity and determination of fatherhood is thus of a social nature.72 The rule is meant to ensure the integrity of the family as a social unit and that the child will be cared for by both parents.73 This means that for paternity, social kinship and the best interests of the child, rather than biological kinship as for motherhood, is seen as more favourable. With the pater est rule the biological principle yields to governmental support for the nuclear family and its privileged position in society.74

For heterosexual cohabitants or parents not living together, the law requires active deeds on the part of the father. The father must declare paternity either during pregnancy or after the child is born and the mother has to agree with the paternity.75 Social kinship is given less weight because of the couple’s form of living arrangement. This marks marriage as the preferred living arrangement. The distinction between the rules of paternity in marriage and in cohabitation is founded on the rationale that cohabitants are a diverse and shifting group. The presumption that the mother’s cohabitant is the child’s father is therefore weaker than for marriage.76

Furthermore, legal paternity can be allocated or altered by a court ruling on the basis of a DNA test or, if the analysis provides no conclusive answer (or has not been conducted), based on the probability that the person is the father because of the mother having had sexual intercourse with the man in question.77 In the case of assisted conception, paternity can be attributed if the husband or cohabitant consented to the conception and it is probable that the

69 Prop. 74 L (2015–2016) [Proposition to the Storting (bill)] 37.
70 Shortening of pater est quem nuptiae demonstrant (the true father is established through marriage). The pater est rule has been stated by statutory law since 1892. Children Act Commission, ‘NOU 1977: 35 Lov om barn og foreldre’ [Norwegian Official Report] (1977) 12.
72 Ot.prp. no.33 (2007–8) [Proposition to the Odelsting (bill)] [9.2.2].
73 Prop. 105 L (2012-2013) Endringer i barnelova (farskap og morskap) [Proposition to the Storting (bill)], [4.1.1]–[4.1.4].
75 Children Act § 4; Prop. 105 L (2012-2013) Endringer i barnelova (farskap og morskap) [Proposition to the Storting (bill)] [4.3].
76 Prop. 105 L (2012-2013) Endringer i barnelova (farskap og morskap) [Proposition to the Storting (bill)] [4.2.4].
77 Children Act, §§ 6, 9. See generally Backer, above n 65, 56–8, 100–118.
child was born as a result of assisted conception. Legal paternity can never be allocated to a donor by way of a court ruling.

Paternity established on the basis of marriage or declaration can be changed if another man declares paternity, provided the mother and the person who initially was assigned paternity consent in writing and a DNA analysis confirms paternity. With the consent of the parties, biological evidence gives grounds for paternity, whereas social paternity provides no opportunity to change a biologically established paternity. The only way to do this is through adoption.

According to the Gender Recognition Act, for a legal woman who begets a child with her own semen, legal parenthood is established based on the rules on paternity, as described above. The legal woman cannot, in this case, be the legal mother. Nor are the requirements for co-motherhood fulfilled, as discussed in the next section. In a similar way, the rules on fatherhood cannot be applied to establish parenthood for a legal man who gives birth since the person who gives birth is the child’s mother. When birth assigned gender and gender identity conflict, birth assigned gender wins out in determining parenthood. The rules (re)constitute the biological link between semen and man/father. In regulating families, the wording of the law does not recognise a legal woman who begets a child as a woman.

Co-motherhood

The woman to whom the mother is married at the time of birth, when the child is born after assisted conception, is considered to be the co-mother. The prerequisites are that she has consented to conception and that the couple has used a known donor in an approved health institution. The pater est rule is thus applied to regulate co-motherhood despite the absence of biological or genetic kinship. As explained in the preparatory work, this approach was based on considerations of the best interests of the child and of gender equality. For women cohabitants, co-motherhood can be acquired by declaration, in the same manner as for fatherhood, or allocated by a court ruling if the co-parent consented to conception. The rules for assigning and declaring co-motherhood are thus founded on social parenthood and the consent of both lesbian cohabitants or married partners. Here the Act differs from the otherwise increased emphasis on biology with respect to fatherhood.

The rules on co-motherhood also apply if the partner of a legal woman, (who has changed her legal gender), avails herself of assisted conception by the use of donor semen. Since the requirements for co-motherhood are fulfilled, it is not necessary to apply the birth assigned gender in order to establish parenthood. Thereby, in the case of co-mother, the rules recognise gender as social.

