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

Male Circumcision in Family Law Disputes Before Dutch Courts

Question(s) at stake:

Whether the cultural and religious upbringing of a five-year-old child, whose divorced parents are in a dispute regarding his circumcision, should be considered when deciding on the permissibility of the circumcision.

Outcome of the ruling:

Considering the cultural and religious aspects of the case and the irreversibility of the surgery, the circumcision of the child is not allowed.

Topic(s):

- Personal Status, Family and Inheritance
- The Human Body

Keywords:

- Best interests of the child
- Bodily integrity
- Children's rights
- Male circumcision
- Custody
- Bodily practices
- Genital modifications

Tag(s):

- Joint parental responsibility

Author(s):

- Kersten, Fei An (Faculty of Law, Maastricht University, Netherlands)

Country:

Netherlands

Official citation:

Court of Appeal of ‘s-Hertogenbosch, Judgement of 26 November 2002, R200200450 (Gerechtshof 's-Hertogenbosch, Uitspraak van 26 november 2002, R200200450)

Link to the decision:

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2017:2625

ECLI:

ECLI:NL:GHSHE:2002:AF2955

Date:

26 November 2002

Jurisdiction / Court / Chamber:

Court of Appeal ‘s-Hertogenbosch

Remedy / Procedural stage:

Second instance, appeal

Previous stages:

- District Court of ‘s-Hertogenbosch, 17 May 2002 (not published)

Subsequent stages:

-

Branches / Areas of law:

Family law

Facts:

The parties were married to each other in Rabat, Morocco. During their marriage, a son was born. The woman has Moroccan nationality and has been a Muslim since birth, while the husband is a Dutch national who converted to Islam.

On 13 October 2000, the District Court of ‘s-Hertogenbosch finalized the divorce between the two parties, granting the parents joint custody of the child. Following the divorce, the woman continued to reside in the Netherlands. During the court proceedings, the child’s main residence was established with his mother.

Pursuant to Article 1:253a of the Dutch Civil Code, the woman applied to the District Court of ‘s-Hertogenbosch for a ruling that the child should be circumcised at the age of five in accordance with the Muslim religion and tradition. She argued that both parties had consented to raising the child as a Muslim and that it was customary in Islam for a young boy to be circumcised around the age of five. According to her, the child could potentially face social isolation if the circumcision was not performed at this age. She maintained although he attended a public school, the majority of the children there were Turkish Muslims, which increased the chances of facing social isolation there. Additionally, she argued, the woman’s family in Morocco would be disappointed if the circumcision did not take place.

Contrariwise, the husband contended that the child’s freedom of choice ought to be considered in this decision, especially since circumcision is irreversible. The husband expressed his wish that the child should be allowed to decide for himself, later in life, whether or not to be circumcised.

The District Court subsequently granted the wife’s request, prompting the husband to file an appeal with the Court of Appeal of ‘s-Hertogenbosch.

Ruling:

In contrast to the District Court, the Court of Appeal of ‘s-Hertogenbosch ruled against the circumcision of the child, overturning the ruling of the District Court and rejecting the woman’s request.

The Court of Appeal noted that the case involved a dispute between parents from different cultural backgrounds. On the one hand, the man is Muslim, has Dutch nationality and lives in the Netherlands. On the other hand, the woman is of Moroccan origin and continued to live in the Netherlands after the divorce.

Although the Court of Appeal acknowledged that circumcision may be a common practice in Islam around the age of five, Islam does not require that boys be circumcised at that age. Circumcision, it noted, can also take place at a later point in a child's life when he can make such a decision for himself.

Furthermore, the Court of Appeal held that it had not been established that not circumcising the child would result in social isolation. To arrive at this assessment, the Court considered the fact that the child had been born and raised in the Netherlands, held Dutch citizenship, had grown up in Dutch culture, and had attended a public school in the Netherlands. It had not been demonstrated that the child would be looked down upon by the predominantly Turkish Muslim boys at his school were he not circumcised. Additionally, the Court continued, the opinion of the woman's family in Morocco should not be the decisive factor in this matter.

Lastly, the Court of Appeal stated that circumcision was an irreversible modification of the body and medically unnecessary. Hence, the Court urged caution when considering such a procedure.

Considering all of the above factors, the Court of Appeal ruled against the woman's request for circumcision and decided that the child should not undergo the procedure.

Main quotations on cultural or religious diversity:

- "Although circumcision of five-year-old boys is common in Islam, the Muslim faith does not mandate circumcision at that age. Circumcision can be deferred until [the child] is able to decide for himself. Furthermore, it has not been established at all that [the child] will face social isolation due to the (temporary) omission of circumcision. [The child] was born in the

Netherlands and holds Dutch nationality. He is integrated into Dutch culture and attends a public school. It has neither been stated nor shown that he will be looked down upon by the predominantly Turkish Muslim boys at his school if he is not circumcised. In any case, the opinion of the woman's family in Morocco should not be decisive." (para. 4.4.)

