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

Validity of Repudiation and Religious Marriages in the Netherlands and Implications for Parentage

Question(s) at stake:

Whether the repudiation of a first marriage and the subsequent entering into a second religious marriage, both of which took place in the Netherlands, can be recognized as valid, and whether the invalidity of these acts affects the legal parentage of a child born of the second marriage.

Outcome of the ruling:

Under Dutch private international law, a repudiation and religious marriage that takes place in the Netherlands cannot be recognized. As a consequence, in cases in which the divorce of the first marriage is not recognized and a child born during that marriage already has two parents, subsequent acknowledgement of the child by its biological father is not valid.

Topic(s):

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

Keywords:

- Determination of parenthood
- Dissolution of marriage and partnership
- Divorce
- Kinship and filiation
- Marriage and partnership
- Parenthood
- Religious marriage
- Talaq

Tag(s):

- Recognition of foreign religious marriages
- Recognition and validity of domestic religious marriages
- Somalian marriage law
- Recognition and validity of domestic repudiation

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ECLI:

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Date:

09 April 2014

Jurisdiction / Court / Chamber:

District Court of Zeeland-West Brabant

Remedy / Procedural stage:

First Instance

Previous stages:

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Subsequent stages:

Branches / Areas of law:

Private international law; Family law; Marriage law

Facts:

In July 2010, a child's registration in the Dutch Municipal Records listed the child's mother and identified man Y as the father, attributing this status to Y's formal acknowledgement of paternity.

In this case, the public prosecutor submitted a request for amending the child's registration by replacing man Y as the father with man X. The reason for this was the revelation that, at the time of the child's birth, it was not known that the child's mother had already been married, and was still married to, X.

The case centred on a traditional marriage that had occurred in Somalia between a woman and man X. They were married by a *sheikh* in the presence of two witnesses. Despite the loss of their marriage certificate, upon relocating to the Netherlands, they both submitted in 2010 statements regarding their marital union, leading to the official registration of their marriage at the Municipal Records.

In September 2009, the parties underwent a divorce following the husband's unilateral repudiation of the wife, which effectively terminated their marriage. This repudiation occurred in the Netherlands. On 8 February 2012, the District Court of Breda granted their divorce, which was registered in the Dutch civil registry on 29 February 2012.

In the period between the repudiation and the civil divorce, the woman entered into a marriage with man Y under Islamic law in the Netherlands, conducted by an imam in the presence of two witnesses.

A child was born after the repudiation of the first marriage *but* before the official civil divorce of the woman and man X. The birth was after the religious marriage between the woman and man Y. Subsequently, Y acknowledged the paternity of the child. The child was granted Dutch citizenship on 30 August 2013.

In the present case, the woman seeks to have X's paternity legally contested on the grounds that Y is the child's biological father. Furthermore, the mother and Y contend that her first marriage with X had already been dissolved in 2009. In addition, the Court must determine the effects of the parents' status on the birth certificate, including the designation of the child's father and the child's name

Ruling:

Article 5 of the Act on the Conflict of Laws on Marriage (now incorporated into Article 10:31 of the Dutch Civil Code) stipulates that a marriage contracted outside the Netherlands can be recognized as valid if it complies with the law of the state in which it was contracted or if it subsequently becomes valid in accordance with the law of that state.

The union between the woman and man X was a traditional marriage concluded in Somalia according to Islamic law. The parties were married by a *sheikh* in the presence of two witnesses. Since their marriage had been registered in the Dutch Municipal Records, the Court concluded that it was also valid under Somali law. Consequently, the Court recognized the marriage's validity in accordance with Article 5 of the Act on the Conflict of Laws on Marriage (now incorporated into Article 10:31 of the Dutch Civil Code).

As for the divorce between the two parties, it bears mention that the repudiation in 2009 took place within the Netherlands and not outside the country. It therefore cannot be recognized as valid on the basis of Article 3 of the Act on the Conflict of Laws on Divorce (now incorporated into Article 10:58 of the Dutch Civil Code). According to Article 10:55 of the Dutch Civil Code, the dissolution of a marriage in the Netherlands can only be officially pronounced by a Dutch court. Therefore, the parties were only considered divorced in 2012, following the pronouncement by a Dutch civil court and subsequent registration in the civil registry.

A second marriage occurred between the woman and Y. They were wed in the Netherlands according to Islamic law and *before* the civil divorce with X. The ceremony was performed at home by an imam in the presence of two witnesses.

Since the marriage took place in the Netherlands, it could not be recognized under Article 5 of the Act on the Conflict of Laws on Marriage (now incorporated into Article 10:31 of the Dutch Civil Code), seeing as this provision refers to marriages concluded abroad. Furthermore, the Dutch legal system only recognizes civil marriages as being valid marriages concluded on *its* territory (Article 1:30 Subsection 2 Dutch Civil Code). Consequently, the Court ruled that the marriage between the woman and man Y could be recognized.

