

## Religion and Culture in Family & Law

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In current Western societies, discussions on religious and cultural customs and beliefs have become daily news. The most glaring examples are debates on radicalisation and jihad as the number of citizens travelling to Syria to join so-called Islamic State (IS), even at a very young age, is increasing. The relation with Islamic fundamentalism is undeniable. Yet, the threats of terrorism are not the only cases where religious or cultural aspects come to the fore. A few years ago, a German judge ruled that a Muslim child should not be circumcised because it would harm his bodily integrity<sup>1</sup> and in the Netherlands, the orthodox Christian movement that rejects immunisation for its children had to explain its position in public debate when a measles outbreak occurred and one child died as a result.<sup>2</sup> The public acceptance of exceptional viewpoints on immunisation is decreasing, especially when the well-being of children is at stake. The same goes for boyhood circumcision which is now regarded as suspect because harmful to children. The dominant secular cultural and legal norms concerning the development of children into balanced individuals appear to clash with religious and cultural norms of minority groups. From one perspective, interventions from the government to protect the well-being of children could be seen as justified. However, this is not the only interest of children at stake. The view has been expressed that the significance should be emphasized of the interest of children to identification with other members of their religious or cultural group. It is known that children who are vaccinated against their parents' will could become outcasts within their religious community. It is also claimed that the religious identity of children could be at stake if they were not circumcised. Within the Jewish community it is commonly held that a child will only become 'whole' and 'unified' by being circumcised.<sup>3</sup>

One case shows the intensity of these clashes. In 2013 it was revealed by the Dutch and Turkish news media that a child of Muslim and Turkish parents, named Yunus, had been placed with lesbian foster parents in the Netherlands.<sup>4</sup> Yunus's natural parents, supported by Turkish state officials, protested against this decision, claiming that it did not respect their religion. The Turkish government intervened and wanted the Dutch government to explain this practice which was considered by the Turkish government and the parents to be disrespectful and insulting to Turkish Muslims.<sup>5</sup>

In this special issue of the *Utrecht Law Review*, we will focus on cases where culture or religion are considered relevant in debates on family law and practice in Western societies. One would expect that judges who are confronted with religiously inspired behaviour would take into account in their ruling that this

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1 Landgericht Köln: Urteil vom 07.05.2012 – 151 Ns 169/11.

2 <[http://rivm.nl/Documenten\\_en\\_publicaties/Algemeen\\_Actueel/Nieuwsberichten/2013/Meisje\\_overleden\\_na\\_mazeleninfectie](http://rivm.nl/Documenten_en_publicaties/Algemeen_Actueel/Nieuwsberichten/2013/Meisje_overleden_na_mazeleninfectie)> (last visited 24 June 2016).

3 W. Dekkers et al., 'Bodily integrity and male and female circumcision', (2005) 8 *Medicine Health Care and Philosophy*, no. 2, <http://doi.org/10.1007/s11019-004-3530-z>, pp. 179-191.

4 See <<http://nos.nl/artikel/482057-turken-druk-met-homo-pleeggezin.html>> (last visited 13 January 2016). According to the Convention on the Rights of the Child Art. 20, the parents were right in asking that due consideration be paid to the child's cultural and religious background.

5 H. Güler, 'Report: Turkish foster children alienated from their culture', *Today's Zaman*, 14 October 2013.

behaviour is directly linked to religion, or at least mention this when deciding a case. One can also expect that, given the differences between cultures, differences in laws between countries will become apparent as well.

