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

Marriage Confirmation Leading to Bigamy

Question(s) at stake:

Whether a man, after having concluded an informal customary marriage in Morocco, committed a criminal act of bigamy by subsequently entering into a second marriage in the Netherlands.

Outcome of the ruling:

Being "legally" married is not a necessary condition for having committed the criminal act of bigamy under Dutch criminal law. A man who, after having concluded an informal customary marriage abroad, subsequently enters into a second marriage in the Netherlands may commit a criminal act of bigamy if he was aware of the fact that he was previously married abroad.

Topic(s):

- Crime and Punishment under State Law
- Personal Status, Family and Inheritance

Keywords:

- Customary marriage
- Polygamous marriage

Tag(s):

- Bigamy
- Marriage confirmation
- Criminal offense
- Citizenship
- Morocco
- Loss of citizenship

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Country:

Netherlands

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Supreme Court, Decision of 1 December 2009 (Hoge Raad 1 december 2009)

Link to the decision:

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ECLI:

ECLI:NL:HR:2009:BJ2779

Date:

01 December 2009

Jurisdiction / Court / Chamber:

Supreme Court

Remedy / Procedural stage:

Final

Previous stages:

- District Court (unknown)
- Court of Appeal Leeuwarden 16 October 2007, no. 24/003131-06

Subsequent stages:

None

Branches / Areas of law:

Criminal law, family law, private international law, law on citizenship, and migration law

Facts:

A (presumably Moroccan) man entered into a civil marriage in the Netherlands in 1998. This marriage was validly dissolved in the Netherlands in May 2002. The man stated that he was previously married to another woman in Morocco in 1988. In October 2003, thus after the dissolution of the Dutch marriage, he requested that this Moroccan marriage, concluded in 1988, be registered with the Dutch personal records register. This was refused because the husband could not provide proof of this marriage. In July 2005 he submitted another request for registration of this marriage, submitting new documents from Morocco. These documents included:

1. a certificate of marriage confirmation registered in the Moroccan marriage register on 9 December 2002 (hereinafter: certificate of marriage confirmation);
2. a judgment of the Moroccan District Court of Nador (Family Chamber) of 17 January 2005 (hereinafter: judgment of the Moroccan court).

The certificate of marriage confirmation recorded the testimony of two notarial witnesses (*'udul*) associated with the notarial department of Driouch (later also referred to as the notarial deed). Their testimony was drawn up and signed by them on 4 December 2002 and registered in the Moroccan register on 9 December 2002. The notarial judge of the notarial department of Driouch had authorized the making of the testimony. The notarial witnesses declared that, at the request of the man and his mother, 12 witnesses appeared before them and stated that they knew the man and his (first) wife. They confirmed the existence of the marriage of the parties since 1988, that the dowry was 5,000 dirhams, that the wife's guardian was her father, that the husband and his wife had lived in their marital home as spouses, and that the marriage ties had not yet been broken. The statement was made by witnesses at the husband's request and

confirmed on the basis of their knowledge and of their relationship with the two spouses. Due to circumstances, at that time (in 1988), the parties had not been able to have a marriage certificate drawn up by two *'udul*. All 12 witnesses were listed in the certificate. The certificate was signed by the two *'udul* and by the notarial judge and entered in the marriage register at the court.

The Court in Nador declared in its judgment of 17 January 2005 that the certificate of marriage confirmation was admitted by Moroccan law as proof of the existence of the marriage.

The man was then criminally charged with bigamy because at the time of the marriage in the Netherlands in 1998 he was already married in Morocco (since 1988) to another woman.

The man took the position that the Moroccan marriage was not formalized until 2005 and only then became legal, and thus that when he got married in 1998 he was not already legally married. At most there had been a religious marriage. The man put the question of whether a marriage had been concluded in Morocco in 1988 to an expert, who indicated that the marriage in 1988 did not meet the requirements of the Mudawwanah at that time.

The Court of Appeal in Leeuwarden sentenced the suspect on 16 October 2007 to a prison term of three months for "bigamy". The Court established that the defendant turned to the Moroccan authorities in 2002 in order to register his earlier marriage in 1988 and not, as he stated, to conclude a marriage in 2002. Therefore, in 1998, when he married in the Netherlands, he was already aware of the fact that he was previously married in Morocco.

