Essays

Unilateral Repudiation or Divorce? *Ṭalāq* Betwixt and Between Diverse (Extra-)Judicial Environments

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Abstract

This contribution focuses on the (in)formal implementation of a form of nuptial dissolution – which is broadly identified with the Arabic term *ṭalāq* – in Italy. The essay raises red flags to signal normally unperceived dynamics affecting the (non-)recognition of foreign *sharīʿah*-compliant matrimonial dissolution forms, as well as potential discriminatory practices enacted by state legal systems and diplomatic missions.

Adopting an interdisciplinary approach, the paper sheds light on otherwise concealed multiple family arrangements implying concurrent diverse nuptial statuses for transnational Muslim partners, including "limping marriages" and polygamous unions. By juxtaposing Islamic and Italian legal provisions, gendered readings offered to the judiciary by disputing (ex-)spouses and contrasting perceptions on revocability are revealed. Thorough analyses of original Arabic-language documentation and their carefully tuned translations bring to light problematic *ṭalāq* recognitions, which deserve to be properly scrutinized, including unnotified man's unilateral repudiations that violate the public policy criterion and the spouse's right of defense.

I. Introduction

This article[1] examines the multiple manners in which a foreign form of nuptial dissolution – broadly identified with the Arabic term *ṭalāq* –[2] can *de facto* be civilly recognized by judicial and administrative authorities.[3] Precise attention is thus paid to both the processes of normative acknowledgement and the civil recording of foreign legal proceedings or administrative procedures identified as *ṭalāq*-s. This Islamic institution is emblematic of the interaction between different

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[2] The diverse meanings of this Arabic term are discussed below, see subsection 3. In this essay, the word *ṭalāq* is pluralized by adding the suffix '-s'.

[3] Due to space restrictions, *ṭalāq*-s performed privately between the parties and those issued in religious worship centers (eg mosques) and diplomatic missions are not investigated. The involvement of both Italian and MMCs' diplomatic missions in Italy is addressed solely with regard to the civil registration of foreign *sharīʿah*-compliant matrimonial dissolutions.

legal systems – including those of Muslim majority countries (MMCs) – and religious or cultural normative orders.

Focusing on the (in)formal implementation of *sharīʿah*-compliant[4] forms of matrimonial dissolution in the Italian legal system, this study investigates legal interactions between official state bodies and Muslim (ex-)partners. It contributes to the current academic debate by raising red flags that signal broadly unperceived dynamics affecting the (non-)recognition of foreign *ṭalāq*-s and discriminatory undercurrents enacted by, or in the folds of, European legal systems.

Although Muslims living as a minority in European environments have been increasingly studied,[5] important areas remain invisible to traditional legal perspectives. Otherwise concealed fluid courses of actions are disclosed when embracing an interdisciplinary approach. Zooming in on *ṭalāq*-related issues, this article sheds light on multiple real-life scenarios involving concurrent nuptial statuses, including "limping marriages".[6] By comparing Islamic and Italian provisions, "gendered readings" offered by disputing (ex-)partners are unveiled, while thorough analyses of field-collected documentation in Arabic reveal civil *ṭalāq* recognitions that are in violation of public policy.

This contribution comprises five main sections and five subsections under section IV. The next section outlines the adopted methodologies. More specifically, it details how three methods in particular help uncover phenomena that would otherwise remain invisible. The discussion then expands on two recent *ṭalāq* proceedings addressed by the Italian Supreme Court, which represented an unprecedented opportunity for debating the ideas of living law and public policy, after half a century of judicial silence.

Building on published and unpublished legal proceedings, document analysis, and field data, the core of the proposed analysis then identifies three main characteristics that affect the (non-)recognition of a foreign *ṭalāq*. These concern the nature of the foreign authorities issuing the relevant documents, the respect of the (ex-)spouse's right of defense, and the revocability of foreign decisions concerning matrimonial dissolution. These characteristics are deeply intertwined

[4] This expression indicates that an Islamic or Muslim norm is observed. *Sharīʿah*, literally 'the road to the watering place', refers to the canon law of *Islām* and *Allāh*'s commandments. J. Schacht, 'Sharīʿa', in M.Th. Houtsma, T.W. Arnold, R. Basset, and R. Hartmann eds, *Encyclopaedia of Islam*, I Ed (1913-1936), online at https://tinyurl.com/yc7bv53w (last visited 30 June 2022); R. Aluffi, 'Šarīʿa' *Enciclopedia del Diritto* (Milano: Giuffré, 2015), VIII, 741-754; F. Castro, 'Diritto musulmano' *Digesto italiano* (Torino: UTET, 1990), VI, 289.

[5] See, among the others, O. Scharbrodt, S. Akgönül, A. Alibašić, J.S. Nielsen and E. Racius eds, *Yearbook of Muslims in Europe* (Leiden: Brill, 2021) (Vols 1-13).

[6] 'Nuptial limping statuses' can result from voluntary choice or from non-recognition of a certain form of matrimonial dissolution, and can often hide 'chained spouse' situations. The expression "chained spouse" derives from the Hebrew word *agunah,* which means chained and refers to the wife left without a *get* (a Jewish divorce). J. Baskin, 'Agunah', in *The Cambridge Dictionary of Judaism and Jewish Culture* (Cambridge: CUP, 2011); S.B. Aranoff and R. Haut, *The Wed-Locked Aguno* (Jefferson: McFarland, 2015).

with two additional key elements; namely the socio-legal performative of a *ṭalāq*[7] and the translation of the relevant foreign terms. To different extents, the interplay of these five elements eventually determines – I argue – the (in)formal implementation of *sharīʿah*-compliant nuptial dissolutions in the Italian legal system.

Mentioned elements are examined, firstly, by focusing on the possible diverse translations of the Arabic word *ṭalāq* in the laws of MMCs and according to Islamic provisions, and by investigating the impact of these translations on the Italian judiciary. Secondly, attention is paid to the role played by the foreign wording identifying the (extra-)judicial authority documenting the parties' matrimonial dissolution forms, and to the understanding of foreign normativities by judicial and administrative bodies. Thirdly, investigating the (temporary) *ṭalāq* revocability, the proposed discussion presents cutting-edge cases disclosing complex interactions between civil registrars and diplomatic missions, which remain unobserved by legal professionals and academic scholars. Subsection 4 then addresses the (ex-) spouse's right of defense and, building upon first-hand original material in Arabic language, discloses civilly recognized unnotified unilateral repudiations while raising concerns in terms of non-discrimination and equitable treatment. The last subsection gives voice to (foreign) Muslim ex-spouses, diplomatic personnel, translators and interpreters: customized and carefully tuned translation formulae are thus unveiled as pragmatic choices or the result of power unbalances, which might, in the end, obfuscate legal and social realities.

II. Combining Methodologies. When the Invisible Becomes Visible

This essay adopts an interdisciplinary methodology. First of all, legal, Islamic, and linguistic anthropology are used to support administrative and judicial bodies in clarifying the legal categories and vocabulary relied upon by the parties when coping with *sharīʿah*-compliant divorces or unilateral repudiation cases.[8]

When one embraces a different viewpoint that goes beyond published legal proceedings, neglected underlying dynamics – which can sometimes result in *de facto* multiple nuptial statuses – become visible to legal professionals and scholars. Therefore, the essay relies upon a reality-conscious (extra-)judicial approach that transcends the sole 'public policy criterion' as commonly reported by official bodies dealing with *ṭalāq* (non-)recognition processes. Accordingly, foreign *sharīʿah*-compliant forms of matrimonial dissolution, along with their implications and pitfalls, can be handled in a way that is more efficient and respondent to the

[7] For further details on the *ṭalāq* 'formalization' according to the legal and social normativities of the relevant MMCs and Muslim community as well as the utterance by means of which Muslims Islamically dissolve their marriages, see below subsection 1.

[8] This is aimed at overcoming the underlying linguistic structures rooted in diverse disciplines, while dismissing the metalinguistic assumptions built into legal thinking. See E. Mertz, 'Within and Beyond the Anthropology of Language and Law', in M.C. Foblets, M. Goodale, M. Sapignoli and O. Zenker eds, *The Oxford Handbook of Law and Anthropology* (Oxford: OUP, 2021).

actual kinship arrangements characterizing transnational Muslim families.

Secondly, when scrutinizing the legal wording adopted in judicial and administrative proceedings, empirical data play a key-role. The analysis offered here indeed combines a meticulous examination of original documentation with informants' interviews and ethnographic observation. The data examined were collected by the author from 2005 to 2020,[9] using qualitative social-science research methods.[10]

For the first time in the empirically underexplored Italian legal scenario,[11] original legalized documents – as submitted to diplomatic missions, civil registrars, and judicial bodies – are brought into focus. Consequently, this article discloses potentially shadowy techniques. As supported by statements released by officially appointed translators, interpreters, diplomatic personnel, and divorcing foreign Muslim women, the discussion also unveils undercurrents impacting bureaucratic procedures and judicial proceedings concerning Muslim (ex-)partners settled in Italy.

By digging deeply into the legal and administrative arenas and concentrating on the role played by socio-legal actors in transnational contexts, what some informants – ie (ex-)partners, translators, interpreters, lawyers, diplomatic personnel – informally identify as 'magic words' become visible. This renders it possible to investigate the socio-legal performative impact of these words and, crucially, of their translations from Arabic into Italian language, on the actual acknowledgement of foreign *sharīʿah*-compliant marriage dissolutions at the civil or social level. This approach uncovers otherwise concealed (often gendered) negotiations and potentially stereotyped kinship realities concerning transnational

[9] The research personally conducted by the author has been partially supported by the Renato Treves scholarship, Incoming post-doctoral research fellowship (BDR 04/2015), and the Max Planck Institute for Social Anthropology. See below, subsections 1-5 for specific details.

[10] Among the others, the employed methodology relies on R. Banakar and M. Traver eds, *Theory and Method in Socio-Legal Research* (Oxford-Portland: Hart, 2005); B.L. Berg, *Qualitative Research Methods for the Social Sciences* (London: Pearson, 2004); A. Bryman, *Social Research Methods* (Oxford-New York: OUP, 2001); N.K. Denzin and Y.S. Lincoln eds, *The Handbook of Qualitative Research* (London: Sage, 2017); N.K., Denzin ed, *The Handbook of Qualitative Research* (London: Sage, 1994); R.L. Gold, 'Roles in Sociological Field Observations' 36 *Social Forces*, 217-233 (1958); W. Hollway and T. Jefferson, *Doing qualitative research differently: Free association, narrative, and the interview method* (London: Sage, 2000); J. Lofland and L.H. Lofland, *Analyzing Social Settings: A Guide to Qualitative observation and analysis* (Belmont: Wadsworth, 1995); F.K. Ringer, *Max Weber's Methodology: The Unification of the Cultural and Social Sciences* (Cambridge: HUP, 1997); S. Sarantakos, *Social research* (Basingstoke: Palgrave Macmillan, 2005); D. Weinberg ed, *Qualitative Research Methods* (Oxford: Blackwell, 2002).

[11] In Italy, scholars rarely collect ethnographic evidence; rather they focus on case law. A.A. Alqawasmi, 'Marriage and divorce practices in Islamic centers in Italy' 11(4) *Onati Socio-legal series*, 959-989 (2021), began to explore Italian mosques by interviewing five *imam-s*. Regrettably, this author reports extremely limited data, mostly relying upon researches discussed in R.C. Akhtar, R. Probert and A. Moors, 'Inform al Muslim Marriages: Regulations and Contestations' 7(3) *The Oxford Journal of Law and Religion*, 367-375 (2018); J. Jones and Y. Shanneik eds, 'Reformulating Muslim Matrimony: Islamic Marriage and Divorce in Contemporary United Kingdom & Europe' 40 *Journal of Muslim Minority Affairs*, 1 (2020). See also section III.

family members.

