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Judicial Review of Mufti Decisions Applying Islamic Family Law in Greece

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Abstract: Greece is a unique example of a country member of the Council of Europe that allows for the application of Sharia law by the Mufti on a select part of its citizenry: the members of the Muslim minority in Western Thrace (situated in NE Greece). However, to produce their effects, Mufti decisions need to undergo review and to be declared enforceable by the civil court. The aim of this article is to explore the relevant legal framework arranged in law 4964/2022 and presidential decree 52/2019, whereby the details of such a judicial review are set out. In particular, this article considers the prerequisite of the exequatur to religious adjudication, and then, it goes through all of the levels over which the said review extends, bringing progressively into focus the review of the scope of jurisdiction, the review of compatibility with the Constitution and the European Convention of Human Rights, and the review of some additional issues raised specifically by presidential decree 52/2019 over and above the points just mentioned. A final remark follows in connection with possible errors committed in religious adjudication—errors of law or fact—which remain beyond the reach of the review.

Keywords: Sharia; Mufti; accommodation; ECHR; constitution; public policy; divorce; consent; Rome III Regulation; due process

1. Introduction

Greece is a unique example of a country member of the Council of Europe that allows for the application of Sharia law by Sharia courts on a select part of its citizenry: the members of the Muslim minority in Western Thrace. The accommodation of the legal system of Sharia in Greece has its roots in a series of international treaties, namely the Treaty of Constantinople (1881); the Treaty of Athens (1913); the Treaty of Sèvres (1920); and, finally, the Treaty of Lausanne (1923), which is the only one still in force today (for a comprehensive survey of these international instruments, see [Ktistakis 2006](#), p. 89 ff.). The last specifically regards the Muslims of Western Thrace, who, together with the Christians of Constantinople and those of the islands of Imbros and Tenedos, were exempted from a large-scale compulsory population exchange agreed upon between Greece and Turkey that affected all other Muslims of Greece and Christians of Turkey (see the analysis by [Tsitselikis 2012](#), p. 67 ff., who notes that the measure effectively involved ‘ethnic cleansing’, understood as a policy ‘to drive out ethnic groups in an attempt to establish a homogeneous nation-state’). As per its wording, Greece (like Turkey) ‘undertakes to take’ for her minority ‘in so far as concerns [. . .] family law or personal status, measures permitting 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 clause merely guarantees the ‘religious distinctiveness’ of the minority and does not require Greece to make room for Sharia law and courts in the indicated areas (see, notably, *Molla Sali v. Greece*, para. 151, cited *infra*). However, this approach is disputable. At most, perhaps, the two strands could be discerned. On the one hand, ‘customs’ pertaining to ‘family law and personal status’, by definition, refer to relevant norms that have been constantly observed within the minority. This is Sharia law. On the other hand, Sharia courts are not necessarily part of the picture in the sense that ‘the



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settlement of these questions in accordance with' the above might have been 'outsourced' to civil courts. The preference of Sharia courts over civil courts reflects a policy stance vis à vis the minority; it is not construed as a commitment stemming from the Treaty of Lausanne.

In any event, both Sharia law and Sharia courts (chaired by *the Mufti*) are well established in Greece. Two provisions, one substantive (Art. 4 para. 1 of law 147/1914) and one procedural (Art. 146 para. 8 of law 4964/2022), bolster this conclusion:

Art. 4 para. 1 of law 147/1914 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.'

Art. 146 para. 8 of law 4964/2022 reads:

'The Mufti exercises jurisdiction [. . .] between Greek citizens members of the Muslim minority of Thrace, 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.'

