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Divorce on grounds of discord: Did the Moroccan family law reform bring the guarantee of divorce for women? An ethnographic perspective on the changing landscape of divorce. The *Mudawwana* a decade on

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Abstract: This article discusses the new divorce on grounds of discord procedure (*taṭliq li-š-šiqāq*) within the context of the Moroccan family law reform of 2004. Literature available in English and French has, so far, focused primarily on the improvements the Moroccan family law reform has brought in regard to women's rights. The reform is considered one of the most progressive legislative projects in the MENA region and a milestone for gender equality, notably the reform of divorce law. Divorce on grounds of discord was seen as the long-awaited divorce guarantee for women. However, legal scholars maintained that case law jeopardised the divorce guarantee. This legal-anthropological study is informed by fieldwork at the family court in Rabat, as well as official statistics, case law and the standard legal commentary. It aims to scrutinise how divorce on grounds of discord is put into practice by the judiciary, how Moroccan men and women make use of it and how changes on a procedural and institutional level affect the implementation of the new divorce procedure. My empirical findings show that divorce on grounds of discord effectively guarantees Moroccan women's right to divorce. Well beyond the discussion on women's rights in divorce, I will demonstrate that, within a decade, divorce on grounds of discord developed into a standard divorce procedure for both men and women across socio-economical milieus and age groups.

Keywords: divorce, family law, *Mudawwana*, reform, women's rights

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1 Introduction

This article explores the divorce on grounds of discord procedure, introduced in Morocco in 2004 as part of family law reform. This procedure brought widespread access to divorce for Moroccan women. While the beginning of the 21st century saw a number of reforms to divorce law in the MENA region,¹ Morocco's family law reform of 2004 was hailed "the most substantive and radical reform of family law achieved by women's activists in any Muslim country".² Mir-Hosseini argued its singularity lay in the incorporation of the principle of equality into the Islamic framework of the *Mudawwana*.^{3,4} Rude-Antoine affirmed the new codex brought substantial improvement to women's legal position in the realm of family in Morocco, i.e. through new rights in judicial divorce.⁵ Before 2004, women were compelled to produce evidence of mistreatment to obtain a judicial divorce, with legal counsellor and women's rights activist Fatema El Mekkaoui recounting her experience of working with female victims of domestic violence. Procedures were long, sometimes stretching up to ten years, and could easily end without results, i.e. with no divorce judgement. Bringing women long-awaited access to divorce has thus been a core claim of Moroccan women's rights activists.⁶

The history of Moroccan family law is a highly political one. Morocco's family law codex was first decreed at the time of independence and has been a major

1 In 2000, Egypt amended procedural rules making it possible for women to divorce by means of the *ḥul'* procedure without the consent of the husband (before the amendment, the husband's consent was mandatory). In 2001, Jordan introduced a temporary law following the Egyptian model. The Jordanian Personal Status Law of 2010 included a modified version of divorce through compensation allowing women to divorce without the husband's consent. The Algerian reform of family law in 2005 similarly authorised women to divorce through compensation without the consent of the husband. Also, the Algerian legislator introduced a procedure of divorce by mutual consent based on the Tunisian model. The UAE, Qatar, and Bahrain reformed legislation on *ḥul'* in 2005, 2006, and 2009 respectively granting women the right to divorce through compensation without seeking the husband's consent. See Möller 2013 and 2014.

2 Mir-Hosseini 2007: 1500.

3 The expression *Mudawwana* is used as an abbreviation for Morocco's code of family law "Mudawwanat al-usra" which in Arabic reads "Collection of the family". It refers to the title of Sahnun's (d. 240/854) standard collection of *Māliki fīqh*.

4 Mir-Hosseini 2007.

5 Rude-Antoine 2010: 57.

6 Personal interview with Fatema El Mekkaoui at the CIOFEM women's shelter in Rabat on 6th September 2013. Fatema El-Mekkaoui works as a legal counsellor at the shelter. The *Centre d'Information et d'Observation des Femmes Marocaines* (CIOFEM) is an independent observatory on the situation of Moroccan women. It was created in September 2001 and serves as interface between the *Fédération de la Ligue Démocratique des Droits des Femmes* (FLDDF) and the general public.

nation-building project. In contrast to the Tunisian secular family codification project, the Moroccan legislator chose to stick with a conservative reading of the *Mālikī*⁷ tradition.⁸ Mernissi denounced “Postcolonial Morocco designated male supremacy and female subordination as symbols of cultural specificity and political legitimacy”.⁹ In turn, family law has been a key element of the mobilisation and development of Moroccan feminism since 1946, when feminists first protested against polygamy.¹⁰ There were many attempts at reforming family law,¹¹ but it took until 1993 for a limited reform to actually take place. The 1999 *Plan d’action national pour l’intégration de la femme au développement* aimed to align Morocco’s family law to the stipulations of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), which Morocco signed in 1993.¹²

But King Hassan II eventually strongly opposed the *plan* and the government abandoned the multi-level reform project due to fierce public pressure from the Islamists.¹³ It was the young king Mohammed VI who endorsed a discourse of modernity and women’s rights, turning the reform of the family law into a symbol for the compatibility of modernity and Islam.¹⁴ The reform of 2004 was then made possible by a fundamental shift of the political field¹⁵ and was achieved in a climate of political and economic rapprochement between Morocco, the EU and the US, adding to the internal pressures pushing for reform.¹⁶

Research on the *Mudawwana* has, to date, focused primarily on the improvements the reform brought for women’s rights. Methodologically speaking, Ben Hounet and Rupert’s¹⁷ inquiry into gender and parenthood has been the only

7 The *Mālikī* school of Islamic jurisprudence is one of the four major Sunni schools of law. The *Mālikī* tradition is less restrictive in relation to the reasons allowing women to seek divorce. *Mālikī* family law thus served as a source of inspiration for reformers throughout the Muslim world in the 20th century. See Anderson 1970.

8 Buskens 2003: 72–77.

9 Mernissi 1987 as in Sadiqi 2008: 330.

10 Sadiqi 2008: 325.

11 After the *Mudawwana* was enacted in 1958, first attempts at reform were made in 1961 and 1962. In 1965 a commission was established with the task to inquire into the shortcomings of the *Mudawwana* but was soon dissolved. In 1970, 1974 and 1979 the government initiated a reform of the *Mudawwana*. In 1981 a royal commission prepared a draft version of a reformed family law code, but it never reached parliament. See Buskens 2003 and Harrak 2009.

12 Harrak 2009: 4; and Buskens 2003: 84.

13 Harrak 2009: 4–5.

14 N’Diaye 2016: 54–56.

15 Not least because of the weakened islamist block after the Casablanca bombings in 2003. See Sadiqi 2008: 336.

16 Wuerth 2005: 309, 332 as in Mir-Hosseini 2007: 1510.

17 Ben Hounet/Rupert 2018.

ethnographical take on the *Mudawwana* so far. Research on divorce on grounds of discord has been mostly limited to the text of the law and small samples of case law. Providing an ethnographically-informed perspective on divorce on grounds of discord is at the heart of this paper.

When I first started my field research, I wanted to investigate to what extent divorce on grounds of discord effectively guaranteed Moroccan women access to divorce. I asked myself whether there had been a conservative reaction to the facilitation of divorce for women within the first decade of implementation and how this might have played out. Henricot¹⁸ and Bentayeb¹⁹ indeed maintained case law resulted in a conservative backlash, jeopardising women's access to divorce. I wanted to challenge Henricot's and Bentayeb's claims that the concept *responsibility for divorce* was used by the judiciary to obligate women with compensations or restrain from granting the divorce altogether. If Henricot's and Bentayeb's claims were substantiated, this would mean a hard recoil on women's rights. In the field, it soon became clear that divorce on grounds of discord had a far more significant impact on the field of divorce in Morocco and that this had not been mentioned in the literature to date. I thus grew interested in how Moroccan men and women made use of this new divorce procedure and how it transformed the field of divorce more generally. This paper represents the first ethnographical take on the divorce on grounds of discord procedure. It aims to contribute to the research of contemporary Islamic family law, as well as gender and women's studies in the MENA region.

The field research informing this paper was undertaken in Rabat in 2013 and 2014 over almost three months. I primarily relied on participant observation in the office of social workers in the family court of Rabat. Here, I collected 67 cases of divorce on grounds of discord which were (mostly informally) discussed between litigants and social workers. Furthermore, I conducted interviews with two social workers, two judges and the president of the family court in Rabat, as well as with three activists, three lawyers and four litigants (among them, three women and one man). Additionally, I was granted access to 80 court records (cases of divorce on grounds of discord, 2011–2014, 20 cases per year). This qualitative data is contrasted with case law from the court of cassation and official statistics provided by the Ministry of Justice and Liberties. Judge 'Abdelhādi Bṭaḥ,²⁰ director of the department of family affairs for the Ministry of Justice and Liberties and author of the legal

18 Henricot 2011.

19 Bentayeb 2015.

20 I use DMG transliteration for Arabic quotes and concepts but the romanisation used in Morocco for places and the personal names of my interviewees. Because judge 'Abdelhādi Bṭaḥ figures in the bibliography, I used the DMG transliteration for his name consistently.

standard commentary in relation to divorce on grounds of discord supported this research and gave legal advice. I followed the legal framework laid out in his comprehensive study.²¹ To my knowledge, this is the first paper in a European language which introduces Bṭaḥ's legal writings on divorce on grounds of discord.

