Consensual Accommodation of Sharia Law and Courts in Greece

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Abstract

Having been exempted from a massive population exchange that took place between Greece and Turkey under the Treaty of Lausanne (1923), the Muslim minority of Western Thrace enjoys ever since a special status providing for the application of the Sharia law in family and succession matters, as well as the jurisdiction of the Mufti for the resolution of relevant disputes. A reform introduced by Law 4511/2018 marks a watershed moment in this long history. From now on, the Sharia law and the Mufti cease to be mandatory; their intervention requires the consent of the members of the minority, who also have the alternative to subject to the civil law and courts. This article tries to explore key features of the new model providing for an accommodation of the Muslim personal legal system based on choice. It focuses on the technique employed to structure the right of choice, on the proper ways for the exercise of choice, on the possibilities offered (or not) to make a partial choice only and revoke a previously made choice. In the end, a further question is raised, concerning how effective the right of choice may prove in the hands of women insiders, given that these are the most likely to experience pressure to demonstrate loyalty and not ignore the traditions and values – including the nomos – of their collective.

Keywords: choice architecture, law reform, Molla Sali v. Greece, Mufti, multicultural accommodation, Muslim minority, nomoi group, Sharia law.

A Introduction

Since the last quarter of the 19th century, Muslim communities living on territories that were gradually lost by the Ottoman Empire to be annexed to Greece have enjoyed a special regime aimed at facilitating the smooth transition from the previous to the new dominion. Such a special regime is reminiscent of the *millet* system by which the Ottoman Empire granted autonomy to confessional communities situated inside it; this was now reversed in a peculiar version that combined pre-modern divisions with modern citizenship. This *'neo-millet'* synthesis[1] involved,

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1 *See* K. Tsitselikis, *Old and New Islam in Greece: From Historical Minorities to Immigrant Newcomers*, Leiden, Martinus Nijhoff Publishers, 2012, pp. 8 *et seq.*, 536; K. Tsitselikis, 'The Pending Modernisation of Islam in Greece: From *Millet* to Minority Status', *Südosteuropa. Zeitschrift für Politik und Gesellschaft*, Vol. 55, 2007, pp. 354-372.

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inter alia – *e.g.* native language education or administration of pious foundations (*vakifs*) –, the application of the Sharia law in family and succession matters, as well as the jurisdiction of the Mufti for the resolution of relevant disputes. All this played out against the backdrop of a series of international treaties: the Treaty of Constantinople (1881), the Treaty of Athens (1913), the Treaty of Sèvres (1920) and, finally, the Treaty of Lausanne (1923), the only one still in force today. The latter regards specifically the Muslims of Western Thrace, who, together with the Christians of Constantinople and of the islands of Imbros and Tenedos, were exempted from a massive population exchange – to wit, an operation of national cleansing – agreed between Greece and Turkey, that affected all other Muslims of Greece and Christians of Turkey.[2]

Of main importance are Law 147/1914[3] and Law 1920/1991.[4]

Article 4 Paragraph 1 of Law 147/1914, a substantive law provision, reads:

> All matters relating to the marriage of persons belonging to the Muslim [...] religion, that is to say the matters relating to the lawful contracting and dissolution of marriage and personal relations between spouses during their marital life, as well as all matters relating to kinship, shall be governed by their holy law and adjudicated in conformity with it.

Article 5 Paragraph 2 of Law 1920/1991, a procedural law provision, reads:

> The Mufti exercises jurisdiction [...] between Greek Muslim citizens resident in his region, in the spheres of marriage, divorce, maintenance, guardianship, custodianship, emancipation of minors, Islamic wills and intestate succession, where such matters are governed by Holy Muslim Law.

Thus, the Muslim minority of Western Thrace is recognized in its quality as *'nomoi group'*[5] or *'minority legal order'*[6] and is made an integral part of the official state legal structure.

It is contested whether the above provisions are, in fact, *required* by the Treaty of Lausanne. As per its wording, Greece (like Turkey) "undertakes to take" for her minority "in so far as concerns [...] family law or personal status, measures permit-

2 *See* on international law Y. Ktistakis, *Sacred Law of Islam and Muslim Greek Citizens: Between Communitarianism and Liberalism*, Athens-Thessaloniki, Sakkoulas, 2006, pp. 89 *et seq.* (in Greek); A. Tsaoussi & E. Zervogianni, 'Multiculturalism and Family Law: The Case of Greek Muslims', *in* K. Boele-Woelki & T. Sverdrup (Eds.), *European Challenges in Contemporary Family Law*, Antwerp, Oxford and Portland, Intersentia, 2008, pp. 210 *et seq.*

3 'On the applicable legislation to the annexed countries and their judicial organization' (Government Gazette A 25).

4 'Ratification of the Legislative Act of 24 December 1990 "On Muslim Religious Officers" (A 182)' (Government Gazette A 11), replacing previous Law 2345/1920 ('On the temporary Chief Mufti and Muftis of the Muslims of the State and on the management of the property of Muslim Communities' (Government Gazette A 148)).

5 *See* A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Cambridge, Cambridge University Press, 2001, p. 2, n. 5.

6 *See* M. Malik, 'Minorities and Law: Past and Present', *Current Legal Problems*, Vol. 67, 2014, pp. 67-98.

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ting the settlement of these questions in accordance with the customs of th[is] minorit[y]" (Art. 45 referring to Art. 42 Para. 1). It is argued that this stipulation merely implies appropriate measures that guarantee the minority's 'religious distinctiveness' and does not go further than that, towards the establishment of the minority's legal-jurisdictional independence in the areas mentioned.[7] However, this approach is questionable. At most, perhaps, one could discern the two strands. The term 'customs' pertains to norms of "family law and personal status" having been constantly observed by the members of the minority. This is *the Sharia law.* On the other hand, *the Mufti* is not part of the picture, in the sense that the enforcement of the Sharia law might have been 'outsourced' to the civil courts. The decision that the Mufti should supersede here the civil courts reflects policy considerations on how to best serve the minority and is not construed as a commitment stemming from the Treaty of Lausanne.

