The symbolic power of legal kinship terminology : an analysis of 'Co-motherhood' and 'Duo-motherhood' in Belgium and the Netherlands

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Abstract

This paper provides a theoretically-grounded critical analysis of how the Belgian and the Dutch legal systems are addressing new kinship formations through the production of new legal terminology. As Belgium and the Netherlands are at the forefront of legal recognition of minority sexualities and emerging forms of relatedness, statutory Belgian 'co-motherhood' and Dutch 'duo-motherhood' for 'lesbian parents' (both enacted in 2014) cast some light on how European state family laws and policy frameworks are likely to evolve vis-à-vis the multiplication of new family formations. After tracing the developmental trajectory of these new family law categories and their connection to ordinary language categories, the article claims that legal labels are hardly merely descriptive, for they exert contradictory effects of recognition, regulation, normalisation, and exclusion. By foregrounding the potential frictions between 'kinship-in-action' and 'kinship-in-the-books' and the possible drawbacks of top-down statutory interventions, the article contends that, when based on conventional family categories, legal kinship terminology runs the risk of foisting pre-given narratives upon emerging kinship formations, which would eventuate in the normalisation of alternative realities. The article concludes by drawing a parallel between partnership labels and parenthood labels and by advocating the need for deeper ethnographic research before new legal kinship labels are crafted.

Keywords: family, family law, kinship, legal labels, motherhood.

"*Le lait va aussi loin que le sang!*"[1]

Introduction

This article deals with the difficulties that legislatures and courts face when they are called upon to govern emerging kinship phenomena that exceed conventional binary grids, such as male/female, husband/wife, father/mother and so on. Rules meant to regulate kinship phenomena incorporate specific representations of kinship formations, and by and large take the shape of definitional labels. When the law cannot revert to conventional terminology, legislators and officials are forced to issue new definitions that may provide guidance for conduct for those who take on unconventional roles. However, as we will argue throughout this article, definitional labels are normative instruments that exert performative effects on those who carry out the roles marked out by legal rules. In this regard, the production of new labels is a normative activity that not only regulates, but also moulds social practices.

As Belgium and the Netherlands are at the forefront of European legal recognition of minority sexualities and emerging forms of relatedness, statutory Belgian 'co-motherhood' and Dutch 'duo-motherhood' for 'lesbian parents' (both enacted in 2014) cast some light on how European state family laws and policy frameworks are likely to evolve vis-à-vis the multiplication of new family formations. This is why we look at them as exemplary cases. In the subsequent pages we will embark on a theoretically-grounded analysis in order to understand if, and to what extent, the newly created labels reflect the phenomena they intend to regulate. In the first section we will explain what kinship terminology is and will give some insights into recent developments in the regulation of family formations in Europe generally. In the second section we will concentrate on legal developments in Belgium and the Netherlands. In the third section we will tease out the performative force of legal terminology, which, in our opinion, can hardly be regarded as a mere representation of social practices, in that it actively contributes to constructing what it intends to govern. Based on this twofold inquiry (doctrinal and theoretical), in the fourth section we will problematise the recent developments discussed in the preceding sections. Finally, we will claim that legislatures and courts should take ad-

vantage of recent kinship studies and encourage new socio-anthropological research to bridge the gap between the law and social practices.

Kinship-in-the-books and kinship-in-action

One of the fundamental components of all kinship systems is the existence of a particular vocabulary that allows directly addressing and indirectly referring to ego's kin from generation G^{+2} to generation G^{-2} (Godelier 2004). Such a nomenclature (Trautmann 1999) semantically conveys a negotiated social meaning on who ego's kin are and which contents their kinship relation has (Gibbons 1999). It thus allows ego, his kin, and the society at large to position ego within the kinship structure, 'which provides a specific place for and within every generation'.[2] This 'kinship-in-action' reflects how people involved in kinship relations structure and experience the latter (Ould and Withlow 2011).

Kinship nomenclature is also used in legal language, albeit in a different register (Gibbons 1999). 'Kinship-in-the-books' is how kinship relations are reflected in state law and state policy when it comes to defining their formation, content and dissolution. Legal kinship labels refer to a predefined context of rules on kinship. This abstract context will indistinctively apply to any actual kinship formation that is categorised under the legal label (Berman 2013; Morrison 1989). For example, it is instrumental in imposing impediments on formal relationships,[3] granting parental responsibility or organising rebuttal of parenthood.

Needless to say, there might be gaps between 'kinship-in-action' and 'kinship-in-the-books'. It is unlikely that kinship-in-the-books and its basic terminology can ever exhaustively cover the variety of kinship formations. Therefore, inevitably, a good many incongruities and frictions affect the relationship between the social and the legal dimensions of kinship and of kinship terminology. In what follows we will explain that the proposed legal label and its social counterpart may not coincide, and that the written legal term is not, as a kind of 'sediment', the 'translation' of the spoken social word (Berman 2013; Gibbons 1999). This is even truer

today, as demographic transitions continue to change the conventional family grid on which ordinary language and legal kinship nomenclatures are still based. The recent wave of 'new kinship studies' has brought to light a variety of kinship formations other than the conventional ones enshrined in Western legal systems (Carsten 2000; Franklin, McKinnon 2012; Jallinoja, Widmer 2011)[4] and we would like to capitalise on these results to put legal kinship terminology to the test. More precisely, this article sets out to understand to what extent the evolutions in legal kinship terminology in the Low Countries reflect, and at the same time govern, emerging kinship formations that, according to many scholars (Collier, Yanagisako 1987; Freeman 2007; Hayden 1995; Weston 1991), are seriously challenging the conventional family grid and the range of values, hierarchies and power differentials attached to it. To put it otherwise, the family grid is no longer affixed to what Martha Fineman (2005) defines as the "Sexual Family", that is, the state-sanctioned union between two individuals and their progeny that still lies beneath recent developments of family law and state policy (see also McCandless and Sally Sheldon 2010: 177). Because of this, we believe that the very term "kinship", which is mostly used in anthropology scholarship, is better suited to account for the variety of "family" formations that are developing all over Europe. Moreover, reference to "kinship" rather than "family" invites to expand current legal understandings of the latter, which is historically grounded on a collapse (Butler 2004) of kinship into the model of the family conceived as a legitimately and legally married couple and their joint progeny. Within the Low Countries,[5] we chose to analyse Flanders – the Dutch-speaking part of Belgium – and The Netherlands, because of their shared Dutch language.