As to the structure of this article, I will begin by describing Moroccan divorce law as it took effect in 2004. Second, I will outline the major statistical trends. Third, I will take a more technical look into the design of divorce on grounds of discord, detailing the legal reasoning of Moroccan reformers based on Morocco's *Mālikī* tradition. Comparing divorce on grounds of discord to the Egyptian reform of the *ḥul'*-law enacted in 2000, I will highlight how the Moroccan reform stands out. Fourth, I will discuss the technical term *discord* and question the extent divorce on grounds of discord means Moroccan women's guarantee to divorce. Fifth, I will bring attention to a number of procedural and institutional innovations vital to ensuring access to divorce. These are the principles of non repeal, family courts and the fund for family aid. Sixth, I will outline how Moroccan divorce law handles property issues in the event of divorce. Seventh, I will examine judiciary practices regarding *mut'a*, showing that case law saw a turn due to high numbers of male appeals. This meant women lost their right to *mut'a*, unless the husband filed for divorce. Eighth, I will scrutinise the concept *responsibility for divorce*, challenging Henricot's and Bentayeb's views. Finally, I will explore divorce on grounds of discord as the new standard divorce procedure for both men and women in Morocco. Why have Moroccan men increasingly turned to the new divorce procedure? Did women refrain from filing for divorce after the turn in case law? What socio-economical and age groups are represented within the applicants? And looking at today, what strategies have men and women developed in relation to divorce on grounds of discord?

2 Moroccan divorce law as laid out in the *Mudawwana*

Moroccan family law is codified on the basis of the *Mālikī* tradition of Islamic law, which dominated in the kingdom throughout history. Divorce law is consequently framed by *Mālikī* law and its categories. That is to say, the *Mudawwana*

²¹ Bṭaḥ, 'Abdelhādi (2012): *Aṭ-ṭatlīq li-š-šiqāq. Aṭ-ṭatlīq li-š-šiqāq fī 'amal iqsām qadā'i-l-usra. Dirāsāt tawṭiqīya, iḥṣā'īya wa taḥlīliya li-sab' sanawāt min aṭ-ṭatlīq* (Divorce on grounds of discord in the work of the family jurisdiction. Documentation, statistics and analysis of seven years of implementation). *Ar-ribāṭ: Dāru-l-qalam*.

discriminates rights and duties of spouses according to gender. Insofar, the *Mudawwana* retains major features of the asymmetrical gender relations in Islamic law, while aiming to accommodate women's and children's rights.

The Moroccan legislator distinguishes between two categories of divorce on the basis of its procedural form, *ṭalāq*²² and *taṭliq*.²³ Prior to 2004, only *taṭliq* was performed at court, whereas *ṭalāq* constituted – just like marriage – a notarial deed and was performed outside of court. After 2004, all divorce procedures have been brought to court, but the procedural forms vary. The category *ṭalāq* includes all procedures of divorce which have required the approval of the court since 2004, but leave the responsibility to set up the divorce contract to spouses (and their lawyers), i.e. divorce contracts are verified by the judge and approved as long as they comply with the legal requirements. *Taṭliq* means formal judicial divorce, i.e. marriage is dissolved and divorce is pronounced through a judgement and the financial stipulations are set by the judge.

The category of *ṭalāq* includes: I) unilateral divorce by the husband (*aṭ-ṭalāq al-raġ'ī*),²⁴ II) divorce through compensation by the wife (*aṭ-ṭalāq al-ḥul'ī*), III) divorce with prior authorisation, i.e. the spouses stipulate in the marriage contract that the wife has the right to divorce (*aṭ-ṭalāq al-mumallak*) and IV) divorce by mutual consent (*aṭ-ṭalāq al-ittifāqī*). Divorce by mutual consent is a new type of divorce instituted in 2004 and works similarly to the French model, *divorce par consentement mutuel* (French Code Civil art. 230 and 232). The spouses agree on the divorce and the respective financial and legal stipulations (e.g. custody) in a divorce contract, which is verified and authorised by the court.

All divorce procedures initiated by the wife and by mutual consent are irrevocable, i.e. the husband cannot revoke the divorce and cannot continue married life. Unilateral divorce, in contrast, because it is initiated by the husband, is reversible twice, but irrevocable the third time. The exception being unilateral

22 *Ṭalāq* means divorce in Arabic. It is derived from the verb *ṭalaqa* (to divorce). What is peculiar about *ṭalāq* procedures is that the marriage is dissolved by one or both spouses and not by the judge. This means that the spouses basically decide on the stipulations of the divorce contract on their own (potentially with the aid of their lawyers).

23 *Taṭliq* is the verbal noun of the II causative derivation of the verb *ṭalaqa* (to divorce), *ṭallaqa* literally means *to make (someone) divorce*. *Taṭliq* thus denotes a type of divorce which is dissolved by someone else than the divorcees. It would hence be more accurate to translate *taṭliq* as *dissolution of marriage* for all types of judicial divorce. However, because the Moroccan Ministry of Justice uses *divorce* as the official translation, I will stick to the official terminology and use *divorce* for both *ṭalāq* as well as *taṭliq*.

24 *Ṭalāq* is often translated as repudiation. But because I aim to follow the official Moroccan terminology used by the Ministry for Justice and Liberties (if provided), I use the term unilateral divorce.

divorce before the consummation of the marriage (*aṭ-ṭalāq qabla-l-binā'*), which is immediately irreversible (art. 123).²⁵

The category, *taṭlīq*, includes: I) divorce on grounds of violations of stipulations of the marriage contract (*iḥlālu-z-zawǧ bi-šarṭ min šurūṭ 'aqdi-z-zawāǧ*), II) on grounds of prejudice (*aḍ-ḍarar*), III) on grounds of lacking maintenance (*'adamu-l-infāq*), IV) on grounds of absence (*al-ġayba*), V) on grounds of a fundamental vice of the spouse (*al-'ayb*), VI) on grounds of sexual abstinence or an owe to sexual abstinence (*al-iylā' wa-l-haǧr*) (art. 98), and VII) on grounds of discord (*li-š-šiqāq*) (art. 94). Judicial divorce is generally reserved to the wife. Divorce on grounds of discord represents an exception to this rule, the legislator explicitly targeting both spouses. Divorce on the above-mentioned grounds are irrevocable given that they are not pronounced by the husband, but by a judge in form of a judgement.

Divorce procedures of *ṭalāq* and *taṭlīq*, likewise, involve a mediation session and if the couple has children, two mediation sessions. In *taṭlīq*, the second session takes place after an interval of 30 days (art. 81, 82, 94 and 95). Consequently, the trial period for *ṭalāq* is generally shorter than for *taṭlīq* and might as well be finalised within a month if the couple does not have children.

Upon divorce, the wife can raise three major claims. She has the right to I) the remaining part of her bride wealth (*aṣ-ṣadāq al-mu'aḥar*) if stipulated in the marriage contract, II) maintenance and housing during the time of waiting (three months) until she is allowed to contract a new marriage (*nafaqatu-l-'idda*), and III) financial compensation (*mut'a*) according to the duration of marriage, financial means of the husband, the motives for divorce and the degree of arbitrariness manifested by the husband in relation to divorce. The amount of *mut'a* (literally meaning enjoyment) is fixed by the judge and applies only if the marriage has been consummated and only in the advent of divorce, but not in the advent of the husband's death. During the time of waiting, the wife retains the right to reside in the marital home or is to be provided with appropriate accommodation (art. 84). In case of divorce on grounds of prejudice, the wife is entitled to compensation for the prejudice she has suffered (*ta'ūyīḍu-ḍ-ḍarar*) if there is sufficient evidence (art. 101).

Divorce does not bring any changes to the children's right to receive maintenance from their father. The father is required to support his children, guaranteeing the same living standard and schooling as before the divorce (art. 85). The right to maintenance applies until they reach the legal age of maturity or until the age of 25 if they are pursuing university studies. Daughters do not lose their right to maintenance until they can provide for themselves or are married (art. 168 and

²⁵ I used Lafrouji's edition of the Mudawwana (2012) throughout this study.

198). Custody, however, is granted, with few exceptions, to the mother, while the father is allowed visiting times.²⁶

3 Divorce on grounds of discord in light of statistics

This chapter outlines the statistical evolutions in the field of divorce. This is pertinent to appreciating how popular divorce on grounds of discord (*taṭliq li-š-šiqāq*) became within a decade. Indeed, divorce on grounds of discord has turned into the standard divorce procedure for both men and women.

