(Re)Defining Legal Parenthood and Kinship: The Limits of Legal Change in the Finnish *Child Custody Act* of 2019

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Abstract

This article examines how Finland took a role as an international predecessor in separating the parent's right of access from custody, biology and legal parenthood. It addresses the (re)defining of the legal reference fields of kinship, family and parenthood in the process of rewriting the *Act on Child Custody and Right of Access* in Finland. Through an examination of the discourses of the legislative process, it shows how the Finnish legislation has moved from an emphasis on biological origins towards a more flexible and individualised conception of kinship. The analysis focuses on how the *Child Custody Act* works to recognise various marginalised positions, while leaving others unattended. Through a close examination of the changes to the Act, the article highlights the simultaneous processes of de-marginalisation of certain structures of kinship, and the marginalisation of others. The article concludes by predicting the direction of future developments in legislation concerning kinship, family and parenthood, based on prevalent trends of legal development, and the limits of what can presently be recognised by the law, and why.

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Introduction: What is a Parent?

"What is a parent?" asks Marilyn Strathern in her influential 2011 text, before going on to discuss the orders of knowledge that define Euro-American conceptions of parenthood. She claims that what preoccupies much of Euro-American thinking about parenthood is a search for origins – foundations, that are simultaneously prior in time and prior in logical status (Strathern 2011: 275).

The question of what makes a parent, and what kinship consists of, is also relevant in Finland, where the legal boundaries of family and kinship were reshaped during a process of rewriting the *Act of Child Custody and Right of Access* (hereafter *Child Custody Act*, abbreviation CCA). The concepts of *nature*, *law*, *origins*, *foundations*, all enmeshed in different orders of knowledge, are crucial in analysing why and how questions of kinship and parenthood can be resolved in a very practical situation of a single, smallish State attempting to write legislation concerning the right of a child to its parents.

In this article, I will ask how biological, social, juridical and affective relationships have been rethought and redefined in contemporary Finnish legislation. I will analyse the case of rewriting the Finnish *Child Custody Act* in 2017-2019, in order to draw out negotiations between different orders of knowledge according to which kinship is legally defined. Moreover, I will suggest what specific attributes need to be present in the kinship relationships that are considered worthy of protection by the State and by law. I will also look at what kinds of relationships are left unprotected, or in the shadows of legal recognition, and what it is that places them outside the scope of law. Finally, I will consider the legal changes from a feminist perspective. I will relate the Finnish reform to a wider Nordic and European perspective and ask how the expansions brought about in the reform affect the

autonomy of parenting, and how this development should be considered in terms of equality and rights (Pylkkänen 2007).

I will track the subtle changes in conceptions of legal kinship through several examples showing how the Finnish law has gradually moved from a grounded and origin-based, natural-oriented conception of kinship to a more malleable, contextual, individual and flexible direction. In this sense, the Finnish legislation is a predecessor in the European context. The Finnish way of discussing parenthood and legal recognition of the child's important relationships beyond legal kinship is rare even on a north/western European scale. What happens in Finland is of interest for researchers and legislators working within other regions, as discussions in Finland have led to a legal model that goes beyond legislation in other European countries, much of the United States, and elsewhere. For example, recognition of a third legal parent is possible in British Columbia under some circumstances (Boyd 2015), but not in Europe, and the legal recognition of parenthood that is not agreed upon at birth is mostly strictly confined to adoption. Thus, the new Finnish law is ground-breaking, and an interesting example to consider in developing new legislation on parenthood internationally. According to the new Finnish *Child Custody Act*, the custody of a child can be divided in principle between an unlimited number of persons,[1] and the child can acquire rights of access also to non-legal parents.

In this slow tale of "progress", however, some forms of kinship, parenthood or parent-child-relationships are more recognised than previously, while others have lost their legal definitional power. These developments, I claim, have significant and partly hidden aspects regarding gendered practices of parenting, family forms and normative sexualities and genders. They are also part of a

[1] However, the best interest of the child needs to be accounted for in deciding on the number of persons with custody of the child.

more general trend in Euro-American legal and social development, which is, arguably, gearing towards a wider recognition of social and actual kinship arrangements, while downplaying the importance of the biological or genetic "grounds". In this development, conceptions of parenthood are the most crucial indicators of change.

Lately, the legislation around family in several western societies has been under pressure, especially from LGBTIQ[2] family movements, to change its definitions toward a greater inclusivity of different family formations (Mägi & Zimmerman 2015; Stern, Oehme & Stern 2016: 79). However, the more our understanding of parenthood is shaped by the practices of care and the affects related to lived relationships, the more difficult it is to answer the question of "what is a parent?". In all ways that matter, the sort of legal parenthood that is based on biological or genetic heritage, or the matrimonial status of the birth mother at the time of birth, seems to gradually lose its significance in determining the everyday life and lived relationships of the child (Gottberg 2010: 175). However, the process is slow and not always linear or logical, and there are still multiple situations in different legal contexts where definitions of parenthood can violate existing social relationships (Ferr & Goldberg 2019: 152).