Until recently, this framework was mandatory for the Muslims of the minority. Although the idea was being championed that the civil law and courts were accessible with the celebration of a civil – instead of a religious – marriage,[8] or the filing of a request to the civil courts,[9] or the drawing up of a will of civil law,[10] the prevailing opinion opposed this view. This means that with the civil marriage, the parties could bypass religious marriage only, whereas their request was inadmissible and their will was null and void, based on Laws 147/1914 and 1920/1991.[11] To be sure, the parties had a chance to change this on a quite strict condition, if they accepted to proclaim their non-belief and thus exclude themselves from the scope of Laws 147/1914 and 1920/1991 *ratione personae*.

7 *See, e.g.* Ktistakis, 2006, pp. 89, 102 *et seq.*, 115, 117. Such reading is also endorsed by the European Court of Human Rights (ECtHR) in the case *Molla Sali v. Greece*, No. 20452/14, 19 December 2018, Para. 151 (*see* on this judgement *infra*).

8 *See, e.g.* Xanthi Court of First Instance, judgements No. 1623/2003 and No. 66/2017, *in* Nomos database, available at: https://lawdb.intrasoftnet.com/.

9 *See, e.g.* Thebes Court of First Instance, judgement No. 405/2000, *Dike International*, Vol. 32, 2001, pp. 1097 *et seq.* (with concurring comments by K. Mpeis), holding that the request to the civil court necessitates a 'conflict of the Muslim holy law and the human rights' (*see also* Ktistakis, 2006, pp. 39, 155). In cases where the two proved to be congruent, the Mufti had exclusive jurisdiction.

10 *See, e.g.* Thrace Court of Appeal, judgements No. 237/2011 and No. 392/2011, *in* Nomos database, available at: https://lawdb.intrasoftnet.com/.

11 *See* on the last point the unwavering case law of the Court of Cassation: judgements No. 322/1960 (*Nomiko Vima*, Vol. 8, 1960, pp. 1121 *et seq.*) and, more recently, No. 1041/2000, No. 1097/2007, No. 2113/2009, No. 1497/2013, No. 1862/2013, No. 1370/2014 and No. 229/2017, *in* Nomos database, available at: https://lawdb.intrasoftnet.com/.

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This situation was challenged before the European Court of Human Rights (ECtHR) in the case *Molla Sali v. Greece*,[12] in which Greece was found to have violated the ECHR. The issue turned around the economic loss suffered by the wife of a Muslim testator, owing to the fact that the will of civil law (under which she was inheriting the whole estate) should yield to the *ab intestat* rules of Sharia law (under which she was inheriting only part of the estate). But the gravamen of the verdict lies in the wrong committed to the Muslim testator himself, who was unable to rely on ordinary law because of his affiliation with the Muslim minority. A repercussion of this constraint was felt on the side of the applicant. More generally, this and every similar constraint that locks the individual into a parallel order of family law, law of succession and jurisdiction, run counter to human rights imperatives, *e.g.* those deriving from *the right to freedom of religion* of Article 9 ECHR and *'the right to free self-identification'*, 'the "cornerstone" of international law' 'in the field of protection of minorities'. In particular, the 'negative aspect' of these rights – not to participate in religious practice and 'not to be treated as a member of a minority' – are paid no respect when such participation and treatment are forced on the individual.[13]

On 15 January 2018, when *Molla Sali* had been heard and the judgement of the ECtHR was pending, the Greek Government passed a bill that became Law 4511/2018.[14] The new law does away with the mandatory character of Sharia law and courts, and renders *consent* a prerequisite for their accommodation.[15] The remainder of the article focuses on this crucial development.[16]

12 Molla Sali v. Greece, *No. 20452/14, 19 December 2018. For commentaries* see, e.g. *I. Leigh, 'Religious Adjudication and the European Convention on Human Rights',* Oxford Journal of Law and Religion, *Vol. 8, 2019, pp. 1-27; I. Iacovidis & P. McDonough, 'The Molla Sali Case: How the European Court of Human Rights Escaped a Legal Labyrinth While Holding the Thread of Human Rights',* Oxford Journal of Law and Religion, *Vol. 8, 2019, pp. 427-446; D. McGoldrick, 'Sharia Law in Europe? Legacies of the Ottoman Empire and the European Convention on Human Rights',* Oxford Journal of Law and Religion, *Vol. 8, 2019, pp. 517-566; İ. Tsavousoglou, 'The Curious Case of Molla Sali v. Greece: Legal Pluralism Through the Lens of the ECtHR', available at:* https://strasbourgobservers.com/2019/01/11/the-curious-case-of-molla-sali-v-greece-legal-pluralism-through-the-lens-of-the-ecthr/ *(last accessed 15 January 2021); N. Koumoutzis & C. Papastylianos, 'Human Rights Issues Arising from the Implementation of Sharia Law on the Minority of Western Thrace* – ECtHR Molla Sali v. Greece, *Application No. 20452/14, 19 December 2018',* Religions, *Vol. 10, No. 5: 300, 2019, pp. 1-12.*

13 *See Molla Sali*, Para. 157, where, however, the ECtHR does not contemplate much the right to freedom of (and, more precisely, *from*) religion.

14 'Amendment of Article 5 of Legislative Act of 24 December 1990 "On Muslim Religious Officers" (A 182) ratified by the Sole Article of Law 1920/1991 (A 11)' (Government Gazette A 2). A non-official translation is available at: www.minedu.gov.gr/publications/docs2018/Law_4511_2018_Reform_on_Mufti_jurisdiction_Sharia_law.pdf (last accessed 15 January 2021).

15 *See, generally,* on *'consensual accommodation'* as technique of 'joint governance' between the *nomoi* group and the state, Shachar, 2001, pp. 103 *et seq.*

16 A development that the ECtHR 'notes with satisfaction' (*Molla Sali*, Para. 160), overlooking, however, the serious problem pointed up *infra* at B I.

