Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Moroccan Parental Responsibility and the Recognition of the Wilaya and Hadana Under Dutch Law

Question(s) at stake:

Whether (1) Islamic wilaya and hadana established abroad can be recognized by a Dutch court and (2) whether a father who is attributed wilaya can be excluded from his parental responsibility.

Outcome of the ruling:

The Moroccan legal categories of wilaya and hadana are recognized under Dutch law. However, the Court ruled that as a result of residing in the Netherlands, the question of parental responsibility is governed by Dutch law. Under these circumstances, the mother was awarded sole parental responsibility, which resulted in the removal of the father's parental rights

Topic(s):

- Foreign Laws, Decisions, Acts and Institutions
- Personal Status, Family and Inheritance

Keywords:

- Applicable law
- Custody
- Measures and actions involving children
- Parental responsibility
- Parental rights
- Recognition
- Right to respect for family life
- Rights and freedoms

Tag(s):

- Hadana
- Wilaya

Author(s):

- Rebbik, Ibtissam (Faculty of Law, Maastricht University, Netherlands)

Country:

Netherlands

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District Court of Zeeland-West Brabant, Judgement of 25 October 2019, C/02/337222 FARK 17-5918 (Rechtbank Zeeland-West Brabant, 25 oktober 2019)

Link to the decision:

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ECLI:

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Date:

25 October 2019

Jurisdiction / Court / Chamber:

District Court of Zeeland-West Brabant

Remedy / Procedural stage:

First instance

Previous stages:

- District Court of Zeeland-West Brabant, 26 July 2018 (Request to the Council for Child Protection for further investigation)

Subsequent stages:

- No information found

Branches / Areas of law:

Private international law; Family law

Facts:

The applicant, a mother of Moroccan nationality, is seeking sole parental responsibility for her four minor children and requesting the removal of parental responsibility from the father. The respondent, the father, holds both Moroccan and Dutch nationality. He firmly opposes the applicant’s request.

The backdrop of the case involves the applicant’s departure from Morocco with her children to the Netherlands on 27 November 2015. Although the respondent has always been registered in the Netherlands, he lives in Morocco with his new wife and child. The respondent was granted Dutch citizenship through a Royal Decree on 18 July 1995. The children had been living with their mother in the Netherlands for almost four years, during which neither the mother nor the children maintained contact with the father.

All the children hold both Moroccan and Dutch nationality. Three of the minors were born before the 1966 Hague Child Protection Convention came into effect on 1 May 2011. One of these three minors was born in the Netherlands while the other two were born in Morocco. One of the minors was born in Morocco after the aforementioned date.

Both the applicant and respondent assumed that they would be sharing parental responsibility.

On December 11, 2018, the Moroccan Court of Cassation discussed the matter and ruled against the mother’s request for sole parental responsibility.

The Council for Child Protection in the Netherlands wrote a report on their situation and concluded that the father had not taken seriously his parental responsibilities and that the children had had a troubled past with him. The Council’s investigations showed that the minors had gone through many

challenging experiences, although the report did not explicitly state what those experiences were. Due to frequent relocation, the children enjoyed little stability or continuity in life. Furthermore, they had told both the Council and aid agencies about their past experiences with their father's violent behaviour.

Since 2015, the mother has succeeded in creating a secure, stable, and nurturing environment for the minors, fostering their growth. The Council also observed a deeply strained relationship between the parents, with both demonstrating an inability to communicate effectively.

In the Council's view, it would not be in the children's best interests to remove them from their current family situation with their mother and to elevate the father's role in their lives. Based on the minors' accounts of their interactions with the father, their resulting insecurity, their subsequent behaviour in childcare, and the subsequent impact on their development, the Council saw no possibility of re-establishing contact with the father at this time.

Ruling:

Both parents were initially considered to have joint parental responsibility under Dutch law. However, the mother's application for sole parental responsibility was eventually granted by the Court.

The judge first assessed whether the parents had sole or joint parental responsibility for the children. The Court then considered whether sole parental responsibility could be granted to the mother, ruling that Article 3 of the Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants (hereinafter the 1961 Hague Convention on the Protection of Children) applies to minors born before 1 May 2011. Article 3 states that "[a] relationship subjecting the infant to authority, which arises directly from the domestic law of the State of the infant's nationality, shall be recognised in all the Contracting States." Since the children possess both Moroccan and Dutch nationality, the Court interpreted Article 3 as follows: If an authority relationship exists under the law of either nationality, it should be recognized across all contracting states, aligning with the Convention's objectives

and the specific article in question.