In what concerns his legal competences, the Mufti is, on the one hand, a religious jurist qualified to issue non-binding opinions (*fetwas*: '*ieronomikes ritres*') (Art. 146 para. 6 of law 4964/2022) and, on the other hand, a religious judge qualified to render binding decisions (Art. 146 para. 8 of law 4964/2022). Normally, in the Islamic administration of justice, the second role is assumed by the Qadi. In Greece, the distinction between the two figures still existed under the Treaty of Constantinople (1881); nevertheless, it was abandoned early on under the Treaty of Athens (1913), in which evidently the Mufti had replaced the Qadi (see [Ktistakis 2006](#), pp. 32, 90, 91 ff., and [Tsitselikis 2012](#), p. 391). Soon after that, the Mufti jurisdiction took shape in law 2345/1920, following which it was reaffirmed three more times along the way before the enactment of its actual version—namely, by law 1920/1991; by law 4518/2018; and last but not least, by presidential decree 52/2019, which moreover introduced 'procedural rules on cases under the [Mufti] jurisdiction' and created a new administrative structure, the 'Directorate for cases of the Mufti jurisdiction'. There are three Mufti offices in Western Thrace, located in Komotini, Xanthi, and Didymoteicho; therefore, jurisdiction is distributed among them.

It is noteworthy that Sharia law and courts are no longer mandatory for the Muslims of the minority, unlike what it used to be until quite recently (see [Koumoutzis 2021](#)). This situation clearly violated the European Convention on Human Rights (ECHR), as the European Court of Human Rights (ECtHR) found in its judgment on the case *Molla Sali v. Greece* (Application no. 20452/14, 19 December 2018). At present, the Muslims of the minority are simply accorded a right to choose whether to have their matters regulated by Sharia—instead of civil—law and courts. The right to choose was first enshrined with law 4511/2018 (Art. 1), amending law 1920/1990 (i.e., adding to Art. 5 a new para. 4a referring to Mufti intervention in family disputes and a new S 4c referring to succession), and has already carried over into law 4964/2022 (Art. 146: see para. 10a on Mufti intervention in family disputes and para. 10 b on succession), which repealed the previous two. The practical details on how the parties may choose the Mufti—the rules on 'the procedure of application'—are spelled out in presidential decree 52/2019 (Art. 7 and Art. 8 para. 4).

The reason why these instruments are of interest here is that they (also) place religious adjudication under judicial review:

In Art. 146 para. 9 of law 4964/2022, it is stipulated that:

'Decisions issued by the Mufti in cases of contentious jurisdiction cannot be enforced and do not constitute *res judicata* unless they have been declared enforceable by the single-member court of first instance of the region for which the Mufti is responsible, under the procedure of voluntary jurisdiction. The court

examines only whether the decision was issued within the bounds of the Mufti's jurisdiction and whether the provisions applied are contrary to the Constitution, in particular to paragraph 2 of article 4, and to the European Convention on Human Rights. The decision of the single-member court of first instance may be challenged before the multi-member bench of the court of first instance, which adjudicates in accordance with the same procedure. The decision of the multi-member bench of the court of first instance is not open to ordinary or extraordinary appeal.'

In Art. 12 para. 2 and para. 3b of presidential decree 52/2019, it is stipulated that: 'The decision of the Mufti shall not be declared enforceable' if, over and above the points just mentioned that are also included in Art. 12 para. 3a and para. 3c, 'it has not been served to the parties' (para. 2) and 'the provisions of law 4511/2018 (A'2) [and now of law 4964/2022] and of the present decree on the procedure of submission to the jurisdiction of the Mufti have not been observed' (para. 3b).

The remainder of this article attempts to unpack this pivotal—yet under-researched—legal framework. It begins with a consideration of the prerequisite of the exequatur to Mufti decisions by civil court order (*infra* 2), and then, in the main part, it goes through all of the levels over which this review of the civil court extends, bringing progressively into focus the review of the scope of jurisdiction (*infra* 3), the review of compatibility with the Constitution and the European Convention of Human Rights (*infra* 4), and the review of the issues raised by Art. 12 para. 2 and para. 3b of presidential decree 52/2019 (*infra* 5). A final remark follows in connection with possible errors contained in Mufti decisions—errors of law or fact—which remain beyond the reach of the review (*infra* 6).