During the period between the repudiation and the civil divorce between the woman and X, and after the religious marriage between the woman and Y, a child was born. The biological parents of this child were the mother and Y. The key issue here was determining the legal parents of the child.

According to Article 1 of the Act on the Conflict of Laws on Parentage (now incorporated into Article 10:92 of the Dutch Civil Code), whether a child has legal family ties to the woman from whom it is born and to the woman's husband at the time of birth is determined by the law of the common nationality of the two or, if not applicable, by the law of their common habitual residence at the time of birth. The Court here presumes that both parties have Somali nationality on the basis of their registration in the Dutch Municipal Records and the Registration for Foreign Nationals. However, at the time of the child's recognition, both parties had asylum status in the Netherlands. Therefore, Dutch law was applicable (Article 10:17 of the Dutch Civil Code and Article 113 of the Aliens Act 2000).

The woman's maternity over the child was not contested in the present case (see also Article 1:198 of the Dutch Civil Code). Pursuant to Article 1:199(a) of the Dutch Civil Code, the father is considered to be the man who was married to the mother at the time of the child's birth. At the time of the birth, the divorce between the woman and X was not yet formally finalized in accordance with Dutch law, while at the same time, the religious marriage that had taken place between the woman and Y was not deemed valid. Therefore, at the time of the birth, the mother was still considered to be married to X, and as such the legal parenthood of the child fell upon X. However, Y had acknowledged the child as his *after* X had repudiated the mother but *before* the civil divorce between the

woman and X. The question here is whether this acknowledgement could be regarded as valid.

Article 4 of the Act on the Conflict of Laws on Parentage (now incorporated into Article 10:95 of the Dutch Civil Code) provides that legal issues concerning the recognition of familial ties are governed by the law of the person's nationality at the time of recognition. The Court presumes that similar to the mother and X, Y has Somali nationality on the basis of his registrations in the GBA and the Registration for Foreign Nationals. It is important to note, however, that he also held asylum status in the Netherlands. Therefore, Dutch law must be considered as the law governing the acknowledgement of the child by man Y (Article 10:17 of the Dutch Civil Code and Article 113 of the Aliens Act 2000).

According to Article 1:204(1f) of the Dutch Civil Code, an acknowledgement made while a child already has two legal parents is considered invalid. This was the case here, as mentioned previously. Therefore, the acknowledgement of the child by Y cannot be deemed valid.

The woman requested the contestation of X's fatherhood because Y was the biological father. Both X and Y signed this request and the Court granted it. However, they noted that legally, they must first record X as the father on the birth certificate before they can approve such a contestation. The rationale of the Court was that X's parenthood must be documented on the birth certificate.

Main quotations on cultural or religious diversity:

- "The mother stated, at the first hearing on 4 October 2007 by the Immigration and Naturalization Service (hereinafter referred to as the IND) upon arrival in the Netherlands, that she was traditionally married to [X] in Somalia on [date of marriage], that is, before the birth of the minor. On the occasion of the first interview with the IND on 28 September 2009, [X] stated that he was traditionally married to the mother [...] in Somalia upon his arrival in the Netherlands. He stated that they had been married by a sheikh, in the presence of two witnesses, and that the proof of this marriage

ceremony had been lost." (para 3.7.1)

- "On the basis of the above, the officer allowed the mother and the husband to make a declaration of marriage in accordance with Article 36 of the Municipal Personal Records Act. The mother made this declaration on 7 October 2010, in which she stated – in summary – that she was married to [X] in Somalia on [date of marriage]. [X] also made such a declaration. As a result of these declarations, the matrimonial data of the persons concerned were amended in the municipal database of personal records." (para 3.7.1)
- "Based on the above, the Court is of the opinion that a marriage exists between the mother and [X], concluded on [date of marriage] in [place name], Somalia. The Court assumes, particularly considering Mr. [X]'s statement regarding the nature of the marriage, that this marriage is legally valid under Somali law. Pursuant to Article 5 of the Act on the Conflict of Laws on Marriages (now incorporated into Article 10:31 of the Dutch Civil Code), the Court has decided that the marriage is legally valid." (para. 3.7.1)
- "The Court is of the opinion that this repudiation is not eligible for recognition in the Netherlands under Article 3 of the Act on the Conflict of Laws on Divorce (now incorporated into Article 10:58 of the Dutch Civil Code) because the requirement that the repudiation took place outside the Netherlands has not been met. Pursuant to Article 10:55 of the Civil Code, the dissolution of a marriage in the Netherlands can only be pronounced by a Dutch court." (para. 3.7.2)
- "The mother and [Y] also took the position that [...] they were married according to Islamic law in the Netherlands. They stated at the hearing that they were married at home by an imam in the presence of two witnesses." (para. 3.7.3)
- "The District Court is of the opinion that this marriage cannot be recognized in the Netherlands pursuant to Article 5 of the Act on the Conflict of Laws on Marriage (now incorporated into Article 10:31 of the Civil Code) because the requirement that the marriage was contracted outside the Netherlands has