Legal systems are shaped by their religious and cultural backgrounds. When comparing the legal systems of two or more countries, religious and cultural factors are important 'explanatory factors' for the similarities and differences found.<sup>6</sup> In family law in particular, examples can be found on the impact of religious and cultural factors. The way in which, for example, marriage, divorce and abortion are regulated in a country closely depends on the religious and cultural background of a country. In Malta, for example, divorce was not permitted until the end of 2011, due to strong Catholic influences. In Denmark, on the other hand, spouses can easily get a divorce by sending an application to the State Administration. Unlike in many other countries, in Denmark the judiciary is not involved in such cases. Cultural and religious differences also influence the immunisation policy of a country. In contrast to Belgium, for example, the Netherlands does not have a compulsory vaccination programme. Nevertheless, the vaccination rate is extremely high in the Netherlands, except in certain areas, namely the so-called Bible belt.<sup>7</sup> Orthodox Christian families living there have conscientious objections to immunisation, based on a firm belief that one should not interfere with God's plans for humankind. In some ways the conscientious objections of a minority group in the Netherlands are respected in current regulations and politicians are hesitant about making changes, while at the same time public acceptance of conscientious objections is decreasing. By contrast, in California a law has recently been passed that obliges all children to be immunised when they start going to school.<sup>8</sup> Group protection is considered important in this debate to protect the weak individuals within groups. This too shows how, within countries, differences in culture can lead to differences in law and that changing debates on culture and religion in society will apply to laws as well.

At the same time, religion and culture influence current legal systems, particularly family law. Legal professionals (such as lawyers and judges), but also state agencies (e.g. youth protection workers, local government officers and the legislature) working in the field of family law are confronted with 'other cultures'. The question arises as to how to deal with practices and beliefs that stem from a culture that is different from the dominant culture on which the (secular) legal system in a particular country is based.

In this special issue of the *Utrecht Law Review* both themes are addressed. While the articles of Kronborg, Mol and Spruyt address the question of how we have to understand current law from an historical and cultural perspective, the articles of Verhallen, Van Spaendonck, Van Rossum & Van den Hoven, and Tigchelaar & Jonker address the question of how current (Dutch) legal practice deals with religious and cultural issues. Attention to these themes lies at the core of the research conducted by the Utrecht Centre for European Research into Family Law (UCERF, <[www.ucerf.rebo.uu.nl](http://www.ucerf.rebo.uu.nl)>) which is the centre where most of these authors contributing to this special issue work. Central to UCERF's research is the fundamental question of to what extent is the state, on the one hand, allowed and, on the other, forced to intervene in the private relations of its citizens. Religious and cultural identity play an important role in answering this question, as this special issue demonstrates. UCERF strives for intradisciplinary and interdisciplinary cooperation, for instance within the Utrecht University strategic research theme of the Dynamics of Youth. In this context, this special issue combines perspectives from researchers from different disciplines and from different areas of the law, resulting in new combined perspectives on religion and culture-related issues; for instance a legal sociology perspective intertwined with insights from philosophy and religious studies (the article by Van Rossum & Van den Hoven) and a legal theory perspective combined with hard-core family law in the article by Tigchelaar & Jonker. Another example is the contribution by Verhallen, an ethnographic study of families in relation to family and child protection law, which shows how the use of a rather different method (a non-traditional legal method) has a specific added value revealing insights which would otherwise be invisible.

Both perspectives are closely linked with each other. In the article by Spruyt, for example, the dilemma of obligatory vaccination is addressed. While on the one hand children have the right to physical and emotional

6 J. Huusa, *A New Introduction to Comparative Law* (2015), pp. 157-163.

7 <[http://www.rivm.nl/en/Documents\\_and\\_publications/Scientific/Reports/2016/april/The\\_National\\_Immunisation\\_Programme\\_in\\_2015](http://www.rivm.nl/en/Documents_and_publications/Scientific/Reports/2016/april/The_National_Immunisation_Programme_in_2015)> (last visited 19 June 2016)

8 <<http://www.nvic.org/Vaccine-Laws/state-vaccine-requirements/california.aspx>> (last visited 19 June 2016)

integrity, on the other hand parents have the rights to freedom of religion and to raise their children accordingly. Spruyt gives an overview of the vaccination policy in the Netherlands since the 18th century. He describes how this policy has developed and the reactions of the politicians after the several epidemics that occurred. In other words, he examines the religious and cultural explanatory factors with regard to our current (voluntary) vaccination policy. One of these factors might be the unwillingness of Dutch politicians to restrict the religious rights of parents. Spruyt argues:

‘With regard to vaccination, this restraint is based on a long tradition. The process of secularization and, as a consequence, new perspectives on the meaning and importance of different human rights, have not altered the Dutch government’s response to parents refusing to have their children vaccinated.’<sup>9</sup>

This ‘hands-off’ attitude of the legislature also has consequences for legal practice, for example, with regard to parental disputes concerning religious matters. It is left to the discretion of the judge to determine what is in the best interests of the child and to what extent parents have a right to religious freedom. In the article by Tigchelaar & Jonker, the question is addressed as to which factors are used by Dutch judges to assess the best interests of the child in religious disputes between parents and whether Dutch case law concerning this topic is in conformity with the case law of the European Court of Human Rights.<sup>10</sup>

The contributions show an overlap on several topics that we will address successively.

First, what combines almost all the contributions is a notion of the best interests of the child. Tigchelaar & Jonker try to unravel how the notion is used in case law and what considerations seem to determine its content. Several factors, like stability, social inclusion and the (future) choice of the child seem to be of importance in cases concerning religious disputes between parents. Van Rossum & Van den Hoven question how legal professionals are informed and trained in order to interpret the best interests of the child in child protection cases. Van Spaendonck investigates to what extent the best interests of the child are considered at the international, national and local level when preventing minors from travelling to Syria or Iraq. She draws the conclusion that, when it comes to prevention, the best interests of the child are explicitly addressed, however, not by repressive measures.<sup>11</sup> As is to be expected, it follows from these articles that the concept of the best interests of the child, is not clearly defined in law or legal practice.

Second, there is conceptual uncertainty in many other debates as well. Verhallen clearly shows how in the field of youth protection a notion like ‘multi-problem family’ is important but that it is often unclear what is meant by it: does it, for example, refer to the experience of a family that has multiple problems (experience based), where more than one family member needs help (multi agents based) or where more than one professional organisation is involved (caretakers based)? The concept that is meant to help label family needs in order to offer care more efficiently, also stigmatizes and reifies, according to Verhallen.<sup>12</sup> The negative connotation of the term, focusing on risks and problems within families, will not help families to overcome their problems. Moreover, the labelling does not result in more efficient care, as her research clearly shows. This makes one wonder in a field that is dominated by interprofessional care.

In addition, conceptual uncertainty is to be found in the distinction between cultural and religious aspects. Quite often, these are intertwined: life style, dress code, daily rhythm, playing habits of children, for example, are influenced both by a cultural background as well as by religious beliefs. Yet, debates on honour-related violence are considered to be primarily a cultural issue, not one that belongs to a Muslim background, even if the majority of honour-related violence occurs in Muslim families from certain geographical backgrounds. The argument for strictly distinguishing this as a cultural issue and not a matter of religious background, might be that a cultural practice can more easily be criticized. Yet, in discussions

9 G.H. Spruyt, ‘Politicians and Epidemics in the Bible Belt’, (2016) 12 *Utrecht Law Review*, no. 2, <http://doi.org/10.18352/ulr.349>, p. 126.

10 J. Tigchelaar & M. Jonker, ‘How is a Judicial Decision Made in Parental Religious Disputes? An analysis of determining factors in Dutch and European Court of Human Rights case law’, (2016) 12 *Utrecht Law Review*, no. 2, <http://doi.org/10.18352/ulr.350>, pp. 24-40.

11 R. van Spaendonck, ‘To School or to Syria? The foreign fighter phenomenon from a children’s rights perspective’, (2016) 12 *Utrecht Law Review*, no. 2, <http://doi.org/10.18352/ulr.348>, pp. 59-60.