In present-day Euro-American societies, law has the power to protect relationships that are significant for people, or to cut off or break them. Law also regulates the flows of property and protection post-mortem (Knauer 2019: 11). Thus, the question of what a parent is, both socially and legally, is crucial. But even more crucial for the children and parents living their lives among changing family and kinship relationships, is how to bridge the gap between who is socially

[2] The abbreviation LGBTIQ refers to lesbian, gay, bisexual, transgender, intersex and queer – a common abbreviation in attempting to refer to a broad company of non-heterosexual, non-cis-gendered people and identities. The abbreviation is seen in research literature as well as in common use in many different forms, some of which may include a + or a ++ at the end to mark the fact that the list can never be complete or all-encompassing. I have chosen to use this abbreviation in this article, conscious of the fact that it will never be able to grasp all diversity.

considered to be a parent, and what sorts of parenthood arrangements the law recognises and protects. As Kendra Huard Fershee (2014: 449-450) puts it, "arguing that gay and lesbian parents have no personal stake in seeking access to the children they co-parent is an anathema to reality". The same, of course, is true for foster families, blended families (stepfamilies) or adoptive families as well.

In the wake of Kath Weston's (1997) influential work on chosen families, and Janet Carsten's (2004) thinking of new kinship formations in the context of artificial reproductive technologies, I have previously (Moring 2013) used the concept of "performative parenting"[3] in analysing the specific ways that parenthood is done in LGBTIQ families in the absence of legal bonds. This concept suggests that when families exist in the shadows of law, they start constructing parenthood through acts, placing a lot of weight on "doing" parenting rather than "being" one. As one non-biological mother in a same-sex partnership stated in an interview:

> In the beginning, I made sure to be the one holding the child as much as possible, especially in public places and when we had visitors. Having the child in my arms somehow confirmed to others that I was a parent. (Strömberg & Stenholm 2004: 47)

During the past 10 years, the role of "performative parenting" or "practising parenting" (Leckey 2015; Herring 2015) has become increasingly crucial also in terms of legislating parenthood. Fershee (2014: 468) states that "as the law transitions toward a deeper understanding and acceptance of nontraditional families, there must be a way to allow court access to individuals who

[3] The concept of performativity here comes from Judith Butler's work, e.g. Butler (1990).

have become parents via nontraditional means". [4] The Finnish case is a model example of how this is done: through the acknowledgement of de facto parenthood, defined through "doing" parenthood.

Development of the Finnish *Child Custody Act*

Before 1983, a child living in Finland could only have one legal guardian and parent with custody at a time, unless the parents were married. In cases of divorce, the guardian was by default the mother, but if the parents were in agreement and obtained a court order, the father could be the legal guardian instead of the mother (HE 224/1982 vp). However, in the 1970s, social practices had changed toward more equal forms of post-divorce arrangements (Koulu 2014: 94-96).

In 1983, the first Finnish *Act on Child Custody and Right of Access* (163/1983) was approved. According to Sanna Koulu (2014: 97), the 1983 reform entailed two crucial shifts: first, it prioritised agreements between parents over court decisions and gave legal parents the right to make agreements that could be enforced by municipal social committees[5] without going through the court. Second, it let the parents share custody after a divorce. These changes provided more possibilities to parents to make agreements and more incentives to reach agreements outside the court (ibid.). Moreover, the 1983 *Custody Act* included a reform that is important in light of the later legal development: it stated that with a court order, custody or legal guardianship could be given to another person beside or instead of the parent(s), even when the parents had custody themselves.

[4] For definitions of de facto parenthood or psychological parenthood, that may in some states of the United States validate a claim for custody or visitation, see Fershee (2014: 436, n. 4 and 5). These definitions are not valid everywhere even in the United States, and naturally do not apply in Europe, but many Euro-American national or state laws already do have some ways of acknowledging situations of de facto parenthood (Proposition 88/2018 vp).

[5] A municipal social committee is a committee consisting of politically elected representatives. The structures of these committees vary within different municipalities. These committees handle cases of child protection, adoption, custody and visitation and so on, but most commonly, when handling individual cases, in practice, they end up confirming suggestions made by social workers or parents themselves. Thus, for example, the notion of custody being enforced by a municipal social committee in practice would mean that the parents can make a mutual agreement in a custody case, and as default the committee would enforce it.

This development reflected the increasing belief in the importance of the presence of fathers in their children's everyday lives. However, despite these changes, the role of fathers has not been particularly visible in statistics on parenthood pre- or post-divorce. Finnish fathers still use only 9.7% of all parental leave days, and of all families with children, the number of children officially residing with their fathers is a mere 1.9%, while children residing with their mothers account for 18.9% of all Finnish children under 18 years of age (Tilastokeskus 2018).

The changes in conceptions of parenthood, care and custody were reflected in the way the *Child Custody Act* was applied. The possibility of giving custody to another person beside the legal parents, that was more of a parenthesis at the time of the reform, was increasingly applied to varying situations in, for example, same-sex parents' families, foster care, or blended families. This shows how changes in law can facilitate legal recognition of changes in parenthood and kinship practices, which could not necessarily have been anticipated at the time the law was written. But it also shows how practices of parenthood and kinship, when in need of legal recognition, search for it within the existing structures of the law, even when the structures were not necessarily meant to recognise such arrangements in the first place (Koulu 2014: 107).

