How fast can you get divorced in Europe?[1]

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Introduction

The co-operation between the EU member states, the opening of the internal European market and the increasing mobility of citizens have caused a growing need for insight into the structuring and functioning of the different legal systems existing in Europe.

One of the most important tasks of the CEPEJ is the development of an assessment method that will enable researchers to compare the organization and functioning of the different legal systems in Europe. In view of the differences in types of legal systems, legal cultures and attendant problems with respect to definition and interpretation, this is not an easy assignment. An important goal within this assignment is to gain better insight into the length of legal procedures and the prevention of needless delays.

In the CEPEJ report of 2006, mention has been made of the measurement of the length of procedures (from the filing of the petition to the court's ruling) as one of the 'achievement measurements' of courts of law. Short procedures are supposed to be indicative of an efficient situation in which courts of law make optimal use of their personnel resources. Longer procedures may be an indication of inefficiency. To gain more insight into the workload of European courts and to compare the figures in a more reliable way, a section has been added to the CEPEJ report, containing descriptions of the number of cases and the length of four types of cases, one of which is divorce procedures. This involves litigious divorce procedures or, as the report circumscribes it:

> '*Litigious divorce cases*: i.e. the dissolution of a marriage contract between two persons, by the judgement of a competent court. The data should not include: divorce ruled by an agreement between the parties concerning the separation of the spouses and all its consequences (procedure by mutual consent, even if they are processed by the court) or ruled on through an administrative procedure.'

By Dutch standards, this means that the only data to be reported are those involving cases of unilateral divorce in which the partner has put up a defence, and not the ones involving unilateral petitions without a defence, or the joint petitions. A *joint* petition means that both partners request the divorce together and that they agree on the consequences of the divorce. This enables them to hire one lawyer and to file their petition for divorce jointly. If the partners cannot reach a solution by mutual agreement, the partner who wishes to divorce can file a *unilateral* petition for divorce at the court through his or her lawyer. Subsequently, the other partner is called by the court to submit a defence. For this, he/she needs a lawyer of his/her own. In the defence, this partner is allowed to make a number of requests, to which the other partner can react. Subsequently a session is planned, to be followed approximately six weeks later by a judicial ruling.

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[1] This article is a translation of a Dutch article published in a special issue on CEPEJ in Justitële Verkenningen, nr. 4, 2009, pp. 95-105.

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In the remainder of this article, I will briefly discuss the divorce data presented in the CEPEJ report, how they may be interpreted, and which position is taken up by the Netherlands within the European whole.

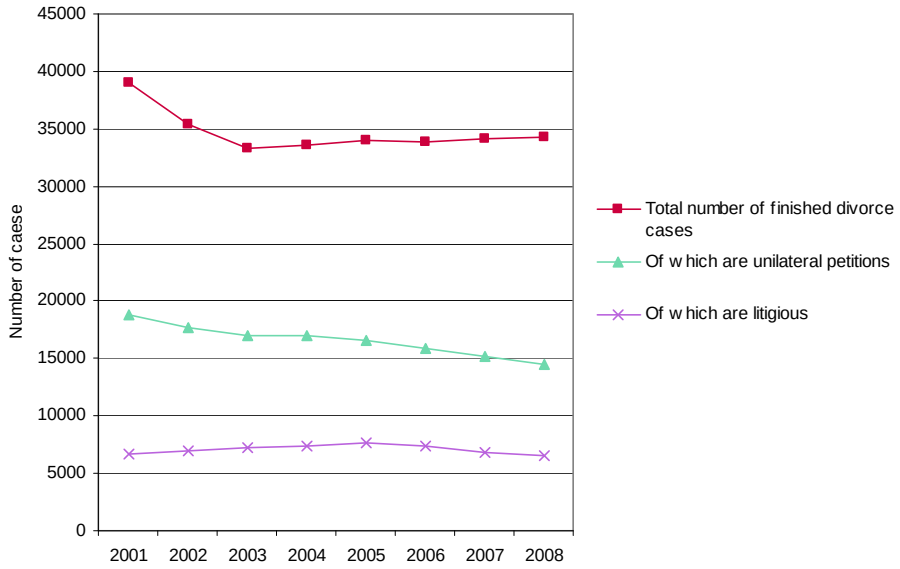
The number of (litigious) divorces

The CEPEJ report shows that the number of litigious divorces in 2006 varied between countries. That volume differed from 0,2 per 100.000 in habitants in Georgia to 381 per 100.000 inhabitants in Belgium. First of all, these figures suggest that there probably are quite a lot of legal differences regarding divorce procedures, as well as cultural differences that are often related to these. Moreover, this number is also obviously connected to the number of marriages that have been entered into, and to the alternative possibilities of legally laying down forms of cohabitation, such as registered partnership in the Netherlands.