2. Exequatur to Mufti Decisions by Civil Court Order

Mufti decisions do not have immediate legal effects. They need to be declared enforceable by the court of first instance, with a so-called order of exequatur. Moreover, when they are declared enforceable, their legal effects are deployed ex nunc and not retrospectively from the time of their delivery (see [Dimitriou 2007](#), p. 773 ff.). That said, the settlement of relevant family disputes is, in the end, credited to the Mufti. Thus, for example, *the Mufti* is the organ from which the dissolution of marriage or the injunction to pay maintenance originates, after the determination of each litigious right in accordance with Sharia law. The court of first instance merely intervenes to sanction his actions (see also [Dimitriou 2007](#), p. 773).

The exequatur is certainly not new. The exequatur traces back to law 2345/1920, which had placed it within the remit of the president of the territorially competent court of first instance (Art. 10 para. 2 (2)). Thereafter, with law 1920/1991, it was entrusted directly to the territorially competent court of first instance, and the two-tier system of validation that is also reflected in the current law 4964/2022 was set up. According to this system, a review of Mufti decisions is conducted by the single-member court of first instance, the judgment of which—either refusing or awarding the exequatur—may then be challenged before the multi-member bench of the court of first instance (in a similar vein, law 2345/1920 had allowed for the judgment of the president of the court to be challenged before the court itself; however, as it referred only to cases of refusal of the exequatur, it excluded cases of award of the exequatur from such a possibility: see Art. 10 para. 3 (2) and, contra: [Tsourkas 1981–1982](#), p. 590). The judgment of the multi-member bench of the court of first instance may uphold the judgment of the lower court, or may overturn it and take the opposite view (in favour of a refusal or an award of the exequatur, as applicable) on the grounds that the previous review was flawed. In any event, the new review is final, 'not open to ordinary or extraordinary appeal'. In both trials, the special rules of voluntary jurisdiction of the Greek Code of Civil Procedure (Arts. 739 ff.) are followed.

It is worth stressing the advantage of the ex ante oversight technique of the exequatur, as designed by the Greek legislature. A different solution would be to let the rulings of the Sharia tribunal become fully operational from the outset and to foresee that any

complaints about alleged violations of jurisdiction or human rights be heard by the civil court *ex post*, as applied in the model of Israel (see [Sezgin 2018](#), pp. 246, 249 ff., on the role of the Supreme Court in such cases in its capacity as High Court of Justice), among others. The drawback of this model is that it leaves the initiative of the whole process to the parties themselves, who may have already been ‘semi-coerced’ into accepting the authority of the Sharia tribunal and are therefore least able to overcome their family and communal pressures and to challenge it afterwards by turning to the secular court for judicial review (see [Shachar 2008](#), pp. 599, 600, and [Sezgin 2018](#), p. 242). Of course, there is always room here to infuse some degree of *ex ante* oversight so as to prevent violations of the restrictions placed on the religious judges by secular law—one possible method is indeed through mandatory training of religious judges in secular law (see [Shachar 2008](#), p. 600, and [Sezgin 2018](#), p. 242), which is precisely what Israel has adopted since 2002 (see [Sezgin 2018](#), pp. 242 ff., 245, on the selection of the appointed Qadis). However, without underestimating its effectiveness, it is highly doubtful that, under that kind of regulation, violations of jurisdiction or human rights can be totally eliminated; which means that, when the problem occurs, the difficulty to access the civil court remains unaddressed. Seen from this point of view, the *exequatur* is definitely a more reliable option.

3. Review of Scope of Jurisdiction

The court of first instance exercises a review to ensure that the Mufti has not acted in excess of his jurisdiction. This is a complex issue, combining questions of scope of jurisdiction *ratione personae* as well as *ratione materiae*. It can only be briefly considered here (for a discussion in legal scholarship, see [Kotzambasi 2003](#), p. 64 ff.; [Ktistakis 2006](#), p. 33 ff.; [Pantelidou 2013](#), p. 299 ff., and [Koumpli 2022](#), p. 336 ff.):

As to the personal scope of the religious jurisdiction, law 4964/2022 expressly states that it covers ‘Greek citizens members of the Muslim minority’ (Art. 146 para. 8). This means that *all* Muslims of the minority, without exception, are included here, even if they are not ‘permanent residents of [the] district’ of the Mufti, i.e., Western Thrace (such a restriction that had been added in Art. 2 para. 1 of presidential decree 52/2019 is now repealed with law 4964/2022 (Art. 162 ib)). On the other hand, the opposite applies for Muslims outside the minority, as the courts of first instance have also been able to confirm on several occasions (see [Ktistakis 2020](#), p. 3 n. 7, and [Sakaloglou 2015](#), p. 1375 n. 38 and p. 1376 n. 39).