Divorce on grounds of discord (*taṭliq li-š-šiqāq*) accounted for 4900 cases in 2005 and 39,800 in 2013 (as shown in the graph on national application numbers 2004–2013, Figure 1). In relative numbers, divorce on grounds of discord accounted for 45% of the total case numbers of judicial divorce (*taṭliq*) in 2004 and 97% of the total case numbers in 2013, respectively. This shows that, by 2013, divorce on grounds of discord had become the most popular judicial divorce procedure. The absolute numbers show an enormous rise in popularity in the period immediately after the reform. Case numbers rose steeply from 4900 to 32,300 between 2005 and 2010. In 2010 and 2011, case numbers plateaued. 2012 saw an increase of 43%. After the peak in 2012, case numbers fell by –18% in 2013. Yet, despite this decrease, case numbers in 2013 were still 12% higher than in 2011.²⁷

Do the statistics show a counter trend? I would rather suggest the decrease in 2013 was a correction of the sharp increase in 2012. This sharp increase was probably caused by macroeconomic distress in 2011. The financial crisis particularly affected European countries with significant Moroccan labour immigrants such as Spain, Italy and France. In this sense, the decrease in 2013 can be interpreted as a corrective bounce back to the slower, but steady, upward trend from 2010 onwards.²⁸

The popularity of divorce on grounds of discord becomes manifest in comparison to unilateral divorce, divorce through compensation and divorce by mutual consent. These three divorce procedures accounted for roughly 25,000 cases per year and looked at together, show a rather steady evolution. But

²⁶ Importantly, the mother has no financial responsibilities for her children in Moroccan law but these lay entirely with the father.

²⁷ Al-mamlakatu-l mağribīya, wizāratu-l-‘adl wa-l-ḥurrīyāt, Al-qaḍā’u-l-usarī 2014: 60–61.

²⁸ As interpreted by Mohammed Houbib, social worker at the family court in Rabat on 12 May 2014 via phone.

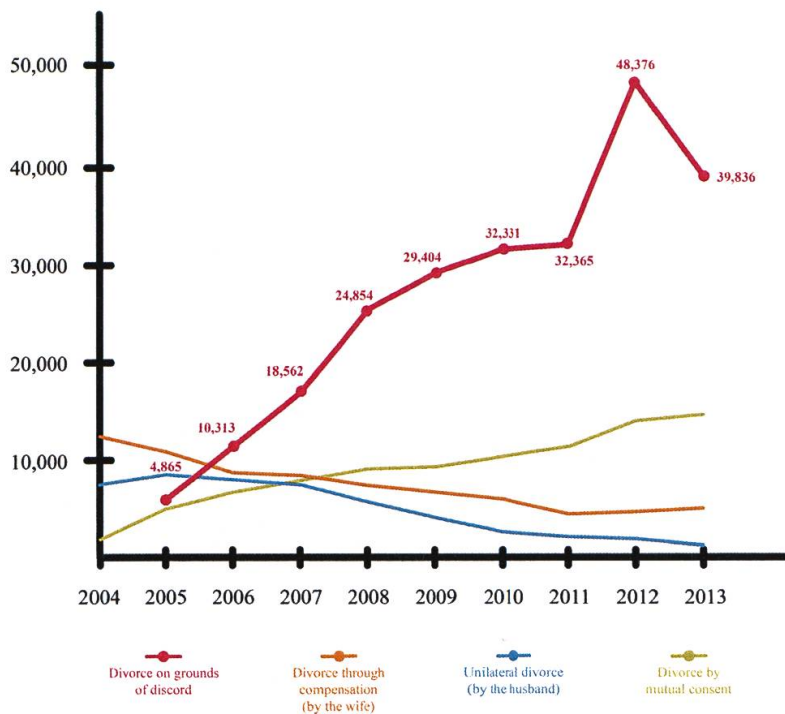


Figure 1: National case numbers 2004–2013.

while unilateral divorce and divorce through compensation have decreased significantly, the new procedure, divorce by mutual consent, saw an all-important rise in popularity from 1860 in 2004 to 14,992 cases in 2013. Notably, the traditional forms of divorce, i.e. unilateral divorce for men and divorce through compensation for women, have become marginal.²⁹ Divorce on grounds of discord significantly outnumbers divorce by mutual consent and the *ṭalāq* procedures as a whole. In comparison, the total case numbers of the category, *ṭalāq*, numbered roughly between 38,000 and 52,000 between 1994 and 2003. Case numbers peaked in 1996, reaching 51,700 cases, decreased by 27% to 37,600 in 2001, and increased again by 20% – 45,000 cases – in 2003.³⁰

Did divorce on grounds of discord become popular with both men and women? As shown in the graph on application numbers by gender (Figure 2), applicants were mostly women, during the first years after the reform, but gender ratios increasingly converged. In 2006, only 22% of applications were initiated by the husband, i.e. 5800 cases against 20,200 initiated by the wife. Until 2013, the ratio of male applicants continued to increase and reached 30,500 cases or 44%, respectively. In the course of six years, the male share increased six-fold. Female applicants, in contrast,

²⁹ Al-mamlakatu-l maġribīya, wizāratu-l-‘adl wa-l-ḥurriyāt, Al-qaḍā’u-l-usarī 2014: 54–54.

³⁰ Royaume du Maroc, Ministère de la Justice et des Libertés 2006: 43.

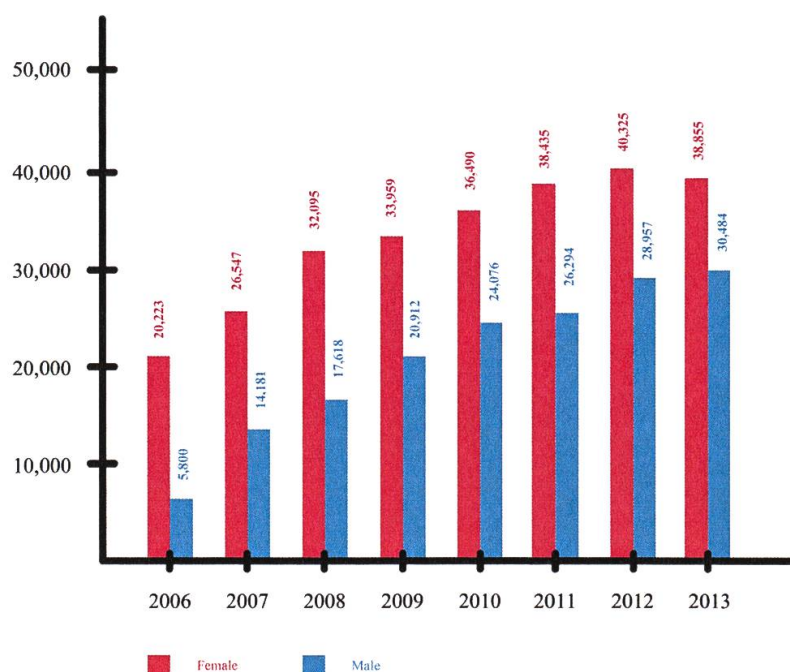


Figure 2: Application numbers by gender 2006–2013.

accounted for 78% of applications in 2006, but only 56% in 2013. This means divorce on grounds of discord became similarly popular with both men and women.

However, the absolute number of female applicants did not decrease. Indeed, applications initiated by women increased significantly over the decade, from 20,200 cases in 2006 to 38,900 cases in 2013. The number of applications initiated by women peaked in 2012 to 40,300 cases, i.e. nearly double those in 2006.³¹

Men have appropriated divorce on grounds of discord and have made it their standard procedure since early on, I suggest. Numbers show that men increasingly opted for divorce on grounds of discord rather than unilateral divorce. In 2007, only three years after the reform, nearly 14,200 men filed for divorce of discord compared with roughly 6330 files of unilateral divorce. This is to say, twice as many men opted for divorce on grounds of discord rather than the traditional unilateral divorce in 2007. This trend continued in 2009, with male applicants choosing divorce on grounds of discord accounting for nearly 21,000 cases compared with 3800 cases of unilateral divorce. In 2013, more than 30,000 men filed for divorce on grounds of discord compared with less than 2000 cases of unilateral divorce. Female applicants accounted for nearly 38,900 cases in 2013.³²

³¹ Al-mamlakatu-l mağribīya, wizāratu-l-‘adl wa-l-ḥurrīyāt, Al-qaḍā’u-l-usarī 2014: 62–64.

³² Al-mamlakatu-l mağribīya, wizāratu-l-‘adl wa-l-ḥurrīyāt, Al-qaḍā’u-l-usarī 2014: 54 and 64.

Within a decade, men have turned away from unilateral divorce and show a strong preference for divorce on grounds of discord.

4 The Moroccan path to divorce reform: Building on the *Mālikī* tradition

Numbers suggest that Moroccan women have been granted access to divorce on a par with men since 2004. This is exceptional when compared with other countries of the MENA region featuring Islamic family law. Looking at the new divorce procedure more technically allows us to appreciate how divorce on grounds of discord stands out. The achievements of the Moroccan divorce reform become clear in comparison to the Egyptian reform of *ḥul'*-law, which took place only a few years earlier in 2000. Both countries sought to reconcile women's rights and Islamic law, but in Egypt, the right to divorce for women remains fairly limited.