New Kinship Formations and Kinship Terminology

There is no vocabulary yet that covers emerging social kinship practices and the evolutions in public perception, and that reflects the fuzziness, intricacy and possibilities of kinship formations. In order not to merge different aspects of the way meanings are used within different

contexts of the social realm, a basic distinction should be made between on the one hand *public perception*, that is, *crystallised* social meanings concerning kinship and family, which reflect how civil society at large conceives kinship, and on the other hand the meanings produced within *flexible* instances of kinship-in-action, where people face the emergence of new situations and develop new meanings to make sense of their environment. A major cause of incongruities and frictions is the fact that kinship-in-the-books tends to rely on crystallised social meanings on kinship and family, which do not always keep abreast of the evolutions in kinship-in-action. In fact, as will become clearer below, the social realm is itself a multi-layered space where different, and sometimes conflicting, views about kinship are at work.

For the analysis hereinafter we will refer to what we called public perception, that is, crystallised meanings concerning kinship, listed as lemmas in the official list of Dutch words,[6] or in other dictionaries, or those used by civil society organisations or media. Whereas some new kinship formations have a long-standing accepted social meaning, for instance the prefix '*stief-'* ('step-'), meanings that denote emerging phenomena are less sedimented and thus fuzzier and more unstable. To illustrate, the labels 'meemoeder/meevader' (*co-mother/co-father*) and 'duomoeder/duovader' (*duo-mother/duo-father*), referring to the same-sex adult who shares a parental project with the mother or father, entered the sphere of public perception only in the early 2000s.[7]

However, the ultimate purpose of the present article is not to assess the adequacy of social labelling of new kinship formations, let alone to ascertain whether these labels correspond to actual social practices or if they successfully capture how these practices are spoken of in ordinary language. Although we will finally claim that more research should be carried out, our chief aim here is to scrutinise the activity of legal labelling when it comes to regulating new kinship formations in the legal order, and to question the impact of labelling on kinship formations. In point of fact, new kinship formations are poorly reflected in legal terminology. The Belgian and Dutch civil codes, for example, do not explicitly refer to stepparenthood,

whilst both codes do regulate some consequences of stepparenthood, e.g. in the areas of adoption, maintenance and succession. In the light of the narratives surrounding kinship and family, it is interesting to note that the Belgian statutory provisions are labelled as '*Assepoesterclausules*' (*Cinderella clauses*) in legal literature (see e.g. Puelinckx-Coene 2011), undoubtedly bespeaking a misgiving about stepparents.[8]

To penetrate the complexity of legal terminology in this area, a first difference should be brought to light between family law and family life as instruments to regulate kinship formations (Figure 1).

Figure 1. Social and Legal Meanings of Kinship and Family

Family law, as we understand it here, is limited to the *status* of persons within a family. It concerns mandatory rules on the formation, content, and dissolution of family relations. In continental legal systems, such as the Belgian and the Dutch, these rules are contained in statutory law, particularly the Civil Code.

Besides, the European Convention on Human Rights (ECHR) and other international instruments impose positive and negative obligations on member states to grant legal protection to *family life*, that is, social practices comparable *de jure* or *de facto* to family *status* (European Court of Human Rights [ECtHR], *Marckx vs. Belgium* [1979]).[9] This entails a functional rather than dogmatic approach. In *Merger & Cros vs. France* (2004) the ECtHR established that:

> 44. [t]he question whether or not a "family life" exists is essentially one of fact depending upon the real existence in practice of close personal ties […]. The notion of "family" is not confined solely to marriage-based relationships but may encompass other de facto "family" ties where the parties are living together outside marriage […].

The abovementioned international instruments have direct effect in Belgium and The Netherlands and the courts can directly rely on them with a view to granting legal protection to family life. In their application in the Low Countries, persons who are not legally kin have been statutorily granted a right to personal contact with a child (Belgium: Art. 375*bis* Civil Code; The Netherlands: Art. 1:377a Civil Code). Some protection also exists in other areas of statutory law, such as tax exemptions or parental leave.

A more recent international and national trend is the legal – mostly judicial – recognition of even potential kinship formations on the basis of the right to protection of *private* life rather than family life (Swennen 2011). The right to protection of private life encompasses the right to develop one's identity by receiving legal recognition of social 'belonging', that is: of legal, social, biological, intentional links with other persons that are relevant for one's self-development. The ECtHR for example has recognised visitation and information rights for the conceiver if in the best interest of the child, even if the latter also has a legal-social father, on the grounds that

> a child born out of wedlock and the child's biological father are inalterably linked by a natural bond[10].

As we noted above, (self-)identification requires an adapted and representative terminology (see Ould and Whitlow 2011).

Evidently, private life and family life often are not labelled as *status* in family law, and conversely some family law formations do not reflect *de facto* family life. This sometimes gives rise to attorney or court inventions in order to settle power imbalances, for example when it is disputed under which label the ex-female partner of the mother or the new partner of

a divorced parent may be represented to the children – usually the reference to any parenting role is the core of the dispute[11].