As to its material scope, religious jurisdiction appears less easily amenable to delimitation. What is certain is that the Mufti hears disputes concerning the subject matters enumerated in the procedural law provision of Art. 146 para. 8 of law 4964/2022, ‘inasmuch as these subject matters are governed by the holy Muslim law’ on the basis of the substantive law provision of Art. 4 para. 1 of law 147/1914 (see *supra* 1). Therefore, the two provisions must somehow match in order for the jurisdiction of the Mufti to be established. However, no consensus exists about which disputes really satisfy the said requisite. At the very least, this is considered to be the case only for disputes over the lawful conclusion of marriage and divorce *per se*, while almost everything else—the consequences of divorce, for the most part—is marked as a grey area. Importantly, in recent years, the courts of first instance have rejected requests for *exequatur* of Mufti decisions on post-divorce custody, parent–child contact, child maintenance, spousal maintenance, and patrimonial relations many times, cutting down his jurisdiction accordingly (see [Ktistakis 2020](#), pp. 5, 6 ff., and [Sakaloglou 2015](#), p. 1375 n. 38 and p. 1376 n. 39). It remains to be seen whether this trend will persist or is about to discontinue as soon as the courts of first instance overcome the reluctance they have been showing so far to deliver at the phase of the human rights review (see *infra* 4.3), which is probably why they have felt the need, in some of the proceedings where it was possible, to maintain control of the outcome at the preliminary phase of the review of jurisdiction by means of a strict interpretation of the relevant legal texts.

4. Review of Compatibility with the Constitution and the European Convention on Human Rights

According to law 2345/1920, the sole question that the competent organ of the exequatour (the president of the court of first instance) sought to examine before declaring a Mufti decision enforceable was whether it actually lied within the ‘bounds of his jurisdiction’ (Art. 10 para. 3 (1)). Quite crucially, this was no more sufficient under law 1920/1991 (Art. 5 para. 3 (2)). Here, the competent organ of the exequatour (the court of first instance) was called to take a step forward and to examine whether ‘*the provisions applied are contrary to the Constitution, ‘in particular to paragraph 2 of article 4 and to the European Convention on Human Rights*’, as the last phrase had been subsequently inserted into the text by law 4511/2018 (Art. 1 para. 3 (2)). The new version is repeated verbatim in Art. 146 para. 9 of law 4964/2022.

It is not without significance that, after 2018, the law does not stick to a general reference to ‘the Constitution’ (GC). On the one hand, it foregrounds ‘in particular [. . .] paragraph 2 of article 4’, which enshrines the equality of Greek men and women (the latter reads: ‘Greek men and women have equal rights and equal obligations’) and presumably offers the most prominent field of tension between Sharia law and human rights. On the other hand, it underscores the role of the ECHR. Although the ECHR is elevated to a higher hierarchical rank in comparison with any domestic law—Sharia law included—by virtue of Art. 28 para. 1 GC, in a way that any breach of the ECHR counts at the same time as a breach of Art. 28 para. 1 GC itself (cf. [Chrysogonos 2001](#), p. 225 ff.), and as such, it can be considered covered by a general reference to ‘the Constitution’, the fact is that the ECHR did not attract much attention until 2018, but it was at that very point when its visibility was restored. To summarise, the process of the exequatour has been rather strengthened by these two amendments, thanks to which the civil court now has sharper tools for review at its disposal.

4.1. Complementarity to the Review Set Forth in Art. 93 Para. 4 of the Constitution

Art. 93 para. 4 GC stipulates that:

‘The courts shall be bound to not apply a statute whose content is contrary to the Constitution.’

