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Sharia in Norwegian Courtrooms?

KATJA JANSEN FREDRIKSEN

In 2002 the Supreme Court was confronted by a case that questioned the validity of a marriage that had already been dissolved through divorce.² The claim was raised through doubts about the legitimacy of a divorce dissolved at a Sharia court in a Muslim-majority country prior to a marriage contracted in a Norwegian mosque. Muslims in Norway have the right to solemnize marriages in accordance with their own customs and traditions, while separation and divorce only can be granted by the county governor or by the court. The discrepancy in the status of religious marriage and divorce can lead to complicated situations in court. Such situations, in turn, offer insight into the possibilities and limitations of "legal pluralism." The case at hand revolves around Ahmed and Laila (pseudonyms), both of whom are Muslims with an Arab background. Each is also middle-aged and had been married before. Laila has adult children from a previous marriage, one of whom lives in Norway. After a short marriage to Ahmed, Laila filed for divorce in Norway. In this way, she received permanent residence in Norway and could continue to live with her daughter. She could even remarry her first husband if she pleased. Ahmed on the other hand seemed to have gained little from his marriage with Laila. His subsequent actions revealed that he felt deeply humiliated by the whole situation. As the parties solemnized their marriage in a mosque in Norway, he may mistakenly have expected that Norwegian law allowed for Islamic divorce procedures as well. This may well be the reason why Ahmed started a court case in defence of his "honour," expecting justice from the Norwegian Court. One could also assume that Ahmed did not want to pay alimony to Laila, but as the couple did not have children together this point is moot.

The male perspective

After many rounds in court, Ahmed, who had permanent residence in Norway, appealed to the Supreme Court claiming that "his marriage to Laila was invalid since she never seriously intended to marry him."³ He

meant that she contracted a marriage of convenience (*pro forma*) in order to obtain legal residence in Norway. He also questioned the authenticity of Laila's divorce papers, implying that she had committed polyandry, a serious crime both in Norway and her country of origin. Ahmed concluded that the case had "important legal and social complications for him personally and that he risked the death penalty or at best life-long imprisonment, in those countries that apply Sharia (Islamic law) such as the country in which his family is currently living." Ahmed obviously attempted to gain sympathy and support for his case by invoking a media discourse that presents Sharia in its most extreme forms.

The Supreme Court agreed with Ahmed that the case involved the material invalidity of the marriage and not a divorce or dissolution as in § 24 of the Marriage Act, as the High Court of Appeal mistakenly had assumed. The Supreme Court thus dissolved the judgement and returned the case to the High Court of Appeal. In May 2003 a

new round started up, during which Ahmed presented new information and documentation. He explained that Laila and her first husband Khalid have a daughter in Norway who had moved there several years

Immigration and other aspects of globalization have brought a wealth of new ideas, norms, and values into Norwegian society and into its courtrooms as well. Analyzing a court case in which a Muslim man tried to invalidate a marriage that had already been disbanded, the author looks at how boundaries between legal systems can grow blurred, and how competing discourses are mobilized in order to influence the judicial process.¹

earlier after marrying a Norwegian Muslim citizen. He suggested that this might have been the reason why they had both earlier applied for residence in Norway.

He also revealed some details about the context of his marriage. In 1999 he had first met Khalid and told him about his wish to remarry a woman who already had children. Afterwards Khalid had contacted his wife and they had

agreed upon a divorce in order for her to marry Ahmed. Laila's brother had represented her husband at the local Sharia court and all parties had agreed. Ahmed called the whole procedure a "farce" and intimated that the divorce was to be understood as *mukhala'a*, not *talaq*.⁴ He also meant that a divorce should be initiated by men in order "to be acceptable by Islamic Law." This opinion is also generally supported by Islamic countries that do not recognize Norwegian divorces when they are initiated by Muslim women without the approval of their husband.