As an example, Figures 2 and 3 provide an overview of the use of new kinship vocabulary in G^{+1}, G^{0} and G^{-1} in legal documents in Flanders and The Netherlands respectively. We have underlined the vocabulary that is used in secondary legal sources, such as circular letters of government agencies, preparatory legislative documents, or published case law. We have put in bold only those labels that are used in statutory texts. We have used the official legislative databases for the latter category.[12]

Figure 2. Belgian (Flemish) kinship terminology

Figure 3. Dutch kinship terminology

One of the explanations for the piecemeal approach is the legal deconstruction of the legal labels 'mother' and 'father', which used to cover the coinciding biological, intentional and social 'reality'. Motherhood has now been 'fragmented' into five categories: the egg donor[13], and the genetic, biological, intentional and social. Fatherhood may reflect a biological, intentional and social condition (see Bereswill, Scheiwe and Wolde 2006; Collier and Sheldon 2008; Schwenzer 2007).

The alternative strategy adopted by the legislatures with regard to new kinship formations seems to be threefold.[14] Firstly, new kinship formations are legally protected as family life, e.g. by granting a right to personal contact and information to a significant person and thus by extending some of the contents of family law to family life. Secondly, new realities are

sometimes accommodated in existing *status* categories that are expanded. Thirdly, new legal categories are created (on the basis of former categories) to make new kinship formations visible. Whereas the Dutch legislature opted for the second strategy to protect 'lesbian parenthood', the Belgian lawmaker employed the third one. The English legislature also followed the latter path when the category of 'female parent' in the Human Fertilisation and Embryology Act 2008 was introduced (see Lind and Hewitt 2009: 396-397; McCandless and Sheldon 2010: 186-187). Before we discuss those strategies it is worth explaining why legal labelling is that relevant.

The regulatory force of legal labelling

The effect of subjectivation that categories exert on the subjects who are "interpellated" (Butler 1993) by them calls for particular scrutiny when it comes to legal labelling (Herring 2013). Far from being a mere activity of description, producing official labels with legal effectivity also has performative effects on the social practices that labels claim to denote, above all as far as kinship relations are concerned (Croce 2015b). Berman (2013: 65, 75, 76 and 83) speaks of legal language as "shaper of reason and will". Where does this power to constitute social entities lie? How does it perform its function of social disciplining? We believe that official kinship categorisation – that is, state-supported kinship categories and the family relationships on which they confer recognition – offers an enlightening example.

Pierre Bourdieu (1977: 33-37; 1990: 162-200) takes issue with the normative power of the official representation of kinship, which he sees as a representation of something that is backed by the power to speak on behalf of "the public". The juridico-political authority provides a "description" of social reality which, far from being a mere ostension, operates like a sieve that makes certain relations socio-politically visible and thus speakable, and confines others to the realm of political (and to some extent social) inexistence. Bourdieu (1990: 166-179) addresses this key function of official kinship categorisation by showing how categories

perform a political task insofar as they bring about a distinction among groups and legitimise certain relationships to the detriment of others. A good way to account for Bourdieu's overall view is to say that official kinship carries out a *micro* and a *macro* activity of legitimation working along two interrelated axes of political action. At the *micro-level*, official kinship confers recognition on specific types of relationship (for example monogamous marriage) and on a first axis of political action sanctions the patterns of rules and roles that constitute the latter (for example husband/wife and parents/children). At the *macro-level*, official kinship recognises a certain web of interactions and, by doing so, makes them the "visible reality of relatedness" on a second axis, so much so that these kin interactions appear to be the only way in which a given society reproduces itself.

Bourdieu brings to light the performative force of the language of political institutions, which work as a vehicle for specific knowledge. In other words, kinship categories – but this applies to all sorts of categories – offer a representation that is designed to impart specific instructions on how the constituent elements of the representation are to be taken, or rather, to be read, viewed, and spoken in the public domain. At the macro-level, the language of the representation is already-and-always normative, as it claims to have the publicly recognised and legitimated power to say *how things stand in reality*. Yet, if we look at how categories work at the micro-level, we can view them as signposts that instruct individuals in what to do in the here and now of a given institutional framework (Croce 2014). This is why, in an enlightening example relative to the incest taboo, Bourdieu (1990: 35) insists that kinship categories "institute frontiers and constitute groups, by performative declarations [...] that are invested with all the strength of the group that they help to make". Accordingly, the label "sister" itself is a performative declaration, which sanctions the multi-layered institutional background that gives the label its proper meaning: one can be meaningfully referred to as a sister only within a specific kinship framework. It is the ensemble of relationships that defines the relative status of the institutional figure of sister, and, more importantly, the rights, duties, and responsibilities

that draw its boundaries. When one performs the speech act "She's your sister", therefore, one is not simply referring to the role of sister, but is conjuring up, and reaffirming, the overall structure that, as a whole, gives sisterhood its status in the here and now.

In sum, at the micro-level, kinship categories are cognitive instructions that assign individuals a specific role within the institutional framework where roles are formed, assigned, and performed. Seldom are instructions on how to perform the role correctly imparted by way of dedicated statements or rules on how to behave as a mother, a daughter or a sister. More often than not, such instructions are affixed to the cognitive background of the different institutional frameworks as guidelines deriving from a variety of sources, such as narratives about exemplary models, good manners, general principles, widespread beliefs and so on. Therefore, at the macro-level, kinship categories work as a constant reaffirmation of the complex institutional framework that attributes meaningfulness and contents to the various institutional figures.