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B The Right to Choose the Sharia Law and Courts: Overview of Law 4511/2018 Amending Article 5 of Law 1920/1991 – Dates of Entry into Force and Transitory Dispositions

Law 4511/2018 (in its Art. 1 Para. 2) adds a new Paragraph 4 to Article 5 of Law 1920/1991, enshrining for the members of the Muslim minority a right to choose the Sharia law and courts. In this connection, a distinction is made between family disputes (covered in Paras. 4a and 4b) and succession (covered in Para. 4c).

I Family Disputes

Henceforth, "[t]he Mufti exercises jurisdiction *under the conditions and procedures set out in Paragraph 4*" (Art. 5 Para. 2 of Law 1920/1991, as amended by Art. 1 Para. 3 of Law 4511/2018). Paragraph 4 is divided in two (sub)paragraphs, a and b.

> Paragraph 4a provides that:
>
> The cases of Paragraph 2 are regulated by ordinary provisions and only exceptionally come under the jurisdiction of the Mufti, provided that both parties file an application before him to settle their specific dispute in accordance with the Holy Muslim law. The submission of the case to the jurisdiction of the Mufti is final and it precludes the jurisdiction of the ordinary courts on this particular dispute. If one party does not wish to submit the case to the jurisdiction of the Mufti, he or she may apply to the civil courts, pursuant to ordinary substantive and procedural provisions, which in any event have the presumption of jurisdiction.
>
> Paragraph 4b provides that:
>
> By Presidential Decree issued after a proposal by the Minister of Education, Research and Religious Affairs and the Minister of Justice, Transparency and Human Rights, the following shall be set out: all necessary procedural rules on the discussion of the case before the Mufti and on the issuing of his decisions and in particular the procedure of application by the parties, which shall contain the elements of introductory pleadings as per the Code of Civil Procedure and, on pain of nullity, explicit irrevocable declaration of each party on the choice of this jurisdiction, the representation by authorized lawyers, the procedure of filing an application and serving a notice to the other party, the procedure of discussion and issuing of the decision, the matters of organization, creation and filling of posts for staff (permanent, contracted for indefinite term and temporary) and of the operation of the relevant service of record-keeping, as well as any matter related to the implementation of this law.

> The much-awaited Presidential Decree 52/2019 was enacted on 11 June 2019.[17]

It is noteworthy that, initially, Paragraph 4a was set to take effect not immediately with the publication of Law 4511/2018 (on 15 January 2018), but later on with the publication of the Presidential Decree of Paragraph 4b (as per Art. 1 Para. 4 of Law 4511/2018), whenever this would follow. As a result, the Muslims of the minority *continued to lack access to civil law and courts* and were yet to be vindicated. There is no logical explanation why access to civil law and courts was made conditional on the overhaul of the Mufti jurisdiction and should be deferred until then. This decision had even further ramifications, if one factors in the transitory disposition with which it was accompanied, providing that, in the interim, the Mufti "deals with cases brought before him with common consent" (Art. 1 Para. 2 (1) of Law 4511/2018). As to family disputes that only one party might have been keen to see terminated against the will of the other, these were now suddenly not allowed to be processed by the Mufti (under Sharia law), and in parallel were still not allowed to be processed by the civil courts (under civil law) either, meaning *a total eclipse of judicial protection*. Paradoxically, a reform intended to cater for the human rights of the stakeholders had achieved not only not to improve but also to deteriorate their position, because of the ill-conceived Articles 1 Paragraph 4 and 1 Paragraph 2 (1). These were fortunately abolished with Article 48 Paragraph 3 of law 4569/2018[18] on 11 October 2018, whilst the Presidential Decree of Paragraph 4b was undergoing review by the Council of State. Therefore, at this earlier stage, at least, the possibilities ushered in with the reform were unblocked.[19]

II Succession

Paragraph 4c provides that:

> Succession relations of members of the Muslim minority of Thrace are regulated by the provisions of the Civil Code, unless the testator draws up before a notary a last will declaration, according to the form of a public will, containing exclusively his explicit wish to subject his succession under the Holy Muslim Law. This declaration is freely revocable, either by a subsequent contrary declaration before a notary or by drawing up a subsequent will, in accordance with

17 'Procedural rules on cases under the jurisdiction of the Muftis of Thrace – Establishment, organization and operation of the Directorate for cases of the Mufti jurisdiction at the Muftiates in Thrace' (Government Gazette A 90). A non-official translation is available at: www.minedu.gov.gr/publications/docs2020/Presidential_Decree_52_2019_Procedural_rules_on_cases_under_the_Muftis_jurisdiction.pdf (last accessed 15 January 2021).

18 'I) Central Securities Depositories, II) Adjustment of the Hellenic Legislation to the provisions of Directive 2016/2258/EU and other provisions, and III) Other provisions' (Government Gazette A 179).

19 The explanatory report of Law 4569/2018 alludes to a 'social issue' that had emerged with Muslims who did not exercise their right to apply to the Mufti, 'with the expectation' that they would soon be in a position to exercise their right to apply to the civil court, and thus they 'postponed the resolution of their disputes'. However, the 'social issue' was far greater for Muslims whose very right to apply to the Mufti had been curtailed by Art. 1 Para. 2 (1) of Law 4511/2018.

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> the regulations of the Civil Code. Concurrent application of the Civil Code and the Holy Muslim Law on the succession either in a percentage or on specific parts of it is prohibited.

In contrast to family disputes, the implementation of the reform in matters of succession was carried out flawlessly. On the one hand, Paragraph 4c applies as of 15 January 2018 (Art. 2 of Law 4511/2018). On the other hand, regarding wills of civil law already drawn up before this date when the succession had not yet occurred, it is clarified that these "develop their legal effect normally at the time of the opening of the succession" (Art. 1 Para. 2 (2) of Law 4511/2018); this transitory disposition was essential to reassure the testators that they did not have to repeat their wills out of fear that, otherwise, their wills would be assessed with the old yardstick and would be exposed to legal attacks, as it had happened in *Molla Sali*.