Moroccan law distinguishes between *hadana* and the *wilaya*. Under Moroccan law, the father assumes the legal representation of his legitimate children from birth, establishing parental authority (wilaya) over both the children and their assets. Both father and mother both provide their children with basic needs, ensuring their physical and mental well-being (hadana*)*. After a divorce, hadana becomes the responsibility of the mother while wilaya remains the responsibility of the father. The Court notes that although the mother's duty towards her children is very important, under Moroccan law – unlike Dutch law which assigns parental responsibility to both parents during *and* after their marriage – only the father has parental responsibility by operation of law.

Since Dutch law attributes parental responsibility to the mother from the very fact of the birth of her minors, this results in shared parental responsibility for both parents of these minors.

The fourth minor, however, was born after 1 May 2011, rendering applicable the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereafter referred to as the Hague Child Protection Convention 1996). Article 16(1) of the Hague Child Protection Convention 1996 states that the "attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child."

Although the children had lived in both Morocco and the Netherlands, both the petitioner and the respondent agreed that the fourth minor had lived in Morocco until the mother moved to the Netherlands with her children in November 2015 (with the exception of the period between January 2014 and the summer of 2014). The judge therefore considered that the minor's habitual residence was in Morocco, and awarded sole parental responsibility to the father under Moroccan law. However, under Article 16(4) of the Hague Child Protection Convention 1996, "[i]f the child's habitual residence changes, the attribution of parental

responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence."

At that time (November 2015), the habitual residence changed to the Netherlands. For this fourth minor, both father and mother would ultimately share parental responsibility under Dutch law.

It had not been established that the shared parental responsibility had been altered by a court decision or in any other way. The previous decision of the Moroccan Court of Cassation of 11 December 2018 did not concern parental responsibility (apart from the question of whether the Dutch Court was bound by that decision at all).

Like the Council for Child Protection, the judge was of the opinion that given the children's troubled past, the lack of contact between the father on the one hand and the children and the mother on the other, and the children's and the mother's strong dislike of the father, shared parental responsibility was considered unattainable. Consequently, the mother's request for sole parental responsibility was granted under Articles 1:253n and 1:251a of the Dutch Civil Code.

Main quotations on cultural or religious diversity:

- "In light of the documents, it must be assumed that all minors were born from the marriage between the parties and that they qualify as their children under both Dutch and Moroccan law. Both the man and woman hold Moroccan nationality. Under Moroccan nationality law, a child acquires Moroccan nationality by operation of law if one of the parents has this nationality, regardless of the place of birth". (para. 5.1)
- "Since [three of the minors] were born before 1 May 2011, it applies to them that pursuant to Article 3 of the 1961 Hague Child Protection Convention […] an assessment must be made to determine whether a relationship of authority has arisen under the domestic law of the State of which the minors are nationals. The question is how this should be assessed, given that all three have dual nationality and, moreover, that both nationalities have

arisen by operation of law and the article in question does not provide a definitive answer. Having regard to the purpose and scope of the Convention and of the said Article, the Court is of the opinion that it should be interpreted as meaning that, if a custody relationship has arisen by operation of law on the basis of one of the child's nationalities, this relationship should be recognized by all contracting states". (para 5.2)

- "In Moroccan law, as far as relevant here, a distinction is made between the *hadana* and the *wilaya*. The father is the legal representative of his legal minor children from birth. The father thus has authority – *wilaya* – over the child's person and assets. During the marriage, the father and the mother jointly exercise the *hadana* over their minor children. The *hadana* involves taking care of the basic needs of the child and protecting him physically and mentally. After the dissolution of the marriage, the father's authority extends to all aspects of his minor children's lives, with the exception of the *hadana*. The *hadana* is exercised only by the mother after the divorce (unless otherwise decided by court order)". (para 5.3)
- "Although the mother fulfils an important task in the lives of the minor children, the Court assumes that it is the father who is entrusted with parental authority by operation of Moroccan law". (para. 5.3)
- "Since [one of the minors] was born after 1 May 2011, it applies to him that pursuant to Article 16 paragraph 1 of the 1996 Hague Child Protection Convention […], the attribution of parental responsibility by operation of law is governed by the law of the State of the habitual residence of the child. The minors have resided alternately in Morocco and the Netherlands. [The minor] was born in Morocco. […] The Court assumes that the habitual residence of [the minor] was in Morocco and that it must therefore be assumed that only the father was attributed parental responsibility over him. However, pursuant to Article 16 paragraph 4 HKBV [Hague Convention on Child Protection or *Haags Kinderbeschermingsverdrag*] 1996, if a child's habitual residence is changed, the attribution of parental responsibility by operation

of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence. That, currently, is the Netherlands. For [the minor], therefore, also under Dutch law, the guiding principle is that the father and the mother jointly exercise parental responsibility over him". (para. 5.4)

