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Evaluation of the Law on stipulations on the right to have contact or interaction after partner killing

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- SUMMARY -

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Summary

Background

A change in Book 1 of the Dutch Civil Code (*Burgerlijk Wetboek*) entered into force on 1 January 2018: the enactment of the Law on stipulations on the right to have contact or interaction after a partner killing (*Wet clausuleren recht op contact of omgang na partnerdoding*). The right to contact or interaction of a parent with their child is a fundamental right. Contact is understood as the parent having custody of the child; interaction is understood as the situation in which the parent has no custody of the child. Even if one parent killed the other parent, in principle that parent has a right to have contact or interaction with their child. Before the law was changed, the contact or the interaction of the child with the parent who killed the other parent could take place without the juvenile judge having ruled on it. In practice, this was found to be unsatisfactory: accepting contact or interaction with the detained parent could lead to untoward pressure on children. The law change regulated that, in the case of actual or suspected partner killing, the juvenile judge always rules whether contact or interaction is in the interest of the child, and does so on the basis of a request by the Child Care and Protection Board (*Raad voor de Kinderbescherming*, *RvdK*).

For readability's sake, the report only uses the concepts of interaction and interaction arrangement. This must include those rare cases in which, after the partner killing, the parent retains custody and in which there is therefore contact or a contact arrangement.

Since this law was enacted on 1 January 2018:

- in all cases in which there is actual or suspected partner killing and in which minors are involved, the Child Care and Protection Board investigates the desirability of an interaction arrangement between the child and the detained parent. Based on this investigation, the Child Care and Protection Board requests that the juvenile judge either set up an interaction arrangement or deny the interaction. The request of the Child Care and Protection Board must also indicate the duration of the requested interaction arrangement or interaction denial.
- a juvenile judge always rules in this respect and has the possibility to review this ruling after at least one year at the request of the parent. However, if the court decides on a denial of two years or longer, any new request of the parent is admissible only after two years.
- the law provides for the obligatory appointment of a curator ad litem to represent the child in all the aforementioned matters in which determining an interaction arrangement or denying interaction is requested. This can be a lawyer or a behavioural expert, for example.

Evaluation of the Law on stipulations on the right to have contact or interaction after partner killing

The law change had as objective the safeguarding of the carefulness of decisions regarding interaction in cases of partner killing, and therefore the proper safeguarding of advocacy for the child's interests. The purpose of this investigation was to obtain insight into the effects of this law change. The problem formulation ensuing from this comprises the following four questions:

- Has the law been implemented? If it has, how? If it hasn't, why not?
- How does the law relate to the European Convention on Human Rights (ECHR)?
- Have there been undesirable effects because of the implementation of the law?
- With the law change and its application, are the interests of the child being sufficiently served?

In order to ensure a logical structure, the main questions of the report have been somewhat rearranged, with the main question about undesirable effects now being discussed in the chapter about the interests of the child.

Methods and data collection

To answer the investigation's questions, several steps have been covered to collect the necessary data:

- **Documents study:**
  Here, first of all steps were taken into operationalising 'the interests of the child'. To this end, documents were read from the history of the law change, extensively examining the reactions of various organisations that were consulted in the consultation phase of the law.
- **Exploratory interviews:**
  Exploratory interviews took place with seven parties (Dutch National Police [*Nationale Politie*], Child Care and Protection Board [RvdK] Child Protection Amsterdam [*Jeugdbescherming Amsterdam*], Child Protection Rotterdam-Rijnmond [*Jeugdbescherming Rotterdam-Rijnmond*], Victim Support Netherlands [*Slachtofferhulp Nederland*] and the National Psychotrauma Centre [*Landelijke Psychotraumacentrum*]). These interviews covered the actual implementation of the law, the vision of these parties on the implementation, and the parties' operationalisation of the interests of the child.
- **Establishing a total number of cases:**
  The Child Care and Protection Board and the National Police were requested to provide information. The request to the Child Care and Protection Board yielded an overview of 24 cases from 1 January 2018 until the beginning of this investigation (December 2022). The request to the National Police did not yield an overview that was suitably comparable.
- **Dossier investigation**
  Child Care and Protection Board as well as Council of the Judiciary (*Raad voor de rechtspraak, Rvdr*) dossiers were investigated. A total of 14 of the Child Care and Protection Board's dossiers were investigated. Several dossiers of the total 24 dossiers could not be used because of the particular sensitivity of the information or too short a window to include them in the investigation.
  Only seven of the 14 Council of the Judiciary (Rvdr) dossiers were accessible via the non-public online E-archive, the main reason for this being that not all court rulings have been digitised.
- **Legal analysis:**
  This analysis was conducted by:
  - reading the parliamentary history in terms of the law change.
  - finding out via the European Court of Human Rights (hereinafter: HUDOC) and Rechtspraak.nl to what degree there are supplements to HUDOC 19 June 2003, 46165/99 (Nekvedavicius vs. Germany); HUDOC 17 May 2011, 9732/10 (Heidemann vs. Germany); and other jurisprudence that makes reference to the parliamentary documents.
  - In addition to the aforementioned analysis in relation to the ECHR, it was also investigated whether there were developments in which there was discussion on how the right to have interaction or its stipulations relate to the legal position of a minor as protected by the Convention on the Rights of the Child (CRC). To that end, the published jurisprudence of HUDOC and of the Dutch Supreme Court (*Hoge Raad*) about contact/interaction since the enactment of the law change was used as a basis.
- **Case interviews**
  For all 14 cases, attempts were made to interview several involved professionals. In the end, a total of 22 interviews took place, divided over the cases:
  - in 13 of the 14 cases with the Child Care and Protection Board;
  - in four cases with the Certified Institutions (hereinafter: CIs);
  - in four cases with the curators ad litem;
  - in one case with Victim Support Netherlands.
- **Analysis of the Child Care and Protection Board requests and the rulings of the juvenile judges:**
  The Child Care and Protection Board requests and the rulings of the juvenile judges were additionally analysed, seeking references to the interests of the child.
- **Expert meeting:**
  Last, the findings based on the remaining investigative activities were presented in an expert meeting for clarification to a number of experts:
  - a clinical epidemiologist of a psychotrauma centre;
  - a clinical psychologist;
  - a family law lawyer familiar with the issues of partner killing;
  - a juvenile judge;
  - an expert from Defence for Children;
  - an expert from Expertisecentrum K I N D.

Part A: Has the law been implemented? If it has, how? If it has not, why not?

The 'Protocol of action for custody, interaction and help after partner killing in which minors are involved' (*Handelingsprotocol gezag, omgang en hulp na partnerdoding waarbij minderjarige kinderen zijn betrokken*), set up in line with the law change, describes the following steps:

1. police reporting to Veilig Thuis/other crisis management service and Victim Support Netherlands within 24 hours;
2. reporting by Veilig Thuis/other crisis management service to the Child Care and Protection Board within 24 hours;
3. VoVo/VOTS[1] request by the Child Care and Protection Board and the corresponding decision of the juvenile judge within 24 hours. The VoVo/VOTS measure is implemented by the CI.
4. custody and interaction investigation by the Child Care and Protection Board within 12 weeks, based on which the Child Care and Protection Board asks the juvenile judge for a definitive custody arrangement and the possible arrival at an interaction arrangement. The custody matter is usually presented to the CI.

The Protocol of action additionally has stipulations regarding:

- appointment by the juvenile judge of a curator ad litem at the beginning of the custody and interaction procedure (this procedure follows after the Child Care and Protection Board's submission of the custody interaction request). This curator ad litem is appointed in order to represent the minor.
- consultation of a psychotrauma centre by the CI within seven days of the partner-killing incident;
- contact between the CI and Victim Support Netherlands. In this respect, the Protocol states that the CI and the case manager from Victim Support Netherlands keep each other informed of relevant developments during the VoVo period.

The investigation shows that the initial steps of the Protocol of action are (most probably) always followed. This would involve police reporting to Veilig Thuis, the Veilig Thuis reporting to the Child Care and Protection Board, the request for a VoVo or a VOTS, and the corresponding court decision. Additionally, the Child Care and Protection Board's custody and interaction investigation is almost always completed within the timeframe of 12 weeks. In most cases by far, based on this investigation, the Child Care and Protection Board requests termination of the custody of the detained parent, and the juvenile judge agrees with this.

Deviations from the Protocol of action which (most probably) occur more regularly concern:

- appointment of a curator ad litem: this does not happen in all cases. The reasons for it are not always clear, but in most cases the parties already involved question the benefit of a curator ad litem.
- involvement of Victim Support Netherlands by the CI: there are signs that this does not happen, for various reasons. Victim Support Netherlands stated that lack of clarity about the actual or possible role of Victim Support and the workload of the CIs contribute to Victim Support not always being seen as a party that the CI should involve.
- the consultation of a psychotrauma centre within seven days: there are known cases in which this does not happen within this timeframe, due to reticence of the psychotrauma centre or initial lack of clarity about the question of whether a specific case really related to partner killing.