Based on Bourdieu's analysis, the question to be investigated is whether the constituent elements of kinship-in-action can take on different meanings when legislative measures revise existing labels or create new ones. More precisely, for our purposes, the crux of the matter is the effect of the new label on the social practice that it aims to capture and regulate. To put it bluntly, is the extension or creation of the label (e.g., co-mother, duo-mother, or instead female parent in England) likely to be conducive to a far-reaching revision of the context where previously existing labels were located? Or, rather, is the subsumption of a new practice, or an institutional figure within it (e.g., a female's female partner) under an existing institutional framework (e.g., the family), through the use of previously existing labels (e.g., co-motherhood as based on motherhood) conducive to the normalisation of potentially deviant kinship practices (e.g., the presence in the same family assemblage of two or three females and a male with different roles and tasks)?

Towards the introduction of 'Co-motherhood' and 'Duo-motherhood' as Parenthood in 2014

In the light of what we have so far argued, we can get back to the legal category of *parent* in Belgium and the Netherlands. Based on the establishment of filiation vis-à-vis maximum two parents, parenthood or 'parental status' (Lind and Hewitt 2009: 392) automatically generates an indivisible bundle of family rights and obligations, among which parental responsibility and maintenance obligations are the most relevant, as they are constitutive of lifelong (and beyond, through inheritance law) kinship with a child. This bundle of rights and obligations *as such* is accessible only for parents, adopters being equalled with parents. However, the Dutch (but not the Belgian) legal system also provides for joint parental responsibility of one parent and one non-parent who is the (former) partner of the parent (Art. 1:253sa and 1:253t Civil Code). Both systems impose a maintenance obligation on the conceiver of a child (Belgium: Art. 336 Civil Code; The Netherlands: Art. 1:394 Civil Code), whereas Dutch law also does so with regard to the stepparent and the partner of the mother who consented to assisted reproduction (art. 1:394 and 1:395 Civil Code).

The legal content of the abovementioned parent-labels has thoroughly changed over the last decades, and has (already) undergone three stages in the direction of the gender and sex neutrality of family law (Heyvaert 2005). Prior to those interventions, a same-sex second party in a parental project would be only protected partially under the shape of family life. For that reason, the Belgian Constitutional Court[15] had already urged the legislature to regulate 'lesbian parenthood' in a 2003 landmark case. The Court was called upon to assess the possible discrimination against children growing up with their mother and the latter's female partner, with both women equally caring for them, in comparison with children growing up with their mother and a male partner. As to the former children, it was not possible to legally anchor their relation to their mother's female partner, even if the women were willing to commit to parenting. The Court contradictorily found that these children were treated differently without objective

and reasonable justification, but that this did not amount to discrimination. The sitting Judges found that it was for the legislature, and not for civil courts, to determine if, and under which conditions, parental responsibility can be extended to persons other than the parents.

A first change in content, not directly relevant to 'lesbian parents' but all the more to the gendered conceptions of parenthood, has been to interpret the female or male gender (of a parent) as *legal* gender and not the biological gender, so as to include transgender parents (Belgium: Art. 62, § 7 Civil Code; The Netherlands: Art. 1:28c par. 2 Civil Code – but also see par. 3 of that provision according to which a male person who gives birth to a child will be considered to be the mother).

In a second stage, adoption has been opened to same-sex parents. Same-sex adoption became available in Belgium in 2006 (Art. 343 Civil Code) and in The Netherlands in 2001 (national adoptions, Art. 1:227 Civil Code) and 2009 (inter-country adoptions, amendment to Art. 1 Act of 8 December 1988). Prior to this change, adoptive parenthood was supposed to imitate the biological, "Sexual Family" (*adoptio naturam imitatur*).[16] By opening the door to adoption, both the Belgian and the Dutch legislature explicitly opted to preserve filiation as a legal label for biological parents (with the understanding that biological parenthood must be possible in theory and that it does not require parents to be in fact the biological parents). Yet, the same-sex second parent did not have an equal legal *status* as adopter compared to a parent through filiation. The Belgian Constitutional Court found this situation to be discriminatory in two 2012 cases.[17] In The Netherlands, a State Commission[18] had already issued a report on the protection of 'lesbian parenthood' through filiation as early as 2007.

In the third stage, both Belgium and The Netherlands have extended the category 'parent' to a second woman, besides the mother, instead of a man. The Belgian Act of 5 May 2014 on the parenthood of the co-mother (on the Act: Seghers and Swennen 2014; Seghers and Swennen 2015) created a third legal category of parent, that is, the *co-mother*. The Act regulates the establishment of co-motherhood of the woman who either is married to the mother at the time

of the birth (or who was married to her less than 300 days before birth; on the significance of the formal recognition as a couple see McCandless and Sheldon 2010: 188-189), or who voluntarily acknowledges the child, or whose co-motherhood is judicially determined. The legislature however did not provide any definition of co-motherhood. It remains unclear whether or not co-motherhood can only be established in the case there was a 'parental project' under the scope of the Act on medically assisted reproduction (at to England, see McCandless and Sheldon 2010: 184 and 189-190). This is the case when co-motherhood is established on the basis of voluntary acknowledgment or judicial determination against the will of the mother, but not in other cases. The same uncertainty exists in the hypothesis of the rebuttal of established co-motherhood. The *Dutch* Act of 25 November 2014 (on the Bill: Vonk 2011 and Bos 2012) extended the statutory definition of the existing label *mother* so as to include the duo-mother – term that is used in the preparatory documents. According to Article 1:198 of the Civil Code, the mother of a child is the woman

1. who has given birth to the child
2. who at the time of birth of the child was married to or in a registered partnership with the woman who has given birth to the child, if the child is conceived through artificial donor conception under the [Act on Donor's Data in case of Artificial Conception] and the donor's identity is unknown to the woman who was inseminated […].
3. who has recognised the child [also outside the scope of the Act on Donor's Data in case of Artificial Conception]

Judicial determination of motherhood is also possible in the Netherlands, even outside the scope of artificial donor conception (Art. 1:207 Civil Code).