Thirdly, the essay investigates how *ṭalāq-s* are entwined in the Italian fabric, and how the entanglement of religious and ethno-cultural practices, as discursive traditions, affects the sensibilities of modern life. This goal is achieved by approaching *Islām* as

> 'a tradition of Muslim discourse that addresses itself to conceptions of the Islamic past and future, with reference to a particular Islamic practice in the present'.[12]

Actual kinship arrangements are thus investigated by juxtaposing legal personal statuses to social ones. When dealing with cross-cultural family members, global frameworks also become critical in understanding the role of law and mutually constituting legal orders.[13] As this paper demonstrates, administrative and judicial bodies better understand foreign documentation when a clear line can be drawn between Islamic religious provisions and Muslim normativities, the latter being norms endorsed by Muslim believers and rules enacted in MMCs.[14]

It follows that an additional comparative methodological layer of analysis is necessary. A fluid scenario surfaces when juxtaposing diverse normative orders; specifically, Italian, Islamic, and Muslim provisions regulating nuptial dissolutions and affecting Muslim (ex-)partners. On that account, attention is to be paid to judicial and administrative authorities – both those in Italy and those in MMCs – that are involved in facilitating the denial or, on the contrary, the acknowledgment of civil effects to foreign nuptial dissolutions. A comparative viewpoint supports the legal expert in deconstructing the arguments employed in the *ṭalāq* (non-) recognition processes and in verifying whether the adopted reasoning reflects the current international, transnational, European, and domestic legal frameworks along with the ideas of *ordre public*.

The alternative courses of action enacted by Islamically married partners, as well as the reasons supporting the nuptial dissolution form – as socially and/or legally validated by the (ex-)spouses and the diplomatic missions of their countries of origin – are to be interpreted by bureaucrats, jurists, and legal professionals in order for them to deal with heterogeneous kinship models. Should this not be

[12] As clarified by Asad, who further explains that 'Islam is neither a distinctive social structure nor a heterogeneous collection of beliefs, artifacts, customs, and morals. It is a tradition'. T. Asad, 'The Idea of an Anthropology of Islam' 17 *Qui Parle*, 2, *Spring-Summ*er, 1-30, 20 (1986/2009). See also A.S. Ahmed, 'Defining Islamic Anthropology' 65 *Rain*, 2-4 (1984); S.M. McLoughlin, 'Islam(s) in context: Orientalism and the anthropology of Muslim societies and cultures' 28(3) *Journal of Beliefs and Values*, 273-296 (2007).

[13] S.E. Merry 'Anthropology, Law, and Transnational Processes' 21(1) *Annual Review of Anthropology*, 357-377 (1992).

[14] The adjectives 'Muslim' and 'Islamic' are often used synonymously, but the IV form of the Arabic root SLM indicates that this is not correct. *Muslim* identifies the person professing *Islām*; *Islāmī* identifies anything related to *Islām*. Accordingly, 'Islamic' is used here when referring to Islamic sources.

case, diverse nuptial statuses proliferate at the crossroads of multiple provisions concurring in regulating the very same (ex-)couple's matrimony.

The combination of the methodologies described above supplies legal experts with unique and enhanced perspectives aimed at understanding the combination of the culturally embedded goals of (foreign) *sharīʿah*-compliant normativities with the legal viewpoints endorsed by ethno-religious groups and state authorities. Bringing to light the complex issues faced by official bodies in acknowledging foreign Islamically compliant matrimonial dissolution forms as civilly valid, notice can be taken of the arguments put forward by (ex-)partners (who were formerly married according to *sharīʿah*) when claiming the legal (non-)recognition of a *ṭalāq* betwixt and between diverse normativities.

III. The Italian Judiciary, *Ṭalāq-s*, and the Living Law

After more than fifty years of silence, the Italian Court of Cassation was required to address the recognition of foreign *ṭalāq-s* not once, but twice. Prior to 2020, the Supreme Court had dealt with a *ṭalāq* case only once, in 1969.[15] Among the courts of first and second instance, about fifteen cases have been reported in legal journals in more than seventy years.[16] In Italy, despite a consistent Muslim presence,[17] legal proceedings addressing *ṭalāq*-related issues are, therefore, scarce.

The main reasoning of the two recent proceedings deserve to be briefly summarized to elucidate two key categories employed by judicial and administrative bodies in *ṭalāq* (non-)recognition processes; namely, public policy and living law. In the decision deposited at the beginning of August 2020,[18] a Jordanian-Italian (ex-)husband – who had previously obtained the transcription in the Italian civil

[15] Corte di Cassazione 5 December 1969 no 3891, *Rivista di Diritto Internazionale Privato e Processuale*, 868 (1970).

[16] Amongst the relevant proceedings addressing *ṭalāq*-related issues in Italy, see Corte d'Appello di Roma 29 October 1948, *Foro Padano*, 348 (1949); Tribunale di Milano 21 September 1967, *Rivista di diritto internazionale privato e processuale*, 403 (1968); Corte d'Appello di Roma 9 July 1973, *Il Diritto di famiglia e delle persone*, 653 (1974); Tribunale di Cremona 27 March 1973, *Rivista di diritto internazionale privato e processuale*, 307 (1974); Corte d'Appello di Trieste 23 October 1980, *Il Foro Padano*, 62 (1981); Corte d'Appello di Milano 17 December 1991, *Rivista di diritto internazionale privato e processuale*, 109 (1993); Corte d'Appello di Torino 9 March 2006, *Il Diritto di famiglia e delle persone*, 156 (2007); Corte d'Appello di Cagliari 16 May 2008, *Rivista di diritto internazionale privato e processuale*, 647 (2009); Corte d'Appello di Venezia 9 April 2015, *La Nuova giurisprudenza civile commentata*, I, 1031 (2015); Corte d'Appello di Roma 12 December 2016, *Il Diritto di famiglia e delle persone*, 353 (2017). For an analysis of the interplay between these legal proceedings and the Italian legislation aimed at avoiding "limping nuptial statues", see F. Sona, 'Defending the family treasure chest: Navigating Muslim families and secured positivistic islands of European legal-systems', in P. Shah, M.C. Foblets and M. Rohe eds, *Family, religion and law: Cultural encounters in Europe* (Farnham: Ashgate, 2014), 115-141.

[17] In 2018, the visible Muslim population was estimated at 2.8 million. See F. Ciocca, 'Musulmani in Italia: una presenza stabile e sempre più italiana' *Lenius*, 9, II (2022).

[18] Corte di Cassazione 7 August 2020 no 16804, *Rivista di Diritto Internazionale Privato e Processuale*, 107 (2021).

status registers of an Islamically compliant nuptial dissolution issued by the Palestinian *Sharīʿah* Tribunal of Western Nablus – appealed to the Supreme Court. The (ex-)wife reacted by starting a judicial procedure before the Court of Appeal in Rome aimed at the cancellation of the parties' divorced status. The Court stated that the foreign *sharīʿah*-compliant (non-final and final) proceedings did not meet the legal requirements for their effect to be recognized in Italy, therefore the *ṭalāq* should have not been registered.[19] The man appealed this judgment before the Court of Cassation, and his (ex-)wife resisted by way of a counter-appeal. Given the complexity of the case,[20] the Supreme Court first required additional information concerning the foreign Islamic and Muslim normativities.[21] The judiciary then ruled that respect for the Italian *ordre public* impedes recognition of a foreign decision of (male) unilateral repudiation. A legal principle was thus formally stated.

In another ruling deposited in mid-August,[22] the Supreme Court adopted a different approach. In this case, the (ex-)husband disputed the former decision of the Court of Appeal of Bari ordering the competent civil registrar to cancel the transcription of the divorce pronounced by the Supreme Court of Teheran, as claimed by the man's (ex-)wife. To the Supreme Court, the argument of the Court of Appeal

> 'seems to ignore the effects of ongoing developments that have led the judiciary (…) – under pressure from the progressive opening of the internal system to supranational law – to significantly change its thinking in the direction of increasing reference to the legal values shared by the international community and to the protection of fundamental rights'.

Accordingly, the Court of Cassation underlined that the Court of Appeal's reasoning 'shows that it is making its own conviction in matters of public policy that is no longer reflected in the living law'.[23]

The relevance of the 2020 Court of Cassation proceedings is twofold. Not only did the judiciary break a long silence that had lasted half a century,[24] but it

[19] The civil registrar was ordered to cancel the transcription on the parties' marriage certificate; Judgment 7464/2016.

[20] First, the case was remanded; Interlocutory Order 6161/2019. See E.W. Di Mauro, 'Il ripudio islamico tra riconoscimento e contrarietà all'ordine pubblico' *Diritto delle Successioni e della Famiglia*, 3, 1086-1105 (2020).

[21] Concerning the foreign procedural law applicable to divorces in Palestine, as well as 'the recognition, in the national legal system, of the effects of a divorce decree, judicial or extrajudicial, obtained by one of the spouses before a foreign religious court.'

[22] Corte di Cassazione 14 August 2020 no 17170, *Rivista di Diritto Internazionale Privato e Processuale*, 352 (2021).

[23] Corte di Cassazione 14 August 2020 no 17170 n 22 above, paras 5 and 9.

[24] See among the others A. Bellelli, 'La irriconoscibilità nell'ordinamento italiano del provvedimento straniero di scioglimento del matrimonio fondato sul ripudio' *La Nuova Giurisprudenza Civile Commentata*, II, 422-426 (2021); P. Di Marzio, 'Provvedimenti di ripudio (talàq)

also outlined potentially diverging *ṭalāq* (non-)recognition paths. Whereas the first decision of the Supreme Court (no 16804 of 2020) establishes the legal principle of *ṭalāq* non-recognition with civil effects on Italian soil, the second one (no 17170 of 2020) calls for a more careful and *ad hoc* examination of the foreign proceedings documenting a *sharīʿah*-compliant form of nuptial dissolution. Paraphrasing the methodology adopted here, it can be said that the invisible must be made visible for a judge to properly issue a ruling on the recognition of *ṭalāq-s*. *Ad hoc* proceedings and in-depth investigations of certificates submitted by foreigners to administrative and judicial authorities might imply higher costs linked to the involvement of diplomatic missions and country-of-origin experts, and therefore affect access to justice by disadvantaged family members. The interests at play are therefore to be carefully balanced.

The Supreme Court also emphasizes the concept of 'living law' and the relevance of 'international and supranational law' in contemporary multicultural societies. Indirectly echoing Ehrlich's vocabulary,[25] the Court of Cassation concentrated on family members as crucial socio-legal actors in what Merry described as transnational processes shaping local legal situations.[26] Consequently, even if the Italian scholarship had been consistent in arguing that a *ṭalāq* would usually be regarded as contravening public policy,[27] and would therefore not be

e riconoscimento dell'efficacia civile in Italia (Nota a Corte di Cassazione 7 August 2020 no 16804), *Ilfamiliarista.it*, 4 gennaio 2021; G. Liberati Buccianti, 'Il ripudio islamico e l'ordine pubblico (internazionale)' *La Nuova Giurisprudenza Civile Commentata*, II, 381-390 (2021); A. Licastro, 'Scioglimento del matrimonio pronunciato all'estero e 'ordine pubblico': la Cassazione si pronuncia contro la riconoscibilità in Italia del ripudio islamico' *Quaderni di Diritto e Politica Ecclesiastica*, 3, 923-953 (2020); M.T. Magosso, 'Decisione di ripudio emanata all'estero da un'autorità religiosa' *Lo Stato Civile Italiano*, 11, 12-15 (2020); D. Milani, 'Diversità e diritto internazionale privato: il ripudio islamico e la sua rilevanza nell'ordinamento giuridico italiano alla luce di due recenti pronunce della Corte di Cassazione' *Stato, Chiese e Pluralismo Confessionale*, 14, 153-171 (2021); F. Pesce, 'La corte di cassazione ritorna sul tema del riconoscimento del ripudio islamico' C*uademos de Derecho Transnacional*, 13, I, 552-573 (2021); M.E. Ruggiano, 'Il ripudio della moglie voluto dalla Sharia e la contrarietà al diritto italiano' *Familia*, 1-15 (2021); C. Scalvini, 'Un divorzio 'unilaterale' non è automaticamente contrario all'ordine pubblico' *Giurisprudenza Italiana*, 2, 345-351 (2021); D. Scolart, 'La Cassazione e il ripudio (ṭalāq) palestinese. Considerazioni a partire dal diritto islamico' *Questione Giustizia*, 1, (2020); C.E. Tuo, 'Divorzio-ripudio islamico, riconoscimento automatico e ordine pubblico' *Corriere Giuridico*, 481 (2021); P. Virgadamo, 'Il ripudio islamico pronunciato da un Tribunale religioso è ancora contrario all'ordine pubblico: una sentenza tanto decisa nelle (giuste) conclusioni, quanto perplessa nelle (a tratti nebulose) argomentazioni' *Diritto di Famiglia e delle Persone*, 1406 (2020). On these commetaries, see also below in the text.

