

# THE DUTCH LAW OF CHILD RECOGNITION AND ITS APPLICATION TO EXTRA-MATRIMONIAL PROCREATION

Mirjam Freudenthal\*

## INTRODUCTION

Developments in modern medical technology and changing patterns of social relations make it timely and appropriate for lawyers to reconsider current laws applicable to parental relationships.<sup>1</sup> This is especially true in the Netherlands because of the exceptional nature of Dutch law with respect to the father-child relationship. Under Dutch law, as in many legal systems, a child's relationship to his or her mother is based only on his or her birth. The child's relationship to the father in principle derives from the father's marriage to the mother or from recognition. However, recognition under Dutch law does not require the father to be biologically related to the child.

This article will consider the legal position of a man who, without being married to the mother, wants to create a legal relationship between himself and the child, especially if the child was the object of a surrogate maternity contract. The discussion will be divided into the following seven parts: (I) Law of Parental Relationship; (II) The Character of the Recognition in Dutch law; (III) Legal Consequences of Recognition; (IV) Acceptance of Recognition by the Mother of the Child; (V) Recognition and Procreation; (VI) Changes in the Law of Parental Relationship; and (VII) The Bill to Discourage and Counter Commercial Surrogate Parenting. Section VIII provides an overview of new legislation in Germany concerning these issues as an example of the way a leading Western European legislature tries to deal with the subject.

## I. LAW OF PARENTAL RELATIONSHIP

Dutch law distinguishes between legitimate and illegitimate children. A child is legitimate when born during marriage, or within 307 days after the dissolution of the marriage.<sup>2</sup> A child conceived by the semen of a man other than

---

\* Docente at the Law Faculty of the State University of Utrecht the Netherlands. The author gratefully thanks Prof. Robert A. Sedler and Prof. William Burnham, Wayne State University, Detroit, for their scholarly comments and valuable help.

1. This article will not deal with parenthood by adoption.

2. Burgerlijk Wetboek [Dutch Civil Code] [BW] art. 1:197. One exception occurs when the mother is remarried at the time of the child's birth, in which case the child is viewed as a legitimate child of the new marriage. A second and obvious exception is

the mother's husband (an artificial insemination donor), with the consent of the husband, also has the status of a fully legitimate child.<sup>3</sup> According to the same provision in the Dutch Civil Code, once the husband has given his consent to artificial insemination, he can no longer institute an action for denial of paternity. Therefore, artificial insemination of the wife during marriage is not likely to present any legal problem because the husband will usually have given his consent to the procedure. Any child born out of wedlock or whose paternity is successfully denied by the husband of the mother is considered by law to be an illegitimate child.

An illegitimate child having a parental relationship with a person is called in Dutch legal terminology a "natural child" of that person. An illegitimate child is by birth automatically a "natural child" of his or her mother. But, according to the family law provisions of the Dutch Civil Code currently in force, the child only attains the status of a "natural child" of his or her father as a result of the father's voluntary recognition of the child.

## II. THE CHARACTER OF RECOGNITION IN DUTCH LAW

Under the Dutch civil code,<sup>4</sup> recognition is considered to be a juristic act creating a legal relationship between a man and a child. It is the act of someone who is willing to accept the legal consequences of fatherhood of a child, whether or not he is the child's biological father. In this respect, the Dutch law of recognition is exceptional. Most Western European systems of law generally provide only for recognition by the presumed biological father. In these systems, recognition is considered as a statement of a biological reality, rather than as a juristic act by a man who wants to create a legal relationship with a child, which is the case in the Netherlands.<sup>5</sup> In marriage, this biological relationship of the mother's husband is presumed by law.

From a biological standpoint, the concept of fatherhood in Dutch law is a legal fiction. This fiction has been accepted for two reasons. First, it is considered to be in the best interest of the child and the mother. Second, no useful purpose would be served by an extensive inquiry into the child's biological parentage.<sup>6</sup>

---

the situation where the husband is able to prove that he could not possibly be the father of the child. BW at art. 1:199.

3. BW at art. 1:201.

4. BW at art. 1:221, § 1.

5. Examples are found in the laws of the following countries: Austria, Allgemeines Bürgerliches Gesetzbuch [Civil Code] par. 163(b); France, Code civil art. 334-8; Germany, Bürgerliches Gesetzbuch [Civil Code] par. 1600-e, Zivilprozessordnung [Code of civil procedure] par. 641(c); Greece, Astikon Kodeks art. 1479; Italy, Codice civile art. 269; Portugal,Codigo civil arts. 1853, 1869(a); Spain, Código civil arts. 120-2/3; and Switzerland, Code civil suisse art. 260.

6. Dutch law does not provide for the possible tracing of the biological father. A draft Bill proposes to allow tracing for medical reasons in case of donor-insemination.

From a political standpoint, legitimacy is considered to be the most favorable factor, with the relationship between biological and legal fatherhood being only of secondary interest in the eyes of the Dutch legislature.<sup>7</sup> The primary interest of the child is treated by the law as the creation of a social relationship with the parent characterized by mutual affection, care and understanding.