Hence, a system of ‘diffuse’ or ‘dispersed’ constitutionality review has been put in place, whereby, in essence, it falls upon all ordinary courts during the hearing of a case to check whether a statute which is otherwise relevant to that case is also constitutional; if they find it unconstitutional, they must not take it into consideration (see, for instance, [Skouris and Venizelos 1985](#), p. 51 ff.).

This review proves important with respect to the Sharia law of succession (*faraidh*), which produces effects automatically upon death, provided that the Muslim had expressed the wish to subject their estate to it via appropriate notarial declaration (see Art. 146 para. 10b of law 4964/2022; Art. 2 para. 3 of presidential decree 52/2019). A civil court may then be called to deal with this situation in various civil proceedings implicating the estate (see examples in [Fragistas 1963](#), Art. 6 no. 42). On these occasions, the civil court is under the mandate of Art. 93 para. 4 GC. A good case in point is ruling no. 9/2008 of the Rodopi court of first instance (Nomos Database) concerning an action brought by a sister against her brother—based on Arts. 798 ff., 1887 ff. of the Greek Civil Code and Arts. 478 ff. of the Greek Code of Civil Procedure—for judicial partition of a joint real property that they had inherited from their parents who died intestate. What quantum they had inherited emerged thus as an incidental matter in the trial. In fact, upon this was largely premised the main matter of the trial, namely the right to partition as such. At that time, *faraidh* was still compulsory for the minority. Yet, according to it, the female child received half the share of the male child, a treatment that—as the court itself was careful to ascertain—appears arbitrary from the angle of Art. 4 para. 2 GC. As a result, the court resolved to set aside *faraidh* and to employ civil law instead for purposes of calculation of the siblings’ hereditary portions. By doing so, it recognised equal hereditary portions to

each of them and finally ruled for a fair, fifty–fifty partition between the plaintiff and the defendant (the published extract does not clarify the more technical question of whether this was a partition by division in kind or a partition by auction and division of the profits).

An interesting takeaway here is, therefore, that there are *two complementary devices of human rights review* of the Islamic personal law in Greece. As far as the Sharia law of succession is concerned, the application of which is freestanding, this is covered by the general review mechanism of Art. 93 para. 4 GC. As far as the Sharia family law is concerned, the application of which is mediated by a Mufti decision requiring the exequatur, this is covered by the special review mechanism of Art. 146 para. 9 of law 4964/2022. By the same token, there is no way for any of these different parts of Sharia law to divert to the review mechanism foreseen for the other.

4.2. Necessity of the Review

The introduction of the constitutionality review back in 1991 was an overdue measure, since large parts of Sharia law were—and still are—not consonant with human rights, especially so with gender equality. This contradiction is not anyhow ‘mitigated’, as it is sometimes said, on the argument that Greece has accepted the religious law to govern the personal affairs of the Muslim minority in Western Thrace (see [Papassiopi-Passia 2001](#), p. 407) or that, in any event, the submission of the individuals to religious law is left entirely up to them (see [Papassiopi-Passia 2001](#), pp. 406, 407, and [Papassiopi-Passia 2012](#), p. 50).

First, the incorporation of Sharia law into the official state legal structure does not automatically mean that it is bound to become a parallel system endowed with full autonomy. On the contrary. As it is aptly noted, even regimes ‘that take great pride in advancing a multicultural agenda’ appear zero-tolerant towards ‘claims for insulation’ from the purview of their constitutional order, which are perceived as nothing less than direct challenges to the latter’s ‘lexical priority’ (see [Hirschl and Shachar 2014](#)). Moreover, for a signatory to the ECHR such as Greece, this is not simply a matter raised on the domestic level; a hands-off approach to Sharia law would have as a consequence that the country falls short of its international obligation to ‘secure to everyone within [its] jurisdiction’ the rights set out in the Convention and the Protocols thereto (see Preamble and Art. 1 ECHR).

