Logo

CUREDI023NL003

Question(s) at stake:

Whether the Dutch court considers the type of divorce (tafriq or talaq) to be relevant to the claim of the woman to the dower according to Iraqi law.

Outcome of the ruling:

Under Iraqi law, only in the case of talaq, and not in the case of a tafriq, is the man required to pay the dower in gold. Since in this case, the Dutch court classified the divorce as a tafriq, the woman cannot successfully claim the dower in gold.

Topic(s):

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

Keywords:

Tag(s):

Author(s):

- Rutten, Susan (Faculty of Law, Maastricht University, Netherlands)

Country:

Netherlands

Official citation:

Court of Appeal Amsterdam, Decision of 16 July 2019, 200.177.325/01 (Gerechtshof Amsterdam 16 juli 2019)

Link to the decision:

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2019:2705

ECLI:

ECLI:NL:GHAMS:2019:2705

Date:

16 July 2019

Jurisdiction / Court / Chamber:

Amsterdam Court of Appeal

Remedy / Procedural stage:

Judicial Review (final)

Previous stages:

- District Court Amsterdam 24 June 2015, ECLI:NL:RBAMS:2015:3924 (1st Instance)
- Amsterdam Court of Appeal 5 July 2016, ECLI:NL:GHAMS:2016:2657 (Intermediate ruling)
- Amsterdam Court of Appeal 19 July 2016, ECLI:NL:GHAMS:2016:2925 (Intermediate ruling; correction)

Subsequent stages:

- None

Branches / Areas of law:

Private international law; Family law

Facts:

The parties got married in 1985 in Al-Kut, Iraq. The marriage contract contains an agreement about the payment of an immediate dower of 10,000 Iraqi dinars and a deferred dower of 20,000 dinars payable by the husband on demand. The woman (petitioner) filed for divorce in 2007 at a Dutch court. The marriage was dissolved by a Dutch divorce order in 2014. At the time of the procedure, both spouses lived in the Netherlands. After the divorce, the man left for England in 2015.

In dispute is whether the bridal gift that has to be paid by the man (respondent) must or can be paid in Iraqi dinars, as parties agreed, or is to be converted to gold. In case the value should be converted to gold, it is also important whether the nominal value should be calculated according to the time of the marriage or the time at which payment is claimed in the event of divorce. In the second case, the agreed bridal gift of 20,000 dinars amounts to an amount of only € 14.92. Whereas in the first case, at the time of the conclusion of the marriage, the agreed deferred bridal gift represented a value of more than four kilograms of gold which corresponded to a value of € 160,000,-.

The answer to the question is to be assessed by the content and interpretation of Iraqi law, in particular, whether the way the divorce took place, is decisive in this regard. The woman posits that she can claim payment in gold in both a *talaq* and a *tafriq* divorce. The man argues that payment in gold can only be claimed in a *talaq* and not in a *tafriq* divorce. Finally, the question is whether it follows from current Iraqi legislation that the bridal gift is due only if the man is financially able to pay it.

In the divorce decision, the dispute regarding the deferred dower has been adjourned pending legal advice from The Hague Institute of Private International and Foreign Law (IJI).

In 2015, the Amsterdam District Court adopted the advice of the IJI that the Dutch divorce proceedings can be regarded as *tafriq*. From this, according to the court, it follows that the woman cannot claim the bridal gift in gold. The court, therefore, sentenced the man to pay the woman the equivalent of 20,000 Iraqi dinars. On appeal, the Amsterdam Court of Appeal requested further advice from the IJI (decision of 5 July 2016 restored on 19 July 2016) and reserved the decision.

IJI states in its report that it found no indication that the calculation in gold only takes place in the case of *talaq* and not *tafriq* .

The man then submits a declaration of a scholar at the Al Khoei Foundation in London (a voluntary organisation that looks after the welfare and cater for the needs of Muslim communities, and Shi'a Muslims specifically, around the globe) stating that when a divorce (*talaq*) is the outcome of abusive behaviour, the deferred dower may be calculated to match its value in gold; and when legal separation (*tafriq*) is decided by the court, according to Iraqi personal law, the deferred dower mentioned in the marriage contract is to be paid exactly as it is stipulated and not in gold. The woman has disputed this statement. According to her, the Iraqi Law on Personal Status is unlikely to distinguish between *talaq* and *tafriq*. If there was a distinction, it would lead to arbitrary situations in which the husband could opt for a *tafriq* divorce to avoid compensation in gold. She also stated that the bridal gift was created to provide the woman with a financial safety net after the divorce and to prevent the man from undesirable behaviour (e.g, committing adultery) before the divorce. It is, therefore, contrary to the rationale of the dower to only award the nominal compensation.

