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BUMPER ISSUE: ALL YOU EVER WANTED TO KNOW ABOUT DUTCH FAMILY LAW (AND WERE AFRAID TO ASK)

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I INTRODUCTION

In the 2002 edition *Survey* article for the Netherlands attention was focused exclusively upon marriage and marriage-like relationships. This time we have sought to provide an overview of the main developments across the entire field of family law. A number of important developments in the field of private international law are discussed (the private international law consequences of opening up marriage to same-sex couples, the Act on conflicts of law arising in cases of pension adjustment, the Act on conflicts of law in cases of determination of parentage by descent and the Bill on conflicts of law in adoption). The review of family property which is taking place in the Netherlands now includes two new Acts: the Act on the Rights and Duties of Spouses (and registered partners) and the Act on Contractual Participation Clauses. We discuss case-law on maintenance issues (termination of maintenance liability in the event of cohabitation of the person entitled to maintenance with a third party, and the maintenance liability of the mother's same-sex partner for a child which they brought up together). Selected case-law on parenthood issues is included, as well as a discussion of the Act on Storage and Dissemination of Information regarding Gamete Donors. An overview of recent developments in custody and access law is provided, featuring the position of step-parents and the position of the parent who does not have custody following divorce. An item on recent research on the use of mediation in custody and access disputes is included. Finally, the review concludes with a discussion of recent important developments in child protection cases (supervision orders and the position of foster parents, the case for introduction of a new measure aimed at preventing child abuse, the new Act on Child Abuse Advice and Reporting Centres and the Bill to reform the Child Assistance Act).

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II MARRIAGE AND PARTNERSHIP

A Opening up marriage to same-sex couples: private international law aspects

On 1 April 2001, it became possible for the first time for couples of the same sex to celebrate civil marriage ceremonies before the Registrar of Births, Deaths and Marriages.¹ The historical aspects of the legislative process itself have already been described in detail in the last three editions of this Survey.² However, since the 2002 edition, the Dutch Standing Committee on Private International Law (the *Staatscommissie*) has furnished a report outlining its insight into the possible private international law problems and solutions arising from the opening up of marriage to couples of the same sex.³ At first sight, it might seem that for couples of the same sex, marriage could be treated in the same way as a registered partnership.⁴ Although there are many similarities between the two institutions, there are fundamental differences. On the one hand, registered partnership is a new and young institution that is relatively limited in its recognition, whereas marriage, on the other hand, is a consolidated, traditional and pre-existing institution.⁵ In the field of private international law this has the result, according to the *Staatscommissie*, that registered partnership deserves new rules whilst the question remains open as to how far the existing rules relating to marriage are also applicable to same-sex marriages.

The formal requirements of the Dutch legislation allow same-sex marriages to be celebrated between non-Dutch nationals, so long as one of the parties has a permanent place of residence in the Netherlands.⁶ This increases the chance that there will be a foreign element in the marriage, consequently increasing the chance that rules of private international law will need to be invoked. The recognition of a same-sex marriage in other countries was the first question posed by the *Staatscommissie*. In dealing with the question, the *Staatscommissie* rightly stated that this cannot be answered by resorting to Dutch legislation, but instead must be referred to the country where recognition is sought.

The Netherlands, Luxembourg and Australia are currently the only three signatories to the 1978 Hague Convention on the Celebration and Recognition of the Validity of Marriages, which lays down, *inter alia*, a set of choice of law rules

¹ The Registrar in the Netherlands is also responsible for the registered partnerships register.

² *The International Survey of Family Law (2000 Edition)*, ed A Bainham (Family Law, 2000) at 240–253; *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001) at 301–304; *The International Survey of Family Law (2002 Edition)*, ed A Bainham (Family Law, 2002) at 278–282.

³ *Advies inzake het internationaal privaatrecht in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht* (Staatscommissie, 2002).

⁴ For more information on the Dutch registered partnership, see W Schrama, 'Registered partnership in The Netherlands' (1999) 13 *International Journal of Law, Policy and the Family* 315–327.

⁵ *Advies inzake het internationaal privaatrecht in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht* (Staatscommissie, 2002), p 2.

⁶ Article 2a, Wet Conflictenrecht Huwelijk, *Staatsblad 1989*, nr 419.

relating to the recognition of foreign marriages.⁷ The Convention imposes a requirement upon the 'recognising' signatory state to recognise, subject to a public policy exception, all those marriages concluded in accordance with the law of the *lex loci celebrationis* (the law of the place where the marriage was celebrated). The *Staatscommissie*, however, was divided on the question whether the Dutch same-sex marriage actually falls within the scope of the Convention. The 1978 Convention is no different to any other Hague Convention in that the definition of the key term, 'marriage', is notable in its absence. It is stated:

'The Special Commission has not attempted to qualify or to reduce the scope of the term "marriage" in the preliminary draft Convention by definition, and this term when used in the Convention should be taken to refer to the institution *in its broadest, international sense*.'⁸

The division in opinion centred on the understanding of the phrase 'in its broadest, international sense'. Some of the members of the *Staatscommissie* believed that the stress should be placed on the word 'international' and not on the word 'broad'. At present, the opening up of civil marriage to couples of the same sex seems likely to continue to be a uniquely Dutch phenomenon. Although recent developments have sparked a debate in the Belgian Chamber of Representatives concerning the introduction of similar legislation,⁹ the trend is certainly not towards a greater general European or world-wide phenomenon. Therefore, the understanding of the word 'international' must, *per se*, be restrictive. Only those institutions that can be compared on the basis of minimum requirements would fall within the applicability of the Convention (thus excluding same-sex marriages). The rest of the *Staatscommissie* believed that the stress should instead be placed on the word 'broadest' and therefore encompass all relationships that are considered to be marriages according to national law.¹⁰

The *Staatscommissie* report also deals with issues relating to matrimonial property,¹¹ the applicable law on the ending of a marriage, divorce jurisdiction and the recognition thereof, maintenance, adoption, joint parental authority and inheritance law. Each of these aspects are obviously also worth attention, but in this Survey, time and space restrict detailed explanation of the problems and solutions encountered and proposed.¹²

⁷ *Tractatenblad* 1987, nr 137 (14 March 1978). Ratified by the Netherlands and came into force through the Wet Conflictenrecht Huwelijk, *Staatsblad* 1989, nr 392.

⁸ Author's own emphasis, *Actes et Documents de la Treizième Session, Tome II*, p 292 § 9.

⁹ Discussions in the Chamber of Representatives, 1999–2000, 0692/001. Wetsvoorstel tot wijziging van de artikelen 144, 162 en 163 van het Burgerlijk Wetboek; Discussions in Chamber of Representatives, 1999–2000, 0861/001. Wetsvoorstel tot wijziging van het Burgerlijk wetboek betreffende het homo-huwelijk; Discussions in the Chamber of Representatives, 2000–2001, 1011/001. Wetsvoorstel tot aanvulling van artikel 144 van het Burgerlijk Wetboek betreffende het huwelijk van personen van hetzelfde geslacht; Discussions in the Chamber of Representatives, 2001–2002, 1692–001. Wetsontwerp van wet tot openstelling van het huwelijk voor personen van hetzelfde geslacht en tot wijziging van een aantal bepalingen van het Burgerlijk Wetboek.

¹⁰ LThLG Pellis, 'Het homohuwelijk: een bijzonder nationaal product' (2002) 6 *Tijdschrift voor Familie- en Jeugdrecht* 162–168.

¹¹ Governed in the Netherlands by the Wet conflictenrecht huwelijksvermogensregime, *Staatsblad* 1991, nr 628.

¹² For more information, see the report itself and Pellis, *op cit*, n 10 above.

B Other aspects of opening up marriage to couples of the same sex

1 RELIGIOUS MARRIAGES

During the debate surrounding the opening-up of same-sex marriage, the issue of religious marriages was brought to the forefront. According to Art 1:68 of the Dutch Civil Code, a religious ceremony is not allowed to take place before the parties have assured the minister of religion that a civil marriage ceremony has previously taken place before the Registrar of Births, Deaths and Marriages. This provision must also be considered in combination with Art 449 of the Dutch Criminal Code, which makes it a criminal offence for a minister of religion to solemnise a marriage before a civil marriage has taken place. Some commentators believe that the Art 1:68 ban is contrary to the parties' freedom of religion.¹³ It has been said that, since the opening-up of same-sex marriage, the inherent and fundamental nature of marriage has changed. All those couples who now wish to enter into a civil marriage must opt for the 'new opened form' of marriage (ie one which is also open to same-sex couples). It has consequently been argued that the prohibition on legally recognised religious marriages should now also be abolished.¹⁴ However, the State Secretary has stated that there remains enough justification for the maintenance of Art 1:68 of the Dutch Civil Code and Art 449 of the Dutch Criminal Code.¹⁵ It seems, therefore, that for the foreseeable future, the distinction between church and state marriage will remain. It is the author's opinion, however, that the objections brought against Art 1:68 are far-fetched. Whilst marriages are now solemnised between couples of the same sex as well as opposite sexes, the 'fundamental nature' of marriage remains the same: the public display of commitment between a loving couple irrespective of gender or sexuality.

2 CIVIL SERVANT DIFFICULTIES

Since the summary in the last edition of the Survey,¹⁶ two Dutch municipalities have refused to perform marriages between couples of the same sex on grounds of conscientious, religious objection.¹⁷ The law itself provides no solution for the religious objections of Registrars to performing same-sex marriages, and the municipalities must deal with the situation themselves. Registrars with conscientious, religious objections are allowed to hand these cases to another Registrar either in the same municipality or in a neighbouring municipality. The two municipalities in question stipulated that all Registrars were compelled to solemnise all marriages regardless of the gender of the parties. The Commission on Equal Treatment held that, although the requirement contained no form of

¹³ 'Kerkelijk huwelijk voor burgerlijk huwelijk blijft strafbaar' (2001) 43 *Nederlands Juristenblad* 2118-9.

¹⁴ S Roes, 'De scheiding van Kerk en Staat en het huwelijk' (2001) 11 *Tijdschrift voor Familie- en Jeugdrecht* 111-113.

¹⁵ Kerkelijk huwelijk voor burgerlijk huwelijk blijft strafbaar, op cit n 13 above.

¹⁶ *The International Survey of Family Law (2002 Edition)*, ed A Bainham (Family Law, 2002) at 281-282.

¹⁷ 'Gewetensbezwaarden hoeven geen homohuwelijken te sluiten' (2002) 13 *Nederlands Juristenblad* 696.

direct discrimination on grounds of religion, there was, however, a form of indirect discrimination since people with a religious background would be more frequently affected by such a requirement. The General Law on Equal Treatment¹⁸ requires that all forms of indirect discrimination are objectively justified. Since there were enough Registrars in the two municipalities in question who had no conscientious, religious objections to solemnising marriages between couples of the same gender, these marriages could be celebrated without problem. Therefore, there was no objectively justified reason for the compulsory requirement imposed on the Registrars. The Commission on Equal Treatment therefore concluded that the requirement imposed on the Registrars was a form of indirect discrimination which could not be objectively justified and consequently allowed Registrars with conscientious, religious objections to refuse to perform same-sex marriages.¹⁹

3 LIGHTNING DIVORCES

With the introduction of the same-sex marriage legislation, two new articles were introduced into the Civil Code, providing for the conversion of a registered partnership into a marriage and vice versa.²⁰ In this article, reference will be made to a conversion from marriage into registered partnership, but of course the same process is also valid in the opposite direction. The procedure itself states that if two people have notified the Registrar of Births, Deaths and Marriages (hereafter referred to as 'the Registrar') that they wish their marriage to be transformed into a registered partnership, the Registrar of the place of residence of one of the parties may draw up an instrument of conversion. It would seem that this Article provides the Registrar with a discretionary competence to refuse to draw up such document. However that is not the case. The Registrar is allowed to refuse to draw up such an instrument only on the grounds listed in Art 18b of Book 1 of the Dutch Civil Code.²¹ The future registered partners must live in the Netherlands (although not necessarily together)²² or one of them must possess Dutch nationality.²³ In the latter case, the conversion must take place at the Registry of Births, Deaths and Marriages in the Hague. It is also stated that the conversion shall constitute a termination of the registered partnership and cause the marriage to commence on the date upon which the deed of transformation in the register of marriages is drawn up. Importantly, the provision also states that conversion does not affect any pre-existing family law relations with children born prior to the conversion.²⁴ The mirror procedure to convert a registered partnership into a marriage is elucidated in Art 1:80g of the Dutch Civil Code.

¹⁸ Algemene Wet Gelijke Behandeling.

¹⁹ Equal Treatment Commission, 15 March 2002, Decision nr 2002-24.

²⁰ Article 77, Book 1, Dutch Civil Code provides for the conversion of a marriage into a registered partnership and Art 80g, Book 1, Dutch Civil Code provides for the reverse.

²¹ These grounds are that the parties have not complied with the grounds listed in Art 18, Book 1, Dutch Civil Code or on grounds of public policy.

²² Article 83, Book 1, Dutch Civil Code had imposed a cohabitation condition, but has since been repealed.

²³ SFM Wortmann, 'Rechtsontwikkelingen in het personen- en familierecht: flitsscheidingen en verrekenbedingen' (2002) 6477 *Weekblad voor Privaatrecht, Notariaat en Registratie* 165-172.

²⁴ Article 80g §3, Book 1, Dutch Civil Code.

One would imagine that the issue of conversion would have been heavily discussed in both academic and legislative circles. However, it appears that the issues surrounding the conversion procedure were not thoroughly thought through and many consequential problems now need to be addressed.²⁵ For example, imagine that a woman in a heterosexual marriage becomes pregnant. The couple decide that they would like to convert their marriage into a registered partnership. After the conversion is complete, the child is born. This has the consequence that, assuming the father has not recognised the child before the birth, the father of the child acquires no automatic paternity rights over the child, even though the child was conceived during a marriage and the same parties are still connected in a state-regulated institution which is equated in all but a few respects to that of marriage. Is it really justifiable that the father must then seek parental authority under the Art 252 procedure?²⁶ These issues have rarely been addressed in Dutch literature, and it is the author's opinion that this legal loophole needs to be tightened, or at the very least addressed by the legislature.

The possibility of such a conversion procedure allows for a married couple (whether of the same or different sex) effectively to divorce, if both parties are in agreement, within twenty-four hours. The question arises whether this form of dissolution is simply a form of administrative divorce.²⁷ Recent figures indicate a quadrupling in the number of heterosexual registered partnerships which coincides with the introduction of the conversion procedure from marriage to registered partnership.²⁸ Little research has been conducted in this field, although the Dutch Central Bureau for Statistics has agreed to look into whether it is possible to maintain statistics on the number of couples utilising this procedure.

The Minister of Justice has the impression that the number of dissolutions of a registered partnership after the conversion into a marriage is increasing. Nevertheless, he does not believe that the conversion of a marriage into a registered partnership necessarily leads to an impulsive divorce. After all, the only way to dissolve a registered partnership speedily is by an agreement to terminate.²⁹ The President of the Association for Family Lawyers has also stated that the number of such lightning divorces is on the decrease.³⁰

²⁵ See C Forder, 'Spiegel Matrimoniael' (1999) 32 *Nederlandse Juristenblad* 1559–1560 and Wortmann, *op cit*, n 23 above; I Sumner, 'Transformers: Marriages in Disguise?' (2003) 1 *International Family Law* 15.

²⁶ Before being able to use the Art 252 procedure, the father must first recognise the child in accordance with Art 204, Book 1, Dutch Civil Code. He must apply under Art 253c, Book 1 but is not regarded as the father until he has recognised the child. The Art 252, Book 1 procedure requires both the parents of the child to register together with a county court registrar. It requires no court intervention, and the Registrar has only limited competency and cannot determine whether the parental authority order is in the best interests of the child. For more information, see the last Survey article *The International Survey of Family Law (2002 Edition)*, ed A Bainham (Family Law, 2002) at 278–282.

²⁷ See, *inter alia*, PMM Mostermans, 'De wederzijdse erkenning van echtscheidingen binnen de Europese Unie' (2002) 3 *Tijdschrift voor het Nederlands Internationaal Privaatrecht* 263–273.

²⁸ The number of heterosexual registered partnerships in 1998 was 1,616; in 1999, 1,495; in 2000, 1,322; 2001, 2,691; and up until July 2002, 3,445 heterosexual registered partnerships have already been celebrated.

²⁹ As provided for under Art 80c(c), Book 1, Dutch Civil Code in conjunction with Art 80d, Book 1, Dutch Civil Code.

³⁰ 'Flitscheiding stuk minder populair', *Algemeen Dagblad* (15 August 2002).

C Sham marriages

The Prevention of Sham Marriages Act, as discussed in earlier Surveys,³¹ introduced into the Second Chamber on 28 October 1999, came into force on 1 April 2001.³²

III PROPERTY RIGHTS ARISING THROUGH MARRIAGE OR REGISTERED PARTNERSHIP

A Act on the Rights and Duties of Spouses

The provisions of the Act on the Rights and Duties of Spouses are described in the 2001 Survey.³³ The Act³⁴ came into force on 22 June 2001.³⁵ The proposal in the Bill to amend the law regarding liability of spouses *inter se* for household costs³⁶ was abolished by amendment on 9 October 2000.³⁷ The government followed arguments put forward by academics that the proposed new Art 84 caused more problems than the old one. In particular, the new proposal was considered unduly complicated, especially in comparison with similar, but generally more global, provisions in neighbouring countries. It was not very likely that couples would understand the new rules.³⁸ Moreover the new rules could cause injustice when the husband was the main earner and the wife worked part-time, spending the majority of her time on child-care and home-making. Were the wife in this situation to inherit property under an exclusion clause, so that it was her own and not community property, the new rules could nevertheless require her to make her inheritance available to defray the household expenses. Under the present rules, which indicate the incomes of the spouses as the primary source for discharging household expenses, her inheritance would not normally be vulnerable. The government accepted the point that this change would achieve an unfair result.³⁹ The government accepted that it was attractive to try to find a way of recognising unpaid contributions made by a spouse who worked in the home

³¹ *The International Survey of Family Law (2000 Edition)*, ed A Bainham (Family Law, 2000) at 240–253; *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001) at 301–304; *The International Survey of Family Law (2002 Edition)*, ed A Bainham (Family Law, 2002) at 278–282.

³² *Staatsblad 2001*, nr 160, Besluit van 27 maart 2001 tot inwerkingtreding van de Wet van 13 december 2000, *Staatsblad 2001*, nr 11, tot wijziging van de regeling in boek 1 van het Burgerlijk Wetboek met betrekking tot het naamrecht, de voorkoming van schijnhuwelijken en het tijdstip van de totstandkoming van de scheiding van tafel en bed alsmede van enige andere wetten.

³³ Dutch report, *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001) at 306–312.

³⁴ Act of 31 May 2001, *Staatsblad 2001*, nr 275.

³⁵ *Ibid*, Art III.

³⁶ Dutch report, *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001) at 309–310.

³⁷ Second Chamber, 2000–2001, 27 084, nr 6.

³⁸ Gr Van der Burght (2000) 6409 *Weekblad voor Privaatrecht, Notariaat en Registratie* 493–501, especially at 498.

³⁹ Second Chamber, 2000–2001, 27 084, nr 5, p 11.

rather than in paid work, but could not find any satisfactory legal form for achieving this through adjustment to Art 84.⁴⁰ Finally, it was recognised that Art 84 had in many cases little or no practical significance.

In debate in the Second Chamber, objections continued to be raised against the abolition of the duty of spouses to live together.⁴¹ These arguments were expounded in the 2001 Survey.⁴² This issue was also extensively discussed in the First Chamber.⁴³ The government maintained its position on this point that abolition of the duty of spouses to cohabit was in accordance with the modern, somewhat business-like way in which marriage is regulated in law.⁴⁴

There was fierce debate about the proposed abolition of Art 85. Article 85, Book 1, Dutch Civil Code makes spouses jointly and severally liable vis-à-vis third parties for each other's debts incurred in the course of the 'ordinary running of the household'. That provision, and the proposal for its abolition, is described in the 2001 Survey.⁴⁵ Against abolition it was argued strongly that the protection offered to third parties was not a dead letter; there was even a tendency in case-law to extend the provision to, for example, dental and medical treatment. Third parties might be more ready to extend credit in doubtful cases if they knew that both spouses would be liable.⁴⁶ An amendment to reinstate the joint liability of spouses was accepted by the Second Chamber.⁴⁷ Arguments on behalf of the government that the provision secured an outdated protection of the more economically vulnerable married woman in the 1950s⁴⁸ did not carry the day. The question why this special protection should be available to third parties dealing with a married person, whilst not extended to a third party dealing with an unmarried (though cohabiting) person, was not answered.