C Outline of the Analysis

The provisions of Article 5 Paragraphs 4b and 4c of Law 1920/1991 are examined more thoroughly below. The analysis tackles key features of the right to choose the Sharia law and courts. It successively goes through the design of choice architecture built-in Paragraphs 4b and 4c (Section D), and three more topics relating to the expression of pro-Sharia choices (Section E), the range of pro-Sharia choices (Section F), the reversal of pro-Sharia choices (Section G) in both family disputes and succession. The concluding remarks (Section H) query whether such choices are actually ineluctable for *women of the minority*, who will not 'dare' defy the Sharia law and courts.

D Choice Architecture

The Muslims of the minority do not decide in a vacuum on which legal authority they will subject to; they do so in a context of some kind of *'choice architecture'*, where the choice they are facing is framed in a certain way.[20]

The pivotal theme in this discussion revolves around the *default option, i.e.* the one that obtains if the individuals stay inert. Clearly, Law 4511/2018 has set the default option on the civil law and courts. Thus, all personal affairs regarding family and succession relations are regulated by the relevant parts of the Greek Civil Code (GCC), family law (*see* Art. 5 Para. 4a (1) of Law 1920/1991) and law of succession (*see* Art. 5 Para. 4c of Law 1920/1991), whereas the civil courts "have the presumption of jurisdiction" (*see* Art. 5 Para. 4a (3) of Law 1920/1991). The Muslims of the minority may take two different approaches towards the regime that applies to them automatically. First, they may stick to it and let it produce its ef-

20 *See, generally,* on 'choice architecture' the seminal work of R. Thaler & C. Sunstein, *Nudge. Improving Decisions About Health, Wealth, and Happiness*, New Haven and London, Yale University Press, 2008, pp. 3, 81 *et seq.*

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fects or develop these further, *e.g.* by pursuing a civil law divorce or post-divorce maintenance or by making a will of civil law, as they see fit. Second, they may switch from the standard position to its alternative. The means put at their disposal to accomplish this are the Paragraph 4a application(s)[21] (that shall bring to the fore the Sharia family law and the Mufti) and the Paragraph 4c last will declaration[22] (that shall bring to the fore the Sharia law of succession). The upshot is equally well described in terms of *opting out* or *opting in* – opting out of the standard position, the secular legal system,[23] or opting in for its alternative, the religious legal system,[24] depending on the angle from which the situation is looked at.

E Expression of Choice

I No Choice through Muslim Marriage (nikah)

Only with the application(s) and the last will declaration is the choice of personal law and jurisdiction attainable. On the contrary, no choice of personal law and jurisdiction is to be tacitly inferred from any other behaviour of the members of the minority, such as, mainly, the contracting of a Muslim marriage *(nikah)*. The reason is that there are intended spouses who all they want is the ceremony conducted by the Mufti or the Imam – perhaps because they consider this as a legacy of their forebears which is binding upon them, or simply as a more familiar ritual than the respective one followed in the town hall –[25] and do not feel like moving any deeper into the Sharia normative order, by claiming extra accommodation of personal law and jurisdiction on matters bearing on the function, the dissolution of their relationship or their succession. What seems problematic if nikah is associated obligatorily with extra accommodation is that the intended spouses in these cases are in a dilemma and need to make a decision on which side they will eventually compromise. The decision will encroach either on the positive or on the negative side of the rights of religion and self-identification. The positive side (the right to have a nikah) should be given up by Muslims who value more their negative right to avoid the extra exposure to Islamic law. The negative side (the right to avoid the extra exposure to Islamic law) should be given up by Muslims who value more their positive right to have a nikah. These are unacceptable sacrifices[26] that the intended spouses are spared under Law 4511/2018.

21 *See infra* at E II.

22 *See infra* at E III.

23 *See* E. Kalampakou, 'Is There a Right to Choose a Religious Jurisdiction over the Civil Courts? The Application of Sharia Law in the Minority in Western Thrace, Greece', *Religions*, Vol. 10, No. 5: 300, 2019, pp. 2, 3.

24 *See* V. Koumpli, 'Managing Religious Law in a Secular State: The Case of the Muslims of Western Thrace. On the Occasion of the ECtHR Judgement in *Molla Sali v Greece*', available at: www.constitutionalism.gr/wp-content/uploads/2019/04/2018-Koumpli-IACL-Molla-Salli.pdf, p. 7 (last accessed 15 January 2021).

25 *See also* Shachar, 2001, p. 108.

26 *Cf.* Xanthi Court of First Instance, judgement No. 122/2012, *in* Nomos database, available at: https://lawdb.intrasoftnet.com/, and E. Kalampakou, *Equality versus Religious Pluralism: Religious Exemptions from Neutral, General Laws* (PhD, on file at the Aristotle University of Thessaloniki), 2015, pp. 322 *et seq.* (in Greek).

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II Family Disputes

Matters regarding marriage, divorce, maintenance, *etc.* are normally governed by civil law, and the civil court has the presumption of jurisdiction, with the members of the minority being able to decide differently on the occasion of a "specific dispute", if they bring it before the law and the court of their religion (Art. 5 Para. 4a (1) and (3) of Law 1920/1991; Art. 2 Para. 2 (1) of Presidential Decree 52/2019). Therefore, those who are displeased with the default option are invited to *make a choice of (Sharia) law alongside a choice of (Sharia) court,*[27] *whilst they initiate proceedings*. The parties cannot disentangle the three parts of the package into which comes the prerogative of choice. First, they are not allowed to make a choice of law and jurisdiction outside the context of adjudication. Second, when a trial is inevitable, they are not allowed to make a choice of Sharia law or the Mufti independently of one another. Thus, Sharia law may not be administered by the civil judge, and civil law may not be administered by the Mufti.