The main difference between the Moroccan and the Egyptian approach is fundamentally financial and it is a critical one. The Egyptian reformers took the *ḥul'* procedure as a starting point for facilitating women's access to divorce. Consequently, Egyptian women have to compensate their husbands financially if they wish to divorce. The reform has given women access to divorce in that the husband cannot reject his wife's wish to divorce as was previously the case in *ḥul'*. By law, this would mean the wife returns the bride wealth. But as case studies show, judges charge divorcees with higher compensation than the bride wealth registered in the wedding contract. The judiciary does so by claiming that the amount of bride wealth registered is often lower than the actual bride wealth for tax evasion reasons. Because of the serious and rather unpredictable financial implications of *ḥul'* and the arbitrariness of the judiciary, divorce is accessible only for middle class women. Insofar, the reform of *ḥul'*-law did not ensure the effective right to divorce for Egyptian women, especially for the millions of impoverished women.³³

Unlike the Egyptian reformers, the Moroccan legislator designed the right to divorce for women based on the model of judicial divorce and not based on the model of *ḥul'*. This is the key difference to the Egyptian reform project. Judicial divorce was reserved for women in Morocco until 2004. In judicial divorce, the wife is not required to compensate the husband, but retains her right to the deferred part of the bride wealth (*aṣ-ṣadāqu-l-mu'ahhar*), financial compensation by the husband (*mut'a*) and an allowance during the waiting period. All stipulations regarding the children apply, irrespective of the category of divorce.

³³ Sonneveld 2012.

The Moroccan reform design is based on the *Mālikī* tradition of the kingdom. The legislator has built on the *Mālikī* tradition of judicial divorce in order to facilitate women's access to divorce. Bṭaḥ lays out the rationale of the Moroccan legislator as follows: In contrast to the *Ḥanafī*, *Šāfi'ī* and *Tāhirī* tradition, *Mālikī* law regards *discord* as a legitimate reason for the dissolution of a marriage as *permanent discord* constitutes *prejudice* for the spouses. If *prejudice* represents a reason for divorce, so must *discord* in consequence. Separation is the only way to end discord. Therefore, the new law aimed to give women the same right to end marriage in the cause of justice.³⁴

The rationale put forward by Bṭaḥ can be analysed as follows: I) Moroccan divorce law features a procedure of judicial divorce on grounds of prejudice. II) The *Mālikī* tradition considers persisting discord prejudice. III) If prejudice is a reason for judicial divorce, so must persisting discord. This is because in order to end discord, separation is necessary. IV) Women shall have the right to end a marriage if discord persists for the sake of equality between the spouses. Note that the Moroccan legislator establishes a parallel between prejudice and discord. This allowed reformers to include discord in the reasons for judicial divorce procedures. The Moroccan legislator granted women with the right to divorce on grounds of discord as with the case for prejudice. Bṭaḥ legitimises the change in the law with gender equality. This is to say, Moroccan reformers have built upon *Mālikī* law in order to serve their aim and align family law and gender equality.

The combination of *Mālikī* divorce law and gender equality manifest in the rationale of the legislator is worth commenting on. Moroccan reformers, indeed, used religion to legitimise their claims for equality and women's rights. Naji El Mekkaoui was one of the few female members of the royal commission assigned to prepare the draft text of the reform. She argued “[...] la révision globale à laquelle la Moudawana a été soumise tentait de récupérer la réelle philosophie musulmane qui consacre l'égalité, la justice et l'équité entre les deux sexes.”³⁵

5 Divorce on grounds of discord: The guarantee to divorce

Divorce on grounds of discord was designed on the model of judicial divorce, setting the Moroccan divorce reform apart from similar reform projects in the MENA region. But what is essential for the access to divorce and finally the divorce

³⁴ Bṭaḥ 2012: 24.

³⁵ Naji El Mekkaoui 2009: 21 | v°I.

guarantee, is that the concept of discord is an extremely inclusive one in the practice of the Moroccan judiciary.

The *Mudawwana* lays out that divorce on grounds of discord may be initiated by the wife or the husband forasmuch they fear discord among one another “*idā talaba-z-zawġāni aw ahaduhumā min al-maḥkama ḥall nizā‘ baynahumā yaḥāfu minh aš-šiqāq*” (art. 94). The wording of the law does not define the term *šiqāq*. But the wording clearly refers to sura 4, verse 3: “*wa in ḥiftum šiqāq baynahumā*”, which translates to “if they feared discord among the two of them”.³⁶ In a similar vein, the Moroccan Ministry of Justice issued a very broad definition defining *šiqāq* as “a deep and permanent difference between the spouses to a degree making the continuation of the marriage impossible.”³⁷

The broad definition of the term *šiqāq* has left the door open for *ijtihād*³⁸ and led to an all-embracing extension of the term, according to Bṭaḥ. Diverse factors including violence, verbal abuse, lack of maintenance, impotence, and lack of thoughtfulness for the spouse have been accepted as reasons for divorce in procedures of *taṭliq li-š-šiqāq*, even though some of these are dealt with through relative procedures of divorce.³⁹ Judge Bendaïjou, president of the family court in Rabat, presented a very similar picture from his experience. All kinds of reasons may be accepted by the judiciary. If one of the spouses demands to be divorced, the judge cannot decline her or his request.⁴⁰

Divorce on grounds of discord also functions as an alternative to divorce on grounds of prejudice. If the applicant cannot provide sufficient evidence, divorce on grounds of prejudice ends without results, i.e. the judge cannot dissolve the marriage. But if the applicant persists in claiming for divorce, the judge proceeds to divorce on grounds of discord automatically (art. 100). Eventually, the applicant may lose her or his claim on compensation for prejudice, but will obtain the divorce.

Why is it important to have an alternative to divorce on grounds of prejudice? Experience has shown that it is difficult to meet the burden of proof in divorce on grounds of prejudice. If there is a criminal judgement proving violence, the applicant will win her or his case. In other cases, the prospect of success is fairly poor, judge Ben El Maddani explained.⁴¹

Divorce on grounds of prejudice and divorce on grounds of absence remain time-consuming and complicated procedures, notwithstanding the reform.

36 Bṭaḥ 2012: 19.

37 Al-mamlakatu-l-maġribīya, wizāratu-l-‘adl wa-l-ḥurrīyāt 2008 as quoted in Bṭaḥ 2012: 20.

38 *Ijtihād* refers to independent reasoning in Islamic jurisprudence as opposed to following established opinions. See Oxford Islamic Studies Online 2009: “*Ijtihād*.”

39 Bṭaḥ, 2012: 21, 100.

40 Personal interview with judge Bennasser Bendaïjou in his office on 5th September 2013.

41 Personal interview with judge Ali Ben El Maddani in his office on 11th February 2014.

Divorce on grounds of discord, in contrast, is the fastest and easiest procedure, legal counselor El Mekkaoui asserted. The major hurdle from a women's rights perspective lies in the fact that judges demand significant evidence of prejudice. In cases of domestic violence, for example, a medical certificate is not sufficient and a witness must be produced. In a society where domestic violence is still a taboo, neighbours, for example, are reluctant to testify in court. Although domestic violence constitutes a criminal offence under Moroccan law, protection for women remains insufficient, the counsellor pointed out. In her experience, a number of women file an action, yet many abandon the procedure because of their social environment and procedural hurdles.⁴²

The *Mudawwana* struggles with insufficient divulgation due to a high level of illiteracy, especially among women, social worker Mohammed Houbib pointed out. As a consequence, women often suffer from legal illiteracy. In his experience, applicants very often do not know that they are entitled to ask for a compensation for prejudice. They entail the procedure of divorce on grounds of discord and do not use the opportunity to file for compensation.⁴³ The practitioner's view reiterates similar findings described in the literature. In a national survey in 2005, Mellakh found that Moroccan women, in general, had little knowledge of the details of the divorce procedures. Rural and illiterate women, in particular, remained ignorant of the legal innovations. They were also reported to be reluctant to women's quest for divorce, which they perceived as going against traditions and values.⁴⁴

Divorce on grounds of discord guarantees access to divorce because appellants do not have to produce evidence as is the case with divorce on grounds of prejudice. This is critical considering the shortcomings in protection from domestic violence in Morocco.

6 What is new? Non repeal, family courts and the fund for family aid

The *Mudawwana* brought pivotal changes to the procedural level. Firstly, all judicial procedures of divorce must not exceed a limit of six months (art. 97).⁴⁵ Secondly, divorce, once adjudged, is final and cannot be repealed, not even by

⁴² Personal interview with legal counsellor Fatema El Mekkaoui on 6th September 2013.

⁴³ Personal interview with social worker Mohammed Houbib on 28th August 2013.

⁴⁴ Mellakh 2005–2006: 35–54.