B Act on Contractual Participation Clauses

This Act is the second in a series of three concerned with modernisation of the law of matrimonial property. The first is the Act on the Rights and Duties of Spouses, discussed above. The third will amend the basic matrimonial system of property which applies in default of any contractual provision and will introduce an

⁴⁰ Second Chamber, 2000–2001, 27 084, nr 5, pp 12–13; nr 10, p 15 (Cohen).

⁴¹ Second Chamber, 2000–2001, 27 084, nr 7 (Van der Staaij and others); nr 10, pp 3–4, 9–11 (Van der Staaij (SPG) Schutte (RPF/GPV)); Second Chamber, 32–2721–2 (Van der Staaij).

⁴² Dutch report, *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001) at 308–309.

⁴³ First Chamber, 2000–2001, 27 084, nr 152a and 152b; First Chamber, 22 May 2001, 30–1377–1382.

⁴⁴ Second Chamber, 2000–2001, 27 084, nr 10, pp 12–15 (Staatssecretaris Cohen); Second Chamber, 6 December 2000, 32–2723–2726; First Chamber, 22 May 2001, 30–1382–1387 (Staatssecretaris Kalsbeek).

⁴⁵ Dutch report, *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001) at 311.

⁴⁶ Second Chamber, 2000–2001, 27 084, nr 10, p 5 (Vos, VVD), 15; Second Chamber, 6 December 2000, 32–2723.

⁴⁷ Second Chamber, 2000–2001, 27 084, nr 9 (Vos); Second Chamber, 12 December 2000, 34–2815 (votes).

⁴⁸ Second Chamber, 6 December 2000, 32–2724 (Cohen).

alternative basic system. The Act on Contractual Participation Clauses was passed on 14 March 2002,⁴⁹ and came into force on 1 September 2002.⁵⁰

The Act introduces a statutory system for contractual participation claims between spouses and registered partners. The statutory regulation of participation in the profits accumulated during marriage is abolished, and the new regulation takes its place in the Civil Code in Book 1, Title 8, s 2. The system which was abolished was a specific form of contractual participation, by which the spouses, who owned no common or joint property during the marriage, bound themselves in contract to share any increase in value in their respective goods. The reform introduced by the Act responds to a change in practice of married couples. In the 1950s and 1960s, only 8% of couples-to-be entered a marriage contract regulating property rights at all; the vast majority allowed their property rights to be regulated by the statutory community of property system which applies in default. At the end of the 1970s, pre-marriage contracts regulating property became more popular; in 1970, 10.5% of couples made such a contract, but in 1996, the number was 28%. Within that group of couples concluding a pre-marriage contract excluding the system of community of property, the most popular construction was total exclusion of all community of property. In 1970, 61% of couples concluding a pre-marriage contract did so in order to exclude all community of property. At that time contractual participation schemes were used in 14% of all cases of couples concluding a pre-marriage contract. But after 1975, contractual participation schemes became more popular: in 1996, 73% of all pre-marriage contracts featured contractual participation schemes.⁵¹

The attraction of exclusion of community of property is that it ensures that inherited property does not leave the family via marriage (and, in particular, marriage followed by divorce) and it protects one spouse in the event of bankruptcy of the business of the other. However, one serious disadvantage is that a spouse who is not economically active during the marriage can end up empty-handed at the end of the marriage. To deal with this problem, notaries developed clauses which excluded community of property but provided for some participation in the profits accrued by both spouses during the marriage. This rejoices in the name of the 'Amsterdam contractual participation clause', of which a new version, developed in the 1950s, is also extant. In the original Amsterdam clause the parties would divide all surplus assets present at the end of the marriage, not being assets brought in by inheritance or gift. This scheme received the blessing of the Dutch Supreme Court in 1944.⁵² In the new Amsterdam clause the division of surplus assets should take place on an annual basis. It was realised even then that spouses probably would not insist on division of assets at the end of each year. But it was considered important that each had the possibility to request

⁴⁹ *Staatsblad* 2002, nr 152 (K 27 554).

⁵⁰ Besluit van 3 juli 2002, houdende vaststelling van het tijdstip van inwerkingtreding van de wet van 14 maart 2002, tot wijziging van Boek 1 van het Burgerlijk wetboek (regels verrekkenbedingen) (*Staatsblad* 2002, nr 152), *Staatsblad* 2002, nr 370.

⁵¹ MJA Van Mourik, 'De ontwikkeling in de praktijk der huwelijkse voorwaarden', (1998) 6302 *Weekblad voor Privaatrecht, Notariaat en Registratie* 17; Second Chamber, 2000–2001, 27 554, nr 3, p 5.

⁵² Dutch Supreme Court, 21 January 1944, *Nederlandse Jurisprudentie* 1944, 45 (Van de Water-Van Hemme).

such division. Where division did take place it had the dual effect of enabling each spouse gradually to build up some private resources and furthermore it gave the spouse who was not in paid employment a measure of independence. The Amsterdam clause is an example of a final contractual participation clause (because participation only happens at the end of the relationship) and the new Amsterdam clause is an example of a periodic contractual participation clause. In both cases there is no community of property. The clauses described represent a broad general form; in notarial practice an infinite number of permutations are possible.

The new provisions are divided into three sections: Part One regulates general rules regarding contractual participation schemes. Parts Two and Three cover periodic and final contractual participation clauses respectively. The Civil Code only regulates matters regarding contractual participation clauses which can apply to all cases: aspects which vary from case to case are not provided for in the Civil Code. For example, the Civil Code does not specify whether the contractual participation applies to earned or unearned income; that is a matter for the parties to each marriage to decide. The provisions included in the Code are thus applicable to all forms of contractual participation clause, whether relating to earned or unearned income.⁵³ Most of the provisions may be excluded expressly or implicitly by the pre-marriage contract. Furthermore, it is provided that certain matters can be varied by simple contract; the parties are not bound in this case to the formal requirements applying to the making of a pre-marriage contract. Thus, in the situation of divorce, the parties can vary by simple contract the moments in time suggested in Art 142 of Book 1, Dutch Civil Code for determining the extent and content of the property in which both spouses are to participate. A number of provisions cannot be varied by the parties. These are: first, the power to request from the other spouse an annual, written overview of assets.⁵⁴ If this provision is excluded, the whole operation of participation can be thwarted. Secondly, the power to request termination of the obligation to participate cannot be excluded; nor can the power to request damages.⁵⁵ Thirdly, the power to request a payment provision⁵⁶ may not be excluded. This applies when one spouse is in financial difficulties and requires a special arrangement to spread or otherwise ease the burden of the payments. Fourthly, the limitation period applicable to contractual participation claims⁵⁷ cannot be excluded. Fifthly, the power to request a description of goods subject to the participation scheme⁵⁸ cannot be excluded. Just like the first provision, an exclusion of this provision would undermine the whole scheme.

Contractual participation clauses have generated considerable case-law in the last few years. Most persistent have been disputes regarding what should happen when the spouses, contrary to the contractual provisions, have not periodically shared in the increase in value of their respective properties, but wish to do so

⁵³ Second Chamber, 2000–2001, 27 554, nr 3, p 11.

⁵⁴ Article 138(2), Book 1, Dutch Civil Code.

⁵⁵ Article 139(2) and (3), *ibid.*

⁵⁶ Article 140(1) and (2), *ibid.*

⁵⁷ Article 141(6), *ibid.*

⁵⁸ Article 143(1)–(3), *ibid.*

when the relationship breaks down. The Dutch Supreme Court held in 1985 that the clause could be complied with by the man saving all the assets in his name throughout the marriage; a reasonable interpretation of the clause implied that these savings should be divided on breakdown.⁵⁹ Similarly, if the parties had contracted under the new Amsterdam clause, but had not divided any assets during the marriage, the Dutch Supreme Court held it was reasonable to make the division at the end of the marriage.⁶⁰ Difficult questions were raised in various cases regarding the applicability or not of various provisions in the Civil Code when one or other Amsterdam clause was used.⁶¹ There was uncertainty as to whether, if the division of assets did not take place, the spouse who had invested his property was also liable to share the profits of investment as well as the assets themselves.⁶² The Dutch Supreme Court had to lay down limits regarding the validity of a clause which provided, when periodic division of assets was stipulated by the parties but had not taken place, for lapse of the right to request division.⁶³ It is expected and hoped that the codification of this case-law in the new provisions will provide some clarity regarding the limits of contractual freedom in this field and, at the very least, will not lead to any increase in the work-load of the judiciary.⁶⁴

A brief exposition of the general principles which apply to contractual participation clauses under the new rules follows. These provisions may be deviated from in the pre-marriage contract. The provisions from which deviation is not possible have already been mentioned. The starting point is that of mutuality; both parties must have equal access to the assets subject to the duty to divide.⁶⁵ The underlying idea is that the assets should benefit the spouses equally. The same rationale underlies the provision that the division should be equal.⁶⁶ A spouse who, in the process of division, deliberately conceals property which should be divided, is obliged to compensate the other spouse.⁶⁷ The participation scheme applies only to property acquired during the existence of the duty to divide; thus property already existing before the marriage and inherited and gifted property is not subject to the scheme.⁶⁸ A testator or benefactor is entitled to

⁵⁹ Dutch Supreme Court, 15 February 1985, *Nederlandse Jurisprudentie* 1985, 885, annotation Luijten.

⁶⁰ Dutch Supreme Court, 7 April 1995, *Nederlandse Jurisprudentie* 1996, 486, annotation Kleijn (Vossen-Swinkels); Dutch Supreme Court, 19 January 1996, *Nederlandse Jurisprudentie* 1996, 617, annotation Kleijn (Rensing-Polak); Dutch Supreme Court, 28 March 1997, *Nederlandse Jurisprudentie* 1997, 581, annotation Kleijn; Dutch Supreme Court, 3 October 1997, *Nederlandse Jurisprudentie* 1998, 383, annotation Kleijn (Bal-Keller).

⁶¹ Dutch Supreme Court, 23 October 1981, *Nederlandse Jurisprudentie* 1982, 256, annotation Luijten; Dutch Supreme Court, 7 April 1995, *Nederlandse Jurisprudentie* 1996, 486, annotation Kleijn (Vossen-Swinkels); MJA van Mourik, 'Het periodiek verrekenbeding op orde gebracht', (1995) 6188 *Weekblad voor Privaatrecht, Notariaat en Registratie*.

⁶² Dutch Supreme Court, 3 October 1997, *Nederlandse Jurisprudentie* 1998, 383 (Bal-Keller).

⁶³ Dutch Supreme Court, 18 February 1994, *Nederlandse Jurisprudentie* 1994, 463, annotation Kleijn; Dutch Supreme Court, 19 January 1996, *Nederlandse Jurisprudentie* 1996, 617, annotation Kleijn (Rensing-Polak).

⁶⁴ Second Chamber, 2000–2001, 27 554, nr 3, p 10.

⁶⁵ Article 133(1), Book I, Dutch Civil Code.

⁶⁶ Article 135(1), *ibid.*

⁶⁷ Article 135(2), *ibid.*

⁶⁸ Article 133(2), *ibid.*

provide that the property he or she gives is not to be subject to any contractual participation obligation between the spouses.⁶⁹ Provision is made for the circumstances in which an asset which should have been divided has in fact been alienated. If the alienation takes place for value, the goods which are bought with that money may in some circumstances be brought under the duty to divide.⁷⁰ In principle, the division should take place with money, but in certain circumstances a division of goods in kind may take place.⁷¹ In particular, it might in some circumstances be unacceptable to sell the matrimonial home in order to satisfy the obligation to divide. This might occur where one spouse needs the home in order to bring up the children and that spouse is able to pay the outgoings and continue the mortgage repayment whilst the other spouse has no special reason to insist on sale.⁷² A division of goods in kind can only be requested by one spouse, or imposed upon the other spouse, if the circumstances are such that a payment in money would be unacceptable in the light of standards of reasonableness and fairness.⁷³ One spouse is not liable to the other for the way in which he or she manages his or her property. Poor management of property does not give rise to any liability to pay damages.⁷⁴ A corollary of this lack of responsibility for management is that it must be possible for one spouse to terminate the duty to share if the other spouse is incurring unreasonable debts, wasting assets or failing to provide information regarding the property.⁷⁵ In these circumstances, the disadvantaged spouse does have the right to be compensated by the other for his or her losses.⁷⁶

The Dutch Supreme Court's case-law regarding the situation when division has not taken place when it should have done, is codified in Art 141, Book 1, Dutch Civil Code. In principle the property which should have been divided, but has not been, will be the subject of a division at the end of the relationship: a periodic participation clause is thus treated in these circumstances as a final participation clause. However, other property might be included in this later division if such is required by considerations of reasonableness and fairness.⁷⁷ The obligation to divide is not extinguished earlier than three years from the end of the marriage. The parties cannot agree to a shorter period.⁷⁸ Because divorce can be a very emotional period, a period for consideration of such an important matter as division of assets accumulated throughout the marriage should not be subject to shortening.⁷⁹

⁶⁹ Article 134, Book 1, Dutch Civil Code.

⁷⁰ Article 136, *ibid.*

⁷¹ Article 137, *ibid.*

⁷² Second Chamber, 2000–2001, 27 554, nr 3, p 15.

⁷³ Second Chamber, 2001–2002, 27 554, nr 5, pp 10–11; nr 6.

⁷⁴ Article 138(1), *ibid.*

⁷⁵ Article 139, *ibid.*

⁷⁶ Article 139(2), *ibid.*

⁷⁷ Article 141(3), Book 1, Dutch Civil Code; Second Chamber, 2001–2002, 27 554, nr 5, pp 12–13; nr 6.

⁷⁸ Article 141(6), Book 1, Dutch Civil Code.

⁷⁹ Second Chamber, 2000–2001, 27 554, nr 3, pp 17–18.

Many of the criticisms of the Act on Contractual Participation Clauses⁸⁰ are connected with the complexity of putting a relatively simple idea into practice. The kind of complexity is illustrated by recent case-law of the Dutch Supreme Court. On 2 March 2001 the Dutch Supreme Court gave judgment in a fishing business case.⁸¹ The parties had contracted to exclude all community of property, but had provided, on the basis of the Amsterdam clause, that there would be division of the assets built up by the parties during the marriage. The assets had not been divided during the marriage. The court accepted that the husband's assets, which included active shares in his fishing business, should be brought into the division. The question was how this should be done. The duty to divide includes not only assets accumulated, but also the profits of any investments made with such assets. The Dutch Supreme Court held that a clause purporting to exclude reliance upon a claim to divide assets after a period of time had elapsed, could only be relied upon where such was fair and reasonable. The court rejected the husband's claim to invoke that clause; there were no circumstances justifying reliance upon it. However, the court stressed that the spouses' liability to divide was always subject to the principles of reasonableness and fairness. This meant, in particular, that the wife could not expect the husband to sell his business in order to achieve maximum realisation of his assets. (The wife had led the unprepossessing argument that the husband was the oldest fisherman in the fleet and could therefore be expected to retire.) A crucial argument was the method by which the value of the fishing business should be calculated. The wife argued for liquidation value; this would be the maximum valuation. But since the court had rejected the argument that the husband should be expected to cease his business, it was logical to reject the argument that his liability to divide assets should be founded on a valuation which assumed that he had sold the business. The valuation preferred by the court was the yield value. This was the lowest valuation. The court held that it was necessary to use this conservative valuation as the husband's earnings were determined to a decisive extent by fishing quotas. The amount of these fishing quotas were impossible to predict as they were determined by European Union and national fishing policy. Furthermore, considerations of reasonableness and fairness meant that the wife's claim to division could never extend so far that the husband would be required to make a payment which would place the husband's source of livelihood in jeopardy. In applying this principle, it was reasonable to take account of any future developments possibly causing a decrease in the yield of the business, in particular, a possible lowering in fishing quotas in the future.

In a case decided by the Dutch Supreme Court on 26 October 2001, the dispute was about the date at which the goods to be divided should be valued.⁸² The parties were married under exclusion of all community of property, but they

⁸⁰ For critical comments on the Act, see: LCA Verstappen, 'Naar nieuwe verrekenstelsels (I)' (2000) 6387 *Weekblad voor Privaatrecht, Notariaat en Registratie* 67-72, and (2000) 6388 *Weekblad voor Privaatrecht, Notariaat en Registratie* 92-95; Gr van der Burght, 'Wetsvoorstel nieuw huwelijksvermogensrecht: Beter laat dan nooit, maar toch te vroeg (I)' (2001) 6437 *Weekblad voor Privaatrecht, Notariaat en Registratie* 251-259, (2001) 6438 *Weekblad voor Privaatrecht, Notariaat en Registratie* 277-280.

⁸¹ *Nederlandse Jurisprudentie* 2001, 583 and 584, annotation Wortmann.

⁸² *Nederlandse Jurisprudentie* 2002, 93, annotation Kleijn.

had contracted an Amsterdam clause, which required them to divide from time to time the assets acquired during the marriage. No division had ever taken place. During the marriage the parties had bought their first house in the husband's sole name and financed by a mortgage in the husband's name. The first house was sold for a price far above the price originally paid; partly with this profit the couple bought their second house which was in both names. The question arose as to the date at which the property should be valued; in particular whether the increase in value of the first house should be included in the division of assets. The general principle that the relationship between the parties is governed by the principles of reasonableness and fairness does not provide a good indication for the answer to such a specific question. The Dutch Supreme Court noted that, although the parties were bound to share the assets accumulated during the marriage on an annual basis, they had not done so. Nor had either of them kept a track of their financial matters in order to facilitate such division at a later date. The court held that the principles of reasonableness and fairness implied that the parties are bound to divide, in accordance with the contractual participation clause, assets acquired during the marriage when it cannot be established that the parties or a third party had the intention that that asset should be in the sole property of one of the spouses. In principle, it is reasonable to assume, if the parties have made no provision to the contrary, that the property was acquired in consequence of investment of income which should have been divided. In practice, this meant that the husband was obliged to share the extra value of the first house with his wife. The Supreme Court remarked that the first house, although transferred into the husband's name, was bought on a mortgage paid off by their joint incomes.⁸³ Moreover, the profits made on sale of the first house were used to buy a second house in joint names. In these circumstances, the Supreme Court could see no indication that the parties had any other intention than that the profits of the house should ultimately accrue to husband and wife jointly.

C Act on Conflicts of Law arising in cases of Pension Adjustment

On 1 May 1995, new pension adjustment rules after divorce came into force.⁸⁴ Under the old law, upon the death of a spouse, the surviving spouse had an automatic right to a share of any pension accumulated during the lifetime of the deceased.⁸⁵ The Pension Adjustment After Divorce Act (hereafter called the PAADA) extended these rules to divorced couples, albeit only with limited rights being extended to the divorcée on the pension accumulated during the marriage by the other spouse. However, in many cases the question concerning the applicable law began to arise when spouses, either by virtue of their nationality or by virtue of their place of residence, had connections to a country other than the Netherlands. Take a married couple, married in accordance with the law of a country other than the Netherlands, who move to and take up residence in

⁸³ This conclusion was remarkable, as neither the court of first instance nor the Court of Appeal had concluded this from the facts.

⁸⁴ Wet verevening pensioenrechten bij scheiding, *Staatsblad* 1991, nr 628.