This liberal Dutch law of recognition contains, however, certain legal restrictions. For example, under Article 1:224, subsection 1, BW, a recognition is void if declared:

- (a) by a man who, by law, is not allowed to marry the mother, such as the mother's father or brother;
- (b) by a man who was married to another woman within 306 days prior to the birth of the child;
- (c) by a minor, unless the recognition took place at the time of his marriage to the mother;
- (d) without the prior written consent of the child's mother, unless she is dead; or, finally,
- (e) during the majority of the child (18 years of age) without his or her prior written consent.<sup>8</sup>

Some of these restrictions will be discussed in greater detail later.<sup>9</sup>

### III. LEGAL CONSEQUENCES OF RECOGNITION<sup>10</sup>

As in most legal systems, the Dutch law of recognition creates a legal family relationship between the recognizing father (who, hereinafter, will simply

---

*See discussion infra* part VII.

7. Recognition as a means to create a legal relationship, even in cases where the biological relationship is absent, was historically a solution to the non-existence of adoption in Dutch law. In 1956, the Dutch legislature introduced rules on adoption. Since adoption was then restricted to adoption by a married couple of a child who had no relationship to either spouse, recognition was still used as a surrogate for adoption. This situation was altered slightly in 1979. In that year, adoption of a child who already had a legal relation with one partner of a married couple, by the other, became a legal possibility.

8. In cases (d) and (e), this consent can be included in the instrument of recognition. BW at art. 1:224, § 2.

9. Recognition is voidable in case of mistake, threat or fraud. If the man attempting to recognize the child could not possibly be the biological father, a petition for avoidance of the recognition can be filed by the child, by the man's descendants, by the man's former wife, or by the Public Prosecutor. In all these cases, special conditions have to be fulfilled. BW at arts. 1:224, 1:225.

10. I will not discuss the question whether any person has a fundamental right of reproduction; my focus only concerns the surrogate motherhood.

be referred to as "the father") and the child. The child will take the father's family name and nationality and is given maintenance and succession rights with respect to the father.<sup>11</sup> In addition to these statutorily-created rights, Dutch case law has initiated an important development in this area by giving direct effect<sup>12</sup> to Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and, thereby, subordinate Dutch family law to these international rules of non-discrimination.<sup>13</sup>

Some recent decisions by the Dutch Supreme Court, the *Hoge Raad*, on parental authority and visitation rights are of major importance.<sup>14</sup> The Dutch Civil Code provides for joint parental authority over children, only with regard to parents who are married to each other.<sup>15</sup> If the parents are not currently married and have never been married, the mother ordinarily will be appointed guardian and the father can claim "sub-guardianship" over the child.<sup>16</sup> If the parents were previously married and are now divorced, the Code provides that one of the

11. BW at art. 1:222. This article has been introduced as a result of the Marckx decision of the European Court of Human Rights, which began the abolition of all differences between legal and illegitimate children by defining these differences as discriminatory. Marckx Case, 31 Eur. Ct. H.R. (ser. A) at 1 (1979). Comparable provisions in other Western European legal systems include the following: Belgium, Code civil art. 335, Code de la Nationalité art. 8; France, Code civil art. 334-1, Code de la Nationalité art. 29; Greece, Civil Code art. 1506, Nationality Code art. 1/3; Italy, Codice civile art. 262, Legge sulla Cittadinanza arts. 2, 3; and Luxemburg, Code civil art. 334, Code de la Nationalité art. 2.

12. The words "direct effect" mean that these provisions of the European Convention on Human Rights do not require legislation or any other act to make them operative as a part of the municipal law; by their superiority they subsume and supplement the Dutch municipal law. See *infra* note 19.

13. Article 8 of the European Convention of Human Rights reads:

1) Everyone has the right to respect for his private life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise with this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention for the Protection of Human Rights and Fundamental Freedoms. Done at Rome, Nov. 4, 1950. Entered into force, Sept. 3, 1953. Europ. T.S. No.5, 213 U.N.T.S. 221, art.8 [hereinafter ECHR]. Article 14 of the ECHR reads: "The enjoyment of the rights and freedoms set forth in in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." *Id.*

14. See *infra* note 18.

15. BW at art. 1:246.

16. BW at art. 1:287.

parents will be appointed guardian and the other one sub-guardian.<sup>17</sup>

This system of guardianship, as applied to divorced parents and extra-matrimonial parental relations, has been re-interpreted in decisions of the *Hoge Raad* in 1984 and 1986.<sup>18</sup> In these cases, the *Hoge Raad* decided that, in light of Article 8 of the ECHR, especially regarding its provision dealing with family life, the terms of Article 1:161 subsection 1 BW could not be applied strictly.<sup>19</sup>

In the 1984 case, the parents in a divorce proceeding sought the continuation of joint parental authority, instead of the appointment of one parent as guardian and the other as sub-guardian. The *Hoge Raad* decided that continuation of joint parental authority could be permitted under the certain conditions. First, both parents must agree to this continuation. Second, the mutual understanding between the parents must be valid. Third, the factual circumstances, e.g., the distance between the dwelling of the father and that of the mother, make joint authority feasible, as it was in this particular case. And finally, the continuation of joint parental authority must be in the best interest of the child. In the two 1986 cases, unmarried couples asked the court for joint parental authority over their children as if the couples were married.<sup>20</sup> In each of these cases, the *Hoge Raad* agreed that these requests for joint parental authority were permissible, provided that the father had recognized the child.