The legal question that has to be answered is whether according to Iraqi law the type of divorce (*tafriq* or *talaq*) is relevant to the claim of the woman to the deferred dower.

In answering this question, the court reduced itself to the interpretation of an Iraqi decree from 1999, entitled: *The full payment of a deferred bridal gift, fixed in gold at the time of the marriage, to a woman*. Both parties have relied on this decree. This decree reads, among other things: "*On the basis of the provisions of paragraph a) of the forty-second article of the Constitution, the Revolutionary Command Council has decided as follows:*

First, a woman receives her full deferred bridal gift, which is set in gold at the time of the wedding, in the case of a Talaq".

Ruling:

The Court of Appeal confirmed the decision of the District Court and rejected the claims of the petitioner (wife). As a result, the wife could not claim the bridal gift in gold and was only entitled to the equivalent of 20,000 Iraqi dinars.

The court did not accept the explanation of the IJI with regard to the meaning of the Iraqi 1999 Decree but followed the explanation of the respondent (man). In short, the court had to decide whether the word *talaq* only referred to unilateral *talaq* or also included other kinds of divorce like the *tafriq*. The court considered in its judgment the fact that the petitioner, unlike the respondent, did not take the original text of the decree as basis for her interpretation, but the English translation. The court also considered the interpretation of the decree in light of other articles in the decree and in light of the intention of the decree. In addition, the petitioner had not cited any sources that specifically referred to the interpretation of the Iraqi decree.

The court therefore concluded that there were insufficient points or circumstances that support the view that under Iraqi law, even in the event of a *tafriq* divorce, the husband was in principle obliged to pay the deferred dower to be valued in gold. Based on its interpretation of the Iraqi rule, the court followed the position of the man. As a result, the interests of the woman were overruled, and she saw virtually the entire bridal gift being lost. The court thus rejected the woman's request to set the amount of the dower at 20,000 Iraqi dinars, to be valued in gold as of the date of the marriage.

The man also stated that the legislation in Iraq had now been amended and that the dower was nowadays only due if the man was financially able to pay. He also argued that the woman could not request payments for both the dower *and* spousal maintenance. Since the woman's claim for payment of the deferred dower in gold could not be granted, the man's other defences no longer required consideration.

In conclusion, based on the content, system, and intended purpose of Iraqi legislation (a decree on the dower and the Act on Personal Status), the court has concluded that there were insufficient arguments and indications for the view that under Iraqi law, in both *talaq* and *tafriq* divorce, the man would be required to pay the deferred dower in gold, to be appreciated at the time of the wedding. In the present case, there was a *tafriq* divorce, which meant that the woman could not successfully claim the deferred dower in gold. The woman's argument, i.e., that this conflicted with the purpose of the bridal gift, was not accepted since the sources to which the woman referred to did not offer sufficiently concrete guidance to explain the decree as advocated by the woman.

Main quotations on cultural or religious diversity:

- "Unlike the IJI, the court considers the explanation of the decree as advocated by the man to be the most plausible. To this end, the following is considered." (para 2.6)

- "The wording of the decree is clear, and reads: 'A woman receives her full deferred bridal gift, which is fixed in gold at the time of the wedding, in the case of a Talaq'. The latest report from IJI shows that the expert consulted by the IJI, an unnamed Dutch expert in Islamic family law, did not assess the authentic text of the decree (or a (sworn) translation thereof) at the time of the investigation. Therefore, it should be taken into account that this authentic text did not form the basis for the advice given." (para 2.6)

- "In its report, the IJI did not clarify why it took as a starting point that there are no indications in Iraqi law that indicate that only in the case of talaq, and not in the case of a tafriq, the deferred dower should be calculated in gold. Without that insight, which must be offered in view of the wording of the sworn translation, the advice lacks conviction. Referring to the consulted expert and literature on Islamic law, the IJI gave an explanation about the dower under Islamic law and the purpose of the dower in general, without going into concrete terms on the interpretation of the decree under Iraqi law." (para 2.6)

- “According to the IJI and the expert consulted by the IJI, who apparently examined the English translation of the decree, the word divorce can be read in the decree as both tafriq and talaq. This is not further substantiated. The Court of Appeal, therefore, does not follow this principle. To this end, the court considers in the first place that the man’s lawyer requested the translator of the decree not to translate them if she found the Arabic words talaq and tafriq in the text to avoid discussion about the translation, which led to the above translation.” (para 2.6)