Are these constraints justified? As far as the sophisticated mixes of heterogeneous laws and forums are concerned, they probably are. But an issue is definitely raised as to the other point, namely that the Sharia law applies only as a consequence of an appeal to the Mufti and not beforehand as long as family relationships run smoothly. Under such circumstances (and in some cases, possibly, forever), the family rights and obligations will keep stemming from civil law, no matter how much the parties themselves would like it to be otherwise – no legal act is provided for to express this wish. This is not insignificant; it implies that the reform fails to satisfy certain Muslims of the minority in their project to live "in accordance with the[ir] customs" (= the Sharia law), as the Treaty of Lausanne commands.[28]

1 Application(s)

The Presidential Decree 52/2019 specifies the procedure for submitting a dispute to the Mufti. This is done with the filing of application(s) to the Directorate for Cases of the Mufti Jurisdiction of the territorially competent Mufti Office (Art. 7 Para. 4 (1)). In particular, there may be one *common application* or two *separate applications* (Art. 7 Para. 1) reaching the Mufti simultaneously or successively. The date and time of the hearing are fixed, and the case is registered in the docket ("a book of cases for hearing") immediately on the filing of the common application, the simultaneous applications or the single application when the complementary application is missing (Art. 8 Para. 2 (1)). In the last hypothesis, no *lis pendens* is yet established, as extra steps are called for in this respect: At least 60 days prior to the hearing, the initiating party must serve a copy of his application to the other party, containing note of the clerk's act setting out the date and time of the hearing and a summons for the other party to file his own application. The recipient may do so and serve a copy of this late application to the initiating party at least 10 days prior to the hearing (Art. 8 Para. 4 (1), (2), (4)). In the event of no response or an overdue

27 *See also* on this combination E. Jayme & C.F. Nordmeier, 'Griechische Muslime in Thrazien: Rechtsspaltung und neues Wahlerfordernis im Familien- und Erbrecht', *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 38, 2018, p. 277.

28 *See supra* at A.

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response, "the case is erased from the book of cases for hearing and the first application is considered as having never been filed" (Art. 8 Para. 4 (5)).

It is noteworthy that there is no 'plaintiff' and 'defendant' in the classical sense here; the adversaries entrust their dispute to the Mufti in a way that strongly echoes the conclusion of an arbitration agreement (*see* Art. 867 of Greek Code of Civil Procedure).

2 Bilateral Choice

Whilst "one party" can autonomously resort to the civil court, only "both parties" in concert can choose the Mufti (Art. 5 Para. 4a (3) and (1) of Law 1920/1991). These provisions plainly confirm that, contrary to what was the case up to the reform of 2018, after this, the civil court and not the Mufti is considered the 'natural' judge for the Muslim minority, the "judge assigned by law" whom "[n]o person shall be deprived of against his will" (Art. 8 Para. 1 of Greek Constitution).[29] Such will is driving the common application or the separate applications, by which each applicant renounces the protection of the civil court (and law) in order to subject to the court (and law) pertaining to his faith and group membership. But when discord arises, the conflict of rights is sorted out in favour of the party who does not wish to put forward his faith and group membership against the party who does and seeks appropriate accommodation. No accommodation is forthcoming upon the other's *veto, i.e.* his refusal to make a common application or to finalize an already commenced process of separate applications, as required by the Presidential Decree 52/2019.

III Succession

1 Declaration

According to Article 5 Paragraph 4 (c) (1) of Law 1920/1991, succession falls out of the GCC, if

> the testator draws up before a notary a last will declaration, according to the form of a public will, containing exclusively his explicit wish to subject his succession under the Holy Muslim Law.

Regarding this declaration, the following remarks are in order:

- The declaration is vested *"the form of a public will"*. The term 'form' denotes all traits and requisites of the public will. These are laid down in Articles 1724 *et seq.* GCC and include, mainly, the oral statement of the wishes of the testator before a notary in the presence of three witnesses or one witness and a second notary, the drafting of a notarial deed by which the

29 *But see* A. Askitis, 'The Establishment of the Joint Competence of the Mufti in the Field of Family Disputes. Sharia Faced with the Challenges of Human Rights and Religious Mediation', *Efarmoges Astikou Dikeou & Politikis Dikonomias*, Vol. 12, 2019, p. 170 (in Greek), maintaining that both the civil court and the Mufti are the 'natural judge' in this case.

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above is reduced to writing, then the reading of the deed aloud to the testator and the other persons, and finally the signing by all of the deed and every page of it in case there are more than one. The observation of the prescribed formalities is intended to guarantee the true will of the testator, the authenticity, clarity and accuracy of its content.[30]

- The author of the declaration is dubbed *'testator'*, although what he is actually carrying out does not literally amount to a testament;[31] it is linked with the testament only to borrow the preceding formalities. In substance, the declaration diverts the future estate to the ambit of the Holy Muslim Law and in this it exhausts its potential. The distribution of the estate, *i.e.* the question who the beneficiaries will be and what lot they will be entitled to, is determined directly by the Quranic rules and not the 'testator' himself, who, technically, dies intestate!
- There must be an *ad hoc* declaration by the 'testator', "containing exclusively his explicit wish to subject his succession under the Holy Muslim Law". As a consequence, the 'testator' is precluded from recording in the notarial deed of the declaration any additional legal act that he might be also ready to perform, such as a transfer of real property or an acknowledgement of paternity.[32] Arguably, this prohibition ensures the full concentration of the 'testator' on the declaration. On the other hand, it would not be reasonable to sanction a declaration intertwined with a transfer of real property or an acknowledgement of paternity and consider it null and void on this ground.[33]

2 Unilateral Choice

The declaration of the 'testator' suffices for the Holy Muslim Law *(farâ'idh)* to govern his succession. The heirs – spouse and relatives – do not have a say on this; therefore, they cannot forestall farâ'idh from deploying effects in their regard upon the death of the 'testator'. Two points deserve further comment:

First, in some cases, the spouse and relatives will be forced to inherit under farâ'idh, although they would prefer *to inherit under the civil code*. This is in sharp contrast to the field of family disputes, where, as shown above, the application of religious minority law is out of the question in the absence of consent from all concerned sides. In succession, the opposed freedoms of religion and self-identification are accorded different weight and their priority relation is inversed; here, the positive right (of the 'testator') is the one that outstrips the negative right (of the heirs). Presumably, the reason lies in the gratuitous nature of the legal act in

30 *See* A. Georgiadis, *Law of Succession*, 2nd ed., Athens, Law and Economy P.N. Sakkoulas, 2013, § 14 Nos. 1, 4 (in Greek).