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78 Children Act § 9.
79 Ibid. § 9.
80 Ibid. § 7.
81 Prop. 74 L (2015–2016) [Proposition to the Storting (bill)] 37.
82 The term co-father is not a legal term and is not applied in any regulation on parenthood.
83 Children Act § 3.
84 Ot.prp. nr.33 (2007–2008) [Proposition to the Odelsting (bill)] [9.6.1.2].
85 Children Act § 4.
86 The rules in §§ 6 to 9 apply likewise for a co-mother to the extent that they are fitting. The legal effects of co-motherhood are therefore the same as for fatherhood. Children Act § 4a. 9.
87 Backer, above n 65, 50.
88 Prop. 74 L (2015–2016) [Proposition to the Storting (bill)] 37.
Disrupting the biological link

As illustrated above, the basis of the parental rules under the Children Act remains that of a man and a woman whose legal genders match their birth assigned genders. A father is presumed to be a cisman and a mother a ciswoman. As recognition of the rights of lesbian couples to assisted conception challenged the male/female parenting dyad, the new legal term ‘co-mother’ was introduced. The Act also establishes that a child cannot have both a father and a co-mother, as this would be too much of a violation of the biological principle, since there will always be a ‘father’ when donor insemination is not used, as explained in the preparatory work. Nor can a child have two legal mothers or co-mothers. Although the Act opens social parenthood as a basis for legal parenthood, such as for co-motherhood, it remains anchored in the biological principle.

As we have seen, the Gender Recognition Act challenges the biological parenting dyad by making it possible for legal men to give birth and legal women to produce semen. Yet whereas the basis for legal genders is in motion from biologic to social recognition, the birth assigned gender, which is based on biological characteristics at birth, continues to be the basis for the establishment of legal parenthood. In relation to parenthood, law governs gender as biological.

However, rules that govern parenthood by treating gender as biological are not unique to Norway. For example, in Denmark, Sweden and the Netherlands, the person who gives birth is the child’s mother, irrespective of legal gender. The one exception may be the Gender Recognition Act 2004 (UK) which states that ‘[t]he fact that a person’s gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child’. The provision is ambiguous, but in the view of Stephen Gilmore, it is likely that it refers to parenthood prior to legal gender recognition, meaning that parenthood before transitioning remains the same after legal gender recognition. Gilmore suggests that, after recognition of preferred gender, legal parenthood can be acquired in keeping with legal gender, which would mean that a transgender man could be legal father, as wished for by my informant quoted at the start of this chapter.

So why has the legislature held onto the traditionally presumed link between gender and parenthood categories? Why not change the wording of the Act so as to comply with the purpose of the Gender Recognition Act, which is self-determined gender, or even better gender-neutralise the rules regarding parenthood in the Children Act? The law cannot prevent forms of genetic kinship that do not conform with the paradigm of normality produced and governed by law. For example, since transgender people undergoing gender确认ment treatment are not able to arrange for the preservation of their eggs in Norway, because surrogacy is not permitted, one of my young transgender informants told me that he is

89 Children Act § 4a; Ot.prp. nr.33 (2007–2008) [Proposition to the Odelsting (bill)] [9.6.1.2].
91 Gender Recognition Act (UK) c 7.
travelling abroad to preserve his eggs to ensure that his partner can carry and give birth to his child. He will be genetically related to his child, whereas his partner will be biologically related by way of carrying their child. Since his partner will give birth, she will be the child’s mother. It would be in line with the objectives of the rules on parenthood, such as ensuring the integrity of the family and ensuring the best interests of the child by ensuring that the child has two legal parents, if he is assigned fatherhood to the child born by his partner. If he gave birth, he would automatically be assigned motherhood. By overcoming the limitations imposed by law, these parents will challenge the ‘normal’ biological link between gender and reproduction. This means that the rules on parenthood under the *Children Act* are no guarantee for presumed biological parent/child relations, and as we have seen above, they are inconsistent in whether or not transgender peoples’ gender identity is recognised.

**Governing (trans)parenthood**

So, how are the Gender Recognition Act and the *Children Act* governing parenthood? In particular, what are their effects in the lives of transgender Norwegians? As Foucault argues, in modern societies power operates through normative discourses, which lead to the normalisation of certain conduct and behaviour. Law works as an important medium that produces power, which works to discipline populations by defining what are normal ways to live and what are not.