⁴⁵ The limit of six months is not respected in the majority of the cases, the sample of judgements from the Family Court of Rabat shows. Most cases take between six months to one year or little more than one year from application to decision. More complicated cases, e.g. involving property claims or if one of the spouses cannot be detected/lives abroad, can take up to two years.

a higher court – only the various stipulations of the judgement may be modified. These changes concerning the procedural framework of divorce cannot be overemphasised as they effectively grant the finalisation of divorce in a feasible period of time and an effective – because unrepealable – dissolution of marriage.

Compared with the situation prior to 2004, the significance of these achievements becomes clear. Prior to 2004, the dissolution of marriage through judicial divorce could take several years, particularly because the dissolution was revocable by higher courts. If the case was continued through different appeal levels, a woman seeking judicial divorce would find herself in a very precarious situation, being neither really married nor actually divorced. Furthermore, a procedure might also end without result due to lack of evidence after years of litigation.⁴⁶ Procedures of judicial divorce were too complicated prior to 2004 and too many obstacles were put in the way of women seeking divorce, judge Ben El Maddani pointed out. He, personally, witnessed the case of a young girl for whom it took thirty years to get divorced because the case was continued through the different appeal levels.⁴⁷ The above-mentioned changes on the procedural level granted a new degree of legal certainty and increased the effectiveness of legal decisions.

What about the institutional level? The legislator's aim to facilitate divorce for women led to two vital elements in terms of practical application: the establishment of family courts, including social workers, and the fund for family aid (*sundūqu-t-takāfuli-l-‘ā’ili*).⁴⁸

Courts specialising in family matters were created to provide court personnel that are specifically trained in matters of family law, women's and children's rights and social work. Social workers are at the core of the legislator's goal to facilitate access to justice, with particular regard to women's and children's rights. Social workers have been effectively instituted since 2011⁴⁹ and have a panoply of different tasks. These include legal counselling and formal mediation between the spouses and their families in divorce procedures, as well as issuing psychological reports that are required if minors are demanding the court authorises a request to marry. However, social workers are also the main contact between citizens and judiciary. They hand out the blank forms and receive completed forms for all kinds

⁴⁶ Personal interview with legal counsellor Fatema El Mekkaoui on 6th September 2013.

⁴⁷ Personal interview with judge Ali Ben El Maddani on 11th February 2014.

⁴⁸ Benradi et al. 2007 offer a comprehensive study on the implementation and the application of the *Mudawwana* in the first years after the reform.

⁴⁹ Because this profession did not exist prior to 2004, it took nearly a decade to put law in practice, a.o. putting in place the respective university curriculum.

of procedures dealt with at the family court. In Rabat, their office was the only one that had a printer at their disposal.

During field research in the family court of Rabat, I spent roughly five hours a day assisting the two social workers in their office. It was constantly busy, just like the waiting room. What impressed me most was that the social workers were mostly busy with rather informal means of counselling. That is to say, all kinds of divorce procedures, as well as the legalisation of marriage,⁵⁰ polygamy, marriage of minors, and domestic violence. Many people came in and asked for information about divorce. They wanted to know about their rights and duties in order to understand whether they should file for divorce or not and, if so, what procedure to choose to protect their personal interests. Men would often ask about the amounts of maintenance and other financial duties at their expense. Women would ask about the necessary steps to take for a divorce and their financial rights. Social workers offered legal advice and practical assistance with filling in the forms and preparing the required documents. They helped citizens with little or no education to manage the paperwork. It was their duty to ensure that every citizen could claim for divorce without the help of a lawyer, in the words of the social workers at the family court of Rabat. Social workers pass on legal knowledge acquired over years of experience at the court and offer valuable legal and bureaucratic assistance to citizens. Insofar, social workers effectively ensure that less fortunate citizens also have access to justice.

The fund for family aid is designed to ease the financial burden for divorced women in need and their children. The fund – and thus the state – advances the maintenance of children and divorced women as stipulated in the judgement in case the husband and father is absent or insolvent. By law, the father has to pay back the fund once he is solvent or detectable. However, it is limited to the amount stipulated in the divorce decree and the maximum of 1200 MDH per family (approximately 120 €) – even if the beneficiaries had the right to a higher maintenance according to the judgement. The sums for maintenance and housing do not correspond with the social realities because the judges are oblivious to these and the needs of the families, Jamila El Soyouri criticised. 300 MDH per child and a total of 1200 MDH per family never cover the real needs. This leads to child labour⁵¹

⁵⁰ The *legalisation of marriage* is a transitional procedure in act from 2004 until date and allowed for the registration of informal marriage. Informal marriage is a wide-spread phenomenon, particularly in rural Morocco. The legislator hence aimed at strengthening women's and children's rights by opening the door to post-factum registration. The social workers in Rabat criticised this procedure for facilitating the marriage of minors and polygamy.

⁵¹ The ratio of child labour in Morocco was approx. 3.5% in 2017. 247,000 out of 7,049,000 children aged between seven and 17 were involved in labour according to Morocco's High Commission for Planning. As reported in Morocco World News, 18/06/2018.

and children being denied their right to schooling because of financial constraints in families with many children, she warned.⁵²

Notwithstanding the limits of the fund, it has two important functions. First, it helps women in need, who would otherwise have to provide for their children on their own, second, it facilitates the finalisation of the divorce if the husband does not deposit the due maintenance at the court. This blocks the judgement from being enforced. This hints at a strategy men increasingly choose in order to prevent women from divorcing.

7 Money matters: Separate property and property acquired during marriage

What is new with regard to financial matters? Moroccan family law principally legislates separate property, just like in Islamic family law in general.⁵³ But in 2004, the legislator introduced the option of stipulating a contract governing the utilisation and separation of the property which has been acquired during marriage. This contract is independent of the marriage contract and may also be signed after the conclusion of the marriage contract. The notary who assists up to the conclusion of the marriage has the duty to inform the couple about this option (art. 49). If no such contract was signed, the court determines the household share of each one of the spouses in basis of evidence on his or her efforts (e.g. payment receipts for the rent of the marital domicile).

Critically, non-monetary contributions such as childcare and domestic work are not considered as contributions to the household expenses by the judiciary. This puts the high ratio of housewives in Morocco at a disadvantage in the event of divorce. Although parliament discussed a draft law demanding the inclusion of domestic work into the contributions to the household expenses, the proposition was later dismissed. Some progressives, therefore, criticised the lack of courage of parliament.⁵⁴

How is this new option received by the population? Moroccan couples refrain from signing a contract concerning the property acquired during marriage. It is

⁵² Personal interview with Jamila El Soyouri, president of the association Adala, in her office in Rabat on 29th January 2014. Adala is a Moroccan NGO promoting legal security and quality of the law. Adala issues reports about the legal situation, the realities of application and implementation, and the judiciary as well as guidelines for professionals. Adala is a.o. supported by the European Commission.

⁵³ This detail is important to consider for European readers as it stands in contrast to legislation in many European countries.

⁵⁴ N'Diaye 2016: 145.

perceived as a lack of trust towards the spouse, social worker Mounia Hakim told me.⁵⁵ 1,520 contracts on property acquired during marriage were stipulated in 2013, nationwide, this was double the amount in 2012 and 2011, which had only 641 and 609, respectively.⁵⁶ In 2013, 306,533 marriages were concluded (with minor variances in 2012 and 2011).⁵⁷ Today, the ratio of couples who opt for a contract on the property acquired during marriage remains fairly low at barely 0.5%.

Neglecting to contractually arrange financial matters often puts women at a disadvantage, El Mekkaoui, legal counsellor at CIOFEM, sums up her experience and said it was because women tended to cover the daily expenses, while men paid back the loan for the shared home. In the event of divorce, the husband has plenty of evidence for his expenses, while the wife has none.⁵⁸

What does case law say? In claims on property acquired during marriage, providing evidence is crucial. The court of Marrakesh set a precedent with its decision dating 04/07/2007. In this case, the husband claimed half of the real estate of which the wife was the sole deed holder. He argued he had contributed the same monthly amount of money to amortise the credit for the flat as his wife. Although she admitted that he had guaranteed for the purchase and contributed the same monthly rate, the judge dismissed his claims on the basis of lack of evidence.⁵⁹

8 The turn in case law on *mut'a*: Negotiating women's rights

The financial compensation, *mut'a*, has seen a dramatic turn in case law. This mirrors debates about the new standing of women in the eyes of the law in Moroccan society, I suggest. The judiciary responded to mainly male and conservative criticism with a turn in case law that limited the right to *mut'a* to cases where the wife was not the applicant.

*Mut'a*⁶⁰ is an once-only financial compensation paid by the husband to the wife upon divorce, in *ṭalāq* as well as in *taṭlīq* (*Mudawwana* art. 84 and 97). Article

55 Personal interview with social worker Mounia Hakim on 28th January 2014 at the family court in Rabat.

56 Al-mamlakatu-l maġribīya, wizāratu-l-'adl wa-l-ḥurrīyāt, Al-qaḍā'u-l-usarī 2014: 73.

57 Al-mamlakatu-l maġribīya, wizāratu-l-'adl wa-l-ḥurrīyāt, Al-qaḍā'u-l-usarī 2014: 38.

58 Personal interview with legal counsellor Fatema El Mekkaoui on 6th September 2013.

59 Bṭaḥ 2012: 68.

60 It is important to not confuse *mut'a* with the deferred part of the bride wealth. The Moroccan usage of the term must also not be confused with timely restricted marriage called *marriage for pleasure* as traditionally known in the Shia context.