31 *See also* Th. Papazissi, 'The Sharia in Greece after Law 4511/2018', *Efarmoges Astikou Dikeou & Politikis Dikonomias*, Vol. 12, 2019, p. 245 (in Greek).

32 These are made by notarial deed, too: *see* Arts. 1033 GCC (transfer of real property) and 1476 GCC (acknowledgement of paternity).

33 *See* Art. 174 GCC: the legal act that a statute prohibits is not null and void "if the statute leads to a different conclusion". – In any event, the issue is not raised at all if, during the *same meeting* at the notary's office, *different deeds* are drafted, on the one hand, for the declaration, and, on the other hand, for the transfer of real property or the acknowledgement of paternity.

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which the 'testator' engages in the sole interest of the heirs. It can be posited that some discretion is justified for him to extend his offering in a way that honours his cultural attachments.

Second, in other cases, the spouse and relatives will be forced to inherit under farâ'idh, although they would prefer *not to inherit at all*. On its face, the situation is comparable to that under the civil code, where there is no stage of vacant succession (*hereditas jacens*) either, such as it had existed in the Byzantine-Roman tradition.[34] The succession is devolved automatically, without the heir having manifested intention to accept it (Arts. 1710 Para. 1 and 1846 GCC). There is disparity, nevertheless, between the involuntary heir of civil code and the involuntary heir of farâ'idh. The heir of civil code acquires a right in suspense, as he may exercise his power of renunciation within prescribed time limits (Art. 1847 GCC). If he does, then, by a legal fiction, the estate is considered as not having passed upon him, but as having passed upon the person who would have taken his place if he were not alive at the 'opening' of the succession (Art. 1856 GCC). The heir of farâ'idh acquires a definitive right, as no power of renunciation exists under farâ'idh.[35] This deficit is problematic. Of course, the heir of farâ'idh does not need to refuse his title to be shielded against the insolvency of the estate. The reason is that he is not liable for the debts of the estate; he will merely receive the residual-net assets (if anything) left, after all debts of the estate are successfully discharged (*cf.*, on the contrary, for the heir of civil code, Arts. 1710 (1) and 1901 (1) GCC).[36] On the other hand, it is not excluded that the heir of farâ'idh might need to refuse his title *on moral-conscience grounds, as a matter of principle*.[37] The concern is adequately met if Articles 1847 and 1856 GCC are applied analogically in his case, complemented by Articles 1848-1855 and 1857-1859 GCC, setting out the full details of the "renunciation of the succession".

F Range of Choice

Article 5 Paragraph 4 of Law 1920/1991, as amended by Law 4511/2018, devises two stand-alone ways through which the diversion of family disputes and the estate to the personal legal system takes place. As regards family disputes, applications to the Mufti are required (Para. 4a). As regards the estate, a last will declaration targeting farâ'idh is required (Para. 4c). It follows that Paragraph 4a applications may combine with the decision to pass one's estate according to civil law, and, in the same vein, a Paragraph 4c last will declaration may combine with the decision to litigate one's family disputes before the civil judge. On this comprehensive level,

34 *See* Georgiadis, 2013, § 9 No. 2 and § 38 No. 6.

35 Only legatees nominated in an Islamic will have this right. *See* extensively N.J. Coulson, *Succession in the Muslim Family*, New York, Cambridge University Press, 1971, pp. 231 *et seq.*

36 *See* on this N. Yassari, 'Intestate Succession in Islamic Countries', *in* K. Reid, M. de Waal & R. Zimmermann (Eds.), *Comparative Succession Law: Volume II: Intestate Succession*, New York, Oxford University Press, 2015, p. 424; K. Pantelidou, 'The Regulation of Succession Relations of Greek Muslims', *Efarmoges Astikou Dikeou & Politikis Dikonomias*, Vol. 7, 2014, p. 810 (in Greek).

37 *Cf.* Georgiadis, 2013, § 9 No. 1 and § 38 No. 2, invoking a 'general principle of law' that no one becomes heir willy-nilly.

the consensual accommodation scheme does not press the individuals into an 'all-or-nothing choice'.[38]

I Family Disputes

Likewise, this flexibility is also prominent on the level of family disputes. Law 4511/2018 rejects a strict solution, whereby the first time they would need to go to court, the parties would be confronted with a one-off choice between the Mufti and the civil judge. The fact that they are soliciting one of them to treat their actual dispute does not entail that this organ, religious or secular, as the case may be, is allocated general jurisdiction, in the sense that there is no right to determine the forum afresh in a new dispute. On the contrary, every choice is about "a specific dispute".[39] Thus, *e.g.* the parties can refer both their divorce and post-divorce maintenance to the Mufti or the civil judge, or handle each litigious object differently, taking the divorce to the Mufti and post-divorce maintenance to the civil judge or the divorce to the civil judge and post-divorce maintenance to the Mufti – forum shopping on multiple opportunities is welcome.

II Succession

However, things differ on the level of succession. The wording of Article 5 Paragraph 4c (1) of Law 1920/1991 (and Art. 2 Para. 3 (1) of Presidential Decree 52/2019), conferring upon the 'testator' the power "to subject his succession under the Holy Muslim Law", leaves no doubt that here is meant the succession *in its entirety*. This is firmly stipulated in Article 5 Paragraph 4c (3) of Law 1920/1991 (and Art. 2 Para. 3 (3) of Presidential Decree 52/2019):

> Concurrent application of the Civil Code and the Holy Muslim Law on the succession either in a percentage or on specific parts of it is prohibited.

According to the explanatory report of Law 4511/2018,[40] the succession shall be governed by a single law, either secular or religious, because anything else 'would constitute an impermissible – and most probably impracticable – adulteration of both juridical systems'. But this assertion does not stand scrutiny:

Firstly, it is not accurate that the coexistence of devolutions of the estate based on secular and religious law would be 'impractical'. The law of succession suffers from no technical deficiency to deal simultaneously with multiple grounds of succession. There are already three of them in the GCC, the devolution by will (Arts. 1710 and 1712 *et seq.* GCC), the devolution *ab intestat* (Arts. 1813 *et seq.* GCC) and the devolution of the reserved portion for the children or the parents and the spouse of the deceased (Arts. 1825 *et seq.* GCC), all of which may well apply on a single estate. Nothing prevented from unfolding this pattern further to also afford space for a devolution in terms of farâ'idh.