Neither the Belgian nor the Dutch legislature has explicitly determined on which basis co- or duo-motherhood is vested. Nevertheless, it is clear that, in keeping with the findings of the new kinship studies mentioned above, the 2014 statutory interventions are significant in

that, by opening filiation, and subsequently parenthood, to same-sex female parents, both legislatures have departed from the biological paradigm of filiation for the first time.[19]

Whereas both Belgium and The Netherlands have partially disposed of biology as one of the pillars of conventional Euro-American kinship, neither of them have jettisoned the (no less biologically relevant) paradigm of *dual* parenthood.[20] Elsewhere, we have already predicted as a fourth stage the opening of parenthood, or at the least parental responsibility, for more than two parents (Swennen 2015). A Dutch State Commission *Herijking Ouderschap* (Recalibration of Parenthood) is to draw up recommendations on multi-parenting by May 1, 2016, following a report by the Dutch Ministry of Justice's Research and Documentation Centre (Antokolskaia 2014).[21] The State Commission will draw on relatively recent legislative reforms in Canada (Leckey 2012; Vonk 2011), England (Antokolskaia 2014; McCandless and Sheldon 2010) and the United States (Hunter Jules and Nicola 2014).

This ambiguous attitude toward biological (and seemingly natural) features of the family betrays the presence of residues of the "Sexual Family" and is described in this context as the dimorphic model of family by Julie McCandless and Sally Sheldon (2010). As a result, these measures tend to be more concerned with preserving a type of family form modelled on the original specimen of the "Sexual Family" than with "the actual contingencies of care-taking relationships and dependency" (McCandless and Sheldon 2010: 177). In other words, the conflation of kinship and the conventional family is re-enacted under different forms and circumstances. This is not to say, as McCandless and Sheldon illustrate, that new legislative measures on emerging family forms deliberately or structurally exert normalising effects on the practices they address. Rather, what matters is exactly the aspect with which we are concerned in this article, to wit, the existence of tensions and frictions between the cultural units (Schneider 1980) that the law puts at work and the set of actual relationships (or at least those aspects of them) that these units fail to capture.

As we will contend in the subsequent pages, there is no way to identify tensions and frictions between kinship-in-action and kinship-in-the-books other than put them in context and seek to tease out the cultural history that the fragments of kinship-in-the-books recount and reflect. This means that often the reasons for determinate legislative measures or judicial rulings to foster certain forms of regulation and not others lie not so much in the set of emerging needs and interests that they claim to accommodate as in the relationship of these measures and rulings to the cultural units they enshrine. It is on the performative manner in which these units affect and constrain instances of kinship-in-action that we would like to dwell upon in what follows.

Putting legal evolutions in a theoretically-grounded context

If we look at the legal developments discussed above, we can identify the performative interplay that the law sets in motion and that brings about ambiguous and potentially contradictory consequences. We would like to discuss three of them.

Firstly, Figures 2 and 3 make it clear that legal terminology for new kinship formations builds on the crystallised meaning of the 'conventional family' lexicon, and accommodates emerging phenomena by expanding the lexicon (The Netherlands) and/or by adding lexical markers, particularly prefixes or suffixes (Belgium and The Netherlands). This finding should come as no surprise, for analogy ("*as if*") is generally used to start developing the meaning of legal labels and the law (Berman 2013) and is claimed to be the driver of thought in general (Hofstadter and Sander 2013).[22] The use of the socially instituted term "mother", for example, seems limited to those cases in which a woman socially or legally fulfils the same role as a mother (or father).[23] Similarly, the Dictionary of the Dutch Language defines as mother not only the woman who has given birth to the child, but also the woman who cares *as* [*if* she were] a mother.[24] In reference to Quebec's family law, Robert Leckey (2013: 7) claims that

courts' reliance on the conventional lexicon of motherhood in order for it to cover the situation of a woman with no genetic tie to the child, "makes it likelier that she will be granted custody, an attribute of parental authority which is itself an effect of filiation". In this respect, the subsumption of new social practices under available categories proves a vehicle for legal recognition.[25]

Despite this, the Belgian tendency to add the *new* category of *co-mother* may convey the message that the second female parent *is not the*, or *a*, mother, let alone a father (see also Diduck 2007: 476; McCandless and Sheldon 2010: 193-197). This term was derived from the unmarked and gender-neutral term *co-parent* (French: *co-parent*) and was then (sexually) marked so as to refer only to lesbian parenthood in view of the limited scope of the act. The label *co*-mother is confusing. The prefix "*co*-" linguistically, on the one hand, points at *next to*, *alongside* or *beside* and indeed the co-mother's legal position, for a legal viewpoint, is equal to that of the mother. But according to the Van Dale Groot Woordenboek der Nederlandse Taal (a standard dictionary of the Dutch language, comparable to Oxford Dictionary), the prefix "*co*-", on the other hand, refers to *assistance to* or *collaboration with* another person *who is higher in rank*.[26] Compared to the Belgian approach, the Dutch strategy seems clearer: the duo-mother (social meaning) is one of the two mothers (legal meaning). Even though in some provisions the suffixes "*who has given birth to the child*" and "*who has not given birth to child*" have been used to distinguish between the two mothers, thus again creating a different label after all, the Dutch legislature by re-defining motherhood seems to have recognised an equal non-substitute meaning of "milk" and "water" as fundaments of kinship (Parkes 2003; see also Banks 1974: 48).