In 2015 the Finnish government decided to renew the 1983 Act and in June 2018 it put forward a proposal for the renewal. This proposal (HE 88/2018 vp) and the subsequent changes in the *Child Custody Act* (8.4.1983/361, changes in force from 1.12.2019) are the focus of this article.[6] The new

[6] While the proposal had become law by the time this article was completed, the proposal is the document where the legal reform is justified, and thus my analysis will focus mostly on the proposal. Other material used as support for the analysis will include the *Memorandum on the Renewal of the Child Custody Act* (Mietintö: Lapsenhuoltolain uudistaminen, Oikeusministeriön mietintöjä ja lausuntoja 47/2017) as well as statements by stakeholder organisations and some private persons (http://oikeusministerio.fi/hanke/-/hankesivu/hanke?tunnus=OM010%3A00 %2F2016), and the summary of the statements by the Ministry of Justice (https://julkaisut.valtioneuvosto.fi/handle/10024/160891). References will also be made to the *Paternity Act* (13.1.2015), the *Public Health Insurance Act* (21.12.2004/1224) and the new *Maternity Act*, which at the time of writing had been approved, but was not yet in force (20.4.2018/253).

Act renegotiates borders of parenthood, challenges the conceptions of legal kinship, and opens ways to further bend the limits of legal family and kinship ties.

The Effects of the Reform of the *Child Custody Act*

The *Child Custody Act* is the legislation that most powerfully defines the concrete possibilities of parenthood. It holds the power to grant or deprive access to "performative parenting": acts and deeds connected to parenthood. It also defines the premises for which kinds of performative actions are required of a parent to remain eligible for joint custody post-divorce, or to claim that the child should officially reside with, or have access to them. Together with the *Child Maintenance Act* (Laki lapsen elatuksesta, 5.9.1975/704) it provides the framework for care, support and maintenance of the child in situations where the parents do not belong to the same household.

The need to renew this legislation sprung from a variety of causes. Practices and structures of parenthood have changed in 35 years. One specific issue that was mentioned in all the background work for the renewal was the growing number of joint physical custody arrangements.[7] The 1983 Act was written at a time when fathers' roles post-divorce generally were quite different from what they are today. Furthermore, according to the Ministry of Justice, the law needed updating both in relation to custody arrangements but also to secure the relationship of the child to "both" parents after a divorce (Report 47/2017).[8] In the following sub-sections, I will go on to address two major changes in the 2018 proposal.

[7] Bergström et al. (2017: 294) define joint physical custody as "a practice where children with non-cohabiting parents live alternatively and about equally with both parents".
[8] In the biannual Finnish school healthcare research over 15% of all 14-15-year-olds reported that their parents have a joint physical custody arrangement (THL 2017).

1. The Right of Access

One of the major new propositions was to allow a child right of access[9] to a person other than their legal parent. The right to access would thus be applicable also to persons who were not legal parents to the child. The proposal limited this right to a person, who has an "especially close relationship to the child", defined as "an established relationship, comparable to that of a parent and a child" (2018 Proposal §9c and explanations).

As the law has only been in force from December 2019, it is as yet unclear what the courts will regard as criteria for an especially close relationship to the child. The proposal is quite vague on this point, stating only that the child could have formed this kind of relationship "for example with a grandparent who has lived in the same household or a foster parent or a previous partner of a parent" (Prop 88/2018 vp, 2.2.2.). It is also stated that this relationship "typically require[es] living with the child and daily participating in the care and upbringing of the child during that period" (ibid: 55).

These kinds of practices have been reinforced in several states in the United States, as well as in other European countries (Romero & Goldberg 2019; 2018 Proposal, Background). However, it is rare that the law should directly recognise the right of a non-legal parent, making it a general principle of legal access. Access, again, is one of the major factors separating legal parenthood from other kinds of regulated kinship, for example custody, cohabitation, or inheritance rights. With the new *Child Custody Act*, Finland thus became an international predecessor in flexing the limits of legal parenthood.

[9] Right of access in Finland entails the right of the child to visit and be taken care of by the non-residential parent, or after this change also by a person comparable in importance to the non-residential parent.

However, this right of access to an especially close person can, according to the proposal, only be granted through a court decision. As opposed to legal parents, who can independently make an agreement on custody, residence and right of access and have it confirmed by the municipal social committee, non-legal parents must go to court and obtain an order, even if all parties agree and there is no conflict.[10] Going through a court hearing means that the applicant must pay a court fee of ca 250 €, and the process is time-consuming.

This decision was, according to a member of the committee writing the proposal, motivated by the novelty of the legislation. The thought was that if all parties agree on the visitation arrangements, there is no need for a ratified agreement.[11] What is interesting is that according to the rationale of the proposal, a ratified agreement is considered in the best interest of the child when the legal parents make it, whereas this is not the case with non-legal parents. This shows that flexing the borders of parenthood is done with caution and the gateways to access by non-legal parents need to be safeguarded by the courts.

The proposal highlights the precarious position of non-legal parents, and the cautiousness with which their claims are met. On the other hand, the difficulty of the process of attaining visitation rights works to protect the parental autonomy of the legal parents. The threshold for seeking the right to access remains high, which is bound to restrict applications to cases where the applicant is quite certain of a positive outcome. In the Finnish context, one significant group claiming the right of access are grandparents. Signalling that all grandparents do not qualify for right of access based

[10] Cf. https://yle.fi/uutiset/3-10240813, viewed 13.6.2018.
[11] Interview in the newspaper *Suomenmaa*:. https://www.suomenmaa.fi/uutiset/lakiehdotus-voi-laajentaa-lapsen-oikeutta-tavata-laheisia-aikuisia-ei-automaattinen-isovanhempien-tapaamisoikeus-6.3.382403.4f456326f8, viewed 13.6.2018.

solely on biological relatedness or even active presence in the child's life may be one factor that has prompted the legislators to keep the threshold quite high.