38 It is not true that, in its nature, so to speak, 'the consensual accommodation scheme forces individuals into an untenable all-or-nothing choice by setting out two exclusive yet competing legal routes' (as is contented by Shachar, 2001, p. 109).

39 *See also* explanatory report of Law 4511/2018, p. 2.

40 *See* pp. 2 *et seq.*

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Secondly, it is not accurate that the coexistence of devolutions of the estate based on secular and religious law would be an 'impermissible [...] adulteration of both juridical systems'. This is not what happens when different subdivisions of the inheritance come under different bodies of law and distinct regulatory strands, one of secular and another of religious provenance, operate side by side.

All in all, the prohibition of 'concurrent' devolutions of secular and religious law is largely owed to misunderstandings and appears as unduly rigid.

G Reversal of Choice

Another preoccupation of the drafters of the amendment of Law 1920/1991 was whether the choice of Sharia law and courts, once already completed through the application(s) of Article 5 Paragraph 4a (regarding family disputes) or the last will declaration of Article 5 Paragraph 4c (regarding succession), would be binding on the parties or these should maintain – and on what conditions – a right of change of heart, enabling them to roll back to the authority of civil law and courts. Theoretically, consensual accommodation can be adjusted to fit both opposite perceptions.[41]

I Family Disputes

According to Article 5 Paragraph 4a (2) of Law 1920/1991 (and Art. 2 Para. 2 (2) of Presidential Decree 52/2019),

> [t]he submission of the case to the jurisdiction of the Mufti is final and it precludes the jurisdiction of the ordinary courts on this particular dispute.

Moreover, the common application or separate applications, simultaneous or successive, establishing the jurisdiction of the Mufti, "shall contain [...] an explicit irrevocable declaration of each party on the choice of this jurisdiction" (Art. 5 Para. 4 (b) of Law 1920/1991 (and Arts. 2 Para. 2 (1) and 7 Para. 1 (c) of Presidential Decree 52/2019)).

It has to be noted from the outset that this irrevocability is substantially watered down in the Presidential Decree 52/2019. Here, it is stated that: "[t]he parties must appear at the hearing in person" (Art. 6 Para. 4), as the default of any of them implies cancellation of the hearing (Art. 9 Para. 9 (1)); that, in this event, a further push of the procedure is necessary, with the transfer of the case to a new hearing, "as provided for in article 8 Paragraph 10" (Art. 9 Para. 9 (1)); that the transfer is possible on the parties' own motion, if they jointly cater for the appointment of a new hearing (Art. 8 Para. 10 (1)); and that if they do not do so within 60 days, then "the case is erased from the book of cases for hearing and the applica-

41 *But see* Shachar, 2001, pp. 103, 107, 108, for whom in consensual accommodation it is always about a 'one-time' choice, strictly. *Cf. also* critical on this point R. Sandberg, 'Conclusion: In Pursuit of Pluralism', *in* R. Bottoni, R. Cristofori & S. Ferrari (Eds.), *Religious Rules, State Law, and Normative Pluralism – A Comparative Overview*, Switzerland, Springer, 2016, p. 408, seeing 'no reason why this should be the case'.

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tions are deemed as having never been filed" (Art. 8 Para. 10 (2)). Therefore, it is quite easy to sidestep the Mufti after having chosen him, by simply failing to appear before him and by leading the open procedure to retroactive extinction. After this point is crossed, the possibility of accessing the civil judge is automatically reinstated!

That said, the irrevocability rule is *up to this point* binding upon the applicants, who cannot withdraw the application(s) to bring an action to the civil judge even earlier – such action would have to be dismissed, given the irrevocability rule.[42] The soundness of this effect must be tested in the two scenarios where the irrevocability rule applies.

First, the irrevocability rule prohibits the withdrawal of the application envisaged by *one litigant*. In this respect, it is justified. Admittedly, the activation of the Islamic law and jurisdiction requires two consents and is excluded in case of dissensus, when negative and positive rights of freedom of religion and self-identification clash. At this juncture, the negative rights take precedence over the positive rights. However, such line of reasoning ceases to be pertinent after law and jurisdiction have been voluntarily determined. From then on, this situation generates legitimate expectations that the resulting *lis pendens* will be terminated with a decision. If one litigant alone seeks to impede this outcome – with the intention either to return to the Islamic law and jurisdiction with a subsequent application, or to turn to the civil law and jurisdiction, or even without having made up his mind yet on his future stance –, he does not deserve protection against the other, the consistent litigant. Hence, the negative and positive rights of freedom of religion and self-identification should be re-balanced accordingly. Curiously, this is not the logic of the Presidential Decree 52/2019, which leaves ample room for someone to unilaterally game the system and evade the irrevocability rule.

Second, the irrevocability rule prohibits the withdrawal of the application(s) envisaged by *both litigants*. In this respect, it is absurd. The fact that it is the litigants themselves who paved the way for Sharia law and the Mufti with their application(s) seems no convincing reason for denying them to reclaim their negative rights of freedom of religion and self-identification in a context where – unlike in the previous case – the change of heart does not give rise to any conflict of rights. For its part, the Presidential Decree 52/2019 offers some remedy, but this may involve observance of a waiting period for the irrevocability rule to 'expire'. In order to make the help of civil law and courts immediately available, an exception to the irrevocability rule must be admitted when the submission of the dispute to Sharia

42 It would not be correct to say that the problem posed by the irrevocability rule is theoretical rather than real, because, by the time the case is examined by the civil judge, the retroactive extinction of the application(s) to the Mufti will have already occurred. There is nothing in the Presidential Decree 52/2019 to support such conclusion. The hearing before the Mufti is fixed *"at least"* 30 days after the filing of the common application or 90 days after the filing of the first application when the filing of a second application must follow (Art. 8 Para. 5). Therefore, it can be fixed at a (much) later stage, which does not have any ultimate limit, but clearly depends on the backlog of the Mufti. As to the retroactive extinction, this comes 60 days after the abovementioned hearing is cancelled (Art. 8 Para. 10). Under these circumstances, it is quite likely – even after reckoning with the usual delays of administration of civil justice in the country – for a civil trial to begin while we are *still* under the irrevocability rule.