The man lodged an appeal in cassation (an appeal to the supreme court of a country on points of law) against this decision with the Supreme Court.

The Attorney General (AG) concluded that the appeal should be dismissed.

Ruling:

The indictment is based on Art. 237, para. 1 section 1 of the Dutch Criminal Code. That provision reads:

“Imprisonment not exceeding four years or a fine of the fourth category shall be levied against:

1. He who intentionally enters into a double marriage.” (para. 3.2)

The Supreme Court considers that being “legally” married is not a necessary condition for a charge of bigamy in the sense of Art. 237, para. 1 section 1 of the Criminal Code. The Court considered the phrase from the charge “although he was legally married” to be accurate, since the man was already married under Moroccan law at the time of his (Dutch) marriage in 1998. The plea cannot lead to an appeal in cassation.

The Supreme Court upholds the judgment of the Court of Appeal insofar as it concerned its substantive substantiation and substantive judgment.

Main quotations on cultural or religious diversity:

Quotations from the Opinion of the AG

“First and foremost, the AG states that the judgment of the Court of Appeal, interwoven as it is with weighing and evaluation of a factual nature reserved for the judge of factual instances, can only be assessed to a limited extent in cassation.” (para. 3.5)

The AG argues that, “now that the Court of Appeal has apparently ruled that proof of the existence of the marriage since 1988 was provided in 2002 by means of the notarial deed drawn up and confirmation thereof by the judgment of the Moroccan court, […] the answer to the question of the extent to which the marriage must be regarded as legally existing must be given in accordance with the law of the country where the marriage is concluded.” This is “in accordance with Article 5, paragraph 1 of the Dutch Conflict Law Act on Marriage, which reads as follows: ‘A marriage concluded outside the Netherlands that is legally valid or has subsequently become legally valid under the law of the State where the marriage took place will be recognized as such.’” It follows from this that “in the recognition of a marriage concluded abroad, the central question is whether the marriage was concluded by (i) a competent authority (for example, the civil

registrar or other (civil or religious) authority) and (ii) that it was concluded in accordance with the law of the state where the marriage took place. In addition, the term ‘law’ also includes unwritten (customary) law and the ‘marriage ceremony’ encompasses a wide scope, in which so-called traditional marriages, marriages that are concluded informally without being registered (by the government), are explicitly not excluded from recognition. Furthermore, the marriage must be validly concluded in accordance with the substantive requirements applicable under foreign law. In view of the case law on the Moroccan certificate of marriage confirmation – as the notarial deed presented in the means of evidence no. 3 – it appears to meet the above requirements: Dutch case law supports the view that such a marriage certificate is equivalent to an ordinary marriage certificate.” (para. 3.6)

“In the opinion of the Court of Appeal it is also decided, first, that the above requirements have been met, taking into account the judgment of the Moroccan court that the notarial deed drawn up in 2002 can be regarded as valid proof of the existence of the marriage; second, that there apparently are no grounds on which to oppose recognition of the marriage from 1988. The Court of Appeal’s judgment that the marriage can be regarded as a legal marriage from the beginning, and that the defendant was thus already married in the Netherlands at the time of his marriage in 1998, confirms that this is not an error of law, nor is it incomprehensible. The explanation by the proposer of the plea of the content of these documents, that it only shows a recognition of the marriage as of 9 December 2002, disregards the content of the certificate of confirmation of the marriage, which clearly states that the witnesses have confirmed the existence of the marriage since 1988.” (para. 3.7)

“In so far as the plea still seeks to argue that the intent of the accused was not aimed at establishing a double marriage and that in 1998 he was of the opinion that he was not married in Morocco, this is clearly contradicted by exhibit 3, in which the witnesses, on the basis of their knowledge and their relationship with the two spouses, have stated that the marriage has existed since 1988. It is so unlikely that the suspect would not have been aware of this that the Court of

Appeal could pass this statement without further motivation." (para. 3.7)

Quotations of the Supreme Court

"Contrary to what the plea takes as its starting point, being 'legally married is not mentioned as a condition of the offence of Art. 237, first paragraph section 1 of the Criminal Code. Apparently and not inconceivably, the Court of Appeal has ruled that, with the phrase 'although he was legally married', the person making the charge expressed that the accused was married under Moroccan law at the time of the charges. The Court of Appeal held that this was the case. The correctness of that judgment cannot be assessed in cassation because the Supreme Court, pursuant to Art. 79 of the Judiciary Organisation Act (Wet op de rechterlijke organisatie [Wet RO]), cannot intervene in the interpretation of the law of foreign states. The judgment of the Court of Appeal is not incomprehensible even without further motivation. There is no room for further assessment […] in cassation." (para. 3.3)