From a legal point of view, there are indeed differences that make it easier to get a divorce in one country than in another. In Malta, for example, it is entirely impossible to get legally divorced. In some countries, a divorce can be ruled only after strict conditions have been met. Sometimes, partners can only get a divorce when they both consent to it; it is impossible to file a unilateral petition for divorce. In other instance, it is only possible to get a divorce if the partners have not cohabitated during the last four years of their marriage.

Furthermore, it is important that the CEPEJ report only mentions the number of *litigious* divorces. It is questionable whether all countries are able to extract the registration of such cases from their systems. For that matter, the report does not contain this comment with regard to any of the national figures, which may indicate that it does not play a role. Anyhow, in the Netherlands, we are able to make a distinction between divorce petitions with and without defence.

Figure 1 **Total number of finished divorce procedures, unilateral petitions and litigious divorces in the Netherlands, 2001-2008**

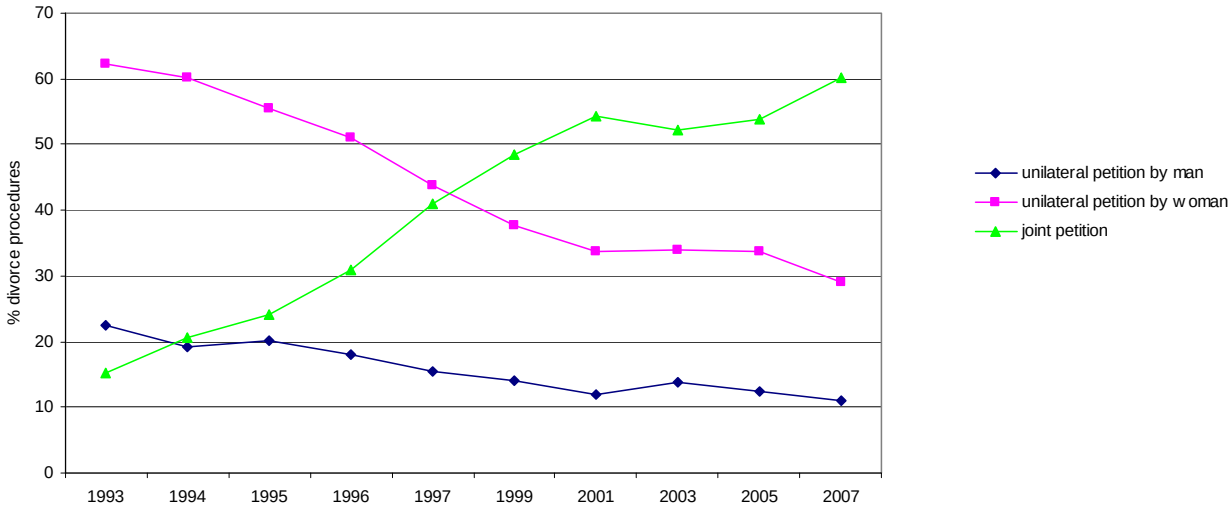


Source: Council for the Judiciary (national research database)

Yet, the first thing that catches the eye when we look at the Dutch figures presented in the CEPEJ report is that they are incorrect. The figures relate to all divorce procedures, that is, not only to litigious cases. As Figure 1 shows, the number of litigious divorces in the Netherlands is considerably lower than the more than 33.000 cases mentioned in the report. In recent years, of the total number of divorce petitions, between 44% and 50% were unilateral petitions. Of these unilateral divorce petitions, approximately 45% were litigious. As from 2001, this has amounted to approximately 6.600 to 7.600 litigious divorce cases per year.