12 T. Verhallen, “‘E kuchú ta korta mi’ versus ‘I cut myself with a knife’: Cultural Assumptions in Child Protection Intervention Processes”, (2016) 12 *Utrecht Law Review*, no. 2, <http://doi.org/10.18352/ulr.344>, pp. 63-80.

on boyhood circumcision we cannot deny the influence of both cultural background – as the majority of US male citizens are circumcised – as well as its relevance from a religious perspective. In a similar manner, one could argue that radicalisation has nothing to do with Islam, and is not a religious issue, yet at the same time the strong relation to fundamentalist Islam cannot be denied. The same goes for the orthodox Christian refusal to be immunized; only in some geographical areas, like the Netherlands and the US (Amish) do we find such strict refusal of immunisation based on conscientious objections, while in many other countries conscientious objections are more based on different insights on health (anthroposophy) or a parental fear of side effects. The cultural context seems to highly influence the religious motivations for refusal. The two, cultural and religious aspects, seem to intertwine in debates and can hardly be separated.

Furthermore, Van Spaendonck addresses the lack of clarity concerning the definition of ‘youth’ with regard to measures taken in connection with the prevention and control of radicalisation. Policy makers do not seem to distinguish between minors and young adults. Only the Council of Europe mentions the UN Convention on the Rights of the Child (CRC) in its explanatory report to the Additional Protocol on the Prevention of Terrorism. As a result, the ‘special’ legal position which minors should have, namely to be protected by the state, is often not acknowledged.

Third, differences in family formation regulations can be explained from a historical perspective. The religious and cultural differences between countries are often used as an argument against the feasibility and desirability of harmonization or unification of family law in Europe. However, as proved by the Commission on European Family Law (CEFL) cultural differences between countries do not have to be an obstacle when establishing legal principles concerning family law matters. Comprehensive comparative legal research on the legal status of informal relationships carried out by the CEFL shows that, although informal relationships have increased significantly all over Europe, European legislators have reacted differently to this development. While some countries have a *lex specialis* in family law with regard to informal relationships, other countries only recognize formal relationships. Most countries, however, provide for some rights and duties in several areas of law. Mol examines the legislation in the nine European jurisdictions (Sweden, Hungary, Slovenia, Croatia, Catalonia, Portugal, Scotland, the Republic of Ireland and Finland) that have regulated informal relationships as a *lex specialis* in family law.<sup>13</sup> She describes and compares the scope of the regulation and the legal effects that are granted to these couples. The emphasis is on the explanations given by the legislators for their decisions to regulate. The article provides an interesting insight into why and how these countries have come to a regulation for this kind of relationship. Kronborg compares and evaluates two other aspects of family formation (access to marriage and fertility treatment) in Denmark, Norway and Sweden.<sup>14</sup> While these countries are often referred to as belonging to the same legal family (having the same cultural background), differences between the Scandinavian countries exist. The aim of Kronborg’s study is to indicate how historical developments in these countries have influenced their family laws and, in so doing, to establish the importance of a historical perspective on this area of law. The analytical framework is shaped by the classification of marriage established by Sörgjerd, who distinguishes between whether family formations in law are constructed in terms of contract, or in relation to civil status.<sup>15</sup> She comes to the conclusion that while in Denmark the contractual element is strong with regard to family formation, in Norway and Sweden the civil status is more decisive. These differences can be explained by political and cultural factors which are thoroughly described by Kronborg.

A fourth overlapping observation is that there is undeniably a tenuous relation between parental freedom, freedom of religion and governmental interventions. Under the CRC, a child is entitled to freedom of religion (Article 14 CRC) and to enjoy his or her own culture and religion (Article 30 CRC). At the same time, parents have a right to provide direction in their children’s upbringing with regard to religious matters. Although states are obliged to respect these rights of children and parents, they also have a duty to intervene whenever this is necessary to protect public safety, order, health or morals, or the fundamental rights and

13 C. Mol, ‘Reasons for Regulating Informal Relationships: A comparison of nine European jurisdictions’, (2016) 12 *Utrecht Law Review*, no. 2, <http://doi.org/10.18352/ulr.347>, pp. 98-100.

14 A. Kronborg, ‘Family Formation in Scandinavia: A comparative study in family law’, (2016) 12 *Utrecht Law Review*, no. 2, <http://doi.org/10.18352/ulr.345>, pp. 81-97.