Main legal texts quoted in the decision:

Quoted by the Supreme Court or the AG:

Domestic Law

- Art. 237, first paragraph, section 1 of the Dutch Criminal Code
- Dutch Conflict Law Act on Marriages, Art. 5, section 1 (since 2012: Dutch Civil Code, Art. 10:31)
- Judiciary Organisation Act (Wet op de rechterlijke organisatie [Wet RO]), Art. 79

Moroccan Law

- Mudawwanah, Art. 16 (indirectly)

Cases cited in the decision:

Only a general reference to Dutch case law concerning the Moroccan certifications of marriage confirmation.

Commentary

Marriage Confirmation Leading to Bigamy

The case concerns a situation in which a man entered into an informal marriage in Morocco in 1988 and subsequently, in 1998, married another woman in the Netherlands. After the dissolution of this marriage in May 2002, he had his first marriage confirmed in Morocco. Such situations of marriage confirmation are not uncommon in the Netherlands. The importance of having the first marriage confirmed may lie in the fact that the (first) woman can then be allowed residence in the Netherlands as a spouse or that the children born from the marriage can be given the status of his legal children and thus obtain residence in the Netherlands and, if the man possessed Dutch nationality at their birth, acquire Dutch nationality. From another decision that was pronounced in the case under description, it follows that the man (in 2003) and the wife (in 2005) in fact had applied for a temporary residence permit for the first wife (as spouse) and her children (Council of State 17 March 2010, ECLI:NL:RVS:2010:BL7834, para. 2.1.2).

The question at hand is whether the man, by entering into a second marriage in the Netherlands in 1998, committed a criminal act of bigamy. The Leeuwarden Court of Appeal thinks so. This Court argued that the defendant turned to the Moroccan authorities in 2002 in order to register his earlier marriage in 1988 and not to conclude a new marriage. Therefore, in 1998, when he married in the Netherlands, he was aware of the fact that he was already previously married in Morocco. The Supreme Court came to the same conclusion, i.e., that the man is guilty of criminal bigamy. In addition, the Supreme Court considered that being “legally” married is not a condition for the definition of the offence as stated in Art. 237, para. 1 section 1 of the Dutch Criminal Code. The Supreme Court added that the Appeal Court had concluded that in 1998 the man was already married under Moroccan law. After all, the charge contained the claim that the person was already legally married, which was considered proven by the Appeal Court. The Supreme Court no longer reviewed this in cassation. In the conclusion before the Supreme Court, the AG seemed to require that there was a legally valid marriage. The AG discussed in detail how this should be assessed. The question of whether

the marriage concluded in Morocco in 1988 was legally valid at the time of the second marriage in 1998 or only became legally valid afterwards must, also in the context of Art. 237 of the Criminal Code, be assessed on the basis of the recognition rules of private international law (PIL), as laid down in Art. 5 of the Conflict Law Act on Marriage (currently Art. 31, Book 10 of the Dutch Civil Code). Since an informal marriage in Morocco can be ratified later, and this was done correctly in this case, it can be assumed under Moroccan law that a legally valid marriage existed from 1988 onwards. Partly on the basis of Dutch case law, this marriage was therefore also recognized as legally valid “with retroactive effect to 1988”. Bigamy could thus be assumed. Although the Supreme Court did not explicitly adopt the AG’s reasoning, it came to the same outcome.

The importance of the present judgment lies in the fact that the Supreme Court expresses itself on the question of whether criminal law is in line with the recognition rules of private law regarding the validity of marriages, or whether a different approach is chosen in criminal law.

