Out of the Box? Domestic and Private International Law Aspects of Gender Registration

A Comparative Analysis of Germany and the Netherlands

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Abstract

The legal regulation of gender identity seems to be in a state of flux. This paper compares the German and Dutch legal systems with regard to the registration of a person's sex, focusing on the possibility in both countries not to register a baby's sex until it can be clearly determined. In both systems, it has thus become possible that a person has no specified gender for a considerable period of time. These persons may encounter various kinds of legal problems, since the two jurisdictions have not been adapted to accommodate them. In addition, two potential problems regarding private international law issues are discussed.

Keywords: gender identity, sex registration, intersex, transgender, private international law.

A Introduction

The legal regulation of gender identity seems to be in a state of flux. Worldwide law and practice are challenged, sometimes successfully. The impossibility to change one's legal sex as such is increasingly regarded as old-fashioned and as being in conflict with human dignity,[1] even though the European Court of Human Rights has identified a violation of the European Convention of Human

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1 *See*, for example, O'Flaherty's comment on the Irish Gender Recognition bill: Michael O'Flaherty, 'Gender Recognition Bill Is in Violation of International Human Rights Law. Irish Bill needs to be Amended to Respect Transgender People's Dignity and Freedom', *The Irish Times*, 10 February 2015, available at: <www.irishtimes.com/opinion/gender-recognition-bill-is-in-violation-of-international-human-rights-law-1.2097289> (last visit 18 February 2015).

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Rights only in specific circumstances.[2] Several countries are now simplifying procedures for transsexuals to change their legal sex from male to female or *vice versa*. Some of these countries only drop the most controversial and far-reaching requirements, such as the condition that one is no longer able to beget or give birth to a child (the so-called 'sterilisation requirement').[3] Other countries go further and allow people to change their legal sex[4] unconditionally. Declarations of medical experts, for example, are no longer needed.[5] Sometimes multiple changes are possible, allowing people to go back and forth between male and female as they please, at least in theory.[6]

These developments have now been taken a big step further by challenges to the law's binary conception of sex. On 2 April 2014, the High Court of Australia made headlines by ordering a registrar to register *Norrie* – who identifies as sexually ambiguous – as of 'non-specific' sex.[7] This was followed only two weeks later by the Supreme Court of India in the *NALSA* case.[8] The Court ordered the Indian federal and state governments to legally recognize 'third genders' and to start improving the position of this group. Just a few months before, in November 2013, Germany had been in the spotlights because it allegedly had introduced a 'third gender', at least according to the newspapers.[9] Norway installed a committee that is currently considering the possibilities to introduce one or more extra options as well as other solutions to alleviate the problems caused by a binary registration system providing just male/female.[10] In the Netherlands, the deputy minister of Security and Justice commissioned a research into the possibilities to

2 *Christine Goodwin v. the United Kingdom*, ECHR (2002), appl. No. 28957/95.

3 In the Netherlands, sterilization is no longer required since 1 July 2014. The German Bundesverfassungsgericht decided on 11 January 2011 that sterilization as a condition to change legal sex was unconstitutional: BVerfG, 1 BvR 3295/07, ECLI:DE:BVerfG:2011:rs20110111.1bvr329507. In some other countries, the requirement was never introduced. For example, in the UK change of legal sex was made possible in 2004, without such a demand.

4 The concepts of sex and gender are highly controversial and have many different meanings. *See*, for example, J.W. Scott, 'The Uses and Abuses of Gender', *Tijdschrift voor Genderstudies*, Vol. 16, No. 1, 2013, pp. 63-77. In this article, the terms are used interchangeably.

5 This happened or is happening for example in Argentina, Denmark and Malta.

6 However, many countries, such as the Netherlands, still require a '*permanent* conviction that one belongs to the other sex'.

7 High Court of Australia, *NSW Registrar of births, deaths and marriages* and *Norrie*, [2014] HCA 11, 2 April 2014, S237/2013.