97 describes the procedure for divorce on grounds of divorce and states that if the spouses cannot be reconciled, art. 83, 84 and 85 apply. These articles are found in the chapter relating to unilateral divorce initiated by the husband.

Art. 83 legislates that if the spouses cannot be reconciled, the court fixes the amount of the payments to the wife and the children. The husband has to deposit the due amount in court within 30 days. Art. 84 specifies the rights of the wife in the event of divorce: the remaining part of her bride wealth, maintenance and housing (or the right to reside in the marital home) during the time of waiting and the *mut'a*. Art. 85 regulates the rights of the children and refers to articles 168 and 190.

Judge Ben El Maddani commented that the court of cassation set a precedent because of the many men appealing to higher courts, they thought it unjust to pay *mut'a* if the wife initiated the divorce.⁶¹ Indeed, I interviewed a man in Rabat who had appealed for the second time against the financial stipulations of his divorce judgement.⁶² Legal counselor El Mekkaoui criticised that this turn in case law was part of a revolt against the changes introduced by the *Mudawwana*. Also, judges were insufficiently educated on the new family law and continued to adjudge on the basis of the old family law in effect prior to 2004. The *Mudawwana* did not intend – in contrast to the old family code – a restriction of *mut'a* to women who were divorced by their husbands versus women who initialised the divorce procedure, she insisted.⁶³ It appears that, eager to appease male appeals, the judiciary drew on a tool from the old family law codex. Bṭaḥ states that, according to the wording of the *Mudawwana*, the wife is to be granted the right to *mut'a* in the event of divorce, regardless of which of the spouses initiated the divorce. The new legislation stands in stark contrast to the law prior to 2004. According to the old family law, *mut'a* applied only if the husband filed for divorce, except if he had already paid the bride wealth and the marriage had not been consummated (art. 52).⁶⁴

How did the turn in case law come about? The court of Agadir (2005/05/18 | file 2005/19) and the court of Laayoune (2006/10/10 | file 06/319 | decision 517) set

⁶¹ Personal interview with judge Ali Ben El Maddani on 11th February 2014.

⁶² Personal interview with a 46 year old man at the family court in Rabat on 6th February 2014. The divorce was originally pronounced in 2012, at the moment of the interview his case was hanging on in the court of appeal in Rabat. He stated he was not only financially responsible for his ex-wife and her child but also for his ill mother and his sister. The payments included in the divorce judgements would go beyond his possibilities. Also, he felt treated unjustly because his ex-wife left the marital home after getting pregnant and filed for divorce while he was charged with exuberant costs. He maintained divorce on grounds of discord would be exploited by women and men could not do anything about it.

⁶³ Personal interview with legal counsellor Fatema El Mekkaoui on 6th September 2013.

⁶⁴ Bṭaḥ 2012: 64.

precedents. Although the *Mudawwana* does not restate this distinction of the old code of family law, the judiciary insisted that the wife had only right to *mut'a* if she was not the applicant. The court of cassation followed this interpretation (2010/09/21 | file 2009/1/2/623 | decision 433), thereby restricting the right to *mut'a* to cases where the husband was the applicant.⁶⁵

According to Bṭaḥ, this is an unnecessarily narrow interpretation of article 84. Article 84(1) reads as following: “The rights of the wife include: the deferred bride wealth if required, maintenance during the time of waiting, and the *mut'a* which shall be granted according to the duration of the marriage, the financial means of the husband, the motives for divorce (*asbāb aṭ-ṭalāq*) and the degree of arbitrariness manifested by the husband in performing it (*madā ta'ssufi-z-zawğ fi-tawqī'ih*).” Bṭaḥ argues the term *ṭalāq* in article 84 should be understood as a generic term and not as opposite to *taṭliq*. The legislator refers to article 84, not only with regard to divorce on grounds of discord, but to other types of judicial divorce, as well as divorce with prior authorisation.⁶⁶ Pivotal to Bṭaḥ's view, the term *ṭalāq* is not mentioned as a precondition for granting *mut'a* in art. 84, but rather in the context of the criteria governing its estimation.

What is the legal reasoning leading to the turn in case law? The court of cassation (2011/04/05 | file 2009/1/2/548 | decision 159) redefined the interpretation of art. 84 in April 2011. The highest court of Morocco assessed that the wife had right to *mut'a* only if the husband was the applicant. The judiciary argued that the wife would be granted a compensation in cases of *taṭliq* if she could prove that the husband was responsible for the separation.⁶⁷ Later that year, the court of cassation (2011/10/04 | file 2010/1/2/285 | decision 534) accepted the claim of an appellant whose wife had divorced him in 2009 when he lost his job in Italy because of the economic crisis. The court of cassation adjudged that the responsibility (*mas'ūliya*) for the separation lay with his wife and, hence, denied the wife's claim to *mut'a*.⁶⁸ Over 2010 and 2011, the court of cassation allowed for a major turn in case law and established *responsibility* as a core principle regarding the right to *mut'a*.

This fundamental turn in case law is seen in the sample of judgments relating to divorce on grounds of discord from the family court of Rabat. The judgements dating 2011 feature old case law and women are consistently granted *mut'a* with

⁶⁵ Bṭaḥ 2012: 65.

⁶⁶ Bṭaḥ 2012: 65–66.

⁶⁷ Al-mamlakatu-l-mağribiyya, maḥkamatu-n-naqḍi, ġurfatu-l-aḥwāli-š-šaḥsiyyati wa-l-mīraṭi 2012: 47–48.

⁶⁸ Al-mamlakatu-l-mağribiyya, maḥkamatu-n-naqḍi, ġurfatu-l-aḥwāli-š-šaḥsiyyati wa-l-mīraṭi 2012: 44–46.

the exception that they deliberately disclaim their financial rights. But from 2012 onwards, women are consistently not granted *mut'a* if they had initiated the divorce procedure. One decision in the sample (2012/04/09 | file 11/1841/32 | decision 1047 – unpublished) explicitly states that the wife had no right to *mut'a* because she initiated the divorce. The judge deliberates that this was according to case law and refers to the decision of the court of appeal of Rabat (2011/05/09 | file 1622/2011/116 | decision 530).

Interestingly, from 2012 onwards, the number of women who disclaim their financial rights⁶⁹ or parts of it increased significantly, as did the number of male applicants. I suppose women refrained from initiating divorce in reaction to case law. Female applicants who take the initiative, regardless of the financial disadvantages, might be financially independent from the husband, the husband might be insolvent, the husband's salary might not be verifiable (e.g. informal labour), or the applicant might primarily seek to finalise the procedure (as fast as possible).

Did the turn in case law perpetuate? Ben Hounet and Rupert carried out field research at the family court in Rabat from March to December 2016. They observed that the wife was allowed *mut'a* in procedures of divorce on grounds of discord only if she was not the applicant.⁷⁰ It, therefore, appears that the turn in case law has perpetuated. Notably, Ben Hounet and Rupert did not discuss this judiciary practice critically, nor did they mention that it was a product of case law. By 2016, this practice had turned into normality, so it seems.

9 Responsibility for divorce – the conservative backlash?

We have seen the emergence of case law cutting back women's financial rights. Would *responsibility* potentially develop further into an instrument for a conservative backlash on the advances the *Mudawwana* has brought for women's rights? Could the right to divorce for women be undermined through case law? This is what Henricot and Bentayeb maintained.

Henricot insisted the Moroccan judiciary would use the concept of *responsibility* to the detriment of women. The judiciary would systematically impute

⁶⁹ To disclaim the financial rights is a strategy in order to obtain the divorce faster and circumvent any procedural hurdles because the husband has 30 days to deposit the due amount in court. The ratio of women disclaiming their financial rights has been high since the beginning. Benradi et. al report a ratio of 50% for a sample of 90 judgements (2007: 227).

⁷⁰ Ben Hounet/Rupert 2018: 176.

the *responsibility* for the dissolution of the marriage to the women and impose compensations on them, she maintained: “[...] les magistrats imputent, systématiquement semble-t-il, la responsabilité de la dissolution du lien conjugal à l’épouse – qu’elle soit demanderesse ou déferenderesse de l’action – et la condamnent à payer une indemnité visant à réparer le préjudice subi par son époux lésé.”⁷¹

The judiciary condemns women to pay compensations which are equivalent to the financial dues of the husband in the event of unilateral divorce, Henricot observed. In her view, women’s financial rights had become void and access to divorce, limited. She concluded that the application of divorce on grounds of discord by the Moroccan judiciary converged dangerously with *ḥul’*.⁷²

Henricot quoted three decisions from the court of cassation and three decisions from courts of appeal across different Moroccan jurisdictions dating 2005–2008. The decisions from the court of cassation involve cases where the wife resided abroad and refused to join her husband in Morocco. In one case, the couple used to reside abroad together, and the husband decided to return to their home country after retirement, which the wife refused to do. One of them is the case as mentioned by Bṭaḥ (2006/03/15 | file 519/2/1/2005 | decision 178). A similar case involves a decision from the court of appeal of Oujda (2008/05/07 | file 63/08 | decision 346 – unpublished). All of these cases include judgements demanding the wife to *return to the marital home*.

