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Divorcing abroad, sharīʿah style: Legal reforms and Moroccan women

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ABSTRACT

Against the backdrop of the fast-progressing legal reconfigurations happening in European countries and the Muslim world, this article brings to light two internationally noteworthy yet overlooked scenarios. The first regards the plasticity of the Italian provisions fostering the privatization of family matters via extra-judicial matrimonial dissolution formulae, which potentially accommodate Islamically inspired normativities either by granting legal validity to ex-spouses' *sharīʿah*-compliant agreements, or by incorporating potential concessions for the Islamic legal waiting period. The second scenario concerns access to justice for Muslim Moroccan wives, who may strategically seek divorce before Italian tribunals through the implementation of Moroccan family law to benefit from more advantageous interpretations and judicial discretion. In-depth examinations of unpublished legal proceedings reveal an evolving legal vocabulary while documenting strengthened confidence in applying the *Mudawwanah* on European soil. While this can impede the validation of European (extra-)judicial divorces in Muslim-majority countries and lead to divergent implementations of the same norms in Italy and Morocco, the dynamics nonetheless foster forum shopping and women's empowerment. Paying careful attention to the "gendered readings" of legal provisions introduced by disputing partners before the judiciary, the narrative depicting victimized Muslim women in migratory contexts is therefore challenged.

1. INTRODUCTION

Family laws, in particular the provisions impacting transnational kinship relations, are currently undergoing momentous changes. Legislative reforms and debates are happening at international and national levels, both in the Muslim world and in Western countries.[1] Against the backdrop of these fast-progressing legal reconfigurations, the article brings to light two internationally overlooked and quite peculiar scenarios—those of European domestic laws (potentially) reconciling *sharīʿah*-inspired provisions[2] with European domestic laws by

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1 See Sections 2 and 3.

2 Within Muslim discourse, the word *sharīʿah* designates rules and regulations governing the lives of Muslims, as predominantly derived from the *Qur'ān* and the *Sunnah*; in this sense, *sharīʿah* can be associated with the discussion of divine law by Muslim scholars of Islamic jurisprudence (*fiqh*). For further

fostering the privatization of family matters, alongside those of Muslim wives (strategically) seeking the implementation of Moroccan law on European soil.

The proposed analysis investigates to what extent a non-Muslim-majority national state can—theoretically and practically—(advantageously) accommodate the needs of (foreign) Muslim women willing to dissolve their marriage. It demonstrates that, in the search for justice, European civil courts can creatively intertwine foreign *sharīʿah*-inspired norms with constitutional principles, private international law rules, human rights, and international instruments. Additionally, it reveals that, in the folds of European domestic legislation, Islamically compliant normativity[3] can be enacted by Muslim partners even without recurring to conflicts of laws. This plasticity[4] partly explains the no-need of the creation of Islamic bodies specifically catering for the needs of Muslim family members like the *Sharīʿah* Councils or other *fatāwā*-issuing Islamic bodies,[5] differently from what is happening in some common law jurisdictions, such as the UK and Australia.

The present contribution first looks into access to justice as granted to women in Morocco by paying attention to the relevant provision of the *Mudawwanah al-aḥwāl al-ousaria-shakhṣiyyah*[6] and juxtaposing Moroccan matrimonial dissolution formulae to the Italian ones. Then, the Italian legal landscape is sketched while exploring its—potential and actual—compatibility with Islamic principles and Moroccan family law. Additionally, an accurate reading of Italian laws discloses the commonly unnoticed possibility for Muslim (ex-)spouses to implement legally binding *sharīʿah*-compliant agreements while dissolving their nuptial bond.

The second part of the article examines unpublished legal proceedings in which Italian tribunals interpreted and implemented some norms of the Moroccan Code of Personal Status.[7] The main case studies regard spouses attempting to divorce in compliance with the law of their Muslim-majority country (MMC) of origin while living abroad. These requests are specifically aimed at dissolving the couple's marriage—religiously and civilly at once—and thus avoid matrimonial captivity and limping nuptial statuses.[8] Whereas Moroccan spouses appear

details, see Norman Calder and MB Hooker, 'Sharīʿa', in Peri Bearman and others (eds), *Encyclopaedia of Islam* (2nd edn) Brill. <http://dx.doi.org/10.1163/1573-3912_islam_COM_1040> accessed 17 July 2023.

[3] Normativity is something relating to, or deriving from, (legal, religious, customary, social) provisions resulting in a correspondent behaviour. For further discussion on normativity as the object of competing philosophical and legal theories, see inter alia (i.a). David Plunkett, Scott J Shapiro and Kevin Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019).

[4] As highlighted by Friedman, 'every legal system has an element of plasticity and thus contains within itself the ability to adapt or grow [. . .]'; some legal systems or normative orders might be more flexible when accommodating diversity. See Lawrence M Friedman, 'On Legal Development' (1969) 24 Rutgers Law Review 11-64.

[5] For further discussion see Azzouz, Bano, Uddin, and Krayem in this *Special Issue*. Because of space limit, further bibliographical details in this burgeoning field of academic literature cannot be reported here but can be found in Federica Sona, 'Marriage Practice in Western Europe' in Suad Joseph (ed), *Encyclopedia of Women and Islamic Cultures* (Brill 2023).

[6] Literally, 'Code of Personal Status'; see Law No 70-03 of 8 March 2003, Official Bulletin No 5184, 14 *ḥija* 1424 (5 February 2004), 418. This is sometimes referred to as 'Moroccan Family Law', hereinafter also *Mudawwanah* or MM.

[7] See Sections 4 and 6.

[8] A 'limping' marriage is a matrimonial union recognized as valid exclusively by some normative orders or legal systems. The expression 'chained women' has been specifically used in relation to Jewish women unable to obtain a religious divorce; more recently, scholars began to rely upon the expression matrimonial or marital 'captivity' when referring to cases in which marriage is perceived as a prison by the spouse who is trapped within the marriage against her or his will. See respectively, Judith R Baskin (ed), 'Agunah' in *The Cambridge Dictionary of Judaism and Jewish Culture* (Cambridge University Press 2011) and Susan

to be less interested in claiming foreign laws to be applied when approaching the domestic judiciary in other European countries, a careful examination of first-hand observed and unreported Italian legal proceedings unveils unique and peculiar features.

The proposed analysis sheds light on the divorcing couples' power dynamics and discloses a scenario of migrant families enduring discomforts and privations, which regrettably can lead to domestic abuse and gender imbalance. These situations are nonetheless counterbalanced by Italian legal professionals who, since the early 2000s, proved to have become increasingly familiar with the examined Moroccan legislation. The judiciary's confidence in implementing Islamically inspired norms on European soil grew despite this approach having been contested in the public sphere as a discriminatory attitude that, in practice, may favour foreigners over Italian nationals.

In the attempt to accommodate postmodern transnational families, the Moroccan Family Law may however be interpreted differently by the Italian and the foreign judiciary. As the article seeks to corroborate, this can lead, on the one hand, to empowered Muslim Moroccan women, on the other hand, to forum shopping, and eventually impeding the recognition, in *sharīʿah*-compliant legal systems, of European judicial decisions applying the *Mudawwanah*.

2. MOROCCAN MUDAWWANAH

Amongst the most broadly Western-implemented foreign Codes of Personal Status, the Moroccan legislation deserves specific attention. Although it has recently been discussed whether Muslim realities do call for the introduction of amendments to the family code to create a balance between Islamic teachings and the reality of modern Moroccan society,[9] the *Mudawwanah al-aḥwāl al-ousaria-shakhṣiyyah* (MM)[10] is still regarded one of the most substantive and progressive family laws in the Middle East and North Africa region (MENA).[11]

Rutten, Benedicta Deogratias and Pauline Kruiniger (eds), *Marital Captivity: Divorce, Religion and Human Rights* (Eleven International Publishing 2019).

[9] In March 2023, the Moroccan House of Representatives hosted a debate aimed at discussing the possibility of amending the *Muddawanah*. A couple of months after, the Moroccan Minister of Justice stressed his determination to take steps toward reforming the Moroccan Code of Personal Status at the National Conference of the Authenticity and Modernity Women's Organization. See Sara Zouiten, 'After Nearly 20 Years, Morocco Discusses Family Code Reform' (*Morocco World News*, 14 March 2023); See Sara Zouiten, 'Justice Minister Vows to Take Steps to End Gender Injustice, Revamp Moudawana' (*Morocco World News*, 22 May 2023).

[10] See n 6.

[11] Several comparative studies juxtapose legal reforms concerning family matters and their implications with reference to political debates and social dynamics (including gendered provisions) in the Muslim world. See i.a. Ziba Mir-Hosseini, 'How the Door of Ijtihad was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco' (2007) 64 Washington and Lee Law Review 1499; Janine A Clark and Amy E Young, 'Islamism and Family Law Reform in Morocco and Jordan' (2008) 13 Mediterranean Politics 333; Serida Lucrezia Catalano,'Shari'a Reforms and Power Maintenance: The Cases of Family Law Reforms in Morocco and Algeria' (2010) 15 Journal of North African Studies 535; Rania Maktabi, 'Female Citizenship in the Middle East: Comparing Family Law Reform in Morocco, Egypt, Syria and Lebanon' (2013) 5 Middle East Law and Governance 280; Marième N'Diaye,'Refonder le droit de la famille au Sénégal et au Maroc: l'intérêt d'une comparaison aux frontières' (2015) 22 Revue Internationale de Politique Comparée 419; Paul Scott Prettitore 'Family Law Reform, Gender Equality, and Underage Marriage: A View from Morocco and Jordan' (2015) 13 Review of Faith & International Affairs 32; Nadia Sonneveld, 'Divorce Reform in Egypt and Morocco: Men and Women Navigating Rights and Duties' (2019) 26 Islamic Law and Society 149; Dörthe Engelcke, *Reforming Family Law. Social and Political Change in Jordan and Morocco* (Cambridge University Press 2019).

The following subsections engage with the relevant provisions of the Moroccan Family Law, whilst pointing up the conceptual affinity and potential compatibility of these *sharīʿah*-inspired norms with the Italian ones.

A. Specificities and applicability

According to Moroccan law, matrimonial dissolution is permitted 'in exceptional circumstances, considering the rule of the least harm, given the family dislocation and harmful effects on children' (Article 70 MM), and this provision can clearly resonate with Italian law.[12] The *Mudawwanah* states that a marriage can be dissolved in five different ways (Article 71 MM). The list includes: death (Articles 74–76 MM), annulment (Article 77 MM),[13] male unilateral repudiation (*ṭalāq*), judicial divorce (*taṭlīq*), and divorce in exchange for compensation by the wife (*khulʿ*).

A number of *sharīʿah*-compliant divorce formulae are explicitly mentioned and regulated.[14] The divorce at the demand of the husband (ie, the male unilateral repudiation)[15] can also be delegated to his wife, who can repudiate herself (Article 89 MM; *tamlīk*).[16] The divorce in exchange for compensation (Articles 115–120 MM)—being grounded on the spouses' agreement—is disciplined in the same Title V, which introduced the divorce by mutual consent (Article 114 MM; *al-ṭalāq al-ittifāqī*). The divorce by mutual consent is a new type of divorce instituted in 2004, which can resonate the French *divorce par consentement mutuel*.[17] According to this procedure, the spouses concur to dissolve their marriage and agree upon financial and legal stipulations, the eventually reached 'divorce contract' is then verified and authorized by the court. The above-described divorce path implies a *ṭalāq* rather than a judicial divorce (*taṭlīq*) procedure, whose implications are clarified further in the text.

In the case of judicial divorce (*taṭlīq*), several possibilities exist. Matrimonial dissolution can be sought by either spouse on grounds of discord due to irreconcilable differences (Articles 94–97 MM), and this formula is called *taṭlīq li-l-shiqāq*. A married woman is also entitled to submit an application for *taṭlīq* in specifically identified hypotheses. The list includes the husband violating the stipulations of the parties nuptial contract (Article 99 MM), causing prejudice or harm (Articles 100–101 MM), lacking to provide maintenance (Articles 102–103 MM), being absent (Articles 104–106 MM), having a fundamental vice or a latent defect (Articles 107–111 MM),[18] and taking an oath of abstinence from his wife or abandoning her (art.112 MM).

Attempting the spouses' reconciliation is compulsory both in *ṭalāq* and *taṭlīq* procedures (Articles 81–83, 94–97 MM),[19] and the parties' irreconcilable differences are to be settled within a deadline not to exceed six months from the petition date (Article 97(2) MM). The divorce procedures detailed by the Moroccan law appear very fast when compared to the

[12] See Sections 3.A and 5.

[13] Another specificity concerns the effects of Moroccan matrimonial dissolutions: even in case of annulment, these are always *ex nunc* (art 71 MM).

[14] In the interpretation suggested by the *Mālikī* schools of *Sunnī* Islamic jurisprudence, based on the teachings of the *imām* Mālik ibn Anas.

[15] This is called *ṭalāq*; see arts 78–93 MM.

[16] The possibility for a husband to delegate the right of repudiation to his wife was already provided for by arts 44 and 67 of the 1993 Personal Status Law. See Sonneveld (n 11) 157.

[17] Arts 230 and 232, French Civil Code. See Elisabeth Nössing, 'Divorce on Grounds of Discord: Did the Moroccan Family Law Reform Bring the Guarantee of Divorce for Women? An Ethnographic Perspective on the Changing Landscape of Divorce. The Mudawwana a Decade On' (2020) 74 ASIA 35, 40.