Legality of the marriage

The Supreme Court considered that being “legally” married is not a necessary condition for a charge of bigamy in the sense of Art. 237 of the Criminal Code. If this consideration would be intended as a general statement, it could possibly imply that even marriages that are not recognized as legally valid in the Netherlands, for example informal marriages, could then be recognized as marriages within the meaning of criminal law (i.e. Art. 237 of the Criminal Code). Although this is not practical in the legal system, it is not a strange position. After all, the man in the present case was actually already married to a woman in Morocco in 1988. There was in fact a marriage. That fact may seem sufficient for criminal law to be able to speak of bigamy in the event of a subsequent marriage. However, it becomes confusing when the Supreme Court considers that the Court of Appeal ruled that the man was married under Moroccan law in 1998 at the time of the charges. The fact that the Public Prosecution Service had included “being legally married” in the indictment as a “condition” to be proven meant that the Court had to comment on this. By considering that being “legally” married is not

part of the offence (Supreme Court), it appears that the prosecution has demanded more in the charges than was strictly necessary by law. The question remains whether the legal validity of the marriage under Moroccan law is an additional requirement and what role should be given to the retroactive recognition of the marriage under Dutch private international law. Could it be that the Supreme Court meant that the only requirement is that the marriage is legally valid in the country where the marriage was concluded – in this case Morocco – but that it is not necessarily required that this marriage is also recognized as legally valid in the Netherlands? In this sense Wortmann, in her annotation to the judgment (NJ 2010, 118), who deduced with some caution from the judgment of the Supreme Court that the Supreme Court did not want to be in line with the requirements of PIL regarding the validity of foreign marriages (para. 4).

In 2018, the criminal chamber of the Supreme Court had to comment in a different context on the question of whether the definition of a spouse should be consistent with private law (Supreme Court, 3 July 2018, ECLI:NL:HR:2018:1053). This case concerned a man who had married in Iraq according to Islamic law. He lived with his wife in the Netherlands. The husband was accused of assaulting his wife. The question was whether the woman could be regarded as his wife within the meaning of Art. 304, para 1 of the Dutch Criminal Code, in which case there would be an aggravating circumstance (increase of the penalty by one third). The man had argued in cassation that a marriage concluded in Iraq according to Islamic law did not mean that the victim of the abuse could be regarded as a “spouse” as referred to in Art. 304, para 1 of the Criminal Code. The Supreme Court considered this view incorrect. The Supreme Court considered very explicitly about the relationship between civil law and criminal law (and therewith following the Conclusion of the AG, ECLI:NL:PHR:2018:267) that “it emerged from the legislative history that the legislature, when interpreting the term “spouse” as referred to in Art. 304, had sought as much connection as possible with the system of personal and family law as laid down in the Civil Code. Partly in the light of this, it must be assumed that such a “spouse” may also be involved in the event of a legally concluded marriage outside the Netherlands, unless it appears

that this marriage, pursuant to Art. 10:31 of the Dutch Civil Code in conjunction with Art. 10:32 of the Civil Code, does not qualify for recognition in the Netherlands" (para. 4.4.2). In this judgment, the Supreme Court quite explicitly concurs with the recognition rules under private law to assess whether there is a marriage and therefore a spouse.

Date from which a legal marriage is accepted

Back to the marriage in the present case. This was an informal marriage concluded in 1988, confirmed and registered in 2002, authorized by the Moroccan judge in 2005, and considered legally valid from 1988 onwards. However, this legal validity was only established in 2005; without the certificate of marriage confirmation from December 2002 and the Moroccan judicial confirmation in 2005, the informal marriage of 1988 would not result in a legally valid marriage. However, the recognition rule of Art. 5 of the Conflict Law in Marriages (currently: Art. 10:31 of the Dutch Civil Code) not only accepts foreign marriages that have been validly concluded abroad, but also marriages that have subsequently become legally valid abroad. The latter was the case in the present case. According to previous case law, these marriages can be recognized in the Netherlands and can be recognized "with retroactive effect", thus from the moment the marriage was concluded informally. Since the amendment of Moroccan family law in 2004, it is clear that a marriage confirmation by the Moroccan court is required (Art. 16 of the Mudawwanah). All those "procedural" conditions were met. A consequence of the acceptance of "retroactive effect" is that Dutch authorities, which at the time of taking their first decision on a recognition request, had no other choice than to refuse recognition of the foreign marriage, that they will have to reverse their earlier decision later, after the marriage has been confirmed (see for example the judicial decision described in CUREDI023NL004).