Recently, the District Court of Amsterdam set aside this requirement of recognition on the ground that it conflicted with Article 14 ECHR.<sup>21</sup> The court held that refusing to give joint parental authority to the parents, although they satisfied the other requisite conditions, solely on the grounds that the father had not recognized the child, would unlawfully discriminate against these unwed parents compared to other unwed parents similarly situated, except for the act of recognition. In the case mentioned here, the reason why the father did not recognize the child was a special one, namely, that both the father and the mother wanted to give the child the mother's family name, which was only possible if the father did not recognize the child.<sup>22</sup>

---

17. BW at art. 1:161, § 1.

18. *Hoge Raad der Nederlanden* [Highest Court] [HR], May 4, 1984, *Nederlandse Jurisprudentie* [Netherlands Law Reports] [NJ] 1985, at 510; HR, Mar. 21, 1986, NJ 1986, at 586-87. For reasons of privacy Dutch law reports do not mention the names of the parties in family law decisions; they are referred to by X, Y and Z.

19. According to the Dutch Constitution, treaties like the ECHR are self-executing. Article 93 of the Constitution of the Kingdom of the Netherlands states the following: "Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published." *Grondwet* [Constitution] [Grw.Ned.] art. 94. The Constitution also states: "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions." *Id.*

20. *See supra* note 16.

21. *Rechtbank Amsterdam*, May 4, 1987, NJ 1987, at 842.

22. In such circumstances Article 14 of the ECHR is involved. *See supra* note 13

A comparable development is found in the rules on visiting rights. Article 1:161a of the Dutch Civil Code provides that visiting rights can only be granted after divorce to the parent to whom the guardianship has not been assigned. The Code does not mention visiting rights of unmarried parents that have split up.<sup>23</sup> However, in a number of decisions the *Hoge Raad*, as a consequence of the superiority of Articles 8 and 14 ECHR over domestic legislation,<sup>24</sup> recognized a visiting right with respect to each person who had maintained a "family life" with the child.<sup>25</sup> A special condition required for these judicially recognized visiting rights is that the visiting rights must be in the best interest of the child. Initially, the *Hoge Raad* imposed the additional condition that the father must have recognized the child. This condition was dropped because it was considered discriminatory and, thus, in conflict with Article 14 ECHR.<sup>26</sup> Hence, today any person—parent, grandparent, foster-parent or the like—can be awarded visiting rights, as long as he or she has had a family life with the child.<sup>27</sup>

These court derived developments in the Dutch law of visiting rights are still being debated. One such controversial case involved a semen donor<sup>28</sup> who claimed visiting rights to the child procreated by his semen. In that case, the *Hoge Raad* decided that his biological paternity alone was not sufficient to establish family life within the meaning of Article 8 of the ECHR.<sup>29</sup> Instead, the court found that a more substantial relationship than biological paternity was necessary, such as regular contacts between father and child.

## V. ACCEPTANCE OF RECOGNITION BY THE MOTHER OF THE CHILD

As the previous discussion has illustrated, recognition in Dutch law does not depend on the man's biological paternity of the child. However, in order to

---

for text of article 14. In this case the District Court agreed and decided that, although the condition of recognition was not fulfilled, the parents were entitled to exert joint parental authority. *Rechtbank Amsterdam*, May 4, 1987, NJ 1987, at 842.

23. Newly recodified in: *Wet van*, Sept. 13, 1990, *Staatsblad van het Koninkrijk der Nederlanden* [Stb.] 1990, at 482.

24. *See supra* notes 13, 19.

25. The European Court of Human Rights construes section 1, article 8 of the ECHR as including a right of protection of family life. *See Marckx Case, supra* note 11. "Family life" has become an independent notion of European human rights law requiring a combination of factual and legal relations between parents and children.

26. *See HR*, Mar. 21, 1986, NJ 1986, at 586-87.

27. On the other hand, even the legal father can be denied visiting rights if he has not had a family life with his child. According to the *Hoge Raad*, the only deciding factor to establish family life is the character of the relationship between the father and his child; being the biological father is, thus, not a sufficient reason. *HR*, Nov. 10, 1989, NJ 1990, at 628.

28. *HR*, Jan. 26, 1990, NJ 1990, at 630.