Another deviation from the law in a strict sense is that in its interaction requests the Child Care and Protection Board does not always choose for either an interaction arrangement or a denial with a specific duration. The Child Care and Protection Board regularly chooses to not request or to wait before requesting interaction arrangements, leaving the corresponding assessments and decisions to the CI. Such requests are usually substantiated by the observation that, after three months, there is still too much uncertainty about the situation to make a more concrete request. In those cases in which the Child Care and Protection Board has requested to not determine or to wait before requesting an interaction arrangement, the investigation showed that the juvenile judge usually takes over this request from the Child Care and Protection Board.

[1] VoVo = provisional guardianship; VOTS = provisional family supervision order.

Given that the number of cases in which a denial decided for a specific timeframe is very minimal, no conclusions can be drawn about the working of the law in the period during and after a denial timeframe.

Part B: How does the law relate to the European Convention on Human Rights (ECHR)?

When, in a case of partner killing, decisions are taken about the contact between the children and the detained, suspected or convicted parent, the human rights of those involved could become imperilled. It was therefore investigated how the law relates to convention stipulations from the ECHR. The rights of the child that, according to the CRC, deserve to be protected are also involved in that investigation. Special attention was paid to the jurisprudence of the Dutch Supreme Court (Hoge Raad) and the European Court of Human Rights in Strasbourg. In that context it can be determined that, since the enactment of the law, no published jurisprudence has been found which places the relation of the law to the mentioned convention's stipulations in a new or different light.

This means that special value must be attached to the admissibility decision in the case Nekvedavicius versus Germany, where the HUDOC ruled that the reasons to deny interaction can in any event not be considered as permanent and that the national judges have an ongoing obligation to re-evaluate the situation. This obligation to periodically re-evaluate after one year was subsequently nuanced, in terms of the ability of waiving it under some circumstances. That is the case if the re-evaluation were to severely threaten the well-being of the child, as seen in the HUDOC's admissibility decision in the case Heidemann versus Germany.[2]

The crucial question that was explored is whether this system of periodic re-evaluation of an interaction denial is sufficiently protected in the Law on stipulations on the right to have contact or interaction after a partner killing. Book 1 Article 377e(3) of the Civil Code determines that the parent that is suspect/convicted is only eligible for a re-evaluation request after two years, instead of one year. The question is how that relates to the requirement to look at each situation individually by assessing the concrete circumstances of the case, to which the HUDOC in the Heidemann case seems to oblige.

It is important that in those situations that fall under the law there be more of a *direct weighing of the interests of the child* – when things are quiet and when having or not having interaction with the parent – as against the *right of the parent to request interaction* and the ensuing further stress and unrest for the child. This situation modifies the obligation from the side of the government.

It is essential that a parent, who after actual or suspected partner killing has to deal with an interaction denial, under changed circumstances still be able to request a new ruling from the judge. That could be possible, for example, if the criminal procedure results in an acquittal for the parent. In this way, the rights of the corresponding parent – which are safeguarded by ECHR article 6 – are met.

The fact that minors themselves can take the initiative, and based on their informal right to access to courts of law from Book 1 Article 377g of the Civil Code together Book 1 Article 377e of the Civil Code (and in cases of joint custody via the bond of Book 1 Article 253a(4) of the Civil Code) can attempt to undo an interaction denial, is an important supplementation. This possibility also meets the UN Convention on the Rights of the Child and the premise that as much justice as possible is done to the views of the child.

This leads to the conclusion that, according to the current status of the convention's jurisprudence, the stipulations of the *Law on stipulations on the right to have contact or interaction after partner killing* are (still) not at odds with the convention framework of the ECHR, as can be derived from the jurisprudence of the HUDOC and the Dutch Supreme Court. All in all, the legal system appears to offer sufficient guarantees to weigh the involved interests carefully against each other, in situations of partner killing.

[2] HUDOC 17 May 2011, Appl.no. 9732/10, ECLI:CE:ECHR:2011:0517DEC000973210 (*Heidemann vs. Germany*).

Part C: With the law change and its application, are the interests of the child being sufficiently served? Have there been undesirable effects because of the implementation of the law?

First of all, when answering this question, it was examined how the involved parties define the interests of the child. When defining what must be understood as the interests of the child, the police focuses mainly on the **safety** of the child. In addition to safety, parties such as the Child Care and Protection Board, the CIs and the National Psychotrauma Centre also focus specifically on the **development** of the child and how this development can be guaranteed to elapse in a healthy manner.