[18] These include any defect that prevents intimate conjugal relations; or any disease endangering the life or the health of the other spouse and cannot be cured within one year (art 107 MM).

[19] In case of children, the court undertakes two reconciliation attempts separated by a minimum of thirty days (art 82 MM).

Italian ones; however, it has been stressed that the limit of six months for all judicial procedures is not respected in the majority of the legal proceedings in Morocco.[20]

Although translated differently in the Arabic legislative text and the French 'Practical guide to the family code' published by the Moroccan Ministry of Justice,[21] the *Mudawwanah* encompasses two main categories of divorce—*ṭalāq* and *taṭlīq*.[22] The key difference between these two matrimonial dissolution formulae lies with their legal procedure.[23] In the case of *taṭlīq*, the parties' marriage is dissolved by the judiciary. In the case of *ṭalāq*, the marriage is not dissolved by a judge, but by one or both spouses, who submit to the court, for verification and authorization, their 'divorce contract' once they have reached (on their own or with the support of lawyers) an agreement concerning financial and legal stipulations. This last formula therefore can partly resonate with the Italian extra-judicial procedures facilitating the so-called "privatization" of separation and divorce procedures.[24] Nonetheless, differently from the Italian landscape, the dissolution of the bonds of matrimony according to Moroccan law always requires to happen in court.[25] And this might explain why, when settled on Italian soil, the path of the so-called 'direct-divorce procedure' can be the favoured one in the case of Muslim spouses or nationals of MMCs. In effect, obtaining the acknowledgement and the recognition, in an Muslim-Majority Country (MMC), of an extrajudicial divorce reached abroad might become a challenging procedure.

A few other dissimilarities between the two legislations here juxtaposed are to be highlighted. First of all, Moroccan law does not envisage the Italian institute of 'antechamber of divorce', namely, separation.[26] Secondly, the *Mudawwanah* contemplates both revocable and irrevocable divorces. In the case of *taṭlīq*, when the matrimonial dissolution is issued by the court, the divorce is irrevocable, with few exceptions comprising the judicial divorces granted on grounds of abandonment and non-maintenance (Article 122 MM). Conversely, the *ṭalāq* pronounced by the husband is revocable with the exceptions of the third male unilateral repudiation,[27] the divorce uttered before the consummation of marriage, the divorce by mutual consent, the divorce in exchange for compensation (*khulʿ*), and the repudiation when the husband has assigned his right to exercise it to his wife (Article 123 MM). A wife is

[20] Data indicate that most cases take between six months to more than one year from application to decision; more complicated cases can take up to two years. See Nössing (n 17) 48.

[21] Official Bulletin No 5358, 2 *ramadhān* 1426 (6 October 2005), 667. In French language, the word *ṭalāq* is translated as 'divorce under judicial supervision' instead of 'husband's unilateral repudiation of his wife'. See Marie-Claire Foblets and Jean-Yves Carlier (eds), *Le Code Marocain de la Famille: Incidences au Regard du Droit International Privé en Europe* (Bruylant 2005) 57–58, and Roberta Aluffi (ed), *Persone, Famiglia, Diritti. Riforme Legislative nell'Africa Mediterranea* (Giappichelli 2006) 184. Also Federica Sona, 'Unilateral Repudiation or Divorce? Ṭalāq Betwixt and Between Diverse (Extra-)judicial Environments' (2022) 8 Italian Law Journal 293.

[22] The codifications of Muslim family law or personal status law maintain a variety of divorce procedures based on traditional *fiqh*, consisting of *ṭalāq* either as unilateral 'repudiation' of the wife by the husband, or as *khulʿ*; in alternative to a judicial divorce—termed *taṭlīq* or *tafrīq*—which may be sought on a number of specific grounds primarily but not only by the wife; and by *faskh* (a judicial dissolution terminating a marriage that is or has become invalid). See Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press 2007) 107.

[23] This is clarified by Nössing (n 17) 40.

[24] See Section 3.A.

[25] Prior to 2004, the *ṭalāq* was considered a notarial deed (similar to the nuptial contract) and therefore perfected without judicial intervention.

[26] See Section 2.A.

[27] The third irrevocable divorce puts an immediate end to the marriage relationship, but does not prevent the parties to enter into a new marriage contract (art 126 MM).

deemed irrevocably divorced at the conclusion of her legal waiting period (*al-'iddah*) following a revocable divorce (Article 125 MM).[28]

With regard to private international law principles, Article 128(2) of the Moroccan Family Law states that decisions issued by foreign judiciary concerning divorce (*ṭalāq*), judicial divorce (*taṭlīq*), divorce in exchange for compensation (*khul'*), or annulment (*faskh*) may be enforced if two requisites are satisfied. This happens when they are rendered by a competent court and are based on grounds that are not incompatible with those provided for by the *Mudawwanah*.[29] In the Moroccan legal system, recognition is thus not automatic, rather it follows the procedure of *exequatur*. In principle, *exequatur* is to be granted if the foreign judge, or authority, had jurisdiction and if the substance of the judgment complies with Moroccan laws. This implies that the jurisdiction of the foreign judiciary is to be assessed in light of its own international jurisdiction rules; the merits of the case are instead to be assessed in compliance with Moroccan laws, rather than according to the law applicable under the conflict rules of the court *a quo*.[30]

In effect, Article 2 MM rules that the *Mudawwanah* is to be applied to 'all Moroccans, including those with another nationality', to stateless refugees, to mixed relationships where one of the parties is Moroccan; and to the relationship between two Moroccans, one of whom is Muslim. This implies that two connecting factors are identified: one is based on nationality and the other one is linked to religious belonging. While the second criterion appears to be potentially contentious,[31] the first one further facilitates the application of Moroccan legislation by the Italian judiciary, as shown further in the text.

B. Moroccan women's access to justice

The *Mudawwanah* has been described as an unprecedented initiative helping to eradicate discrimination against women and to improve gender equality within the principle of complementarity between men and women, as indicated by the *sharī'ah*.[32] The Kingdom of

[28] Italian courts might, however, be confused with regard to the revocability of a (judicial) divorce. The Tribunal of Aosta (judgment 25 June 2010), for instance, considered a judicial divorce issued on grounds of discord due to irreconcilable differences (*al-taṭlīq li-l-shiqāq*) as a revocable divorce, therefore contrary to public policy. This mistake was due to the French translation of the Moroccan law blurring the diction between the words *ṭalāq* and *taṭlīq*. See Roberta Aluffi, 'Jurisprudence Italienne' in Marie-Claire Foblets (ed), *Le Code Marocain de la Famille en Europe: Bilan comparé de dix ans d'application* (La Charte 2016) 605–14.

[29] Then it continues clarifying that this should happen 'with a view to the dissolution of the marital relationship, after such judgments and deeds have complied with the legal procedures relating to exequatur, in accordance with the provisions of articles 430, 431, and 432 of the Moroccan Code of Civil Procedure'.

[30] See Foblets and Carlier (n 21) 71. The authors also clarify that further to a Parliamentary amendment, the new wording of the provision covers all forms of dissolution of the marriage bond. And, according to the 'Practical guide to the family code', verification of compliance with Moroccan law does not require 'reference to the provisions of Moroccan law', but is limited to the absence of conflict with the grounds for dissolution of marriage under the MM and with public policy. Accordingly, Italian rulings implementing the *Mudawwanah* should be recognised as legally valid in Morocco. See Sections 4–6.

[31] Moroccan courts can indeed apply the provisions of family law where one of the parties is Muslim, regardless of his/her nationality, domicile or habitual residence; this rule based on Moroccan public policy might therefore create a major obstacle in international relations with European countries. See Foblets and Carlier (n 21) 7–9.

[32] Leila Hanafi, 'Moudawan and Women's Rights in Morocco: Balancing National and International Law' (2012) 18 ILSA Journal of International & Comparative Law 515; Rachel Newcomb, 'Justice for Everyone? Implementation of Morocco's 2004 Mudawana Reforms' in Rubya Mehdi, Werner Menski and Jorgen Nielsen (eds) *Divorce in Muslim Societies* (DJOF Press 2012) 105–27.

Morocco has indeed taken a decisive step towards improving the status of women along with enshrining equality between spouses in the shared responsibility of the family.[33]

As a result, the *Mudawwanah* should have encouraged women's access to justice. Studies nonetheless disclose *de facto* discrepancies, mostly between Moroccan rural and urban areas; in the latter, the law has created a system for dealing efficiently and effectively with gender-based domestic violence cases, but the scenario may differ in the countryside.[34] Furthermore, although not having been entirely ineffective, claims of domestic underimplementation of some provisions included in this law have been raised.

From a cultural and social perspective, four main issues have been identified.[35] In particular, in areas showing high illiteracy rate, women risk being prevented from learning about the Moroccan Family Law or from effectively exercising their rights within the legal system. Furthermore, Moroccans' continued respect for traditional public notaries (*ʿudūl*) as family law authorities can affect their willingness to seek guidance and redress in family courts.[36] Thirdly, the implementation of the law suffers as a result of the grassroots anti-*Mudawwanah* propaganda disseminated by conservative religious groups. Last but not the least, the Moroccan judicial system seems to be ill-equipped to implement the Moroccan Code of Personal Status.

Amongst the others, the implementation of the provisions regulating alimony and maintenance payments seems to be particularly ineffective.[37] Some reasons have been identified. First, judicial discretion over alimony and maintenance payments can result in contentious decisions awarding insufficient financial support to ex-wives and their offspring. Secondly, the provision providing for the imprisonment of debtor husbands does not support divorced women and their children since they do not receive any compensation after their husbands are sentenced.

Other obstacles have been identified and these specifically exist in case the partners did enter into a so-called '*fātiḥa* marriage'. This is a customary *sharīʿah*-compliant marriage performed by reciting the first *sūra* of the *Qurʾān* and lacking a registered written nuptial contract, which appears to be still widespread in some Moroccan rural areas.[38] According to the law (Articles 16, 156–157 MM), if a woman becomes pregnant before the legal registration of her *fātiḥa* marriage, the mother can file a petition claiming that the offspring is affiliated to her fiancé on the grounds of 'sexual relations by error' and this creates kinship maintenance and inheritance rights, provided some conditions are met. Theoretically, these types of marriages—as codified in the Moroccan Code of Personal Status—should have become one pathway to legitimate paternal filiation (*nasab*). Nevertheless, the recasting of this traditional

[33] Karima Nour-Aissaoui, 'The Current Debate on the Moroccan Family Code Mudawwanat al-usra in Morocco' (2020) 8 Electronic Journal of Islamic and Middle Eastern Law 77.

[34] Leila Hanafi, 'Moudawan and Women's Rights in Morocco: Balancing National and International Law' (2012) 18 ILSA Journal of International & Comparative Law 515.

[35] For details see Ann M Eisenberg, 'Law on the Books vs. Law in Action: Under-enforcement of Morocco's Reformed 2004 Family Law, the Moudawana' (2011) 44 Cornell International Law Journal 693, 709.

[36] E Tyan, ''Adl' in Peri Bearman and others (eds), *Encyclopaedia of Islam* (2nd edn) Brill. <http://dx.doi.org/10.1163/1573-3912_islam_COM_0019> accessed 17 July 2023.

[37] Eisenberg (n 35) 711–13, also with regard to the reasons reported below.

[38] This mechanism can also be relied upon in case of underage marriages with the *fātiḥa* performed when a girl is still a minor, and upon she reaching eighteen years, the marriage is then legalized. See i.a. Prettitore (n 11) 39. With regard to unregistered marriages, the recognition prescribed by art 16 MM was admissible within five years; this period was, however, extended twice (in 2009 and 2014) thus demonstrating that the goal of marriage registration has not been (yet) achieved in Morocco, as stressed by Badouin Dupret, *Positive Law from the Muslim World. Jurisprudence, History, Practices* (Cambridge University Press 2021) 200.

type of customary marriage into an 'engagement period' or 'bethrotal'—in addition to the fact that DNA testing is not enough to establish paternal filiation in Morocco—resulted in against-discriminated single mothers and their children, who are regarded as illegitimate being born out of wedlock.[39]

Consequently, it emerges that the application of the *Mudawwanah* in Morocco still entails what has been defined as 'countless problems that concern alimony, parental filiation, and the protection of children'.[40] Legal implementation indeed requires the non-automatically guaranteed cooperation of state and non-state actors.[41] Furthermore, judicial discretion implies uneven applications of its principles by Moroccan judges, who can be affected by their own religious interpretations and rely upon social norms when applying the law.[42] Moroccan women may therefore benefit from better access to justice and more advantageous implementation of the Moroccan Family Law on European soil; and amongst the European countries, Italy seems to offer good prospects.[43]

Mirroring the previous sections, the following ones delve into the Italian legal system; the possibility to accommodate foreign *sharīʿah*-inspired laws is explored by investigating the potential compatibility and conceptual affinity between diverse divorce provisions.