[25] E. Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge: HUP, 2002/1936). See also, R. Pound, 'Law in Books and Law in Action' 44 *American Law Review*, 12-36 (1910). In Italian, see L. Mengoni, 'Diritto vivente' *Vita e pensiero*, 1 (1988); L. Salvato ed, *Profili del «diritto vivente» nella giurisprudenza costituzionale* (Roma: Quaderni e Ricerche della Corte Costituzionale, 2015); A. Mariani Marini and D. Cerri eds, *Diritto vivente: il ruolo innovativo della giurisprudenza* (Pisa: PLUS-Pisa UP, 2007).

[26] See n 13 above.

[27] See among the others, L. Mancini 'Il matrimonio islamico in Italia', in I. Zilio-Grandi ed, *Sposare l'altro. Matrimoni e matrimoni misti nell'ordinamento italiano e nel diritto islamico* (Venezia: Marsilio, 2006), 105-118; S. La China, 'Matrimoni misti al filtro dell'esperienza giudiziaria', in I. Zilio-Grandi ed,

recognized by the judiciary, this last Supreme Court decision might have opened up a new realm of possibilities.[28]

In real terms, the legal scenario already appears to be much more variegated, as this article demonstrates. In considering the legal and bureaucratic arguments, as well as the social and legal implications of *ṭalāq* (non-)recognition, the analysis uncovers usually neglected underlying dynamics. These become manifest when paying specific attention to the documentation submitted to the competent authorities, as well as to the claims argued by the (ex-)partners before the judiciary in MMCs and in Italy, respectively.

IV. Foreign Divorces and Official State Bodies. Potential Controversial Scenarios

The above-mentioned 2020 Supreme Court proceedings share a relevant feature. In both cases, the civil recognition of foreign *ṭalāq-s* in Italy was disputed before the domestic judiciary by the (ex-)wives.[29] Recognition of the *sharīʿah*-compliant nuptial dissolutions (Palestinian and Iranian, respectively) was not opposed by the competent Italian administrative authorities, who promptly acknowledged its civil validity and recorded the *ṭalāq-s* in the parties' civil status register.

In effect, foreign judgments can be recognized when the requirements set by the law are met. The civil registrar is authorized to recognize and record a foreign ruling when seven pre-requisites are satisfied.[30] These regard the competence of the foreign body issuing the judgment,[31] both parties' essential rights of defense, the non-revocability of the foreign judgment, and the respect of the *ordre public*. The parties' declaration is required to prove that the foreign final ruling is not conflicting with an Italian final judgment, and that no prior proceeding is pending before an Italian judge for the same matter and between the same parties. The foreign divorce submitted to the civil registrar must also be properly translated and legalized.[32] Once these conditions are met, the civil registrar of the municipality where the parties' marriage had been previously registered shall

Sposare l'altro. Matrimoni e matrimoni misti nell'ordinamento italiano e nel diritto islamico (Venezia: Marsilio, 2006), 119-137; also C. Campiglio, 'Il diritto di famiglia islamico nella prassi italiana' *Rivista di Diritto Internazionale Privato e Processuale*, XLIV, 343-376 (2008).

[28] For further discussion, see F. Sona, 'Paths to (in)justice. The interplay between Sharīʿah Tribunals and public policy', in M. Maclean and R. Treloar eds, *Research Handbook on Family Justice Systems* (London: Edward Elgar, 2022).

[29] For further details, see below subsection 1.

[30] Art 64 of legge 31 May 1995 no 218, *Gazzetta Ufficiale* no 128, 3 giugno 1995, hereinafter legge no 218 of 1995.

[31] Namely, the legal authority of a tribunal, a court, or any other body authorized to deal with nuptial status related matters.

[32] Art 22, Decreto del Presidente della Repubblica, *Gazzetta Ufficiale* no 303, 30 December 2000 no 223, hereinafter DPR no 396 of 2000.

record the dissolution of the marriage or its annulment.[33] If these requisites are not satisfied, the civil registrar must refuse the transcription, providing a written explanation.[34] Anyone interested can then petition for a declaratory judgment of the foreign decision ascertaining that the necessary requirements are met.[35]

Under certain circumstances, the *ṭalāq* recognition is not denied but contested. It can happen that the civil registrar acknowledges the civil validity of a foreign *ṭalāq*, whereas one of the parties disputes the transcription into the Italian civil register and his/her change of nuptial status—as happened in the cases recently addressed by the Supreme Court. Examining the typology of contested registrations of foreign *sharīʿah*-compliant nuptial dissolutions before administrative and judicial authorities, I have identified three main potential controversial scenarios. The first two encompass cases in which the spouse(s) dispute the non-recognition of a foreign *sharīʿah*-compliant nuptial dissolution, or one of the (ex-)spouses opposes the already granted, or denied, civil validity of a foreign *ṭalāq*.[36] Additional highly contentious situations arise when both spouses appeal the non-recognition of a foreign divorce by Italian administrative or judicial authorities.

As per the motivation of recognition, or refusal, of a foreign *sharīʿah*-compliant nuptial dissolution, ethnographic observations indicate that Italian legal and administrative authorities often ground their decisions on a few keywords used on the legalized translation of the documents provided by the parties or on the certificates issued by MMCs' diplomatic missions. The active intervention of the Italian diplomatic premises appears to be infrequently required; therefore, a decisive role is played by the translated documentation provided by the (ex-) partners, which might include what some informants call 'magic words'.[37] This expression identifies some specific translation formulae that can actually facilitate or, on the contrary, impede the recognition and registration of foreign *ṭalāq*-s. These customized or carefully tuned translations, and their pitfalls, in effect remain undetected by judicial and administrative bodies, as this essay discloses.

A thorough examination of court judgments and administrative procedures – addressing the potential recording and acknowledgement at civil effects of foreign *sharīʿah*-compliant matrimonial dissolution forms – shows that disputes tend to pertain to three main issues. These concern the nature of the alien authority documenting the nuptial dissolution and/or the one issuing the document;

[33] Art 10, legge 1 December 1970 no 898, *Gazzetta Ufficiale* no 306, 3 December 1970. See also Art 63(2G) and Art 12(10), DPR no 396 of 2000.

[34] Art 19, DPR no 396 of 2000; see also Art 7.

[35] Art 67, legge 31 May 1995 no 218.

[36] This pattern was recently examined by the Cassation Court. The (ex-)spouse obtains the registration of a foreign nuptial dissolution, whereas the other partner opposes this decision before the judiciary, and, if and when obtained, the other party appeals the Italian judicial decision granting (or denying) the change of the parties' nuptial status (from 'married' to 'divorced'). See above section III.

[37] See below subsection 5.

the right of defense as exercised by the defendant or the respondent,[38] and the (potential or temporary) revocability of the foreign matrimonial dissolution. The disputed matters are all deeply intertwined with additional key elements, most notably the translation of the foreign documentation and the *ṭalāq* 'formalization' according to the legal and social normativities of the relevant MMC; namely, the socio-legal performative of a *ṭalāq*. All these five elements are specifically addressed and unpacked in the subsections below.

1. *Sharīʿah*-Compliant Forms of Marriage Dissolution and *Ṭalāq-s*

When investigating the potential (un)acknowledgement of civil effects to alien *sharīʿah*-compliant matrimonial dissolution forms, primary issues concern the translation of the word *ṭalāq*. This derives from the Arabic root TLQ, which refers to the verb 'to free or to be freed.' It is also found in the verb *ṭallaqa*, which means 'to untie.'[39] In both Arabic language and Islamic law, the expression *al-ṭalāq* is an umbrella term that can identify different typologies of Islamic and Muslim nuptial dissolutions.

The Italian judiciary and administrative authorities tend to link the expression *ṭalāq* to the unilateral repudiation of the wife that becomes effective when the husband pronounces the words *anti ṭāliq,* which mean 'I repudiate you'. And indeed, family laws in the Muslim world can use the term *ṭalāq* when referring to a man's unilateral repudiation of his wife. *Ṭalāq* in this sense is used, for instance, in the Moroccan Code of Personal Status.[40] Art 70 of the *Muddawanah al-aḥwāl al-shakhṣiyyah* differentiates amongst the Arabic words *ṭalāq* – which refers to the husband's unilateral repudiation – and *taṭlīq*, which is used in case of judicial divorce.

The (official) translations of these foreign provisions into European languages might however blur the borders among the definitions of different *sharīʿah*-compliant matrimonial dissolution forms. The case of Morocco exemplifies this. On the first anniversary of the *Muddawanah* promulgation, the French translation of the 'Practical guide to the family code' published by the Moroccan Ministry of Justice,[41] interpreted the word *ṭalāq* as marriage dissolution 'by divorce under judicial supervision' and not as 'a husband's unilateral repudiation of his wife'.[42]

[38] In cases of men's unilateral repudiations issued in MMCs, the respondent is usually the woman.

[39] For an introduction, among the others, see J. Schacht, J. and. A. Layish, 'Ṭalāḳ', in P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs eds, *Encyclopaedia of Islam*, II Ed, online at https://tinyurl.com/5n6sd3ed (last visited 30 June 2022).

[40] *Muddawanah al-aḥwāl al-shakhṣiyyah*, Law no 70-03, *Official Bulletin* no 5184, 14 *hija* 1424 (5 February 2004), 418; hereinafter Moroccan *Muddawanah*.

[41] *Official Bulletin* no 5358, 2 *ramadhan* 1426 (6 October 2005), 667.

[42] As highlighted by the translations provided by M.C. Foblets and J.Y. Carlier eds, *Le code marocain de la famille: incidences au regard du droit international privé en Europe* (Bruxelles: Bruylant, 2005), 57-58, and R. Aluffi ed, *Persone Famiglia Diritti. Riforme legislative nell'Africa Mediterranea* (Torino: Giappichelli, 2006), 184.

By replacing the word 'repudiation' with 'divorce' and adding the expression 'under judicial control', the possibility of misunderstanding – a possibility that the Arabic version foreclosed – reappeared in the French version.[43] The purpose of this choice may lie in the political interest in uniting all forms of nuptial dissolution under the all-encompassing idea of divorce.[44]

Nonetheless, this approach can lead to controversial outcomes, as court proceedings show. One (ex-)spouse might support the idea of *ṭalāq* as a broad all-encompassing form of matrimonial dissolution, whereas the other partner might favor an understanding of *ṭalāq* as a man's unilateral repudiation, depending upon their respective arguments and claims. These reasonings, as well as the documentation submitted to the competent administrative or judicial authorities, can significantly impact the decision regarding the civil acknowledgement of a foreign *ṭalāq*.

A case brought before the Court of Appeal of Torino well illustrates the point. In this dispute, while an Italian-Moroccan woman submitted a plea for separation before an Italian judge, her husband obtained a 'declaration of assessment of irrevocability of repudiation' before the Moroccan Tribunal of Khouribga. This proceeding was then transcribed in the matrimonial act register. The spouses were thus 'divorced' in both Italy and Morocco. Objecting to this, the woman petitioned the Italian judiciary. The man argued that 'repudiation' should be equated with 'divorce,' and his claim was supported by a commentary written by the Italian consulate in Casablanca, which clarified that the Arabic word *ṭalāq* can be translated into Italian 'interchangeably as repudiation or divorce'.[45] In spite of that, the Italian Court regarded the defendant's reasoning equating the documented irrevocable repudiation with divorce to be 'mere verbal ploy'. To the judiciary, the word *ṭalāq* identified the man's unilateral repudiation of his wife, and not a divorce. In addition to the vague translation provided by the Italian diplomatic mission, the legal commentary of the proceeding created an extra layer of most probably unwanted linguistic confusion: the word *ṭalāq* was indeed given a fresh meaning, that is to say 'repudiation-divorce'.[46]

[43] R. Aluffi, 'Il codice della famiglia del Marocco e la sua incidenza sulla vita familiare dei marocchini in Italia' *Aequitas sive Deus*. Torino, 1187-1192 (2011).

[44] L. Ascanio, 'Equivoci linguistici e insidie interpretative sul ripudio in Marocco' *Rivista di Diritto Internazionale Privato e Processuale*, 48, 3, 573-594, 585 (2012).