Internationally, another legal issue for non-legal parents concerning their relations to their children has been standing – that is, who can bring a case to court (cf. Fershee 2014; Harding 2015). In the 2018 proposal, standing is given to any of the concerned parties, including the non-legal parent. During the discussions surrounding the preparation of the proposal, suggestions were made to limit standing to the social worker representing the child. This was opposed by the argument that making standing a separate issue would only create unnecessary legal obstacles, where courts would have to make a decision first on standing, instead of solving the actual issue.[12] Interestingly, this is what Fershee claims that US courts are obliged to do (Fershee 2014: 453). As it is, the Finnish proposal gives standing to any person who claims to have a parent-child-like relationship to the child and is thus again a progressive example in an international context.

In relation to the other articles in this special section, an important side-note needs to be made about the situation of grandparents. In the process of writing the Act, many grandparents made claims to have a recognised right of access to their grandchildren. The national association of grandparents was represented in the follow-up group, to which the working group that worked on the proposal reported. One of the reasons that the legislation was reconsidered in the first place was the position of grandparents (The 2018 proposal, background).

As Anna Avdeeva discusses in relation to the grandparents of "natural" parents in Russia (see Avdeeva in this issue), and also in the Finnish legislation, the role of grandparents ended up remaining separate from that of social parenthood. The groundwork for the *Child Custody Act*

[12] The writer's notes of discussions in the follow-up working group on the draft proposal, 27.09.2017.

specifically addressed the issue of grandparents and stated that a grandparent is not automatically to be thought of as an especially close person to the child and thus eligible for legal access. However, a grandparent *can* be classified as a close person, if the child has resided with the grandparent for a long time and if the relationship sufficiently resembles that of a parent and a child. Grandparenthood is thus also constructed as performative and as Zhabenko writes in the case of Russian grandparents, even a directly descending biological kinship relation is not presumed to be a ground for (legal) access. On the other hand, grandparenthood does not disqualify a person from having an "especially close relation" to the child, thus widening the generational scope whereby legal access to a child can be gained.

2. Joint Physical Custody

The second major change in the *Child Custody Act* related to redefining kinship, is the possibility to register a joint physical custody arrangement (JPC, see Bergström et al. 2017) in the civil registry. The proposal defines JPC as a situation where the child(ren) reside with both parents at least 40% of the time. The registration of this arrangement does not entail any significant changes or benefits as such; for example, the child still only has one official address. But this change, even before it became official, started a process of rethinking social benefits.[13] The Finnish governmental program of 2019-2023 included a proposal to give children living in JPC arrangements the right to social benefits in both of the families, as well as having two official places of residence.

According to the report by the Ministry of Social Affairs and Health (18/2018), joint physical custody has a bearing on at least child allowance, housing allowance, alimony, some forms of support for families with disabled children, compensation for travel costs to and from hospitals,

[13] The report of a workgroup working on these issues in the Ministry of Social Affairs and Health, *STM raportteja ja muistioita 18/2018*, can be accessed at https://stm.fi/julkaisu?pubid=URN:ISBN:978-952-00-3929-5, viewed 13.6.2018.

school rides, as well as generally for the definition of the number of residents in a household, which is significant, for example, in applying for state supported rental apartments or considering sibling reductions of day-care fees. Official JPC also potentially affects the services a family is entitled to, such as day-care, schools, social services, healthcare and dental care.[14] None of these reconsiderations were done at the time the Act was passed, but they were scheduled to be considered during the governmental period of 2019-2023.

These changes will make joint physical custody not only socially, but also economically, the ideal case of post-divorce parenthood. If joint physical custody is registered, the economic benefits for the parent at whose home the child now resides but is not officially registered can rise to several hundreds of euros per month, depending on the level of social support for which the family is eligible. The economic consequences of this change are therefore not insignificant. Thus, it is of great importance who can have access to these arrangements.

According to the 2018 proposal, an official joint physical custody arrangement can be registered if it is agreed upon by all the parties concerned – that is, all persons to whom the child officially has access – and the agreement will be enforced by the social committee or by a court. The scope of the parties who can make this arrangement is not limited to legal parents, but also an "especially close person" to the child can register a JPC arrangement if they have a contract or court order to prove the existence of the arrangement.

As noted previously, prior to the reform the non-legal parent of the child could not have their right of access enforced by the social committee but needed to take their case to court. Acquiring a court decision cost time and money and thus created a situation where the law treated certain family and

[14] Ibid.

kinship positions unequally – with considerable economic consequences. Whereas a legal parent needed to visit the social services once, or email them an agreement, and then would be entitled to all the benefits that joint physical custody brings, a non-legal parent could lose up to six months' worth of these benefits, plus have to pay a court fee of ca 250€. The economic losses in this case could rise to thousands of euros.

These two changes, that of the right of access to the child and that of recognising joint physical custody, are the two main changes that remodel the Finnish legal regulation of kinship. Next, I will go on to ask: what are the relationships that the law now accounts for or acknowledges like? What are the premises of these acknowledgements? What kinds of understandings of care, kinship and parenthood are reinforced, promoted and protected by the law and what kinds are omitted or pushed toward the margins? Where are the new borders of the redefined legal kinship in Finland? To answer these questions, I will turn to Marilyn Strathern's thoughts about kinship and recognitions and constructions of parenthood.