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law and the Mufti serves no one's interests and the litigants converge to discontinue proceedings ('teleological reduction' of Law 1920/1991 (and Presidential Decree 52/2019)).[43]

II Succession

In a spirit opposite to the irrevocability rule enshrined in family disputes, the 'testator' who makes a declaration to have his succession settled according to Holy Muslim Law can withdraw it any time before his death. Article 5 Paragraph 4 c (2) of Law 1920/1991 foresees two ways to achieve this:

> either by a subsequent contrary declaration before a notary or by drawing up a subsequent will, in accordance with the regulations of the Civil Code.

It can be argued that the "subsequent contrary declaration" may be formulated in a negative or positive manner ('I do not wish to subject my succession to Holy Muslim Law' or 'I wish to subject my succession to civil law'), and that the "subsequent will" may be of any category among those listed in the GCC (Arts. 1721 *et seq.*), namely some kind of ordinary will (holographic will, public will, mystic will) or extraordinary will (will made at sea, military will, will during blockade).[44]

Remarkably, the withdrawal of the initial declaration is made possible under *fewer formalities* than those of the public will, set out for the initial declaration itself.[45] First, although the "subsequent contrary declaration" also takes place "before a notary", this is the sole element common with the public will; all the rest of the provisions regarding the persons who must be present and the procedure that must be followed before the notary in the event of a public will are inapplicable here. Second, the "subsequent will" may turn out to be even more straightforward than the public will, considering notably the option of the holographic will, for which mere handwriting, dating and signing of a private instrument is suitable. In short, relinquishing – contrary to choosing – farâ'idh does not raise serious reservations and does not demand exacting preliminary controls intended to safeguard the autonomy of the 'testator'.

After the setting aside of farâ'idh, the devolution of the estate shall be disposed of within the framework of civil law. In particular, Articles 1813 *et seq.* GCC on *ab intestat* succession (in the case of the "subsequent contrary declaration") or the testamentary dispositions (in the case of the "subsequent will") have vocation to apply upon death. Moreover, these virtual effects are themselves open to modifications if one's options under civil law are later revisited. In particular, (in the first case) Articles 1813 *et seq.* GCC may be – in whole or in part – further displaced by testamentary dispositions, and (in the second case) the testamentary dispositions may be – in whole or in part – further revoked, giving way either to newer testamentary dispositions or to Articles 1813 *et seq.* GCC. In any event, the rules

43 On 'teleological reduction' *see* K. Larenz & C.W. Canaris, *Methodenlehre der Rechtswissenschaft*, 3rd ed., Berlin Heidelberg, Springer, 1995, pp. 210 *et seq.*

44 *See also* Papazissi, 2019, p. 245.

45 *See supra* at E III 1.

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on forced heirship must not be infringed. As a reserved portion for the surviving spouse and close relatives applies (Arts. 1825 *et seq.* GCC), the devolution of the estate may need to be partially corrected or even totally overturned if it jeopardizes the reserved portion.

H Concluding Remarks

The enactment of Law 4511/2018 marks a watershed moment in the long presence of the Sharia law and courts in Western Thrace. From now on, the Muslims of the minority have a choice between these and the civil law and courts for the arrangement of their family disputes and succession. The previous sections tried to highlight the modalities of this right. There is an outstanding question, nevertheless, concerning how effective this right may prove *in the hands of women insiders*. The argument is that the latter – in comparison to men insiders – assume a 'unique role' for the perpetuation of the collective, as they fulfil the core tasks of reproduction and nurturance of the next generations. In this sense, they become 'emblematic' of what the collective stands for and its demarcation *vis-à-vis* the larger society. That is why they are burdened with 'heightened responsibility' and 'enormous pressure' to demonstrate loyalty and not ignore the traditions and values – including the *nomos* – of the collective. If they go the other way, they run the risk of being singled out as 'cultural traitors'.[46] Therefore, one should not get carried away and idealize the option of the civil law and courts. In fact, in some instances, this equals to a 'purely formal' option, namely to 'no [option] at all',[47] whose waiver in favour of the Sharia law and courts is, rather than the fruit of free will, the product of extorsion.

This objection raises many issues that cannot be addressed in full here. One thing to stress is that it immediately loses part of its force as soon as the default option of Law 4511/2018 is taken into account. As already said,[48] the default option is on the terrain of the secular and not the religious 'jurisdiction', which is important, because the understanding of the appeal to the civil law and courts in each case varies. When the secular jurisdiction serves as the starting point, this appeal, in essence, leaves the situation as it is. When the religious jurisdiction serves as the starting point, this appeal culminates in the removal of one's family disputes and succession as well as in his/her own exit from the *nomoi* group. It is plausible to presume that the accusations for 'cultural treason' and, in view of these, the deterrence that the individuals experience in their attempt to avail of the

46 *See* on the above Shachar, 2001, pp. 45 *et seq.*

47 *See* S.M. Okin, '"Mistresses of Their Own Destiny": Group Rights, Gender, and Realistic Rights of Exit', *Ethics*, Vol. 112, 2002, pp. 214, 224, expounding, moreover, (at pp. 205 *et seq.*) the cultural factors that compromise the agency of women and make 'unthinkable' for them the idea that there is an option beyond the collective.

48 *See supra* at D.

civil law and courts, are primarily stimulated in the last setting; they seem less likely under the 'reverse optionality' privileged in Law 4511/2018.[49]

49 *See* on 'reverse optionality' G. Mahajan, 'Can Intra-group Equality Co-exist with Cultural Diversity? Re-examining Multicultural Frameworks of Accommodation', *in* A. Eisenberg & J. Spinner-Halev (Eds.), *Minorities within Minorities: Equality, Rights and Diversity*, New York, Cambridge University Press, 2004, p. 106, who doubts whether this can neutralize the influences that tend to keep women walled-off the civil law and courts.

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