[45] Corte d'Appello di Torino 9 March 2006, *Diritto di Famiglia e delle Persone*, 156 (2007). In the proceeding, 'the declaration of irrevocable repudiation' issued by two public notaries and a tribunal was regarded as a 'definitive and irrevocable divorce proceeding'; nonetheless, its validity in Italy was denied on the grounds that this form of nuptial dissolution violated public policy. The court also differentiated between internal *ordre public* (for Italian nationals) and international *ordre public* (for aliens).

[46] A. Sinagra, 'Ripudio-divorzio islamico ed ordine pubblico italiano, nota a Corte d'Appello di Torino 9 marzo 2006 n 44 above, 156-168 (2007). As clarified below, the expression 'repudiation-divorce' is not to be confused with 'divorce-repudiation.' The former was used to identify the *ṭalāq* when the husband repudiates his wife; the second expression might also be translated as 'unilateral' or 'consensual' divorce repudiation. It usually identifies other types of *sharīʿah*-compliant forms of nuptial dissolution according to which the *ṭalāq* uttering is formalized by the legal system of a MMC or a

Accordingly, two matters become of pivotal importance. First, focusing on the translations of the original documentation; secondly, differentiating between Islamic and Muslim laws.[47] In fact, MMCs' legislations can inflect the legal meaning of an Arabic term used in Islamic law to give it diverse significances and nuances, as is the case with the 2004 Moroccan Code of Personal Status. The approach recently adopted by the Italian Supreme Court in acquiring *ad hoc* clarifications on the Jordanian family law implemented in Palestine,[48] or in recommending that the competent Court of Appeal seeks to obtain the relevant information from the country concerned in order to decide a case,[49] is therefore to be supported. This course of action might, however, affect length and cost of the proceeding. A case-by-case evaluation of every *ṭalāq* is to be highly seconded while protecting weaker family members. By contrast, the establishment of a rigid postulate impermeable to any assessment regarding the specificities of every foreign (*sharīʿah*-compliant) nuptial dissolution would lead to the crystallization of the principles to be enacted within Italian legal boundaries.[50] *Ad hoc* rather than general principles are instead to be favored.[51]

The risk is that every time the word 'repudiation' is reported on a document submitted to the competent (judicial or administrative) authority, the civil validity of a foreign *sharīʿah*-compliant matrimonial dissolution is automatically denied. A case addressed by the Court of Appeal of Rome exemplifies these dynamics.[52] The judiciary ruled that the unilateral repudiation act pronounced by the husband at the wife's request cannot be subject to exequatur.[53] Consequently, the Italian wife of an Egyptian man, who had agreed to an *al-khul'* (الخلع) procedure[54] thirteen years earlier, was still regarded as the Muslim man's wife by the Italian legal system.

Some clarifications might be necessary. An Islamically married wife may obtain her *ṭalāq* either from a judicial authority, or directly from her husband. In the first case, the grounds for judicial divorces vary according to the legislation of

religious authority; or the woman agrees to, or requires, the matrimonial dissolution. See sections II and subsections 1-4.

[47] See above section II.

[48] Corte di Cassazione no 16804/2020. See above sections III-IV.

[49] Corte di Cassazione no 17170/2020, para 4. The Supreme Court clarified that Corte d'Appello di Bari violated Arts 14-15, legge 31 May 1995 no 218. See also above sections III-IV.

[50] See F. Pesce, n 24 above.

[51] See D. Scolart, n 24 above.

[52] Corte d'Appello di Roma 9 July 1973, *Diritto di Famiglia e delle Persone*, III, 653-661 (1974). See C. Schwarzenberg, 'Ordine pubblico e riconoscimento in Italia dello scioglimento di matrimonio islamico per ripudio' *Diritto di Famiglia e delle Persone*, 653-660 (1974).

[53] If and when certain requirements are met, private international law principles provide for the automatic recognition of foreign sentences, according to legge 31 May 1995 no 218.

[54] The Arabic word *khul'* derives from the verb *khala'a*, meaning 'to undress'; the spouses are indeed appointed as mutual 'dresses' – *libāsat* or *ālbisah* – in the *Qur'ān* (2: 187). The justification of the 'divorce-repudiation' is found in the *Qur'ān* (2: 229).

the relevant MMCs[55] and the Islamic sources the partners refer to.[56] Accordingly, the wife can obtain a *ṭalāq* broadly translated as 'divorce-repudiation' pronounced by her husband or by a court (or even by a *shaykh* when referring to the so-called *Sharīʿah* Councils active on European soil). These forms of nuptial dissolution are identified with the expressions *mubāraʾah*[57] or *al-khulʿ*.[58] A third option is called *tawfid*.[59] In these situations, by renouncing the deferred part of the nuptial gift (*mahr* or *ṣadaq*) reported on the partners' nuptial contract,[60] the woman can be divorced by her husband, who either repudiates her or delegates the woman to repudiate herself as his wife.[61]

Focusing on the effects of the legal proceeding mentioned above, the woman remained 'unilaterally married' to her (ex-)husband, as the Court of Appeal in Rome refused the exequatur of the foreign (repudiation) judgment, namely, a *khulʿ*. The submitted act reported that the woman declared: 'I exempt you from paying the pending part of the nuptial gift and from paying alimony, on condition that you repudiate me.' The legal act dissolving the marriage was therefore a 'consensual divorce-repudiation' instead of a man's unilateral repudiation. The judiciary dealing with this case was probably misled by a Supreme Court judgment dating back to 1969 (the sole one prior to 2020).[62] In that 1969 Court

[55] The country the parties are nationals of, or the country where the spouses contracted their matrimony, or the countries where (at least one of) the partners are willing to dissolve their marriage.

[56] Primary sources are *al-Qurʾān* and *al-Sunnah*. See respectively, A.T. Welch, R. Paret and J.D. Pearson, 'al-Ḳurʾān', in P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs eds, *Encyclopaedia of Islam*, II Ed, online at https://tinyurl.com/5ey5p5me (last visited 30 June 2022); G.H.A Juynboll and D.W. Brown, 'Sunna', in P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs eds, *Encyclopaedia of Islam*, II Ed, online at https://tinyurl.com/553esnew (last visited 30 June 2022).

[57] *Mubāraʾah* comes from *ībrāʾ*, which concerns the remission of debts. Accordingly, the wife remits the husband's debts with her regards. The *ṭalāq ʿalā al-ībrāʾ* implies a conjugal agreement; therefore, it is sometimes defined a 'consensual divorce'. See D.S. El-Alami and D. Hinchcliffe *Islamic marriage and divorce law in the Arab world* (London: CIMEL & Kluwer, 1996), 27-28; L. Welchman, *Women and Muslim family laws in Arab states: A comparative overview of textual development and advocacy* (Amsterdam: AUP, 2007), 112-116.

[58] For a definition, see above footnote no 54.

[59] The wife can repudiate herself if she had been formerly delegated to do so by her husband in their nuptial contract, under certain circumstances (eg he contracts a new marriage). This is quite common in South Asia. See amongst the others, I.D. Pal, 'Women and Islam in Pakistan' 26 *Middle Eastern Studies*, IV, October, 449-464 (1990); M. Munir 'Stipulations in a Muslim marriage contract with special reference to Talaq Al-Tafwid provisions in Pakistan' 12 *Yearbook of Islamic and Middle Eastern Law,* 235-262 (2005/6).

[60] According to *sharīʿah*, the groom has to pay his bride a gift (*mahr* or *ṣadāq*) as reported in the nuptial contract; part is anticipated at the conclusion of the marriage ceremony, the remaining is due if the husband repudiates her. In cases of *khulʿ*, the amount of money the husband gave to the woman when concluding the nuptial contract is to be returned by her. See for instance Spies, 'Mahr', in P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs eds, *Encyclopaedia of Islam*, II Ed, online at https://tinyurl.com/5hcmfpyn (last visited 30 June 2022).

[61] The formula traditionally identified with the word *tamlīk* is described in Art 89, Moroccan *Moudawwanah*. See n 40 above.

[62] See section III.

of Cassation proceeding, civil recognition of an Iranian unilateral declaration of repudiation was denied on the grounds that it was against the *ordre public*.[63] Thus, the motivation provided by the Rome judiciary did not fit the case at hand, being based on a misunderstanding of the foreign *sharīʿah*-compliant matrimonial dissolution form, civil recognition of which was requested by the woman to end her "limping marriage".[64]

This lawsuit indicates that, in the interplay between diverse competing normativities, the discrepancy between nuptial legal status and social reality can grow into a potentially unbridgeable gap. It shall indeed be stressed that none of the women who were part of the judicial proceedings mentioned above disputed the validity of the *ṭalāq* in light of Islamic and Muslim laws. The women, who formerly entered into *sharīʿah*-compliant marriages (whose civil effects were recognized in Italy), never questioned the validity of the *ṭalāq* issued in compliance to both Islamic normativity and the laws of the relevant MMCs. And, frequently, these (ex-)wives acted accordingly in both the religious and foreign socio-legal arenas.[65]

To better understand these undercurrents, as well as the Islamic validity of the nuptial dissolution forms, legal and linguistic anthropology can assist the legal professional. First of all, the fickleness of legal language can best be grasped when one understands that the word of the jurist, or the person who is responsible for implementing a legal norm, becomes a 'signifier' in and of itself. Accordingly, a 'legal word' has a meaning, but it does not have a referent. As elucidated by Sacco, it is a 'performative,' that is to say that 'what the word means is one with the word itself.'[66] However, the context can determine diverging interpretations.

In the case of transnational Muslim families, a *ṭalāq* becomes a 'performative utterance of exercitive type'[67] with illocutionary force.[68] For an utterance to be illocutionary, the parties must be aware of the social obligations involved in their relationships,[69] as evidenced by the following conditions. A conventional procedure

[63] C. Schwarzenberg, n 52 above. The Court denied the civil validity of a 'unilateral repudiation act' received from an Iranian notary acting in his civil capacity.

[64] It can be ventured that the woman then submitted an application for marriage dissolution according to Art 3, legge 1 December 1970 no 898.

[65] By way of illustration, in one of the *ṭalāq* cases recently examined by the Italian Cassation Court (see section III), the woman withdrew from her husband's bank account an amount of money equivalent to the still due nuptial gift. For a definition see footnote no 60.

[66] R. Sacco, *Antropologia giuridica* (Bologna: il Mulino, 2007), 204 also with regard to the previous sentence. On legal 'perfomatives,' see among the others L. Fiorito, 'On Performatives in Legal Discourse' *Metalogicon*, XIX, 2, 101-112 (2006). Linguistic anthropology clarifies a very similar concept with regard to the word *ṭalāq*; as explained further in the subsection.

[67] J.L. Austin, *How to do things with words* (Oxford: OUP, 1962), 150-163.

[68] J. Searle, *Speech acts: An essay in the philosophy of language* (Cambridge: CUP, 1969), 23-24. Building upon Austin (1962: 15-15), Duranti indicates these six conditions for an illocutionary act to work. A. Duranti, *Linguistic anthropology* (Cambridge: CUP, 1997), 224-226.

[69] As elucidated by Wardhaugh building upon Austin's five categories of performative. See R. Wardhaugh, *An introduction to linguistics* (Oxford: Blackwell, 1992), 285-286; J.L. Austin, *How to do*

is to be followed; an appropriate number and types of participants and circumstances have to be met; the execution should be complete; it should involve the participation of the required parties; and the participants must have certain intentions and behave accordingly. Diverse MMCs detail various *sharīʿah*-compliant procedures for a pronounced *ṭalāq* to be formalized and, in all the examined cases, these requirements were satisfied.[70]

Religious and social obligations being met, the *ṭalāq* is then perceived by the (ex)partners as valid despite the legal arguments they may invoke before civil courts. It can thus be inferred that the social and legal performative of the same (foreign) words are molded differently depending upon the normativities the (ex-)spouses are referring to. And the ethnographic observations I conducted disclose that this is a constant pattern in legal proceedings before the Italian judiciary.

Legal professionals and bureaucrats shall thus pay attention to 'gendered readings' as offered by disputing (ex-)partners. While women might argue for *ṭalāq* non-recognition on public policy grounds, men might stress the similarities between Italian and *sharīʿah*-compliant family laws in claiming the civil validity of foreign matrimonial dissolutions. From the religious and social perspectives, however, the *ṭalāq* as a valid and effective marriage dissolution form is not challenged by the Islamically married (ex-)partners, who are particularly aware of the social obligations involved in their relationship and its dissolution.