⁸⁵ *Tractatenblad* 1988, nr 130 (14 March 1978). Ratified by the Netherlands and came into force through the Wet Conflictenrecht Huwelijksvermogensregime, *Staatsblad* 1991, nr 628.

the Netherlands. They begin working there and build up their pension schemes in the Netherlands. What is the applicable law regulating the pension adjustment after divorce? According to the original pension scheme rules, the answer was left open. However, since the enactment of the Act on the Conflict of Laws arising in cases of Pension Adjustment,⁸⁶ based on proposals of the *Staatscommissie*,⁸⁷ new provisions lay down rules to deal with these situations. A new Art 10a, PAADA provides that, in the case of a divorce where one party has the right to a share of the pension scheme built up by the other spouse, the applicable law is the same as that applicable to the matrimonial property scheme. The Act came into force on 1 March 2001. The law deals only with marriages,⁸⁸ the international private law aspects of registered partnership are to be dealt with separately.⁸⁹

IV MAINTENANCE OBLIGATIONS

A Marriage is the basis of the maintenance obligation

When is a marriage not a marriage? For some purposes, in particular immigration, the civil status registrar may refuse to register a marriage contracted with no other objective than to obtain a right of residence. Furthermore, such marriage may, even after it has been contracted, be declared null and void.⁹⁰ But it is no defence to an action for spousal maintenance that both parties contracted the marriage with no other intention than to evade immigration laws by providing the husband with a right of residence, even though there was no consummation and the parties never lived together. The Dutch Supreme Court held on 1 February 2002 on these facts that as long as the marriage had not been declared null and void it was valid for the purposes of bringing a maintenance obligation into existence.⁹¹ The Supreme Court rejected an argument that the maintenance obligation came into effect only if the spouses could be shown to care for one another, to live together or otherwise run a joint household. And it was certainly not the case that it was necessary to demonstrate that there is a causal connection between the way in which the parties have organised their lives during the marriage and the reduced earning capacity of the partner seeking maintenance support. Those factors were all relevant for determining the extent of the obligation, in value and in time, but were not relevant for determining whether there was any obligation at all.⁹² The Supreme Court was unimpressed by the fact that the administrative court had concluded

⁸⁶ Wet conflictenrecht pensioenverevening, Wet van 13 december 2000, *Staatsblad* 2000, nr 4.

⁸⁷ Advies inzake pensioenverevening (Staatscommissie, April 1998).

⁸⁸ Since the Dutch definition of marriage has been altered in Art 1:30, this provision is equally valid for same-sex marriages, as for opposite-sex marriages.

⁸⁹ Advies inzake geregistreerd partnerschap (Staatscommissie, May 1998).

⁹⁰ Articles 51 ff, Book 1, Dutch Civil Code. See Dutch report, *The International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001) at 304–306 and Dutch report, *The International Survey of Family Law (2000 Edition)*, ed A Bainham (Family Law, 2001), at 252–253.

⁹¹ *Nederlandse Jurisprudentie* 2001, 171.

⁹² See also Dutch Supreme Court, 9 February 2001, *Nederlandse Jurisprudentie* 2001, 216, annotation Wortmann.

that the marriage was a sham for immigration purposes and for the purposes of social security liability. The orders of the administrative court did not in any way undermine the fact that the marriage was valid for civil law purposes unless and until declared void. The defendant argued that, since the declaration by the immigration court that he should leave the Netherlands, he was obliged to live in the underworld and that he had no access to the employment market. It was therefore unreasonable, argued the defendant, for the civil court to order him to pay maintenance. In the Supreme Court's view, this point was relevant to the extent of liability, but not to the existence of the obligation.

B No termination of ex-husband's maintenance obligation in consequence of cohabitation with a married man

According to Art 160, Book 1, Dutch Civil Code, the liability of an ex-spouse to pay partner maintenance terminates automatically when the ex-spouse in receipt of maintenance marries or registers a partnership, or lives with another person as if they were married or had registered a partnership. The approach of the Dutch Supreme Court to the question whether the ex-spouse is living together with another within the meaning of Art 160, is, in the light of the very drastic consequences, notoriously restrictive.⁹³ Thus, the Dutch Supreme Court recently held that, if a wife who is in receipt of maintenance starts living with a married man, she cannot be said to be living with another person as if they were married. The Supreme Court reiterated its earlier position that cohabitation within the meaning of Art 160 implies that the cohabitants have an emotional relationship of enduring character and that the partners care for each other, live together and have a joint household. In short, the relationship should have the characteristics of commitment associated with a normal marriage.⁹⁴ The intention of the parties in this case was not to live together permanently, but merely to provide the married man with accommodation in a period during which he was looking for a new place to live. The very short period of living together – a total of four months – and its limited purpose indicated that in this case the comparison with marriage was inappropriate. Furthermore, the parliamentary history of Art 160 indicated that the purpose of including under Art 160 the situation in which the person in receipt of maintenance was living with another, was to avoid such a person having an incentive to cohabit rather than to re-marry. However, if the new partner is married, the wife in receipt of maintenance has no option but to cohabit, since her chosen new partner is simply unavailable for marriage. In this case the new partner had no intention of divorcing his wife, who was a psychiatric patient.

The Dutch Supreme Court pointed out that the fact that the wife is living with another man is a circumstance which the court is entitled to take into account when determining the extent of her need for maintenance in accordance with Art 157 of Book 1. Moreover, the court has power, under Art 401 of Book 1,

⁹³ Article 160 is discussed in the Dutch Report, *The International Survey of Family Law 1994*, ed A Bainham (Martinus Nijhoff, 1996), at 355–356.

⁹⁴ Dutch Supreme Court, 2 April 1982, *Nederlandse Jurisprudentie 1982*, 374; conclusie A-G Franx in Dutch Supreme Court, 10 April 1981, *Nederlandse Jurisprudentie 1981*, 348; Dutch Supreme Court, 25 November 1994, *Nederlandse Jurisprudentie 1995*, 299, annotation de Boer.

Dutch Civil Code, to adjust maintenance liability in the light of changed circumstances affecting the needs of the person in receipt of maintenance. The court added that it was preferable to take account of it in this way, rather than under Art 160, as the court is able to take account of all the specific circumstances of the case and to reach a decision in the light thereof.⁹⁵

Given that the court has this flexible jurisdiction under Art 401 of Book 1, Dutch Civil Code to take account of any new developments indicating a change in the needs of the person receiving maintenance, it is far from evident that Art 160, Book 1 is needed at all. Moreover, the restrictive interpretation of Art 160 by the Dutch Supreme Court in the above case and a list of other cases has reduced it more or less to a dead letter. Many other legal systems do quite well without such a provision.⁹⁶ The Dutch government has said, in response to remarks in Parliament during the introduction of legislation on marriage, that it will review the operation of Art 160, Book 1, Dutch Civil Code.⁹⁷ Advice is now being sought from the Dutch Society for Case-Law and the Dutch Order of Advocates.

C Maintenance obligation of mother's female partner

The Dutch Supreme Court passed judgment on 10 August 2001 on the question whether the mother's female partner could be held liable to pay maintenance in respect of the child born five years earlier to the mother. The two women had had a relationship of ten years' standing and, after five years, they had together arranged the conception and birth of the child who was born to the plaintiff, and they had together brought up the child for five years. When the couple separated the defendant denied that she was liable to pay maintenance. According to Art 394, Book 1 of the Civil Code, a man who consents to his female partner receiving artificial insemination treatment can be sued for maintenance of the child. Because that provision refers to a 'man', the birth mother's female partner who consented to artificial insemination cannot be sued for maintenance. The Supreme Court noted that the question had already been raised in Parliament when the Bill was being debated, and that the Parliament was informed that the provision did not include a woman. The Dutch Supreme Court confirmed that there was no provision of international law leading to another result. The court maintained the argument that, in the absence of provision by the legislator, a maintenance obligation could only be based upon marriage or partnership or a blood tie or something which could have been a blood tie.

The Supreme Court rejected an argument that there was relationship of 'family life' within the meaning of Art 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) between the two women. Family life was alleged to arise from the fact that the women had lived together as partners for more than ten years and had given birth to and cared for a child together for more than five years. The interpretation of family life by the

⁹⁵ Dutch Supreme Court, 13 July 2001, *Nederlandse Jurisprudentie 2001*, 586, consideration 3.5.

⁹⁶ For example, Sweden: A Agell, 'Samenwonen zonder huwelijk', in CD Saal and CJ Straver (eds), *Samenleven in meervoud, juridische en sociologische aspecten van het samenwonen zonder huwelijk* (1981, Samson sociale en culturele reeks, Alphen aan de Rijn/Brussel) at 192-214.

⁹⁷ First Chamber, 2000-2001, 27 084, nr 152a, p 2.

Dutch Supreme Court such that the lesbian co-parents are excluded is highly questionable. Despite the fact that the issue concerned maintenance, and therefore did normally fall within the scope of 'family life' in Art 8 of the ECHR, the court allowed itself to be distracted by the lesbian character of the relationship which the court saw as a reason to negate 'family life'. Because the Supreme Court concluded that the relationship did not fall under the protection of Art 8 of the ECHR, the Supreme Court did not have to consider the discrimination argument based on Art 14 of the ECHR. Article 14 of the ECHR does not apply to a situation of fact not falling within the scope of another Article of the Convention.⁹⁸ It is regrettable that the applicants did not allege violation of Art 26 of the International Covenant on Civil and Political Rights (ICCPR), which is an independent discrimination provision applicable regardless of whether the subject-matter of the claim falls under another Article of the ICCPR.⁹⁹ It is equally difficult to appreciate why the Supreme Court did not apply Art 26 of the ICCPR of its own motion.¹⁰⁰ In our view this question should be run again under the Twelfth Protocol of the ECHR when it comes into force.¹⁰¹ That protocol provides protection from discrimination in situations of fact not covered by another Article of the ECHR.

The Swedish Commission on Children in Homosexual Families recommended in 2001 that, if the female partner of the birth mother consents to donor insemination which results in the birth of a child and subsequently the partner denies that she is the child's parent, it should be possible for the birth mother to apply to the court for an order establishing that the partner is the parent of her child or establishing liability for maintenance.¹⁰²

V PARENTHOOD BY DESCENT

A Right to know one's origins

The Bill on Storage and Disclosure of Information on Gamete Donors, described in the 2000 Survey,¹⁰³ was passed on 25 May 2001¹⁰⁴ and will be brought into force in stages by statutory instrument. The provisions of Art 3 regulating disclosure of identifying information about the donor¹⁰⁵ will come into force on 29 May 2004.¹⁰⁶

⁹⁸ Dutch Supreme Court, 10 August 2001, *Nederlandse Jurisprudentie* 2002, 278, annotation Jan de Boer.

⁹⁹ Opened for signature in New York on 18 December 1966.

¹⁰⁰ Annotation Jan de Boer, under the Supreme Court's decision in *Nederlandse Jurisprudentie* 2002, 278.

¹⁰¹ Opened for signature on 4 November 2000, *Tractatenblad* 2001, nr 18. Ratification by the Netherlands is pending (K 28 100(R 1705)).

¹⁰² SOU 2001:10, p 14.

¹⁰³ Dutch report, *The International Survey of Family Law (2000 Edition)*, ed A Bainham (Family Law, 2000), 256–261.

¹⁰⁴ *Staatsblad* 2002, nr 240.

¹⁰⁵ Article 3(2), second sentence, and (3)–(5).

¹⁰⁶ Act of 25 May 2002, *Staatsblad* 2002, nr 240, Art 14.

In the 2000 *Survey*, it was mentioned that the government would commission research to examine the likely effects upon prospective sperm donors of disclosure of identifying information regarding the donor.¹⁰⁷ This research was submitted to the Second Chamber of Parliament in September 1999.¹⁰⁸ At present, there are some 500 sperm donors in the Netherlands: 433 'A' donors (anonymous) and 71 'B' donors (who disclose their identity). The research shows a difference in the motives for the men to become sperm donors. Category 'B' donors, in contrast to category 'A' donors, are more frequently single, and have themselves no children and often do not wish for them. Regarding all donors and potential donors,¹⁰⁹ the most commonly given reason for being a donor was to help someone else to have a child. The research tried to estimate what the effect would be upon the willingness of men to come forward as donor after introduction of the Act on disclosure of information regarding sperm donation. Of those interviewed, who are at present acting as sperm donors, 50% said that after the Act had come into force they would not be prepared to be a sperm donor any more. One third of those presently acting as sperm donors said that they would be prepared to continue acting as donor after the Act came into force. The results also indicate that the provisions of the Act are not well known or well understood. A publicity campaign may have a positive effect upon the willingness of men to act as sperm donors.

B Act regulating conflicts of law in cases in which parenthood by descent is at issue

In cases where parenthood by descent is at stake, current practice refers all cases to a judge whose answer is characterised by the use of unwritten rules and an absence of argumentation. However, on 14 March 2002, the government passed a long-awaited codification of the private international law rules related to such issues.¹¹⁰ The aim of this codification was to fill the lacuna for the Registrar of Births, Deaths and Marriages and to codify the current case-law in the field. The Act itself, as suggested by a report written jointly by the *Staatscommissie* and the Permanent Commission for cases involving civil status and nationality,¹¹¹ is divided into 13 Articles, subdivided into five chapters. The first chapter deals with the situation of parenthood by descent in relation to married or divorced couples; the second with parenthood by recognition or judicial determination of fatherhood; and the third with parenthood by legitimation.

Article 1 lays down a three-tier hierarchical system for the applicable law in cases where the parenthood of a child is in question. Since the birth mother is

¹⁰⁷ Dutch report, *The International Survey of Family Law (2000 Edition)*, ed A Bainham (Family Law, 2000), 261.

¹⁰⁸ M den Otter, M Trommelen and G van der Veen, *Bereidheid tot donatie van sperma bij opheffing van anonimiteitswaarborg* (September 1999, ZorgOnderzoek Nederland/Zon, SWOKW).

¹⁰⁹ This was simply a random selection of men whose names were chosen from the telephone directory and who were in the relevant age group: p 17 of the report.

¹¹⁰ A number of cases (Dutch Supreme Court, 31 January 1992, *Nederlandse Jurisprudentie* 1993, 261, and Dutch Supreme Court, 7 November 1997, *Rechtspraak van de Week* 1997, 217) highlighted the need for legislation in this field.

¹¹¹ Second Chamber, 2001–2002, 26 675, nr 3.

under Dutch law always considered to be the legal mother,¹¹² this Article really in effect only refers to questions relating to fatherhood. If the man and wife have a common nationality then this is to be regarded as the applicable law.¹¹³ In its absence, the applicable law will be the law of the state where the man and woman have their habitual residence, or if this is also absent then the state of habitual residence of the child. The same law is also to be applied to the question of whether such a decision can be annulled.¹¹⁴ If the parties are not married then the parenthood of the child is determined according to the law of the birth mother's nationality.¹¹⁵

In cases involving the recognition of a judicial determination of paternity, a similar hierarchical system of applicable law is applied. Reference is made in the first place to the law of the state of the man's nationality, followed in its absence by the law of the state of the habitual residence of the child. If this is also absent, then the law of the state of the child's nationality determines questions relating to parenthood.¹¹⁶

The legitimation of a child by reason of the marriage of one of his or her parents, or by reason of a subsequent decision of a legal or another competent authority, is determined by reference to the 1970 Rome Agreement.¹¹⁷ An irrevocable foreign legal decision, whereby the parenthood by reason of parentage is determined or changed, will always be recognised in the Netherlands, unless:

- (1) there appears to be insufficient connection with the Netherlands to found the jurisdiction of the Dutch judge;
- (2) there is evident lack of research or argumentation undertaken; or
- (3) the recognition of the decision would be contrary to the public policy of the Netherlands.¹¹⁸

Such an Act is long overdue and provides the necessary clarity needed in this field, even if it is slightly unfortunate that such a complicated system of hierarchical conflicts of law rules has been chosen. The decisions previous to the Act had brought a somewhat arbitrary feeling to this field of law, which this Act will hopefully begin to dispel.

C Mixed case-law on the establishment of parenthood

As already stated in the previous section, motherhood is almost always ascertainable. Fatherhood, on the other hand, is a more complicated issue. The new parentage rules introduced on 1 April 1998 have created a system of legal

¹¹² Article 198, Book 1, Dutch Civil Code.

¹¹³ If the husband and wife have more than one common nationality, then Art 1(3) determines that they are deemed to have no common nationality.

¹¹⁴ Article 2(1), Wet conflictenrecht afstamming, *Staatsblad* 2002, nr 153.

¹¹⁵ Article 3(1), *ibid.*

¹¹⁶ Article 4(1), *ibid.*

¹¹⁷ *Tractatenblad* 1972, nr 61 (10 December 1970).

¹¹⁸ Article 9(1), Wet conflictenrecht afstamming, *Staatsblad* 2002, nr 153.

paternity which gives strong emphasis to the blood link.¹¹⁹ The new rules, as discussed in previous Survey reports,¹²⁰ extended the father's rights in a number of determinate fields. For example, old Art 224(1) had required a father to obtain the mother's consent before he was able to recognise the child. Article 204(3) codified the case-law from the Dutch Supreme Court and gave the court the power to substitute the mother's consent. This provision has recently been tested in two Supreme Court cases.

In a case before the Supreme Court on 16 February 2001, the parties had had a relationship from October 1995 until the end of 1997, during which time they had cohabited for one and a half years.¹²¹ In 1998, after the break-up of the relationship, a child was born. The father, who wanted to recognise the child, submitted a claim on the basis of Art 1:204(3) of the Dutch Civil Code.¹²² The district court allowed the request and the mother appealed. The Court of Appeal in Amsterdam stated that:

'The father of a child, who is born outside of a marriage, is he who recognises the child. For a recognition to be valid the father needs the permission of the mother. Art 1:204(3) of the Civil Code grants the man, who is the begetter of the child and to whom the mother bestows no permission, a procedural right. The begetter can, when the conditions of Art 1:204(3) of the Civil Code are satisfied, request that the permission be substituted by that of a district court. The basic assumption in this procedure is that both the child and the begetter are aware that the recognition will have consequences for their parentage relationship. It is in this light not reasonable for the mother to ban the father from the child's life.'¹²³

The mother made three claims in her appeal case of which the first is of most interest. She claimed that the Court of Appeal had misunderstood the weighting of the interests of the child, the mother and the father. Reference was made to Art 204(3), Book 1, where it is stated that the mother's permission can be substituted by the court if the recognition would not prejudice the interests of the mother or child. The Court of Appeal had, however, mentioned a number of situations where the best interests of the mother would be preserved by a refusal of substituted permission, eg in instances of rape. However, a similar situation was here not evident. The Supreme Court agreed with the Court of Appeal in Amsterdam, and the appeal was subsequently rejected. It is interesting here to see the Supreme Court's reasoning in allowing the father to recognise the child quite regardless of the quality of the relationship with the mother or the child. Previous to this decision it was a widely held opinion that the father would have to prove 'family life' within Art 8 of the ECHR.

¹¹⁹ For further information, see SFM Wortmann, 'Nieuw afstammingsrecht' (1997) 12 *Tijdschrift voor Familie- en Jeugdrecht* 282-287.

¹²⁰ Dutch report, *The International Survey of Family Law (1997 Edition)*, ed A Bainham (Martinus Nijhoff, 1999), at 259-308.

¹²¹ Dutch Supreme Court, 16 February 2001, *Nederlandse Jurisprudentie 2001*, 571.

¹²² This provision allows for a district court to substitute its permission for the mother's permission in a recognition procedure.

¹²³ Author's own translation.

The application of this Article was subsequently brought under review on 31 May 2002.¹²⁴ A begetter¹²⁵ wished to recognise his child, which had been born outside marriage. The mother refused to consent to the application. The father requested substituted permission, which the district court subsequently granted. The mother appealed; however, before the decision of the Court of Appeal, the mother's spouse, with the permission of the mother, recognised the child. The biological father requested that this second recognition be disregarded by the court since he had already requested substituted permission and proceedings were still pending. The Court of Appeal held the recognition to be invalid. The mother appealed. The Supreme Court held that, from the moment when a request for substituted permission by the biological father has been granted, the mother can only grant conditional permission to another for recognition. This conditional permission therefore has effect only when the request for substituted permission is judicially refused. The case is striking since it gives an *a priori* right to biological parentage over and above parentage established by dint of marriage. It is also surprising that the issue of bad faith on the mother's part was not discussed.

Another area which has been heavily discussed concerns DNA-testing. In a case brought to the Court of Appeal in The Hague in May 2001,¹²⁶ a child had been born in 1996 to a married couple who divorced in 1998. The father had signed the birth certificate and was registered as being the father. The mother applied for a declaration of non-paternity. The mother stated that she had had an extra-marital relationship and in this period had become pregnant with the child. She believed that it was in the best interests of the child to know who her real biological father was. It was common knowledge, according to the mother, that her husband was not the father, and she wanted to prevent the child hearing this from a third party. The father refused to have a voluntary DNA-test. The mother requested that the Court of Appeal order a DNA-test. The father continued to assert that he was the child's biological father and denied that he had ever said that he was not the biological father. The Court of Appeal, with reference to previous case-law, held that a declaration of non-paternity can be made only when circumstances indicate that the father cannot reasonably be the biological father of the child. The burden of proof lies with the claimant, in this case the mother, to prove such allegations, which she had failed to do. A DNA-test results in a serious infringement of the physical integrity of the father, which can only be justified if there were already reasons to believe that the father cannot plausibly be the father of the child. Therefore, the Court of Appeal held that a declaration of non-paternity would not be granted. This case can be seen in stark contrast with the Supreme Court case of 22 September 2000 where the decision revolved around an application for paternity recognition instead of non-paternity.¹²⁷

The parties had had a relationship from April 1995, during which period they also lived together for just under a year. They separated but remained in contact.