Ahmed also questioned the legitimacy of the divorce for the following reasons: Firstly, Laila already had her foreign divorce approved in Norway before she met Ahmed, meaning that she already may have had plans to remarry in Norway. Secondly, the authorized translation was dated two weeks earlier than the original divorce papers. Thirdly, Ahmed presented the Court a certificate from the local Arab register of population which confirmed Khalid's civil status as still being married.

Ahmed further claimed that he and Laila never actually lived together and that "she was always covered and seemed unwilling to fulfil her marital duties." As a result of the marriage and the following divorce Ahmed felt deeply humiliated and concluded once more by expressing his fear of prosecution ("stoning or even worse") the next time he visited his family. In classical Islamic law the concepts of adultery are a part of criminal law and are regulated by the *hadd* punishments. As these punishments are generally more severe they also require a more rigorous standard of proof. Since this standard is difficult to meet, the normal practice is to apply milder punishments, such as imprisonment, lashes, or a fine.⁵ Ahmed's fear of prosecution thus seemed exaggerated.

The female perspective

Laila did not contest that her marriage with Ahmed may have been *pro forma*, but considered this irrelevant, as it had been dissolved already. Neither did she contest that Ahmed would have committed adultery (*zina*) if he married an already married woman. "This would be the case whether they had had sexual relations or not," she said, "Because if they were married everyone would believe that they had had sexual relations." Both parties agreed that according to the formal Sharia law of their country of origin, a marriage had to be consummated in order for it to be valid. At the same time, Laila appealed to Norwegian law, which does not require the consummation of a marriage for it to be regarded as legitimate. She asserted that, "there would be many illegal marriages in Norway if marriages without sexual relations were invalid." Laila thus attempted to strengthen her own position by appealing to a broad spectre of social, cultural, and religious conventions. As the marriage was contracted in Norway the issue of consummation did not carry any formal weight, but was still deemed of some importance by both parties.

During the court sessions Laila rejected Ahmed's fear of prosecution as being unsubstantiated. She presented a letter from the Norwegian Embassy which explained the workings of her kind of divorce (*mukhala'a*), i.e. one that is based on mutual agreement. "The fact that she initiated the divorce at a Sharia court did not mean that her former

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husband could not have pronounced a *talaq* earlier in order to free himself from her," Laila added. It is indeed not unusual in Islamic countries for Muslim women to seek judicial divorce in order to receive a divorce registration. Some men deliberately fail to register *talaq* at the local authorities in order to escape the obligation to pay alimony.⁶

Laila admitted that the translation may have been incorrect, but claimed that the divorce papers were originals. "The fact that a year after the divorce her former husband [Khalid] still was registered as married by the local authorities does not prove anything because it is unclear when this information was received," Laila asserted.

Laila consistently emphasized the difference between "pro forma" and "forced" marriages, invoking a discourse that is often staged on the political level with the goal to limit further immigration. Laila explained that it is possible to contract arranged marriages in Norway as long as they are not established under coercion. "As a rule, these marriages also function well and if not, both parts can file for separation and later divorce in accordance with Norwegian law," she added, possibly referring to herself.

Additionally, Laila presented the Court a letter by a mother's shelter which confirmed that she had come to it asking for help when in a poor physical and mental shape. Ahmed had treated her badly, she argued, and this had been the main reason why she had left their marital home. Indeed, Laila suggested that this court case was just another brick in his game to harass her and her family.

Final judgement of the Court

The High Court of Appeal explained in its judgement that, according to the Marriage Act and its later amendments, marriages can be annulled only when coercion and severe abuse of the institution of marriage are involved. Even if Laila had only married Ahmed to improve her immigration status, this would not be sufficient to nullify the marriage, according to the Court.

Norwegian law allows all parties to freely provide evidence to support their cases. Eventually, the Court decides which arguments have most evidential force. In this case the Court relied, not surprisingly, heavily on the documentation provided by the Norwegian Embassy. The documentation provided by the Muslim authorities (population register) was not given any weight. The Court, furthermore, confirmed that consummation is not a marriage condition in Norwegian law and that disappointment about unfulfilled expectations in this sense is not a reason to declare the marriage void.