3. ITALIAN LAWS ACCOMMODATING (FOREIGN) MUSLIM EX-PARTNERS

Italian family law is currently being impacted by one of the country's major reforms in procedural law. Amongst other significant amendments, the so-called 'Cartabia's reform'[44] provides for the creation of a 'sole' or 'consolidated' tribunal (*tribunale unico*) dealing with proceedings concerning the status of persons, minors and families to be established by the end of 2023.[45] Also, in the case of transnational families, the choice of law applicable to divorce and legal separation is to be regulated by the so-called Rome III

[39] Ginger Feather, 'The Conflation of Single Mothers and Prostitutes in Morocco: Qiwama, Legal Exclusion, and Paternal Impunity' (2021) 17 Journal of Middle East Women's Studies 294. The author clarifies that in a 2017 Moroccan court case a mother sought child support from a man confirmed through DNA testing as the biological father of her child. The trial court ruled in favour of the mother, but the appellate court overturned this ruling therefore denying the illegitimate child any maintenance and inheritance in addition to the father's name.

[40] The most contentious issues regard the implementation of some provisions; more specifically art 16(2) MM as it has been used contrary to its purpose by encouraging underage marriage and polygamy; art 20 granting the judge the authority to authorise the marriage before marital age; art 49 on the distribution of property between spouses after getting divorced. See Nour-Aissaoui (n 33) 77–85.

[41] Engelcke (n 11) 199.

[42] Newcomb (n 32) 105–27.

[43] See Section 7 for a comparison with the Spanish and Dutch legal systems.

[44] Law No 206 of 26 November 2021 (Gazzetta Ufficiale—hereinafter GU—SG 292, 9 December 2021) has been named after the former Ministry of Justice Marta Cartabia. See also Legislative Decree No 149 of 10 October 2022 (GU SG 243, 17 October 2022 SO 38).

[45] The reform encompasses three main phases. On 22 June 2022, the provisions relating to the modification of the criteria of the competent jurisdiction between the Ordinary Tribunal and the Minors' Tribunal came into force (amended art 403, and art 709-ter, Italian Civil Code). On 30 June 2023, the so-called 'single rite' shall be applicable to all proceedings relating to the status of persons, minors, and families. By 31 December 2024, the 'sole tribunal for persons, minors and families' will be established. See also Book II, Title VI-bis, Italian Code of Civil Procedure. For an introduction, see i.a. Monica Bombelli, *Il Procedimento in Materia di Famiglia Nella Riforma Cartabia* (Key 2022); Claudio Cecchella (ed), *La Riforma del Processo e del Giudice per le Persone, per i Minorenni e per le Famiglie: Il Decreto Legislativo 10 Ottobre 2022, n. 149* (Giappichelli 2023).

Regulation,[46] providing for uniform conflict-of-law rules while strengthening the parties' autonomy by recognizing a limited possibility to the choice of applicable law.[47]

One of the most debated legal changes regards the possibility of a so-called 'simultaneous process' (*unico procedimento*) combining the claims for separation and divorce[48] since this had been by some conflated with the idea of a 'direct' or 'immediate' divorce. The latter is a matrimonial dissolution option currently available in a very limited number of cases for Italian nationals, whereas foreigners appear to have more room for manoeuvre in undergoing divorce formulae avoiding prior legal separation. This discrepancy has raised discriminatory concerns, particularly when the so-called 'immediate divorces' are issued by the Italian judiciary in compliance with the Islamically inspired family laws of some MMCs. Debates have also been stirred by emphasizing the religious component of the foreign applicable norms. In real terms, former reforms to the domestic legislation already created some space for the (potential) legal validation of (ex-)spouses' *sharīʿah*-compliant agreements.

The following sub-sections first contextualize the relevant norms, then explore the potential and actual accommodation of *sharīʿah*-compliant normativities in the Italian legal system. Attention will then be paid to the dynamic interactions between the Moroccan Code of Personal Status and the Italian judiciary when divorce procedures are initiated by foreign nationals, predominantly Muslim women.[49]

A. Separations, divorces, and privatized sharīʿah-compliant agreements

As a first step, the relevant Italian laws are to be briefly analysed, being the framework in which *sharīʿah*-compliant norms and Islamically inspired foreign laws enfold.

In the Italian legal system, a marriage is dissolved either by the death of one of the spouses[50] or in 'the other cases contemplated by the law'.[51] More specifically, separation, divorce, invalidity, and legal voidness of a marriage are the remedies offered to a crisis or a failure in the parties' matrimonial relationship. The effects arising from these institutes on the marriage—as a legal act and/or as a legal relationship—[52] are significantly different.[53]

[46] Art 31, Law 218/1995 (GU 128, 3 June 1995 SO 68) as amended by Legislative Decree No 149 of 10 October 2022 (GU 243, 17 October 2022 SO 38) and Law No 197 of 29 December 2022 (GU No 303, 29 December 2022 SO 43), as applicable to proceedings commenced after 28 February 2023.

[47] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Official Journal L 343, 29 December 2010, 10–16.

[48] Art 473-bis Italian Code of Civil Procedure (ICCP) Cass.C, Sez.Civ., No. 28727 of 16 October 2023. https://www.cortedicassazione.it/resources/cms/documents/28727_10_2023_civ_oscuramento_noindex.pdf

[49] See Sections 4–6.

[50] The original art 149 of the Italian Civil Code of 1942 stated that the marriage was 'dissolved only with the death of one of the spouses'. The 'family as a natural society founded on marriage'—as stated by art 29 of the Italian Constitution (IC)—represented indeed the cornerstone of the Italian society, and thus the principle of matrimonial indissolubility subtended the idea of marriage as a value that is more prominent than personal interests.

[51] Art 149(1) Italian Civil Code (ICC).

[52] In the Italian legal system, the marriage is both a 'legal act' and a 'legal relationship'. The former address the form of the marriage act and the legal requirements for contracting a valid marriage; the latter governs the personal and patrimonial effects of the marriage between the spouses and in relation to their children.

[53] A judge declaration of the cessation of the civil effects of a marriage, similarly to the homologation of the parties' agreements, is depriving *ex nunc* the marriage of its effects. Conversely, when an anomaly is identified by a judge in the nuptial legal act, the marriage can be declared invalid and this retroactively eliminates the marriage civil effects between the spouses. The spouses' mutual rights and duties are also affected by the separation, this institute, however, does not dissolve the nuptial bound between the spouses.

Without explicitly mentioning the word 'divorce',[54] legal reforms gradually incorporated new options in the Italian legal landscape. The idea of matrimonial dissolubility was introduced,[55] therefore, recognizing family as a 'social group' (Article 2 Italian Constitution, IC) rather than an institution.[56] Then, the 'fault provision' as a requirement for the spouses' separation was abolished in favour of the notion of the 'intolerability of the continuation of cohabitation'.[57] The actual Italian Civil Code (ICC) indeed describes separation as a remedy when the continuing of cohabitation is not possible due to the spouses' intolerability of the protraction of their cohabitation, or in case the living together of the spouses' may cause serious prejudice to the children's education (Article 151(1) ICC). Undoubtedly, this lexicon can very well resonate with some provisions of the *Mudawwanah*, including the rule of the least harm.[58]

Three types of separation exist in Italy: personal, consensual, or judicial. The personal separation is a *de facto* situation that can be assimilated into the one of Islamically divorced couples. To put it differently, in the case of a religious-only marriage entered into by two partners—should they untie their "matrimonial knot"—their status before and after the Islamic waiting period (*al-'iddah*)[59] would be one of parting partners with no legal consequences concerning their personal statuses as well as reciprocal financial rights and duties.[60] The institute of separation does not exist neither in Islamic law nor in Moroccan law[61]; however, Muslim partners may end up being personally separated when breaking-up.

When the spouses agree to separate, their consensual separation is a *de facto* separation; then, once a court, a civil registrar, or a lawyer homologates the spouses' judicial or extra-judicial agreement, their consensual separation becomes 'legal'.[62] In compliance with the Italian legal system, thus, even when agreed between the entitled parties,[63] a separation must be assessed by a judicial or extra-judicial authority in order to produce civil effects. A consensual *de facto* separation requires a specifically identified authority—ie, the judge in a judicial

[54] The word 'divorce' is never mentioned in the ICC and in the Law 898/1970 (Law No 898 of 1 December 1970, GU No 306 of 3 December 1970) that introduced the idea of marriage dissolubility in Italy. The marriage dissolution was not contemplated by the Italian legal system until the 1970s, when a process of family law privatisation began. The idea of a 'publicly oriented family' was a characteristic of the Italian Civil Code of the 1865, the Lateran Pacts of the 1929 and the Italian Civil Code of 1942. Accordingly, the marriage indissolubility granted a stable society. Only with the Law 898/1970 and the reform of 1975 the family law began to be 'privately oriented', in compliance with arts 2 and 29 Italian Constitution (IC).

[55] Law 898/1970.

[56] See Gilda Ferrando, *Manuale di Diritto di Famiglia* (Laterza 2005) 152.

[57] Law No 151 of 19 May 1975, GU No 135 of 23 May 1975.

[58] See Section 2.A.

[59] This word comes from the verb 'to count' and refers to the 'waiting period' that must be observed by a widow, a divorced woman or a woman whose marriage has been annulled. In compliance with Islamic law, this time is intended to determine the wife's possible pregnancy and to give the husband the opportunity of atoning his *ṭalāq*. For further details, see i.a. Yvon Linant de Bellefonds, ''Idda' in Peri Bearman and others (eds) *Encyclopaedia of Islam* (2nd edn) Brill. <http://dx.doi.org/10.1163/1573-3912_islam_SIM_3476> accessed 17 July 2023.

[60] Naturally, the parties' offspring are entitled to custody and financial rights independently from the parents' matrimonial statuses.

[61] See Section 4. This aspect can be raised by Muslim husbands when contesting the claim field by their wives before the Italian judiciary; see Section 6.

[62] See Civil Code, Capo V, Law 898/1970, as amended by Law No 436 of 1 Sepember 1978, Law No 74 of 6 March 1987, Law No 55 of 6 May 2015, and Decree-Law No 132 of 12 September 2014 (GU, SG No 212 of 12 September 2014), which was modified and converted into Law No 162 of 10 November 2014 (GU, SG No 261 of 10 November 2014, SO 84).

[63] The right to request judicial separation or confirmation of consensual separation belongs exclusively to the spouses; art 150(3) ICC.

proceeding, and the civil registrar or a lawyer in an extra-judicial one—to homologate a separation accord previously agreed upon by the spouses.[64]

Two approaches exist. As stated by publicistic theories, the legal homologation of the spouses separation agreement produces legal effects and thus the judge's homologation constitutes the spouses' separation, whilst the couple's consent is the presupposition.[65] As maintained by more privatistic theories, the spouses' agreement expresses the spouses' contractual autonomy and the homologation is only a *condicio iuris*.[66] This distinction becomes particularly relevant in light of the recent 'Cartabia's reform', in particular with the possibility to contemporary submission of separation and divorce claims, namely the 'simultaneous separation-divorce procedure'. In fact, this new rule may require a reconsideration of the legal qualification of the judgment on separation; the concurrent admissibility of both applications of separation and divorce appears to imply that the legal separation is now no longer a procedural prerequisite but a condition of the action.[67] Despite allowing for a simultaneous process, the possibility of immediate divorce remain only for the options listed by law,[68] along with the case of nationals or people resident in foreign countries allowing for divorce without previous separation—as it is the case of Morocco.[69]

In Italy, the legal separation can be requested to a judicial authority either by both spouses (in the event they mutually consent to their separation) or by a spouse only.[70] The judiciary is asked to ascertain the objective intolerability of the spouses' cohabitation.[71] In this case, events making intolerable the continuation of the spouses' cohabitation, or causing serious prejudice to the children's education, should have occurred (Article 151(1) ICC). Accordingly, a spouse may apply for a decree of judicial separation independently from the intent of the other spouse, and independently from his/her, or the other spouse's, voluntary and fault behaviour. Again, this resonates with the lexicon of the Moroccan Family Law. The divorce—or better, the dissolution of a marriage contracted in compliance with the ICC (or the cessation of the civil effects consequent to the recognition and registration of a religious marriage)—can then be issued in a number of cases. Law 898/1970 provides various grounds for a spouse to apply for the dissolution of his/her own matrimony; Article 3 comprises a peremptory list of legal grounds for matrimonial dissolution.[72]

[64] And the mutual separation agreement submitted by the parties must contain both spouse's consent to their separation and provisions regarding children and the maintenance of the economically weaker spouse.

[65] Accordingly, the spouse's consent is revocable until the judge's homologation. See i.a. Court of Cassation—hereinafter Cass.C.—No 740 of 3 March 1936, FI, 1936, I, 518; Cass.C. No 940 of 18 March 1940, GI, 1940, I, I, 482; Cass.C. No 1542 of 4 May 1942, GI, 1943, I, I, 43; Cass.C. No 2374 of 21 July 1971, MFI, 1971; Cass.C. Sez.Civ. No 4079 of 13 July 1979, FI, 1979, I, 2611; Cass.C. Sez.Civ. No 589 of 30 August 1993, FI, 1994, I, 589; Cass.C. No 8516 of 12 April 2006, NGCC, 2007, I, 372.

[66] Consequently, the spouse's consent is irrevocable. See i.a. Cass.C. 08.03.1995 No 2700, DFP, 1995, 1390; Cass.C. No 14 of 05 January 1984, DFP, 1984, 473.

[67] Giuseppe Buffone, 'Le nuove norme processuali in materia di persone, minorenni e famiglia (d.lgs. no 149/2022): prime letture sintetiche' (*Giustizia Insieme*, 8 February 2023) <https://www.giustiziainsieme.it/it/riforma-cartabia-civile/2646>

[68] By art 3, Law 898/1970, see Section 3.B.