The dynamics described above indicate that, when transplanted into diverse legal systems and social contexts, the very same *ṭalāq* becomes highly contested; the illocutionary force of this Islamic and Muslim family law institute is nonetheless accepted and enacted by the partners. As this discussion demonstrates, the socio-legal efficacy of a *ṭalāq* is therefore acknowledged by the ex-spouses, whereas its effects may be disputed in a different legal system, by one or by both partners, relying upon constitutional principles and human rights narratives.

2. Competence and Jurisdiction. Extra-Judicial Bodies and Divorce Privatization

When investigating foreign nuptial dissolution forms, it is not only the word *ṭalāq* that can cause translation problems, but also the foreign vocabulary used to identify the authority documenting the marriage dissolution and the body issuing the relevant certificate.

Both the recognition and the registration of foreign *sharīʿah*-compliant nuptial dissolutions present difficulties when the partners are transnational Islamically married (ex-)spouses.[71] In particular, refusals to civilly acknowledge a foreign matrimonial dissolution are frequently grounded in the wording of the foreign

things with words (Oxford: OUP, 1962), 150-163.

[70] For an overview, see for instance, WLUML, *Knowing our rights* (London: Women Living under Muslim laws, 2006), 243-291.

[71] See above Section II.

legal act. In cases of certificates issued in MMCs, the knowledge of foreign legal cultures is thus of pivotal importance, as well as the translation from Arabic, Persian, or Urdu into Italian language.

In *ṭalāq* cases, one key aspect regards the translation of the Arabic words *'adul* and *māzūn,* which are mostly used in the certificates produced by Moroccan and Egyptian nationals, respectively.[72] In compliance with the law, a 'divorce-repudiation' must be authorized by the *'udūl* accredited for this purpose in the judicial district of the conjugal domicile, the wife's domicile or place of residence, or the place where the marriage contract was issued.[73] According to this procedure, the husband states, before officially appointed authorities, that he wishes to pronounce *ṭalāq* to his wife, and he petitions the court for authorization to certify the repudiation by two *'udūl'*. Several years of ethnographic investigations[74] revealed that *'udūl* is often translated as 'public notary' in the Italian copy of the legal act. This translation leads to problems because the Italian legal system does not recognize a notary as competent to render a judgment in family matters. Consequently, the civil validity of these documents is usually denied by civil registrars.

Surprisingly, the transcription refusals issued by administrative authorities are rarely appealed by the parties. In these case-scenarios, Islamically married partners may follow two alternative courses of action. Some (ex-)spouses I interviewed tried to have the Arabic terms *'adul* or *māzūn* translated as '(Islamic) judge' (which in Arabic would be *qādhī*) to secure the civil acknowledgement of the foreign documentation.[75] Other (ex-)spouses opted for a certificated *res judicata* status released by MMCs' embassies and consulates, or favored the *ṭalāq* homologation by foreign courts and tribunals. The last option broadly granted the registration of alien nuptial dissolutions in Italian civil registers, and 'limping nuptial statuses' were accordingly avoided.

Over time, the non-recognition of matrimonial dissolution forms perfected by extrajudicial bodies was counterbalanced by Italian and foreign provisions alike. On one hand, the laws of MMCs increasingly require the judicial homologation of extra-juridical acts, including *ṭalāq*-s. On the other, the Italian Ministry of Interior gradually took notice of other legal systems and their specificities. The Italian reform of legal separation and divorce procedures then further facilitated the recognition of foreign non-judicial nuptial dissolutions.[76] By way of illustration,

[72] The complete Moroccan expression is *kātib al-'adul*.

[73] Arts 79-80, Moroccan *Moudawwanah;* see n 40 above.

[74] For details, see above Section II.

[75] Among my informants, two couples were successful in obtaining this 'customized translation', whereas in another case the interpreter refused to provide 'carefully tuned' translations of foreign certificates.

[76] See decreto legge 12 September 2014 no 132, *Gazzetta Ufficiale* no 212, 12 September 2014; legge 10 November 2014 no 162, *Gazzetta Ufficiale* no 261; legge 6 May 2015 no 55, *Gazzetta Ufficiale* no 107, 11 May 2015.

law no 162 of 2014 and law no 55 of 2015 introduced the possibility to have recourse to extrajudicial separation and divorce procedures when certain requisites are satisfied.[77] This echoes the extension of party autonomy and the increase of non-judicial and non-adversarial processes, also with respect to family matters, as enacted across Europe.[78] The so-called 'privatization' or dejudicialization of family disputes has impacted Muslim family members, albeit indirectly.[79]

When assessing the competence and the nature of the foreign body issuing the document submitted by the (ex-)partners asking the civil acknowledgement of a *ṭalāq*, the Italian legal system focuses on two aspects. These concern the 'legal capability' of the foreign body releasing the relevant document, and the 'jurisdiction' of another legal system in dealing with the parties' matrimonial matters. As clarified by the 2020 Supreme Court ruling on the unilateral repudiation issued by a Palestinian *Sharīʿah* Tribunal, the 'jurisdiction assessment' concerns not only the legitimacy of the authority formalizing the foreign nuptial dissolution,[80] but also the jurisdiction of the foreign legal system.

In this regard, by complementing domestic provisions, the relevant European sources (the so-called Brussels II-*bis* and Rome III Regulations)[81] assist in the process of identifying the (extra-)judicial body responsible for dealing with matrimonial matters and nuptial disputes involving more than one country, specifically when Muslim spouses, who are MMC nationals, are domiciled or resident in Europe.[82] This implies that, when settled on EU soil, the spouses can formally agree upon the national law to be applied to their divorce, or legal separation, provided some requirements are satisfied. The Ministry of Interior's instructions for the civil registrar confirm that

[77] Such as mutual agreement between the spouses, and no minor or disabled children.

[78] See amongst the others K. Boele-Woelki, N. Dethloff and W. Gephart eds, *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (Cambridge: Intersentia, 2014); K. Boele-Woelki and D. Martiny eds, *Plurality and Diversity of Family Relations in Europe* (Cambridge: Intersentia, 2019); J.M. Scherpe and E. Bargelli eds, *The Interaction Between Family Law, Succession Law and Private International Law: Adapting to Change* (Cambridge: Intersentia, 2021).

[79] Whether a *ṭalāq* is to be understood as an 'act of private autonomy' between Muslim spouses has been debated before the European Court of Justice in *Soha Sahyouni* v *Raja Mamisch*, Judgment of 20 December 2017. See for instance A. Licastro, 'La questione della riconoscibilità civile del divorzio islamico al vaglio della Corte di giustizia dell'Unione europea' *Stato Chiese e Pluralismo Confessionale*, 13, 1-34 (2018).

[80] This happens by issuing or registering a *ṭalāq*. See above section III.

[81] Regulation (EC) 2201/2003, *Official Journal of the European Union* L 338, 23 December 2003; and Council Regulation (EU) 1259/2010, *Official Journal of the European Union* L 343/10, 20 December 2010. See among the others C. Campiglio 'Conflitti positivi e conflitti negativi di giurisdizione in materia matrimoniale' *Rivista di Diritto Internazionale Privato e Processuale*, 497-532 (2021). For a recent development, see also the so-called 'the Brussels II-*ter* Regulation', namely Council Regulation (EU) 2019/1111, *Official Journal of the European Union* L 178/1, 2 July 2019, which came into force on 1 August 2022.

[82] Namely, divorces, legal separations, marriage annulments and parental responsibility (including child's custody and access rights).

> 'the jurisdiction of the foreign authority exists when at least one of the following requirements is satisfied: the defendant is resident or domiciled in mentioned foreign country; the marriage was celebrated in mentioned country; or one of the spouses is a citizen of mentioned country'.

These also highlight that the jurisdiction of the foreign judge exists if this has been accepted by the parties, or in case the defendant has not pled the lack of jurisdiction in the first defensive act.[83]

The above-mentioned European and domestic provisions should have facilitated the so-called 'automatic recognition' of foreign divorces and reduced the appealed cases. Nonetheless, controversial situations arise in the actual interpretation of this normativity by local registrars, particularly for MMCs' nationals. In an emblematic case, an Italian woman and a Tunisian man married in Tunisia and lived in Italy for a number of years. When the matrimonial crisis occurred, the spouses began the divorce procedure in Tunis, where the tribunal issued a 'definitive divorce.' The woman requested the civil registration of this nuptial dissolution in an Italian municipality; however, the civil registrar denied it.[84] The written explanation was grounded on a negative opinion issued by the Public Prosecutor of the Republic highlighting the lack of jurisdiction of the Tunisian tribunal in hearing the case. However, the civil registrar consulted the wrong official body – the Public Prosecutor (it should have been the Prefecture) – which had no authority in issuing guidance on such matters. Accordingly, the woman appealed the denial,[85] and the Tunisian 'definitive divorce' was eventually acknowledged as civilly valid in Italy.[86] Procedural mistakes can in fact affect the (non-)recognition of foreign *sharīʿah*-compliant matrimonial dissolutions, and this outcome might be more problematic when the applicant is not an Italian national and is less familiar with domestic provisions.

An additional aspect deserves to be emphasized. The interactions between judiciary and administrative authorities is of pivotal importance. From a historical perspective, Italian judicial bodies have become more inclined to recognize the competence of foreign authorities in certifying *ṭalāq*-s. Accordingly, over the last two decades, legal proceedings tend to predominantly focus on the other two

[83] According to Art 4, para 1, legge no 218 of 1995. See Ministero dell'Interno, *Il Regolamento dello stato civile: guida all'applicazione. Massimario per l'ufficiale di stato civile* (Roma: Ministero dell'Interno, 2014), 137.

[84] Unpublished, Case no 42, in R. Calvigioni, Il diritto internazionale privato applicato allo stato civile. Quadro giuridico e soluzioni operative (Santarcangelo di Romagna: Maggioli, 2019), 261-264.

[85] In compliance to Art 67, legge no 28 of 1995.

[86] R. Calvigioni, *Il diritto internazionale privato* n 84 above, 261-262, notes that 'perhaps out of an excess of zeal, perhaps because being excessively fearful or insecure,' officially enquired for the opinion of the Public Prosecutor of the Republic, nonetheless this procedure was incorrect. In light of Art 9 DPR no 396 of 2000, 'indication and supervision' in matters of matrimonial status compete to the Ministry of Interior; accordingly, the Memorandum 1/50/FG/29 of the Ministry of Justice dated 7 January 1997 was superseded.

characteristics affecting *ṭalāq* (non-)recognition, namely the potential violation of the right of defense, and the (temporary or potential) revocability of the foreign proceeding.[87] Arabic/Italian translations also continue to play a key role. The next subsections investigate these matters.

3. The Issue of (Potential or Temporary) Revocability

Another primary issue affecting the rejection of a petition to record foreign *sharīʿah*-compliant forms of matrimonial dissolution regards the potential, or temporary, revocability of a *ṭalāq*.

Acts of nuptial dissolution issued in MMCs are frequently refused by the Italian legal system on grounds of revocability. The Ministry of Interior clarifies that 'a foreign judgment of 'revocable' divorce involving an Italian citizen is to be considered unrecognizable being against public policy,'[88] and this applies also to recently naturalized Italian citizens.[89] The law demands a foreign proceeding to be *res judicata* for it to be civilly recorded, particularly when this concerns (naturalized) Italian nationals.[90]

The potential, or temporary, revocability of foreign divorces, however, is not an absolute ban; a remedy does exist. This obstacle can be overcome by submitting subsequent documentation declaring the divorce 'definitive and irrevocable.'[91] Accordingly, a *ṭalāq* pronounced by the husband before a public notary,[92] another state body, or certified witnesses can be recognized as a 'definitive divorce' by the judiciary after the Islamic legal waiting period (*ʿiddah*) has expired. With regard to this aspect, two chief elements that are usually overlooked concern the opposing perspectives adopted by Islamic and Italian laws regarding this matter, and the importance of the translation of some keywords from Arabic into Italian, as elucidated in the paragraphs below.

It should be clarified that, according to the *Sunnah*,[93] a Muslim husband can pronounce two types of *ṭalāq*: the 'best one' (*aḥsan*), or the 'good one' (*ḥasan*). A *ṭalāq al-aḥsan* is always 'revocable'; the husband can revoke the marriage dissolution until the legal waiting period expires. Consequently, during the *ʿiddah* the husband can reconcile with his wife and resume cohabitation.[94] According to

[87] As identified and listed in section I.