29. *See supra* note 13.

restrict the number of people who can recognize a child, several conditions have been attached.<sup>30</sup>

One of the most important statutory conditions is that the mother of the child must agree to the recognition. In other words, by refusing to agree, the mother can prevent a recognition and its consequences. Moreover, no provision in the code empowers the court to replace the mother's veto by a decree to the opposite effect.<sup>31</sup>

However, in a recent decision, the *Hoge Raad* held that a mother's veto of a recognition can be a violation of the right to family life as guaranteed by Article 8 of the ECHR, in cases where the man seeking to recognize the child is also the child's biological father.<sup>32</sup> In this case, the biological father and the mother had lived together for several years before the child was born. After the child's birth, the father took care of the child for an extended period of time while the mother was in a mental institution. During and after her illness, the mother refused to agree to the recognition of the child by the father, perhaps out of fear of losing guardianship over the child to the father.

The *Hoge Raad* took the position that the biological father and his child, since they had had a family life within the meaning of Article 8 of the ECHR,<sup>33</sup> were both entitled to have their relationship legally recognized. This decision implies that, in principle, the father holds the right to recognize the child in these types of circumstances. Thus, when the mother refuses to give her consent to the recognition and the refusal constitutes an abuse of her right to withhold consent, this will not operate to defeat the father's right of recognition.<sup>34</sup> Therefore, in deciding whether the father enjoys the right of recognition, there will have to be a balancing of the interests of the father, the mother, and the child.<sup>35</sup>

---

30. See discussion *infra* part II.

31. BW at art. 1:224, § 1(d).

32. HR, Apr. 8, 1988, NJ 1989, at 170. The relativity of the mother's right to refuse to agree to a recognition is further elaborated in the decisions of the *Hoge Raad*. See discussion *infra* part II.

33. ECHR, art. 8.

34. In its November 10, 1989 decision, the *Hoge Raad* accepted a recognition by a married man. HR, Nov. 10, 1989, NJ 1990, at 450. It considered an unconditional denial of recognition, as enacted in the Burgerlijk Wetboek, to be contrary to Article 8 of the ECHR. BW at art. 1:224, § 1(b) (nullifying the recognition by a married man); see *supra* note 13. The court stated that "a legal provision which under all circumstances prohibits a married man from recognizing his illegal child fails to balance the interests involved and distorts the requirement of proportionality laid down by the European Court of Human Rights." HR, Nov. 10, 1989, NJ 1990, at 450. The concept of "proportionality" balances the rights of the parties involved. It allows restricting the right of a child or a father to a legal relationship, but forbids its exclusion in all circumstances.

35. In two recent cases the *Hoge Raad* particularized the mother's right to refuse to agree to a recognition. On one hand, it decided that an interest of the mother important enough to justify her refusal is the child's change of name. In Dutch law, this is an inevitable legal consequence of the father's recognition. HR, May 18,

## V. RECOGNITION AND PROCREATION

The current availability of several types of extra-matrimonial procreation raises questions about the application of the Dutch law of child recognition to such cases. This section will discuss recognition and artificial insemination with donor-semen (AID), a frequent practice in the Netherlands, as well as recognition and surrogate maternity ("*draagmoederschap*"), which is a rare phenomenon in the Netherlands at the present time.

In the Netherlands, AID is ordinarily a completely anonymous procedure. As a rule, the biological father will not know the name of the mother, nor will he be informed of the birth of the child. In such situations, the mother does not know the name of the donor either. Some specialists in this area advocate partial disclosure of donor data, in order to make available important genetic, medical, and social information.<sup>36</sup> In their view, every child has a right to know his or her lineage. But, until such views are generally accepted, recognition will play no part in the case of a child conceived by AID.

The opposite is true in cases of surrogate motherhood because the father of the child is known. The father, his wife, and the surrogate mother in such situations generally have agreed that the latter will carry the child and will relinquish the child after birth.<sup>37</sup> In these circumstances, the question of the possibility of recognition of the child by the father according to Dutch law arises. Here, a number of situations have to be distinguished.

According to Dutch law, as it now stands, a father's recognition of a child is void if he is married to another woman. BW, Article 1:224, prohibits and nullifies the recognition of a child by a married man.<sup>38</sup> In this context, adoption by the married man and his wife, could offer a proper solution. But, as the legal conditions for an adoption are rather strict, not all married couples will be able to comply with them.<sup>39</sup>

---

1990, NJ 1991, at 374-75. On the other hand, the court found that the mother is not allowed to agree to a recognition by a man who is not the biological father of the child, if her agreement is given solely to frustrate the future recognition by the biological father, who had had a family life with the child. HR, Feb. 22, 1991, NJ 1991, at 376; *see also* HR, Dec. 20, 1991; Rechtspraak van de Week [Weekly Law Reports] [RvdW] 1992, at 13.

36. This discussion on the partial disclosure of the name of the unrelated donor is reported in the *Explanatory Report to a Bill on the Registration of Data of Semen Donors*, proposed in 1992 by the Dutch Ministry of Justice. *Nederlands Juristenblad*, 1992, at 882.