[69] See Section 2.A.

[70] The right to request judicial separation or confirmation of consensual separation belongs exclusively to the spouses (art 150(3) ICC).

[71] Scholarship and judiciary debated the objective or subjective nature of this intolerability. The theory of objective intolerably of spouses' cohabitation appears to be widely supported. See i.a. Cass.C. No 3637 of 9 August 1977, DFP, 1978, 132; Cass.C. Sez.Civ. No 5752 of 8 January 1979, MGI, 1979, 1422; Cass.C. Sez.Civ. No 67 of 10 January 1986, DFP, 1986, 487; Cass.C. Sez.Civ. No 4920 of 26 May 1990, RFI, 1990, 41; Cass.C. Sez.Civ. No 7148 of 10 June 1992, MGC, 1992; Cass.C. Sez.Civ. No 6566 of 17 July 1997, DFP, 1998, 82.

[72] See Section 3.B.

In line with the extension of party autonomy and the increase of non-judicial and non-adversarial processes characterizing European national legal scenarios, extra-judicial procedures have then been introduced in Italy also with respect to family matters. More specifically, in 2014, some privatized separation and divorce methods enriched the matrimonial dissolution paths a couple can follow on Italian soil. Two alternative dispute resolution formulae not involving the judiciary have therefore been introduced for partners who agree to separate, to divorce, or to amend the conditions governing their former separation or divorce.

The partners can thus stipulate 'an accord to reach a consensual solution'—with or without legal assistance—and submitting it to a public official, namely the civil registrar (ie, the mayor) as a *condicio iuris*.[73] Only if and when the parties confirm the consensual solution (*accordo*) formerly reached, their agreement acquires the same effectiveness as the corresponding judicial decision. As an alternative, the partners can rely upon an option called 'legally assisted negotiation agreement' (*convenzione di negoziazione assistita*) involving at least one lawyer per party,[74] in case they consent to cooperate in good faith and with integrity in order to solve the litigation in a friendly manner.[75] As a result, it has been underlined that 'separation and divorce can now be the subject of agreements substantially similar to contracts'.[76]

In real terms, as this article demonstrates, the above-described options can accommodate some specificities characterizing Muslim spouses. Accordingly, a couple whose marriage is also valid at civil effects on Italian soil—being their nuptial union a recorded religious marriage, or a marriage perfected in an MMC or its diplomatic premises on European soil—is given the opportunity to finalize a legally binding *sharīʿah*-compliant divorce agreement, provided this does not clash with public policy, constitutional principles and human rights.[77] In this way, Muslim partners may reconcile the religious dimension of their divorce with the civil one.

Secondly, this reform encompasses a procedure that might reconcile the Islamic legal waiting period (*al-ʿiddah*) with domestic provisions. In case of consensual solution submitted to the civil registrar, the partners are indeed asked to confirm the reached agreement at least thirty days after the first meeting. The length of this legally prescribed period of reflection (*periodo di riflessione*)—being agreed upon by the civil registrar and the parities—can theoretically be extended to match the length of the legal waiting period as prescribed by Islamic law. This possibility may thus accommodate Islamically inspired provisions into the Italian framework, also facilitating the social (and legal) recognition of these agreements in MMCs, should one or both spouses be foreign nationals.[78]

[73] This only applies in case the spouses did not parent any children who are not yet of age, or who are of age but have serious disabilities, or are not financially independent. See art 6, Law 162/2014.

[74] Originally, art 6 Law Decree No 132 of 12 September 2014. Only one lawyer could assist the parties in drafting this agreement (art 12); this has been changed by Law No 162 of 10 November 2014 (GU SG 261 of 10 November 2014, SO 84) from 11 November 2014.

[75] Art 6(2) Law Decree 132/2014. The agreement reached has to be sent to the public procurator of the competent tribunal, who is responsible of checking the regularity and, in case of underaged children or adult-dependent children, verify the provisions concerning the offspring.

[76] Emanuele Tuccari, 'A New Italian Family Law?' (2017) 11 Pòlemos 327, 335. These agreements will nonetheless need to be compliant also with EU Regulations. See Costanza Honorati and Sara Bernasconi 'L'efficacia cross-border degli accordi stragiudiziali in materia familiare tra i regolamenti Bruxelles II-bis e Bruxelles II-ter' (2020) 2 Freedom, Security and Justice: European Legal Studies 22.

[77] It is worth mentioning that purely private divorce formulae (with no public authority control, as ruled by the European Court of Justice (First Chamber Judgment) of 20 December 2017, *Soha Sahyouni v Raja Mamisch*) are excluded from the scope of the so-called Brussels II-bis EU Regulation. See Sabine Corneloup (ed), *Droit Européen du Divorce. European Divorce Law* (LexisNexis 2013).

[78] On the highly problematic legal recognition of extra-judicial divorce procedures in Morocco, see n 25.

B. Fast divorces, immediate divorces, and MMCs' national spouses

To date, the most common divorce scenario in Italy remains the untying of the matrimonial knot when the spouses have been legally separated for a certain period of time, according to certain conditions. The marriage dissolution law requires either that the spouses' judicial separation has been granted and became *res judicata*, or that the spouse's consensual separation has been homologated.[79]

Originally, Law 898/1970 entailed the spouse's legal separation to have continuously lasted for at least five years before the dissolution of a civil marriage (or the cessation of the civil effects of a recorded religious marriage) could have been claimed, even in case of judicial proceeding eventually transformed into a consensual one. The limit was raised to six and seven years in some specific cases.[80] The time threshold to be met then became three years,[81] and this was further reduced to six or twelve months (depending upon consensual or adversarial procedures),[82] to the point that this formula is now informally labelled as 'fast' or 'quick' divorce (*divorzio breve*). The necessary time of legal separation has thus been significantly reduced from the original sixty months to a minimum of six months.

In spite of that, the separation continues to be considered as the almost always necessary "antechamber of divorce" (*anticamera del divorzio*). Despite being an institution unknown to Islamic law,[83] I maintain that legal separation may also accommodate a sort of extended version of the Islamic legal waiting period (*al-ʿiddah*). This argument rests on the fact that the marriage entered into by the partners is not immediately dissolved but somehow suspended since the spouses—who are still regarded as husband and wife—can potentially reconcile while being legally separated. The Italian legal separation thus entails what an Islamic scholar can describe as a 'revocable nature', and this can resonate the idea of *sharīʿah*-compliant revocability if freed from the element of gender imbalance.[84]

Notwithstanding legal separations being regarded as "divorce waiting-rooms", the possibility of recurring to a 'direct' or 'immediate' divorce (*divorzio diretto*) does exist in Italy.[85] The Italian legislator concedes the possibility to dissolve the marriage without being previously separated in the so-called 'criminal grounds for divorce' cases. These comprise situations in

[79] Art 3(2B), Law 898/1970 as modified. An additional option listed the possibility of the spouses' *de facto* separation lasting for at least two years before the Law 898/1970 came into force; in other words, two years before the 18 December 1970.

[80] The original provision stated: '[i]n the event of opposition by the respondent spouse, the above time limit is increased to seven years in the case of separation pronounced through the sole fault of the petitioner; to six years in the case of separation by mutual consent approved before the entry into force of this law or *de facto* separation'.

[81] Law No 74 of 6 March 1987 (GU, SG No 58 of 11 March 1987).

[82] Art 5, Law No 55 of 6 May 2015 (GU, SG No 107 of 11 May 2015). Today, art 3(2B) reads: '[. . .] for the purposes of applying for dissolution or termination of the civil effects of the marriage, the separation must have lasted uninterruptedly for at least twelve months from the date of the hearing where the spouses appeared in the legal separation proceedings, and for six months in the case of separation by mutual consent, even when the contentious proceedings have turned into a consensual separation, or from the date certified in the separation agreement reached following negotiation assisted by a lawyer, or from the date of the document containing the separation agreement concluded before the civil registrar'.

[83] As objected by some Muslim husbands when their wives were soliciting the application of Italian law to dissolve their marriage. See Sections 3.A and 4 and Section 6 below.

[84] According to classical Islamic law, only the husband is entitled the right to revoke a 'revocable divorce' during the legal waiting period. It should be mentioned that, differently from Islamic law, the period of legal separation does not expire in Italy, therefore the spouses' marriage is not immediately dissolved at the expiry of the *'iddah*. See n 59.

[85] Art 3, Law 898/1970 enumerate the options.

which a spouse has been subject to some criminal sentences for serious offences.[86] If and when one of the legally listed hypotheses happened, and the spouses interrupted the cohabitation after the defendant's serious offences or criminal behaviours, the other spouse is entitled to apply for the dissolution of the parties' civil marriage or the cessation of the civil effects of their religious matrimony. On that account, when serious crimes have been committed by a spouse, the other is entitled to petition for an immediate divorce.

The matrimonial tie can be dissolved without a prior legal separation between the partners when a spouse has been acquitted of the offences of incest or sexual violence mentioned by Article 3(1B, C) but s/he was found insane, and the court considers the respondent unfit 'to maintain or reconstruct the community of family life' (Article 3(2A)); or in case the crimes mentioned by Article 3(1B, C) have been found no longer punishable by reason of the limitation period; however, the judge entitled to the marriage dissolution regards as still subsisting the constitutive elements of the crimes and the spouse's liability to punishment (Article 3(2C)); incest has been found non-punishable by reasons of absence of public scandal (Article 3(2D)). In these extraordinary cases, the judge is given a wider discretionary power going beyond the black-letter law in order to adjust the provisions to actual situations and the real needs of the family.

Apart from the criminal law scenarios described above, a few more 'direct-divorce options' exist: in addition to the spouse's sex change,[87] and the marriage non-consummation (Article 3(2F)), specific courses of action are prescribed for foreign spouses. In effect, a marriage annulment or matrimonial dissolution obtained by a foreign spouse abroad, or a new marriage entered into by the foreign spouse abroad, are all grounds for an immediate divorce procedure. In the past, this last option proved to be specifically relevant in avoiding the so-called "limping" nuptial statuses when the Islamic repudiation between the spouses, as issued abroad in an MMC, was not recognized as valid by the Italian judiciary.[88] Accordingly, the Italian national (usually, a woman) could have legally claimed the immediate dissolution of the marriage, having his/her spouse obtained a *sharīʿah*-compliant divorce abroad.[89] The fact that a spouse had contracted a fresh marriage was even regarded as the ground to foster the recognition of a definitive divorce-repudiation (*ṭalāq*) formalized by Egyptian authorities upon request of an Italian-Egyptian man.[90]

[86] In other words, a spouse has been sentenced to life imprisonment or imprisonment for a term exceeding fifteen years for a crime committed before or after the marriage ((art 3(1A)); or has been sentenced to imprisonment for incest (art 564 IPC) or sexual offences regulated by arts 519, 521, 523, 524 IPC or offences related to prostitution (art 3(1B)); or has been sentenced to any penalty for voluntary homicide/wilful murder against his/her child(ren), or attempted murder against his/her child(ren) or his/her spouse (art 3(1C)); or has been found guilty on two or more counts of offences involving personal injuries, ill-treatment or neglect of his/her spouse or his/her child(ren) according to arts 582, 583, 570, 572, 643 IPC (art 3(1D)).

[87] Art 3(2G), Law 898/1079 as introduced by Law No 164 of 14 April 1982 (GU, SG No 106 of 19 April 1982).

[88] Accordingly, a special provision had been purposely included the possibility of a spouse applying for the dissolution of his/her marriage or the cessation of the civil effects of the marriage when the other spouse—a foreign national—obtained an annulment or a dissolution of the marriage abroad or s/he has contracted a new marriage abroad (art 3(2,E), Law 898/1970). Further details in Federica Sona, 'Defending the Family Treasure Chest: Navigating Muslim Families and Secured Positivistic Islands of European Legal Systems' in Prakash Shah, Marie-Claire Foblets and Mathias Rohe (eds), *Family, Religion and Law: Cultural Encounters in Europe* (Ashgate 2014) 115–41, 129–32. Also, see n 8.

[89] Eg, Trib.Cremona 27.03.1973, RDIPP 1974, 307.

[90] Court of Appeal of Cagliari 16 May 2008, RDIPP 2009, 647. See also Adina Barbu, 'Compatibilità del Ripudio-divorzio Islamico e Ordine Pubblico Italiano' (2009) 2 Rivista Giuridica Sarda 311.

When husband and wife are nationals of foreign countries, further options do exist.[91] The Italian statute on private international law established that legal separation and marriage dissolution are to be governed by the common national law of the spouses.[92] Consequently, a married couple of foreign citizens—who were national of the same country—was allowed to petition, before an Italian tribunal, an immediate divorce as regulated by the laws of their own national legal system.

The European Union (EU) rules on conflict of laws then took precedence over domestic rules of private international law. Consequently, spouses are entitled to choose the applicable law (*optio legis*) provided that it is: the law of the Member State in which both partners are currently living; or the law of the state where the partners were last jointly resident, insofar as one of them still resides there at the time of the agreement; or the law of the state of nationality of either partner at the time the agreement is concluded; or the law of the forum. In the absence of agreement on the applicable law, the above connecting factors are applied in hierarchical order.