- "Moreover, this is an irreversible physical procedure without medical necessity. In general, the judge who has to decide on a dispute involving parental authority should exercise more caution when considering such an intervention compared to other matters." (para. 4.4.)

Main legal texts quoted in the decision:

Domestic law

- Article 1:253a of the Dutch Civil Code

Cases cited in the decision:

-

Commentary

Male Circumcision in Family Law Disputes Before Dutch Courts

The practice of male circumcision is known to exist among various religious and cultural communities. As a result, Dutch courts must at times address various legal issues that arise in cases involving male circumcision.

As the case at the centre of this template has shown, parents may not agree on whether or not their child ought to be circumcised. In this particular case, the Court of Appeal provides a comprehensive overview of the factors influencing the decision and their relative significance.

Male circumcision in Islam

Male circumcision is very common in Muslim-majority countries, with a circumcision rate of between 90 and 100 percent (Morris et al. 2016). Some proponents of the practice argue that it is an obligation, citing religious scriptures

such as the Quran (12:38). According to these arguments, a man who remains uncircumcised is considered impure, and his prayers are therefore deemed invalid due to the presence of filth and urine under the foreskin. As a necessary condition for the validity of an obligatory religious act, circumcision is therefore regarded as obligatory. On the other hand, others contend that circumcision is not an obligation but rather an important *sunna* (practise) of the Prophet Muhammad. Those who adhere to this view interpret the relevant Quranic references differently. They note that the Quran does not explicitly mention circumcision and question the reliability of certain sources (Dessing 2010: 52-53).

Islamic traditions do not provide specific recommendations on the age at which the ritual should be performed. The age of circumcision among Muslims therefore varies depending on specific family characteristics, region, and country, although most children are circumcised in late childhood or early adolescence (Anwer et al. 2017; World Health Organization 2009). In the case at hand, the Court of Appeal states that circumcision at the age of five is common in Islam (on the reasons for circumcision see also template CUREDI090NL002).

Dutch family law

In light of religious traditions, male circumcision is not uncommon in the Netherlands. Dutch law allows the procedure to be performed by a medical professional (see also CUREDI090NL002). It is important to note that female circumcision is not allowed in the Netherlands.

The choice to circumcise a male child is closely linked to the parents' freedom to raise their children according to their religion or faith. This freedom falls within the ambit of the parents' custody rights. In situations involving joint custody, both custody holders must provide consent for the circumcision to proceed. However, conflicts may arise when parents disagree for various reasons. For instance, they may not adhere to the same religion, especially in cases of divorce after which the child may primarily live with one parent (Rutten 2010: 67).

In case of a conflict, a request may be made for a court to decide on the issue on the basis of Article 1:253a of the Dutch Civil Code, the so-called

geschillenregeling or “conflict arrangement”. The purpose of this provision was for the judiciary to regulate the resolution of disputes that may arise between parents regarding the exercise of their joint custody.

Balancing of interests and fundamental rights

As previously mentioned, the parents’ right to decide whether their male child should be circumcised falls within their custody rights and is directly related to the right to the parents’ freedom of religion. They have the right to raise their child according to their religion or faith (Article 9 of the European Convention on Human Rights or ECHR). Various rulings by Dutch courts, however, indicate that the best interest of the child is given primary importance. In this argument, reference is also made to Article 3 of the Convention on the Rights of the Child (District Court of Zutphen, Judgement of 31 July 2007, 83927 JE RK 07-110, ECLI:NL:RBZUT:2007:BB0833).

In the present case, the Court of Appeal had to render a decision on whether a five-year-old boy may be circumcised. The mother of the child has Moroccan nationality and has been a Muslim from birth onwards. The husband has Dutch nationality and converted to Islam at a later time in his life.

When deciding on the case, the Court of Appeal considered the fact that in Islam, circumcision is common at the age of five but not obligatory. It may instead take place later on in the child’s life when he can make that decision on his own.

In a separate case, the District Court of Groningen explicitly connected the freedom of the child to decide whether he wishes to be circumcised to his freedom of religion. In said case, the mother of the child, who raised him, was Muslim and wanted the child to be circumcised. On the other hand, the father was Hindu, arguing that the child ought to be circumcised at a later age. The Court ruled that the child could not be circumcised in light of the fact that the procedure would be irreversible even though the child’s choice of religion was not yet clear (District Court of Groningen, Judgement of 11 December 1996, KG 1997, 36).