Henricot overlooked a crucial point in her analysis of this sample of case law: leaving one’s marital home is considered an *offence* in Morocco because it constitutes a breach to the duties of the spouses as laid out in article 51.⁷³ Insofar, the cases Henricot quoted are by no means evidence for the systematic incrimination of women in divorce on grounds of discord. This is because, in the logic of Moroccan family law, the judiciary has a judgement at hand proving that the wife caused the divorce by leaving the marital home. In the quoted cases, the judges did not systematically impute women with the responsibility for the dissolution of the marriage, but acted on the basis of judgments when accepting the men’s claims for compensation for prejudice.⁷⁴

71 Henricot 2011: 6; restated in Bentayeb 2015: 91–92.

72 Henricot 2011: 8.

73 If a married woman moves out from the marital home without divorcing (and moves back in with her parents e.g.), the husband has the right to demand her return to the marital home according to Moroccan family law. The procedure is called *ar-ruḡū’ ilā-l-bayti-z-zawḡīya* (return to the marital home). The court issues a judgement demanding her return to the marital home.

74 As laid out above, it is possible to raise claims for compensations for prejudice in divorce on grounds of discord.

However, the question of *responsibility* is pertinent. In the following, I want to lay out Bṭaḥ's understanding of the case law. To begin with, the term *responsibility* is found in the wording of art. 97(2). It reads, "In case conciliation is impossible and the discord persists, the court confirms this in a report, pronounces the divorce and determines the due payments according to articles 83, 84 and 85 supra while taking into account the responsibility of both of the spouses regarding the reasons for the separation (*mas'ūliyat kull min az-zawġayn 'an asbab al-firāq*) in estimating what the court can impose on the responsible to the benefit of the other spouse."

The Moroccan legislator provided the spouse who is adversely affected with the right to compensation for the prejudice according to the divorce judgement if the other spouse caused the divorce (*l-i'tā' az-zawġa-l-mutaḍarrar al-ḥaqq fī-t-ta'ūyīd 'an aḍ-ḍarrar alladī laqīḥah min ġarrā' al-ḥukm bi-t-taṭliq 'indama yakūn aṭ-ṭarafu-l-āḥar huwa-l-mutasabbab fī-t-taṭliq*), affirmed Bṭaḥ. This was in accordance with the principle of justice, fairness and equality between the spouses. The estimation of the compensation is left to the judiciary to be decided according to the *offence* (*al-mas'ūliya at-taqṣirīya*). Also, this measure does not depend on whether the spouses initiated the procedure together or one of them took the initiative.⁷⁵

What is telling about the interpretation offered by Bṭaḥ is that his reading of art. 97(2) semantically leans towards *divorce on grounds of prejudice*. He used the expressions, "the spouse who is adversely affected", "compensation for the prejudice" and "offence". This is in stark contrast to the wording of the article, which only speaks of *responsibility* and not of *prejudice*.

But this is what the court of cassation (2006/03/15 | file 519/2/1/2005 | decision 178) laid out in the precedent case, Bṭaḥ argued. The court refused the objection filed by a woman. She had been charged for compensating her husband for the moral and material prejudice by a lower court. The woman had filed for divorce in order to circumvent a judgement forcing her to *return to the marital home*. The court asserted that the responsibility for the separation lay with the wife, who manifested *arbitrariness* when she filed for divorce.⁷⁶

What is to be observed on the notion of *arbitrariness*? The court of cassation observed *arbitrariness* (*ta'assuf*) from the woman who filed for divorce and refused to return to the marital home. Here, the court of cassation extended the term to women in divorce on grounds of discord, I want to emphasise. *Arbitrariness* is a term mentioned in art. 84 relating to the estimation of *mut'a*. It was originally used with regard to men in the event of unilateral divorce. In the context of unilateral divorce, the judge is to appreciate the degree of *arbitrariness* manifested by the husband when estimating the amount of *mut'a*.

75 Bṭaḥ 2012: 70.

76 Bṭaḥ 2012: 70.

How about the relation between *mut‘a* and compensation for prejudice? The *mut‘a* shall exceed the compensation for prejudice to the benefit of the husband, even if only symbolically, Bṭāḥ stated. This is to ensure the will of the legislator that grants the wife, who initiated the divorce, the indispensable right to *mut‘a*.⁷⁷ We have seen in the chapter before that the court of cassation has taken a different stance on *mut‘a* than Bṭāḥ. Yet, he offers an interesting view on balancing the rights of the wife and the principle of equality between the spouses. Even if the wife initiated the divorce and the husband has the right to compensation, the compensation shall not exceed her right to *mut‘a*.

Henricot quoted one case from the court of appeal of Al Hoceima (2006/12/05 | file 2006/260), which hints at a much further extension of the term *responsibility* by the Moroccan judiciary. The court of Al Hoceima imposed a compensation to the benefit of the husband on a woman because “she did not present any serious cause for the dissolution of the marriage”. The court of Al Hoceima refers to a decision by the court of appeal of Al Jadida (2006/12/12 | file 2006/101/34). In the latter case, the wife initiated the divorce, while the husband wanted to maintain the marriage. The court of appeal of Al Jadida insisted that the dissolution of the marriage constituted a breach of the marital duties and, therefore, the spouse wanting to maintain the marital union was entitled to a compensation. Henricot observed that the judiciary extended the principle of responsibility far from the wording of the law.⁷⁸ Unfortunately, she did not give further information on the cases. But it appears that the decision of the court of appeal of Al Jadida from 2006 is not consistent with Bṭāḥ’s take on the case law and stretches the term *responsibility* much further.

Is there case law shedding a different light on the issue? Indeed, there is. The family court of Rabat (2005/01/07 | 32/987/04 – unpublished) rejected the claim for compensation of a man, who maintained he suffered prejudice from the divorce on grounds of discord. The judiciary asserted that the wife cannot be incriminated for making use of her rights.⁷⁹ This decision is in contrast to the sample quoted by Henricot. The judiciary does neither impute the wife initiating the divorce with the *responsibility* for the dissolution of the marriage nor does it see an *offence* in ending marital relations.

The sample of judgements from the family court of Rabat does not feature cases as described by Henricot. I observed that men may demand compensations for *prejudice* just like women, but they have a hard stand. In a sample of 77 judgements, only three men filed an action demanding a compensation for *prejudice*. All claims for compensation raised by men were denied, without exception.

77 Bṭāḥ 2012: 66.

78 Henricot 2011: 7.

79 Benradi et al. 2007: 229–230.

In contrast, the sample featured thirteen cases where women claimed for lacking maintenance and these claims were accepted in eight cases by the judiciary. Again, lacking maintenance is an *offence* in Moroccan law, so it is only natural that the judiciary imposes a compensation on the husband. However, when it comes to compensations for reasons of violence, women have a hard stand too. In five cases out of 77 judgements, the wife claimed for compensation for reasons of violence. The judiciary dismissed all of them because of insufficient evidence. From my sample of case law, it, therefore, appears that compensations for prejudice have a hard stand, regardless of the gender of the claimant.

The reasons mentioned in the three decisions featuring an (unsuccessful) claim for compensation by the husband differ, but *breaking the marriage contract* is not mentioned at all. In one case, the wife was not living with the husband. She claimed that he would not offer a marital home separated from his family's home and made her leave. In the second case, the wife was living in France with the sons of the couple and refused to return to her husband in Morocco. She claimed the husband had agreed on her stay abroad to assist their sons who were at university. In the third case, the wife wanted to stay in Italy for economic reasons.

While assisting the social workers, I did not witness any case of compensation imposed because of a breach of marital duties. My interview partners also did not mention cases corroborating Henricot's observation. Ben Hounet and Rupert also did not observe that women were systematically imposed with financial compensations in their study carried out in Rabat in 2016.⁸⁰ Given that the two decisions quoted by Henricot date from 2006, I suggest this interpretation was not applied on a national level, but was endorsed by the judiciary to a limited degree only. This is notably what the fieldwork in Rabat showed.

Bentayeb claimed that the principle *responsibility* hurdles the right to divorce to an extent impeding divorce. Based on two judgements from the court of Nador (2006/02/01 | decision 127) and the court of Oujda (2005/10/31 | decision 4361), she maintained that judges would restrain from pronouncing the divorce if they could not determine which one spouse was responsible for the divorce.⁸¹ Her argument runs against my empirical findings. Judge Ben El Maddani stated there was no objective reason to reject a case of divorce on grounds of discord. Sometimes formal errors would occur, and applications could not be accepted by the court. But in terms of the content, the judiciary could not refuse to grant the divorce.⁸² Also, the social workers in the Rabat family court never mentioned this phenomenon to me. Given that Bentayeb quoted decisions originating from lower courts in

⁸⁰ Ben Hounet/Rupert 2018: 169–183.