¹²⁴ Dutch Supreme Court, 31 May 2002, *Nederlandse Jurisprudentie* 2002, 470, annotation de Boer.

¹²⁵ The term *verwekker* in Dutch refers to the biological father who provides genetic material through sexual intercourse. This therefore excludes a biological father who provides sperm via sperm donation.

¹²⁶ Court of Appeal, The Hague, 16 May 2001, case number 955-R-00; (2001) 9 *Tijdschrift voor Familie- en Jeugdrecht* 246.

¹²⁷ Dutch Supreme Court, 22 September 2000, *Nederlandse Jurisprudentie* 2001, 647.

In May 1998 a child was born which the mother claimed to be the child of her ex-partner. The man denied the allegation and refused to recognise the child as his own. The mother subsequently requested the district court to establish the biological fatherhood of her child. The case pivoted on the DNA-tests that needed to be undertaken. The district court undertook expert research, which the Court of Appeal confirmed. The fact that the man could well be the begetter of the child can be reason enough for the ordering of DNA-tests. The district court judge was, held the Supreme Court, justified in holding that expert DNA-tests be undertaken even if this was to have an impact upon the bodily integrity of the man himself. This case serves to reinforce the current position under Dutch law, that if a man could be a possible begetter of the child, then the judge is justified and competent to order DNA-tests to be undertaken.¹²⁸ If the father were to refuse to submit to the tests, adverse conclusions could be drawn.

D Procedural position of minors in parentage litigation

Even though the Dutch legislature has consistently avoided confronting the question whether an independent right to bring proceedings for minors should be introduced,¹²⁹ there is continued debate and disagreement as to its desirability.¹³⁰ Since 1995, a number of individual pieces of legislation have increased the right of a minor to bring his or her own case before the court, but it is still the case that a minor is normally treated as incompetent to commence legal proceedings and therefore needs a representative. In a number of special family law procedures, the child plays a central role. Examples are the annulment of the recognition of a child,¹³¹ an application procedure for a declaration of non-paternity,¹³² or the legal declaration that a man is the child's father.¹³³ The question therefore arises whether the child can play an independent role in such proceedings, or must he or she be represented by a representative?

If the request is made by the father or mother, then the child is treated as an interested party and earns the right to be represented by a court-appointed curator.¹³⁴ However, if the minor child requests an alteration in his or her own legal parental status, then the child is represented by a court-appointed curator who is treated as the claimant.¹³⁵ It was decided in 1995 that the increased juridicalisation of family arguments was not desirable and therefore the possibility for children to bring claims themselves should, as far as possible, be kept to a minimum. However, as compensation, the rights and duties of the *curator bonis* were extended.

¹²⁸ A Heida, 'Vaderschapsprocedures en DNA-onderzoek' (2002) 5 *Tijdschrift voor Familie- en Jeugdrecht* 122–129.

¹²⁹ Second Chamber, 1989–1990, 21 309.

¹³⁰ P Vlaardingerbroek, 'De bijzondere curator en het afstammingsrecht' (2001) 4 *Tijdschrift voor Familie- en Jeugdrecht* 101–107.

¹³¹ Article 200, Book 1, Dutch Civil Code.

¹³² Article 200(4), *ibid.*

¹³³ Article 199d, *ibid.*

¹³⁴ Article 250, *ibid.*

¹³⁵ Article 212, *ibid.*

In emergency procedures, where the fundamental rights of a minor child are in issue and the appointment of a special court-appointed guardian cannot be delayed, it is clear that the child should in principle be represented by a special court-appointed curator, if the interests of the child are contrary to those of the parents.¹³⁶ It seems that in parentage cases the child's interests are required to be represented by a court-appointed curator. The case-law on whether a special court-appointed curator is able to request a declaration of non-paternity, the annulment of recognition of the child or the legal declaration that a man is the child's father if the child is younger than 12, is contradictory.

In a recent case in the district court in Rotterdam,¹³⁷ a child requested the annulment of a recognition, stating that the man was not his biological father.¹³⁸ The claim was, however, made by the mother of the child in her position as an interested party in the case. The minor requested a DNA-test be undertaken to establish parentage. The district court decided that, in accordance with Art 7(1) of the UN Convention on the Rights of the Child,¹³⁹ a child has the right from birth to know who his or her parents are. The district court in its judgment implied that the minor has the right to know whether his or her legal parents are also his or her biological parents. Stemming from the provisions of the Convention on the Rights of the Child, the Rotterdam district court also held that this implied that it needed to be sure that the child was financially capable of bringing such a claim. If that be the case, and the child is a party to the case, then this places the obligation on the Kingdom of The Netherlands to pay for the costs of the case.¹⁴⁰ This must be seen in contrast to the case discussed above at C before the Court of Appeal in The Hague on 16 May 2001, where the DNA-test was refused. In the present case, there were factors indicating that the defendant might not be the father.

VI ADOPTION

A Intercountry adoption

Adoption has been possible in the Netherlands since 1956, but to this day there remains an evident lack of rules concerning the private international law issues relating to adoption cases falling outside the scope of the 1993 Hague Convention on Adoption.¹⁴¹ A Bill on conflicts of law rules in adoption cases has, therefore, now been sent to the Dutch Council of State.¹⁴² The Bill regulates which law a

¹³⁶ Article 250, Book 1, Dutch Civil Code. P Vlaardingebroek, 'De bijzondere curator en het afstammingsrecht' (2001) 4 *Tijdschrift voor Familie- en Jeugdrecht* 101-107.

¹³⁷ District Court Rotterdam, 10 July 2000, rek nr 00-203.

¹³⁸ I Pieters, and P Dorhout, 'Jurisprudentie: Afstamming' (2001) 1 *Tijdschrift voor Familie- en Jeugdrecht* 24.

¹³⁹ *Tractatenblad* 1990, nr 46. Came into force in the Netherlands on 7 March 1995.

¹⁴⁰ Article 182(3), Dutch Code on Civil Procedure; *Airey v Ireland* (1979) 2 EHRR 305.

¹⁴¹ Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption 1993, *Tractatenblad* 1993, nr 197. This Convention was brought into force in the Netherlands by the Wet van 14 mei 1998 tot uitvoering van het op 29 mei 1993 's-Gravenhage tot stand gekomen verdrag, *Staatsblad* 1998, nr 302.

¹⁴² Wetsvoorstel Conflictenrecht Adoptie, (2002) 2 *Nederlandse Juristenblad* 107.

Dutch judge must apply in adoption cases in international cases, as well as the conditions for the recognition of foreign adoptions which fall outside the scope of the 1993 Hague Convention. The proposal has no impact on cases that fall within the scope of the 1993 Hague Convention.¹⁴³

According to Art 3(1), Dutch law will apply to all adoptions obtained in the Netherlands except on issues related to the permission, consultation and informing of the child's parents, other people or institutions.¹⁴⁴ These issues will be referred to the law of the child's nationality. If the child is in possession of two or more nationalities then the nationality with which the child has the closest connection will be deemed to be applicable. If this law does not recognise the adoption, then Dutch law will apply in default. In the explanatory notes, it is stated that, at first sight, it might seem strange that a separate Article is deemed necessary when dealing with the legal consequences attached to an adoption order. However, under Dutch law, different private international law rules may apply depending upon the legal issue being discussed. For example, if discussing issues related to the child's inheritance rights, then reference to the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons must be made. Here it is stated that, in the absence of a chosen choice of law, the habitual residence of the testator or testatrix will be applicable. Conversely, if one was discussing the parental maintenance obligations with respect to the child, the law of the child's habitual residence is applicable.¹⁴⁵ The government has consequently opted for an all-encompassing rule to govern all questions related to the legal consequences of adoptions falling under the scope of this Bill.

The third section of the Bill deals with the recognition of foreign adoptions and their legal consequences. The basic assumption and core of the definition is that the decision in question, which creates parental ties between the child and the adoptive parents, must have been made by a competent authority.¹⁴⁶ Currently the vast majority of cases which come before Dutch judges are decided in accordance with unwritten and rather arbitrary rules. By introducing a standardised set of applicable law rules, it is hoped to harmonise the decision-making process and create more certainty in this field.¹⁴⁷

The Bill makes a distinction between a number of different types of adoption depending on where the parties are habitually resident. The habitual residence is taken to be the habitual residence of the party, both at the time when the request for adoption was made and at the time of the decision. According to Art 6, once it is determined that the decision has been made by a competent authority, a foreign adoption order will be automatically recognised if concluded:

- (a) in a foreign state where the adoptive parents and the child had their habitual residence at the time of the request for adoption and at the time of the decision;

¹⁴³ Article 1, Wet Conflictenrecht Adoptie, Second Chamber, 2001–2002, 28 457, nr 2.

¹⁴⁴ Article 3(2), *ibid.*

¹⁴⁵ Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations 1973, *Tractatenblad 1974*, nr 86.

¹⁴⁶ Second Chamber, 2001–2002, 28 457, nr 3, p 12.

¹⁴⁷ *Ibid.*, p 4.

- (b) in a foreign state where either the adoptive parents or the child had their habitual residence both at the time of the request for adoption and at the time of the decision.

The decision will, however, nonetheless not be recognised in the Netherlands if:

- (a) no substantial research or consultation has been undertaken;
- (b) if, in the case of Art 6(1)(b), the adoption order is not recognised in the state where the child has his or her habitual residence at the relevant time. In other words, if the order is obtained in State A (the state of the habitual residence of the parents), but not recognised in State B (the state of the habitual residence of the child) then it will also not be recognised in the Netherlands; or
- (c) if the decision is contrary to public policy.

A complex set of rules has been proposed in relation to the recognition of foreign adoption orders. However, it is submitted that this is a step towards the avoidance of limping adoption orders.

B Article 8 of the ECHR and adoption

A recent case came before the Dutch Supreme Court dealing with the issue of adoption and the right to family life protected under Art 8 of the European Convention.¹⁴⁸ The case centred on the application by a stepfather who sought to adopt the children of his spouse. The biological father did not oppose the adoption order. The prospective adoptive father was, however, less than 18 years older than the children he wished to adopt. The Court of Appeal refused the application since the stepfather had not satisfied the requirements of Art 228(1), Book 1 of the Dutch Civil Code that there should be at least an 18-year age-gap between him and the children. The stepfather argued, on appeal to the Supreme Court, that this was contrary to his right to family life as protected under Art 8 of the European Convention on Human Rights. The Supreme Court held that, even though Art 8 can lend itself to the protection of family life between adoptive parents and children,¹⁴⁹ there is no right to be able to adopt a child, without first satisfying the conditions stipulated by national legislation. Therefore, due to the fact that the adoption was contrary to the age requirements in Art 228, Book 1 of the Dutch Civil Code, Art 8 of the ECHR could not be used to support an adoption application.

The opinion of the Dutch Supreme Court in this case that Art 8 of the ECHR does not safeguard any right to adopt a child appears to be supported by the European Court of Human Rights' decision in *Fretté v France* where it was stated that Art 8 of the ECHR does not guarantee any right to adoption.¹⁵⁰ *Fretté* was, however, not a case in which there was *de facto* family life between the prospective adopter and the child. It is moreover understandable, in the light of the current restrictive policy in Dutch legislation regarding step-parent adoption,

¹⁴⁸ Dutch Supreme Court, 30 June 2001, *Nederlandse Jurisprudentie* 2001, 103.

¹⁴⁹ ECRM, 10 March 1981, Application No 8896/80, D&R 24, p 176 and ECRM, 5 October 1982, Application No 9993/82, D&R 31, p 241.

¹⁵⁰ Application Number 36515/97, 26 February 2002, § 32.

that the Dutch Supreme Court was not anxious to find a right to adopt in this case.¹⁵¹

VII PARENT AND CHILD LAW

A Custody

1 JOINT CUSTODY

The Act on shared custody by dint of registered partnership, discussed in the 2001 Survey,¹⁵² came into force on 1 January 2002.¹⁵³ That Act is intended primarily to provide for shared custody to arise automatically when a child is born to a woman who has a registered partner or spouse who is also a woman. The Act also applies if a child is born to a woman who has a man as a registered partner; in that case different provisions apply depending upon whether the man has recognised the child before birth or not. Not everyone is convinced that this Act does justice to the position of the mother's female partner. Henstra argues persuasively in her doctoral thesis that the mother's female registered partner or spouse should become the child's legal parent by dint of birth.¹⁵⁴ However, there is much more going on in custody law. Not least is the problem of excessive complexity of all the different provisions¹⁵⁵ and inconsistency.¹⁵⁶

Another problem is connected with the possibility of obtaining a joint custody order. Parents who have shared custody during the marriage and who divorce after 1 January 1998 have automatically, in consequence of the Act of 30 October 1997,¹⁵⁷ joint custody after the divorce unless one or both request the court to order sole custody in the child's interests. According to a decision of the Dutch Supreme Court on 10 September 1999, the court should only accede to the request for sole custody if there is shown to be an unacceptable risk that the child will be caught between warring parents. Moreover, there must be no reasonable prospect of improvement in the situation. Mere disagreement or communication difficulties between the parents provide insufficient reason for an order for sole custody.¹⁵⁸ Where the circumstances between parents are difficult, the court has the possibility of making an order regulating the child's place of residence without

¹⁵¹ A new statutory condition of Dutch adoption is that the child cannot expect anything from his or her birth parent as a parent: Article 227(3), Book 1, Dutch Civil Code.

¹⁵² Dutch report, *International Survey of Family Law (2001 Edition)*, ed A Bainham (Family Law, 2001), at 315–319.

¹⁵³ Act of 4 October 2001, *Staatsblad* 2001, 468. Implementation instrument of 7 November 2001, *Staatsblad* 2001, 544.

¹⁵⁴ A Henstra, *Van ouderschapsrecht naar afstammingsrecht* (Boom juridische uitgevers, 2002).

¹⁵⁵ A Nuytinck, 'De complexiteit van de gezagsregeling', *Tijdschrift voor familie- en jeugdrecht* 2002, 190–191.

¹⁵⁶ J Doek, 'Het gezag over minderjarigen, iets over een doolhof en het zoeken van (rode?) draden', (2000) *Tijdschrift voor Familie- en Jeugdrecht*, 217–226.

¹⁵⁷ *Staatsblad* 1997, 506, discussed in the Dutch report, *The International Survey of Family Law 1997*, ed A Bainham (Martinus Nijhoff, 1999), at 284–288.

¹⁵⁸ *Nederlandse Jurisprudentie* 2000, 20.

necessarily having to make any order regarding the joint custody.¹⁵⁹ It is thus evident that there is a strong policy decision in favour of joint custody. In some circumstances, the court may be unable to order joint custody at the time of the divorce, but circumstances may change so that a later application for joint custody may become appropriate. Under the present provisions, a later order changing an order for sole custody into an order for joint custody can be made only where both parents make an application for joint custody.¹⁶⁰ This restriction is incompatible with the rationale of the joint custody provision, which does not require excellent communication between the parents, but only the absence of unacceptable risk for the child. It has therefore been proposed by Jansen that the law on this point be changed. He has argued that the failure to introduce reform may lead to violation of Arts 8, 6 and 13 of the ECHR, since the parent who is unable even to bring the issue to court is deprived of a vital aspect of his or her family life.¹⁶¹

If the parents have joint custody and the child, due to mental or physical challenge, is living with and being cared for by both parents even in adulthood, the Dutch Supreme Court has held that Art 8 of the ECHR is violated by the absence of possibility in the Civil Code to give both parents the power to act in legal matters on the child's behalf.¹⁶² The Dutch Supreme Court held that it was not necessary to refer the matter to the legislator; the Supreme Court declared the provision of joint guardianship to be applicable to this situation by analogy.

2 POSITION OF THE PARENT WHO DOES NOT HAVE CUSTODY

If, following divorce, an order for sole custody is made, or the parents were never married and the father recognised the child but did not obtain an order for custody, the parent who does not have custody is not in a very favourable position. On 13 July 2001, the Dutch Supreme Court was seized of an application for joint custody by a mother who had had sole custody of the child since his birth, and her spouse, who was not the child's father.¹⁶³ The child's natural father, who had recognised the child but had never had custody, opposed the application. Article 253t(3), Dutch Civil Code provides that the court should reject an application by the parent with custody to share joint custody with another 'if, also taking account of the interests of the child's other parent, there are reasonable grounds to believe that granting the application will be contrary to the child's interests'. The natural father was trying to establish access with the child; trial access arrangements were not going smoothly. The father's fears that the grant of the application would dash his hopes of establishing a good relationship with the child were not accepted by the Dutch Supreme Court as a reason not to grant the order requested.¹⁶⁴ The Dutch Supreme Court held that parliamentary debate on the provision in question indicated that it was Parliament's intention that the

¹⁵⁹ Dutch Supreme Court, 15 December 2000, *Nederlandse Jurisprudentie 2001*, 123, annotation Wortmann.

¹⁶⁰ Article 253o(1), second sentence, Dutch Civil Code.

¹⁶¹ S Jansen, 'Gezamenlijk gezag na scheiding: over een dubieuze voorwaarde' (2000) *Tijdschrift voor Familie- en Jeugdrecht*, 109–111.

¹⁶² Dutch Supreme Court, 1 December 2000, *Nederlandse Jurisprudentie 2001*, 390.

¹⁶³ The application for a legal parent to share custody with another person is made under Art 253t, Dutch Civil Code.

¹⁶⁴ Dutch Supreme Court, 13 July 2001, *Nederlandse Jurisprudentie 2001*, 514.

decisive indication for the question whether the order should be granted was whether the child's interests were undamaged. The interest of the parent without custody only had a subsidiary role. The value choice behind this provision has been criticised by Van Teeffelen. Whereas there is, in general in Dutch family law, a preference for the interests of the natural parents when in competition with social parents, in Art 253t, Book 1, Dutch Civil Code (the application for joint custody of a child's birth parent and a person who is not the child's parent), the preference is reversed. The provision says that the application by the parent with custody and the new social parent (who need not be married to the birth parent) must be granted unless the child's interests are shown to be at risk. This contrasts with the situation in the event of an adoption application by the parent with custody and his or her new partner. If the parent with custody and her new partner wish to adopt the child, the parent without custody has a right of veto. That veto right can only be overridden if the parent without custody has never or scarcely lived with the child or has been guilty of abuse or neglect of the child.¹⁶⁵ Van Teeffelen proposes that Art 253t(3), Book 1 be amended to provide that when deciding whether to grant joint custody to the parent with sole custody and the proposed social parent, account must be taken of the interests of the other birth parent in the continuation of a good relationship with his or her child. The decision should be made which promotes the child's best interests.¹⁶⁶ However, it may be doubted whether this proposal, if adopted, would bring any different result or reasoning than that of the Dutch Supreme Court of 13 July 2001 discussed above. The law is confronted with a dilemma between protecting the position of the social parent and that of the parent without custody. The position of the social parent, most particularly the step-parent, has been the subject of a doctoral dissertation, to which I will now turn.

3 LEGAL POSITION OF STEP-PARENTS

In Dutch law the step-parent has practically no legal status. Considering the increasing frequency of step-parenting, this absence of provision is striking. The step-parent may take advantage of the provision discussed above (Art 253t, Book 1) of applying together with the parent with sole custody for an order for joint custody. It should be noticed that the step-parent only has that possibility if the parent with custody consents to the joint application; the step-parent cannot act on his or her own initiative. Furthermore, the application will be rejected unless the parent with custody has held sole custody for a minimum of three years.¹⁶⁷ If the parent with custody has joint custody with the other birth parent, there can be no shared custody with the step-parent. It was seen in the preceding paragraphs that the policy of the law tends to promote joint custody between divorced parents, thus restricting the scope for the step-parent to apply for shared custody. Furthermore, the parent with custody and the step-parent must have cared for the child for at least one year immediately preceding the application.¹⁶⁸

¹⁶⁵ Article 228(2), Book 1, Dutch Civil Code.