37. In 1986 there were only nine cases of surrogate motherhood known to the Child Protection Authority in the Netherlands. This Authority has to make a recommendation in the adoption proceedings that are usually the consequence of surrogate motherhood. According to the Dutch National Health Council, in the Netherlands, surrogate motherhood is often an arrangement entered into between sisters. *Report on Artificial Procreation*, Child Protection Authority, 1986.

38. *Cf. supra* notes 8-9 and accompanying text.

39. Adoption is codified in BW, article 1:228. The main conditions are: minority



If the surrogate mother is unmarried and the biological father is also unmarried, e.g., living with another woman, the surrogate mother's consent to the recognition is important. The agreement between the biological father and the surrogate mother will possibly contain a requirement that the mother give her consent to this recognition. But an action for performance of that obligation will undoubtedly be seen as *contra bonos mores* and so will not lie.<sup>40</sup> As a rule, any contract containing provisions for, or aimed at, the termination of parental rights or guardianship will be void for its immoral character, especially if financial considerations are at stake.<sup>41</sup> Such will also be the fate of contracts for surrogate motherhood.

If we compare these rules to those given by the Supreme Court of New Jersey in *In the Matter of Baby "M"* we see a remarkable similarity.<sup>42</sup> There, the New Jersey Supreme Court voided the contract as against public policy because the natural mother's rights were completely ignored, her decision was uninformed and less than totally voluntary, and the contract did not take account of the best interest of the child. The difference in the final results of this case versus Dutch case law is due to the mother's right to refuse the father's recognition under Dutch law, whereas, according to New Jersey law, the natural father holds recognition rights equal to those of the mother.

What will be the situation in the Netherlands if the mother, with or without a surrogate maternity agreement with the father, refuses to consent to a recognition by him? Would the court hold, as in the decisions of the *Hoge Raad* in 1988 and 1990,<sup>43</sup> that Article 8 ECHR overrules the right of veto provided for in Article 1:224, subsection 1d BW? Such a result is unlikely. The *Hoge Raad* expressly held that the mother's right of veto would be overruled only if the biological father could prove that he had a family life with the child, a condition necessarily absent at the time of the surrogate mother's contractual obligation to relinquish the child.

If the surrogate mother is married, the situation of the unmarried father who seeks to recognize the child is even more complicated. Not only does the surrogate mother have to give her consent to his recognition, but he can recognize the child only after a denial of fatherhood by the surrogate mother's husband. Furthermore, the husband can only effect a denial if he can show that he could not possibly be the father of the child, and that he did not consent to the AID, which in cases of surrogate maternity is seldom true.<sup>44</sup>

---

of the child, both adopters must be between 18 and 50 years older than the child, both adopters must be fostering the child for more than one year, and the child's biological mother must be at least 16 years old. Additionally, the adopting couple must have been married for at least five years. There have been cases in which a married couple, who did not fulfill the requirements for adoption, registered the new-born baby as their own child. Once discovered, this fraudulent declaration was invalid and prosecuted.

40. See BW at art. 3:40.

41. BW at art. 1:267; see also HR, Feb. 9, 1990, NJ 1990, at 767.

42. *In the Matter of Baby "M,"* 525 A. 2d 1128 (N.J. Sup. Ct. 1987).

43. See *supra* notes 32, 35.

44. One of the main characteristics of Dutch adoption law is that at the present

## VI. CHANGES IN THE LAW OF PARENTAL RELATIONSHIP

In 1981, a draft Bill reforming the Dutch Law of Parental Relationship was published. However, the Bill itself was not sent to Parliament until June 1988. Both the Draft and the Bill notably improve the legal position of children born out of wedlock.<sup>45</sup> One of the Bill's central objectives is to extinguish legal differences between legitimate and illegitimate children. However, in a recently published revision of this Bill,<sup>46</sup> the recognition of the child would continue to be a juristic act, instead of a statement of a biological reality. Several reasons for this provision have been given.

First, even if recognition was not only a purely juristic act, as it is now under Dutch law, but also a statement of (presumed) biological paternity, as it is in many other States' laws, no absolute certainty would exist concerning someone's blood relationship to his or her registered father. Second, in the case of artificial insemination with the semen of an unrelated donor (AID), the biological relationship remains irrelevant to the establishment of a legal relationship, since in practice,<sup>47</sup> it is impossible in the Netherlands for such a child to trace his or her biological father.

The Bill adapts the grounds for nullity enumerated in Article 1:224 BW to the latest developments in case law.<sup>48</sup> Under the Bill's new main rule, the biological father is entitled, in principle, to have his parental relationship legally established. The Bill's explanatory report interprets Article 8 ECHR as including the child's right to an establishment of legal paternity.