Let us now move on to the second consequence. The Belgian and Dutch legislatures' interventions in 2014 issued measures with an eye to creating legal certainty, and yet in the end they seem to have the opposite effect of disordering rather than ordering.[27] Opening filiation to two female parents gives rise to manifold questions. Firstly, it will without a doubt give rise to

so-called "limping situations", whereby a woman's motherhood will be legally recognised in Belgium and The Netherlands but not – at least not as such – in (most) other countries who would consider such situation contrary to their public order. The comparable issue of the international recognition of same-sex marriages is still not sorted (Sanders 2014, Swennen and Eggermont 2012). Secondly, (co-)motherhood is confined to the existence of a joint parental project of the mother and another woman. Yet as explained in the previous sections, it remains unclear whether such intention is the genuine pillar of (co-)motherhood, or whether this category is limited to women who fulfil their parental project under the applicable Acts on medically assisted reproduction, under which a higher threshold for parenthood applies. This leaves civil courts (and ultimately also the Belgian Constitutional Court) with no foothold when they have to assess claims to extend the newly created legal label to situations not envisaged by the letter of the law. Thirdly, and conversely, it remains unclear – and doubtful – whether the (co-)mother can still opt *not* to establish her co- or duo-motherhood, and to adopt the child[28] or to remain under the shape of family life and not entering a formal kinship structure. According to the letter of the law, she can be forced into the *status* of (co-)mother by the mother and by the child; a voluntary choice for the establishment co- or duo-motherhood also cannot be rebutted in most cases. "Families we choose" (Weston 1997) thus become "unchosen families" (Lewin 2012), that is to say families that individuals cannot not choose and cannot undo once chosen. We are facing the paradoxical situation whereby family law in general is moving towards de-institutionalisation, whereas new families constitute a new colony of rigid institutionalisation (marriage, adoption and now filiation) (Swennen 2015).

Finally, the third consequence has to do with the most important, though more general, issue of the disciplinary and exclusionary effects of legal labelling. Many kinship formations do not fit in the current structure of either filiation or adoption. After the opening of adoption and filiation, the question is if there is any space left for "court legislation" (Berman 2013), under which the courts would have judicial instruments to protect informal situations that fall

outside the scope of the created legal labels as family law. May it be the case that the legislature is implicitly conveying the message that those formations should remain in a space of legal unspeakability (Croce 2015b)? In effect, Leckey (2013: 16) himself recognises that a question remains as to the possible disciplinary effects that stem from the use of available labels to make room for "the diversity of queer kinship". In other words, the extension of available categories is likely to promote an inadvertent process of normalisation. This process is triggered by the two-way intercourse between kinship categories and social practices. It is worth devoting a few more words to this intercourse.

Kinship-in-action (or, more correctly, some instances of the much broader phenomenon of kinship-in-action) furnishes the substantive contents for kinship-in-the-books (binding formulations of official kinship relationships), whereas the latter reinforces and legitimises the former. In this manner, two key functions of social interaction are performed. On the one hand, the flexibility and innate mutability of social practices is restrained by the solidifying and rigidifying force of legal provisions. On the other hand, the law can gain a stable toehold in the social realm by capitalising on the normative resources and substantive contents provided by social practices. Needless to say, such a productive stability comes at a price. As we explained above by building on Bourdieu, minority practices typical of kinship-in-action are relegated to a state of silence and marginalisation (Joshi 2012; Polikoff 2008; Sheff 2011; Zivi 2014).

To redress this inevitable outcome, liberal states tend, to a greater or lesser extent, to implement inclusive policies intended to make room for marginalised subjects. However, as a good deal of critics point out (Ammaturo 2014: Barker 2013; Conrad 2010), this extension comes at an even higher price. The pursuit of socio-political legibility and speakability prompts marginalised sexual minorities to engage in an ongoing negotiation that achieves two goals. Firstly, rights that have long been associated with the hegemonic culture are redistributed among a wider range of individuals. Secondly, former marginalised sexualities turn out to be included in the platform whose boundaries are marked by the official lexicon of kinship.[29]

This negotiation leads to an important transformation. Specific family law categories, such as "marriage", "wife", "husband", "family", "parent", and "child" continue to serve as descriptive devices for kinship roles, but the range of individuals who can perform these roles is broadened. Nevertheless, within this bounded negotiation ("bounded" because changes are conditional upon the acceptance of the hegemonic lexicon) the chances that this extension may serve as an effective form of resignification (Butler 1997; Lloyd 2007) are slim. As soon as individuals act towards the symbolic formation of traditional roles, they are invested with the weighty load of the role's cognitive background and its narratives about exemplary models, good manners, general principles, widespread beliefs. The intercourse between one's performing a role in a potentially innovative way and the role's tendency to preserve its traditional shape would be likely to bring about effects only in the wake of the much broader societal process that Bourdieu (2001) describes as the neutralization of the unceasing activity of 'de-historicization and externalization' of the structures that determine the sexist and heterosexist organisation of society.

Conclusion

The legislative developments examined in this article, as we illustrated thus far, are ambiguous. There are good reasons to conclude that legislatures have been either too fast or too conservative in formalising kinship formations in view of political concerns (also see McCandless and Sheldon 2010:205). Our aim was to shed some light on this friction. In any case, this ambiguity is further evidence that, whereas "[t]he law is supposed always to listen first, and then speak" (Berman 2013: 78), legislatures tend not to take advantage of evidence-based guidelines (Antokolskaia 2013). In the case discussed above, we believe that the newly created or revised legal kinship labels not only fail to precisely negotiate a legal meaning that provides reliable guidance for specific conduct in specific circumstances (Gibbons 1999). Even more important-

ly, they confer on co- and duo-motherhood legal speakability and socio-political visibility only insofar as the experience of co- and duo-mother is *viewed through the lens of motherhood*.