¹⁶⁶ P Van Teeffelen, 'Sociaal en biologisch ouderschap, Enige kritische opmerkingen over Art 1:253t BW' (2001) *Tijdschrift voor Familie- en Jeugdrecht*, 133-137.

¹⁶⁷ Article 253t(2)(b), Book 1, Dutch Civil Code.

¹⁶⁸ Article 253t(2)(a), *ibid*.

Notwithstanding the rather minimal opportunity for the step-parent to share custody with the birth parent, the step-parent is liable, for the duration of the marriage or registered partnership, to maintain the child.¹⁶⁹ However, there then appears another peculiarity: the step-parent's liability to pay maintenance for the child terminates on divorce from the birth parent without any possibility of extension. This contrasts with the maintenance liability of the birth parent's partner who obtains custody under Art 253t, Book 1, Dutch Civil Code, which continues after termination of the custody relationship for a period equivalent to the duration of the custody order.¹⁷⁰ In the last situation there is even the possibility of extending the maintenance liability. These and many other anomalies are investigated in Draaisma's PhD thesis. Draaisma proposes that the step-parent, regardless of the type of relationship with the birth parent (marriage or registered partnership, same or opposite sex), should have automatic custody over a child living with and being cared for by the step-parent. The step-parent should be obliged to co-operate with access arrangements between the child and the birth parent without custody. The step-parent should be liable for the child's maintenance and should be liable for torts committed by the child. After termination of the relationship between the step-parent and the birth parent, the step-parent should have a right to apply for access with the child. A change of name to the step-parent's name and step-parent adoption should only be possible in exceptional circumstances. The recent reform of adoption law¹⁷¹ introduced an extra condition for an adoption, namely, that the child should expect nothing from his or her natural parents. Furthermore, although Dutch courts have the power to order a change of the child's surname to that of the step-parent, in practice they rarely do so.¹⁷²

B Access

1 CONDITIONS CIRCUMSCRIBING WHO MAY APPLY FOR ACCESS

Not everybody has the right to apply for an order providing for access to a child. A parent (ie the child's birth mother and the man who is married to her or who has recognised the child¹⁷³ or regarding whom paternity has been established by court order) has a right to apply under Art 377a, Book 1, Dutch Civil Code for regulation of access.¹⁷⁴ Other persons, in order for their application to the court to be admissible under Art 377f, Book 1, Dutch Civil Code, must prove additionally that they have a relationship with the child of such quality that it may be regarded as 'family life' within the meaning of Art 8 of the ECHR. In the Dutch Civil Code

¹⁶⁹ Article 392 ff, Book 1, Dutch Civil Code.

¹⁷⁰ Article 253w, *ibid*.

¹⁷¹ Act of 21 December 2001, *Staatsblad* 2001, 10; see Dutch report, *The International Survey of Family Law (2000 Edition)*, ed A Bainham (Family Law, 2000) at 262–264.

¹⁷² T Draaisma, *De stiefouder: stiefkind van het recht. Een onderzoek naar de juridische plaatsbepaling van de stiefouder* (VU Uitgeverij, 2002).

¹⁷³ Dutch Supreme Court, 26 November 1999, *Nederlandse Jurisprudentie* 2000, 85. As was held in that case, even a sperm donor who has recognised the child (with the mother's consent) is entitled to make an application under Art 377a rather than Art 377f, Book 1, Dutch Civil Code.

¹⁷⁴ Article 377a, Book 1, Dutch Civil Code.

this family life is expressed as a 'close personal relationship'.¹⁷⁵ Applications under Arts 377a and 377f, Book 1, Dutch Civil Code do not only differ concerning the requirement that extra circumstances be established. An application under Art 377a may only be refused in restricted circumstances, namely: if the access order would cause serious damage to the child's welfare; if the parent is evidently unsuitable to exercise access; if the child, being 12 years of age or older, has indicated serious objections; or other serious considerations affecting the child's welfare obtain (Art 377a(3), Book 1, Dutch Civil Code).¹⁷⁶ An application under Art 377f may be rejected if the access is not in the child's interests or the child, being 12 years or older, objects (Art 377f(1), second sentence, Book 1, Dutch Civil Code).¹⁷⁷

This rule applies to a begetter who is not married to the mother and has not recognised the child, but also to other persons such as grandparents, foster parents or step-parents. A case before the Dutch Supreme Court on 29 March 2002 concerned an alleged 'social grand-parent'; the applicant did not convince the court that the relationship between her and the child was sufficiently close to qualify as family life.¹⁷⁸ It is sometimes argued that a distinction should be made between the begetter and the other categories of applicant, and that the begetter should not be required to prove extra circumstances in order to have the right to apply for access.¹⁷⁹ So far the Dutch Supreme Court has held that the distinction is compatible with Arts 8 and 14 of the ECHR.¹⁸⁰ The fact that the begetter could in theory have recognised the child – so bringing himself within Art 377a, Book 1 – but did not do so, is not a reason to disregard or adjust the factual circumstances which tend to establish family life for the purposes of the begetter's access application under Art 377f, Book 1, Dutch Civil Code.¹⁸¹ Courts regularly make mistakes regarding the grounds of refusal to be applied in access applications by begetters, but such an error is not a ground for cassation as it can be corrected by whichever court is seized of the proceedings.¹⁸²

The distinction in the grounds for refusal of access, mentioned in the previous paragraph when applied to the begetter, were at issue in a series of cases against Germany which were recently decided by the European Court of Human Rights. The applications were made by four unmarried fathers who complained of discrimination when compared with divorced fathers. Access applications by an unmarried father can be rejected according to the grounds laid down in § 1711 German Civil Code whereas an access application by a divorced father can only

¹⁷⁵ Article 377f, Book 1, Dutch Civil Code.

¹⁷⁶ Article 377a(3), *ibid.*

¹⁷⁷ Article 377f(1), second sentence, Book 1, Dutch Civil Code.

¹⁷⁸ Dutch Supreme Court, 29 March 2002, *Rechtspraak van de Week* 2002, 62.

¹⁷⁹ De Boer, annotation under Dutch Supreme Court, 15 November 1996, *Nederlandse Jurisprudentie* 1997, 423.

¹⁸⁰ Dutch Supreme Court, 15 November 1996, *Nederlandse Jurisprudentie* 1997, 423, annotation de Boer; Dutch Supreme Court, 26 November 1999, *Nederlandse Jurisprudentie* 2000, 85; Dutch Supreme Court, 25 June 1999, *Nederlandse Jurisprudentie* 1999, 616; Dutch Supreme Court, 19 May 2000, *Nederlandse Jurisprudentie* 2000, 545, annotation Wortmann; Dutch Supreme Court, 29 September 2000, *Nederlandse Jurisprudentie* 2000, 654; Dutch Supreme Court, 8 December 2000, *Nederlandse Jurisprudentie* 2001, 648.

¹⁸¹ Dutch Supreme Court, 29 September 2000, *Nederlandse Jurisprudentie* 2000, 654 o.w. 3.4.

¹⁸² Dutch Supreme Court, 25 June 1999, *Nederlandse Jurisprudentie* 1999, 616.

be rejected in the more restrictive circumstances mentioned in § 1634 German Civil Code. In *Elsholz v Germany*¹⁸³ the European Court stated that it would not exclude the possibility that the difference in treatment violated Art 14 in conjunction with Art 8 of the ECHR but held that on the facts it was not demonstrated that the discrimination had made any difference. However, in *Sahin*,¹⁸⁴ *Sommerfeld*¹⁸⁵ and *Hoffmann*¹⁸⁶ the European Court held that Art 14 in conjunction with Art 8 of the ECHR was violated. The distinction between those two paragraphs is identical to the distinction made in the Dutch Arts 377a and 377f outlined in the previous paragraph. Applicants for access under Art 377a, Dutch Civil Code have a right to access which may only be refused under the conditions circumscribed. By contrast, applicants under Art 377f Dutch Civil Code must prove that the circumstances justify their claim to the right and, furthermore, that right can be excluded in circumstances less restrictive than those specified in Art 377a, Dutch Civil Code. However, the ground of distinction is different. The Dutch access provisions make a distinction between, on the one hand, a 'father', who may be either married to the mother or divorced from her or a man who is not married to the mother but has recognised the child, and, on the other hand, a man who has not recognised the child. This distinction seems much more reasonable than the German distinction between the man who is married to the mother and the man who is not. The German distinction makes an assumption about all unmarried fathers without differentiation.

In the social grandmother case previously mentioned, Advocate-Generaal Moltmaker argued that grandparents by blood possibly should not have to prove additional circumstances in order to apply for an access order. The Advocate-Generaal bases this argument on Art 8 of the ECHR and the European Court's statement in *L v Finland* that the 'mutual enjoyment by ... grandparent and child, of each other's company constitutes a fundamental element of family life and domestic measures hindering such enjoyment amount to an interference with the right protected by Art 8 of the Convention ...'¹⁸⁷

These additional circumstances demonstrating a close personal relationship to the child may concern events before the child's birth or events thereafter. Events before the child's birth will relate particularly to the quality of the relationship which the applicant had with the mother. If a man has a relationship with the mother which is comparable to a marriage, through cohabitation or a living-apart-together relationship, then according to the case-law of the European Court of Human Rights, the man has family life with any child born out of that relationship.¹⁸⁸ Other circumstances before the birth may be of relevance to the question as to whether there is family life, such as whether the pregnancy was planned, whether the man cared for the woman during the pregnancy or otherwise adjusted his position. Circumstances of relevance after the birth will be, in

¹⁸³ *Elsholz v Germany*, 13 July 2000, para 54–61, ECtHR.

¹⁸⁴ *Sahin v Germany*, 11 October 2001, para 56–61, ECtHR.

¹⁸⁵ *Sommerfeld v Germany*, 11 October 2001, para 53–58, ECtHR.

¹⁸⁶ *Hoffmann v Germany*, 11 October 2001, para 56–60, ECtHR.

¹⁸⁷ *L v Finland*, 27 April 2000, (2001) 32 EHRR 30; Dutch Supreme Court, 29 March 2002, *Rechtspraak van de Week* 2002, 62, Conclusie van de Advocate-Generaal, o.w. 2.10.

¹⁸⁸ *Keegan v Ireland*, 26 May 1994, ECtHR Series A, vol 290, para 44; *Kroon v The Netherlands*, 27 October 1994, ECtHR Series A, vol 297-C, para 30.

particular, the extent to which the man has been engaged in the care and upbringing of the child. The Dutch Supreme Court's requirements for the proof of family life, whether based on circumstances before or after the birth, are strict.¹⁸⁹ However, the Dutch Supreme Court on 29 September 2000¹⁹⁰ found family life to be established when the man had stayed overnight with the mother very regularly over a period of a year. A further slight relaxation in these high standards was made in a decision of the Dutch Supreme Court on 19 May 2000.¹⁹¹ The Dutch Supreme Court held that it was possible, in order to establish a close personal relationship, to take circumstances before and after the birth into consideration. The parties had a short-term, difficult relationship, in which the pregnancy was unplanned. But they made preparations for the birth of the baby, and the mother explored whether she would agree to recognition of the child by the father and, for a short time, was prepared to try out whether they could stay together as a family. Five months after the baby's birth, the relationship broke down completely. The circumstances before the birth, taken alone, did not compare to the kind of relationship found in *Keegan* (where the parties had lived together for a year) or even *Kroon* (where the parties had a long-term living-apart-together relationship). Nevertheless, in combination with the circumstances after the birth they did amount to sufficient closeness to allow the man to make an application for access.

2 ENFORCEMENT OF ACCESS

The Dutch Supreme Court has been asked to rule in a number of cases upon the nature and extent of the State's obligation to secure the enforcement of access. On 30 November 2001 the Dutch Supreme Court held that the filming of the father's visits to the children on video was a violation of his private life within the meaning of Art 8 of the ECHR. Accordingly, if the father was not prepared to give his consent to the filming, the videos could not be made unless there was a statutory basis for the action. In that case there was none, so that the child protection authorities had to desist. The decision on this point is just one small illustration of the very difficult relationship between the father and the child welfare authorities, in which the father was the loser. The Dutch Supreme Court upheld the appeal court's decision that access could be excluded because the father's failure to co-operate with the child welfare authorities presented a risk to the children's welfare.¹⁹²

The European Court of Human Rights stated in *Hokkanen v Finland* that Art 8 of the ECHR imposes an obligation upon states to take effective measures to enforce access between parent and child. In that case, Finland was found to have violated Art 8 of the ECHR by a persistent failure of the authorities to enforce contact between Hokkanen and his daughter who lived with her maternal grandparents.¹⁹³ But the responsibilities of the State (in particular the courts) are not unlimited. In *Nuutinen v Finland*, the European Court held that the refusal of

¹⁸⁹ See the case of Dutch Supreme Court, 5 June 1998, discussed in Dutch report, *The International Survey of Family Law (2000 Edition)*, ed A Bainham (Family Law, 2000) at 264–265.

¹⁹⁰ *Nederlandse Jurisprudentie 2000*, 654.

¹⁹¹ *Ibid* 545.

¹⁹² Dutch Supreme Court, 30 November 2001, *Rechtspraak van de Week 2001*, 192.

¹⁹³ 23 September 1994, ECtHR, Series A, vol 299-A.

the Finnish authorities to deploy the measure of 'fetching' – the forcible collecting of the child – was justified on the facts of the case. The European Court recognised that, although realisation of access is generally in the child's interests, circumstances can be such that the enforcement of access is against the child's interests. The central question is 'whether the national authorities have taken all necessary steps to facilitate access as can reasonably be demanded in the special circumstances of each case'.¹⁹⁴ The Dutch Supreme Court concluded on 29 June 2001, in accordance with the decision in *Nuutinen*, that Art 8 of the ECHR does not impose upon the state the duty to impose forcible measures in order to secure the enforcement of access.¹⁹⁵ Furthermore, the Dutch Supreme Court held that neither Art 8 of the ECHR nor Art 16 of the International Convention on the Rights of the Child (hereafter ICRC) imposes an obligation upon the state such that the court is obliged to order the Child Welfare Authority to supervise and assist in implementation of access.¹⁹⁶ Such activities by the Child Welfare Authority constitute an interference with parental rights within the meaning of Art 8 of the ECHR and therefore require to be provided for by statute. In fact the Child Welfare Authority was not empowered by statute to act in access cases; nor did the court have a statutory power to order the Child Welfare Authorities so to act. The lack of statutory authority meant that any engagement of the Child Welfare Authority in access matters is a violation of Art 8 of the ECHR which cannot be justified under para 2 of Art 8. Everything depends upon the circumstances. The European Court accords the state a wide margin of appreciation in the area of enforcement of access. In accordance with this wide margin of appreciation is the judgment of the Dutch Supreme Court on 13 April 2001. That court held that the imposition of a supervision order in order to secure the enforcement of access can be justified under Art 8 of the ECHR, if the lack of access or the existence of access, or the conflicts arising from the enforcement of access, present a serious threat to the child's mental or physical welfare. A further condition for the application of a supervision order is that other less invasive instruments for enforcing access have failed or may reasonably be expected to fail. The indications for a supervision order in a particular case must be proven to a high standard.¹⁹⁷

The attitude of the Dutch Supreme Court is underwritten by two decisions of the European Court declaring applications against the Netherlands regarding enforcement of access inadmissible because manifestly unfounded. In *Zander v the Netherlands* the applicant complained that Art 8 of the ECHR was violated by the fact that the court had terminated the applicant's exercise of access with his daughter and that the authorities had not taken sufficient measures to safeguard the applicant's right of access with his daughter. The European Court held the application inadmissible. The European Court held that a wide margin of appreciation was applicable and that the decisions were evidently taken in the

¹⁹⁴ 27 June 2000, ECtHR, para 128.

¹⁹⁵ Dutch Supreme Court, 26 January 1996, *Nederlandse Jurisprudentie* 1996, 355; Dutch Supreme Court, 24 March 2000, *Nederlandse Jurisprudentie* 2000, 356 o.w. 3-4; Dutch Supreme Court, 29 June 2001, *Nederlandse Jurisprudentie* 2001, 598 annotation Wortmann.

¹⁹⁶ Dutch Supreme Court, 29 June 2001, *Nederlandse Jurisprudentie* 2001, 598 o.w. 3.3.

¹⁹⁷ Dutch Supreme Court, 13 April 2001, *Nederlandse Jurisprudentie* 2002, 4 o.w. 3.3; Dutch Supreme Court, 13 April 2001, *Nederlandse Jurisprudentie* 2002, 5 o.w. 2.5 (obiter).

child's best interests.¹⁹⁸ In *Troost v the Netherlands* the European Court also held the complaint manifestly unfounded. The applicant had requested the court to impose an unlimited fine on the mother or to reduce the maintenance to which the mother was entitled on the daughter's behalf if the mother failed to comply with the access order. The Dutch national court had imposed the fine but refused to bring the non-payment of the fine into account in order to reduce the maintenance order. The European Court held that the refusal of the national court was reasonable, taking into account the mother's limited financial resources. Moreover the state could not be held responsible for the mother's limited financial resources and thus the unsuitability of imposing upon her the remedies proposed by the applicant.¹⁹⁹ A similar line is followed in *Glaser v United Kingdom*.²⁰⁰

C USE OF MEDIATION IN ACCESS AND CUSTODY DISPUTES

In 1998 a number of experimental projects using mediation in divorce cases and access disputes were set up in various parts of the country. In that year, the Ministry of Justice commissioned an investigation into the effectiveness of those projects. The results of those investigations were published in September 2001.²⁰¹ This research was preceded by a report of the De Ruiter Commission in 1995, which had examined the role of mediation in achieving simplification of divorce procedure.²⁰² One of the most important conclusions of that report was that the Commission thought it possible to introduce a form of out-of-court divorce, in which the post-divorce provision would be made in a deed drawn up by an advocate or notary. Mediation has a key role in these proposals, to assist divorcing couples to make the agreements which will be recorded by deed. Hence the Ministry of Justice commenced the above-mentioned mediation projects and the evaluation thereof.

The success of the mediation was measured. There are two measurements to be made: the extent to which the parties were satisfied with the mediation process itself, and the extent to which they were satisfied with the result. The levels of satisfaction differed for the two different types of mediation: namely, divorce mediation and access mediation. Regarding divorce mediation, 78% of those interviewed were satisfied with the mediation process as such; and 75% were satisfied with the outcome. Although those interviewed commented that the mediation process was emotionally very demanding, many considered a great advantage of mediation was that they had managed to negotiate the arrangements themselves without the intervention of a court. The results were less good regarding access mediation. But given the situation at the outset, this is not surprising. Of those couples making use of access mediation 83% described their ability to communicate as poor. In 48% of cases, the court had imposed the exercise of access; in 37% of cases, the parties had themselves agreed to access. Access mediators, in contrast to divorce mediators, are generally not lawyers. In

¹⁹⁸ 24 October 2000 and 5 December 2000, ECtHR, *Nederlandse Jurisprudentie* 2001, 384.

¹⁹⁹ 27 April 2000, ECtHR, Application 3764/97, *NJCM-Bulletin* 2001, p 241.

²⁰⁰ 19 September 2000, (2001) 33 EHRR 1, ECtHR.

²⁰¹ B Chin-A-Fat, and M Steketee, 'Evaluatie experimenten scheidings- en omgangsbemiddeling' (2001) *Tijdschrift voor Familie-en Jeugdrecht*, 296-302.

²⁰² Anders Scheiden, *Rapport van de Commissie Herziening scheidingsprocedure*, 2 October 1996.

41% of cases, the parties were satisfied with the outcome of mediation. In 31%, the mediation failed and the parties returned to court. The courts were not generally prepared to impose a duty on the parties to go to mediation. The research indicated that the parties did not always understand what they could realistically expect from the mediation. For instance, a common reaction was that one party had expected the mediator to be more assertive vis-à-vis the other party.

The most interesting aspect of the results of this investigation concern two questions: first, whether the mediators were able to protect adequately the interests of the weaker party to the divorce, and secondly, whether the children affected by the divorce are adequately involved in the mediation process. Regarding the first question, it is important to notice that economic imbalance of power almost never played a role. That is to say that the mediator was able to compensate adequately for the lack of economic power of one of the parties. But an imbalance of emotional power was a serious problem. For example, if one party had the children living with him or her, the other party felt himself or herself at an emotional disadvantage. It is a challenge for the mediator to manage those imbalances and where necessary to compensate for them.