The Bill also proposes a more detailed set of requirements for the child's mother's consent to the father's recognition. However, her right of veto will lose its absolute character. Instead, whenever the man seeking to recognize the child is the biological father, a judgment of the Juvenile Judge may substitute for her consent.<sup>49</sup> A court judgment may also substitute for the mother's consent if the mother has either died or is mentally ill.<sup>50</sup>

The prohibition of a recognition by a married man, currently contained in

---

time, only married couples are entitled to adopt. Therefore, adoption is not an alternative in this case. In cases where an unmarried couple contracts with a surrogate mother to have a child, recognition by the father is still the only way to create a legal relationship between the father and the child. Only in the event of a dramatic change in the Dutch adoption law, one that effectively removes the condition of marriage, will the partner of the biological father be in a position to create a legal relationship with the child.

45. Parliamentary Docs. No. 20 626(2).

46. Parliamentary Docs. No. 20 626(6).

47. In Dutch medical practice AID is mostly anonymous. See discussion *supra* part V.

48. HR, Apr. 8, 1988, NJ 1989, at 170; HR, May 18, 1990, NJ 1991, at 374-75. See also HR, Nov. 10, 1989, NJ 1990, at 450.

49. BW at art. 1:209, § e (Proposed Article).

50. The Bill introduces a requirement that the mother's consent must be in writing and that a written consent of the child is required if the child is over 12 years of age.

Article 1:224, subsection 1b BW, has been modified in the new Bill. The main rule will continue to be that it is not possible for a married man to recognize the child of a woman other than his wife. However, under certain circumstances a court may grant recognition. Important circumstances include the condition that neither the man's wife, nor any of his other children, oppose his act of recognition. Another condition is that his actual marriage must only exist as a formality, for example, during a divorce proceeding.<sup>51</sup>

A new feature in the Bill is the possibility of a judicial declaration of paternity at the request of the mother or the child, if the child is of age. This judicial declaration of paternity has limited consequences. It establishes the father's duty to maintain the child and simultaneously gives succession rights to the child. However, the child will not have the name of the father, nor will there be any legal consequences in terms of parental authority over the child.<sup>52</sup>

## VII. A BILL TO DISCOURAGE AND TO COUNTER COMMERCIAL SURROGATE PARENTING

Commercial brokerage of surrogate maternity is a very recent phenomenon in the Netherlands. Brokerage agencies have been formed and advertisements, even by foreigners, especially Americans, inviting women to commercial surrogate motherhood, appear in Dutch newspapers. To redress this commercialization of surrogate motherhood, the Government has drafted a Bill<sup>53</sup> which has recently been adopted by Parliament.

This Bill is aimed at preventing commercial surrogate maternity from gaining social acceptance. The many risks related to surrogate maternity, for the surrogate mother, for the future parents, and for the child, have led to the legislature's conclusion that surrogate motherhood is an undesirable phenomenon. The most obvious risks concern the mother's emotional inability to surrender the

---

51. To introduce the possibility for a married man to recognize his illegitimate child will create an easy opportunity for married couples to legalize a child born of an unmarried surrogate mother. First, the married man, whether or not he is the biological father, must recognize the child. After that, the couple may adopt the child by way of step-parent adoption. In Dutch law, step-parent adoption is possible only if the child is the legal child of one of the spouses. In a case of step-parent adoption, the only requirement is the agreement of the child's other parent. See BW at art. 1:228, subsec. 2. The general legal restrictions do not apply. See *supra* note 39.

52. See BW at art. 1:213.

53. This Bill, along with an explanatory report, was sent to Parliament on December 20, 1990. Parliamentary Docs. No. 21 968. The subject will be dealt with in article 151, sections (b) and (c) of the Criminal Code. The Bill is aimed at codifying a Recommendation of the Council of Europe. See Human Artificial Procreation, CAHBI/INF (89)1, Jan. 1989 [hereinafter Human Artificial Procreation]. In September 1993, this Bill was adopted and will enter into force on December 1, 1993.

child and the future parents' disappointed expectations in the case of a disabled child. However, an absolute prohibition of surrogate motherhood was not considered to be expedient. Thus, surrogate motherhood within the family or between friends will not be prohibited.<sup>54</sup>

The Bill defines the surrogate mother as a woman who becomes pregnant with the intent of carrying a child for another person, who wants to obtain parental authority over the child or who wants to accept the care and education of that child for a durable period of time.<sup>55</sup> Under this definition, it is irrelevant whose ovum was impregnated, the mother's or the surrogate mother's. Such a definition is, therefore, suitable for all kinds of modern reproductive techniques.

The Bill prohibits surrogate motherhood only for commercial uses, which means for a remuneration which exceeds the costs. A presumption of commercial use arises if the surrogate motherhood contract is mediated by a professional broker.<sup>56</sup> Consequently, Americans' advertisements soliciting for surrogate mothers, which currently appear in Dutch newspapers occasionally, will violate the provisions of the Act once it enters into force.