8 Supreme Court of India, *National Legal Services Authority v. Union of India and others*, writ petition (civil) No. 400 of 2012, with writ petition (civil) No. 604 of 2013, 15 April 2014.

9 On 1 November 2013, § 22 (3) of the *Personenstandsgesetz* entered into force. This provision prescribes that the entry regarding sex has to be left empty whenever the child cannot be related to the male or female gender.

10 *See* J. van der Ros, *Equality Is Not Enough, and Where Is Trans*gender in the Equation? The Case of Norway*, paper presented at the Conference Equality is not enough, Antwerp 4-6 February 2015.

register sex differently or not at all for specific groups of transgender persons and to make an inventory of the consequences such changes would entail.[11]

The legal framework of assigning sex to individuals and registering that sex in population registrations and on birth certificates in Germany and the Netherlands is the focus of this article. An exhaustive overview is neither intended nor possible. In Section B, the two legal systems, which are largely similar regarding record-keeping and sex registration, will be briefly described. This is followed by a more detailed comparison, in particular of the German and Dutch provisions on the registration of babies with an intersex condition. In Section C, the transnational dimension of legal sex is explored. Two problematic situations that can be expected are briefly discussed. Central to the article is the question whether Germany and/or the Netherlands should consider copying one or more elements from each other's systems. The conclusion under Section D will also tentatively answer the question to what extent both systems are getting 'out of the binary box'.

B Sex Registration in Germany and the Netherlands

The German and Dutch registry systems are largely similar. The systems are characterized by the use of a central source for personal records that informs all other registers and systems.[12] This is an important difference between civil law systems, such as the German and Dutch systems, and common law systems which keep separate records for different purposes.[13] This explains for example why a country like New Zealand has been able to introduce 'option X' on passports and other travel documents without forcing those interested in this option to change their legal gender identity to 'X' for all other purposes. Civil law systems are more rigid: if a person's sex has not (yet) been registered for one reason or another, the non-registration will be reflected in all documents that indicate that person's legal sex. On travel documents such as passports, non-registration will take the form of an 'X', in conformity with the standards of the International Civil Aviation Organisation (ICAO Document 9303).

Despite the use of a central source for all purposes, it is still possible that an entry as male or female in one national register deviates from the entry in another register. This may happen for instance to German citizens residing in the Netherlands, who have used their German identity card as evidence of their identity when registering their presence in the country. Since German identity cards do not contain information on gender, the Dutch registry is obliged to leave the

11 M. van den Brink & J. Tigchelaar, *M/V en verder. Sekseregistratie door de overheid en de juridische positie van transgenders* [M/F and Beyond. Sex Registration by the Government and the Legal Position of Transgenders], The Hague, Boom Juridische Uitgevers 2015. The research report, with a summary in English, will be available online as of the beginning of March 2015 at <www.wodc.nl>.

12 Although the data are collected by different municipalities, these data are fed into an electronic database. This is why the systems are referred to as 'central sources'.

13 *See* S. Gössl, 'Intersexuelle Menschen im Internationalen Privatrecht' [Intersexual People in International Private Law], *Das Standesamt* (*StAZ*), Vol. 66, No. 10, 2013, pp. 301-305, at 302.

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entry open until the person concerned provides authoritative evidence of gender identity such as a passport or a birth certificate. This is notwithstanding that that person's sex may seem obvious to the registrar. It thus may happen that a German citizen, who is registered as female in the German civil registry, is not awarded a specific sex entry in the Dutch registry. As a consequence, this person may not receive calls for sex-specific medical examinations such as for breast cancer. Dutch identity cards, as opposed to German identity cards, do contain an indication of a person's legal sex.

Something else the Dutch and German systems have in common is that – with a few exceptions – gender is a mandatory entry and that the available sex categories are limited to male and female.