For the Child Care and Protection Board, this focus on the development of the child clearly comes to the fore both in the way the Child Care and Protection Board structures its investigation and in the way they substantiate their requests for custody and interaction. Whereas in custody requests this predominantly leads to a clear choice to deny the parent's custody, the considerations related to interaction are more complicated. When **denying** interaction for a specific timeframe, the Child Care and Protection Board also considers the risks for the development of the child. For this reason, it is usually considered too strict to deny interaction for a specific timeframe, and the preference regularly goes to leaving the decision up to the CI. The voice of the child is considered by the Child Care and Protection Board to the extent that, in the considerations, whether the child clearly indicates wanting or not wanting to see the parent can be decisive.

The interviewed CIs and the curators ad litem also see the development of the child as an important element of the interests of the child. Here, just like the Child Care and Protection Board, both parties see ways in which denial of interaction can *damage* or *serve* the interests of the child, and generally agree with the conclusions drawn by the Child Care and Protection Board in this respect. In this context, the CIs tend to follow the reasoning that they regularly get plenty of decision leeway when determining what should happen in terms of interaction. It does happen though that, in retrospect, the CIs sometimes consider that denial of interaction for a specific timeframe could have offered a more harmonious solution in a case. Although CIs thus mention that a delimited denial can have benefits, they also state that, at the time of the court decision, the knowledge which is needed to make a well-informed decision is often lacking.

It was also examined how the elements from the law change worked out for the child and whether there were undesirable effects, such as unnecessary overlegalising. The interviewed parties take the view that the children are more or less oblivious to the obligatory council investigation by the Child Care and Protection Board and the subsequent custody and interaction procedure. On the one hand, this has to do with the fact that the children in the investigated cases are mostly younger than 12 – the age at which children are heard by the juvenile judge in accordance with the right-to-be-heard standard. On the other hand, the involved parties indicate that the acute life changes these children have to deal with play a role that is more on the foreground. Lastly, the involved parties make targeted choices regarding the extent to which they communicate with the children about the council investigation and/or the judicial procedure, so as not to burden children unnecessarily. It must be emphasised that Board staff indicate that CIs and curators ad litem probably have a better idea about what is discussed with the children, whereas the picture from the interviews emanates mainly from the interviews with Board staff.

Another element of the law change is the linking of the custody and interaction investigation, as a result of which the interaction investigation must now take place within three months. This linking is generally considered positive. The involved parties do, however, point out that the term of three months can be too short to arrive at conclusive recommendations, especially with regard to interaction.

In terms of the undesirable effects, the obligatory custody and interaction procedure in the courts leads by definition to *legalising*, as the procedure must take place after all. The interviewed professionals usually do not find this legalising *unnecessary* though. Professionals do see solid benefit in the obligatory intervention of the juvenile judge when it comes to:

- the legal assessment of the major decisions related to interaction;
- the legitimacy that such assessment gives these decisions;
- the reporting, which later on reveals to the child why certain decisions were made;

- the establishment of binding agreements, which can be referred back to if turmoil arises in a case later on.

The findings of this investigation were presented to a number of experts. These experts stated the following in this respect:

- In general, **the custody and interaction investigation and the subsequent judicial procedure** are seen as legal instruments that contribute to advocating for the interests of the child. The benefit of these legal steps is generally found in the carefulness and the expertise that are thus guaranteed when arriving at a decision about interaction.
- In general, experts doubt whether the **denial of interaction for a specific timeframe** in such complex cases such as partner killing makes sense and serves the interests of the child. They emphasise that the needs and the wishes of the child can quickly change and that this has to be anticipated: there must be scope to look at each situation individually.
- In general, experts understand that **the CIs usually get a lot of decision leeway in the judicial interaction arrangements**, as this offers scope to look at each situation individually. At the same time, there are doubts about whether CIs – given their sometimes high turnover of personnel – are sufficiently equipped to take all the decisions without any direction from the court or the Child Care and Protection Board.
- In general, the experts consider it **important that there always be someone representing the voice of the child in the custody and interaction procedure**; therefore, the fact that a curator ad litem is not always appointed deserves attention. There are doubts about whether this representational role should always be fulfilled by a curator ad litem, or whether the role can also be fulfilled by a party that is already involved. Experts consider that the latter can be the preferred option, to avoid having too many parties involved around the child. The advantage of a curator ad litem in such contexts lies mainly in a guarantee of neutrality and the right expertise by someone who always talks with the child (especially when this is a behavioural expert).

Overall conclusion

Ultimately, the most important question in this investigation was: do the changes in the law, as well as the way in which the law is implemented, sufficiently serve the interests of the child in this type of matters? We reflect on this based on the legally implemented changes.

