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

The Denial of Fatherhood in Moroccan Law and the Dutch Public Order Exception

Question(s) at stake:

Whether the court may refuse to apply foreign law, in this case Moroccan law, on the basis of the public order exception if a request for the denial of fatherhood is not available for the requesting party under that law.

Outcome of the ruling:

In light of the unequal right between men and women concerning the competence to file an application for the denial of paternity under Moroccan law and in view of the protection of the applicant's newly founded family, the foreign law should be disapplied on the basis of Dutch public policy.

Topic(s):

- Personal Status, Family and Inheritance

Keywords:

- Kinship and filiation
- Parenthood
- Fatherhood
- Denial of fatherhood
- Applicable law
- Rights and freedoms
- Right to respect for family life
- Limitations and justifications
- Public order

Tag(s):

- Moroccan family law

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Country:

Netherlands

Official citation:

District Court Rotterdam, Judgement of 27 January 2010, Case nr 327767/ F2 RK 09-694, ECLI:NL:RBROT:2010:BL1502 (Rechtbank Rotterdam 27 januari 2010, Zaaknr 327767/ F2 RK 09-694, ECLI:NL:RBROT:2010:BL1502)

Link to the decision:

https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBROT:2010:BL1502

ECLI:

ECLI:NL:RBROT:2010:BL1502

Date:

27 January 2010

Jurisdiction / Court / Chamber:

District Court

Remedy / Procedural stage:

First instance

Previous stages:

None

Subsequent stages:

No information found

Branches / Areas of law:

Family law, Private international law

Facts:

The respondent, a man of Moroccan and Belgian nationality, was previously married to the applicant, a woman of Dutch and Moroccan nationality. Although the parties separated in 2004, the Belgian court only officially proclaimed their divorce in October 2007, and the divorce was only registered in the Belgian registers in February 2008.

Ever since their separation in 2004, the respondent and his former wife have not had any sexual intercourse. In 2007, the woman started a relationship with another man, from which a child was born. Under Moroccan law, the respondent was registered as the father of the child.

The mother proclaims that she is a hundred percent sure that the man with whom she started this new relationship is the biological father of the child. She wishes to raise the child with the biological father and would like the biological father to officially recognize the child.

Furthermore, according to the appointed special guardian (*bijzondere curator*) who has spoken with the biological father, he himself is sure that he is indeed the biological father and wishes to recognize the child and have the child bear his name.

As such, the mother (applicant) requests the fatherhood of the former husband (respondent) to be denied. According to the mother, the respondent does not oppose the mother’s request.

Ruling:

The Court ruled that by not applying Moroccan family law in light of the public policy exception, the request of the mother for the denial of the fatherhood of the respondent ought to be granted.

According to Art. 2 (1) in connection with Art. 1(2) of the Dutch Act on Conflicts of Laws on Filiation (now Art. 10:93(1) in connection with 10:92(3) of the Dutch Civil Code (DCC)), Moroccan law is applicable to this dispute seeing as both the

applicant and the respondent have Moroccan nationality.

It follows from Moroccan law that the respondent is the legal father of the child because it was born within one year of the divorce (Art. 154 (2) Mudawwana (Mud)). Denial can only take place by judicial decree ex Art. 159 Mud in accordance with Art. 153 Mud. An appeal against this may only be filed by the husband according to Art. 153 Mud. It follows that a Moroccan woman – the mother and applicant in the present case – is not able to deny the fatherhood of a man to whom she had been married.

Article 2(2) of the Dutch Act on Conflicts of Laws on Filiation (now Art. 10:93(2) DCC) does not provide for a solution either, seeing as the denial of fatherhood would require a joint request of the mother and the respondent. The fact that the respondent did not appear in the proceedings, and therefore did not present a defence, cannot replace such a joint request. Therefore, pursuant to the referral rule, Dutch law cannot be applied to the present request.

However, the Court is of the opinion that Moroccan law, which grants the authority to submit an application for the denial of paternity exclusively to the husband, constitutes such an inequality between husband and wife under Dutch law that it should be disapplied as contrary to the Dutch public order.

The Court also ruled that the invocation of Art. 8 European Convention on Human Rights (ECHR) by the appointed special guardian (*bijzondere curator*) is successful. In the present case it has been shown that the mother and the child's (alleged) biological father will not – at least for the time being – get married or live together. At the same time, it has also been sufficiently established that the child's biological father, as designated by the mother, wants nothing more than to recognize the child as his child as soon as possible. The mother shares that desire. Therefore, the aforementioned provisions of Moroccan family law prevent the establishment of a family law relationship between the child and the biological father, since the denial of paternity of the legal father at the mother's request is not permitted and the legal father has not appeared in these proceedings. As such, the Court ruled that it will apply Dutch law to the present

case.

In light of the above-mentioned information, the Court also deems it to be sufficiently established that the man is the biological father of the child, in addition to the fact that the respondent is not. As such, the Court grants the request of the mother for the denial of the fatherhood of the respondent.