### VIII. THE GERMAN LEGISLATION ON ARTIFICIAL PROCREATION

Since artificial and extra-matrimonial procreation have become legal issues, most legislators in Western European countries have prepared and introduced legislation to regulate and restrict these practices.<sup>57</sup> An example of the way one legislature has dealt with the issue can be found in recent legal developments in Germany.<sup>58</sup>

In the last few years, Germany introduced two special statutes: one in December 1989, about agency on adoptions; and another, in January 1991, on the

---

54. See *supra* note 45.

55. Dutch Criminal Code art. 151(b).

56. Dutch Criminal Code art. 151(b)(1), art. 151(c)(1). Violation of these provisions will be punished with imprisonment or a fine.

57. Most European national legislation on this subject is influenced by discussion within the European Council. Human Artificial Procreation, *supra* note 53.

58. The United Kingdom adopted the Human Fertilisation and Embryology Act 1990. An interesting Bill on the civil rights with respect to the integrity of the human body has been proposed to the French Parliament. Sénat, Première session ordinaire 1992-1993, No 66. The bill involves the identification of persons, their genetic characteristics, and medically-assisted procreation. *Id.* As to medically-assisted procreation, a new article in the French Code civil, 311-19, denies any legal relationship between an unrelated donor and the child issue of the procreation. The legal relationship between the husband or the partner of the mother and the child may only be contested if the husband or the partner did not consent to the artificial insemination, or if the child was not the issue of that insemination. See *infra* note 62.

protection of embryos.<sup>59</sup> These two statutes seriously restrict the use of techniques for artificial procreation.

The Protection of Embryos Statute makes it a criminal offence for any person to implant a fertilized or unfertilized ovum in another woman.<sup>60</sup> Artificial insemination is permitted only if its sole aim is the pregnancy of the woman who produced the ovum.

As a result, almost all transfers of ova are effectively prohibited. In practice, all kinds of artificial procreation, whether by guest mothers, where the wife's fertilized ovum is carried by another woman, or by stand-in mothers, where the biological mother is artificially inseminated by another woman's husband's sperm, have, thus, become legally forbidden.<sup>61</sup>

The Agency on Adoptions Statute forbids anyone to act as an intermediary for surrogate parenting, and includes a prohibition of mediation for guest mothers as well as stand-in mothers.<sup>62</sup> The prohibition applies specifically to advertisements in newspapers offering or soliciting surrogate mothers.<sup>63</sup>

Comparing the two German statutes with the principles formulated by the Council of Europe, and the proposals made by the Dutch government in its Bill on surrogate parenting,<sup>64</sup> we may conclude that these statutes have set the rules which other legislatures have followed in dealing with these subjects.

## SUMMARY

Recent medical developments on procreation have caused a good deal of legal

59. Gesetz zur Änderung des Adoptionsvermittlungsgesetzes [Statute to Reform the Statute on Agency on Adoptions] 1989 Bundesgesetzblatt [BGBI] I 2014 [hereinafter Statute to Reform]; Gesetz zum Schutz von Embryonen [Statute on the Protection of Embryos] 1990 BGBI I 2746 [hereinafter Statute on Protection].

60. Statute on Protection, *supra* note 59, at §1, S. 1, 2.

61. However, the Statute on the Protection of Embryos excludes punishment of the woman who produced the transplanted ovum or the embryo, as well as the woman in whom the ovum or the embryo has been implanted. Statute on Protection, *supra* note 59 at § 1, S. 3. The surrogate mother and the person willing to take permanent care of the child are, likewise, exempted from punishment under this statute.

62. Statute to Reform, *supra* note 59 at § 13(c). This provision states that "[m]ediation in surrogate parenting is forbidden." *Id.* Section 14(b) imposes a maximum imprisonment of one year for offenders, of two years if mediation was for money, and of three years in case of professional or commercial mediation, but the surrogate mother and the future parents are excluded from prosecution. The French government has proposed a similar provision imposing a fine of 10,000 to 500,000 francs or an imprisonment of six to twelve month for mediation, which is doubled if the mediation was arranged for value or professionally. See *supra* note 58.

63. Statute to Reform, *supra* note 59 at § 13(d). Section 14 imposes a maximum fine of 50,000 DM for offenders. *Id.* at § 14.

64. See also *supra* note 58.

uncertainty concerning extra-matrimonial parental relations. In response to this uncertainty, the Dutch Government has introduced several bills dealing with the subject. The general rule in Dutch law regarding the legal relationship between a mother and a child to whom she gave birth has been validated for all types of surrogate mothers, regardless of the semen or ovum donor.

In surrogate maternity, the legal relationship between a child and his or her unmarried father can only be created by an act of legal recognition by the father. However, the father's recognition is subject to the surrogate mother's consent. Since the mother's right to refuse consent is almost absolute, the biological father may only dispute her refusal if he can claim family life with his child, which, of course, will not occur in the case of surrogate motherhood. Contractual waiver of this right to refuse consent is null and void as being against public policy. Thus, a legal relationship between a child and his or her unmarried father can only be created by adoption, which requires the fulfillment of many conditions.