Imitations and Limitations: How Legal Recognition is Achieved

Marilyn Strathern (2011: 253–254) states that the terms of kinship, such as child/parent, or mother/father, need to be understood through the premise that "no one of a pair of terms can stand as an originary text". Thus, for Strathern, a parent is not the origin point of the child, any more than the child is the origin point of a parent, both exist in relation to each other. A parent cannot be a parent unless there is a child, and a child requires at least some sort of parentage to exist. The relationship between these two is not linear, nor does it automatically prove heritage, genetic bonds or even kinship.

Strathern (2011: 253) makes a distinction between two ways of understanding kinship: *recognition* and *construction*.[15] These terms, she claims, provide a summarising formula for the different orders of knowledge involved in thinking kinship. What is *recognised*, Strathern writes, is "always already there in the language of factuality and information" (ibid.: 254). Thus, for example, a new-born child is recognised as the child of their birth mother. *Construction*, on the other hand, requires human decisions to create categories – such as the legal affirmation of fatherhood, legal custody or adoptive parenthood (ibid., examples mine). According to Strathern, these two terms can exist in a transformative relation to each other. What we perceive as natural facts (*recognise*) act as a ground or a reference point, in relation to which we can decide what needs to be *constructed*, what social conventions we should apply.

To continue with the example of a child and a parent, according to Strathern, a child is *recognised*; its autonomous existence is assumed. You can see a child in the street and say: "There is a child". A parent, on the other hand, is *constructed*; they exist only insofar as they have already been recognised, only when their child not only exists, but *is known to exist* (ibid.: 254-255). If the child is not visible, we need the knowledge of the child to perceive a person as a parent. Parenthood is thus always *constructed* as an object of knowledge. Moreover, at least in mid-twentieth century Euro-American kinship thinking, the "category of parent contains the same distinction within it. The mother is recognised; the father, by contrast, is constructed" (ibid.: 255).

[15] Strathern's argument here is related to the anthropological discussion of nature/nurture, where the question is whether, and in which cultural contexts, kinship should be considered to be based on biological or genetic relatedness versus upbringing and social parenting. This question is surprisingly resilient in discussions concerning kinship and family in many different contexts, for example, in the study of themes such as adoption, foster parenting or surrogacy. As I interpret, Strathern aims to complicate the understanding of nature/nurture and look at the underlying structures on which this binary is based.

Strathern writes in the context of the British parliamentary discussion on new reproductive technologies in 1991, but the framework she builds is valid also in present discussions on defining legal kinship. Looking at the Finnish *Child Custody Act*, a few different categories need to be considered in order to determine what, de facto, kinship "is" in the eyes of the law and how the definition of this kinship is changing. Differentiating between the recognised and constructed orders of kinship gives us a useful tool to analyse these changes in more depth.

1. The Question of Legal or Social Parenthood

The new *Child Custody Act* in Finland provides a possibility to recognise the performative parenthood of a non-legal parent, in the form of making it possible to give a child right of access also to those persons who are not their legal parents. From the text of the Act, it is evident, however, that this recognition requires a construction of an identifiable parenting position that exists prior to its recognition. In the Act, the definition of a person eligible for access to the child is that the child has "an established relationship, resembling that of a parent and a child" with this person (CCA, 9c§). This relationship is further defined as "typically requiring living with the child and daily participating in the care and upbringing of the child during that period" (ibid.: 55).

The Act also incorporates exclusions: a mere kinship bond, such as grandparenthood, or an active participation in the everyday life of the child, does not suffice to build such a relationship. The opinion of the child, whose right to access is discussed, is also taken into account: "Especially in case of older children, considerable weight should be given to whether the child considers this person as especially close, and whether the child wants to maintain regular contact with this person"

(ibid.). Once the legal position of this "especially close person" is defined,[16] it can be legislated upon (cf. Strathern 2011: 254) .

In this process, thus, the relationship is *first* constructed*, then* recognised through this construction. But, importantly, in the Act, the recognition of a relationship between the child and the non-legal parent requires a *pre-existing,* factual, concrete, practised and performative parenting relationship between the child and the "person". As opposed to biological parenthood, or even adoptive parenthood, this relationship cannot be legally recognised *prior to* a mutual bond forming between the parent and the child.

Thus, the law can construct a position, but only when practices that conform to the (quite strict) premises of this construction have been performed, can this relationship be *recognised*. In this sense, the position of a legal parent is different from that of a social parent. In Strathern's terms, even if legal parenthood needs to be constructed, not simply recognised, social parenthood needs this process twice over (see also Avdeeva in this issue). This double construction, the recognition of a position within a construction, I refer to as *imitation*. Thus a person who has been parenting the child in practice throughout the child's life or for a considerable time can be given some of the rights and obligations of a parent, but only when they have been imitating parenthood well enough to be able to be recognised as having a role in the child's life that is close enough to a child-parent relationship.

[16] It is noteworthy, that the term "social parent" is not utilised in the text of the Act. Instead these people are throughout the text referred to as "a person, in relation to whom the child has been given the right to access according to 9c§".

