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

Repudiation and the In Concreto Assessment of Public Order

Question(s) at stake:

Whether the recognition in Belgium of a Moroccan repudiation breaches the Belgian public order?

Outcome of the ruling:

A repudiation can be recognized when no in concreto infringement of public order is found, as it is in this case since the woman accepted the repudiation and it could not be asserted that the repudiation was obtained in breach of Belgian law.

Topic(s):

- Personal Status, Family and Inheritance

Keywords:

- Dissolution of marriage and partnership
- Divorce
- Repudiation
- Legal toolbox
- Limitations and justifications
- Public order

Tag(s):

- Recognition of foreign divorces
- Public policy

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Country:

Belgium

Official citation:

Court of Cassation, 29 April 2002 (Cour de Cassation, 29 avril 2002)

Link to the decision:

https://www.ipr.be/sites/default/files/rechtspraak/20023_20020529.pdf

ECLI:

ECLI:BE:CASS:2002:ARR.20020429.3

Date:

29 April 2002

Jurisdiction / Court / Chamber:

Court of Cassation, 3rd Chamber

Remedy / Procedural stage:

Judicial review (Cassation)

Previous stages:

- Labour Court of Liège, 20 December 2000

Subsequent stages:

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Branches / Areas of law:

Private international law; Family law

Facts:

The defendant, a Moroccan national, and his wife married in 1963 in Morocco, prior to the couple's settlement in Belgium. With the agreement of his wife, who later left for Morocco, he married a second time in 1972. Only after 24 years, a "first revocable decree of divorce" was issued in Morocco with respect to the first marriage. The divorce decree was homologated before a tribunal in accordance with Moroccan law.

The following year, in 1997, his first wife invokes her right to a part of the defendant's retirement pension as a divorced spouse. The Belgian Pension Service, however, refused to recognize the Moroccan marriage dissolution, qualifying it as a repudiation. Since she was now seen as "separated" rather than "divorced", the defendant's pension was split between the ex-spouses.

The defendant brought the case to court. Both in the first instance and appeal, the Moroccan marriage dissolution was recognized. The Pension Service appealed before the Court of Cassation (*Cour de Cassation),* Belgium's supreme court.

Ruling:

As the divorce decree predates the entry into force of the Belgian Code of Private International Law in 2004, Article 570 of the Belgian Judicial Code was still applicable at the time of the court proceedings. This provision established the violation of public order as one of the main barriers to recognition.

The Belgian public order, the court ruled, would be violated if a foreign divorce based on a law that only allows the man to end the marriage, is recognised in Belgium. Such foreign law, it continued, fails to respect the principle of equality between men and women.

The Court specifies that, although the institution of repudiation is inherently discriminatory against women, recognizing the foreign marriage dissolution can still be achieved if the judge assessing the merits of the case does not find an *in-concreto* violation of the public order. This is the case if the woman accepted the repudiation and if the marriage dissolution was not obtained abroad in breach of Belgian law. In this case, the marriage was concluded in Morocco where the first wife has been residing for more than 20 years.

The *Cour de Cassation*'s ruling confirms the prior judgment, thus rejecting the appeal of the Pension Service.

Main quotations on cultural or religious diversity:

Argumentation of the appellant (followed by the Court):

"[T]he contested judgment decides that 'it is indeed true that repudiation remains a procedure reserved for the husband and that discrimination remains against the Moroccan wife. However, it should be noted that the rights of Moroccan spouses are not the same during the marriage. Strictly speaking, it should be concluded that Moroccan marriage is contrary to Belgian public policy and cannot be recognized. To do so would be to ignore the different cultures that have each established legislation, including personal status appropriate to the lifestyles of these different societies. For this reason, it is necessary to verify whether the decision of repudiation is not contrary to Belgian public policy "in concreto" and not "in abstracto"'". (p. 34)

Main legal texts quoted in the decision:

- Article 570 of the Belgian Judicial Code (Gerechtelijk Wetboek)

Cases cited in the decision:

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Commentary

Repudiation and the In Concreto Assessment of Public Order

The actual issue at stake was a financial one: a "divorced" status would entitle the woman in question to a more favourable pension than a "*de facto* separated status" in case of non-recognition of the repudiation.

This led to a principal judgment on the recognition in Belgium of foreign repudiations. The Court rejected an absolute incompatibility of repudiations with the Belgian public order and introduced a case-by-case assessment of the compatibility with public order.

Compatibility with public order should be appreciated *in concreto* – and not *in abstracto* – by taking into consideration the consent of the wife and the absence of evasion of the law or jurisdiction. The Court refuses to sweepingly condemn repudiations in the name of upholding the principle of equality between men and women. An *in concreto* examination could somehow cover the inequality of repudiation by the wife's subsequent acceptance of the repudiation to which she had been subjected and the absence of fraud to the law or jurisdiction.

As for the condition under which the woman accepted the repudiation, this judgment left some uncertainty with regard to the timing of this acceptance. Could, for instance, a new marriage of the woman be interpreted as a subsequent acceptance of a previous repudiation? Reference should be made here to the *Cour de Cassation*'s later judgment of 29 September 2003, which ruled that the acceptance must have taken place at the time of the repudiation or its homologation by a judge. The repudiated woman's "subsequent" acceptance cannot undo a violation of the equality principle. Respect for the rights of defence is one of the prerequisites for recognition of a repudiation established abroad. This ruling of the *Cour de Cassation* also predates the entry into force of the Belgian Code of Private International Law. Article 57 of this Private International Law Code allows for a broader interpretation: a subsequent acceptance can be sufficient if all other strict conditions of Article 57 are fulfilled. The judgment of 29 September 2003 can be consulted via *Tijdschrift@ipr.be* 2004/1: 67-72 (see www.ipr.be).

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

- Carlier, Jean-Yves. 2003. "La reconnaissance mesurée des répudiations par l'examen in concreto de la contrariété à l'ordre public'". *Revue trimestrielle de droit familial*: 35–48.
- Collienne, Fleur. 2005. "La reconnaissance des répudiations en droit belge après l'entrée en vigueur du Code de droit international privé". *Revue Générale de Droit Civil Belge*: 445–453.

- Deschuyteneer, Laura and Sarah Den Haese. 2017. “Overzicht van rechtspraak: erkenning en tenuitvoerlegging van buitenlandse beslissingen en akten inzake echtscheiding en onderhoudsverplichtingen (2010-17)”. *Tijdschrift voor Familierecht* (8): 204–225.

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