At the level of sex registration, a third commonality is the distinction made between *changes* and *corrections* regarding personal records.[14] Different procedures exist for transsexuals who may *change* their legal sex (from male to female or *vice versa*) and for people with an intersex condition who may ask the registrar to *correct* their legal sex in those cases where a specific sex was registered earlier. The rationale of this distinction lies in the idea that in the case of people with an intersex condition, a mistake has been made regarding the original entry: that mistake must be corrected. In the case of transsexuals, no mistake was made, because at the time they 'really were' male or female. However they now *choose* to transition.[15]

As mentioned earlier, Germany made the headlines when it changed the requirement to register a newborn baby's sex. Although it was already possible to leave the entry open on the birth certificate, registration of the baby in the *Personenstandsregister* (register of personal records) did require ticking one of two boxes (m/f). As of 1 November 2013, the registration form "has to be left empty" whenever "the child can neither be assigned the male nor the female sex".[16] Newspapers and other media reported excitedly that Germany was the very first European country to introduce a 'third gender'.[17] However, this is not entirely correct. In the first place, the Netherlands already introduced a more or less similar provision in 1970 and, secondly, it is not yet entirely clear what the implications of the new German law are.

I Indeterminable Sex

In 1970, a provision was included in the New Dutch Civil Code (article 1:17(2) *Nieuw Burgerlijk Wetboek*) that in cases of unclear sex, it should be noted on the

14 This distinction is regularly made also outside Europe. *See, e.g.*, S.E. Wieringa, 'Intersex, Transgender or Same-Sex: What's in a Name?', *The United Academics Journal of Social Sciences*, 2011, pp. 7-16.

15 For Germany, § 47 (2) No. 1 PStG is used to correct an entry, and § 27 (3) No. 4 alternative 2 PStG deals with changes. If there is no sex registration, § 27 (4) alt. 1 PStG applies. The relevant provisions in the Netherlands are Art. 1:24-24b BW for corrections and Art. 1:28 BW for changes.

16 § 22 (3) PStG.

17 *See e.g.* <www.theguardian.com/commentisfree/2013/nov/10/germany-third-gender-birth-certificate> (last visit 9 February 2015).

birth certificate that the baby's sex was unknown. Such an entry could later be changed into male or female, but the fact that there had been a change of the registered sex remained visible on the birth certificate. Many parents as well as civil servants considered this undesirable, and so in practice parents and the public prosecutor often decided together to postpone the registration of the baby until the baby's sex had become clear.[18] In 1995, this practice – which clearly violated the letter of the law – came to an end with the introduction of article 1:19d BW. In conjunction with article 45(1) of the *Besluit Burgerlijke Stand* (Regulation on civil registry), this article provides that if a baby's sex is unclear, a preliminary birth certificate has to be drawn up indicating that 'the child's sex cannot be determined'. After three months, a final birth certificate has to be drawn up, indicating that the child is male, female or that the child's sex still cannot be determined.

The expectation of the Dutch legislator was that in most – if not all – cases, a baby's sex would become clear (or at least decided upon) within three months. This expectation has been met in practice.[19] However, it is theoretically possible that there are people who have been born in the Netherlands who live or have lived with an undetermined legal sex. A query in the Dutch register containing personal records (*Basisregistratie personen*) in December 2013 showed that at that particular moment a total of 67 people had been registered in the Netherlands without registration of their sex. Out of these, 24 had been born in the *Bundesrepublik* (former West Germany) and 20 in Italy where, just like in Germany, no information regarding a person's sex is included on the identity card. Only one of these 67 people without a known sex was born in the Netherlands. One possible explanation is that this person's sex was not registered at birth because it was unclear.[20]

The rationale of the Dutch and German laws on sex registration for babies with an intersex condition is quite similar: the legislator aims at avoiding stigmatization of individuals with an intersex condition and to take away some of the pressure that rests on parents in this particular situation. Furthermore, the law endeavours to avoid constraints that force parents to consent to early medical treatments to fit the baby physically into the binary gender system.[21] The introduction of a third gender does not seem to be an aim of these legal provisions. This impression is strengthened by the fact that any accompanying legislation – paving the way for a third gender – is missing, for instance regarding marriage and regarding legal parentage. In the Netherlands, for example, marriage is possi-

18 *See e.g.* J.N.E. Plasschaert, *Burgerlijke stand* [Civil Registry], Serie Burgerzaken, Amsterdam, Stadsdrukkerij Amsterdam N.V. 2002, pp. 582-584. *See* also: Van den Brink & Tigchelaar 2015, p. 15.