Second, while it is true that Sharia law applies if the parties give consent and thus are keen to expose themselves to its imperfections, it is not correct that they are also entitled to relinquish certain protections that they enjoy under constitutional and international law. Not all protections are categorically immune to waiver (on account that ‘they are in a way an expression of positive natural law’, as hypothesised by [Pamboukis 2019](#), p. 1009). Rather, the problem exists only with those among them that can be considered of ‘fundamental importance’. The ECtHR draws this distinction, holding that in the last case—and here it refers characteristically to the prohibition of discrimination on the basis of ‘race’ (see *D.H. and Others v. the Czech Republic*, Application no. 57325/00, 13 November 2007, para. 204), ‘sex’ (see *Konstantin Markin v. Russia*, Application no. 30078/06, para. 150), and ‘religion’ (cf. *Molla Sali v. Greece*, Application no. 20452/14, 19 December 2018, para. 156)—no waiver is valid ‘as it would run counter to an important public interest’. Its thoughts can be said to be a fortiori to the point when the above factors are compounded, which is precisely what transpires within the framework of Sharia law, where ‘sex’ and ‘religion’ work in tandem to the disadvantage of Muslim females.

Finally, let us note that the value of the above remarks, demonstrating the high significance of the exequatur, is not put into doubt by the fact that, anyway, the review of Sharia family law also falls—and indeed primarily—on *the Mufti himself* in his capacity as a judge ‘bound’, like any other ordinary judge, ‘to not apply a statute whose content is contrary to the Constitution’ (Art. 93 para. 4 GC). Although this may be a correct conclusion, on the other hand, for obvious reasons, no one would be inclined to leave the defense of human rights up to the self-control of a religious authority and consider the filter of Art. 146 para. 9 of law 4964/2022 ‘redundant’.

4.3. The Malfunction of the Review

In the past, the courts of first instance of Western Thrace have regularly abstained from exercising any material constitutionality review of ‘the provisions applied’ by the Mufti, despite Art. 5 para. 3 (2) of law 1920/1991 instructing them to do so. This is confirmed by two empirical studies conducted in their records and covering—if taken together—the relevant case law produced in the period 1991–2014. As the collected data show, the number of Mufti decisions that were denied exequatur on constitutionality grounds is strikingly low. In fact, we are talking about no more than 11 out of a total of 2.679 decisions delivered between 1991 and 2006, according to the first study (see [Ktistakis 2006](#), pp. 118 ff., 154 ff., 158) and 5 out of a total of 917 decisions delivered between 2007 and 2014, according to the second study (see [Sakaloglou 2015](#), p. 1375 ff. n. 38 and 39). It is important to know that, from the remainder of the decisions, only a few were denied exequatur on grounds of other deficiencies, mainly transgressions of jurisdiction; in their vast majority, they were summarily ratified, with all the human rights issues they raised—in terms of gender equality, child protection, or fair trial—being swept under the rug. In both samples, moreover, the benches of the courts of first instance have never accepted appeals to weigh in and reverse such unlawful practices (within the framework of Art. 5 para. 3 (3) of law 1920/1991) (see [Ktistakis 2006](#), p. 124 ff., and [Sakaloglou 2015](#), p. 1376 ff. n. 42 and 43).

The reasons for that failure are to a large extent of a political nature (see [Tsitselikis 2012](#), p. 409), as geostrategic national interests seem at times to be interlocked with the preservation of the authority of the Muftis (see analytically [Sezgin 2018](#), p. 264). No doubt, were the civil courts to carry out the review of the applied Sharia rules properly, these would be found ‘contrary to the Constitution’ as a matter of course, and the Mufti decisions would be without legal value (cf. [Papassiopi-Passia 2001](#), p. 410, and [Tsaoussi and Zervogianni 2008](#), p. 221). However, the opposite idea of what might be dubbed an ‘exequatur of convenience’ is untenable. The preceding analysis, stressing the necessity of the review (see *supra* 4.2), cannot be passed over, whereas the ‘tactic’ per se of first assigning the duty of review to the civil courts and then forcing them to renege on it and simultaneously pretend that they actually fulfil it, is, if anything, paradoxical and undermines their own credibility (see [Papassiopi-Passia 2001](#), pp. 407, 411, who remarks that the exequatur of convenience is not merely silent on the question of whether the applied Sharia rules are ‘contrary to the Constitution’, but it inevitably certifies that *they ‘are not’*, a formal statement by which the state legal system blatantly contradicts itself).