As a result, providing for a choice of law agreement, EU law is also indirectly facilitating the accommodation of Islamically inspired provisions within the framework of the domestic jurisdictions of Member States. The push towards privatization in family matters also at the EU level (granting the choice of applicable matrimonial dissolution law to disputing partners) can nonetheless impede a spouse to claim the application of an immediate (Islamically compliant) divorce in case the other party disagrees or if the respondent remains absent.[93]

According to Italian law, until October 2022, in the absence of the spouses' common national law, their separation and divorce were ruled by the law of the state where the couple's matrimonial life has been predominantly located.[94] Italian law was then applied when the spouses' foreign national laws made no provisions for personal separation and matrimonial dissolution.[95] As a result, the application of Italian laws could have been demanded by a foreign national married either to an Italian citizen or to a citizen of another country, who was willing to separate or dissolve his/her marriage.[96]

Law 218/1995 (Article 32) indeed recognizes a special jurisdiction to Italian tribunals in events related to ending matrimonial life. Nationality was, however, not the sole connecting factor establishing the jurisdiction in a potentially transnational dispute. The general principle was that, albeit his/her own citizenship, when the respondent is domiciled or resident in Italy, then the Italian tribunals represent the competent jurisdiction.[97] Accordingly, in case

[91] When certain requisites are met, foreign spouses can also dissolve their marriage in the diplomatic premises of their country of origin, or claim the recognition of a *sharīʿah*-compliant divorce issued abroad. For a discussion on the debated recognition and/or registration at civil effects of *ṭalāq* in Italy, see Federica Sona, 'Paths to (In)justice? The Interplay between Sharīʿah Tribunals and Public Policy' in Mavis Maclean and Rachel Treloar (eds), *Research Handbook on Family Justice Systems* (Edward Elgar 2023) 229 and Sona (n 21).

[92] Also, art 3(2), Law 218/1995.

[93] As also confirmed in the first decision on the so-called Rome III EU Regulation as issued by the Court of Justice of the European Union (First Chamber) on 16 July 2020 in *JE v KF* (case C-249/19 JE). For a commentary see i.a., Costanza Honorati, 'La prima decisione sul Regolamento Roma III e la legge italiana sul divorzio: le difficoltà del giudice straniero il cui ordinamento non conosca l'istituto della separazione legale' (2021) 6 European Papers 29.

[94] Arts 29(2) and 31(1), Law 31.05.1995 No 218, GU 3.06.1995 No 128 SO.

[95] Art 31(2), Law 218/1995.

[96] Ethnographic researches conducted by the author confirmed that this possibility remained unknown to the majority of Muslim migrants, and lawyers often required more than one meeting with their clients to explain the possibility to apply Italian laws to case scenarios in which Muslim women were willing to dissolve the marriage they formerly contracted in an MMC.

[97] Art 3(1), Law 218/1995.

the respondent has established the principal centre of his/her business and interests in Italy or has his/her habitual abode in Italy, then the Italian jurisdiction is recognized.[98]

Since the Autumn of 2022,[99] legal separation and matrimonial dissolution have been governed by the law designated by the so-called Brussel II-bis, namely the EU Council Regulation on enhanced cooperation in the area of the law applicable to divorce and legal separation, as amended.[100] The partners continue also to be granted the possibility to designate the applicable law by mutual agreement in writing.[101] Foreign spouses can therefore require the application of foreign Islamically inspired laws, and the cases where the Italian judiciary implements foreign laws include the possibility of an immediate divorce.

4. DIVORCING MOROCCAN STYLE

While legally permitted at domestic and international levels, the possibility of obtaining a *sharīʿah*-compliant divorce in Italy began to stir a heated debate on the occasion of a widely media-reported decision issued by the Tribunal of Padua.[102] The legal proceeding concerned a Moroccan man and an Italian/Moroccan woman[103] who did marry and habitually resided in Italy, before filing a joint petition for divorce in application of the Moroccan Family Law before the Padua Tribunal in 2017. The spouses' request encompassed a 'direct-divorce procedure', the *Mudawwanah* allowing for the immediate divorce without a previous period of legal separation, in addition to a lump sum payment made by the husband to the wife as a spousal maintenance claim.[104]

Having been Italy the place of habitual residence of both spouses since before the marriage, the Tribunal retained its jurisdiction on the case.[105] Then, the judge applied Moroccan

[98] Art 43 ICC. The aforementioned 'exorbitant' competence rules are understandable when seeing the jurisdiction as an expression of the state sovereignty. Accordingly, a state tends to overflow its national borders when regarding its own judges' competence over some issues. Family matters, in particular, represent a special chest that states are willing to protect not only with legal provisions but also by extending the scope of the application of their domestic jurisdiction. The aim is indeed to help the state citizens to dissolve their own marriage regardless the provisions of a foreign national legal system where the spouses might live. In addition, a sort of 'right to divorce' is recognised even to foreign couples domiciled or resident in Italy. See Tito Ballarino, *Manuale breve di diritto internazionale privato* (3rd edn, CEDAM 2008) 155–56; Tito Ballarino and Andrea Bonimi, 'The Italian Statute on Private International Law of 1995' (2000) II Yearbook of Private International Law 99.

[99] Art 31(1-2), Law 218/1995 as amended by arts 29(2) and 35(1) of Legislative Decree No 149 of 10 October 2022 (GU No 243 of 17 October 2022, SO 38), and by art 1(380, A), Law No 197 of 29 December 2022 (GU No 303 of 29 December 2022, SO 43).

[100] EU Council Regulation No 1259/2010 of 20 December 2010 (OJ Law 343, 29 December 2010, pp 10–16).

[101] Within the meaning of art 5, EU Regulation 2010/1259; also art 31(2), Law 218/1995.

[102] Trib.Padova, I civ., 8 September 2017. Amongst the journal scoops, see 'Divorzio immediato, applicabile la legge straniera' (*Il Sole 24 Ore*, 4 October 2017); 'Padova, sì del giudice al divorzio alla marocchina' (*Il Corriere della Sera*, 7 October 2017); 'A Padova il primo "divorzio marocchino" riconosciuto in Italia' (*L'Huffington Post*, 7 October 2017); 'Sì al divorzio "marocchino": siamo sempre più islamizzati' (*Il Giornale*, 8 October 2017); as reported in Mario Ricca, 'Divorzi diversi e geografia giuridica interculturale. Il "termine" mobile del matrimonio' (2017) Calumet, Intercultural Law and Humanities Review 1-32.

[103] The details about the parties' nationalities are reported in Joëlle Long, 'Islam e diritto della famiglia e minorile: spazi e limiti di dialogo' (2019) I Quaderni di Diritto e Politica Ecclesiastica 111, 120.

[104] See Sections 2.A and 3.B.

[105] Compliant to art 3(1A), Regulation (EC) No 2201/2003; this is the so-called Brussels II-bis or IIA Regulation. It should be mentioned that for proceedings started on or after 1 August 2022, Brussels IIA Regulation has been replaced by Council Regulation (EU) No 2019/1111; namely, the Council Regulation (EU) 2019/1111 of 25 June 2019 on (Official Journal L 178, 2.7.2019, 1–115), which is called 'Brussels IIB' Regulation).

law being the national law of either spouse at the time the agreement was concluded (as provided by EU norms),[106] and being the *Mudawwanah* the law to be applied to 'all Moroccans, including those with another nationality', as provided by the relevant Moroccan law.[107]

The Italian judge further elaborated her intention to apply Moroccan law to the parties' personal and financial relationships. First, the Padua Tribunal referred to and applied Article 114 MM providing for the divorce by 'mutual consent' (*al-ṭalāq al-ittifāqī*). Given that the relationship had irretrievably broken down—as ascertained by the President of the Tribunal—the judge 'declared the divorce between the spouses'. Furthermore, the Tribunal stated that the *Mudawwanah* had to be applied also to the financial relationships between the partners. Accordingly, the judges homologated the parties' agreements according to which the woman received 2000 euros including all possible spouse's economic divorce-related claims in compliance to Italian and Moroccan laws.[108] Article 114(1) MM, indeed, allows for the spouses to mutually agree on the principle of ending their conjugal relationship with conditions, 'provided that the conditions do not contradict the provisions of this *Mudawwanah*, and do not harm the offspring's interests'.

In the present case, the Italian judiciary and the parties' lawyers showed confidence in implementing the foreign Islamically inspired norms also when listing the claims that could have been put forward by the Moroccan woman. The proceeding in effect lists '*dono di consolazione, ṣadāq e mantenimento per il periodo legale*', and these terms correspond (although reported in a different order) to 'the amount due to the wife' as enumerated by Article 84(1) MM. In Morocco, the divorced wife is indeed to be granted the right to the remaining part of her nuptial gift (*al-ṣadāq al-muʾakhar*) as declared in the spouses' marriage contract, in addition to maintenance and housing during the Islamic legal waiting period. In the case of *ṭalāq* procedures, then a once-only financial compensation sometimes called 'consolation gift' (*mutʿah*) should be provided if the marriage has been consummated. Its amount is to be established by the judiciary according to the duration of the marriage, the financial means of the husband, the motives for divorce and the degree of arbitrariness manifested by the husband in relation to divorce.[109] Issues were nonetheless raised since the Italian judges failed to provide a complete cross-normative translation in relation to the ex-spouses' financial rights, as provided for by Italian and Moroccan laws.[110]

The above-discussed legal proceeding before the Tribunal of Padua was followed by two decisions whose outcome was also highly contentious and broadly reported in the news. These are the judgments issued by the Tribunal of Bologna in May 2017 and by the Tribunal of Bergamo in February 2019.[111]

Similar to the Padua case, the legal proceedings before the Tribunal of Bergamo concerned a joint petition for divorce in the application of the *Mudawwanah* filed by two Moroccan nationals.[112] The so-called 'direct' or 'immediate' divorce was granted by the Italian judiciary to the parties. In addition, the Tribunal applied the Moroccan Family Law

[106] Compliant to art 5(1)(c), Council Regulation (EU) No 1259/2010 'implementing enhanced cooperation in the area of the law applicable to divorce and legal separation'; this is the so-called Rome III Regulation.

[107] Compliant to art 2(1) MM; see Section 2.A.

[108] Although not explicitly mentioned in the ruling, the Italian relevant provision is art 5(8), Law 898/1970 providing for the so-called *assegno divorzile.*

[109] Nössing (n 17) 52–53). See also Sections 5.A to 6.B.

[110] Ricca (n 102) 18. On the wives' entitlement to *mutʿah*, see Section 6.

[111] I was impeded to access the original case-file; therefore, I am here referring to the details reported by Livia Alulino, 'Divorzio secondo il diritto marocchino: un recente caso di applicazione in Italia. Nota a Tribunale di Bergamo, 04/02/2019, n. 300/2019' (2019) Familia 1-2.

[112] No 300/2019, 4 February 2019.

also with regard to the offspring's custody and maintenance. Accordingly, the custody of the children was awarded to the mother (Article 171 MM), and the father was deemed to pay 500 euros as children's maintenance (Articles 189 and 198 MM), custodian salary, and expenses (Article 167 MM).

Despite the media-generated problematization of this decision, financial claims between the parties and child's maintenance had been formerly regulated by Moroccan law -as interpreted and applied by the Italian judiciary- in a former and similarly highly debated legal proceeding. This case was filed before the Tribunal of Bologna and regarded a Moroccan woman married to a Moroccan man. Having been victim of violence and abuse, the wife claimed the application of the *Mudawwanah*, more precisely of the provision concerning the 'judicial divorce for other causes' (Article 98 MM). The Bologna Tribunal entitled the mother to be entrusted with the child's custody (Article 171(1) MM), and imposed kinship maintenance to the father (Articles 198–202 MM). Besides, the Italian court also granted the woman the so-called 'consolation gift' (*mut'ah*) in addition to maintenance during the legal waiting period (*al-'iddah*), corresponding to the house rent to be paid for three months.[113]

5. NOTHING NEW UNDER THE SUN?

The three cases above-discussed raised media controversy as if they were revolutionary decisions; however, the Italian judiciary had been dealing with marriage dissolution claims implementing provisions of the foreign spouses' (*sharī'ah*-inspired) national legal system for a long time. It appears that these dynamics went merely unnoticed by the wider public, possibly because the relevant legal proceedings—particularly those concerning Muslim spouses—showed the tendency to remain unpublished and uncommented in legal journals.

Among the family laws reformed in MMCs, the Moroccan Code of Personal Status has been the foreign legislation mostly applied by Italian tribunals to foreigners or to spouses married to non-nationals.[114] One of the main reasons for this approach can be found in the compatibility between Moroccan and Italian normativities.[115] Furthermore, an early proceeding of the Court of Cassation asserted that the *Mudawwanah* does not violate the Italian *ordre public* and constitutional principles. In this labour law case,[116] the plaintiff's lawyer suggested to adopt the notion of international *ordre public* with reference to foreign laws, and the court eventually endorsed the mentioned approach. Accordingly, the application of foreign law in Italy is limited by the threshold of constitutional principles and human rights

[113] Clarice Carassi, 'Bologna, una sentenza sul divorzio applica le leggi del Marocco' *La Repubblica* (10 May 2017) <https://bologna.repubblica.it/cronaca/2017/05/10/news/non_solo_divorzio_all_italiana_cosi_a_bologna_si_applicano_le_leggi_del_marocco-165101342/>

[114] This statement is grounded on the examined data and the ethnographic researches personally conducted by the author during the years 2006–2012; 2014–2015; 2018–2022—partially supported by the Renato Treves Law and Society programme, the Incoming post-doctoral research fellowship (BDR 04/2015), and the Law & Anthropology Department of the Max Planck Institute for Social Anthropology—and also corroborated by statistical data. The large majority of Muslims foreigners (aged six years and over) residing in Italy were indeed of Moroccan nationality (34.8 per cent); followed by Albanian (15.3 per cent) and Tunisian (8.3 per cent) according to the data available in the examined period of time. See Istat, 'Appartenenza e pratica religiosa tra cittadini stranieri. Anno 2011-2012' *Statistiche Report* (2015), October, 1–9.