19 A non-quantitative survey among civil registrars showed that only 13 out of 196 registrars, with an average of 22.5 years of service, had registered a child's sex as undeterminable one to three times. In all cases, except two, the sex had been noted within three months. *See* Van den Brink & Tigchelaar 2015, pp. 25, 141-142.

20 Van den Brink & Tigchelaar 2015, p. 31.

21 *See* BT-Drucks. 17/9088, 6 and BT-Drucks. 17/12192, 11.

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ble for "two persons of different or the same sex".[22] Similarly, a provision regarding parental status of a person of unknown or 'third' gender is lacking (see also below).

Despite the fact that the provisions are largely similar, the German law has been met with critique, whereas the Dutch provision seems to lead a quiet life in the shadows. One concern regarding the German novelty, voiced in particular by organizations of people with an intersex condition, is that medical professionals may feel obliged to leave an entry open if they have any doubts at all about a baby's sex, even if the parents prefer an entry as male or female.[23] This in turn may push parents to choose for early surgical interventions, so as to remove any medical doubts about their baby's sex. Arguably, similar concerns do not exist in the Netherlands because no medical declaration regarding children's sex is required to register new births.

II Implications of the Exception for Intersex Conditions

The impression that Germany was the first European country to introduce a 'third' gender was also mistaken for another reason: it is far from clear what the implications of the new rule are. Two different views on the issue have been voiced so far. Some argue that the fact that there is no rule providing for the option to erase an entry as male or female so as to make it 'empty' indicates that the new rule is meant as a one-way route with a provisional status, comparable to the rationale of the Dutch provision. The other view holds that to deny a change of an entry as male or female into an empty section would be an unreasonable discrimination and a violation of individuals' personality rights (*Persönlichkeitsrecht*).[24] So far, the first view seems to be confirmed by a judgement of 25 January 2015 of the *Oberlandesgericht Celle*.[25] The Court denied the request of a 25-year-old person to change that person's legal sex into 'inter', 'divers' or similar, because there was no legal basis for such a claim. Interestingly, however, the Court pointed out that the applicant might have asked the Court to delete the registered sex.[26]

The question whether the Dutch provision regarding unknown sex allows for a change from male/female into 'unknown' was decided by the Dutch Supreme Court (*Hoge Raad*) in 2007.[27] 'K' was registered as male at birth, started a transi-

22 Art. 1:30(1) BW.

23 *See* E. Reis, *Geboorteakten kun je wijzigen, chirurgie is voor altijd* [Birth Certificates May Be Changed, Surgery Is Forever], published online on 27 November 2013 at: <http://nnid.nl/2013/11/27/geboorteakten-kun-je-wijzigen/> (last visit 9 February 2015).

24 This discussion is outlined briefly by Nina Dethloff and Susanne Gössl in the country report on Germany, which is included as an appendix in the Dutch report on sex registration, *see* Van den Brink & Tigchelaar 2015, pp. 171-183.

25 OLG Celle, 21.1.2015, 14 W 28/14 (*unreported*) the full text of the decision may be accessed online <http://dritte-option.de/wp-content/uploads/2015/01/OLG-Celle.pdf> (last visit 16 February 2015).