The Bill to Discourage and to Counter Commercial Surrogate Parenting proposes to reduce the extent of possible conflict situations, not by re-regulating the relationship between the surrogate mother and the father and his wife, but rather, by reducing the commercial use of surrogate maternity through its criminalization.

This Dutch Bill is not unique. In some European countries, like Germany, rules on artificial procreation and surrogate parenting have already been introduced; they clearly influenced the drafters of the Dutch Bill.

## CONCLUSION

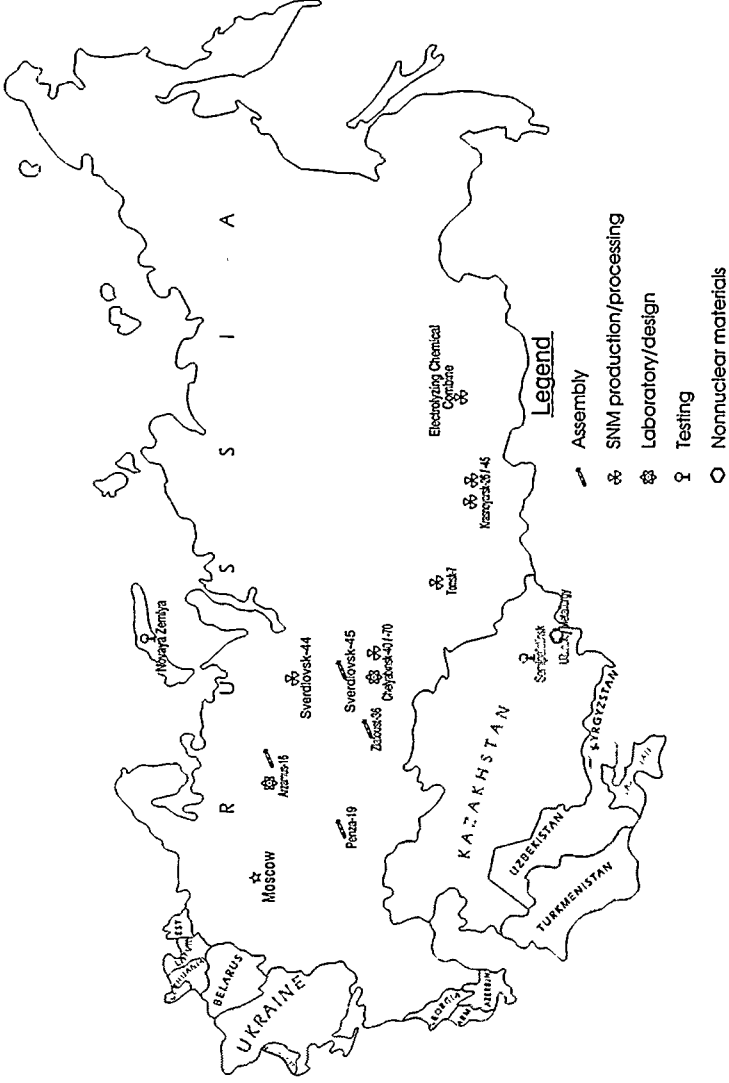
The steadily increasing development of new techniques of artificial procreation provides new ways for childless couples to reproduce. The Dutch law on parental relationship does not provide a means, in all instances, for establishing a parental relationship between the biological father and the child born as the result of modern techniques of artificial procreation. Thus, the adoption of appropriate legislation is needed, especially since the right to respect of one's private and family life, which includes parental relationships, is guaranteed in Article 8 of the ECHR, a self-executing article. Interference with the exercise of this right of privacy is prohibited by this Article "... except such as is in accordance with the law and is necessary in a democratic society . . . for the protection of health or morals, or for the protection of the rights and freedoms of others." In its Explanatory Report to the Bill to Discourage and to Counter Surrogate Parenting, the Dutch Government specifies this exception in the following two ways: (1) a restriction in favor of the child's well-being, and his or her right to have a stable legal status which must be protected; and (2) a restriction to protect the woman's dignity, which requires that her body not become a mere instrument for use by others in their own interest, that procreation must not become the object of a commercial transaction, and that the right to keep the child once it is born must be protected.

The Dutch Government, when drafting the Bill, was clearly influenced by the studies on the legal, medical and public health aspects of human artificial procreation techniques, published by the Council of Europe. The Council considered it desirable to harmonize regulations at the European level because of the danger that exclusively national regulations might prove ineffective in practice. If regulations were inconsistent across borders, it would always be possible to use techniques prohibited by one country in another having different regulations.

As a result of the findings of the above studies, the Council of Europe has recommended that its member-States prohibit commercial surrogate motherhood. The Dutch Bill to Discourage and to Counter Surrogate Parenting, is aimed at codifying such a prohibition.



# Nuclear Weapons Complex in the Former Soviet Union<sup>a</sup>



<sup>a</sup>Locations are approximations. Facilities are commonly named for the nearest town of significant size. Source: CIA