The investigation of the Child Care and Protection Board and the request to the juvenile judge regarding interaction

The investigation shows that the process covered in order to arrive or not arrive at an interaction arrangement benefits the carefulness and transparency of its accomplishment. That is clearly in the interest of the child. It also shows that wherever involved professionals are of the opinion that more room is needed than what the law strictly allows for, they do take that room, based on considerations relating to the interests of the child. Those interests are thus clearly at the forefront of the actions.

Still, a caveat is in place here: the investigation of the Child Care and Protection Board does not regularly lead to a concrete request regarding interaction. Ample room is left to the CI to define this later, when there is more clarity about the development of the case and the minor(s). That entails two risks: first, the risk that the suspected parent will still start a procedure to compel an interaction arrangement; and second, that the consideration now lies in the hands of an institution that is under high pressure and is understaffed with a high personnel turnover, whereas these sorts of questions require specific expertise.

Appointing a curator ad litem

With respect to appointing a curator ad litem, the investigation and the finding that a curator ad litem is not always appointed raise a legal question – that of whether the added paragraph 2 to Book 1 Article 250 of the Civil Code is of benefit in this context. Paragraph 1 of the same article in fact already gives the judge the possibility ex officio to appoint a curator ad litem. With paragraph 2, a choice was made for an obligatory character in case of actual/suspected partner killing, but that obligation is not always complied with. Whatever the answer is to this legal question, if the opinion persists that a curator ad litem

must *always* be appointed, raises in this investigation the question of *how* this should be arranged for, as the current practice does not appear to lead to it.

The fact that a curator ad litem is not always appointed also raises other questions:

- First is the question of why: is it indeed so that a careful weighing (consideration) has always been made to this end and that not appointing a curator is therefore a deliberate choice? And is the reason for it, then (as various respondents in the investigation indicated), that no benefit is seen from having a curator ad litem?
- Next, this finding also raises the question of how and by whom the minor is represented if this is not done by a curator ad litem, and whether both the right of the child to be heard in the procedure and the right to be informed about the procedure are being sufficiently protected in such cases.

Based on the current investigation these questions cannot be answered, but they are important because it is precisely by using a curator ad litem in this type of procedures that these rights of the involved minors can be safeguarded. We now know *that* these rights are not always safeguarded through this route; the remaining question is, then, *whether* that happens through a different route.

In what follows, it is important to reflect on the way in which minors are involved in the entire process that the law applies to. Several experts have been particularly critical of the finding that the Child Care and Protection Board regularly fails to talk to the children themselves. It is important to examine whether it is possible to give the voice of children more space in the process in which decisions are taken with regard to interaction with the suspected parent.

Denial for a duration of two years or more

Due questions can be raised regarding the benefit of Book 1 Article 377e(3) of the Civil Code. In the first place, the investigation points out that, in practice, the prolonged denial is hardly ever opted for. In exceptional cases where that choice is in fact made, it has not been possible to investigate its consequences.

At present it is therefore unclear whether this law change appears to be beneficial in practice. To be able to determine this further, it is necessary to follow over a longer period of time how often interaction is denied for two years or more, and what happens afterwards. The investigation shows that professionals indicate that a lot can change in two years, for example in the grieving process of the child. These professionals therefore emphasise the importance of looking at each situation individually, and consider denial in that context to be a measure that gets in the way of looking at each situation individually.

In conclusion

The 14 cases that were included in this investigation were grouped under 'partner killing', a term that remains controversial. After all, most cases are cases in which men killed their current or former female partner, cases in which the term *femicide* applies and where largely a different dynamic is at play, than cases in which women kill their current or former male partner. This dynamic involves not only relationships between partners/ex-partners, but also relationships between the suspected parent and children and the patterns within these relationships that ultimately culminate in the killing of the partner/ex-partner. Cases of partner killing (the term that is used in this report) therefore demand looking at each situation individually. They require that involved professionals have ample knowledge of violence and relationship patterns, specific expertise on how these relate to children's development, and knowledge about their own norms with respect to relationship dynamics and patterns of violence and how they influence or can influence their actions.

This investigation was not about questioning whether involved professionals possess these skills, nor was it about whether relationship dynamics and patterns of violence are being properly recognised and identified so that decisions about interaction appropriate to that context can be taken. However, for some items, the investigation raises questions in this context: for example, when it comes to a different course of events in which the mother is the suspected parent, or regarding the indicators used to assess whether the parent really is an important attachment figure for the child. Questions certainly remain for the future , and must be addressed by subsequent research.

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