26 The Court says: 'Die Antragstellerin kontte lediglich eine Streichung des Geslechts "weiblich" erreichen'.

27 HR, 30 March 2007, ECLI:NL:HR:2007:AZ5686.

tion but then found that 'they'[28] did not feel at home in either box, a situation more or less comparable to that of *Norrie* in Australia, mentioned above. 'K' asked the registrar to change the entry on their birth certificate to 'de-sexed' (*gedeseksueerd*). The Dutch Supreme Court refused to do this because a legal basis for accommodating such a request was lacking.

C Issues in Private International Law

Sex registration may also play a significant role in private international law. When a case has a factual setting that contains one or more connections with different countries, the applicable law has to be determined. The legal sex of a person may then become relevant in at least four different situations, of which the first and fourth will be discussed here. A *first* situation is when the law governing the determination of the legal sex itself has to be identified. A *second* situation may occur when the conflict-of-law-provision that governs the law applicable to a specific issue employs a sex-specific connecting factor. An example is article 19 (1) S. 2 *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (EGBGB)[29] which links the parent–child relationship in cases of a married *mother* to the law applicable to the general aspects of the marriage at the time of the birth of the child. A *third* situation in which legal sex may be relevant is when a legal relationship or institution that is governed by foreign law is to be recognized by another country which only recognizes that relationship or institution in a limited number of forms. An example here is the legal concept of marriage or registered partnerships that may or may not include same-sex relationships. The *fourth* situation in which a person's legal sex becomes relevant is of a rather recent date. Since a few countries, such as Australia[30] and New Zealand,[31] have now accepted a third category for legal sex, problems may arise in matching this category with binary gender systems in countries that have not or not yet made provisions for such cases.

I The Law Applicable to Gender Determination

The question of the applicable law to the determination of the legal sex of a person has recently been debated again in the German academic literature. The discussion was sparked by the entering into force of § 22 *Personenstandsgesetz*

28 Pronouns for people who do not fit the binary are a complicated issue. In some countries or languages, ways out are looked for. In English, for example, increasingly the plural 'they' is used. In Sweden and Norway, the pronoun 'hen' has been introduced. *See* for example <www.nytimes.com/2015/02/08/education/edlife/a-university-recognizes-a-third-gender-neutral.html?smid=fb-nytimes&bicmst=1409232722000&bicmet=1419773522000&bicmp=AD&smtyp=aut&bicmlukp=WT.mc_id&_r=1> (last visit 8 February 2015) and <www.huffingtonpost.com/2013/04/11/swedish-gender-neutral-pronoun-hen-national-encyclopedia_n_3063293.html> (last visit 8 February 2015).

29 *Einführungsgesetz zum Bürgerlichen Gesetzbuch*, 21 September 1994, BGBl. I 2494.

30 *See e.g. NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11.

31 Sec. 28(3)(a)(i) and (ii), 29(3)(a)(i) and (ii) Births, Deaths, Marriages and Relationships Registration Act 1995, which has status effect, *see* in detail Gössl 2013, pp. 301-302.

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(PStG)[32] which makes it possible to leave the sex of a newly born child undetermined on the birth certificate if it is unclear whether the child is male or female.[33] German private international law does not contain any specific provisions that help to identify the applicable law to determine a person's legal sex.[34] In the *Transsexuellengesetz* (TSG),[35] the German legislator seems to take the position that gender determination should generally be governed by the law of the person's nationality because the provision applies the German rules on *transsexuals* only to German nationals.[36] However, foreigners may fall under the TSG but only in exceptional circumstances. It has therefore been argued that the TSG[37] contains a general rule of private international law that gender determination is governed by the law of a person's nationality.[38] A different strand in the literature achieves the same result by analogy to article 7 EGBGB which connects the legal capacity to the law of the state of a person's nationality.[39] The application of article 7 EGBGB by analogy generally seems to be a sensible approach as the gender of a person is as deeply rooted in an individual's personality as its capacity to be holder of rights and duties.[40] These questions shall, thus, be dealt with by the law of the state with which the person has the closest connection, that is, where the person himself/herself is rooted. Article 7 EGBGB endeavours to meet this connection.[41] It nevertheless remains unclear whether the gender of *e.g.* a New Zealand citizen who has been registered within the gender category 'indeterminate' will be recognized as such in Germany. This depends on whether the application of the law of New Zealand would be regarded as contravening public policy.[42] The question has not yet been decided by the courts, but with the introduction of § 22 PStG it seems harder to argue that the binary gender system German law still

32 *Personenstandsgesetz*, 19 February 2007, BGBl. I 122.