To draw a parallel with the argument advanced by many feminist, queer and radical critics of same-sex marriage (Barker 2013; Freeman 2002; Polikoff 2008), the recognition of minority (sexual) practices through existing institutions has a doubly contradictory effect. On the one hand, as far as those who achieve recognition are concerned, legal recognition works both as a push for equality in terms of rights and benefits, and as a disciplinary tool that erases the subversive element of alternative forms of sexuality (Joshi 2012; Ruskola 2005). On the other hand, as far as those who remain excluded are concerned, they are confined to the realm of the unspeakable and thus can still exert a critical force on the hegemonic matrix of respectable sex (Butler 2004; Cooper 2004). Yet, at the same time, this excision serves as a *means for silencing* what exceeds the grid of official categories, the power to leave them with no words to describe who they are and what they are doing (Diduck 2007; Ritchie and Barker 2006). If this is so, then co- and duo-motherhood are caught in a double-bind: either co- and duo-mothers make use of the newly available category, and thus jettison the potentially innovative, unspoken character of their practices; or else they seek to reclaim their truly alternative, unofficial vocabulary that falls "outside the dominant cultural constructions of love" (Ritchie and Barker 2006: 585), but is much less likely to grant the rights and benefits co- and duo-mothers pursue.

This is not to say that social practices have no effects whatsoever on social perception and legal measures that claim to regulate them. As William Eskridge (2001) points out in response to some of the critiques against same-sex marriage we referred to above, it would be unfair to the very practices that are considered as deviant to neglect their impact on mainstream conceptions of sex and relationships reflected in legal texts. He claims that formerly despised practices erode stereotypes of gender hierarchy and effectively legitimise relationships that denounce the unjust structuration of conventional kinship forms. By overturning (what he regards as) a postmodern bias of left queer criticisms, he argues that the very perfor-

mance of minority sexual practices operates as "a daily deconstruction of rigid gender roles, and of compulsory heterosexuality" (Eskridge, 2001: 129). Similarly, Kathleen Hull (2006) warns against a narrow view of "legal consciousness" that obliterates the social element and presents legal rules and rituals as the mere colonization of the social world on the part of the law. According to her, ignoring the transformative force of practices would be tantamount to ignoring "the possibilities of constructing legality beyond or outside the law of the state" (Hull, 2006: 25).

The main point we would like to make, however, is that the interplay between practices and legal regulation should be measured against the broader socio-cultural framework that informs both. As kinship-in-action does not unfold in a vacuum, but interacts with sedimented social meanings on relatedness and kinship-in-the-books, a top-down view (according to which kinship-in-action is already-and-always subjugated) is as flawed as a bottom-up one (according to which kinship-in-action inevitably effects changes on its environment). As Richard Collier nicely puts it as regards fatherhood (2001: 525), scholarly attention should 'move away from pre-given notions, whether of fatherhood or law, and draw attention to how fatherhood is formed as a particular kind of experience and target for government at particular historical moments so as to account for 'how *ideas* of fatherhood become problemat*ized* at particular historical moments'. This, we believe, applies to all minority sexual and kinship practices, which are carried out within the discursive framework of a hegemonic culture that affects the way in which such practices are socially perceived and publicly narrated both by affected individuals and by society at large.

Based on this, what a critical socio-legal analysis of the developments in the regulation of kinship should address is if and to what extent the risk of normalisation we brought into light has to do with the age-old tie between kinship and biology. If it is true that kinship has long served as an alibi for biology (Freeman 2007) and that at present technology is progressively removing it, nonetheless scholars warn that a high degree of unfairness is currently be-

ing engendered by marked differences in the regulation of natural *vis-à-vis* assisted parenting. In this way, basic differences may be preserved with respect to societal beliefs and policy measures concerning *natural* parenthood within the conventional married couple (Cutas, Bortolotti 2010). Even more sceptical perspectives hold that assisted reproductive technologies, despite any appearance to the contrary, tend to reinstate the narrative of the monogamous family as the locus where society is reproduced and consequently revive the connection between biology, kinship and the values traditionally attached to them (Franklin 2013).This is why we emphasised from the very outset the need to learn the lesson of so-called 'new kinship studies'. Scholars in this subject area urge not to take 'the domain of kinship as being defined a priori by biological facts' (McKinnon, 2014: 2), because what counts as kinship in the here and now is an open question that calls for empirical scrutiny. There is little doubt that developments in kinship practices (particularly those favoured by assisted reproductive technologies) jeopardise a set of cultural units concerning family and relatedness that 'supported particular understandings about gender and kinship that are central to ideas about what constitutes "modernity"' (McKinnon, 2014: 13). But precisely because of this, legislatures and courts should adopt kinship as a lens to make out the (flexible and mutable) ways in which people relate to each other in the here and the now of the metamorphoses that affect the Euro-American scenario. In other words, kinship-in-the-book should struggle to restrain its disciplinary force – the force of official representation that Bourdieu speaks of – and be concerned with phenomena of relatedness that can no longer be reduced to archetypal or stereotypical relationships.