Overall the Court seemed to be more on the side of the female party, considering her the weaker part. The Court continuously argued out of Norwegian perceptions of justice and Norwegian customs rather than observing the underlying conflict between the parties, or trying to find solutions that could meet the expectations of all parties involved. The Court did not deny that Ahmed could be exposed to prosecution, but did not find this fact, of itself, a sufficient reason to declare the marriage invalid. Ahmed thus did not succeed in his petition to annul the marriage and he was ordered to cover all legal costs both for himself and Laila. Ahmed appealed the decision one final time to the Supreme Court, but his appeal was rejected.

The question pertaining to the nature of Ahmed's motive to go to court and risk such financial losses cannot be answered with full certainty. Was it out of "revenge" or was it in expectation of receiving compensation for his loss of social status both in Norway and in the transnational context? Did he feel betrayed by Laila who had divorced him after such a short period of marriage? As Norwegian law does not allow women to claim alimony in cases where they do not have children together, this issue did not play a role here.

The case also raises other and more important questions. Did the Court actually observe the notion of legal pluralism that came to the surface and

did it respect the different social, cultural, and religious norms and values that both parties clearly expressed? How did the Court meet the different expectations of justice as illustrated by the example of Ahmed and Laila and did it meet these different feelings of justice with tolerance?

A plea for openness and knowledge

The court-case described above shows the complexity of cases with an international dimension as they arise before domestic courts. Such cases require more knowledge and openness from Norwegian judges in relation to other cultures and a willingness to cross the borders of their national law. In a global world, it is no longer possible to see national law as an isolated unity. Its internal sovereignty is continuously challenged by external factors, like European law, human rights, or religious law that are not bound by national borders. These developments challenge the traditional studies of law that are used to think in terms like "rules of law," "validity," and "principles of law," while discourses like "conflict," "process," "function," and "group" are considered irrelevant.

Today, Norwegian courts face the complications of a multicultural society where certain "groups" have their own ideas and norms. Such "groups" can be a nation, an ethnic group, or a subculture.⁷ Norwegian Private International Law allows judges to apply foreign law when a case has a stronger connection to another country, thus opening up possibilities for legal pluralism. Still, Norwegian judges continue to strictly arbitrate according to Norwegian rules of law, without paying heed to the underlying ideas, norms, and values that exist in certain groups from different cultures. This may be due to lack of awareness about the existence of different perceptions of justice. It may also be caused by the lack of knowledge about different law cultures or simply a way to protect their national culture of law.

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Oslo, Norway

Notes

1. This article draws on a broader analysis in my Ph.D. dissertation "Islamic law (Sharia) in Norwegian family law cases." There, I discuss the different forms in which Sharia arises before Norwegian courts. This allowed me to focus on how Muslims use their cultural and religious background in family law cases and how Norwegian judges respond to these claims for legal pluralism.
2. Supreme Court of Appeal HR-2002-01322 (Rt-2002-1541 (340 -2002)).
3. All quotations are court descriptions, translated from Norwegian, from the following court cases in chronological order: Oslo District Court nr. 01-01597, High Court of Appeal LB-2002-3920 A/01, Supreme Court of Appeal HR-2002-01322 (Rt-2002-1541 (340 -2002)), High Court of Appeal LB-2002-3920/, Supreme Court of Appeal HR-2003-01067-1.
4. *Talaq*: divorce initiated by men; *mukhala'a* or *khul'*: divorce initiated by the wife, against financial compensation and with the husband's acceptance.
5. Abdullahi A. An-Na'im, ed., *Islamic Family Law in a Changing World: A Global Resource Book* (London and New York: Zed Books Ltd, 2002), 236.
6. An-Na'im, *Islamic Law*, 140.
7. Sten Schauburg-Müller, *Retts teorier i en globaliseret verden* [Theories of Law in a Globalized World], 184, 319-320.