2. The Child-Parent Relationship and the Best Interest of the Child.

Strathern writes (2011: 275) that the problem of legislation is that while it can recognise certain issues, such as tell unethical or harmful kinship or family arrangements apart from ethical ones, its "business is to 'constitute' the grounds on which [a situation] may or may not be recognised as a basis upon which persons can claim rights". Constituting grounds is a process where certain social aspects of situations, such as threat of violence, are difficult to account for. Thus, legislation is in trouble when situations that may seem similar, prove to be different because of affects, motives or risk factors involved in kinship (and all human) relationships.

For example, the risk that two parents, both of whom have been violent toward their spouse, will exercise violence against their child, is different from the parent-partner relationship, depending on the psychological structures of the person or on the dynamic of the parent-child-relationship. These differences can be clearly visible to an experienced professional within family work or a psychologist. In a legal framework, however, the two situations can be difficult to tell apart, as law does not have sufficient tools to account for social or psychological processes and per definition relies on proven facts or evidence. Thus, it can be extremely hard for a judge to legally determine whether a right of access can be given if one parent claims a threat of violence.

Here the law must account for individual and singular situations through a generalising template. For this purpose, many of the bills that have to do with family, kinship or child welfare include the concept of "the best interest of the child" as a basic principle. This concept, as for example Kirsti Kurki-Suonio (1999) has showed, is a slippery and technically difficult tool, as it is perceived differently in different times, places and cultural contexts. In these contexts, I claim, the best interest of the child functions as a legal tool to account for *situationality* – that is, a concept that

requires the legal process to take into account the individual, contextual circumstances of a specific child in a specific case.

In Strathern's terms, the best interest of the child is a concept that can be *recognised*. By this, I mean that the legal use of the concept requires knowledge and affirmation of the factual circumstances surrounding a specific situation, where specific people are involved. In Finland, this is most often achieved in practice by the judge ordering an "investigation of the circumstances of a child", a procedure which is most often carried out by social workers on the initiative of the court. The court then considers its decision based on a report of this investigation, as well as on the basis of the hearings of the parties involved.

The best interest of the child, thus, is not *constructed* in the sense of being conventionally defined through a specific categorisation. There is no specific defined set of criteria that the best interest of the child always meets, nor is any arrangement considered categorically always more in the best interest of the child than some other.[17] This makes it a useful concept for the courts to deal with the changing and situational realities of different family and kinship constellations. But it also becomes a difficult and slippery concept, open to interpretations from different angles, and thus vulnerable to misuse and discrepancies related to power imbalance and the power of definition.

The concept of best interest of the child aims to legally grasp an undefined and vulnerable idea of a socially recognisable situation. In practice, these recognitions can lead to quite opposite solutions in

[17] Interestingly, in Finnish discussions, the only party that has repeatedly called for a thorough and singular legal definition of the best interest of the child in relation to custody and right of access, is *Isät lasten asialla,* which is a fathers' rights organisation strongly opposing parental alienation. (http://www.isatlastenasialla.fi/wp-content/uploads/2019/01/ILA_lausunto_271117.pdf.) They have received occasional support from other men's rights organisations, but no legislative success for their endeavour. On the contrary, the *Child Custody Act* states that no one arrangement can generally be said to be more in the best interest of a child than another and thus each solution needs to be considered individually (CCA 10§, also detailed justification).

different contexts, depending on the current understanding of child psychology, parental rights or the importance of different sorts of relationships (Kurki-Suonio 1999).[18] If, as for example in Sweden, the presence of a father in the life of a child is strongly valued, then the legislation is bound to prioritise definitions of the best interest of the child that lead to joint custody, or even joint physical custody arrangements in all possible situations (Kurki-Suonio 1999; Ryan-Flood 2009; see also Boyd 2015). If, on the other hand, the occurrence of parental conflict is conceived as more harmful than the child losing contact with the other parent, then solutions can be like those in some states of the United States, where the parent with whom the child resides has been given sole decision power over access to the child, thus minimising the presence of conflict in the child's everyday life (Kurki-Suonio 1999; Boyd 2015).[19]

3. The Question of What Can Be Agreed Upon

One of the specific features of child custody agreements in Finland is that this has been a realm where the state interferes with individuals' possibilities to make legally binding (enforceable) agreements with each other. For example, an agreement about custody, residence and right of access needed to be ratified by a municipal social committee or a court in order to become enforceable. The new *Child Custody Act* gives the parents and custody holders significantly more power to decide and agree upon issues concerning custody and residence of the child. Sanna Koulu states that the question of who has the right to make agreements about matters concerning the child marks the ideal model of the family in family law (Koulu 2014: 19). The right to make legal agreements is crucial also when we attempt to look at the borders of legal kinship and parenthood.

[18] For a brief account of the evolution of principles in custody law, see Stern et al. 2016: 81.
[19] According to Kurki-Suonio (1999), however, these kinds of arrangements were already in the 1990s rapidly disappearing in favour of the child's right of access to *both* [sic] parents after divorce.

The new *Child Custody Act* makes several changes in what can be agreed upon and between whom. For example, giving custody of the child to another person beside the parents can, according to the new Act, be agreed upon without going through a court. Additionally, the right of a non-custody-holder to get information about the child from the authorities can in the future be enforced by a municipal social committee. However, the possibility to make an enforceable agreement on the child's right of access to a person who is not a legal parent was not included in the final proposition. Thus, these rights of access can only be verified by courts.