[88] See Ministero dell'Interno, n 83 above, 113, and 142-143.

[89] The Ministry of Interior clarifies: 'in case a recently naturalised Italian citizen requests the transcription of a marriage certificate containing the wording of 'divorced on the basis of revocable divorce', the fact that the events occurred when the citizen was still a foreign national is not regarded as being relevant; on the contrary, the fact that the registered event produces effects clashing with the Italian *ordre public* impedes the legal acknowledgement and registration of the act in the civil register. See Ministero dell'Interno, n 83 above, 113, and 142-143.

[90] Art 64, legge no 218 of 1995.

[91] Ministero dell'Interno, n 83 above.

[92] See section II.

[93] For a definition, see footnote no 56.

[94] The Islamic legal waiting period consists of three monthly menstruation periods if the woman is

Islamic law, however, a *ṭalāq* can also be a *ṭalāq bā'in*, that is to say an 'irrevocable divorce.' Two types of irrevocability – minor and major – exist. If the husband pronounces an irrevocable divorce of the greater degree (*ṭalāq al-baīnūnah al-kubra*), a temporary impediment to the remarriage of the former husband and wife exists. The partners can remarry only after the wife has contracted matrimony with another man and has been divorced by him. Differently, in cases of irrevocable divorce of the lesser degree (*ṭalāq al-baīnūnah al-ṣaġra*), the spouses can remarry, provided a new nuptial contract is entered between the parties.

Adopting the perspective of Islamic law, the irrevocable *ṭalāq* is regarded as reprehensible (*makrūn*), whereas the *ṭalāq al-aḥsan* is to be favored. Conversely, as highlighted by legal proceedings and scholarly debates,[95] a 'revocable divorce' or 'revocable divorce-repudiation' is considered contrary to Italian public policy and therefore not civilly recordable. Opposite viewpoints are thus embraced by Italian and Islamic legal experts with regard to the characteristics of a *ṭalāq,* and these contrasting perspectives become visible only when comparing Islamic and Italian normativities. The fact that a reconciliation can happen between the spouses during *al-'iddah* – at the husband's wish, when some Islamically compliant divorce (repudiation) forms were chosen – represents an obstacle to the civil recognition of the *ṭalāq* in Italy. The Islamically favored revocable *ṭalāq al-aḥsan*, indeed, is not *res judicata*; therefore, it cannot be recorded by an Italian civil registrar. On the contrary, if the (magic) word 'irrevocable' is reported on the translation of the legalized act, then, the matrimonial dissolution can be civilly recognized, regardless of the type of *ṭalāq* irrevocability.

Additional highly under-investigated and otherwise invisible undercurrents are disclosed when examining empirical data. Among the ones I collected and studied, an interesting case regards an Egyptian couple living in Northern Italy. In 2011, the civil registrar of the municipality accepted as civilly valid a *ṭalāq al-baīnūnah al-ṣaġra* issued between these two Egyptian nationals. The Italian administrative authority was presented with a translated and legalized *ṭalāq,* which reported the expression 'minor irrevocable divorce,' and this *ṭalāq al-aḥsan* of inferior irrevocability appeared to satisfy the domestic legal requirements.[96]

Ethnographic investigations, however, disclose two specificities which went unnoticed by state bodies; namely, a discrepancy in the partners' nuptial statuses, and a mismatch between the legally and socially perceived scenarios. The same Egyptian couple, indeed, remarried the following year by virtue of a new, civilly unregistered, *sharīʿah*-compliant marriage contract. Being part of a polygynous

subject to menstruation (*Qur'ān*, 2: 228), or three lunar months or ninety days if the woman is not menstruating (*Qur'ān*, 65: 4), or it lasts until the delivery of the baby if the woman is pregnant (*Qur'ān,* 65: 6). See Y. Linant de Bellefonds, 'Idda', in P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs eds, *Encyclopaedia of Islam*, 2nd ed, online at https://tinyurl.com/yc4v35ey (last visited 30 June 2022).

[95] See section III, and also subsections 1 and 4.

[96] As stated in Art 64, legge no 218 of 1995.

family, the second wife of the (eventually naturalized) husband needed to be part of a civilly recognized matrimony to regularly relocate to Italy as a spouse. The first (Islamically and civilly divorced) wife agreed to undergo a *ṭalāq* procedure since she could benefit from welfare support as a single parent. Consequently, one marriage was dissolved according to foreign *sharīʿah*-compliant laws, but contracted again, by the same partners, by virtue of Islamic provisions. The polygynous man's second marriage was then disclosed to the competent state authorities. Registration issues did not arise, but these spouses' kinship arrangements do not correspond to the official data reported on the civil register.

The opposite can also happen: a *ṭalāq* can be denied recognition even when it is actually a 'foreign definitive and irrevocable divorce'. Field data again clarify some effects related to the 'compromise solution' aimed at circumnavigating the irrevocability requirement, as offered by the Ministry of Interior. As elucidated above, once the Islamic legal waiting period expires, one of the parties of a revocable *ṭalāq* can submit to the civil registrar a subsequent act declaring the 'definitive and irrevocable' nature of the 'intervened divorce'.[97] This approach implies lending an ear to transnational family members by taking into consideration the specificities of a foreign legal system – including the temporary revocability of a nuptial dissolution form – in the attempt to facilitate uniformity amid societal and legal nuptial statuses across national and social borders.

The following case illustrates these bureaucratic dynamics, which usually remain unobserved by legal professionals and scholars. An Italian municipality received a legalized document, duly translated into Italian, reporting the words 'first definitive divorce'. The legal waiting period detailed on the document had already expired, leading the civil registrar to wonder if the divorce had become 'irrevocable' and therefore civilly recordable. The Italian municipality corresponded with the Italian embassy in Cairo requesting clarifications regarding the divorce issued between these two Egyptian nationals.[98] The Italian embassy explained that the divorce judgment was a 'notary act' in the form of a

> 'first definitive revocable *ṭalāq*'. Building upon, Italian private international law and the bilateral convention between Italy and Egypt,[99] the Italian diplomatic personnel regarded this marriage dissolution as 'a non-recognizable divorce with civil effects'.

The embassy also referred the civil registrar to the Egyptian diplomatic authority for further information. At this point, however, the civil registrar denied the registration

[97] See Ministero dell'Interno, n 83 above, 113, and 142-143.

[98] As recommended by Ministero dell'Interno, n 83 above, 145-146.

[99] Respectively, Art 64, legge no 218 of 1995 and Art 10, of the Convenzione tra la Repubblica italiana e la Repubblica araba d'Egitto sul riconoscimento e l'esecuzione delle sentenze in materia civile, commerciale e di stato delle persone, firmata al Cairo il 3 dicembre 1977, *Gazzetta Ufficiale* no 235, 27 August 1981.

of the 'first definitive divorce,' which, in the meantime, had become *res judicata*; consequently, it should have been civilly acknowledged as an 'irrevocable divorce.' In this situation, the partners were actually divorced. The societal reality perfectly matched the (ex-)partners' legal nuptial statuses. Nonetheless, inaccurate translations, bureaucratic misunderstandings, and delayed procedures prevented the legal recognition of the foreign *ṭalāq*.

The three scenarios discussed above all present similar familial arrangements: Egyptian nationals settled in Italy, who had married and divorced in Egypt. Their *ṭalāq*-s, however, were evaluated rather differently by the Italian legal system. The administrative authorities are not to be held solely responsible, and the same is true for the parties. The issues at stake are complex and fluid, and neither the partners nor the civil registrars can keep pace with constantly evolving family laws. A broad understanding of some specificities of Islamic law by administrative bodies can also become a double-edged sword. If it can facilitate the communication between the (ex-)spouses and civil registrars, it may cause misrepresentation and misconceptions, such as the denial of *ṭalāq* recognition on the grounds of its revocability even if the *'iddah* has expired.

4. The Right of Defense and Official Bodies Lost in Translation

Among the important factors impacting the possible (non-)recognition of foreign *ṭalāq-s* by the Italian legal system is the right of defense as exercised by defendants or respondents, usually by the (Islamically divorced) wife.

The husband's unilateral repudiation of his wife violates the fundamental principles enshrined in the Italian Constitution. The right of defense is an inviolable, constitutionally protected right (para 2, Art 24). Moreover, according to the Constitution (para 2, Art 111),

> 'all court trials are to be conducted with adversary proceedings, and the parties are entitled to equal conditions before an impartial judge acting as a third party'.

Consequently, recognition difficulties arise in relation to the legal procedures characterizing some foreign *sharīʿah*-compliant matrimonial dissolution forms. Italian private international law principles require the defendant's essential rights of defense be respected, and that the parties appear before the court in compliance with the law of the country. Rules may nonetheless differ depending on the country of origin of the partners, as the two recent proceedings before the Supreme Court demonstrated.[100]

A thorough study of foreign unilateral marriage dissolutions obtained in MMCs reveals that these legal acts are frequently perfected and recorded when the wife is not present. Accordingly, these documents are signed by the husband,

[100] See above sections III and IV.

the witnesses, and the public notaries only. The lines on the pre-printed forms of the act of *ṭalāq* that are devoted to the wife's signature and to the notice reception are often left empty. The cases I have examined[101] indicate that, whereas the judiciary appears to take this into consideration, civil registrars tend to overlook this fact. Consequently, when the partners agree to request the civil registration of a foreign unilateral *ṭalāq*, issues might not arise even if the right of defense has been violated. In some cases, the original documents, or their translation, are inaccurate or misleading;[102] in other cases, some details simply remain unnoticed.

Following the same pattern adopted in the previous sections, my analysis here refers to empirical data to make visible the otherwise invisible undercurrents. A foreign divorce recorded in central Italy will serve as a first illustration. A certificate of a 'first revocable divorce' issued in Egypt, as translated and legalized by the Italian embassy in Cairo, was submitted to the civil registrar. The document was not signed by the woman, but the paperwork was nonetheless accepted as documentation of an 'irrevocable divorce' once the legal waiting period (*'iddah*) had expired. The missing signature of the wife on the act was not regarded as problematic.

In another case, specific attention was paid to the documentation submitted in Arabic, but some key aspects went missing. The civil registrar declared to be confused by the numerous dates reported on the translation of the legalized act documenting a Muslim husband's 'first verbal divorce' as declared before the competent *māzūn* and recorded on the foreign civil register. Accordingly, additional clarifications were requested by the Italian civil registrar to an Egyptian consulate. Nevertheless, neither the Italian nor the Egyptian authorities raised the issue of the violation of the wife's rights of defense.

No right of defense was actually granted to the wife during this *ṭalāq* procedure. The fact that the woman was not present can be easily inferred when reading the original Arabic certificate. The blank spaces on the document that indicated that the formality relating to the wife's notification had not taken place were however simply not represented in the Italian translation. Examination of the official paperwork shows that the pre-printed *ṭalāq* form was left completely blank and free of any stamps or signatures. This is perhaps why the appointed interpreter did not translate this part of the original certificate. Similarly, when summoned to legalize the document, the Italian diplomatic mission did not point out that part of the official document was missing from the Italian translation. This issue was also not raised by the foreign consulate.

While the diplomatic missions and appointed translators could have been more accurate with the foreign documentation, additional details could also have been inferred by Italian authorities, if the certificates had been carefully examined,

[101] I am referring to *ṭalāq* certificates issued in Morocco, Egypt, Tunisia, Algeria, Bangladesh and Pakistan.

[102] See section II.

or if they had otherwise been made aware of these potentially problematic aspects. Scrutinizing the Italian translation of the document, it becomes evident that the act was signed by 'the spouse (not the *spouses*), the witnesses and the notary' only. Moreover, the Italian translation distinctly reports that 'the wife is not present.' The failure to notice these details, or to raise any issues regarding the woman's right of defense, was most likely unintentional. Nonetheless, it resulted in an unnotified man's unilateral repudiation being regarded as compliant with Italian public policy, and therefore civilly registered.