Main legal texts quoted in the decision:

Domestic law

- Articles 1:251a and 1:253n of the Dutch Civil Code

International law

- Article 16 of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children
- Article 3 of the Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants

Cases cited in the decision:

- District Court of Zeeland-West Brabant, Judgement of 26 July 2018 (Request to the Child Care and Protection Council for further investigation)

Commentary

Moroccan Parental Responsibility and the Recognition of the Wilaya and Hadana Under Dutch Law

The recognition of foreign (Islamic) wilaya and hadana by Dutch courts, and the possibility of excluding a father from parental responsibility, are key considerations in understanding how Dutch courts navigate religious and cultural diversity in relation to parental rights. This case serves as an illustrative example of what happens to legally established parental responsibility in Morocco, which is governed by Moroccan (Islamic) law when a spouse relocates to the Netherlands.

Here, there is a transition from a foreign, Islamic, law to Dutch law, implying that as soon as children are habitual residents in the Netherlands, parental responsibility rights established under an Islamic legal regime are reconsidered.

The present decision is one of several court rulings in which Dutch courts had to decide on parental responsibility in situations where parental rights had initially been established by Islamic law.

In all these rulings, the *wilaya* and *hadana* were analyzed on the basis of Somali, Syrian, or Moroccan law (ECLI:NL:RBZWB:2020:2149; ECLI:NL:RBROT:2012:8660; ECLI:NL:RBNNE:2022:18; ECLI:NL:RBDHA:2017:814; ECLI:NL:RBOBR:2019:4826; ECLI:NL:RBZWB:2021:2524; ECLI:NL:RBGEL:2019:509).

There is a common thread running through these cases, both in terms of content and outcome. In each case, the foreign law in question is rooted in Islamic law. However, there are differences in the depth of explanation of relevant terms and phrases due to linguistic differences. This variation depends, for example, on whether the court in question translates these concepts directly from foreign law or whether it consults the Internationaal Juridisch Instituut (IJI), a Dutch organization that provides advice based on academic analyses of Dutch private international law or relevant foreign law.

In the present decision, the Court is very detailed in its assessment of the Islamic concepts of *hadana* and *wilaya*, providing a clear picture of how these categories are regulated in Moroccan law.

The difference between how parental authority is regulated under Moroccan law and Dutch law is noteworthy. Whereas Dutch law is based on the equality of the parents, Moroccan law grants unequal custody rights to the parents. This difference in authority is rooted in the strikingly contrasting roles assigned to parents. The Court nevertheless accepts this relationship without further consideration and without invoking public order concerns against it.

At the same time, this tolerance has its limits. For instance, the Court recognizes the foreign *wilaya* and *hadana* only to a certain extent. When applying the rules of private international law (Hague Child Protection Conventions of 1961 and

1996), the Court switches to Dutch law. It abandons the restrictions imposed by Islamic law on parental authority and consequently applies Dutch law, emphasizing the equality of the parents. Custody is only granted to one of the parents if this is in the best interests of the children. The potential violation of custody rights under Moroccan law is no longer the determining factor and the best interests of the children are considered to be of paramount importance.

Literature related to the main issue(s) at stake:

- Dennouni, Samia. 2020. “L’autorité parentale et les concepts voisins en droit comparé”. *Les cahiers du LADREN* 11 (1): 94–104.
- Houhou, Yamina. 2020. “La wilaya parentale (autorité parentale)”. *Revue Algérienne des Sciences Juridiques et Politiques* 57 (1): 12–23.
- Ramadan, Moussa. 2002. “The Transition from Tradition to Reform: The Shari’a Appeals Court Rulings on Child Custody (1992-2001)”. *Fordham International Law Journal* 26 (3): 595–655.
- Yassari, Nadjma, Lena-Maria Möller and Imen Gallala-Arndt (eds). 2017. *Parental Care and the Best Interests of the Child in Muslim Countries*. The Hague: Asser Press.
- Zahraa, Mahdi and Normi A. Malek. 1998. “The Concept of Custody in Islamic Law”. *Arab Law Quarterly* 13 (2). Brill: 155–177.

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