- “In doing so, the court also takes into account that under Iraqi law, a distinction is made between the different forms of divorce – the talaq (repudiation)[…], the tafriq (judicial divorce) […], and the khul’ (marriage dissolution by mutual agreement […], whereby it appears that they do not all have the same (legal) consequences. In that regard, the Court of Appeal refers, among other things, to Article […], in which a number of consequences of separation for the bridal gift are determined. Seen in this light, it is not necessarily plausible that in the interpretation of the decree, in which, as already mentioned, it clearly states ‘… in the case of a Talaq’, no distinction should be made when it comes to the postponed dower in gold.” (para 2.6)

- “The wife takes the view that the purpose of the dower is to assure the wife with adequate finances after the divorce and to prevent the husband from committing adultery. She has referred to scientific sources […], which explain Islamic law but not to sources that offer sufficient concrete guidance for an explanation of the decree as advocated by the woman. The same applies to a publication (…) that discusses the postponed ‘mahr’ in the event of divorce/dissolution of the marriage, but does not provide insight into the question of whether the legal consequences of this should be distinguished between talaq and tafriq under Iraqi law nor in the method of calculating the dower in the case of a tafriq.” (para 2.6)

- “Finally, the court considers that it is plausible (…) that the decree is intended to prevent a man from rashly exercising his right to a talaq, which does not require grounds, while tafriq does. This also indicates that the regulation in the decree does not refer to a tafriq.” (para 2.6)

Main legal texts quoted in the decision:

- An Iraqi decree from 1999, entitled (translated): The full payment of a deferred bridal gift, fixed in gold at the time of the marriage, to a woman. Law nr. 127, date 24 July 1999.
- Articles 34 to 46 of the Iranian Law on Personal Status (LPS)

Cases cited in the decision:

-

Commentary:

Circumstances Decisive for the Ability to claim an Islamic Dower

The Islamic dower gives rise to the question of how this legal phenomenon, unknown in Dutch law, can be fitted into its legal order and to the question of how sufficient knowledge of foreign law can be obtained that is necessary for assessing a dower claim and all implementation questions that may arise from such a claim.

The present judgment illustrates a number of issues, namely: 1. That when a dower has been agreed upon in an Islamic marriage, it is not a given that a claim for payment of the dower will be granted. This may depend on the circumstances, such as the kind of divorce; 2. That general knowledge of Islamic law regarding the dower is not sufficient and detailed knowledge of foreign law is required; and 3. How foreign law is assessed by the judge. The present judgment is one of a series of judicial decisions in which the assignability of a dower claim and its scope were discussed (i.a.: Amsterdam Court of Appeal 2 February 2021, ECLI:NL:GHAMS:2021:617; Amsterdam Court of Appeal 17 November 2020, ECLI:NL:GHAMS:2020:3087; Amsterdam Court of Appeal, 14 July 2020, ECLI:NL:GHAMS:2020:2128; Arnhem-Leeuwarden Court of Appeal, 2 July 2020, ECLI:NL:GHARL:2020:5397; Amsterdam Court of Appeal, 26 May 2020, ECLI:NL:GHAMS:2020:1687; Arnhem-Leeuwarden Court of Appeal, 31 March 2020, ECLI:NL:GHARL:2020:2639; Arnhem-Leeuwarden Court of Appeal, 23 January 2020, ECLI:NL:GHARL:2020:608; The Hague Court of Appeal, 19 November 2019, ECLI:NL:GHDHA:2019:3206; Amsterdam Court of Appeal, 16 July 2019, ECLI:NL:GHAMS:2019:2705; North

Netherlands District Court 25 August 2021, ECLI:NL:RBNHO:2021:7850; District Court Rotterdam, 14 April 2020, ECLI:NL:RBROT:2020:3468; District Court Gelderland, 18 March 2020, ECLI:NL:RBGEL:2020:2437; District Court Amsterdam, 15 January 2020, ECLI:NL:RBAMS:2020:150; District Court Amsterdam, 8 January 2020, ECLI:NL:RBAMS:2020:4; District Court Midden-Nederland , 29 January 2019, ECLI:NL:RBMNE:2019:271).

The ruling in the present case is interesting because it can be used to highlight several aspects of the assessment of a dower claim and because of the extensive considerations of the court on the assessment of foreign, in this case, Iraqi, law. The considerations and assessment of the court may reflect the courts views on how to interpret Iraqi law, therefor taking position in a religiously based divorce system.