What also attracts notice, when we look back further than the year 2000, is the increase in the number of joint divorce petitions in the Netherlands (see Figure 2). In 2007, approximately 60% of the divorces took place upon joint petitions, whereas this was no more than 15% in 1993. Apparently, there is a strong tendency to reach mutual agreements already during the trajectory prior to the divorce procedure.

Figure 2 Number of finished divorce procedures according to type of petition (in %) in the Netherlands, 1993-2007



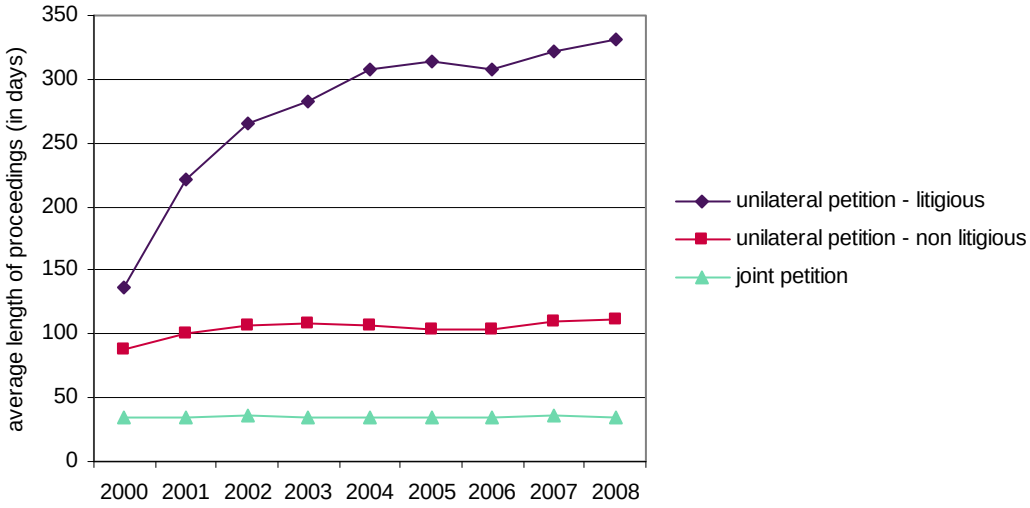
Source: Statistics Netherlands, The Hague/Heerlen 16-1-2009

Length of proceedings

As we have already mentioned, according to the CEPEJ report, the length of divorce proceedings is supposed to be indicative of the efficiency of courts of law. Seventeen countries have provided data on this. The figures show that the length of proceedings in the Netherlands is extremely short, lasting on average 25 days, while the length of procedures in Italy is the longest, lasting 634 days. This is a substantial difference indeed. However, once again, the Dutch figures are incorrect. Data retrieved by the Dutch Council for the Judiciary show that the average length of divorce procedures upon a *joint* petition has been quite stable in recent years, lasting approximately 35 days. During the past years, the unilateral petitions without defence have lasted between 100 and 112 days on average. The litigious cases,

however, show an increase from approximately 140 days in 2000 to an average 330 days in 2008. This is a huge difference from the 25 days mentioned in the report. The remarkable increase of the length of litigious cases - while the other types of divorce cases show a relatively stable pattern - suggests that it is not so much the *efficiency* of the courts that has changed, but that there are other causes. It is possible that during the preliminary trajectory, the goal increasingly is to reach covenants and to de-escalate problems with regard to the divorce. This may result in a relative increase in the number of very difficult litigious cases. Another possible explanation for the increase in length is that, since 2000, litigious divorce cases can be referred to mediation. Since 2005, this possibility has become available at all courts. This means that, where previously the judge ruled to conclude a case, parties now enter into a mediation trajectory, which may take up quite some time. The case will only be removed from the cause list when the mediation has been successfully completed. In addition, there is a growing tendency in the courts to handle all matters related to the divorce as a bundle.

Figure 3 Average length of divorce procedures in the Netherlands, 2000-2008



Source: Council for the Judiciary (national research database)

Now, we will return to the CEPEJ data. The report itself already provides some hints as to why there are such big differences between countries.

- In some countries, partners who file for divorce get a few months' time to think the matter over. Sometimes, this time for reflection applies to all types of divorce, sometimes it applies when one of the partners wants to divorce while the other does not, and sometimes it only applies when underage children are involved. This time to think things over is included in the length of a case.
- In some countries, mediation is compulsory in particular situations, for example when children are involved or when one of the partners does not want to divorce. To what extent this influences the length of divorces, however, is not mentioned in the report.