Exceptions to the rule of self-declared legal gender are regulated by section 6 of the *Gender Recognition Act*. The provision establishes which rules to apply when the rules on establishment of parenthood under the *Children Act* do not fit the situation of transgender people conceiving children, clarifying what conception of gender operates in relation to parenthood. For example, giving birth is not a function only legal women or people identifying as women have. Yet the rules do not reflect this situation. When the rules on parenthood do not fit the ‘reality’, the provision requires that birth assigned gender shall be applied at the expense of (legal) gender. The operation of power of this provision is not by way of precluding transgender people from establishing families with children, like the requirements of sterilisation or infertility did previously. Rather, it draws on normative expectations embedded in this provision. The operation of power works by way of governing what the population sees as ‘normal’ and their wish to be ‘normal’, and not by way of coercion. It is a shift from how the requirement of surgery governed the population and how the less visible form of power of today’s legislation works. Yet, this less visible form of power affects the personal experiences of transgender people and shapes the wider expectations of the society by constituting subjects based on conventional norms. In relation to transgender people, the provision works by way of implying that they are not ‘real’ men or women even though their legal gender indicates that they are. It imposes certain limits on the expulsion of the biologic of gender from the law. The line is drawn at parenthood and reproduction.

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93 Informant interviewed 2015. Since surrogacy is not permitted in Norway preservation of eggs has not been provided for transgender people who are starting hormone therapy and undergoing gender-confirming surgery. Biotechnology Act § 2-15; Directorate of Health, ‘Evaluering av bioteknologiloven 2015: Oppdatering om status og utvikling på fagområdene som reguleres av loven’ (Report, Directorate of Health, 2015) [2.2.9.3]. To date, the Biotechnology Act is under revision and biotechnology options for transgender people are considered.

94 It is uncertain how this would work out in practice. Yet, if they are married, as a main rule the *pater est* rule shall apply.

The enactment of the Gender Recognition Act did not lead to a subsequent change of the wording of the Children Act to bring it into compliance with the new situation. This probably enabled a more rapid introduction of the Act, which was beneficial to transgender people because it abolished medical requirements for change of legal gender. At the same time, this works to limit the effects of the change and protect cisgendered conventions relating to both gender and sexuality. The power of the Children Act works through its gender-specific wording, in other words from the texts as such, which constructs heterosexual, married, cisgender families as the norm. In ‘denying’ the realities of transgender people’s lives, the Act constructs normative expectations about gender and parenthood, which reconstitute and reconfirm their ‘otherness’. Rather than challenging conventional norms, the Act thereby pursues and supports these norms and their power in normalising the population.

Yet, most people never look at the specific wording of legislation, and, as was argued in the preparatory work to the Gender Recognition Act, parents are not listed as mother, father or co-mother in the national population registry or on birth certificates, unlike in Sweden. In 2014 and 2015 Swedish courts found that a mismatch between a person’s gender identity/legal gender and gendered parental status in the national population registry was in breach of article 8 (privacy) and article 14 (non-discrimination) of the ECHR in relation to both the parent and the child. It is, as argued by the Administrative Court in Gothenburg, in compliance with the best interests of the child to register parents in such a way that parents’ ‘change of gender’ is not involuntarily disclosed. The courts concluded that a legal man who gives birth, and a person who changes legal gender after giving birth, can be registered as a father. Such registration was considered to be in keeping with the object of population registration, which is to secure correct and relevant information about individuals. In the view of the Swedish courts, to register a legal man as a mother implies that he is registered as a woman, and as a consequence his gender identity is not fully legally recognised.

Even though the Norwegian population registry registers parents differently from the Swedish registry, other Norwegian laws and regulations also apply cisgendered categories of parenthood. If we look at the National Insurance Act 1997 provisions on pregnancy, birth and adoption benefits, the terms man, woman, mother and father appear throughout. These rules actively impact on the lives of transparents. Indeed, the new legislation specifies that these rules also apply to those who have changed their legal gender, yet, the terms are used in application forms for parental benefits and for assisted conception, which means that...
applicants are forced to disclose their gender history. These rules are therefore a constant reminder of ‘otherness’ – of not being recognised as a parent on an equal footing with cisparents. Here law continues to disqualify transgendered parenthood as fully normal, signalling transgender people’s questionable fitness for parenthood. This might affect not only the well-being of transgender parents, but also indirectly their children. As argued by the Swedish Courts mentioned above, there is no reason to not see birth-giving legal men as fathers.