not been met. Pursuant to Article 4 of the Act on the Conflict of Laws on Marriage (now incorporated into Article 10:30 of the Dutch Civil Code), a marriage can only be validly contracted in the Netherlands in the presence of a civil registrar and in accordance with Dutch law." (para. 3.7.3)

- "Pursuant to Article 1 of the Act on the Conflict of Laws on Parentage (now incorporated into Article 10:92 of the Dutch Civil Code), the question of whether a child has by birth a family relationship with the woman to whom it is born and the man who is married to her shall be determined by the law of the state of common nationality of the man and the woman or, in the absence of such a state, by the law of the country where the woman and the man have their respective habitual residence. The reference point shall be the time of the child's birth." (para. 3.7.5)

Main legal texts quoted in the decision:

Domestic law

- Article 113 of the Aliens Act 2000
- Articles 1:198, 1:199, and 1:204 Subsection 1f of the Dutch Civil Code
- Article 3 of the Act on the Conflict of Laws on Divorce (now incorporated into Article 10:58 of the Dutch Civil Code)
- Articles 1, 4, and 5 of the Act on the Conflict of Laws on Parentage (now incorporated into Article 10:92, 95 and 96 of the Dutch Civil Code)
- Article 5 of the Act on the Conflict of Laws on Marriages (now incorporated into Article 10:31 of the Dutch Civil Code)
- Articles 10:17, 10:30, 10:55, and 10:95 of the Dutch Civil Code

Cases cited in the decision:

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Commentary

Validity of Repudiation and Religious Marriages in the Netherlands and Implications for Parentage

Marriage-related cases that illustrate cultural and religious diversity in Dutch case law often concern a marriage, divorce, or act that was concluded abroad (cf. District Court of The Hague, Judgement of 16 January 2019, ECLI:NL:RBDHA:2019:420; CUREDI076NL001). Consequently, such acts may be recognized as valid under the rules of Dutch private international law. In the present case, however, the parties initially proceeded to a repudiation followed by a religious marriage while residing in Dutch territory. After moving from their home country, where such acts were considered valid, the parties continued to adhere to their own traditions. While the parties themselves may consider themselves to be divorced and/or married, the Dutch legal system does not necessarily attach legal consequences to such religious acts.

When such marriages are concluded on Dutch territory, private international law refers to Dutch family law as the applicable law. Although religious marriages do take place in the Netherlands, Article 1:68 of the Dutch Civil Code requires that a civil marriage must first be concluded before any religious act can take place. The Dutch legal system only recognizes civil marriages as valid marriages that have been solemnized on Dutch territory (Article 1:30(2) of the Dutch Civil Code). As such, religious or traditional marriages have no legal effect. Although the Dutch Parliament had initially adopted a bill to criminalize parties who enter into a religious marriage without a previous civil marriage (see Law of 9 March 2023, *Staatsblad 2023*, 84), this was not included in the final version of the bill (see Law of 9 March, *Staatsblad* 2023, 85). As a result, the criminal provision ultimately did not enter into force.

A fine may be imposed on a religious authority that violates Article 1:68. One may, however, wonder what the legislator’s rationale was for introducing such a strict provision, especially in light of the fact that Article 1:68 came into force in 1970 when religious marriages were still more common. The requirement that a civil marriage must always precede a religious ceremony increases legal certainty. It also enables the state to assess the capacity of both parties to enter into a marriage (e.g., *are they not too young? Is it a monogamous marriage? Is the consent given voluntarily?*) and can define the legal relationships that exist

between its citizens.

A religious marriage can only have legal effect in the Netherlands if it was contracted abroad and is recognized as valid in the country where it was contracted. This case clearly illustrates the importance of the place where the marriage was contracted for its validity.

In this case, the religious marriage between the woman and her first husband took place according to Islamic law. The parties were married in Somalia by a sheikh in the presence of two witnesses. This marriage was subsequently recognized as valid on the basis of Article 10:31 of the Dutch Civil Code, as it is recognized as valid in Somalia while all the requirements for the conclusion of such a marriage were met (District Court of Noord-Holland, Judgement of 21 December 2018, ECLI:NL:RBNHO:2018:11296; Rutten 2011: 62-63). On the contrary, the marriage between the woman and her second husband, which took place according to the same Islamic rules, had no legal effect because the parties had contracted the marriage on Dutch territory.