Ancillary provisions

One important point that influences the complexity of divorce cases and, consequently, also influences their length, is not brought up in the report at all. This concerns the ancillary provisions that may be included in the divorce procedure, and the extent to which these are

compulsory. A divorce has consequences for the division of property and parental access to underage children. In addition to a petition for divorce, it is also possible to ask for one or more 'ancillary provisions'. This is a request made in connection with the divorce. The judge can make arrangements regarding, among other things:

- custody of and parental access to underage children;
- alimony for one of the former spouses and/or for the children;
- the division of the community of property, or the completion of the marriage settlement;
- the use of the marital home;
- pension equalisation.

In a number of countries, including the Netherlands, the involved parties can themselves try to reach an agreement on these 'ancillary provisions', without the need to call in the court, or they can reach an agreement on various matters and get this recorded by a judge. Yet, when these arrangements lead to too many conflicts, resulting in a delayed divorce procedure, it is also possible to take these matters to court in 'separate' lawsuits. In this way, the divorce can be executed quickly, while the apportionment of the joint property may be the subject of a long drawn-out lawsuit. Data from the Council for the Judiciary (see the Appendix) show that, in the Netherlands, a growing number of 'separate' procedures have been concluded concerning custody and access (from 4.100 cases in 2000 to 7.800 cases in 2008) and concerning alimony (from 6.500 cases in 2000 to 9.500 cases in 2008).[3] Of these cases, the percentage of litigious ones is decreasing.

In some countries, it is compulsory to make certain arrangements during the divorce procedure. When underage children are involved, for instance, it is mandatory to lay down the child alimony as well as custody and parental access. In this context, since 1 March 2009, it has become compulsory in the Netherlands to draw up a parental plan when underage children are involved in a divorce. This parental plan contains agreements between both parents regarding care- and parenting tasks, child alimony, and the exchange of information on important matters. After the divorce, both parents usually keep their parental authority and thus also remain responsible for the care for and upbringing of their children. The parental plan should contribute to limiting the quarrels about rearing- and care responsibilities, since these matters have already been covered beforehand by mutual agreements between the partners. The aim is to make children suffer less from a divorce. Yet, the introduction of the parental plan may actually result in prolonged divorce procedures because the grounds for conflict have increased.

Thus, divorce cases will often be more complex and will lead to more conflicts if they involve underage children and financial consequences. Every two years, Statistics Netherlands studies the Dutch divorce procedures. This research shows that, in 2006, underage children were involved in almost two out of every three divorces. In total, this amounted to nearly 36.000 children. More than half of these children were younger than ten at the time of the divorce. In most cases, children stay with their mother. In a third of the divorce procedures, the judge determined a parental access arrangement, mostly for the father. In recent years, approximately 20% of all divorce procedures in the Netherlands included an arrangement with regard to partner alimony, while 35% included an arrangement for child alimony and 40% included the allocation of a house. The study does not mention how many of these divorce procedures with ancillary provisions were litigious.

[3] These procedures do not necessarily relate only to formerly married people, but can also be started by people who have formerly been registered as partners.

Complexity of ancillary provisions and mediation

Other important issues for the workload of the courts are the extent of the complexity of the 'ancillary provisions' and the extent to which the preliminary trajectory leading up to the divorce is used to work round to agreements that are supported by both partners. In this context, the extent to which mediation is applied may be of importance.

With regard to the complexity of ancillary provisions, for instance, the Dutch standards for alimony present a point of particular interest. These are open standards about 'financial capacity' and 'need', based on certain agreements regarding the administration of justice (the so-called TREMA standards). Yet, for citizens, the arithmetic model developed by the judiciary is complex, inaccessible, and unpredictable with regard to the outcome. In the past, the Dutch Lower House has rejected various bills regarding the introduction of an arithmetic system for calculating a fixed sum (Dijksterhuis, 2008). In England, alimony is calculated according to a fixed percentage of the taxable income. It would be interesting to examine whether this system would lead to a simpler, better and quicker settlement of alimony cases.