33 Gössl 2013, p. 301; Nebel, 'Conchita Wurst und das IPR', <www.abstammungsrecht.de/daniela-nebel-conchita-wurst-und-das-ipr-die-einfuehrung-des-%c2%a7-22-abs-3-pstg/> (last visit 19 February 2015).

34 *See* Staudinger/Hausmann, Art. 7 EGBGB, No. 39; Gössl 2013, pp. 301-302.

35 § 1(1) No. 3 (a) and (d). Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen – Transsexuellengesetz v. 10 September 1980, BGBl I 1654.

36 Gössl 2013, pp. 301-302.

37 § 1(1) No. 3 (a) and (d).

38 Staudinger/Hausmann, Art. 7 EGBGB, No. 39; Kegel/Schurig, *Internationales Privatrecht*, 2004, p. 565; *see* also Gössl 2013, pp. 301-303 with further references for this opinion.

39 MünchKomm/Birk, Art. 7 EGBGB, No. 16; *v.* Bar, *Internationales Privatrecht Bd. II*, 1991, § 1 No. 12; Court of first instance Hamburg, *Das Standesamt*, 1984, p. 42; Regional Court Stuttgart, *Das Standesamt*, 1999, pp. 15, 16; Higher regional Court Karlsruhe, *Das Standesamt*, 2003, p. 139; Kammergericht, *Das Standesamt*, 2002, p. 307; *see* also Gössl 2013, pp. 301-303 with further references for this opinion.

40 *See* also Staudinger/Hausmann, Art. 7 EGBGB, No. 39; Higher regional Court Frankfurt a.M., *Das Standesamt*, 2005, p. 73.

41 A different question *de lege ferenda* is whether the nationality of a person today is still the feasible connecting factor to meet the closest connection in this case, *see* J. Scherpe, 'Anmerkung', *Zeitschrift für das gesamte Familienrecht*, 2007, p. 271; Bamberger/Roth/Mäsch, Art. 7 EGBGB, No. 39.

42 Art. 6 EGBGB.

employs[43] is part of the fundamental values of the German legal order that form the measuring rod for the public policy exception.[44]

The situation in the Netherlands is somehow different. Like in Germany, Book 10 of the Civil Code (BW), which contains the private international law of the Netherlands, does not contain any specific provisions concerning the law applicable to gender determination. However, so far there is no broad discussion concerning the determination of the applicable law, nor a debate on the question whether the application of a foreign law that recognizes a third gender category would be contrary to public policy.[45] This result is, at least from a German perspective, surprising because, as discussed in Section B, the Dutch legislator already created the possibility to leave gender in the birth certificate unspecified in 1970.[46] The lack of cases, which was discussed above, may explain why there is a lack of discussion in the field of private international law. Nevertheless, a very similar approach to the one just depicted for Germany may be taken under Dutch law. The Dutch Civil Code also regards the nationality of a person as the basic connecting factor to determine the application of the provisions concerning *transsexuals*.[47] Thus, it seems that the Dutch legislator also has implicitly decided that gender determination shall primarily be governed by the law of the person's nationality. The courts seem to back up this conclusion as they have referred to article 1:28 BW as a provision of private international law in their jurisprudence.[48] Furthermore, Dutch law also considers the nationality of a person as the decisive connecting factor for the fundamental issue of capacity and, thus, equally puts strong emphasis on a person's nationality.[49] Applying article 10:11 BW by analogy to determine the legal gender of a person would therefore be a possible route in order to create a conflict of laws rule on gender determination accordingly.[50]