The decision will be taken as starting point to discuss in the present commentary various aspects that can go along with the assessment of a dower-claim.

The question of whether the kind of divorce (*talaq*, *khul',* or *tafriq/tatliq*) is relevant to whether the payment of the deferred dower is due implies that it may be relevant who initiates the divorce and the grounds on which the divorce was sought. If the man takes the initiative with a *talaq*, no ground is required, and the dower is simply due. When the woman takes the initiative through a *khul'* divorce, it is not uncommon for her to waive her right to the deferred dower. If it concerns a judicial divorce (*tafriq/tatliq*), both husband and wife can file for such a divorce. However, most grounds are written on behalf of the wife and concern a failure of the husband to fulfil (one of) his marital obligations, so that a dower is due. In the present case, the distinction between *talaq* and *tafriq* is at issue. The divorce was pronounced by a Dutch court. The IJI had concluded that under Iraqi law, this divorce would be classified as a *tafriq*, which is the classification the District Court had adopted. Then, the question to answer was whether the payment of the deferred dower could be claimed in gold even in the case of a *tafriq* divorce. The woman argued so and hereby relied on the purpose of the dower, which was to assure the wife with adequate finances after the divorce and to prevent the husband from committing adultery. The man argued differently and stated that the decree was intended to prevent a man from rashly exercising his right to a *talaq*, which does not require grounds, while *tafriq* does. He explicitly pointed to the importance of whether or not there is a ground for divorce. Who takes the initiative for the divorce did not seem to matter. Nor did the man refer to the purpose of the dower, determined by Islamic law or the intention of the involved parties.

The court found the interpretation of the Iraqi decree to be decisive. Since in her argumentation, the woman only referred to the purpose of the dower under Islamic law without explicitly addressing the purpose of the Iraqi legislator, her position was not followed. The position of the man seemed plausible to the court and was followed given the content of and in view of other provisions in Iraqi legislation. There is something reasonable in the reasoning of the court. However, it also raises questions, such as whether this explanation is the only correct one or whether it might also have been conceivable to interpret the Iraqi decree in conjunction with the underlying Islamic law. The judgment also shows the importance for parties of bringing forward thorough and detailed knowledge of foreign law and how much effort this can require.

The question of whether the deferred dower is due in case *the woman takes the initiative* to divorce has been raised in several Dutch judgments (e.g. Amsterdam Court of Appeal 2 February 2021, ECLI:NL:GHAMS:2021:617; Arnhem-Leeuwarden Court of Appeal 23 January 2020, ECLI:NL:GHARL:2020:608). Dutch courts generally assumed that even when the woman initiates a divorce proceeding, the husband owes the deferred dower. Judges argued here that it did not follow from the marriage contract that in such a case there would be no entitlement to the dower or that there was a lack of substantiation by the husband that under the applicable foreign law no dower would be due in that situation (Amsterdam Court of Appeal 26 May 2020, ECLI:NL:GHAMS:2020:1687), or that accepting this would contradict Dutch public policy, since that would imply that the woman in fact would be hindered by means of a financial sanction in her freedom to file a petition for divorce (The Hague Court of Appeal 2 October 2019, ECLI:NL:GHDHA:2019:3968; North Netherlands District Court 25 August 2021, ECLI:NL:RBNHO:2021:7850; Central Netherlands District Court 29 January 2019, ECLI:NL:RBMNE:2019:271). Sometimes a man argued that if the woman herself was the cause of the divorce (for example, because she had a new boyfriend or “otherwise misbehaved”), the man did not owe a dower. Until now, judges have not followed this argument (e.g. Amsterdam Court of Appeal 26 May 2020, ECLI:NL:GHAMS:2020:1687). The argument that the marriage had only lasted for a short time and that no children were born from the marriage did not constitute a reason to reject the dower claim either (Amsterdam District Court 8 January 2020, ECLI:NL:RBAMS:2020:4).