[115] See Sections 2 and 3. Accessibility is another impacting factor to be mentioned: the fact that a translation in French language of mentioned legislation had been made available by the Moroccan government also facilitates its application and implementation. See n 21.

[116] Cass.C. Sez.Lav. No 16017 of 19 July 2007, RDIPP, 2008, 44, 533. The plaintiff's lawyer quoted jurisprudence, however, is a labour law proceeding in which the foreign law has been applied to Italian citizens.

only, foreign provisions can therefore contrast with domestic provisions, and this principle can be relied upon even in the case of (immediate) divorce procedures.

The present section of the article investigates the first[117] (unpublished) seven petitions of marriage dissolution in compliance with the *Mudawwanah* submitted before an Italian court, namely the Tribunal of Torino.[118] Six decisions were issued applying the Moroccan Family Law, whereas one couple eventually reconciled. In this last case, the Islamic divorce that occurred between the parties was thus not homologated by the Italian tribunal in implementing the foreign Islamically inspired law, since the partners reconciled within the Islamic legal waiting period (*al-ʿiddah*).

All seven cases were related to Moroccan spouses who had contracted marriage according to Moroccan law and settled in Italy, where the woman eventually applied for a marriage dissolution before an Italian tribunal in compliance with Moroccan law. In four cases out of seven, the women claimed to be victims of abuse and domestic violence perpetrated by their husbands, who were either gamblers or addicted to alcohol and drugs. In one case, the Minors' Tribunal regarded the family home as prejudicial for the children. The scenario first faced by the Italian judiciary was thus of migrant family hardships and of people who have to endure discomforts and privations.[119] On that account, in five cases, the parties' family circumstances would have encompassed the 'divorce for other causes' as disciplined by the Moroccan Family Law; more precisely, matrimonial dissolutions in case of harm (Articles 99–101 MM), non-maintenance (Articles 102–103 MM), and abandonment (Articles 104–106 MM).[120] Nonetheless, the judiciary followed a different path, as elucidated further in the text.

Whereas the last judicial decisions reveal a stronger confidence in the Italian judiciary to interpret and apply the Moroccan Family Law, in these early cases, the Italian lawyers and judges referred to two sole typologies of divorces among the many listed by the *Mudawwanah*. These are the divorce for irreconcilable differences (Articles 94–97 MM, *al-taṭlīq li-l-shiqāq*) and the divorce by mutual consent (Article 114 MM, *al-ṭalāq al-ittifāqī*).

One might thus wonder if this "timid approach" to foreign *sharīʿah*-inspired provisions conceals an initial lack of confidence in interpreting foreign norms, or if this hides a sort of "unspoken respect" for more religiously based legal provisions disciplining other matrimonial dissolution formulae. In addition to those, I maintain that another explanation can be found in the divorce procedures—which might differ from the Italian ones—or in the pre-requisites—which can become arduous to satisfy when willing to implement some of these provisions. The judicial divorce for 'abstinence and abandonment' (Article 112 MM), for instance,

[117] According to the interviewed informants (judges and lawyers), these were the first submitted cases; I had no possibility to verify otherwise. The proceedings here examined were personally collected by the author and are numerated following the submission date of the application.

[118] This city was chosen because of the significantly high presence of Moroccan nationals and the early cases addressed by the local judiciary. According to the most recent statistical data available, for instance, whereas Moroccans amount to 8.4 per cent of foreign citizens in Italy, in the sole Piedmont region the percentage reaches 12.6 per cent. See Istat, 'Il Censimento permanente della popolazione in Piemonte. Anno 2020' *Censimenti Permanenti, Popolazione e Abitazioni* (2022), 31 March, 1–15.

[119] The described scenario is also reflected in Nezha El Ouafi, 'Dal Marocco all'Italia: l'applicazione della Moudawana in Piemonte' (2008) V Quaderni di Paralleli, Società e cultura 52. Muslim women might face abuse perpetrated by their husbands, extended family members, or even the wider community in other countries as well. In the UK, this would constitute abuse under the Domestic Abuse Act 2021; see Ghauri in this *Special Issue*.

[120] Ch II of the *Mudawwanah* includes also the divorce for latent defects (arts 107–111) and contemplates also the case of 'abstinence and abandonment' (art 112) and the one of harm caused by non-respect of the conditions reported on the marriage contract. See Section 2.A.

provides that the wife can petition the court when her husband abandons her; the court shall then set a deadline of four months and, if after this time the husband has not repented his oath, the court shall grant the divorce. It appears that the highly debated 2017 Bologna case specifically concerned the mentioned scenario[121]; however, it remains unknown whether the Italian tribunal did follow the procedure as precisely detailed in the Moroccan Family Law.

An accurate case-analysis documents an additional key-dynamic; namely, the heightened confidence in requesting the application of the *Mudawwanah* by domestic lawyers. Ethnographic and empirical observations disclose that this went hand in hand with the Italian judiciary becoming increasingly familiar with the Moroccan Code of Personal Status and some principles of Islamic law. Whilst only Articles 94 MM and 97 MM (judicial divorce on grounds of spouses' irreconcilable differences and related vested rights) were quoted by the first judges facing this matter, a wider array of Moroccan norms was relied upon by the Italian judiciary in later proceedings. These regard not only other divorce formulae, such as Article 98 MM (judicial divorce for other causes), Article 114 MM (divorce by mutual consent), Article 124 MM (revocable male unilateral repudiation), but also offspring's related provisions, such as Article 85 MM (vested rights due to dependent children), Article 180 MM (child visit), and Article 189 MM (child maintenance).

Furthermore, the examined legal proceedings reveal that the Italian judiciary became more assertive with regard to its jurisdiction and competence in the above-mentioned matters. Article 31 of Law 218/1995 was indeed constantly quoted in all the cases,[122] and the third judicial decision referred also to Articles 3 and 65 of Law 218/1995.[123] In the fifth case, the judges even drew a parallelism between the *Mudawwanah* (Article 171 MM) and the Italian rule of child's joint custody.[124]

The following subsections further explore these aspects, while elucidating the points here raised.

A. Strengthened confidence in applying the Mudawwanah

The first application filed in Turin regarded two Moroccan nationals, who did contract marriage in 1995.[125] Both migrated to Italy where two children were born in 1997 and 2003. In the Autumn of 2005, the husband abandoned the family home after the intervention of the Italian military police (*carabinieri*). As a result, in November 2005 the woman submitted a claim for marriage dissolution in compliance with the Moroccan Family Law while also filing charges against her husband. Almost three years later, in September 2008, the Torino Tribunal issued the matrimonial dissolution.

The wording of the judgement is particularly relevant. In point of fact, the Italian tribunal paraphrased Article 151 ICC concerning judicial separation in order to find grounds for application of the Moroccan 'divorce sought by either spouse for irreconcilable differences'.[126] Accordingly, the intolerable continuation of the spouses' cohabitation and the prejudice for

[121] See Section 4.

[122] With the exception of Trib.Torino No 304 of 2 December 2010, unpublished. Nonetheless, this judicial decision regards the family house and the child's maintenance and custody; while the marriage dissolution has been pronounced before with partial marriage dissolution decree pronounced by the judge on 14 July 2009.

[123] Trib.Torino No 8521 of 27 November 2009 unpublished.

[124] Trib.Torino No 304 of 2 December 2010, unpublished.

[125] It should be mentioned that the judicial decision of the first submitted application was issued after the second entry of judgment. This happened because the woman submitted the application and the husband proved to be uncooperative and guilty of judicial default. Accordingly, this couple's divorce proceeding lasted from November 2005 to September 2008.

[126] Trib.Torino No 6371 of 23 September 2008, unpublished, 1 and 4.

the child(ren) were referred to by the Italian judge in order to justify the application of Articles 94 and 97 of the *Mudawwanah*. These provisions specifically require the court to ascertain the existence of a persisting conflict between the spouses, then to attempt the parties' reconciliation in compliance to Article 82 MM, and eventually to grant divorce should the conflict between the spouses persist. Similarities between the Italian and Moroccan provisions on different institutes—respectively on judicial separation and on divorce on grounds of discord due to irreconcilable differences (*al-taṭlīq li-l-shiqāq*)—were therefore accurately identified and carefully stressed by the judiciary in this first case implementing Moroccan family provisions.

The second case claiming the application of the *Mudawwanah* in Turin was jointly filed by a Moroccan woman and her husband in May 2006, ten years after they had contracted marriage. Seven months earlier a decree of the competent Minors' Tribunal had established that the woman and her two children were to relocate to a shelter house since the family home had been accounted prejudicial for the couple's offspring.

Despite the documented hardship and the parties' differences, by the time of the application, the spouses agreed for a joint application for marriage dissolution in order to expedite an otherwise time-consuming and expensive procedure.[127] As a result, this petition became the first opportunity for the tribunal of Torino to apply Article 114 MM, providing for divorce by mutual consent (*al-ṭalāq al-ittifāqī*). In effect, the spouses declared to 'mutually agree on the principle of ending their conjugal relationship, in compliance with the text of the norm for the divorce by mutual consent of the Moroccan Family Code'. While ruling on the case, the judge referred also to other articles of the *Mudawwanah*. In particular, Articles 85, 180, and 189 were relied upon to justify the vested rights (ie, the maintenance, in the Italian legal system) due by the father to his children. Almost two years later, in March 2008, the tribunal issued the 'dissolution of the civil marriage between the spouses'.[128]

The third application was filed by a Moroccan woman in 2008. She married a Moroccan man in Morocco in 1983. Five years later, the husband pronounced a revocable *ṭalāq* in Morocco, but then he exercised his right of revocation within the limit prescribed for the legal waiting period (*al-ʿiddah*). In 2000, the husband moved to Italy and, six years later, he claimed family reunification with his wife and his daughter (born in 1996), whilst the couple's son (born in 1986) stayed in Morocco.

Facing non-maintenance and domestic violence by a man who proved to have become addicted to alcohol and drugs, the wife submitted an application for matrimonial dissolution in compliance to the *Mudawwanah* in May 2008. The first hearing was attended by the husband who claimed of having failed to contribute to the wife's alimony and children's maintenance because of his criminal convictions, while also stressing not to agree with the issuing of the divorce sought by his spouse. The husband was then guilty of judicial default in the following hearings.

The Turin Tribunal first asserted its jurisdiction in ruling the case,[129] then it concentrated on the validity of the marriage between the parties. Building upon the lawyers' argument, the judge demonstrated a good knowledge of Islamic provisions and Moroccan laws by clarifying that the partners were validly married according to Italian law[130] since the husband had revoked his wife's repudiation (*al-ṭalāq*) within the Islamic legal waiting period as disciplined by Article 124 MM. In November 2009, the Tribunal of Torino issued the 'dissolution of the

[127] Regarding the lengthy Italian legal proceedings, see Sections 2.A and 2.B.
[128] Trib.Torino No 3283 of 26 March 2008, unpublished.
[129] On the grounds of arts 3 and 31, Law 218/1995.
[130] In compliance with art 65, Law 218/1995.

civil marriage between the spouses' by applying the foreign *sharīʿah*-compliant formula of judicial divorce on grounds of discord (*al-taṭlīq li-l-shiqāq*).[131]

In September 2010, the Turin judiciary issued the fourth judicial decision applying foreign *sharīʿah*-inspired family provisions. This case scenario is peculiar since the couple managed to never physically travel to Morocco not only to contract their marriage, but also to dissolve it, and both the tying and the untying of the matrimonial knot had been perfected in compliance with Moroccan laws. As a matter of fact, in June 2006, these Moroccan nationals had married in the Moroccan diplomatic premises in Italy. Then, in July 2009, the woman applied for marriage dissolution in compliance with the Moroccan Code of Personal Status before the Turin Tribunal.

The judiciary was careful in elucidating that the Moroccan norms were regarded as being applicable to the case at stake since both spouses were Moroccan nationals,[132] and these provisions were compatible with the principles of the Italian *ordre public*,[133] as formerly clarified by the Court of Cassation.[134]

With respect to the implemented matrimonial dissolution formula, other options could have been chosen since the husband remained guilty of judicial default[135]; nonetheless, the court dissolved the foreign spouses' marriage relying upon Articles 94 and 97 of the *Mudawwanah* therefore providing for the divorce for irreconcilable differences. The exact wording clarified that the spouses' marriage dissolution was issued on the grounds of the 'collapse of the communion of life between the spouses'.[136] Albeit applying Moroccan law, the lexicon of the Italian tribunal referred directly to the terminology used by Italian provisions on matrimonial dissolution, rather than to the 'impossible reconciliation' and 'the persistent conflict between the spouses' which are required by Article 97 MM. It is thus worth highlighting that, in this case, the transplant of the foreign norms implied some sort of translations into legal concepts closer to the frame of mind of the Italian legislator.