The 2016 legislative change operates quietly to shape normality by maintaining the fictive link between legal man and semen and legal women and eggs, thereby privileging a cisgendered reality. Law’s power does not work by way of prohibiting particular forms of parenthood, such as it does for egg donation, surrogacy and assisted conception. On the contrary, in relation to transgender parenthood, the wording of the law operates behind the appearance of trans inclusion, interweaving with other tactics in governing gender identities, rewarding preferable forms of (cis)parenthood and casting doubt on the legitimacy of others.

One of my informants, a woman in her 20s, says: ‘I would of course see myself as a mother, but I’m not sure how that would work out on paper. It would have felt quite weird to be defined as a father, creepy actually … I am a woman’. She, like all the other transgender people I have interviewed, would identify as the parent matching their gender identity if they have children. However, the wording of the Act reflected in many application forms will signal that they are not ‘really’ women or men. The same informant says: ‘Being trans is a part of my identity, but not a significant part of my identity. Being trans has evolved from figuring prominently, to wind up in the background [to being a woman]’. To introduce the Gender Recognition Act and not amend related laws, works against the purpose of the Act, which is to recognise gender identity based on self-determination. Instead of diminishing the relevance of being transgender, it is continually foregrounded by law’s representation of the ‘otherness’ of trans parents. Norwegian rules on parenthood create a hierarchy of preferred parents where matters of gender identity, sexual orientation, whether you are in a relationship, and whether you use a ‘proper’ form of conception all matter.

Norwegian law is based on the male/female gender dualism. No other genders are recognised, and biology serves as the predominant basis of determining gender in the context of recognising legal parenthood. Would it not be preferable to introduce gender-neutral terms into the laws regulating and establishing parenthood? The use of gendered terms could be replaced with language that relates to the function or substance that the law is governing: such as pregnancy, cash benefits for the birth-giving parent or caring parent, protection against discrimination on the grounds of pregnancy or becoming or being a parent, access to abortion and parental leave. This would include all parents no matter what their gender identity or sexual orientation, and contribute to ending reliance on gender and sexuality hierarchies based on biologic. It could be a way to disrupt the tenacity of rigid normative and socially constructed dualistic gender roles that continue to rely on biologic, even as they

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[101] Informant interviewed 2015.
[102] Other scholars have also suggested this as a possible option. See, eg, Sheelagh McGuinness and Amel Alghrani, ‘Gender And Parenthood: The Case For Realignment’ (2008) 16 Medical Law Review 261, 282; van den Brink and Tiggelaar, above n 90, 247, 259; Karaian, above n 2, 211–30.
purport to recognise transparency. It would be in compliance with the best interests of the child that shall be a primary consideration in all actions concerning children, as it would ensure that the child has legal parents. Furthermore, it would diminish the role of law in creating authenticity and normalising subjects which could positively influence the well-being of transgender parents and thereby also their children.

I have argued that recent developments in the legal and social regulation of gender identity and parenthood hold fast to the importance of biological foundations, heterosexual family forms, and cisnormativity. In Norway, the Children Act, in combination with the Gender Recognition Act, while not explicitly excluding transgender parenthood, establishes a governing hierarchy of parenthood, gender identities and sexualities that normalises heterosexuality and reinstates the biological link between birth/legal woman and semen/legal man. Law’s recognition of gender as social and fluid is extremely limited. A great deal depends on the subject matter. In the case of parenthood, law refuses the full inclusion of transgender people, and returns to the biologic of the two-sex model. I suggest that it may be time to adopt gender-neutral parental categories under the law, arguing that gender-neutral terms would better include and reflect the reality of parents living in contemporary Norway, and many other parts of the world. Gender-neutral parenthood would also help to realise the human rights principles of self-identification, personal integrity and autonomy that underlie new laws relating to change of legal gender. The goal should be to recognise transgender people’s gender identity in all aspects of their lives.