In a case before the Arnhem-Leeuwarden Court of Appeal, the man argued that since the dower was based on Iranian law, which in turn was based on the Sharia that applied only to Muslims, the fact that the woman had come to adhere to the Christian faith, implied that he did not owe her a bridal gift. The Court did not follow this reasoning, since citizens of Iran in principle always remained bound by Iranian law, even when they stayed outside Iran. Furthermore, it did not appear that Iranian law made a distinction based on religious belief a distinction was made in that law on the basis of religious belief (Court of Appeal Arnhem-Leeuwarden 2 July 2020, ECLI:NL:GHARL:2020:5397). In the same case, as well as in other cases, the man argued that the value of the agreed dower was only *symbolic* and therefor he was not really obliged to pay it (Amsterdam Court of Appeal 2 February 2021, ECLI:NL:GHAMS:2021:617; Arnhem-Leeuwarden Court of Appeal 2 July 2020, ECLI:NL:GHARL:2020:5397; The Hague Court of Appeal 30 November 2016, ECLI:NL:GHDHA:2016:4051; North

Netherlands District Court 25 August 2021, ECLI:NL:RBNHO:2021:7850; Rotterdam District Court 17 March 2022, ECLI:NL:RBROT:4152; Utrecht District Court 10 December 2008, ECLI:NL:RBUTR:2008:BH3018). Courts did not agree with the man. In almost all those cases, the Court believed that if the woman demanded a dower payment, the husband must pay it. Similarly, there were cases in which a reference was made to the *intention of the parties* (e.g. Amsterdam Court of Appeal 2 February 2021, ECLI:NL:GHAMS:2021:617; Amsterdam Court of Appeal 17 November 2020, ECLI:NL:GHAMS:2020:3087). It was stated, for example, that the parties intended the dower as a means of negotiation in the event of a divorce or that the dower was intended to discourage the husband from divorcing. Only very few judges showed themselves to be sensitive to this (e.g. Overijssel District Court 8 March 2017, ECLI:NL:RBOVE:2017:945). However, the intention of the parties must first be found and this can be done in different ways. According to the District Court of Gelderland, for example, the marriage certificate, in which agreements regarding the dower were included, should be interpreted in the light of the parties' intentions: "*What meaning could the parties reasonably assign to the provision in the agreement and what could they reasonably expect from each other? In view of the religious nature of the marriage, the court assumed that the parties also wanted to take the religious consequences and the authority of the Islamic doctrine as a starting point when concluding their Islamic marriage. The social circles in which the parties operate were also important in light of the mutual intentions and expectations surrounding the bridal gift*" (District Court Gelderland 18 March 2020, ECLI:NL:RBGEL:2020:2437).

Finally, circumstances were invoked that could be related to the transnational character of the case and its concurrence with the Dutch legal system. A first argument that was put forward here was that the dower should not be imposed in addition to other financial obligations that were already imposed by the Dutch legal system, such as an alimony obligation. The usual response to this argument was that imposing the payment of a dower would reduce the woman's needs, since the dower would give her certain financial means already (Cf. also CUREDI023NL002). A second argument that was invoked in this context concerned possible options in the country of origin. Iranian men, for example, sometimes feared that their ex-wife, after proceedings in the Netherlands, would again demand a dower from an Iranian court (e.g. Amsterdam Court of Appeal 17 November 2020, ECLI:NL:GHAMS:2020:3087; Amsterdam District Court 28 August 2019, ECLI:NL:RBAMS:2019:6546). The Court did not follow this point of view reasoning that it could be expected that the man could proof before the Iranian judge the payment he made (Amsterdam District Court 8 January 2020, ECLI:NL:RBAMS:2020:4). Another fear that can be identified was that if the man could not pay the imposed dower he would ran the risk of imprisonment in Iran (e.g. Amsterdam Court of Appeal 17 November 2020, ECLI:NL:GHAMS:2020:3087).

In the present case of the Amsterdam Court of Appeal, an institution specialized in foreign law (IJI), an expert in Islamic law, an Islamic religious scholar, as well as various specialized literature were consulted to find out whether the man owed the agreed-upon deferred dower under Iraqi law and what he exactly owed. Correct and detailed knowledge of foreign law that is not easily accessible, can make a world of difference, in this case, a difference of almost €160,000.

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

General legal literature on the topic:

- Fournier, Pascale. 2016. *Muslim Marriage in Western Courts: Lost in Transplantation*. London: Routledge.
- Mehdi, Rubya and Jørgen S. Nielsen. 2011. *Embedding Mahr (Islamic Dower) in the European Legal System*. Copenhagen: DJØF Pub.
- Welchman, Lynn. 2007. *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*. Amsterdam University Press.
- Yassari, Nadjma. 2014. *Die Brautgabe im Familienvermögensrecht: Innerislamischer Rechtsvergleich und Integration in das deutsche Recht*. Tübingen: Mohr Siebeck.

Disclaimer

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

Suggested citation of this case-law comment:

Rutten, Susan (2024): Circumstances Decisive for the Ability to claim an Islamic Dower, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI023NL003, https://doi.org/10.48509/CUREDI023NL003.