In the sixth judicial decision, conversely, the divorce pre-requisites listed by Article 97 MM (namely, impossible reconciliation between the parties and persisting conflict between the spouses within a deadline of six months) are reported correctly in granting the marriage dissolution to the Moroccan spouses.[137] Besides, in this proceeding the Tribunal of Turin referred also to Article 98 MM—ie, 'judicial divorce for other causes'—on the grounds that the husband proved not to have respected his maintenance obligations towards his wife and he had been absent from the family home. This clearly indicates a more thorough understanding of the foreign Islamically inspired provisions.

At first sight, it might be objected that the Italian judges could have referred directly to Articles 102–103 MM regarding maintenance and to Articles 104–105 MM concerning spouse's absence, but they failed to do so. Nonetheless, a careful reading of the legal proceedings indicates that this path might have been a precise choice of the petitioning wife. In effect, Article 104 MM expects the husband to be absent from the conjugal home for more than one year before allowing the wife to petition for divorce on this ground. In this case, instead, the husband had left the family home during the year 2008 and the wife's application

[131] Trib.Torino No 8521 of 27 November 2009, unpublished.
[132] Art 31, Law 218/1995.
[133] Art 16, Law 218/1995.
[134] To corroborate its argument, the Tribunal quoted Cass.C. No 16978 of 25 July 2006, RDIPP, 2007, 43, 432.
[135] See Section 5.A.
[136] See Trib.Torino No 304 of 2 December 2010, unpublished, 3.
[137] See Trib.Torino No 889 of 17 January 2011, unpublished, 3.

for divorce was submitted as early as January 2009; as a result, satisfying the time requirement might have not been possible.[138]

An additional element is worth noticing. This case clearly demonstrates the acquired confidence of the Italian judiciary in dealing with the *Mudawwanah* also in relation to the overall duration of the proceeding, which was much faster, eventually lasting less than eight months.[139]

B. "Gendered readings" of relevant normativities

A close examination of the legal proceedings allows for the observation and analysis of a subsidiary relevant dynamic that specifically concerns the 'gendered readings' of normativities as advanced by Muslim disputing partners.

When embracing a gender perspective, it first emerges that the competence of the Italian judiciary was recognized more by Muslim migrant women, rather than by their husbands. Amongst the six cases eventually ruled upon by the judiciary, only one was divorce by mutual consent.[140] In effect, the Moroccan husbands showed the tendency of being guilty of judicial default when not contesting the Italian jurisdiction. A scenario that appears to be changed in light of the most recent cases, although this is mostly justified by reasons of judicial economy.[141]

From an intersectional angle of analysis, specific attention deserves the fifth case that was submitted before the Tribunal of Turin. As a precursor of the highly contentious and widely debated more recent legal proceedings,[142] it demonstrates that Moroccan provisions were indeed relied upon by the judiciary when promulgating decisions about the spouses' immediate divorce along with child's custody matters.

The socio-legal scenario is similar to the ones examined before. A Moroccan woman submitted the application for her marriage dissolution before the Turin Tribunal in June 2008. The husband was first guilty of judicial default; soon after, the Moroccan man petitioned for the joint custody of the couple's children in compliance with Italian laws. This indicates that, in this peculiar case, the husband claimed protection under Italian laws, while the Italian judges were applying Moroccan provisions to dissolve his marriage at his wife's request. The judicial dissolution of the Moroccan spouses' marriage was issued with a decree pronounced by the Italian judge in July 2009; whilst other matters concerning the daughters' maintenance, their custody and the father's right to visit continued to be debated between the parties before the competent courts.[143]

The tribunal eventually resolved that Article 171 MM was to be applied to the disputed matters: the '[c]hild custody shall be awarded first to the mother, then to the father, then to the maternal grandmother of the child', reported the Turin Tribunal by literally quoting the relevant Moroccan provision. Accordingly, the mother was eventually awarded custody of the couple's two daughters. The judges supported this decision with two main arguments. First, this foreign provision does not contradict the Italian public order since it does not

[138] A different approach was adopted by the court in 2015; see Section 6.

[139] The application was indeed submitted on 20 January 2009 and the judicial decision of marriage dissolution was issued on 17 September 2009; Trib.Torino No 889 of 17 January 2011, unpublished. With regard to the lengthiness of Italian legal proceedings even after the introduction of the so-called 'fast divorce', see Giuseppe Buffone, 'Il cd. divorzio breve (l. 6 maggio 2015, n. 55)1', *Diritto della Famiglia e dei Minori*, (2015) 30 October, 1–8.

[140] Trib.Torino No 3283 of 26 March 2011 unpublished.

[141] The length of the legal proceedings and the related financial costs are indeed impacting on the parties' choice of divorce formula. See Sections 3.B and 5.A.

[142] See Section 4.

[143] Trib.Torino No 304 of 2 December 2010, unpublished.

violate any constitutional norms regarding fundamental rights.[144] Secondly, this decision was compliant with the Italian principles of disciplining parental joint custody on the grounds that both the father and social services had failed to provide evidence supporting the father's possibility to exercise the daughters' custody in the interest of the children.[145]

The aspect of Moroccan husbands petitioning the application of Italian laws not to lose the custody of their children is particularly relevant in highlighting the attitude of Moroccan men and women in relation to the Italian judiciary. Moroccan women tend to feel more protected, and perceive a wider respect of their rights, when a marriage is dissolved by the Italian legal system, or when Moroccan law is applied by the Italian judiciary in dissolving their marriages. Moroccan men, instead, proved to be inclined in developing a paradoxical attitude. In other words, when Moroccan women reveal to be skilled legal system navigators, their husbands defence strategy becomes three-fold—either they can deny the Italian jurisdiction over the case (in favour of the Moroccan one), or they can remain guilty of judicial default, or they can petition the application of Italian legal provisions to their case rather than Moroccan norms.

Thoroughly investigating these dynamics, it is revealed that, when the case is already initiated by the wife before the Italian judiciary, Italian norms appear suddenly preferable to Muslim men rather than the *sharīʿah*-inspired family laws of their MMC of origin as implemented by the Italian judiciary. If traditional Islamic provisions recognize a wider spectrum of rights and possibilities to Muslim men than to women,[146] and if judges in MMCs may show a higher level of conservatism, when European judges are applying Muslim family laws, their interpretation of foreign *sharīʿah*-compliant norms have the tendency to do so in light of domestic provisions. The outcome of a legal proceeding, before an Italian judge implementing Moroccan laws, is thus not as restrictive as it would be in some MMCs. As a consequence, in these situations—mostly *litis pendentia* cases impeding them to initiate a procedure in Morocco—Muslim men can favour the application of European domestic laws, which have the tendency to extensively grant equal rights to men and women, also with regard to children's custody and maintenance.[147]

The above-painted counterintuitive scenario challenges the narrative depicting Muslim women as weaker family members, whose only hope is recurring to *fatāwā*-issuing Islamic bodies,[148] while fostering the representation of these socio-legal actors as skilled normative systems navigators, even when being victims of domestic abuse but supported by appropriate legal advice.

6. EVOLVING LEGAL VOCABULARY AND DIVERGENT IMPLEMENTATIONS IN ITALY AND MOROCCO

When carefully reading the decisions issued by the very same court on similar proceedings over a period of time, another interesting aspect surfaces; this specifically regards the legal lexicon adopted by the Italian judges. Focusing on the Tribunal of Turin, I indeed observed changes in the legal vocabulary relied upon by the domestic judiciary.

[144] The Tribunals was thus indirectly referring to the Court of Cassation case above-mentioned; see n 134.
[145] See Trib.Torino No 304 of 2 December 2010, unpublished, 4.
[146] Although legislations and codifications in different MMCs aims at balancing the rights of men and women.
[147] See Section 7.
[148] See n 5.

In particular, it emerges that in the second and in the third analysed cases[149] the judges carefully issued the dissolution of the *civil* marriage only between the foreign spouses. The Italian judges thus indirectly recognized what we can define as their "secular jurisdiction only", albeit they were interpreting and implementing foreign *shari'ah*-inspired laws. In a sense, I maintain that the Italian tribunals seem to indirectly stress that only the aspects linked to codified foreign laws—rather than Islamic principles—can be applied and implemented by the Italian judiciary.

When looking at the three more recent judicial decisions examined above,[150] the Torino Tribunal is, however, reporting the expression *scioglimento del matrimonio*, which means matrimonial dissolution. Accordingly, we might wonder if this wording conceals an indirect claim of recognition of the Italian decisions in the MMC of origin of the ex-spouses. In real terms, in the third application, the petitioner's lawyer referred also art.128 MM with the aim of underlining that the Moroccan legal system shall recognize foreign judicial decisions on marriage dissolution, under certain circumstances.[151] In spite of that, when issuing its decision, the tribunal did not take up the argument of reciprocal acknowledgement and recognition between the Italian and the Moroccan legal systems.

Despite the efforts made by the Italian judiciary, the actual response of Moroccan authorities in recognizing the validity and effects to Italian judicial decisions applying the *Mudawwanah* in the spouses' country of origin remains unknown and would require further research. It should however be mentioned that, in the past, the Moroccan Supreme Court (No 90, 24 January 2001) refused to recognize a foreign divorce judgment on the grounds that it had not been issued by a Muslim judge, or that it had not been issued in the name of a supreme authority such as a king.[152]

With regard to the changes in the legal vocabulary relied upon by the Italian judiciary, a careful study of unpublished judicial decisions of the very same tribunal unveils additional interesting developments. In a case decided in April 2015, by way of illustration, the Turin Tribunal specifically provided that the parties can require to dissolve their marriage in compliance with Moroccan law 'allowing divorce request without previous separation'.[153] The case concerned a couple of Moroccan nationals who, after having met each other in Italy, travelled to Morocco to marry there in 2007 and relocated together to Italy, where they also parented two children. When the woman filed the application for matrimonial dissolution before the Italian court in May 2012, her husband remained guilty of judicial default. Possibly due to their lawyers' mediation and in order to expedite their divorce procedure while minimizing the financial costs, the spouses eventually agreed to jointly require an immediate divorce according to the *Mudawwanah*.

The tribunal did not explicitly refer to any chosen Moroccan divorce formulae in its ruling, however, in issuing the dissolution of the marriage, it expressly mentioned the 'request for divorce without previous separation'. This lexicon is actually to be found in the party's pleading, where the woman's lawyer had originally requested the application of the 'divorce by discord' (Articles 94–97 MM). The party's claim was precisely grounded on principles of international publicity,[154] in addition to the fact that, formerly, the very same court 'had

[149] Trib.Torino No 3283 of 26 March 2010, unpublished; Trib.Torino No 8521 of 27 November 2009, unpublished.
[150] Trib.Torino No 5656 of 20 September 2010, unpublished; Trib.Torino No 304 of 2 December 2010, unpublished; Trib.Torino No 889 of 17 January 2011, unpublished.
[151] See Section 2.A.
[152] Foblets and Carlier (n 21) 71.
[153] Trib.Torino No 2952/2015 of 24 April 2015, unpublished, 3.
[154] C.Cass. No 10215 of 4 May 2007; C.Cass. No 4040 of 23 February 2006.

repeatedly held the foreign rules on immediate divorce to be applicable'.[155] The examination of the parties' pleadings reveals an additional interesting aspect. The woman's lawyer had requested the application of Moroccan law not only with regard to the immediate divorce sought by either spouse for irreconcilable differences (*al-taṭlīq li-l-shiqāq*), but also with reference to the divorce allowance, the father's child support, and the offspring's custody.[156] In the case at stake, all the kinship financial aspects, along with the child's custody and parental responsibility, were indeed required to be regulated in compliance with the Moroccan Family Law.

A similar scenario emerges from another judicial proceeding whose decision was issued a few months later.[157] In this case, the Moroccan woman originally filed an application for 'fault-based personal separation' (Article 151 ICC) claiming her husband to be held accountable for their marriage breakdown. The man asked for a declaration of lack of jurisdiction of the Italian court due to 'the non-existence of the institution of separation under Moroccan law'.[158] After some time, when appearing before the President, the spouses concurred 'to proceed according to their common law, which provides for an immediate divorce without the need to pronounce a separation beforehand'.[159]

The proceeding thus resulted in the parties' matrimonial dissolution issued according to Moroccan law instead of Italian law. Differently from earlier cases,[160] the Italian tribunal did not opt for a divorce by mutual consent *(al-ṭalāq al-ittifāqī)*, or a judicial divorce on grounds of irreconcilable differences (*al-taṭlīq li-l-shiqāq*), but it rather followed the path of divorce in case of spouse's absence (*al-ġayba*). The applicant had indeed claimed that her husband left the family home in 2006 (seven years before the wife submitted her petition for legal separation according to Italian law) and the husband did not challenge this point while continuing not to cohabit with her and being resident in another place. Confidently implementing the relevant foreign *sharīʿah*-inspired provisions,[161] the Italian court verified the existence of the conditions listed in Article 104 MM—namely, the husband's absence, the length of his absence from the family home and his current residence, while also granting him the possibility to respond—before issuing the immediate divorce.[162]

This outcome is particularly interesting when compared with the Moroccan scenario, where the divorce on grounds of absence (Articles 104–106 MM)—similar to the divorce on grounds of prejudice (Articles 100–101 MM)—are regarded as time-consuming and complex procedures.[163] A domestic case law analysis, in effect, reveals that a plethora of reasons may lead Moroccan judges in issuing a *al-taṭlīq li-l-shiqāq* even when the wife's ill-treatment or abandonment is raised and often documented. It has been noted that Moroccan judges

[155] Referring to some previous proceedings such as Trib.Torino No 6371/2008; Trib.Torino No 3283/2008; Trib.Torino No 889/2011.