Another interesting situation further illustrates similar dynamics, which usually remain in the shadows. In this case, the act was first translated into Italian and legalized by the Italian embassy in Cairo. Then, it was submitted to both the Egyptian diplomatic mission in Italy and to an Italian municipality, where the *ṭalāq* was eventually recorded as an 'irrevocable divorce.' The parties - a Muslim Egyptian man and a Christian Filipino woman - both resident in Italy, had divorced in Alexandria and wanted to be regarded as unmarried in Italy as well. The documents presented to the civil registrar attest that in May 2009 the husband pronounced the first *ṭalāq bā'in* to his wife, and the act was recorded in August 2009. The original Arabic document clearly states that the wife was absent when the *ṭalāq* was completed and indeed, in place of her signature, there is a note in brackets that the woman was absent. More specifically, the original certificate reports that 'she did not come' (*lam taḥadar*). In the part of the document where the notification is supposed to be recorded, the act is scribbled all over with official stamps and legalization signatures. The Italian translation reports that the wife was absent and that the notification form was left empty. Consequently, the wife's right of defense was not respected. Nonetheless, similar to the previous situation, this unnotified man's unilateral repudiation was recorded as a civilly valid divorce.

Comparison between original Arabic documents and their legalized versions submitted to the Italian authorities highlights the importance of careful inspection of translated acts, while also clarifying that misinterpretations and oversights can result in hindering the essential rights of defense. However, had the partners disagreed on their *ṭalāq* registration, all these cases could have been appealed before the competent Italian court, which would have, most probably, denied civil recognition to these foreign acts on the grounds of defense violation and gender discrimination. Yet in the case-studies examined here, no issues were raised. Two possible hypotheses can be advanced: either the parties agreed to register their nuptial dissolution, or the partners were not aware of the possibility of disputing the civil recognition of the foreign *ṭalāq* on grounds of a violation of the woman's right of defense. Power struggles can indeed severely impact weaker family members, particularly in transnational or migration contexts.

Carefully examining the original documentation submitted to civil registrars unveils an additional key element. The potential discrepancy between administrative

and judicial recognition of foreign *ṭalāq-s* becomes evident and creates serious concerns in terms of non-discrimination and equitable treatment. The approach followed by civil state officers is thus to be critically assessed. In effect, the Ministry of Interior's instructions state that

> 'the procedure referred to as an 'act of repudiation' represents a case that is contrary to '*ordre public*' since 'repudiation' constitutes a situation in which the loss of the marital bond is decided and imposed unilaterally by the husband, and this indication cannot be said to be mitigated by the fact that the woman may possibly have manifested some form of consent: it is the institution as such which is contrary to our (ie Italian) legal system and with mandatory principles of public policy'.[103]

Regarding the legally contentious undercurrents described above, it seems plausible that, since the Arabic word *ṭalāq* was translated as 'divorce' instead of 'act of repudiation', the civil registrars did not verify whether the (ex-)wife had actually been notified of the legal act before the foreign *ṭalāq* was civilly recorded. Thus, it becomes evident that the usage of the so-called 'magic words' in the official paperwork again facilitates the legal acknowledgement of *de facto* unilateral repudiations. Remarkably, these processes remain unnoticed by legal professionals and scholars and, consequently, these matters are unmapped and under-debated.

An additional point deserves to be stressed. This concerns the potential amendment and validation of *sharīʿah*-compliant unilateral repudiations. The Ministry of Interior's instructions impede the recognition of unilateral repudiations even if an intervening proceeding certifies the dissolution of the marriage between the parties.[104] Nevertheless, Italian judicial and administrative authorities can support the theory according to which the wife's application rectifies the husband's 'unilateral repudiation', which therefore becomes a 'divorce-repudiation.' Should this be the case, the *ṭalāq* is no longer contrary to *ordre public*. According to some scholars, when the wife petitions for recognition of a repudiation in Italy, the *ṭalāq* cannot be recorded, or acknowledged, since the act itself was formed unilaterally rather than bilaterally.[105] Conversely, others maintain that the husband's unilateral decision is rectified by the claim of recognition submitted by the wife.[106] The repudiation thus becomes a sort of 'consensual divorce'.[107] As a result, the *ṭalāq* recognition should not be refused in case the woman applies for it.[108]

[103] Ministero dell'Interno, n 83 above, 148.

[104] ibid

[105] A.M. Galoppini, 'Il ripudio e la sua rilevanza nell'ordinamento italiano' *Diritto di Famiglia e delle Persone*, 34, 3, 2, 969-989, 982 (2005).

[106] C. Campiglio, 'La famiglia islamica nel diritto internazionale privato italiano' *Rivista di Diritto Internazionale Privato e Processuale*, XXXV, 21-42, 37-38 (1999).

[107] M. D'Arienzo, 'Diritto di famiglia islamico e ordinamento italiano' *Diritto di Famiglia e delle Persone*, 1, 189, 212 (2004).

[108] See A. Licastro, 'Scioglimento del matrimonio' n 24 above.

These academic arguments can be juxtaposed to the 'consensual divorce-repudiation' *(khul')* case whose recognition was refused by the Rome Court of Appeal, as examined above.[109] with specific regard to the Italian judiciary, it should also be mentioned that a pragmatic approach may lead to the acknowledgement of civil effects to a 'unilateral divorce-repudiation' as pronounced by the husband *in absentia* of his wife. The Court of Appeal of Cagliari, in effect, recognized the validity of an Egyptian 'revocable *ṭalāq*' as requested by the Italian-Egyptian (ex-)husband, on the grounds of documentation submitted by the party, including a foreign marriage contract entered into by the applicant's (ex-)wife with another man.[110]

The discussed cases indicate that it is thus of pivotal importance preventing judicial and administrative bodies from being "lost in translation".

5. Performative 'Magic Words'. (In)accurate, (In)complete or Carefully Tuned Translations

Albeit formal declarations and official texts, the examined legal and administrative case-studies unveil highly problematic forms of nuptial dissolution – such as foreign (unnotified) men's unliteral repudiations – which can be recognized as valid divorces in the Italian legal system. A *ṭalāq* can be recorded or, at the opposite, denied civil effects, on the grounds that the relevant documentation is not correctly translated, or understood, by the competent state bodies. It can also happen that the foreign acts are skimmed through rather than being carefully scrutinized, when no *ad hoc* experts are consulted by judicial bodies and administrative authorities, or the non-legally competent authority is eventually approached.

How can this impasse be solved? An Islamisation of social sciences – according to which Muslims can only be studied by those conversant with Islamic sources – is not to be argued for.[111] Fluid dynamics otherwise overlooked by judges, legal professionals, bureaucrats and scholars can be brought to light relying upon Islamic religious provisions, Muslim social normativities and MMCs' laws, as the present work demonstrates.[112] Building upon (un)published proceedings and empirically collected data, the former sections of the paper indeed offered a thorough analysis of seldomly perceived administrative and legal phenomena, while also disclosing neglected issues related to legal transplants and linguistic translation.

[109] See above subsection 1.

[110] Corte d'Appello di Cagliari 16 May 2008 no 198, *Rivista di diritto internazionale privato e processuale*, 647 (2009). For a commentary, see A. Barbu, 'Compatibilità del ripudio-divorzio islamico e ordine pubblico italiano' *Rivista Giuridica Sarda*, 2, 311-321 (2009).

[111] It has been underlined that 'one important Muslim response since the 1960s has been the attempt to Islamize the social sciences, including anthropology, that is, to appropriate them for Islam, by insisting that Muslim societies can only be studied by Islamic anthropology or by those conversant with Islamic textual sources. See R. Tapper, 'Islamic Anthropology and the Anthropology of Islam' 68 *Anthropological Quarterly*, 68, 3, 185-193, 188 (1995).

[112] See subsections 1-4.

An additional layer needs to be added to the analysis; an ear is to be lent to the relevant socio-legal actors. As discussed above, ethnographic researchers document that, in some situations, translators and interpreters might be asked by the (ex-)spouses to facilitate the civil recognition of their foreign *sharīʿah*-compliant form of marriage dissolution; other case scenarios, however, exist. The testimonies of some Arabic-Italian translators and interpreters, as well as those of women who underwent a *ṭalāq* procedure, provide further insights on these matters.

First, attention is to be paid to translators and interpreters.[113] When enquiring clarifications about the chosen wording reported in the Italian translation of foreign documentation, reactions differed. Whereas some informants proved to be annoyed when incongruences were pointed out in the documents produced;[114] others explained that they were unaware of the mistakes. Two were the explanations provided: either the translators stressed not to have expertise in the legal field or – to their understanding – the legislation in their country of origin was different, therefore the 'carefully tuned' translation provided was the result of *bona fide* inaccuracy.[115]

The technique of reporting, on legalized documents, what are commonly labelled by (Muslim) migrants as 'magic words', nonetheless, is not uniformly supported by the community of Arabic-Italian translators and interpreters. Some informants were outraged by the usage of specific formulae purposely aimed at achieving the civil recognition of foreign men's unilateral repudiations by Italian official bodies. This approach appears also not to be seconded by the personnel of MMCs' consulates and embassies.[116] On the contrary, to other interpreters, a

[113] Arabic-Italian translators have been interviewed by the author, in different instalments, from 2006 to 2019. The conversations were held mostly in Italian; specific issues were addressed in modern classical Arabic (*al-fuṣḥā*), while examining foreign original certificates and documentations. The reported statements are verbatims which have been translated into English by the author. Informants have been granted anonymity therefore the names reported in the text are not their original ones.

[114] Mahmoud, for instance, stated: 'No, but you are Italian, you don't have to read Arabic! Instead, read what is written in Italian; forget the Arabic, otherwise you get confused… They (ie the Italian civil registrar, the lawyer and the judge) aren't reading the Arabic anyway. So… don't get confused yourself as well, stick to the Italian version. This (ie the Italian translation of the document) is what you need'.

[115] Tariq clarified: 'I know. I understand what you're saying, but my country is different. I believed - believe me! - that it was still okay like this... you know, this means that... in short, *al-ṭalāq* means that you are divorced. Full stop. And a *qādhī,* a *shaykh,* a *māzūn,* a *ʿadul*... they aren't so different anyway. You know that, don't you?'. In his statement, this informant provided a little summary of the most problematic terminology reported in foreign *sharīʿah*-compliant matrimonial dissolution forms: these specifically relate to the type of *ṭalāq* and the nature of the foreign authorities issuing the relevant documents, as identified and discussed in the previous subsections.

[116] The author interviewed the personnel of MMCs' consulate and embassies, in different instalments, from 2006 to 2020. The conversations were held in Italian and/or in modern classical Arabic. Due to word-limit, only one statement-verbatim is here reported. Salima, who is employed by a MMC's diplomatic mission in Italy, declared: 'You see what they're doing? This is illegal! This is not even Islamic, in my view… The problem is... too many people claim to be able to act as translators and, then, you see the results! Some are in good faith — you have to say so, yes — but others aren't… but, what can you do? At the end, they only read the Italian paper and so if you are lucky, or if they put the 'magic words' there, then you are done! If this is a 'divorce', or if this is 'irrevocable'... or if it doesn't say that the

translation that facilitates the civil recognition of a *ṭalāq* meets the clients' needs, and therefore becomes a priority also having financial implications.[117]

Islamically married partners can approach the issue of these carefully tuned translations from similar pragmatic viewpoints. In spite of that, some women stressed different aspects.[118] An Egyptian divorcée, for instance, agreed to claim the civil registration of her unilateral repudiation issued abroad in order to fasten the bureaucratic process.[119] A Moroccan woman was instead not aware of these 'magic words', but she conceded that the transcription of the foreign *ṭalāq* into the civil register was eventually the best solution, from financial and social perspectives.[120] Explanations of these customized or strategically adjusted translations can therefore be found in several pragmatic reasons. Furthermore, societal and legal implications of the potential (non-)recognition of a *ṭalāq*, and the consequent multiple nuptial statuses and limits to remarry, are carefully balanced by the (ex-)spouses.

Muslim women might however voice a different opinion. This is for instance the case of a Moroccan -naturalized Italian- woman who submitted a plea for non-recognition of a foreign nuptial dissolution on the ground of what she articulately defined as 'customary and religious gender discrimination rules embedded in Muslim family laws'.[121] She was adamant in stressing that women

woman wasn't actually there… then, it's fine: you're divorced! And free to marry again'.