15 C. Sörgjerd, *Reconstructing Marriage* (2012), pp. 320-321.

freedoms of others (Article 14 CRC). When intervention by state officials occurs in the family, which affects religious or minority cultural values, the question of legitimacy arises. Even if it is believed that a minimalist state protection of children against immediate and real harm is insufficient in order to create competent citizens, a more maximalist approach of state intervention could easily be accused of paternalism and intrusiveness in a liberal society. Such a reproach of 'civil religion' may be stronger when state decisions interfere with the private right of parents to provide direction in the development of their child's religious identity. It is often quite difficult to establish which of these approaches is most appropriate.

A fifth overlapping observation is the silence on the topic. Van Rossum & van den Hoven explicitly address this in their contribution, as they conclude that both in professional journals and in professional training offers and interviews, the topic of religious and cultural aspects of the work is often not (sufficiently) addressed, while at the same time research also indicates a great need for intercultural skills for youth workers and other professionals working in the field of youth care.<sup>16</sup> Spruyt shows a timidity of politicians to address the issue of conscientious objections and to pass new legislation to urge parents towards accepting immunisation.

Several types of explanations can be given to account for the limited mentions of the topic in court rulings, journals and daily practice. Van Rossum & Van den Hoven offer a few, also based on findings in previous studies: it might be that cultural or religious considerations are not seen as 'legally relevant' and might be comparable to other 'background facts' like level of education, occupation, etc. Secondly, it might better fit expectations not to bring these elements to the fore. Lawyers might think that it could negatively influence their case, while judges might at the same time expect that lawyers would bring it to the fore when necessary. Even more, one might think that the principle of equality is highly valued and thus that other considerations that deviate from standards of equality, would not easily be raised. Other explanations might also be true, for example that the topic of religious and cultural aspects is simply not on the agenda, hence not given much priority, or that it goes without saying that Dutch standards should apply to all children living in the Netherlands. As Verhallen quotes from the interviews 'although Curaçaoan teaching practices might differ from Dutch practices, the Dutch way is the way we do it' (family supervisor).<sup>17</sup> Similarly, in interviews with lawyers and youth professionals on the topic, a youth worker explained why it was difficult to be uncooperative with Dutch systems:

'We once had a Roma adolescent at our Institute, who had serious problems with housekeeping or in obeying female coaches. He had to learn to live in a collective where exceptions cannot easily be made. This particular teenager became so confused and caught up between two cultures that his family decided to take him home.'<sup>18</sup>

The paucity of discussion on the topic is related to the last overlapping observation: there is a tendency to frame discussions in youth protection and family law in neutral terms. Van Rossum & Van den Hoven quote a legal youth worker who stated:

'The government determines the ground rules for youth work: children should be able to participate in society when grown up. This also determines our moral framework: we look after the safety of children and secondly we see to it that they develop themselves in ways that they can participate in our society when they have grown up. These are the compasses in our work. Parenting in minority families should not jeopardize these general aims that all children are entitled to.'<sup>19</sup>

One way to deal with an issue that appears to be religiously or culturally embedded is to unravel it and conclude that it is mainly another, more neutral, issue. Honour-related violence is culturally embedded but is mainly an issue of safety of a child, and that is the main reason to act. The court rulings that are analysed

16 NJI, <[http://www.nji.nl/nl/\(302196\)-Naar-interculturele-competentieprofielen-in-het-preventieve-en-ontwikkelingsgericht-jeugdbeleid.pdf](http://www.nji.nl/nl/(302196)-Naar-interculturele-competentieprofielen-in-het-preventieve-en-ontwikkelingsgericht-jeugdbeleid.pdf)> (last visited 21 January 2016). W. van Rossum & M. van den Hoven, 'Paucity and the Need for Value Sensitivity in Dealing with Youth Care: Why legal and youth professionals should take cultural and religious considerations seriously', (2016) 12 *Utrecht Law Review*, no. 2, <http://doi.org/10.18352/ulr.346>, pp. 7-23.