A workable way to find out if this is the right path would be to bridge the gap between kinship-in-action and kinship-in-the-books with recourse to fresh socio-anthropological research findings. If and when affected individuals who are involved in emerging kinship practices feel dissatisfied with the nomenclature of kinship-in-the-books, as discussed by Patricia Ould and Julie Whitlow (2011), these people should have a say on how official nomenclature is to be revised. As research on the field has been carried out and will continue to be carried

out in the years to come, courts and legislature should take full advantage of that. This is not to say that, based on concrete evidence, the law should recognise "the existent" as it is and make room for all models of relationship. The law has to perform a task of selection that makes sure that alternative conceptions of the good may coexist peacefully. Making alternative conceptions of the good compatible with each other implies emphasising some of their aspects (e.g. the resemblances of forms of motherhood to one another) and downplaying others (the subversive irreducibility of poly-parenting to the binary male/female). However, socio-anthropological investigation could help understand how individuals involved in kinship-in-action practices perceive their role and their environment to discover how they themselves contribute to the production of new institutional figures and new configurations of relatedness (Dempsey 2010). As the tapestry of human practices is immensely rich, the best way to do justice to this variety is to allow a plurality of forms of life to co-exist by favouring a plurality of regulatory forms. This approach would certainly run the risk of undermining legal certainty as a basic principle of contemporary legal systems, but would prompt individuals to play a more active role when it comes to establishing the rules that instruct them in how they should call themselves and their beloved ones.

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[1] Old Ossetian proverb (Kovalewsky 1983: 213).

[2] Belgian Constitutional Court, N° 157/2006, 18 October 2006 and N° 103/2012, 12 July 2012, available at www.const-court.be (last accessed on November 27, 2014).

[3] Belgian Constitutional Court, N° 157/2006, 18 October 2006 and N° 103/2012, 12 July 2012, available at www.const-court.be (last accessed on November 27, 2014).

[4] Despite the relevance and applicability of these studies to the Euro-American scenario (Strathern 2005), it is important to register a lack of anthropological and ethnographic research specifically devoted to the Low Countries.

[5] The term "Low Countries" historically comprises the whole delta of the Rhine, the Meuse and the Scheldt, so as to also include the French-speaking part of Belgium, Luxemburg, and parts of Northern France and Western Germany.

[6] www.taalunieversum.org. It is worth noting, in this regard, that the Flemish speaking part of Belgium and The Netherlands are members of the *Nederlandse Taalunie* ("Dutch Language Union", an international organisation of Dutch speaking countries).

[7] See www.anw.inl.nl (last accessed on October 29, 2014).

[8] In stark contrast, Dutch legal practitioners use the label *Assepoesterclausule* with a positive connotation for testamentary clauses whereby stepchildren are bequeathed equal shares to children.

[9] Cf. Leckey 2013 on formal vs. functional/factual protection of families.

[10] ECtHR, *Schneider vs. Germany* (2011), § 84.

[11] See for an Australian example Klement & Glynn (No. 2) [2010] FamCA 97 (5 February 2010), available at www.austlii.edu.au (last accessed on October 29, 2014).

[12] See www.ejustice.just.fgov.be/wet/wet.htm and www.wetten.overheid.nl (last accessed on November 27, 2014).

[13] She is not necessarily the genetic mother, e.g. in case of pronucleus transfer. See the Human Fertilisation and Embryology (Mitochondrial Donation) UK Regulations 2015

[14] Compare more generally on the development of law Berman 2013: 111, from a common-law perspective.

[15] Belgian Constitutional Court, N° 134/2003 of 8 October 2003, available at www.const-court.be (last accessed on October 29, 2014).

[16] Berman (2013: 106) describes how in ancient Rome an adopter would simulate childbirth in a ceremony, without intending to conceal that it was a simulation.

[17] Belgian Constitutional Court, N° 93/2012 and N° 94/2012, 12 July 2012, available at www.const-court.be (last accessed on October 29, 2014).

[18] Rapport Commissie Kalsbeek 2007.

[19] Yet without going so far as to render filiation gender-neutral. The Acts indeed only apply to mothers, not to fathers. The reason is that legal motherhood is automatically vested with the birthmother in both systems (*mater semper certa est*), and that no family law legal framework exists for surrogacy. Such framework is considered necessary as a first step.

[20] It is worth noting that, contrary to what happened in the English doctrine (Lind and Hewitt 2009: 396-397; McCandless and Sheldon 2010: 193-197), the question was not whether or not any genetic contribution by a co- or duo-mother would be relevant at all to the terminology used. This is a significant *difference* between legal evolutions occurring in the UK and the phenomena we are tackling in this article.

[21] English summary available at www.wodc.nl (last accessed on November 28, 2014).

[22] This may also be the objective reason why close friends would be "casted" as kin (Weston 1997: xiv).

[23] Belgian Constitutional Court, N° 134/2003 of 8 October 2003, retrieved at www.const-court.be on 29 October 2014; Advice of the Belgian Council of State of 7 October 2005, parliamentary document N° 51-393/002 (2004-2005), retrieved at www.dekamer.be on 29 October 2014.

[24] Remarkably, the woman who has given birth to a child for another woman is also referred to as draag*moeder* (surrogate *mother*). The same does not apply to fathers. Step- and co-*fathers* are acceptable terms in view of the care for the child, but the man who has conceived a child not to take care of it, is called donor or, at best, conceiver. The latter has a much more reduced bundle of rights and obligations compared to the (legal) father. Yet, we need not analyse the legal position of the conceiver as a 'father' in order to develop our thesis. Also see Banks 1974: 47.

[25] In that regard, we do not need to take position in the debate on *focality* in kinship terminology (see e.g. Shapiro 2010). That said, we believe that kinship terminology represents a socio-cultural construct.

[26] Warren Shapiro (2012) claims that Malay kinship terminology also contains terms for "lesser mothers" – who are "*less than* the real" mother, whereby he considers the biological mother to be the 'real' one. David Banks's (1974) research demonstrates that those other mothers fulfil other kinship roles, whereas women fulfilling a same role are called and referred to as mothers in spoken language.

[27] On the function of legal language to create order, see Berman 2013: 77.

[28] The Dutch legislature maintained this option because same-sex adoption is more easily recognised abroad than same-sex filiation.

[29] This twofold effect and its outcomes are analysed in more detail in Croce 2015a.