43 Helms, 'Personenstandsrechtliche und familienrechtliche Aspekte der Intersexualität vor dem Hintergrund des neuen § 22 Abs. 3 PStG', *in* I. Götz *et al.* (Eds.), *Familie – Recht – Ethik. Festschrift für Gerd Brudermüller zum 65. Geburtstag*, München, Verlag C.H. Beck 2014, pp. 301, 303 *et seq.*; W. Sieberichs, 'Das unbestimmte Geschlecht', *Zeitschrift für das gesamte Familienrecht*, Vol. 60, No. 15, 2013, pp. 1180-1184, at 1180, 1181.

44 Gössl 2013, pp. 301, 303; Higher regional Court Frankfurt a.M., *Das Standesamt*, 2005, p. 73 (emphasis on the binary gender system but great argumentatory weight on individual's fundamental rights).

45 Art. 10:6 BW.

46 Art. 1:19d (1) BW.

47 Art. 1:28 BW. A.P.J.M. Vonken, Tekst & Commentaar Burgerlijk Wetboek, Art. 1:28 BW, No. 4, document dated 11 September 2014; *see* also H. d'Oliveira, 'Transsexualität im internationalen Personenrecht', *Praxis des Internationalen Privat- und Verfahrensrechts*, 1987, pp. 189, 190. Just like under German law, foreigners who have their residence in the Netherlands may also come within the scope of these provisions.

48 Rb. 's-Gravenhage 19 November 2007, ECLI:NL:RBSGR:2007:BB8201 ('toepasselijk recht'); Rb. 's-Gravenhage, 14 October 2002, ECLI:NL:RBSGR:2002:AF4586 ('toepasselijk recht').

49 Art. 10:11 BW.

50 The analogous application of Art. 10:11 BW would not be hampered by the existence of Art. 10:17 BW as the provision merely functions as an exception, *e.g.* in refugee cases where the nationality of a person does no longer mirror the closest connection of this person to a specific jurisdiction, *see* Asser/Vonken, Art. 10-II BW, No. 29, document dated 11 September 2014.

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II Kinship

Problems may also arise when it comes to determining the law applicable to parent–child relationships. The relevant private international law provision under German law is article 19(1) EGBGB. The provision contains three alternative connecting factors. The first possible option is to apply the law of the place of the habitual residence of the child. The second option is to apply – in relation to each parent – the law of the nationality of the parent. The third option – as described in the introduction to Section C – points to the law that governs the general aspects of the marriage at the time of the birth of the child. Article 19(1) EGBGB, thus, contains two gender-neutral factors and one gender-related connecting factor. Alternatives one and two may be applied neutrally to persons irrespective of their registered gender. Only alternative three presupposes the presence of a female person as it only applies if there is a married *mother*. Article 19 EGBGB therefore enables determination of the applicable law in two of three alternatives, also when parents do not fit the binary gender system. However, problems arise in the second step, *i.e.* when the substantive law that has to be applied is not gender neutral. This is the case *e.g.* for § 1591 *Bürgerliches Gesetzbuch* (a mother is the *woman* that gives birth to the child). The most sensible solution is the application of § 1591 *Bürgerliches Gesetzbuch* by analogy.[51]

The law in the Netherlands presents similar difficulties. The private international law provisions on parentage were changed recently to accommodate the introduction of the acquisition of co-motherhood by other means than adoption.[52] Since having a (one) father and a (one) mother is no longer a given, provisions (including in Book 10) were rephrased and now generally speak of 'person' when referring to the second legal parent of the child.[53] These provisions, thus, are partly gender neutral. But the Dutch lawmaker stopped half way. With regard to the parent–child relationship towards the birth mother,[54] the law remains sex-specific. The provision states that 'mother' is the *woman* who has given birth to the child. Although a law regarding transsexuals, which entered into force on 1 July 2014, provides in article 1:28c(3) BW for the situation that a legal (trans) male gives birth to a child, the law does not contain any provision

51 *See* Sieberichs 2013, p. 1180, 1182.