Dutch courts therefore give considerable weight to the fact that circumcision is a physical and irreversible procedure that is not medically necessary. Here, the

right to bodily integrity of the child plays a major role and is codified, among others, in Article 11 of the Dutch Constitution; Articles 2, 3, and 5 of the ECHR; and Articles 6, 7, and 9 of the International Covenant on Civil and Political Rights (ICCPR) (Rutten 2005b).

Furthermore, by assessing whether the child would face social isolation if he were to remain uncircumcised, the Court of Appeal explicitly recognizes the importance of this aspect when deciding on the matter. The Court ruled, however, that in the present case, there was no reason to believe that social isolation would ensue. For this, the Court referred to the fact that the child had Dutch nationality, grew up in Dutch culture, and attended a public school, even though it is mostly attended by Turkish Muslim boys. Furthermore, the Court's decision explicitly mentions that the family's opinion is not a decisive factor.

In the case at the centre of this template, no weight was attached to the fact that the child was brought up by his Muslim mother. In contrast, a 2007 decision by the District Court of Zutphen assigned great importance to the cultural environment in which the child had been raised (Judgement of 31 July 2007, ECLI:NL:RBZUT:2007:BB0833).

In light of the various interests involved in the decision for a child to be circumcised, as illustrated in the arguments above, the Court of Appeal in the present case concluded that it was not in the best interests of the child to be circumcised at the age of five.

It bears mention that in the case under consideration, hygienic arguments did not play a role in the Court's decision. This is in alignment with the general trend in the Netherlands, where courts generally do not give much weight to such arguments. For instance, the 2007 decision of the Zutphen District Court acknowledged that it is not customary in the Netherlands for circumcision to be carried out solely on hygienic grounds (District Court of Zutphen, Judgement of 31 July 2007, ECLI:NL:RBZUT:2007:BB0833).

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

- Aldeeb Abu-Sahlieh, Sami A. 2008. *Religion et droit dans les pays arabes*. Bordeaux: Presses Universitaires de Bordeaux.
- Anwer, Abdul Wahid, Lubna Samad, Sundus Iftikhar, and Naila Baig-Ansari. 2017. “Reported Male Circumcision Practices in a Muslim-Majority Setting”. *BioMed Research International* 2017: 1–8.
- Dessing, Nathal M. 2001. *Rituals of Birth, Circumcision, Marriage, and Death Among Muslims in the Netherlands*. Leuven: Peeters Publishers.
- Dessing, Nathal M. 2010. “Besnijdenis en recht”. *Recht van de Islam 24: Kind en recht in de Islam*, 51–66. Hague: Boom Juridische.
- Juynboll, Th. W. 1930. *Handleiding tot de kennis van de Mohammedaansche Wet volgens de leer der Sjâfi’tische school*. Leiden: E. J. BRILL.
- Merkel, Reinhard and Holm Putzke. 2013. “After Cologne: Male Circumcision and the Law. Parental Right, Religious Liberty or Criminal Assault?”. *Journal of Medical Ethics* 39 (7): 444–449.
- Morris, Brian J., Richard G. Wamai, Esther B. Henebeng, Aaron AR Tobian, Jeffrey D. Klausner, Joya Banerjee, and Catherine A. Hankins. 2016. “Estimation of Country-Specific and Global Prevalence of Male Circumcision”. *Population Health Metrics* 14 (1): 1–13.
- Rassbach, Eric. 2018. “Coming Soon to a Court Near You: Male Circumcision in Religious Families in Europe and the United States”. In Robin Fretwell Wilson (ed), *The Contested Place of Religion in Family Law*, 171–190. Cambridge: Cambridge University Press.
- Rutten, Susan. 2005a. “Familiewaarden van Buiten, in de Rechtszaal Naar Binnen”. *TREMA*: 266–272.
- Rutten, Susan. 2005b. *Cultuur En Familierecht in Eigen Kring. Preadvies Voor de Nederlandse Vereniging Voor Rechtsvergelijking*. Deventer: Kluwer.
- Rutten, Susan. 2010. “Besnijdeniszaken voor de Nederlandse rechter”. In Pauline Kruiniger (ed), *Recht van de Islam 24: Kind en recht in de Islam*, 67–78. Hague: Boom Juridisch.
- World Health Organization. 2009. *Traditional Male Circumcision Among Young People: A Public Health Perspective in the Context of HIV Prevention*.

Geneva: WHO Printing Service.

Disclaimer

The translation of this decision/judgement is the author's responsibility.

CC BY ND

This case-law comment is licensed under a Creative Commons Attribution-NoDerivatives 4.0 International License (CC BY-ND 4.0) .

You may share this material, provided that appropriate credit is given. No derivatives or adaptations of this material are permitted.

Suggested citation of this case-law comment:

Kersten, Fei An (2024): Male Circumcision in Family Law Disputes Before Dutch Courts, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI076NL009, https://doi.org/10.48509/CUREDI076NL009.