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

A Pragmatic Assessment of Repudiation

Question(s) at stake:

Whether there are reasons to recognize a Moroccan talaq repudiation despite the unequal position of men and women in the context of this practice?

Outcome of the ruling:

When a Moroccan woman requested recognition of a previous repudiation in order to benefit from more favourable pension rights as a divorcee, the Court examined the compatibility with public policy. After an in-concreto examination of the consequences of non-recognition, the Court concluded that the woman would be doubly victimized if the talaq repudiation was not recognized: in addition to being repudiated, she would also be financially burdened. Thus, the Court recognized the repudiation even though it ruled that there was inequality between man and woman in the case of repudiation.

Topic(s):

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

Keywords:

- Dissolution of marriage and partnership
- Divorce
- Foreign decisions/judgments
- Legal toolbox
- Limitations and justifications
- Public order
- Recognition
- Repudiation

Tag(s):

- Recognition of foreign divorces

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Country:

Belgium

Official citation:

Labour Court of Appeal of Brussels, Judgement of 13 April 2005, 40557 (Cour du Travail de Bruxelles, n° 40557, 13 avril 2005)

Link to the decision:

https://juportal.be/JUPORTAwork/ECLI:BE:CTBRL:2005:ARR.20050413.10_FR.pdf

ECLI:

ECLI:BE:CTBRL:2005:ARR.20050413.10

Date:

13 April 2005

Jurisdiction / Court / Chamber:

Labour Court of Appeal of Brussels, 8th Chamber

Remedy / Procedural stage:

First instance

Previous stages:

- None

Subsequent stages:

- No information found

Branches / Areas of law:

Private international law; Family law

Facts:

The defendant, a Moroccan woman, married in 1977. As her husband’s previous (first) marriage had not yet been dissolved, bigamy arose. Only after almost 20 years of bigamy did he divorce his first wife by repudiation. Two years later, in 1996, his (second) marriage to the defendant also ended.

In 1997, the defendant was granted a pension as a “divorcee”. However, in 1999, the Belgian Pension Service revoked its initial decision: in its view, the first marriage had not been dissolved because the repudiation could not be recognized.

Since the defendant could benefit financially from her status as a divorcee, she took her case to court. At first instance, the Brussels Labour Court upheld her claim and recognized the first repudiation after an in-concreto assessment of its legal nature.

The pension fund subsequently appealed to the Labour Court of Appeal.

Ruling:

The Court starts with a reference to the role of private international law as a matchmaker between different laws and its use of nationality as a connecting factor in personal and family-related issues such as parentage, marriage, and divorce. These national laws, the Court continues, are diverse, especially when inspired by traditions that radically differ from one another. This is the case for repudiation in all its forms. In order to clarify the legal nature of Moroccan repudiations, the Court adds an extract from the relevant doctrine.

The court then qualifies the first divorce as a repudiation. Whether this repudiation can be recognized in Belgian legal order depends on its compatibility

with public policy. For the Court, the difficulty in recognizing the repudiation lies in the inequality of access, since a repudiation is primarily based on the will of the man. However, with the entry into force of the 2004 Moroccan Family Code, the woman is also entitled to repudiation, provided that the man grants her this privilege (commonly known as “tamlik”). Equality is thus possible, the Court concludes, but still depends on the man’s will.

However, refusal to recognize the repudiation would victimize the defendant, as the (second) repudiated wife, twice: firstly, because of the disadvantages of the dissolution of the marriage imposed by her husband, without her being able to oppose it or terminate it in the same way on her own initiative; and secondly, because she would not be able to take the repudiation into account when calculating her social security rights. Non-recognition would therefore be financially burdensome for her, since she would not be considered a divorcee. The Court concludes that it is not the manner in which the dissolution of the marriage was effected that should be given weight by the Belgian courts, but the consequences of that dissolution.

For these reasons, the Court recognizes the repudiation and grants the former spouse the status of divorcee.

Main quotations on cultural or religious diversity:

With regard to the preference in Belgian private international law for nationality as a connecting factor and the clash of cultures it might entail

“Whereas the purpose of private international law is to organize the coexistence of peoples whose laws relating to marriage, divorce, or filiation are different; Whereas the prevailing principle is that everyone remains governed by his or her own national law, at least when it comes to personal problems such as filiation, marriage and divorce (Article 3, paragraph 3 of the Civil Code);

Whereas, however, this principle of nationality sometimes comes up against the differences existing between national laws. That indeed, some national laws are sometimes inspired by traditions that are radically different from ours; that this is

particularly true of the dissolution of marriage by the husband's sole will (repudiation), which exists in various forms of Muslim inspiration" (p. 5)

With regard to the inherently unequal nature of repudiation

"Given that the difficulty in accepting repudiation is the inequality of access to this institution insofar as *talaq* repudiation depends exclusively on the husband […];

Whereas the new Moroccan Personal Status Code certainly allows the wife to initiate repudiation herself, this possibility only exists if the husband has granted this privilege to his wife;

That equality is therefore dependent on the husband's will;

Given that there can be no question of reconsidering equality between men and women;

That, however, to deny repudiation any recognition would be contrary to the re-establishment of equality that has not been respected.

That in some cases, moreover, it may be in the wife's interest to accept repudiation.

[…]

Given that in matters of repudiation, there is a clear inequality between men and women;

That the Court considers, however, that there is reason to be realistic and therefore to recognize repudiation when it is invoked in Belgium;

That it would be obvious that the opposite solution would doubly penalize the wife" (p. 7)

Main legal texts quoted in the decision:

Domestic law:

- Article 3 Belgian Code of PIL (Wetboek International Privaatrecht);
- Article 570 of the Belgian Judicial Code (Gerechtelijk Wetboek)

Cases cited in the decision:

- Court of Cassation, Judgement of 29 September 2003, 2004 *Tijdschrift@ipr.be* 1: 67.

Commentary

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This judgement demonstrates a very pragmatic attitude towards the question of recognition of a foreign institution.

An infringement on public order was not evaluated from the viewpoint of the inherently unequal institution of repudiation, but by looking at the concrete consequences of a non-recognition for the woman's pension rights. This approach is in line with the Court of Cassation's judgement of 29 April 2002 (CUREDI061BE001).

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

- Kruiniger, Pauline. 2013. "Repudiated by Husband and Europe? A Critical Re-Assessment of the Policies of Recognition of Islamic Repudiations in Western Legal Systems". In Marie-Claire Foblets and Nadjma Yassari (eds), *The Law Books of the Academy*, 465–520. Leiden: Martinus Nijhoff Publishers.
- Steylemans, St. 2007. "Het al dan niet toekennen van rechtsgevolgen in de Belgische rechtsorde aan een verstoting naar Marokkaans recht" *Sociaalrechtelijke kronieken* 8: 475–476.
- Verhellen, Jinske. 2014. *Het Belgisch wetboek IPR in familiezaken: wetgevende doelstellingen getoetst aan de praktijk*, 436–463. Brugge: Die Keure.
- Verhellen, Jinske and Hélène Englert. 2016. "L'application du droit marocain de la famille en Belgique 2004-2015". In Marie-Claire Foblets (ed), *Le code marocain de famille en Europe: bilan comparé de dix ans d'application*, 257–341. Brugge: Die Keure.

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