[117] For instance, an Arabic-French-Italian-Spanish translator -who offers his services nearby the entrance of a MMC's consulate- stated: 'Well... you see that's magic! If I write that word, then we're all happy and we move on. It's a win-win situation, eventually: I work, they're divorced and they register it. Done.'. Karim, a translator working in an Italian tribunal in Northern Italy, similarly declared: 'You must understand that I have to work. I can't ... you know, if the rumour spreads... if it goes around that you write like this or like that ...and it isn't good, then they don't come to you anymore! So… better write what you need, so they're happy and you work! ...we are all on the same boat, don't you say so here?!'. The reported statements are verbatims which have been translated into English by the author. Informants have been granted anonymity therefore the names reported in the text are not their original ones.

[118] These selected interviews were conducted by the author, respectively in 2008, 2014, and 2019. The conversations were held mixing Italian, French, modern classical Arabic and Moroccan Arab (called *dārijah*) languages. The reported statements are verbatims which have been translated into English by the author. Informants have been granted anonymity therefore the names reported in the text are not their original ones.

[119] Zahra explained what follows: 'Yes, some friends told us to go to this person because his translations are better, you know what I mean (…) Look, this is simple: we need a divorce. Us, back home... we do so that it costs less and it gets faster. It's true: I don't get any money from him — I was so stupid with such a little *mahr*! — but (he) doesn't have anything anyway, so what am I asking him anyway? Believe me, it's enough for me not to have him as my husband anymore... for heaven's sake! Then, we'll see…'.

[120] In Aisha's words, 'If the municipality doesn't say anything, I don't say anything; it already costs a lot (of money) to make those documents here and there... can you imagine if we have to do more (paperwork)?! (…) And then I'm divorced for us, I can't pretend to be his wife again, here… it isn't good for me too, for my family… and what would my family think?'.

[121] When addressing the potential recognition of a *ṭalāq* in Italy, Fatima added: 'When I saw this, I say: are we joking, are we? He'll always be able to do everything he wants here, too! No, my dear! No, no… Now, I am in Italy and I no longer want the law of my country. There, I can't do anything… nothing more, but not here ...here, I want to be an Italian! Tell me: can a man repudiate you, here? No! Then, he

were not positively impacted by the 2004 Moroccan *Muddawanah*. Consequently, the prospective divorcée did not intend to rely upon *sharīʿah*-compliant laws in regulating her family matters. In 2019, this woman was thus pleading the judiciary of her settlement country to dissolve her marriage according to Italian law and on more gender-neutral terms.

It emerges that local Muslim communities living betwixt and between MMCs and Italy can develop corrective performative formulae – such as carefully adjusted translations perfected by skilled interpreters. These usually overlooked carefully tuned translations remain ambivalent. On one hand, these compensate for the denial of the civil acknowledgement of foreign *ṭalāq-s*. On the other, inaccurate, incomplete or 'adjusted' translations might be craftily used, or even abused, by the (ex-)partner who is more familiar with the provisions of different legal systems, to the detriment of weaker family members. According, an alert and scrupulous analysis of the submitted foreign material is to be enacted by both administrative bodies and judicial authorities. Strategically employed 'magic words' can in effect act as a sponge that eventually functions as epistemological obstacle in obfuscating realities,[122] even to State bodies.

V. Conclusions

Revolving around some aspects of horizontal kinship relationships in the contemporary intercultural scenario, the paper focused on a foreign nuptial dissolution form identified with the Arabic umbrella term *ṭalāq*. It explored the multiple manners in which – in the journey from MMCs to Italy – possibly competing judicial and extrajudicial *sharīʿah*-compliant nuptial dissolutions can be civilly recognized, or not recognized, by Italian judicial and administrative authorities.

The proposed analysis showed that the interplay of five elements eventually determines the (in)formal implementation of *sharīʿah*-compliant nuptial dissolutions in the Italian legal system. The paper identified three main characteristics affecting the (non-)recognition of a foreign *ṭalāq:* the nature of the foreign authorities issuing the relevant documents, the respect of the (ex-)spouse's right of defense, and the revocability of foreign decisions concerning matrimonial dissolution. As clarified in the discussion, these characteristics are deeply intertwined with two additional key elements: the translation of the relevant foreign terminology, and the socio-legal performative of a *ṭalāq*. The 'formalization' of a *ṭalāq* is indeed

(ie my husband) can't repudiate me either! Enough is enough. I'm here, so we do as you do, here! I found a lawyer, and I want an Italian judge to decide, not one back there, who does what a man wants...'.

[122] Bachelard showed how a 'sponge' provided a helpful metaphor for XVIII century scientists in explaining observed phenomena, particularly those not yet scientifically understood; G. Bachelard, *La formation de l'esprit scientifique. Contribution à une psychanalyse de la connaissance objective* (Paris: Librairie philosophique, 1967). See also B. Elevitch, 'Gaston Bachelard: The philosopher as dreamer' *Dialogue*, 7, 3, 430-448 (1968); J.P. Souque, 'The historical epistemology of Gaston Bachelard and its relevance to science education' 6 *Thinking: The Journal of Philosophy for Children*, 4, 8-13 (1986).

affected by the legal and social normativities of the relevant MMCs and Muslim community, as well as by the utterance by means of which Muslim partners Islamically dissolve their marriages.

Combining comparative analyses with social science ethnographies and anthropological investigations, otherwise invisible family arrangements were disclosed and examined, while raising flags for legal professionals and bureaucrats. The paper thus brought to light fluid dynamics and potential discriminatory undercurrents enacted by, or in the folds of, European legal systems.

Adopting a comparative angle, two phenomena were highlighted. First, by the contrasting views of Islamic and Italian laws on potential, or temporary, divorce revocability become manifest. According to Islamic provisions, an irrevocable divorce is regarded as being reprehensible, whereas a revocable *ṭalāq* is to be favored. *Res judiciata* and principle of certainty are instead the fundamental concepts enshrined in Western minds. The very same *ṭalāq* can thus be valued rather differently by a foreign Muslim (ex-)spouse and an Italian legal professional.

Secondly, social and legal normative statuses of the (ex-)partners may diverge significantly. From the proposed discussion it emerged that, independently from the official acknowledgement of multiple nuptial statuses resulting from the civil registration of a foreign *ṭalāq*, the religious and social validity of a *sharīʿah*-compliant matrimonial dissolution form is not disputed by the (ex-)spouses. And this happens even if the civil validity of the foreign act is opposed by one partner before the Italian judiciary. The social and legal performatives of the word *ṭalāq* are thus understood and enacted differently by the parties, in diverse normative systems. Building upon the anthropology of *Islām*, it can therefore be inferred that a *ṭalāq* is to be investigated as an articulation of structural relations.[123]

In exploring the manners in which transnational processes are shaping local legal situations, careful notice is to be taken of the main characteristics that surface when investigating administrative processes and judicial proceedings. The potential recognition of foreign acts is indeed highly affected by the translation of the relevant foreign terminology. And this can concern not only the (potential or temporary) revocability of a *ṭalāq,*[124] but also the parties' right of defence,[125] and the authority documenting the partners' nuptial dissolution.[126]

The diplomatic personnel's, civil registrar's and judiciary's interpretation and (partial) understanding of alien *sharīʿah*-compliant normativity equally plays a key-role in the homologation, or registration of foreign documentation. The

[123] Similarly to the word *Islām* or the idea of religion. See A.H. El-Zein, 'Beyond ideology and theology: The search for the anthropology of Islam' *Annual Review of Anthropology*, 6, 1, 227-254 (1977).

[124] See above subsection 3.

[125] See above subsection 4.

[126] The 'magic words' regard not only the translation of *ṭalāq* and its (un)revocability; but also *'adul*, *māzūn* or *qādhī*; for further details, see above subsection 2.

proposed analysis distinguished among several forms of *sharīʿah*-compliant nuptial dissolutions which are variously translated as 'divorce-repudiation', 'repudiation-divorce', 'consensual divorce-repudiation', 'divorce under judicial control', 'definitive divorce', 'minor irrevocable divorce', 'verbal divorce'. And it showed to what extent the chosen translation formulae impact on the *ṭalāq* civil (non-)recognition, independently from the public policy criterion.

Furthermore, it was releveled that diverging interpretations of the word *ṭalāq* can be fostered by European or MMCs' official bodies as well as by Islamically married partners. Different translations and supporting statements can, for instance, be submitted to state bodies by (irreconcilable) spouses. Approaching Islamic and Muslim normativities as discursive traditions, in effect, Muslim (ex)partners can manifest their socio-legal agency in (apparently) dissonant terms. Furthermore, according to the party's main argument, emphasis can be strategically placed upon the first or the second word in the expression 'divorce-repudiation'; gendered readings are thus frequently offered to the Italian judiciary. These (partially) concealed undercurrents impact on the civil recognition of a *sharīʿah*-compliant nuptial dissolution, or its denial.

Strategically selected wording – such as 'judge' (instead of 'public notary'), 'definitive judgement' (rather than 'notary act'), 'divorce' (rather than 'repudiation'), 'final' (instead of 'revocable') – can also be relied upon to facilitate the civil acknowledgement of a *ṭalāq*. If the partners are in agreement, these shadowy techniques can be used to enact family arrangements such as *de facto* polygynous unions. These households remain unperceived in the eyes of the Italian civil system despite being religiously and legally valid marriages according to the laws of MMCs and Islamic normativity.

Academic studies mostly regards published legal proceedings, which are scarcely available and frequently terminologically confused,[127] and legal commentaries tend not to engage with customized or carefully tuned translations not having access original documentations.[128] Terminological issues, as well as their pitfalls in terms of anti-discrimination rights and weaker family members' protection, cannot therefore be disclosed, debated and properly addressed. Accordingly, filling a gap in the current legal and scholarly debate, this essay shed light on unperceived courses of action and (potential) discriminations. Unexpectedly, official documents and translations issued by Italian diplomatic missions or MMCs' official bodies – which were specifically aimed at facilitating the *ṭalāq* recognition by European legal systems – can also be misleading. On the contrary, 'divorce judgements' that, in real terms, were unilateral forms of 'divorce-repudiation' can be accepted the judiciary as 'effective' in Italy.[129]

Additional otherwise invisible pitfalls also surfaced in the proposed

[127] See above section III, and subsections 1-4.
[128] See above section III.
[129] See above subsection 4.

discussion. If the transcription of irrevocable divorces can be denied, unilateral repudiations unnotified to the wife can be registered with civil effects.[130] This can happen since Muslim (ex-)partners can develop skilled techniques. Reference to various authorities, partial translation of some problematic pre-printed forms in Arabic language, or customized translations of some controversial terms might therefore be used to connect two potentially conflicting principles and rules of diverse normative orders.

As this paper revealed, a full picture of the actual socio-legal dynamics involved in *ṭalāq* acknowledgement processes can be painted only when concentrating also on the involvement of local municipalities alongside with Italian and MMCs' diplomatic missions. The interplay between Muslim (ex-)spouses and State's authorities – both administrative and judicial – is thus to be carefully monitored to grasp the actual implementation of *sharīʿah*-compliant nuptial dissolution forms. The Italian legal system is, however, constantly adjusting to a variegated socio-legal reality that is rarely reported in law books, as also recently claimed by the Supreme Court.[131]

As clarified by the examined numerous case-studies, administrative and judicial authorities scour a difficult terrain studded with reforms and adjustments aimed at attempting to accommodate family members of increasingly cross-national societies.[132] Opposite interpretations might however be advanced. On one hand, taking into consideration the specificities of foreign legal systems, or normative orders, intends to facilitate uniform transnational legal and societal matrimonial statuses and to protect weaker family members. On the other, the very same approach can be perceived as a limit posed to family members' freedom in enacting diverse kinship structures, or when being settled betwixt and between different countries.

Still, both viewpoints indicate that these scenarios usually remain concealed and, therefore, the outcome of a judicial proceeding, or an administrative procedure, can be vitiated. In point of fact, skilled techniques (sometimes grounded on unbalanced gendered power-struggles) play a crucial part in bridging the gap among diverse legal and religious normative orders; whilst also paving the way to creative courses of action. The latter might attempt to dissimilarly (un)accommodate *sharīʿah*-compliant family arrangements as apparently attuned to the public policy criterion, or occasionally disguised.[133]

[130] See above subsections 3-4.

[131] See above section III.

[132] For instance, by relying upon the principle of automatic recognition, or the implementation of Brussels II-*bis* and Rome III Regulations.

[133] By way of illustration, when a *ṭalāq* is understood as a man's unilateral repudiation that violates the *ordre public*, or as it happened in the examined case of the Egyptian *de facto* polygynous family; see above section III and subsections 1-4.