The second issue concerned the position of children. If there are judicial divorce proceedings, the court is obliged to inform itself of the opinion of any child over the age of 12 regarding access and other arrangements following divorce. Children of a younger age should also be consulted, if they are capable of understanding their interests in the arrangements. Furthermore, children of 12 and over, and younger children if they are able to appreciate their own interests, have a right to approach the court informally, to ask the court to amend custody or access arrangements of its own motion.²⁰³ However, if, as the De Ruiter Commission proposes, there is no court proceeding, then these procedural rights of the child no longer obtain. The question is how to engage the child in the mediation process such that his or her ideas and wishes about the arrangements following divorce can be made known. The research shows that in neither the divorce mediation nor access mediation was the child directly involved in the process. In divorce mediation, 18% of children were involved; in access mediation, the figure was 5%. Many mediators feel that mediation concerns a conflict between the parents and that there is no place for the child. Some, especially the lawyers, were unsure how to talk to children. Insofar as the interests and opinions of children were taken account of, this was done indirectly. For example, the mediators advise and encourage the parents to talk to the children about the divorce and its consequences. The researcher sent a questionnaire to a number of children affected by divorce and asked them whether they would have liked to have been involved in the mediation process: 62% of children responding to the questionnaire considered that the parents had taken account of their wishes and interests regarding access, and 70% thought they had done so regarding the place in which they lived. It emerged that 50% of the parents had spoken with their children about the divorce and its consequences; 25% had never spoken with the children on these matters; and 25% sometimes. Of the children responding to

²⁰³ For more detail, see C Forder, 'Seven steps to achieving full participation of children in the divorce process', in: J Willems (ed) *Developmental and autonomy rights of children* (Intersentia, Antwerp, Oxford, New York, 2002) at 105-140.

the questionnaire, 79% were content with the outcome of the procedure. Nevertheless 36% of those children would have liked to have been involved in the divorce mediation process in some way; and 29% of children would have liked to have been involved in the access mediation. It is therefore not surprising that a major recommendation of this report is that children of 12 years or older should be involved in the mediation process. The point is to give them an opportunity to make their views known. The mediator could hear these views, or could engage another person to interview the children. The child concerned should be free to choose whether he makes those views known orally or in a written form, or whether to do so at all.²⁰⁴ Furthermore, if out-of-court divorce is introduced, a procedure will have to be created to make it possible for the court to be informed of the child's views and wishes. A further recommendation was that the provision of information regarding mediation should be improved.

The difficulties of hearing children on matters which affect them are not just practical; much greater is the problem of attitude. On 29 March 2002, the Dutch Supreme Court judged an access application by a woman who had acted as social grandmother to a child who had not quite attained the age of 12.²⁰⁵ It was argued before the Dutch Supreme Court that the lower courts had erred in not hearing the child to find out what she thought of the applicant and whether she would like to see her. The appeal court had refused to hear the child 'because otherwise she might get the idea that she has to take a decision'. In my view it should be possible to make it clear to a child that she may have an opinion, without having to bear any responsibility for the decision; that is, after all, the court's job. According to the Dutch Supreme Court, Art 12 of the ICRC had not been violated by the failure of the lower courts to hear the child. The Supreme Court remarked dryly: 'That Article does not provide that children (younger than 12 years) should personally be heard in all matters which concern them'. The reference to 12 years is clearly wrong. Article 12 does not mention any age-limit, but refers to a child 'capable of forming his or her own views'. It is true that Art 12 does not give the child a right to be heard; it gives the child the right to express his or her views freely. However, it is a minimalistic interpretation of Art 12 to assume that the right to express views freely can be satisfied regardless of whom – if indeed anyone – is hearing those views. The point is made quite clearly in para 2 of Art 12, that the child should be given the right to be heard in any judicial or administrative proceedings affecting him. The final clause of para 2 of Art 12, which provides that the hearing should be 'in a manner consistent with the procedural rules of national law', does not mean that the national authorities are entitled to dispense with the hearing. It is intended to give the national authorities flexibility as to the way in which the hearing takes place. The Dutch Supreme Court miss, in my view, the whole point of Art 12 in its final sentence of the judgment. It reads:

'In the present case the requirements of Art 12 ICRC are satisfied by the fact that various representatives and propounders of the child's interests – the mother, the father and the Child Protection Body – have been heard.'

²⁰⁴ L Smulders-Groenhuijsen, 'Omgaan met omgang, een kritische beschouwing' (2002) *Tijdschrift voor Familie- en Jeugdrecht*, 77–82 at p 82.

²⁰⁵ *Rechtspraak van de Week* 2002, 62.

Article 12 requires the child to be asked for his or her view personally. The views of another person on what the child wants are no substitute for this.

VIII CHILD PROTECTION MEASURES

A Public support of upbringing

There is generally a lot of concern at the moment about the adequacy of the child protection system. In June 2000 the Cabinet published a discussion document entitled 'Compulsory measures supporting upbringing'.²⁰⁶ This document is concerned with two groups of children: namely, those who have committed criminally relevant activities, and those who have been signalled, by schools or social work, as having problems at home, but where the problems are not serious enough to justify child protection measures. The starting-point of these proposals is that it is now known that far more can be achieved with children if intervention is made at an early stage. The numbers of children subject to a supervision order is rising sharply, as is the rate of recidivism: more than 50% of those children subject to a supervision order commit one or more offences in the subsequent 12 months.²⁰⁷ Furthermore, it is understood that many of the children coming into the child protection system have parents with inadequate resources for upbringing.²⁰⁸ (In 87% of child protection cases there are said to be problems with upbringing.) It is thus attractive – and that is the aim of this proposal – to investigate which measures might be used in order to stimulate the willingness of parents to make use of the facilities which are offered to increase upbringing skills or otherwise support the family. The measures which come into question are either threats or coercion. A threat is used when the parents are warned that, if they do not accept help offered, they and their child may well be subject to coercive measures, such as a supervision order or even removal of the child from the home. Coercion is used if the court imposes sanctions upon the child and or parent.²⁰⁹

The civil law measures which are presently available are: supervision orders, discussed in Section **VIII.B** below; and the removal or suspension of parental rights. The latter two measures are seen as more interventionist than supervision orders; they will be used only when a supervision order has been shown to be unsuitable. Suspension of parental rights is less far-reaching than removal thereof. Parental rights can be suspended, as long as the child's interests will not thereby be damaged, if the parent is unsuitable or unable to care for and bring up the child. Suspension will only be ordered against the parent's will in certain defined conditions:

- (a) where a supervision order has been in place for six months and it has emerged that such order is insufficient to protect the child;

²⁰⁶ Second Chamber 1999–2000, 27 197, nr 1. Niet-vrijblijvende vormen van opvoedingsondersteuning.

²⁰⁷ Second Chamber 2000–2001, 27 187, nr 2, p 1.

²⁰⁸ Second Chamber 2000–2001, 27 187, nr 3, p 2.

²⁰⁹ Ibid, p 3.

- (b) where the suspension of the rights of one parent is necessary in order to remove the child from the influence of the other parent, in respect of whom parental rights have had to be terminated;
- (c) where the parent is unable, due to mental disturbance, to consent to the suspension;
- (d) where the child has been cared for outside the family with the parent's consent for at least one year, and it is in the child's interests to continue that care as the child will otherwise be at risk.²¹⁰

Removal of parental rights goes a step further, as it terminates the parent's rights altogether. Accordingly the court is empowered to remove parental rights only if the order is necessary in the child's interests and:

- (a) the parent is guilty of abuse of his or her rights, or serious neglect of one or more of the children;
- (b) the parent has a bad lifestyle; or
- (c) he or she has been convicted for an offence against a minor in his or her family or has been convicted of a number of classified offences against any minor.

Furthermore, removal of parental rights may be ordered if:

- (d) the parent has failed to follow the instructions of the family guardian agency if the child was subject to a supervision order or has interfered with a placement out of the home; or
- (e) there is reason to fear serious neglect of the child's interests because there is a risk that the parent will remove the child from the persons presently caring for him or her.²¹¹

In the Netherlands there is a range of support facilities offered to parents whose children have come into contact with criminal circles or otherwise are having difficulties. The first measure is crisis intervention, which involves giving direct help for a few months. This help is given on the understanding that it is to avert the need for a supervision order. The parents realise that a supervision order will follow if the measure is unsuccessful. Secondly, there is a scheme of video hometraining by which the parents are helped to develop their skills in upbringing. Thirdly, there is a scheme of family psychotherapeutic intervention, as practised currently in the region of Nijmegen. Fourthly, if the child has committed criminal acts, there are schemes by which the child will be steered out of the criminal procedure and given alternative tasks and receive specialised supervision. These last-mentioned schemes are known as 'STOP' and 'HALT'. Parents are involved in these schemes in varying degrees across the Netherlands. There is only one situation in which parents can be subject to a criminal sanction on account of the behaviour of their children: namely, in the case of non-attendance at school. The parent can receive a penalty of a maximum of one month in prison.

Against this background, the Cabinet considered what measures could be done to reach parents who might not be prepared to receive help on a voluntary

²¹⁰ Article 268(2), Book 1, Dutch Civil Code.

²¹¹ Article 269(1), *ibid.*

basis. The Cabinet was not in favour of introducing the measure now in force in England, by which the parent can be made criminally liable for the child's criminal activities. First, the Cabinet argued that such approach contradicted the principle of criminal responsibility for one's own actions. Secondly, this method had not been shown to be particularly effective. Judges in England are understandably reluctant to use the measure. Thirdly, there is a risk that such measure will put further pressure on an already severely burdened parent-child relationship. However, the Cabinet recommended that parents should be systematically involved in any contact which the child had with the State authorities regarding the child's criminal activities. And the Cabinet resolved to consider further the possibility of introducing a new child protection measure in addition to the measures of supervision order or removal or suspension of parental rights.²¹² The objective is to try to reach the parents who do not ask for help with upbringing but who could be expected to benefit from assistance. By definition these are parents of children whose activities are not serious enough to attract any of the existing range of coercive measures (supervision order, suspension or removal of parental rights or criminal intervention with the child).²¹³

This proposal has been subject to criticism.²¹⁴ The problem is that intervention by the State is quite properly strictly circumscribed. Article 8 of the ECHR imposes strict limitations upon any interference in the relationship between parent and child, and the case-law is becoming increasingly strict. The new measure which the Cabinet is thinking about is intended for cases which do not attract the present range of actions. The likelihood is that there is not sufficient indication for any intervention. And Art 8 of the ECHR prohibits intervention unless it is shown to be 'necessary in a democratic society' and that the means used are proportionate to the aim pursued. Moreover, the intervention must be shown to be effective. The aim – of achieving early support to the family in order to reduce the risk of greater problems later – is worthy and in accordance with Art 8 of the ECHR. But it may seriously be doubted whether the Cabinet will succeed in coming up with a proposal which satisfies the requirements of necessity and proportionality.

B Foster children and supervision orders

There has been a considerable amount of writing and research into the question of legal regulation of the position of foster children and the supervision orders which are often used to protect them. In the last two years, the Dutch Family Council brought out three reports on foster children.²¹⁵ A number of reports from different organisations have examined the legal problems associated with long-term care

²¹² Second Chamber 1999–2000, 27 197, nr 1, p 14.

²¹³ Second Chamber 2000–2001, 27 197, nr 3, p 5.

²¹⁴ S Wortmann, 'Kroniek van het personen- en familierecht', *Nederlands Juristenblad* 2002, p 1577–8; M Bruning, 'Herziening kindbeschermingsmaatregelen: over noodzaak en uitstel' (2002) *Tijdschrift voor Familie- en Jeugdrecht* 104; *Nederlands gezinsraad, Als vrijwillig te verblijvend is* Den Haag (2001), p 106.

²¹⁵ *Thuisplaatsing van pleegkinderen* (Den Haag, 2001); *Als vrijwillig te verblijvend is* (Den Haag, 2001); *Pleegzorg en adoptie in Nederland en Engeland* (Den Haag, 2002).

and supervisions orders.²¹⁶ And several investigations have revealed shortcomings in the practical functioning of the system of foster care and supervision orders.²¹⁷

1 WEAK LEGAL POSITION OF THE FOSTER PARENTS

One very serious problem can be summarised as the failure to give foster parents an adequate opportunity to participate in decisions affecting the foster child. This problem arises most acutely when the child is subject to a supervision order and is placed with the foster family by a family guardianship agency.²¹⁸ (If the child's parents agree to the placement of the child in a foster family, the placement is usually made by a placement agency. In this situation the parents retain all parental rights and can decide, subject to the restriction mentioned below, when to remove the child from the foster parents.) Alternatively, the child might be subject to a compulsory protection order made by a court. This can be a supervision order, or removal or suspension of parental rights. In the latter two cases, the parental rights over the child will be exercised by the family guardianship agency. That agency can decide to place the child with a foster family and also to remove that child from the foster family to return him or her to the parents, or to place him or her with another foster family. In both cases, ie voluntary placement and compulsory placement of the child with a foster family, the foster parents have a statutory right to resist removal of the child at the initiative of the parents or the family guardianship agency. If the child has lived with the foster family for more than one year, the foster parents can refuse to release the child, and insist that the parents or family guardianship agency apply to the court for an order regarding the child's future residence.²¹⁹ However, the court must order removal of the child from the foster family unless there is an indication of serious neglect of the child's interests.²²⁰ Nevertheless, this provision ensures that foster parents have the right to bring the matter to court before they are obliged to release the child. In one situation, the foster parents do not have the right to refuse release of the child pending a court application, namely if the child is subject to a supervision order. This situation has arisen despite a reform of the law in 1995 which was intended to increase the legal protection given to foster parents²²¹ – a reform which the Dutch Supreme Court had indicated was necessary in the light of the right to respect for family life of foster parents. The Dutch Supreme Court held that if the foster parents had a relationship of 'family life' with the foster child within the meaning of Art 8 of the ECHR, the foster parents have the right to apply to the court for a supervision order and the right to appeal against removal of their foster

²¹⁶ J de Savornin-Lohman, e.a, *Met recht onder toezicht gesteld, Evaluatie herziening ots-wetgeving*; NW Slot, e.a, *909 zorgen, Een onderzoek naar de doelmatigheid van ondertoezichtstelling* (VU 2001); BO Vogelvang Adviesbureau van Montvoort, *Maatregel ... regelmaat? reconstructie van het (doorbreken van) transgeneratiele overdracht van kindbeschermingsmaatregelen; Probleem ouders, probleem kinderen? Een literatuurstudie van transgeneratiele overdracht van problemen die tot kindbeschermingsmaatregelen (kunnen) leiden* (WODC, 2001); AWM Veldkamp, *Over grenzen!* (Ministerie van Justitie, 2001).

²¹⁷ ECC Punselie, *Pleegzorg met visie, juridische haken en ogen* (Utrecht, VOG, 2000).

²¹⁸ *Gezinsvoogdij-instelling*.

²¹⁹ Article 253s, in conjunction with Art 336a, Book I, Dutch Civil Code.

²²⁰ Article 253s, Book I Dutch Civil Code.

²²¹ Discussed in Dutch report, *The International Survey of Family Law 1995*, ed A Bainham (Martinus Nijhoff, 1997) at 366–367.

child in order to place him or her in another foster family.²²² If the child is subject to a supervision order and is placed with the foster parents by the family guardianship agency, the most invasive action which the family guardianship agency can take is removal of the child. To do this, the family guardianship agency must first obtain court authorisation. The foster parents have the right to request the family guardianship agency to refrain from making the change in the child's residence.²²³ Furthermore, if the family guardianship agency does not respond positively to their request, the foster parents can appeal to the court asking for authorisation for the removal of the child to be withdrawn or suspended.²²⁴ Although this appears at first blush a suitable remedy for the foster parents, it is not. This is because the withdrawal of authorisation to remove the child does not create any rights for the foster parents or restore the child to the foster parents; on the contrary, withdrawal of the authorisation restores the child to the natural parents.²²⁵ The foster parents have no recourse to the court, which can result in the court exercising restraint over the decisions of the family guardianship agency. Although the Child Protection Council has a power to bring such decisions to the court, it can only act in time if it is informed by the family guardianship agency of the latter's proposed actions. In practice, the timely information is seldom forthcoming.²²⁶

The argument given for the weak position of the foster parents when the child is subject to a supervision order is that the supervision order is intended to be a temporary measure. Thus, it is not envisaged that the child will bond with the foster parents; accordingly, it is not thought to be in the child's interests to safeguard his or her home with the foster parents. On the contrary, the idea is that the child will be restored to the natural parents as soon as possible. But, in practice, children often do stay with foster parents for long periods of time. In fact, before the reform in 1995 a supervision order could not last more than two years; since 1995 this restriction no longer applies. It is therefore necessary to accept that the foster parents and foster child can bond, and that this bonding can form 'family life' within the meaning of Art 8 of the ECHR. Accordingly, there is much to be said for the proposal brought by Bruning that if family life has been established between foster parents and child, every change in the child's residence requires a judicial decision.²²⁷

2 INSUFFICIENT REGARD FOR THE CHILD'S INTERESTS

The Dutch Family Council's investigation into the case management of 28 cases of children in long-term foster care reveals that the interests of the children were

²²² Dutch Supreme Court, 10 March 1989, *Nederlandse Jurisprudentie* 1990, 24; Dutch Supreme Court, 23 March 1990, *Nederlandse Jurisprudentie* 1991, 150.

²²³ Article 263(2), Book 1, Dutch Civil Code.

²²⁴ Article 263(4), *ibid.*

²²⁵ AC Quik-Schuijt, 'Het Arnhemse Hof en de rechtspositie van pleegouders', *Tijdschrift voor Familie- en Jeugdrecht* 1999, 75-77.

²²⁶ Dutch Family Council report, *Thuisplaatsing van pleegkinderen* (2001).

²²⁷ M Bruning, 'Pleegouders: verzorgers zonder recht?', *Ars Aequi* 2000, 846-848; M Bruning, 'Herziening ots (nog) geen verbetering voor betrokkenen, hoofdlijnen van de wetsevaluatie ots' (2001) *Tijdschrift voor Familie- en Jeugdrecht* 137-144; *Nederlands gezinsraad, Thuisplaatsing van pleegkinderen* (Den Haag 2001).

seldom, if ever, in the foreground. On the contrary, the legal position of the natural parents is dominant. This attitude is stimulated by the case-law of the European Court of Human Rights, which insists on a very high standard of protection of parental rights. But the position of the child is almost completely overlooked. To make matters worse, children have no procedural protection in these decisions. In many cases their opinions were not asked. In the light of Arts 9 and 12 of the ICRC the procedural as well as substantive law position of children in this area needs revision.

3 ABSENCE OF PRESSURE TO MAKE A DECISION REGARDING THE CHILD'S FUTURE

A second problem with long-term foster care when the child is subject to a supervision order is that the present legislation does not require anybody, at a given moment in time, to make a decision regarding the child's future. The child can thus remain in foster care for years, subject to the uncertainty as to when and if the foster care will end. The child is thus led on by the promise – in many cases, an illusion – that he or she will eventually be returned to the natural parents. In the meantime, uncertainty about the future makes it impossible for the child and foster parents to bond. Since bonding in a loving relationship is essential to the healthy development of the child's personality, it is evident that the present legislation leads to a result which is detrimental to the child's interests.²²⁸ Part of the problem is a sort of inertia, by which the agencies involved with the child prefer to let sleeping dogs lie as long as the child is with the foster parents, and the natural parents do not ask for return of the child. The legal difficulty arises because the measure which has to be sought is removal or suspension of the natural parents' rights. For removal of the parents' rights, the court must be satisfied that the parent is 'unable or unsuitable to care for the child'.²²⁹ But the Dutch Supreme Court has held that, as long as the parent agrees to voluntary placement of the child with the foster parents, it cannot be said that the parents are unsuitable or unable to care for the child. The Dutch Supreme Court stated that the willingness of the parents to allow the child to be brought up by others already shows a sufficient discharge of parental care such that removal of parental rights is not possible.²³⁰ However, the Dutch Supreme Court held that removal of parental rights could be ordered if the parents' decision to allow the child to remain with the foster parents appeared to be uncertain or unreliable,²³¹ or where the natural parents do not wish to bring the child up themselves, but object to particular foster parents.²³² Some authors, for example Bruning,²³³ argue that this attitude of the Dutch Supreme Court sufficiently protects the child and makes further reform unnecessary. But others argue that it is necessary, especially in the light of Art 20

²²⁸ T Weterings, e.a., 'De (on)bruikbaarheid van het huidige maatregelenpakket bij de langdurige pleegzorgplaatsing' (2001) *Tijdschrift voor Familie- en Jeugdrecht*, 66–73.