If the legal validity of the marriage is established under foreign law, recognition of the marriage can only be refused if it is contrary to public policy. This question was not addressed by either the judges or the AG. If in assessing Art. 237 of the Dutch Criminal Code the court had to adhere to the recognition rules of PIL, there

would have been reasons to do so. After all, the institution of marriage confirmation is regarded in the Netherlands as a phenomenon susceptible to fraud (more extensively about this: CUREDI023NL004). In addition, the12 witnesses had stated that the husband and his wife had lived in their marital home as spouses since 1988 and that the marriage ties had not yet been broken, despite the fact that it was known that the man had been living in the Netherlands and had been living in the Netherlands with his “second” wife at least since his marriage to her in 1998. The correctness of the statement of the 12 witnesses could therefore be questioned. Whether this would be enough to refuse recognition of the “first” marriage due to conflict with public policy, is not known.

Intention

Apart from the fact that bigamy requires that there be a previous marriage, intent on the part of the offender is also required. He must intentionally have entered into a second marriage. Curiously, not much attention is paid to this condition. For the Court of Appeal, it suffices to say that “therefore, in 1998, when he married in the Netherlands, he was aware of the fact that he was previously married in Morocco”. This is correct in so far as, on the assumption that there in fact has been a marriage, the man was married informally in 1988 in Morocco. It is also correct that under Moroccan law a legally valid marriage must be accepted retroactively, thus from 1988. The point is precisely that in 1988 there was a marriage that did not (yet) meet the Moroccan requirements. This marriage was not eligible for recognition in the Netherlands. When the man married in the Netherlands in 1998, there was no previous legally valid marriage from a Dutch perspective. In 1998 the man could therefore lawfully conclude a (new) legally valid marriage in the Netherlands and could correctly have assumed that he was not yet married. If he had asked in the Netherlands for his Moroccan marriage of 1988 to be recognized – and it is not known whether that in fact had happened – registration would have been refused because at that time the marriage could not yet be recognized. In this situation, can one object to the husband having deliberately entered into a second or double marriage? That is not immediately

evident.

Consequences: annulment of the marriage, conviction for bigamy, loss of Dutch nationality, risk of loss of residence, and refusal of permission for family members to come to the Netherlands

The husband's second marriage in the present case has cost him dearly. Not only will this marriage be annulled, he has also been criminally convicted of bigamy. In addition, his Dutch nationality was revoked as a result of this fact (Council of State 17 March 2010, ECLI:NL:RVS:2010:BL7834). Pursuant to Art. 14, para. 1 of the Dutch Act on Citizenship (Rijkswet Nederlanderschap), the acquisition or granting of Dutch citizenship may be withdrawn if it is based on a false statement or deception made by the person concerned, or on the concealment of any relevant fact prior to the acquisition or granting. The withdrawal has retroactive effect to the time of acquisition of Dutch citizenship. The man was criminally convicted by the Leeuwarden Court of Appeal for bigamy, whereby the Court had considered that the man knew at the conclusion of his marriage in 1998 in the Netherlands that he had previously been married in Morocco. The Supreme Court has rejected the man's appeal, thus upholding the conviction for bigamy in court. In principle, the administrative judge should proceed from such an irrevocably condemnatory judgment of the criminal judge. Naturalization is therefore based on a false statement or fraud made by the husband, or on the concealment of any fact relevant to the acquisition or granting. In addition, the husband's right of residence is also under discussion, and the first wife from Morocco and the children born of their marriage cannot be granted residence with the husband/father in the Netherlands.

All this despite the fact that in 1998, in the Netherlands, a lawful marriage could be concluded with "the second wife", a marriage which could legally continue until 2005.

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

Publications and comments addressing the case:

- Wortmann, S.F.M. 2010. Comment on the SC decision. *NJ* (*Nederlandse Jurisprudentie*): 118.

General literature on the topic of foreign marriage confirmation:

- Foblets, Marie-Claire. 2016. *Le code marocain de la famille en Europe. Bilan comparé d dix ans d'application*. Brussels: La Charte.
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- Jordens-Cotran, L. 2005. "Enkele aspecten van de Marokkaanse familiewet 2004". *Migrantenrecht* May: 78–80, 91–92.
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- Sillen, J.J.J. 2010. Comments on the Decision of the Dutch Council of State, 17 March 2010, ECLI:NL:RVS:2010:BL7834. *JB (Jurisprudentie Bestuursrecht)*: 112.

Other literature related to the topic:

Linant de Bellefonds, Y. 1965. *Traité de Droit Musulman Comparé, Tombe II: Le Mariage*. La Haye: Mouton & Co.

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