Furthermore, the Dutch regulation regarding community of property is different from those of other countries and can result in more conflict matter. While in many countries, only the income and assets acquired during the marriage falls under the estate, in the Netherlands, this pertains to the *entire* community of property. In principle, all income and assets of the spouses, acquired both before and during the marriage, falls under the community. Both properties merge into one joint property. In principle, all debts contracted both before and during the marriage, fall under the community as well, regardless of which of the spouses contracted the debt. Every creditor of the spouses can recoup from the entire community. The community of property is dissolved by a divorce, upon which it must be divided. The starting point in law is that each spouse is entitled to half. The spouses can deviate from this and reach other agreements in a divorce covenant, or during the division.

The report only summarily provides information on the application of mediation. In Poland, a judge can refer to mediation, while in Portugal, mediation is compulsory when one of the partners wants to divorce and the other does not. Sometimes, mediation is used primarily to bring the partners back together again and to prevent a divorce. In the Netherlands, mediation is applied mostly to jointly attain sound agreements and prevent a divorce battle. In addition, to divorce upon a joint petition is stimulated as well, regardless of whether or not mediation will be part of this process. The goal is to prevent long drawn-out procedures in this way, which may be beneficial for all those concerned, both with regard to the quality of the agreements and to the costs involved.

Conclusion

What can we learn from this comparison of lengths in the CEPEJ report? As will be clear, a short length in a particular country does not mean that 'the courts in question make optimal use of their personnel resources'. This cannot unproblematically serve as an achievement indicator for the efficiency of justice. Moreover, there is the additional problem of how broad or narrow a definition of efficiency should be used here. The report does not offer any framework for this. Next to the short-term effects, long-term effects should be taken into account as well. A litigious divorce may be quickly dealt with by a court, but when this ruling leads to new conflicts that may result in new lawsuits in the future, the court's long-term efficiency will be limited. In this sense, trends in the number of divorces upon joint petition also provide an indication about the efficiency of a judicial system that uses the preliminary

trajectory to achieve a much-needed rapport between partners, under the supervision of lawyers and mediators.

Obviously, another issue is the reliability of the figures. These turn out to be incorrect for the Netherlands and this will undoubtedly be true for one or more other countries as well. As a result, the comparison sinks into quicksand.

Furthermore, a study like this would benefit from a more systematic examination of particular factors that are of great influence on the length of procedures. Such factors are, for instance, legal regulations (built-in time for reflection; which ancillary provisions are compulsory; how often are children involved in divorce cases), but also the approach during the preliminary trajectory (compulsory or non-compulsory mediation; the use of lawyers). The report urges us to think and puts our own legal system into perspective. It is a pity, however, that it only touches on a number of differences, without any further interpretation. What are the advantages and disadvantages attached to specific regulations in other countries? In a number of countries, for example, no lawyer is needed to get a divorce, or the only cases dealt with by the courts are those in which partners fail to reach any mutual agreement. Do former spouses or children come off worse in these situations? Of course, a report like this cannot discuss everything, which is why it would be a good idea to commission separate in-depth studies on particular subfields.

This is all the more important now that the harmonisation of family law in Europe receives increasing attention. The lack of a common family law is considered an obstacle for the free movement of persons, the creation of a European identity and an integrated European legal system (Antokolskaia & Boele-Woelki, 2002). In view of the large differences between European countries, such a common system is unlikely to become a reality very soon. Yet, it would mean an improvement for making the right choices for adaptations of our own legal system, too, if we were to gain more insight into the pros and cons of particular legal systems. In this context, not so much the length of divorce procedures should be an important criterion, but the quality of the settlement of divorces and of the prevention of as much future problems as possible.