52 Wet van 25 november 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het juridisch ouderschap van de vrouwelijke partner van de moeder anders dan door adoptie *Stb.* 2013, 480 (in force since 1 April 2014). Motherhood may now be established automatically if the partner is married to the birth mother and the child was conceived with the sperm of an anonymous donor. In other cases, the female partner may recognize the child.

53 *See* Art. 10:92(1) BW for married couples or registered partners and Art. 10:95(1) BW for the recognition or judicial determination of parentage.

54 Art. 10:92 (1) BW, Art. 10:94(1) BW.

regarding people whose sex has not been registered.[55] In cases where a parent of unspecified sex gives birth to a child, the determination of the applicable law becomes difficult. An application of the relevant provisions of private international law by analogy to the person that has given birth to or begotten the child seems to be the obvious solution *de lege lata* here as well.

D Conclusion

The German and Dutch legal systems have a lot in common as regards the registration of people's sex. The systems are mandatory and only offer two options, with some minor exceptions, of which the most important one is the possibility to postpone registration of a baby's sex if that is not immediately clear. The German provision, which is much more recent than its Dutch equivalent, has been criticized because it is feared that it may be counterproductive. The concern is that parents may decide to subject their child to medical treatment to avoid registration as of unknown gender. That seems highly undesirable given people's entitlement to physical integrity. In this respect, Germany might copy from the Dutch and make sure that parents have the last say in this respect. That would also be in line with the purpose of the German law to alleviate any pressure the parents may experience.

Regarding transnational puzzles, neither jurisdiction has regulated how the law applicable to gender determination should be identified. It is interesting to note that there is a lively discussion on this matter in Germany, whereas such debate has not (yet?) emerged in the Netherlands. However, both systems seem to apply a nationality approach when it comes to the determination of the applicable law concerning transsexuals. Arguably, the nationality principle may be applied equally to gender determination in both jurisdictions.

In Germany as well as in the Netherlands, there appear to be problems with regard to private international law provisions that contain gender-related elements, such as laws applicable to kinship. This article has highlighted two examples. A gender-neutral approach in private international law – if desirable at all[56] – will only be effective if the substantive law provisions correspond to that change.

The perception of gender identity issues seems to be changing rapidly. Especially the idea that gender identity cannot always be squeezed in one of two legal boxes is gaining ground. However, the legal changes in Germany and the Nether-

55 Art. 1:28c(3) BW provides, among others, that the person who gives birth to a child after changing his legal sex to male will be identified as the child's mother. This is because of the adagium of 'mater semper certa est' (the mother is always certain) that underlies Dutch affiliation law. If the transman would not be identified as the child's mother, the child might have no mother at all. *See* also: M. van den Brink & J. Tigchelaar, 'The Equality of the (non) Trans-Parent: Women Who Father Children', *in* M. van den Brink, S. Burri & J. Goldschmidt, *Equality and Human Rights: Nothing But Trouble?*, Liber Amicorum Titia Loenen, Utrecht, SIM Special No. 38, 2015, pp. 247-260, at 259. Available at <http://sim.rebo.uu.nl/en/categorie/specials/>.

56 *See* for an alternative solution of gender flexibility (*Geschlechtsflexibilität*) Coester-Waltjen, 'Geschlecht – kein Thema mehr für das Recht?', *Juristenzeitung*, Vol. 65, 2010, pp. 852-856, at 856.

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lands cannot as yet be qualified as 'really out of the box', although some dents have been made in the binary system. Presumably, the number of persons whose gender identity does not fit the binary female-or-male categories of legal sex will increase in the future. It is therefore to be hoped that more systemic changes will be considered, both in the law relating to the registration of legal sex as such and in other legal areas, such as family law, to tackle these challenges instead of leaving it to individuals to deal with legal gaps and black holes.