17 Verhallen, *supra* note 12, p. 78.

18 Van Rossum & Van den Hoven, *supra* note 16, p. 18.

19 *Ibid.*, p. 17.

by Tigchelaar & Jonker show that considerations of stability and continuity, of social isolation or integration, physical and emotional well-being and actual and future choice of a child itself are building blocks of the concept of the best interests of the child. These are all aspects that are relevant for each child, irrespective of its religious or cultural upbringing, yet at the same time these will be interpreted differently in each family. Thus, focusing on more neutral considerations is not wrong, but covers up the relevance of these considerations. It seems a strategy for escaping the issue. A second way to deal with these issues is to see in what ways they do seem to play a role and must be taken into account. Then, a different picture appears, because it might be true, yet there is insufficient evidence to support this, that due to a different cultural background, parents have a different attitude towards family life, life style, manners, or government bodies. One might, for example, be born with a great distrust of governments or have experience with governments that are corrupt or harmful; or interference with a child's school career is sufficient to cause a reluctance to cooperate. Also, uncooperative attitudes can be the result of a lack of understanding; both cognitive disabilities and unfamiliarity with the system can lead to escalations of the events and stubborn reactions by parents. Thus, addressing these issues more specifically, and recognizing the different backgrounds and beliefs of parents might help to solve problems at an early stage. If a different cultural background influences all sorts of daily life issues, then it urges us to look at many more aspects in interactions with minority groups in legal contexts and youth care than we have done so far. It will imply that we should look beyond those cases where culture or religion are already made explicit and to unravel in what ways these aspects also play a role that might be relevant in court rulings (like a lack of communication or cooperative attitude) and youth care practice.

A neutral stance by governments is to be advocated from one perspective, yet can have counter effects; thus public opinion on refusals of immunisation differs from the political stance and has as a result not yet led to changes in the law in the Netherlands. Two basic considerations seem to be underlying the discussion that relate to parenthood and need to be taken into account. First, the philosophical question as to why parents should be given so much leeway concerning their children at all. Brighthouse & Swift have argued that the special relationships that parents build with their children is so unique that others should not intervene too easily with it, and it helps parents to fully flourish as human beings.<sup>20</sup> Tigchelaar & Jonker show that courts are in general reluctant to get involved in the religious upbringing by parents, as parents are expected to care for the interests of their children in the best way. Yet, at points where this conflicts with majority democratic views in society, the question remains as to whether the primary starting point should be 'are these parents competent or incompetent to care for the best interests of a child'. Secondly, the question as to when governments are allowed to intervene (and in what manner). Verhallen shows how single mothers end up with legal child protection measures, while initially accepting help voluntarily. They feel trapped in a system that judges them as incompetent parents. Kronberg's contribution shows how countries have completely different regulations with regards to fertility treatment: who will become a parent is differently decided from the beginning. In discussions on the wishes of the mentally disabled to bear children, the notion 'good enough parenting' is frequently used, and this might be relevant in family law and youth practice as well: it seems that once intervention has started, the norms increase (we do it the Dutch way), while 'good enough parenting' is actually referring to basic needs of children (food, shelter, school, acceptance by peers).<sup>21</sup>

Overall, it can be concluded that religious and cultural aspects have received little attention in family law. This special issue aims to contribute to the discussion on how religion and culture influence our family-related regulations and policy and how legal practice deals with religious and cultural issues. In order to break the veil of silence, awareness should be created among (legal) professionals and policy makers regarding the religious and cultural rights of parents and children. How is the concept of the 'best interests of the child' to be interpreted in the light of these rights? A better understanding will enable professionals and policy makers to make informed decisions on how to deal with religious and cultural issues in family matters, which is of utmost importance in today's changing society. ■

20 H. Brighthouse & A. Swift, 'Parents Rights and the Value of the Family', (2006) 117 *Ethics*, pp. 80-108.

21 L. Shields, 'How bad can a good enough parent be?', (2016) 46 *Canadian Journal of Philosophy*, <http://doi.org/10.1080/00455091.2016.1148306>.