Literature

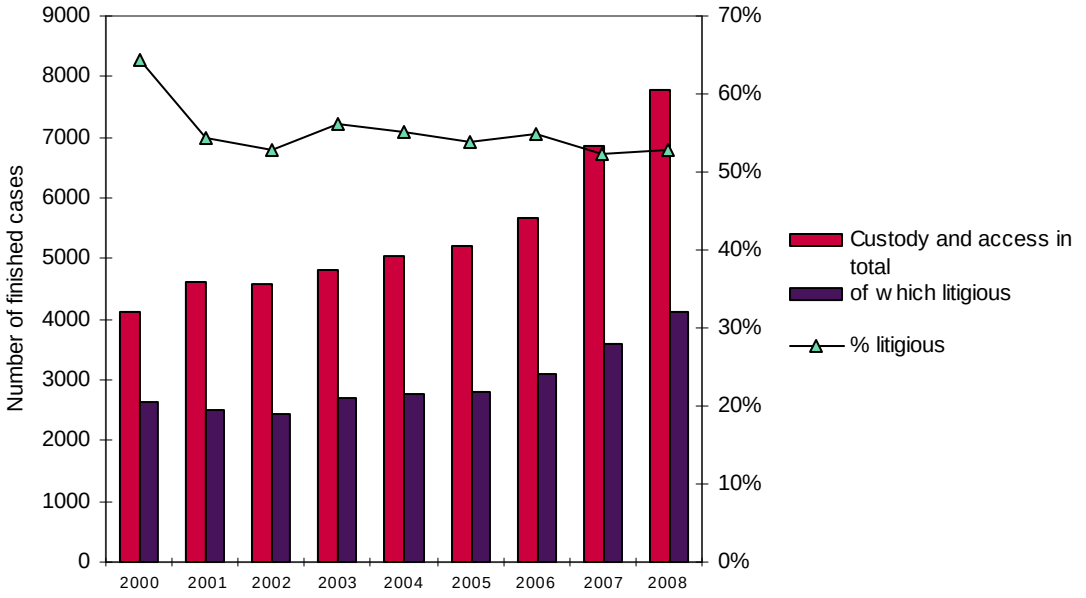
Antokolskaia, M. and Boele-Woelki, K. (2002). Dutch Family Law in the 21st Century: Trend-Setting and Straggling behind at the Same Time. *Electronic Journal of Comparative Law*, vol 6.4. http://www.ejcl.org/64/art64-5.html

Dijksterhuis, B.M. (2008). Rechters normeren de alimentatiehoogte. Leiden, Leiden University press.

http://ec.europa.eu/civiljustice/

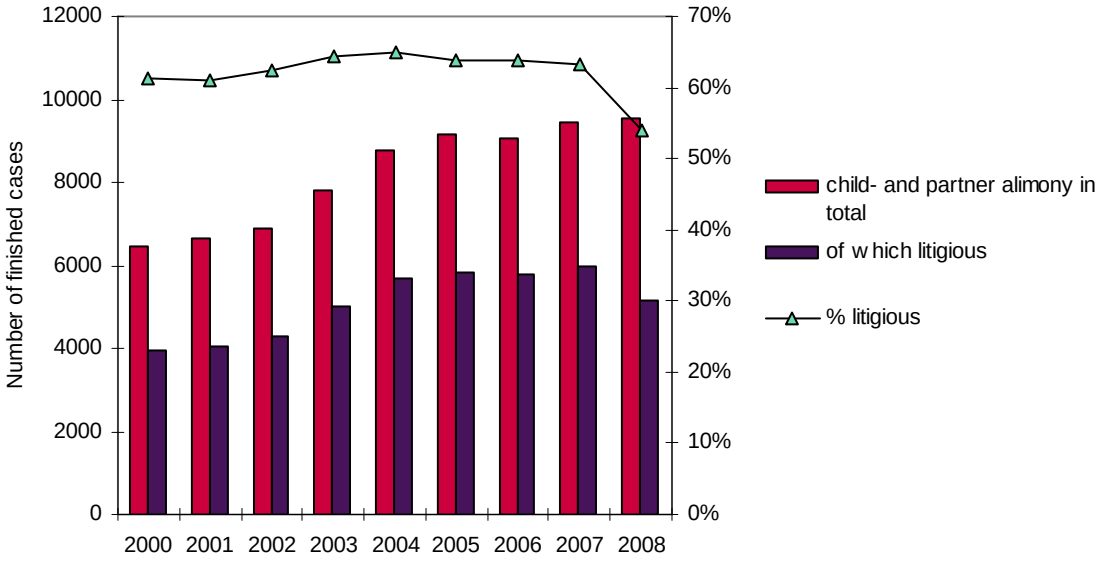
Appendix

Figure 4 Total of finished custody and parental access procedures in the Netherlands, 2000-2008



Source: Council for the Judiciary (national research database)

Figure 5 Total number of finished procedures concerning partner- and child alimony in the Netherlands, 2000-2008



Source: Council for the Judiciary (national research database)