Why is the border of the possibility to make legally enforceable agreements important? According to Koulu (2014: 28), a crucial line between what is private business of the family and what is regulated by the state is drawn between the sorts of agreements that parents can make themselves without a court intervention and the sorts of agreements that the state wants to control. When confronted with the question of why legal parents cannot agree to give a right of access to a non-legal parent as well, the spokespersons from the Ministry of Justice stated that this decision was made because these situations are new to the legislation and there are no precedents that would give guidelines to the social authorities on how to apply the right of access – what sorts of agreements can or cannot be ratified (interview in the journal *Suomenmaa* 6.6.2018). The same justification was used later by the legal committee of the parliament (LaVM 12/2018). Thus, on the question of how many *de facto* parents a child can have, the court remains a guard of the enforceable agreements that can or cannot be made (Koulu 2014: 19).

Marilyn Strathern writes (2011: 251-253) that because of the nature of knowledge, the attempts to validate anything through giving it a meaning are always subject to uncertainty. Strathern turns to Derrida and his notion of supplementation, where each repetition, however homologous it may

seem, is always changing the previous knowledge about a meaning. Thus, for Strathern, each attempt to validate something, for example here the relationship between a child and a person especially close to that child, always also produces new uncertainties. In relation to agreements made about the situation of a child, the law attempts to reduce these insecurities by giving the courts, rather than the legal parents or the custody holders, the power to decide whose relationship to the child is "resembling [enough] that of a parent and a child" (CCA, 9c§, addition AM). According to Koulu (2014: 19) the ideal behind the regulation of agreements is "the appropriate family", a conventional, balanced family, that can make agreements even in a divorce situation. Law is there as a last resort and as a provider of guidelines for agreements. In the absence of legal rights, LGBTQ? families have been encouraged to embrace practices of negotiation (Moring 2013). As is evident throughout the work of scholars working on LGBTQ divorce (cf. Goldberg & Romero 2019), when legal protection is not provided, both professionals and parents of LGBTQ families resort to principles of parenthood that are similar to constructs in the heteronormative legal system. For example, a child's continued relationship to their parents is valued and voluntary agreements are made to protect the child's relation to their *de facto* parents (Gianino & Sackton 2019: 273-278). However, the *Child Custody Act*, while making possible court decisions on access for non-legal parents, wants to explicitly deny the possibility of legally enforceable agreements for families that are not conventional. Thus, although new possibilities are opening, the ideal of what is considered an appropriate family, remains.

I will go on to suggest a direction – an informed hunch or advised prediction if you will – which I believe that (Finnish) family law is going to develop in the very near future. I will also discuss some feminist reflections on this development.

Post-Grounded Kinship and Some Feminist Reflections

In recent years, many European countries have renewed their legislation concerning same-sex partnerships and the children born or adopted into these families.[20] Simultaneously, we have seen an increase in the number of divorces in all forms of marriage and cohabiting relationships and consequently also in the number of single parent and blended families. After a roughly estimated nine decades of some form of a nuclear family being the absolute and unquestioned ideal and model for regulating family and kinship, we are facing an avalanche of new sorts of kinship relationships daring to speak their name and claim recognition, definition and legal protection. And the legislators are listening and laws are changing, as can be seen throughout many European national laws, as well as in several states in the United States and Canada (Boyd 2015; Fershee 2014; CCA; Romero & Goldberg 2019).

The Finnish legal scholar Anu Pylkkänen (2007: 290-292) argues that there are two harmonisation processes going on within the European context of family law. One is directed by the Commission for European Family Law, launched in 2001, and aims to create new principles for European family law. The other is launched by the Nordic Council of Ministers in order to find the possible "harm that might occur because of incongruent laws when people move from one Nordic country to another" (ibid. 295). Pylkkänen notes that both of these processes are intended to be carried out by lawyers without a political perspective, but in both of them, the process very soon has been hindered by questions rooted in cultural, religious and political differences. These differences relate to questions of the degree of secularisation in different societies, attitudes and legal solutions concerning same-sex couples or families and, slightly surprisingly, differences in levels of women's labour force participation (ibid. 298-299).

[20] See for example the ILGA Europe Rainbow Map, listing the legal situations of LGBT etc. people and families in all European countries. https://www.ilga-europe.org/resources/rainbow-europe/rainbow-europe-2018, viewed 23 July, 2018.

Changes in family law are, according to Pylkkänen (2007: 299), based on the same political and legal framework that grounds the law that they are adapted into. Within European and Nordic family law, this framework centres around the norm of a heterosexual, nuclear family and is based on the premise of a conjugal, sexual relationship producing biological offspring within a nuclear family form (Harding 2015; Pylkkänen 2007). The case of the Finnish *Child Custody Act* is yet another example of how new legal categories now created are based on *imitations* of the familiar structures already present in the law.

For people whose intimate relationships have previously been unrecognised by the law, the path to legal recognition often follows from what Judith Butler has called *intelligibility* (Butler 2004).[21] The kinds of structures that are similar enough to the existing ones are understandable and thus easier to adapt to the existing frameworks of the law. Thus, it is much easier for same-sex couples to argue for inclusion in the institution of marriage than it is for a polyamorous three-parent family to argue for the legal acknowledgement of their romantic triad and for legal parenthood for all the three parents.