[156] Indeed, the party's lawyer shows a profound knowledge of Moroccan law and accurately justifies its application and compatibility with Italian law by enumerating and explaining all the relevant foreign provisions.

[157] Trib.Torino No 5511/2015 of 3 September 2015, unpublished.

[158] The Tribunal of Turin then stated its own jurisdiction being both parties resident in Italy (art 3, Law 218/1995), and also clarified that Moroccan law was to be applied as required by the parties by virtue of art 5(2) EU Regulation 1259/2010. On separation and its potential accommodation of the *'iddah*, see Sections 3.A and 3.B.

[159] Trib.Torino (n 158), 2.

[160] See Section 5.

[161] S 3 of ch II, MM.

[162] The tribunal also applied arts 171 and 180 MM with regard to child's custody, and art 198 MM with respect to child's maintenance.

[163] As noted by Nössing (n 17) who clarifies that, in contracts, the divorce on grounds of discord the fastest and easiest procedure.

make an expansive appraisal of the notion of 'discord' leading to judicial divorces on grounds of spouses' irreconcilable differences.[164] This happens since the Arabic term *al-shiqāq* is a 'semantically loaded elastic concept' that leaves the judiciary considerable discretion in its interpretation building upon ratified international conversions, traditional *Mālikī fiqh* (Article 297 MM), or *iǧtihad* (Article 400 MM).[165] Whereas the openness of Moroccan judges in going beyond former conservatory attitudes has been praised, this domestic reading of the *Mudawwanah* indicates that Muslim Moroccan (ex-)partners may benefit from a more extensive—and sometimes even more lenient—application of the Moroccan Family Law when divorcing abroad, including proceedings in before European domestic judiciaries.

The possibility of reciprocal judgements' recognition—alongside with the probability of divergent interpretations of *sharīʿah*-inspired provisions—becomes poignantly relevant in relation to the once-only financial compensation paid by the husband to the wife upon divorce as expressly disciplined by the *Mudawwanah* in *ṭalāq* and in *taṭlīq* cases (Articles 84 and 97 MM);[166] Moroccan courts began to crack down the women's entitlement of this financial compensation as early as 2005. Further to some decisions issued by local courts, the Moroccan Court of Cassation indeed restricted the right to the so-called 'consolation gift' (*mutʿah*) to cases where the husband was the applicant.[167] In later proceedings, the Moroccan Supreme Court, first, argued that the wife should be granted financial compensation in *taṭlīq* proceedings only if she could prove that her husband was responsible for their separation; and, then, it denied the wife's claim to *mutʿah* when the woman was regarded responsible for the spouses' matrimonial breakdown.[168] The interpretation and application of the very same *sharīʿah*-compliant norms given by the Italian judiciary result in relatively different decisions, which do not resemble the Moroccan judicial understanding of 'responsibility' as a core principle with respect to the potential entitlement of the financial compensation paid by the husband upon divorce. Accordingly, the interpretation and application of Moroccan provisions by Italian judges can be more favourable to Moroccan women; to put it differently, divorcing abroad in *sharīʿah* style can be more advantageous.

7. CONCLUSIONS

The application of Islamically inspired norms in Western countries tends to result in deeply polarized public discourses emphasizing cultural conflicts linked to the problematization of Muslim women as victimized weaker family members. In contrast, in Italy, the implementation of foreign *sharīʿah*-inspired laws stirred debates that ignited discriminatory narratives to the detriment of Italian nationals willing to pursue the track of an immediate divorce but

[164] Building upon Austin (John L Austin, *How to Do Things with Words, The William James Lectures delivered at Harvard 1955* (Claredon 1962)), Sadiqi stresses that these judicial arguments have become genuine illocutionary acts or performance acts. See Fatima Sadiqi, 'The potential within: Adjudication on shiqaq (discord) divorce by Moroccan judges', in Elisa Giunchi (ed), *Adjudicating Family Law in Muslim Courts* (Routledge 2014) 121–35 also with regard to the next sentence.

[165] See n 14. The word *iǰtihād* refers to the personal effort in the interpretation of the fundamental principles (*uṣūl*) of the *sharīʿah*. See J Calmard, 'Mud̲jtahid' in Peri Bearman and others (eds), *Encyclopaedia of Islam* (2nd edn, 2012) <http://dx.doi.org/10.1163/1573-3912_islam_COM_0775>

[166] See Sections 2.A and 4.

[167] The Court of Agadir (No 2005/19, 18 May 2005) and the Court of Laayoune (No 06/319, 10 October 2006, Decision 517) set precedents; the Moroccan Court of Cassation then followed this interpretation (21.09.2010/09, file 2009/1/2/623, decision 433); reported in Nössing (n 17).

[168] See, respectively, Moroccan C.Cass. (file 2009/1/2/548, 5 April 2011, decision 159) and Moroccan C.Cass. (file 2010/1/2/285, 4 October 2011, decision 534) also in Nössing (n 17). The last case regarded an appellant whose wife had divorced him when he lost his job in Italy because of the economic crisis.

being legally impeded to do so. The main arguments raised by the media were summarized as it follows:

> '[i]f you are a foreigner or have a foreign spouse; or if you and/or your spouse reside abroad or have maintained your residence abroad; or you are a citizen of a foreign country where immediate divorce is legitimate, in all these cases and if you agree with the other spouse you can avoid the six months (at least) of [legal] separation. If you have the "misfortune" of being only Italian -*dura lex, sed lex*- there will be no judge who will be able to help you by freeing you from the obligation to wait for the period of [legal] separation before divorcing'.[169]

Discrimination was therefore raised not with regard to the application of foreign *sharīʿah*-compliant laws in domestic courts, but instead by the fact that foreigners may benefit from more divorce options when compared to Italian nationals.

In real terms, the Italian legal system appears to be rather sympathetic in leaving room for manoeuvre to (foreign) Muslim spouses. Islamically inspired provisions and institutes can indeed be variously accommodated within the domestic legal framework because of its plasticity. By way of illustration, several options can be found to come to terms with the Islamic legal waiting period (*al-'iddah*) in the case of Muslim spouses.[170] The scope for the initiative is also left to Muslim partners willing to dissolve their religiously and civilly valid marriage by entering into legally valid agreements which can be *sharīʿah*-compliant.[171] In effect, Italian norms providing for extrajudicial procedures and the privatization of family matters can accommodate Islamically inspired provisions, as this article demonstrated.

In the case of transnational families, then, the Italian judiciary proves to support the implementation of the foreign spouses' national laws. The Moroccan Code of Personal Status, in particular, has been broadly applied by domestic tribunals and courts on the grounds of its compatibility with the Italian constitutional principles and *ordre public*.[172] As time passed by, lawyers became more confident in requesting the application of various Moroccan provisions concerning not only *sharīʿah*-compliant direct-divorce formulae but also financial claims and child's custody.

This process went hand in hand with the Italian judiciary becoming more assertive of its jurisdiction and competence, while at the same time familiarizing with the provisions of the *Mudawwanah*, as disclosed by the numerous unpublished legal proceedings examined in this article.[173] In early rulings, the judges attempted to translate Islamically compliant institutes into a mind-frame closer to the one of the Italian legislator, then the employed legal vocabulary gradually evolved. Domestic judicial decisions, for instance, asserted of issuing the spouses' dissolution of (religious and civil) marriage instead of the dissolution of the *civil* marriage only. A broader range of Moroccan divorce formulae has also been gradually implemented by Italian tribunals.

Moroccan law might, however, be interpreted differently by the Italian and the Moroccan judiciary, and this can lead to discrepancies and forum shopping.[174] As a matter of facts, the proposed case law analysis discloses some counterintuitive dynamics challenging the

[169] Ricca (n 102) 11. Translation into English by the author.
[170] Eg, In case of the spouses' legal separation, or in case of a matrimonial dissolution finalised before the Italian civil registrar; as maintained in Sections 3.A and 3.B.
[171] As argued in Section 3.A.
[172] As clarified in Sections 4–5.
[173] See Sections 4–6.
[174] See Section 6.

narrative depicting Muslim family members (more specifically, women) as passive victims who are 'lost in transplantations'.[175] In actual facts, undergoing some Moroccan divorce procedures—such as the judicial divorce (*al-taṭlīq*) on grounds of prejudice (*al-ḍarar*) or on grounds of absence (*al-ġayba*)—can be easier in Italy rather than in Morocco. Additionally, Italian courts may be more generous in recognizing and granting financial entitlements to Moroccan wives, their reading and interpretation of the black letter law of the *Mudawwanah* not being influenced by the Moroccan case law.

These attitudes contribute in explaining the peculiarity and uniqueness of the Italian legal and judicial scenario, which *de facto* empowers foreign Muslim women by applying foreign *sharīʿah*-inspired norms.[176] In effect, Moroccan family members settled in other European countries appear not to claim the application of their national foreign law mainly as part of a strategic action grounded on financial reasons. In the Netherlands, for instance, financially dependent spouses can be entitled to alimony rights lasting up to twelve years, should the other spouse have sufficient means. Accordingly, women with a low or no nuptial gift (*mahr* or *ṣadāq*), as well as dependent men, profit better from the Dutch system of spousal alimony when compared to the Moroccan one. A divorce issued by a Dutch court applying Moroccan law can thus be beneficial for women with a high nuptial gift in their marriage contract but whose husbands have limited income.[177]

Similar pragmatic financial reasons seem to result in lower requests of implementation of Moroccan law in Spain. It has been argued, indeed, that the *Mudawwanah* ends up favouring patriarchal attitudes both in Morocco and in Spain. This happens on account of divorced Moroccan women living in Spain facing hardships since they are left with the sole burden of providing for their children because their husbands fail to comply with court orders in relation to maintenance.[178] Whereas divorcing in compliance to Spanish law would prevent the described scenarios, Moroccan women lament difficulties in getting a divorce issued according to Spanish law being acknowledged and recognized as legally valid by Moroccan competent bodies. As a result, it becomes clear that the solution found by the Italian judges—namely, immediate matrimonial dissolution formulae issued in compliance with the *Mudawwanah*—succeeds in emancipating Moroccan women living abroad, particularly when coping with the dysfunctional contexts of migrant families enduring discomforts and privations.

An intersectional analysis of the examined legal proceedings then discloses gendered readings of the relevant Moroccan norms.[179] Whereas Muslim Moroccan women favour the application of the *Mudawwanah* in direct-divorce procedures before the Italian judiciary, Moroccan men tend to develop paradoxical attitudes. These first encompass judicial default, which is often combined with the attempt either of filing a divorce proceeding in Morocco (to prevent the Italian one on grounds of *litis pendentia*), or the denial of the Italian jurisdiction because of the non-existence of the institute of 'legal separation' in Moroccan laws.

[175] Echoing Pascal Fournier, *Muslim Marriage in Western Courts: Lost in Transplantation* (Ashgate 2010).

[176] And this approach may characterize some specific foreign nationals only; the *optio iuris* can indeed be limitedly used by some foreigners who favour the application of Italian law. See Federica Falconi, 'Il regolamento (UE) n. 1259/2010 sulla legge applicabile al divorzio e alla separazione personale nella recente prassi giurisprudenziale italiana' (2018) 10 Cuadernos de Derecho Transnacional 568.

[177] On these aspects, see Iris Sportel, 'Who's Afraid of Islamic Family Law? Dealing with Shariʿa-based Family Law Systems in the Netherlands' (2017) 7 Religion and Gender 53, 62; Iris Sportel, 'Moroccan Family Law: Discussions and Responses from the Netherlands' (2020) 40 Journal of Muslim Minority Affairs 67.

[178] As explained by Eva Evers Rosander, 'Getting a Divorce in Spain: A Moroccan Case of Legal Pluralism and Transnationalism' (2008) 26 Nordic Journal of Human Rights 321.

[179] As clarified in Section 5.B.

When unsuccessful, the conundrum may lead Moroccan husbands to claim the application of Italian law instead of the Moroccan Personal Status Code. In the majority of the immediate divorce proceedings, however, the spouses tend to eventually reach an agreement for a consensual divorce formula (as facilitated by their lawyers) mostly because of reasons of judicial economy.

The emerging scenario significantly contrasts the narrative of Muslim women being prevented from accessing justice and then becoming victims of misogynistic interpretations of Islamically inspired normativity. Muslim Moroccan women divorcing abroad in *sharīʿah* style have indeed become skilled navigators of the Italian legal system when supported by some well-versed legal experts. This legal empowerment prompts Muslim Moroccan women to benefit from more financial rights—when compared to co-nationals divorcing before Moroccan courts—in addition to faster divorce procedures—when compared to Italian women married to co-nationals. In the concurrent dynamic legal reconfigurations of family laws—a process that is fast-progressing in Europe as well as in the Muslim world—more advantageous divorce arrangements can therefore be strategically obtained in non-Muslim-majority legal systems willing to accommodate *sharīʿah*-inspired provisions.