Main quotations on cultural or religious diversity:

- “However, the court held that Moroccan law, which grants the competence to file an application for the denial of paternity exclusively to the husband, constitutes such an inequality between husband and wife under Dutch law that it should be disapplied as contrary to Dutch public policy.”
- “The court also held that the invocation of Art. 8 European Convention on Human Rights (ECHR) by the appointed special guardian (bijzondere curator) is successful. After all, in the present application it has been shown that the mother and the man she has designated as the biological father of the child will not – at least for the time being – get married or start living together; on the other hand, it has also been sufficiently established that the biological father of the child designated by the mother wants nothing more than to recognize the child as his child as soon as this becomes possible. The mother shares that desire. Therefore, the provisions of Moroccan family law cited above prevent the establishment of a family relationship between the child and the biological father, since denial of paternity of the legal father at the request of the mother is not permitted and the legal father has not appeared in these proceedings.”

Main legal texts quoted in the decision:

Domestic law

- Art. 1 (2) of the Act on Conflicts of Laws on Filiation (now Art. 10:92(3) Dutch Civil Code)

- Art. 2 (1) of the Act on Conflicts of Laws on Filiation (now Art. 10:93(1) Dutch Civil Code)
- Art. 2 (2) of the Act on Conflicts of Law on Filiation (now Art. 10:93(2) Dutch Civil Code)

Moroccan law

- Art. 153 Mud
- Art. 154(2) Mud
- Art. 159 Mud

International legal instruments

- Art. 8 European Convention on Human Rights

Cases cited in the decision:

None

Commentary

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Moroccan law on descent

The rules on descent within Islamic family law are closely regulated: no kinship should exist between a father and a child outside marriage. An extramarital relationship is strictly forbidden and does not entail legal kinship.

Within the law on descent, the father's kinship (*nasab*) plays a central role. The importance of this status appears in various forms, including social protection, education, maintenance, and inheritance law, but it is also reflected in how a child is legally named (Van der Velden 2016: 177).

The legal parentage of a man may derive from a child being born during his marriage to the mother, but this also extends to a certain period after the marriage has already ended. Specifically, under Moroccan law, Art. 154 (2) Mud prescribes that where a child is born within one year of the divorce, the man is the legal father (Van der Velden 2016: 178–185).

According to Moroccan law, denial of fatherhood can only take place by judicial decree ex Art. 159 Mud in accordance with Art. 153 Mud. An appeal against this may only be filed by the husband according to Art. 153 Mud. A Moroccan woman therefore does not have the competence to deny the fatherhood of a man to whom she had been married.

The denial of fatherhood has major consequences, especially within the sphere of family law and succession rights. Furthermore, from a social point of view the man is put into a difficult position: the first question that arises within the community is whether the man is even able to have children, and the second is whether he has sufficient control over his wife (Van der Velden 2016: 183). This may, together with the major role the male plays within Islamic family law, explain why Moroccan law only provides the possibility for fatherhood to be denied on the request of the father himself.

Law on descent in Dutch PIL

Article 10:92 of the DCC prescribes that when determining whether a child has family relations with the woman who gave birth to it and the person married or formerly married to her, the law of the state of the common nationality of the woman and that person is applicable, or failing that the law of the state in which the woman and that person each have their habitual residence, or failing both of these the law of the state of the child’s habitual residence.

Where this question relates to a request for the denial of this family relation, Art. 10:93(1) DCC prescribes that the same law which follows from Art. 10:92(1) DCC is applicable. If such a request is not possible anymore, the judge may apply the legal system of the state where the child has its habitual residence at the time of the denial or the Dutch legal system. For the judge to exercise this competence, a joint request is necessary.

In the present case, the application of the facts of the case to the previously mentioned rule led to the inability of the woman to deny fatherhood as prescribed by Moroccan law. However, according to the Court this constitutes such an inequality between the husband and wife that it should be disapplied as contrary

to the Dutch public policy (see also District Court Haarlem 22 July 2008, ECLI:NL:RBHAA:2008:BD9278, para. 5.5.).

To justify its decision, the Court also relies on Art. 8 ECHR. In the present case, it had been shown that the mother and biological father wished to raise the child together. The application of Moroccan law would therefore have prevented the establishment of a family relationship between the child and biological father, seeing as it did not provide for an alternative method to bring about the denial of fatherhood and the legal father had not appeared in the proceedings. A similar consideration can be found in the ruling of the District Court Limburg (23 January 2013, ECLI:NL:RBLIM:2013:BZ3218), although no explicit reference was made to Art. 8 ECHR.

Interestingly, when deciding upon the present matter, the Court did not perform a balancing act. Arguably, this illustrates that the principle of equality of men and women, together with the right to family life of Art. 8 ECHR, is deemed of such importance within the Dutch legal order that no other considerations would lead to a different result, thus also superseding the designated applicable foreign law.

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

- Buskens, Léon. 1999. *Islamitische familiebetrekkingen in Marokko.* Amsterdam: Bulaaq.
- Jordens-Cotran, Leila. 2007. *Nieuw Marokkaans familierecht en Nederlands IPR.* Maastricht: Maastricht University.
- Van der Velden, Frans. 2016. *Inleiding in de shari'a. Een kennismaking met het recht van de islam-georiënteerde wereld.* Den Haag: Boom Juridisch (Chapter 4: Islamitisch verwantschapsrecht).
- Vonken, A.P.M.J. 2023. Commentaar op art. 10:93 BW, in: H.B. Krans e.a. (red), *Tekst & Commentaar Burgerlijk Wetboek,* Deventer: Wolters Kluwer 2023.

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