⁸¹ Bentayeb 2015.

⁸² Personal interview with judge Ali Ben El Maddani on 11th February 2014.

the first years after the family law reform, I suppose this interpretation has not spread significantly. It, therefore, appears that the concept *responsibility* has not developed into an instrument impeding women's access to divorce.

10 Divorce on grounds of discord: The new standard divorce procedure

As outlined above and drawing from national statistics, divorce on grounds of discord has turned into the most popular divorce procedure with both men and women within a decade. This has, so far, not been appreciated in ethnographic literature.

Applicants include a variety of age groups and socio-economic backgrounds. The youngest applicant for divorce on grounds of discord I witnessed was a 17-year old girl, the eldest, an 84-year-old man. Most applicants ranged between the age of 20 and 50, although the number of applicants over age 50 was marginal. On the basis of address, profession and financial situation (if mentioned in the divorce judgements), I suggest that 14% of the cases involved couples from the upper class or upper middle class and 8% involved couples where at least one of the partners was living abroad. In only one case, both spouses were living abroad. The rest of the judgements featured applicants from a wide range of socio-economic backgrounds. Particularly recurrent were the districts Yacoub el Mansour and Taqadoum. These are large and highly populated districts generally characterised by a working class milieu, but residents may as well be public officers or employed in the informal sector. Taqadoum is often considered a disadvantaged area of Rabat. *Taṭliq-li-šiqāq* insofar seems not only viable for the working class and the socially disadvantaged, but they constitute the vast majority of the applicants. This is a chief difference to Egypt, where access to divorce remains restricted to affluent women.

Did the empirical data from the family law court in Rabat mirror the increase in male applicants shown in national statistics? The cases documented at the family court in Rabat in summer 2013 and winter 2014, including legal consultations and mediations, involved high numbers of female applicants. In summer 2013, 14 out of 18 documented cases featured a female applicant. In winter 2014, 31 out of 50 cases featured a female applicant (in two cases, it was not clear who was the applicant). Yet, the sample of judgements from the family court of Rabat mirrored the statistical trend. In 2011 and 2012, 90% of the cases were filed by women. In 2013, we see the female share fall drastically to 50% and among the judgements issued in 2014, female applicants accounted for a mere 25%. The correlation between turn in case

law and gender ratio of the applicant in the judgment sample is indeed more pronounced than in the national statistical data.

Why is it that men increasingly turn to divorce on grounds of discord? Every one of the lawyers I interviewed confirmed that men would refrain from unilateral divorce and instead opt for divorce on grounds of discord because it was cheaper. Lawyer Mountassir Belmahjoub asserted that the sums relating to maintenance, as well as *mut'a* in a procedure of unilateral divorce, may be 60% higher than in divorce on grounds of discord. Lawyer Rachida Sabry claimed she even observed differences in divorce of discord, depending on who was the applicant. She illustrated her experiences with the following example: if the wife filed for divorce on grounds of discord, the judge would fix the maintenance for the child at MDH 600 (approx. 60 €), if the husband filed for divorce on grounds of discord, the judge would slightly raise the amount to MDH 700 (approx. 70 €), but if the husband filed for unilateral divorce, the judge would significantly raise the right to maintenance of the child to MDH 1300 or 1400 (approx. 130 or 140 €).⁸³ Social workers would advise men wishing to divorce to proceed with either divorce by mutual consent or divorce on grounds of discord, Mounia Hakim, social worker at the family court in Rabat, pointed out. They would indeed discourage men from proceeding with unilateral divorce. This is because the sums fixed for maintenance during the waiting period and *mut'a* were higher. Unilateral divorce was perceived as an act of revenge and public humiliation of the wife. If a man wished to divorce fast, social workers would advise him to opt for divorce by mutual consent and guarantee his wife her full financial rights.⁸⁴ Men opted for divorce on grounds of discord to avoid unilateral divorce, the judge Ben El Maddani confirmed. This was because unilateral divorce would entail higher maintenance obligations. The judge concurred with the social workers in that a man opting for unilateral divorce meant to assert his will against his wife. This was an act of egoism, in his view. The judiciary would, in turn, raise the sums of maintenance.⁸⁵

Three major strategies explain the evolution of the applicants' gender ratio. I) Divorce on grounds of discord is financially most advantageous for men. Therefore, men would abstain from unilateral divorce and opt for divorce on grounds of discord instead. II) Men file for divorce on grounds of discord and do not deliver the due payments to block the procedure and circumvent their wives from

⁸³ Personal interview with lawyer Rachida Sabry on 21st January 2014, lawyer Mountassir Belmahjoub on 28th January 2014, and lawyer Latifa Belaïdi on 3rd February 2014.

⁸⁴ As documented in the family court of Rabat on 6th February 2014.

⁸⁵ Personal interview with judge Ali Ben El Maddani on 11th February 2014.

divorcing.⁸⁶ III) Starting from 2012, women may have pushed men to initiate divorce procedures because of the disadvantageous turn in case law.

The third strategy was daily business at the family court in Rabat in 2013 and 2014. I observed that the social workers at the family court in Rabat would consistently advise women seeking divorce to, instead, make a claim for lacking maintenance. By doing so, they would push the husband to file for divorce and would not lose the right to *mut'a*. Among the many cases I witnessed relative to this strategy, I particularly remember one case. A young woman made a claim for lacking maintenance although her husband abused her physically and sexually and she had already reported him to the police. She would have had plenty of reasons to file for divorce on grounds of prejudice. Yet, she knew it was difficult to meet the burden of proof in divorce on grounds of prejudice and win her case. So, with the support of the social workers, she decided to use a more promising strategy and make a claim for lacking maintenance.⁸⁷

Qualitative empirical data from the family law court in Morocco shows that Moroccan women adopt a strategy also described by Nahda Shehada for Ghaza. In Ghaza, access to divorce for women is laden with obstacles and claiming lacking maintenance is, therefore, one of the major strategies to reach divorce.⁸⁸ Unfortunately, statistical data for Morocco proving an increase in procedures of lacking maintenance (*ṭalabu-n-nafaqa*) since 2011 is not at hand.

11 Conclusion

This study showed that the Moroccan family law reform in 2004 succeeded in facilitating or indeed guaranteeing women access to divorce. This was one of the core concerns of Moroccan women's rights associations and has been attained primarily by introducing divorce on grounds of discord (*taṭliq li-š-šiqāq*). The Moroccan divorce reform stands out in the MENA region for its innovative and multi-level approach, including major changes on the procedural and institutional level. The legislator chose to build upon the *Mālikī* tradition of *fiqh* in the kingdom and designed the legal innovation on the basis of judicial divorce. As a result, Moroccan women filing for divorce do not have to compensate their husbands in return for divorce as is the case in Egypt, for example. By avoiding this considerable financial hurdle, the Moroccan reform has proven much more effective than the reform of *ḥul'* law in Egypt in 2000. This is particularly true for the popular

⁸⁶ Personal interview with legal counsellor Fatema El Mekkaoui on 6th September 2013.

⁸⁷ As documented in the Family Court of Rabat on 23rd January 2014.

⁸⁸ Shehada 2004.

classes. Equally important, no burden of proof impedes access to divorce as is the case with other procedures of judicial divorce. Moreover, newly-instituted family law courts, including social workers and the fund for family aid, ensure social and legal assistance, as well as financial support. The fact that divorce cannot be revoked by a higher court, as was previously the case, brings a new degree of legal certainty.

Case law manifests a male recoil on women's rights in the event of divorce. The Moroccan judiciary has responded to male appeals with a turn in case law on *mut'a*, a financial compensation women in Morocco have traditionally been granted in the event of unilateral divorce. Since 2011, case law has limited the right to *mut'a* to cases where the wife was not the applicant. However, if the husband filed for divorce, the right to *mut'a* remains untouched. Case law has seen critical changes and has brought limitations to women's financial rights, but is not a hurdle to access to divorce, as Henricot and Bentayeb maintained. My empirical data showed that the judiciary does neither systematically incriminate women with the *responsibility for divorce*, nor systematically impose them with compensations. Also, this concept is no hurdle to the finalisation of the divorce procedure in that it is not necessary to determine which spouse is to be held responsible for the divorce in order for it to be granted.

Within a decade, divorce on grounds of discord has become the most popular divorce procedure for both Moroccan men and women across a variety of socio-economic milieus and age groups. Moroccan men have increasingly turned to divorce on grounds of discord for financial reasons. Since 2012, women have turned towards a more indirect strategy to obtain divorce with more advantageous financial conditions. Instead of filing for divorce on grounds of discord and losing the right to *mut'a*, women have resorted to filing a claim for lacking maintenance and, by doing so, pushed the husband to file for divorce.

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