²²⁹ Article 268(2), Book 1, Dutch Civil Code.

²³⁰ Dutch Supreme Court, 7 April 2000, *Nederlandse Jurisprudentie 2000*, 563, annotation de Boer.

²³¹ Dutch Supreme Court, 15 June 1990, *Nederlandse Jurisprudentie 1990*, 631; Dutch Supreme Court, 8 May 1992, *Nederlandse Jurisprudentie 1992*, 498.

²³² Dutch Supreme Court, 4 April 1994, *Nederlandse Jurisprudentie 1994*, 523.

²³³ M Bruning, 'OTS of ontheffing bij pleeggezinplaatsing; een vervolg; is de HR om?' (2000) *Tijdschrift voor Familie- en Jeugdrecht*, 157–160.

of the ICRC, to introduce a statutory requirement to take a decision about the child's future, in order to protect the child from protracted insecurity regarding the future.²³⁴ The Dutch Family Council has for these reasons argued that in many cases an order suspending or terminating parental rights is to be preferred to the protracted duration of the supervision order.²³⁵

An attractive proposal to regulate the position of long-term foster parents and their foster charges is provided by Bruning.²³⁶ She proposes a series of new measures, which will be outlined. First, she proposes an 'upbringing-support measure', intended to provide intensive practical support to the child and parent in the existing situation. This measure is similar to the present supervision order, with the one difference that it cannot be combined with compulsory placement of the child outside the natural parents' home. It can, however, be combined with a voluntary placement with foster parents. The measure should not last more than one year, with very restricted possibility of extension. The whole purpose of the measure is to provide high quality support to the child's upbringing; thus there should be an upbringing plan in which very concrete objectives are specified. Two variants on this measure are possible. There could be 'upbringing-support for adolescents'. The objectives should be to support the adolescent in attaining independence; there is no question of reunion with the parents (in the physical sense). A second variant, based upon recent Supreme Court case-law (discussed in Section VIII.B.2 above), would be 'access-support'. This is a measure to provide practical support for the achievement of access between parent and child. This measure could be applied only if the court has determined that the disadvantages of not having access outweigh the disadvantages of an enforcement measure of this kind. Two recent decisions of the Dutch Supreme Court stress that a court should be convinced in the particular case that the measure of enforced access really serves the child's interests.²³⁷

Bruning's second proposed measure is an 'upbringing-placement'. In this measure the child and parent are physically separated. The measure should only be used if lesser measures are not effective and should last for a maximum of one year. In this measure the ultimate aim should be to restore the relationship between parent and child.

The third category propounded by Bruning is an 'upbringing-placement for unlimited time'. The decision to take such a measure should be made not later than two years after the child was physically separated from the natural parents. Once this measure is in place, it is no longer the objective to restore the (natural) parent-child relationship. The purpose of the measure is to provide the child with the necessary continuity and security. The natural parents do not have to be excluded from having a role in the child's upbringing, but it might be appropriate at this stage to transfer certain parental rights to the foster parents or the family guardianship agency.

²³⁴ Weterings, op cit, n 228 above.

²³⁵ *Thuisplaatsing van pleegkinderen* (2001).

²³⁶ M Bruning, 'Herziening kindbeschermingsmaatregelen: over noodzaak en uitstel, *Tijdschrift voor Familie- en Jeugdrecht* 2002, 102-108'.

²³⁷ Dutch Supreme Court, 13 April 2001 (two cases), *Nederlandse Jurisprudentie* 2002, 4 and 5.

As an ultimate resort, Bruning suggests termination of parental rights. This would be a reform for Dutch law, which at present has two overlapping measures: the removal and the suspension of parental rights (see Section VIII.A above). Considerable confusion exists as to the relationship between these two measures; accordingly, a proposal to unify them can be welcomed. The question whether parental rights should be terminated should be approached from the point of view of the child's needs, not from the point of view of any culpability or otherwise of the parents.

The weak position of the foster parents is reflected in the non-recognition of the financial implications of foster parenting. According to the Dutch Supreme Court on 21 February 2001, the right to respect for family life protected in Art 8 of the ECHR is not violated by Art 19 of the Succession Tax Act. That Article provides that a foster child does not have the privileged position of 'child' for Succession Tax Act purposes unless the child has been cared for by the foster parent to the exclusion of the natural parent for a minimum of five years. According to the Dutch Supreme Court, Art 19 did not, on the facts, place the child in a dilemma which might be prohibited by Art 8 of the ECHR, such that he or she would have to choose between forgoing succession tax advantages and definitively leaving his or her natural parents. In particular, there was no evidence that either the child or the foster parents had felt any restriction in the way in which they lived their family life.²³⁸

In a letter of 8 June 2001, the Ministers of Health and Welfare and Justice indicated that they intend to implement a number of measures to deal with problems in three areas: the payment system for foster parents, the improvement in the support system for foster parents and improvement of the legal position of foster parents.²³⁹ In a letter dated 19 December 2001,²⁴⁰ the Minister of Justice expounded a more general range of hot issues relating to child protection. These are:

- Is there a need for a 'lesser' child protection measure than a supervision order? (discussed in Section VIII.A above);
- Is there a need to improve the legal position of long-term foster parents by giving them (the right to apply for) custody rights?
- Does the present system of child protection measures satisfy the requirements of the European Convention on Human Rights and the United Nations Convention on the Rights of the Child?
- How should the problems faced in the practice of supervision orders be tackled?

Concrete proposals can thus be expected at a later stage, and will be examined in a later *Survey*.

²³⁸ Dutch Supreme Court (tax chamber), 21 February 2001, NJB 2001-13, p 639.

²³⁹ Second Chamber 2000-2001, 27 410, nr 19; Second Chamber 1999-2000, 26 816, nr 27.

²⁴⁰ Second Chamber 2001-220, 28 000 VI, nr 46, p 5; Second Chamber 2001-2002, 28 000 VI, nr 55 (21 February 2002).

C Legislative proposal to regulate child abuse advice – and reporting centres

1 BACKGROUND TO THE ACT

In 1972 the government had commenced, by way of experiment, a system of Confidential Doctor Offices to which suspected child abuse could be reported. This experiment was so successful that it was extended to become a national network. In 1989 the Confidential Doctors Offices were brought within the purview of the Child Assistance Act (*Wet op de Jeugdhulpverlening*) (see Section VIII.D below). In 1987 a commission was asked to investigate the functioning of the Confidential Doctors Offices. This committee reported in 1991 in its report 'Legal position'; as is clear from the report's title, the committee advised that legal regulation of the Confidential Doctors Offices' position was needed. In 1993 the government reacted by stating that legislation would follow. Around the time that the government took up this position regarding the Confidential Doctors Offices, another debate commenced regarding the need to have a child abuse advice and reporting centre. To examine this issue, the Hermans Commission was appointed in 1994. The proposals in the Bill on Advice and Reporting Centres for Child Abuse (referred to hereafter as reporting centres) is based upon the practices already established in the Confidential Doctors Offices regarding the giving of advice and reporting. The provisions on advice and reporting centres are inserted into the Child Assistance Act.

On 3 July 2001 the government presented to the Second Chamber a Bill to regulate reporting of child abuse.²⁴¹ In 1998 the Hermans Commission published the results of its investigations into the reporting of child abuse.²⁴² In reaction to this report, the government announced that it intended to regulate in legislation the powers and responsibilities of the Centres for advice and reporting of child abuse. The Act, which was passed on 26 September 2002,²⁴³ gives effect to that intention.

2 THE ACT CREATES A POWER NOT A DUTY TO REPORT

The Act deals with three matters: first, it defines the responsibilities of the advice and reporting centres; secondly, it regulates the complicated questions of privacy which arise in the context of reporting of child abuse, and thirdly, it prescribes the procedures to be followed in reporting child abuse. For the avoidance of doubt, in the Netherlands a choice has been made not to introduce a *duty* to report. Instead the law concentrates on giving the reporting centres the *power* to receive and deal with reports which are voluntarily made.²⁴⁴ The government gave its reasons for not introducing a duty to report. First, experiences abroad suggest that a relatively high level of false reports could be expected. Secondly, a duty to report might discourage individuals from approaching professionals for help. Thirdly, the

²⁴¹ Wijziging van de wet op de Jeugdhulpverlening in verband met de advies- en meldpunten mishandeling, Second Chamber 2000–2001, 27 842, nrs 1–2 and 3.

²⁴² The Hermans Commission report is discussed in Dutch report, *The International Survey of Family Law 1997*, ed A Bainham (Martinus Nijhoff Publishers, 1999), at 300–301.

²⁴³ *Staatsblad* 2002, 515. To be brought into force by statutory instrument; to date (14 January 2003) not yet in force.

²⁴⁴ Second Chamber 2001–2002, 27 842, nr 5, p 2.

imposition of a duty to report may obstruct the possibility for a professional to resolve the problems in consultation with the family. A power to report gives the professional the opportunity to take the matter further when such an attempt has failed.²⁴⁵ However, in one situation there is a duty to report. This applies in the case of professionals working with children in the field of child protection. If the executive of a child care institution becomes aware that a person working in the institution is committing child abuse, the executive is obliged to report that fact to the reporting centre. Furthermore, any individual working for such an organisation who becomes aware that another employee is committing or has committed child abuse is obliged to report such fact to the executive.²⁴⁶ A similar duty to report already applies to the executive of educational bodies and employees of such bodies.

3 FUNCTIONS OF THE REPORTING CENTRES

The reporting centres do not have the functions of prevention, crisis intervention or assistance. The key responsibilities will be the giving of advice, performing consultation, accepting, investigating and forming a judgment upon appropriate action to be taken on a report of suspected child abuse, referral and transfer of cases, co-ordination of assistance, and providing feedback to reporters of child abuse.

The first function concerns the giving of advice.²⁴⁷ In this case, the reporting centre will only record the personal details of the person seeking advice with that person's consent. In the case of any information recorded, the data protection laws apply without restriction. A difficult situation may arise if, in consequence of information brought by a person seeking advice, the reporting centre becomes aware that there is a situation in which it appears possible or likely that a child is being abused. In this case, the reporting centre should retain a passive attitude. It should try to encourage the person seeking advice to report the suspected abuse. But if the person seeking advice does not wish to report, the reporting centre should not take action on its own initiative. The reporting centre should only act on its own initiative if it is very clear that a child is being abused. This passive attitude is necessary in order to secure the confidence of those seeking advice. A more interventionist approach in these circumstances might deter people from coming to the centre for advice.²⁴⁸

The second function of the centre is to receive reports of suspected child abuse. Ordinary members of the public as well as professionals (police, school staff) and persons working in the child care sector may report child abuse. In acute cases in which the reporting centre believes that urgent action is necessary, it may refer the case immediately to the Child Protection Agency without conducting further investigation. The Child Protection Agency may also be approached

²⁴⁵ Second Chamber 2001–2002, 27 842, nr 5, p 16; Second Chamber 57-3908-9, 19 March 2002 (Vliegenthart).

²⁴⁶ Article 34e, Child Assistance Act; introduced by amendment, Arib et al, Second Chamber 2001–2002, 27 842, nr 14 (amendment) (see nrs 9 and 12).

²⁴⁷ Article 34a(2), Child Assistance Act.

²⁴⁸ Second Chamber 2000–2001, 27 842, nr 3, p 10.

directly in any case in which there is an acute risk and urgent action is needed. All other cases should be brought in the first instance to the reporting centre.

Upon receipt of a report, the reporting centre must investigate the report and decide what action needs to be taken.²⁴⁹ In order to carry out this task of investigation, the reporting centre may talk with the person who reported the suspected abuse; it may request information from other professional bodies or from the local authority registration system; it may talk with the person whom the report concerns (suspected abuser) or, if different, the child's parents, and with the child concerned, or with others, such as teachers. This procedure should conclude with either a referral to the Child Protection Agency or to a voluntary assistance agency or a decision that no action need be taken. The initiative should be that which is most suited to the child.²⁵⁰ If the reporting centre concludes that action needs to be taken regarding the parents' rights of custody, the reporting centre must transfer the case to the Child Protection Agency.²⁵¹ The reporting centre may refer the case to other bodies, such as the police.²⁵² If a referral is made, the reporting centre will follow up the case not later than six months after the date of referral, to establish the outcome of the referral.

Finally, the reporting centre should report the outcome back to the person who made the report.²⁵³ Members of the public will only be informed that the matter has been investigated. Professionals will be given details of the problem identified and the way it has been resolved; and child care workers will be informed of the entire case and its outcome. The Hermans Commission stressed the importance of this feedback, which should have the effect of strengthening the willingness of the public to come forward and remove uncertainty about the effects of reporting child abuse.

In order to enact legislation on reporting child abuse it was necessary to provide a definition of child abuse. This is:

'Every form of physical, mental or sexual interaction involving violence or threats towards a minor by parents or other persons in relation to whom the child is in a position of dependence or otherwise not at liberty. The action by the parent or other person towards the child may be active or passive and must be such that serious damage is caused or threatens to be caused to the minor in the form of physical or mental damage.'²⁵⁴

This definition excludes violence towards children by persons not in a parental or similar position; thus violence by other children is not included, however serious. The definition also excludes violence by persons who have no relationship whatsoever with the child. A crucial element is the element of damage. Particularly in cases of mental damage, where the damage often appears much later in the abused child's life, this requirement of damage is a serious restriction. In debate in the Second and First Chambers, concern was expressed about the fact that the requirement of proof of damage sets a higher hurdle for proof of child

²⁴⁹ Article 34a(1)(b), Child Assistance Act.

²⁵⁰ Article 34a(1)(c), *ibid.*

²⁵¹ Article 34a(1)(d), *ibid.*

²⁵² Article 34a(1)(e), *ibid.*

²⁵³ Article 34a(1)(f), *ibid.*

²⁵⁴ Second Chamber 2000–2001, 27 842, nr 3, p 12.

abuse than in the criminal law.²⁵⁵ The definition includes inaction; accordingly, neglect is also covered. The definition also includes the failure to take steps to prevent the child from being abused by another person. The reporting centres are only concerned with abuse of children. Other groups, such as mentally challenged or older persons, are not covered by this reporting system.

A difficult issue is the question of anonymity. The Confidential Doctors Offices follow a policy of maximum openness towards the family concerned with the report. However, in practice, it is also necessary to take account of the wish of some reporters to remain anonymous. It is possible for a reporter of child abuse to remain anonymous vis-à-vis the child and the family. The reporting centre is entitled to refuse to disclose this identity to the family and child.²⁵⁶ However, reports from reporters who will not disclose their identity to the reporting centre will not be accepted. Furthermore, a reporter who is a professional providing services to the family which are connected to the child's upbringing cannot remain anonymous vis-à-vis the family. This includes the family GP. In these circumstances it is reasonable to expect the professional to discuss the matter with the family. A report from such a person, without disclosing that person's identity to the family, can only be accepted if disclosure would put the child at risk, or if disclosure would for some reason damage the relationship between the professional and the family. Other professionals, such as crèche workers or teachers, are entitled to remain anonymous vis-à-vis the family and the child but not vis-à-vis the reporting centre. Whenever possible, also these reporters should talk things over with the family first. But their relationship to the family is generally of a different character to that of, for example, a GP, so that the opportunity for discussion of suspected child abuse is not so evident.

Detailed rules lay down the procedures to be followed by the reporting centres, the interaction between the reporting centres and the Child Welfare Agency, and the circumstances in which a person is entitled to make an anonymous report.²⁵⁷

4 THE FUNCTIONS OF THE REPORTING CENTRE AND THE PROTECTION OF PRIVACY

The introduction of child abuse reporting centres raises difficult issues regarding privacy protection. For this reason, a number of exceptions have had to be made in the Data Protection Act. Personal privacy is protected in Art 10 of the Dutch Constitution and in Art 8 of the ECHR. The storage and dissemination of personal information is regulated by the Data Protection Act 2001, which implements the European Directive of 24 October 1995 on the protection of natural persons in connection with storage and dissemination of personal information.²⁵⁸ In general, the handling of personal information must be done carefully and responsibly. Such data may only be collected for circumscribed, justified purposes. Furthermore,

²⁵⁵ Article 300, Criminal Code; Second Chamber, 19 March 2002, 57-3919 (Rouvoet (ChristenUnie)); First Chamber 2001-2002, 27 842, nr 295a, p 3 (Groenlinks).

²⁵⁶ Article 43(e), Data Protection Act.

²⁵⁷ Besluit advies- en meldpunten kindermishandeling, Wet op de jeugdhulpverlening 21 June 2002, Staatscourant 2002, nr 116, p 11.

²⁵⁸ Directive 95/46/EG.

every action must be proportionate. In particular, the interference with individual privacy must not be greater than necessary to satisfy the purpose for which storage is made, and must take place in the least interfering manner. Finally, certain categories of information are, because of their extra sensitivity for the individual, subject to extra restrictions. This concerns particularly information regarding health and criminal activities.

In order to investigate a report of suspected abuse, the reporting centre may need to retrieve and store information regarding the child, his or her family members, the informer and the suspected abuser. In principle, this information may only be retrieved and used with the consent of the persons concerned. But the character of the work of the reporting centres requires that exceptions apply. The reporting centre is entitled to retrieve and store information as is necessary to carry out its functions unless, in the circumstances, the rights and freedoms of the individuals concerned should have priority.²⁵⁹

In general, the permission of the child should be sought before information regarding him or her is disclosed to third parties. Nevertheless, the reporting centre is entitled to disseminate information regarding the child who is the subject of the report to any person whose co-operation, in a professional capacity, is necessary in connection with protection of the child. This exception extends to the child's legal representatives. If the child is under the age of 16, the child's legal representatives generally have to be asked for permission to disclose information regarding their child. But the reporting centre may, if the circumstances so require, disseminate information regarding the child to the necessary professionals described above without requesting the permission of the child's personal representatives.²⁶⁰ If the reporting centre discloses information to third parties under these provisions it is obliged by law to inform the persons to whom the information pertains that the disclosure has taken place. In general, this information should be provided at the moment at which the information is taken and stored. However, the reporting centre need not inform the person immediately if supplying the information would place the child at serious risk. In these circumstances, the reporting centre is obliged to delay informing the persons concerned of the storage of information regarding them, for a maximum period of four weeks. This period may be extended by two weeks if such delay is necessary in order to end a situation of child abuse or to investigate reasonably suspected child abuse.²⁶¹ This requirement is onerous for the reporting centre. The two-week period requires the reporting centre to justify repeatedly the delay in informing the persons affected. Moreover, it is quite likely that the two-week or four-week periods will run at different times regarding the various persons involved in any particular case. It may happen that a parent or other person has suspicions that an inquiry is running, and makes an approach to the reporting centre to ask whether information is being collected about himself or herself. In general, the law requires such person to be informed immediately if information is being collected. But in this case also an exception applies, to make it possible for the reporting centre to carry out its work. Thus, even when a person makes a direct inquiry

²⁵⁹ Article 8(f), Data Protection Act.

²⁶⁰ Articles 44(3) and 34c(1), Child Assistance Act.