What is evident in the present situation is, however, that the existing model is now being so broadly and inclusively imitated that it is about to lose its significance and thus its status as a defining and hegemonic model. It is no longer, if it ever was, able to adapt to the sorts of care, kinship and family arrangements that are seeking recognition. Neither is it adequate to support, promote, protect and

[21] Butler has developed her theory of performativity, presented in *Gender Trouble* from 1990, toward a more complex notion of the working of power, agency and normativity. The concept of intelligibility, which she develops in her essay *Undoing Gender* (2004), aims to explain how different lives and real positions become understood or un-understood in a broader cultural context. Thus, for example, grieving for a same-sex spouse, deceased due to AIDS, was an unintelligible grief in the early 1980s, whereas it now, through the debate on same-sex marriage, has become more intelligible. Other griefs, however, remain in the realm of the unintelligible. I claim that the question of what kind of relationships become culturally understood and which remain un-understood is a crucial one with regard also to developments of legislation and in defining the kinds of relationships that can and will be considered in law.

remedy the care relationships that surface today (Herring 2015). Seeing the margins of kinship makes evident the places where more structural shifts need to occur. Although certain positions, say that of a *de facto* parent without legal parenthood, are being demarginalised, new margins are created, and many already existing margins deepened, in the attempts to define the limits of legal parenthood and the best interest of the child.

The question remains, however, of what direction the future of family law will take, when the heteronormative legal framework grounded on biology and monogamy no longer suffices. Marilyn Strathern concludes that perhaps new thinking about kinship needs to acknowledge that the reproduction of *persons* is suddenly depending on the reproduction of *ideas* (Strathern 2011: 276). She writes, in relation to the discussion on New Reproductive Technologies in Britain, how the debate shows a "necessity to provide a legislative stamp to what is constructed as the recognised facts" (ibid.: 270). That is, law constructs a framework that defines the facts that are *recognisable*, or in Butler's words *intelligible*, and the facts that can be recognised through this framework can obtain the legislative stamp required for protection by the state. It is noteworthy, however, that thus far in Finland this legislative stamp applies only to rights, but not to obligations – for example, an "especially close person" to the child can be given access, but cannot be obliged to pay alimony for a child.

And here is the point for a feminist and queer reconsideration. If the development toward more inclusive definitions of parenting is done in ways that forsake the material, economic needs and requirements of the child in favour of a perceived social relationship, what is the perception of parenting that is protected? And if the inclusion of other than legal parents in the realm of parenthood happens without the consent of the legal parents, what are the effects on the autonomy

of the "original" legal parents of the child? Further, we need to take seriously the feminist critique of liberal notions of law, where factors such as women's economic and labour market position are important. Anu Pylkkänen argues that in much of the Nordic family law, we see a construction of "the person in legal narratives as rights-owners and actors in family dissolution […] with an equal bargaining power and with no gender, no sexual identity and barely any caring responsibilities" (Pylkkänen 2007: 298).

As Rosie Harding writes (2015: 194-195), parenting practices are not free from gendered, heteronormative dynamics, nor from inequalities that may take quite material forms. When we consider how legislation needs to be developed, we must also consider the economic and practical issues, everyday life and the possibility that enforcing a relationship to a non-legal parent may be intruding on the autonomy of the already existing parents. These issues are, again, not straightforward, but strongly situational.

The Finnish *Child Custody Act* is an example of a reform, which does *not* account for gendered differences in power or economic responsibilities related to the right to access, or reflect on the autonomy of the parent. The changes are justified through the lens of the best interest of the child, which in this account does not include a consideration of the economic, social or even physical well-being of the parent. We seem to be giving out rights without responsibilities and this development needs to be challenged from a feminist perspective.

What we have seen in the legal development in Finland and other European countries, from the new reproductive technologies, through legislating on surrogacy arrangements, through the recognition of same-sex parents' families, toward recognising blended families and bonus parents' rights, is that

the factual existence of kin and family relationships is being based on the actual time spent together, instead of genetic or biological ties. The legal regulation of parenthood is more and more often based on *doing kinship*, instead of *being kin*, parent*ing* instead of *being* a parent. However, this doing seems to be defined through a social relationship, not a material or economic one. When one adds that in the Finnish system, the right of access – which in principle is the child's right, not the parents' – in practice means that the person to whom the child has right of access has no obligation to meet the child, this right seems to be quite free from any responsibility.

Eva Gottberg (2010: 175) writes in relation to the Finnish family law, that the future development cannot ignore the pluralisation and diversification of family forms and intimate relationships. Based on the analysis above, I agree with her. Further, I predict that the focus of the legal framework will turn more and more toward performative acts of care, affects of belonging and definitions created by the family members and kin members themselves.

I call this direction of development *post-grounded kinship*, as it signals a movement away from the biologically or genetically grounded definitions of family, parenthood and kinship. The course of development will not be easy, it will be a path of endless struggles about the power to define, decide and enforce different relationships in very situated contexts, but it will be relentless and surprisingly fast. It will not make the family law or legal kinship easier to regulate, nor provide the courts with easier and more resolvable cases – on the contrary. But it will certainly provide more support, promotion and protection to the existing relationships and hopefully it will serve to protect what is controversially called the best interest of the child. As the legal recognition of multiple forms of parent-child relationships increases, also the recognition of the responsibilities that come with parenthood – economic, material and social – will be more thoroughly recognised.

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