With regard to divorce, Article 10:55 of the Dutch Civil Code states that a divorce on Dutch territory can only be pronounced by a Dutch judge.

By referring to this provision, the Court was aligned with current case law on this subject (see, e.g., Supreme Court, Judgement of 31 October 1986, NJ 1987/924). In 1986, the Supreme Court prioritized the protection of the interests of the spouses and potential third parties over the cultural and religious inclination toward divorce through traditional and religious practices. In this case, the Supreme Court ruled that a dissolution of marriage on the sole unilateral declaration of the husband could not be recognized if it took place in the Netherlands. In doing so, the Supreme Court held that “[t]he rule that in the Netherlands a marriage […] can only be dissolved by a decision of a Dutch court followed by registration of that decision in the register of births, marriages, and deaths precludes recognition. The main purpose of this provision is to ensure legal certainty, which is of great importance at a time when the dissolution of a marriage has far-reaching legal consequences for both the parties and third

parties. Furthermore, the requirement for the court to intervene […] ensures that, in the event of the dissolution of the marriage, the necessary provisions are also made for the maintenance of the spouse who does not have sufficient income […], for the custody of the children, for the extent and costs of the care and upbringing of minor children of the marriage, and for the housing of the spouses […]. This meaning of the above-mentioned rule of law implies that it is a matter of public policy."

Hence, in the Netherlands, a divorce must be requested by one or both parties before a court. In contrast, repudiation entails that the marriage is unilaterally ended by the husband. Although such an act has no legal effect when performed in the Netherlands, a unilateral repudiation may be recognized as valid under strict conditions if it is performed outside Dutch territory (Article 10:58 of the Dutch Civil Code) (see Supreme Court, Judgement of 13 July 2001, ECLI:NL:HR:2001:AB2623; CUREDI066NL001; CUREDI066NL002).

Regarding the consequences of these legal provisions for the present case, the first marriage continues to exist from a legal point of view. The period between the traditional repudiation and the entry into force of the civil divorce is, therefore, of particular interest. After the repudiation, both parties consider themselves divorced according to their religion, which can be illustrated by the fact that the woman enters into a new marriage before the civil divorce takes effect. From a legal point of view, however, this is not the case and the repudiation has no legal consequences.

However, with regard to the naming of the minor, the Court notes that the Somali legal system would most likely consider the repudiation to be a valid divorce and would even take this into account when determining the name of the child. In so doing, the Court recognizes that a society may have different views on the issue of repudiation. Furthermore, the assessment of the child's name illustrates that a repudiation and a religious marriage, although controversial, can have indirect legal effects in the Netherlands.

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

General legal literature

- Kruiniger, Pauline. 2015*. Islamic Divorces in Europe: Bridging the Gap Between European and Islamic Legal Orders*. The Hague: Eleven International Publishing.
- Rutten, Susanne W. E. (ed). 2011. *Huwelijk en burgerlijke stand*. Apeldoorn: Maklu.
- Van der Velden, Frans. 2016. *Inleiding in de Shari'a: Een Kennismaking Met Het Recht van de Islam En van de Islam-Georiënteerde Wereld*. Den Haag: Boom juridisch.

Literature on unregistered Marriages

- Akhtar, Rajnaara C., Patrick Nash and Rebecca Probert (eds). 2020. *Cohabitation and Religious Marriage: Status, Similarities and Solutions*. Bristol: Bristol University Press.
- Akhtar, Rajnaara C., Rebecca Probert, and Annelies Moors. 2018. "Informal Muslim Marriages: Regulations and Contestations". *Oxford Journal of Law and Religion* 7 (3): 367–375.
- Estin, Ann Laquer. 2011. "Unofficial Family Law". In Joel A. Nichols (ed), *Marriage and Divorce in a Multicultural Context*, 92–119. Cambridge: Cambridge University Press.
- Giunchi, Elisa. 2014. "Muslim Family Law and Legal Practice in the West: An Introduction". In Elisa Giunchi (ed), *Muslim Family Law in Western Courts*, 1–13. London: Routledge.
- Shanneik, Yafa and Justin Jones. 2020. "Reformulating Matrimony: Islamic Marriage and Divorce in the Contemporary UK and Europe". *Journal of Muslim Minority Affairs*.

General literature on the topic from other disciplines

- Al-Sharmani, Mulki. 2017. "Divorce among Transnational Finnish Somalis: Gender, Religion, and Agency". *Religion and Gender* 7 (1): 70–87.

- Tiilikainen, Marja, Mulki Al-Sharmani, and Sanna Mustasaari. 2019. *Wellbeing of Transnational Muslim Families: Marriage, Law and Gender*. London: Routledge.

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