²⁶¹ Articles 34d(1) and (2), *ibid.*

whether information is being collected about him or her, the reporting centre is entitled to refuse to answer if disclosure would cause serious damage to the child's interests.²⁶²

Some information is, because of its sensitive nature for the persons concerned, subject to extra restrictions under the Data Protection Act.²⁶³ This concerns, in particular, information pertaining to the health of the child or other persons, and information regarding the criminal record of the child or others. The reporting centres are entitled under existing law to process such sensitive information regarding the child insofar as such processing is necessary for the good treatment of the child concerned. The word 'treatment' is intended to have a broader meaning than simply medical treatment.²⁶⁴ But the reporting centres may also need to process information regarding the health or criminal record of other persons. The Act gives the reporting centres such power if a report has been made from which a reasonable inference can be made that a child is being abused.²⁶⁵

Further provisions regulate the provision of information to the reporting centres. For example, the reporting centre may wish to seek information from the GP or the child's school or crèche. Information from the police, the child's guardian or the child welfare circuit may be needed. Furthermore, the accuracy of this information may need to be checked against the information stored by the local authority. Because disclosure of this information infringes the right to privacy of the individuals concerned, all of these bodies are subject to restrictions regarding the disclosure of the information to the reporting centres. Some of these bodies are subject to specialised legislation regarding the disclosure of information. Insofar as disclosure is not covered by specialised legislation, the Data Protection Act applies. Many of the individuals mentioned in this paragraph are furthermore subject to a professional duty of confidence. According to existing case-law it is already accepted that a person is discharged from the professional duty of confidence whenever a professional is confronted by a conflict of duties and the other duty outweighs the professional's duty of confidence. A doctor is thus discharged from the duty of confidence to his or her patient if the doctor is aware of circumstances relevant to a situation in which a child is being abused and confidential information pertaining to the patient is relevant to that situation of child abuse. The entitlement of the doctor to disclose is not unrestricted; the disclosure is itself subject to further qualifications regarding the manner and timing of disclosure and the persons to whom disclosure is made. The Bill thus codifies existing law by making it clear that a professional may be entitled to disclose information even though the doctor has obtained that information in the context of a professional duty of confidence.²⁶⁶ In its commentary on the Bill, the Council of State remarked that it did not consider that the proposed reform would lead to any increase in certainty in the law for the professionals concerned. It remains a difficult decision for a professional who, when confronted by the

²⁶² Article 34d(3), Child Assistance Act.

²⁶³ Articles 16–23, Data Protection Act.

²⁶⁴ Article 21, *ibid.*

²⁶⁵ Regarding health matters: Article 34c(2), Child Assistance Act; regarding criminal record, Art 34c in conjunction with Art 21(3), Data Protection Act.

²⁶⁶ Article 34c(3), Child Assistance Act.

dilemma, must take the decision alone and face the consequences later in case of error. Considerable certainty would be given to professionals were the various professional bodies to give thought to the matter and each work out a code of practice.²⁶⁷ A further provision places beyond doubt that the local authorities are obliged to supply information to reporting centres insofar as such information is necessary to discharge the responsibilities of the latter.²⁶⁸ It is of great importance to find a way of creating more security for professionals in this matter; the Hermans Commission was informed that in 27% of cases in which a professional was aware that a child was being abused, the professional nevertheless chose not to disclose the information. It is perhaps necessary to make it absolutely clear to professionals that, where the overriding duty to disclose confidential information obtains in order to avert a situation of child abuse, there is no violation of the duty of confidence. This point is not entirely clear in Dutch law, where the matter rather tends to be presented as if there is a violation of the duty of confidence, but that the violation does not attract liability.²⁶⁹

If a local authority discloses information regarding a person (X) to any other person or body, the local authority is subject to a duty to inform X of the disclosure within four weeks.²⁷⁰ The existing exceptions to this duty do not cover the case of disclosure of information to prevent child abuse. Accordingly, a new provision in the Act entitles the local authority to abstain from disclosing to a person that information regarding that person has been requested and disclosed, if such abstention is necessary in order to end a situation of child abuse or to investigate a reasonable suspicion of child abuse.²⁷¹

The reporting centres have the right to store the information collected under the above-mentioned provisions. However, that right of storage is not indefinite. The information may be stored, when reports have been made regarding several children in the same family, until the youngest child, with whom the reports were concerned, has attained the age of majority.²⁷² The material may be stored only if the material makes a contribution to the termination of the situation of child abuse in that family or if it is reasonable to assume that the material needs to be used with respect to a possible child protection measure. The reporting centre is obliged to destroy information stored within three months of such a request by the person to whom the information pertains.²⁷³ The reporting centre is entitled to refuse to carry out the destruction if the material is needed in order to protect the interest of another person or if a legislative provision prohibits destruction.²⁷⁴ A child of 12 years or younger, or a child older than 12 years who is not capable of appreciating his or her own interests in the matter, is not entitled to request destruction of information.²⁷⁵ In such a case the application may be made by the

²⁶⁷ Second Chamber 2000–2001, 27 842, nr 3, p 26; Second Chamber 2000–2001, 27 842, A, p 4.

²⁶⁸ Article 34c(4), Child Assistance Act.

²⁶⁹ I van der Straete and J Put, 'Doorbreking van het beroepsgeheim bij kindermishandeling: een belgisch-Nederlandse vergelijking' (2002) *Tijdschrift voor Familie- en Jeugdrecht* 66–73.

²⁷⁰ Article 103(3), Wet gemeentelijke basisadministratie persoonsgegevens.

²⁷¹ Article 34c(5), Child Assistance Act.

²⁷² Article 44a, *ibid.*

²⁷³ Article 44b(1), *ibid.*

²⁷⁴ Article 44b(2), *ibid.*

²⁷⁵ Article 44b(3), *ibid.*

child's legal representative.²⁷⁶ Reporting centres will undoubtedly receive reports which, after investigation, turn out to be false or unfounded. This is one reason why it is important that the persons concerned are informed of the reports made about them; they are entitled to request destruction of the information stored. This aspect may require further attention in the future.

5 EVALUATION OF EFFECTS OF THE ACT

The Committee on the Rights of the Child observed, in reaction to the report submitted by the Netherlands under Art 44 of the UN Convention on the Rights of the Child, that it welcomed the efforts of the Netherlands to establish a network of child abuse reporting and counselling centres and the plans to strengthen child abuse monitoring and reporting systems.²⁷⁷ The passing of this Act is a significant contribution to the responsibilities of the State under Art 19 of the Convention. That Article requires the State to take measures to protect children from all forms of physical and mental violence, neglect or negligent treatment, maltreatment or exploitation, whilst in the care of parent(s), legal guardian(s) or any other person who has the care of the child. The way that the Act has operated will be evaluated three years after it comes into force.²⁷⁸ A choice has been made not to introduce a duty to report; that was thought to be counter-productive. But one of the purposes of the provisions is to increase the rate of reporting; according to some figures only one-third of all cases of child abuse are actually reported. The effectiveness of the system in preventing child abuse depends to a considerable extent upon the capacity of the existing services to respond to the referrals which are made by the reporting centres. At the present time there are serious waiting lists for child protection services. If the proposed regulation of reporting centres is successful, an increase in the reporting of child abuse may be expected – an increase of 10% is estimated. But this will lead to further burdening of the child protection services. It would be contrary to the purpose of this legislation were the reporting centres to be tardy, through over-load or other causes, in reacting to reports of child abuse. The statutory instrument allows the reporting centres three months from the date of report of suspected child abuse to conduct their investigation. In the First Chamber there were comments that this period is too long.²⁷⁹ The government is giving its attention to that problem.²⁸⁰

²⁷⁶ Article 44b(4), Child Assistance Act.

²⁷⁷ Committee on the Rights of the Child, Twenty-second session, 26 October 1999, United Nations website CRC/C/15/Add 114, para C 17.

²⁷⁸ Artikel IIA: Second Chamber 2001–2002, 27 842, nr 11 (Tweede nota van wijziging) (25 April 2002).

²⁷⁹ First Chamber, 24 September 2002, EK 1–8 (Swenker); EK 1–17 (Swenker, Le Poole); 1–19 (Ross-van Dorp).

²⁸⁰ Second Chamber 2001–2002, 27 842, nr 5, p 13; Second Chamber 2000–2001, 28 007, nr 1; Second Chamber, 19 March 2002, 57–3913; First Chamber 2001–2002, 27 842, nr 295b, p 3; 24 September 2002, EK 1–13 (Ross-van Dorp); cf Peer Commission Wachtlijsten in de jeudzorg.

D Bill on Youth Care Law

1 BACKGROUND TO THE BILL

A Bill regulating the entire field of Child Care Law was introduced into the Second Chamber on 18 December 2001.²⁸¹ This Bill is intended to replace the Child Assistance Act which came into force in 1990. The Bill regulates the right to care, access to care and the financing of the care provision services. The field of child care has long been challenged by the multiplicity of different organs providing overlapping or not-quite interlocking services. The Child Assistance Act aimed at achieving co-ordination and co-operation of this vast network of services, but even shortly after coming into force it became clear that the Act did not succeed in that goal. The problem was that a number of organisations, providing various forms of child care, managed to negotiate a position outside the purview of the Act. Thus, organisations concerned with children's mental health, family guardianship agencies and closed institutions remained outside the Act. Furthermore, those organisations fell under the responsibility of the Ministry of Justice, whereas the child care institutions covered by the Child Assistance Act were answerable to the Ministry of Health, Welfare and Sport. The Child Assistance Act did achieve some steps in the direction of cohesion and co-ordination by imposing the obligation upon agencies to co-operate, but the steps taken were not enough to satisfy the stringent demands of an over-stretched sector. In 1994 the two responsible Ministries initiated a child care management policy,²⁸² which helped to stimulate co-operation in the child care sector. The Child Care Bill codifies that policy and seeks to underpin the interconnection between the various parts of the child care sector.

The reforms introduced in this Bill are not revolutionary, but rather follow an approach which can already be found in countries such as England and Germany. In fact the *Kinder- und Jugendhilfegesetz* already placed the German child care system at regional and local level in 1990. England and Germany already have an integrated entry-point for determining access to child care services. And in both countries, the integration of services goes further than will be achieved by the Child Care Bill, even if that Bill achieves its objectives. Both countries enjoy the advantage that the child care system falls under the responsibility of one ministry; not two, as in the Netherlands.²⁸³

2 INTEGRATION AND CO-ORDINATION OF SERVICES

Child care for the purposes of the Bill is defined as 'support of and the giving of assistance to children, their parents, step-parents or others insofar as they care for and rear children within their family, in development or child-rearing problems or the threat thereof and in child protection matters'. The Bill is concerned with situations in which upbringing has become problematic, and with private

²⁸¹ Regeling van de aanspraak op, de toegang tot en de bekostiging van jeugdzorg (Wet op de jeugdzorg), Second Chamber 2001-2002, 28 168.

²⁸² Regie in de Jeugdzorg, Rijswijk, Den Haag, Ministerie van VWS en Ministerie van Justitie, 1994.

²⁸³ A Van Unen, 'Concept-Wet op de Jeugdzorg: sluitstuk van en aanzet tot ontwikkelingen in de jeugdzorg' (2001) *Tijdschrift voor Familie- en Jeugdrecht* 213.

(ie non-criminal) child protection measures (supervision orders or suspension or termination of custody).

From an organisational point of view, the Bill provides for one entry-point into the child care system: the child care offices. There will be one child care office in each province. The child care office will be the access-point to all provision of child institutions following a child protection order, most institutions concerned with mental health care for children and the care for mentally challenged children with problems relating to development and upbringing, and other institutions concerned with voluntary child care. However, although the child care offices form the access-point for these institutions, if the bodies concerned are regulated by other statutory regimes, as are the institutions concerned with child protection and children's mental health, those statutory regimes will continue to regulate the bodies as before.

In order to stimulate co-ordination of the various parts of the sector, the Bill creates an obligation to co-operate. Measures are taken in the Bill to ensure that the facilities offered are in accordance with needs. This needs-driven approach contrasts with the approach in the Child Assistance Act which was organised around the characteristics of the providers.

3 DE-CENTRALISATION

The Bill seeks to develop a considerable degree of de-centralisation. Thus, responsibility for financing and organisation of voluntary child care bodies and the family guardianship agencies rests with the provinces. However, the Child Protection Agency and the institutions receiving children pursuant to a child protection order remain under the direct responsibility of the Ministry of Justice. According to the Bill, each province must draw up, in consultation with health insurers, local authorities, the Ministry of Justice, client organisations, the child care offices and the providers, a four-yearly policy plan. This plan must strive to achieve a balance in the need and provision of services, stimulate co-ordination and take account of local policy regarding child care. Since 1994 the provinces have shown that they are capable of assuming these responsibilities; the Bill gives them a legislative basis.

4 A STATUTORY RIGHT TO CHILD CARE

Under the present Dutch law there is no general right to child care. There is a right to mental health care for children and a right to care for developmentally challenged children, because this care is financed by the general health insurance fund.²⁸⁴ Furthermore, a child has a right to be protected against neglect and abuse. The Child Care Bill introduces a right to child care, insofar as such claim does not already exist under other legislation. The right to child care of children who are placed in institutions pursuant to a child care order will not be secured under the Child Care Bill, because the legal position of these children is regulated in another

²⁸⁴ Algemene Wet Bijzondere Ziektekosten.

statute.²⁸⁵ Furthermore, there is no right to child care in respect of general social work services provided for children.²⁸⁶

The right to child care gives the child concerned and his or her parents a claim-right to the services which, following screening by the child care office, have been determined to be necessary for the child. If the care indicated cannot be provided, the child and parents have a claim which may ultimately be enforced against the providers or the health insurers in the administrative court. Van Unen argues that the introduction of the right to child care is a much-needed specification of the fundamental social rights to health care laid down in Arts 20–23 of the Dutch Constitution. Without such specification, the rights cannot provide the basis for directly enforceable individual claims.²⁸⁷ Several courts have indicated that a structural shortage of facilities for certain categories of children is a violation of Arts 3(2) and 20(1) of the United Nations Convention on the Rights of the Child.

5 CHILD CARE OFFICES

The child care offices have the following functions: first, they are the only access point to the child care system. In this capacity, they have responsibility for screening, diagnosing and making referral to the appropriate provider. They should stimulate early action by providing facilities for consultation. They should support and guide the client. They should offer a family guardian or guardian. They should provide a youth probation service. And they should provide an advice and reporting centre for child abuse (see Section VIII.C above).

The key position of each child care office in each province requires that the Offices are entirely separate from any providers. Offices which are currently collaborating in an organisational sense with providers will have to end such collaboration.

The decisions taken by the child care offices are subject to judicial review by the administrative courts. Furthermore, the Child Care and Protection Inspection Service will scrutinise, not just whether the Child Care Act is complied with, but also whether the child care offices function effectively.

6 FINANCING

The focus of the reform in financing is to ensure that the providers are responding to identified needs indicated through care programmes.

The use of the provincial child care office as sole entry-point is a serious contribution to coherence in a labyrinth of services. But this approach is not underpinned by the system of financing of the various providers. Thus the voluntary child care and child protection sector is financed by the provinces; the health insurers finance the child mental health services; and the Ministry of Justice finances the institutions receiving children pursuant to child protection measures.²⁸⁸

²⁸⁵ Beginselenwet justitiële jeugdinrichtingen.

²⁸⁶ Welzijnswet 1994, Wet justitie subsidies, Wet collectieve preventie.

²⁸⁷ A Van Unen, *De wet op de jeugdhulpverlening: overheid of particulier initiatief?* (Lemma Uitgevers, Utrecht, 1996).

²⁸⁸ Van Unen (2001), op cit, n 283 above, p 209.

7 COMPLAINTS AND MEDIATION PROCEDURES

In 1997 every branch of the care sector was required to introduce a client complaints body. The Child Care Bill now requires each organisation to have a separate client complaints body. There are already a number of practical difficulties with the existing obligations; in particular, it is difficult to find enough persons willing to staff them.

A further difficult point is that many organisations have a mediation procedure. Van Unen argues that the Bill fails to deal with a number of aspects of the use of mediation and client complaints bodies. For instance, it should be made clear that a client is entitled to go directly to the client complaints body, and should not be required first to engage in mediation. Furthermore, the Bill should provide that the mediator should be someone whom both parties have agreed; not a person chosen by the institution against whom the complaint is brought. The Bill should specify time limits within which a complaint should be brought, as institutions at present use differing time limits. It is further necessary that the Bill indicates which persons, apart from the child, his or her parents, step-parents and others exercising custody jointly with the parent, are entitled to complain. Some institutions accept complaints by neighbours, grandmothers; others do not. Finally, Van Unen points out that the right to complain should not be restricted to children who have attained the age of 12; children under that age should also have the right, if they are able to appreciate their own interests in the matter.²⁸⁹

E Proposal for a Children's Ombudsman

On 6 December 2001 a Bill to create a post of Ombudsman for the rights of the child was introduced into the Second Chamber by private members' bill (by members Arib and Van Vliet).²⁹⁰ The Committee on the Rights of the Child remarked in its comments on the last Dutch report, submitted to the Committee on 26 October 1999, that 'it was concerned about the lack of an independent mechanism to monitor the implementation of the Convention'.²⁹¹ In a motion brought on 9 May 2000 in the Second Chamber by the members Arib and Ravestein,²⁹² the Second Chamber had voted to request the government to establish a Children's Ombudsman. The government's view, expressed in a letter of 13 November 2000,²⁹³ was that the functions of such an ombudsman were already – probably – adequately covered by existing agencies. Moreover, the government noted that the functions of the children's ombudsman differed from country to country. The government thus considered that further research was necessary to establish exactly which functions of the Children's Ombudsman were not being covered at present in the Netherlands. The members Arib and Ravestein did not agree that the functions were already covered by existing agencies, and

²⁸⁹ Ibid, pp 212–213.

²⁹⁰ Voorstel van wet van de leden Arib en Van Vliet tot instelling van een kinderombudsman, Second Chamber 2001–2002, 28 102.

²⁹¹ Consideration of reports submitted by States Parties under Art 44 of the Convention, Twenty-second session, The Netherlands, CRC/C/15/Add 114, 26 October 1999, para C 12.

²⁹² Second Chamber 1999–2000, 26 816, nr 7.

²⁹³ Second Chamber 2000–2001, 26 816, nr 32.

thus presented this Bill to the Second Chamber. The proposed Bill presents the Children's Ombudsman as a watchdog, who scrutinises the activities of all public authorities in the light of children's human rights. The ombudsman should act on his own initiative or on request in all situations in which the rights of children are at issue, in order to give advice to the government. Furthermore, the ombudsman should keep track of government policy regarding youth in such matters as health, schooling, developmental challenge, child care, children at work, etc. The ombudsman should be independent of all ministries. The ombudsman should have three areas of responsibility: first, supervision and implementation of the UN Convention on the Rights of the Child; secondly, giving comment, with or without request so to do, in the light of the human rights of the child, on all aspects of legislation and policy relevant to children's interests; thirdly, receiving and dealing with complaints regarding children's rights. There is already a developed network of complaints procedures regarding, in particular, the clients of child assistance services, children in closed institutions and clients of the Child Welfare Agency. Nevertheless these procedures do not always work optimally. A particular problem is that the complaints bodies are attached to the institution against which the complaint is to be brought; this feature creates a considerable degree of reluctance to bring complaints. Moreover, there are situations in which there is no one body to which a complaint can be brought. The situation would be improved if the ombudsman could act as a body of last resort for complaints.

IX ELIMINATION OF DISCRIMINATION AGAINST WOMEN

On 6 April 2002, the Dutch Parliament approved the ratification by the Netherlands of the Optional Protocol of the Convention for the Elimination of Discrimination Against Women, opened for signature on 6 October 1999 in New York.²⁹⁴ The ratification by the Netherlands took effect on 22 August 2002.

The Netherlands submitted its third report to the CEDAW (Committee on the Elimination of Discrimination Against Women) in 2000.²⁹⁵ The Committee found the new Dutch law regarding names to be in violation of Art 16 of the Convention.²⁹⁶ The problem lies with Art 5(5), Book 1, Civil Code which provides that if the mother and father who are married do not make a choice regarding the child's surname by the date of registration of the child's birth, the child will take the father's surname by default. The Minister of Justice registered disagreement with the position of the CEDAW. The government is of the opinion that the rule applies only within marriage and that this fact provides a justification for the default rule in favour of the father's name. This view shows an assumption about the nature of marriage which appears outdated. Furthermore, the government argues that there is a need for some certainty regarding the child's name.²⁹⁷ This approach is also debatable; with modern computer facilities it must be possible to

²⁹⁴ Original text of the Convention: *Tractatenblad* 2000, 99; Dutch translation: *Tractatenblad* 2002, 6; Approval of ratification: *Tractatenblad* 2002, 131.

²⁹⁵ CEDAW/C/NET/3, 22 November 2000.

²⁹⁶ Paras 38–39.

²⁹⁷ Brief van de Staatssecretaris Verstand aan de voorzitter van de Tweede Kamer, Den Haag, 1 October 2001.

make some provision pending a decision by the parents. Finally, the government relies upon the decision of the European Court holding the complaint in *Bijleveld v The Netherlands*²⁹⁸ inadmissible for manifest unfoundedness. This argument is also unpersuasive. Although that case concerned equal treatment regarding the names given to children of married parents, it was quite a different issue to the one presently under discussion.

²⁹⁸ Application 42973/98.