In any event, after the enactment of law 4511/2018 and, later on, of law 4964/2022 that replaced it, the country’s commitment to judicial review was reaffirmed. In the new framework, the legal basis of the judicial review was redrafted, such that the civil courts are now *urged to increase their vigilance* at the stage of the exequatur by having regard to Art. 4 para. 2 GC (on gender equality) ‘in particular’, as well as to the ECHR (see *supra* before 4.1). It is therefore strongly anticipated that they will see to it that they break previous habits and start operating as expected in the future.

4.4. Substantive and Procedural Review

The reference to ‘the provisions applied’ by the Mufti in Art. 146 para. 9 of law 4964/2022 is broad enough to embrace not only the *substantive* but also the *procedural* provisions upon which the Mufti relied to make a decision. As far as the last part is concerned, in particular, the civil court must concentrate on the relevant fundamental protections enshrined in ‘the Constitution’ (see mainly Art. 4 GC: right to procedural equality; Art. 20 para. 1 GC: right of defense) and in ‘the European Convention on Human Rights’ (see Art. 6 ECHR: right to a fair trial) to ask itself whether the scheme in place takes them into consideration. However, it is important to bear in mind that the scheme in place no longer emanates from Sharia law (which, on most matters, did nothing more than give leeway to the Mufti to shape the procedure at will, following his own practical sense and wisdom (see notably [Tsourkas 1981–1982](#), p. 587 ff.)); on the contrary, it now consists of a formal procedure laid down in presidential decree 52/2019. As a result, the

procedural review has ended up targeting secular law itself (!), while this cannot be said to fall anyhow below the threshold of procedural justice as determined in the Constitution and in the European Convention on Human Rights.

4.5. Abstract Review

It is submitted that when performing its review, the civil court is practically dealing with the question of whether the decision of the Mufti is compatible with ‘public order’ (see [Tsitselikis 2001](#), p. 590; [2012](#), p. 407 ff.; [Deligianni-Dimitrakou 2008](#), pp. 170, 202 ff., 188 ff.; [Kalampakou 2015](#), p. 344 ff., and [Pamboukis 2019](#), pp. 1004, 1009, 1010). This concept is understood here not in the sense of Greek domestic public order, comprising all the compelling law from which no derogation is permitted by acts of private will (*ius cogens*), but in the sense of Greek international public order, namely of the fundamental principles that reflect social, religious, moral, and other commonly accepted perceptions determinative of the ‘dominant life rhythm of the country’ (see, for example, [Krispis 1979](#), p. 379 ff., on this difference).

It has to be noted from the outset that, according to the Greek Code of Civil Procedure, a foreign judicial decision may receive exequatur in Greece on the condition that it does not infringe upon ‘good morals or public order’ (see Arts. 323 no. 5 and 905 para. 3). Given that the judicial decision of the Mufti does not literally fall within said category—the Mufti being a Greek authority—Arts. 323 no. 5 and 905 para. 3 do not appear apposite for him. On the other hand, there is no objection to the idea of resorting to Arts. 323 no. 5 and 905 para. 3 in the presence of a legal gap. Admittedly, the latter existed as long as the only control where the Mufti was subjected to was the one of jurisdiction. As this was quite narrow and needed to be complemented with certain human rights safeguards, it had been proposed that those might be usefully derived from ‘good morals or public order’. The yardstick of Arts. 323 no. 5 and 905 para. 3 was thus also extended over the unregulated case (see [Tsoukalas 1988](#), p. 1655). That said, the whole discussion became obsolete after the enactment of law 1920/1991, which instituted the constitutionality review, filling the legal gap (see *supra* 4). Thenceforth, one cannot still contemplate an application of Arts. 323 no. 5 and 905 para. 3 ‘by analogy’ (contra: [Tsitselikis 2001](#), p. 590 and n. 27; cf., moreover, [Kalampakou 2015](#), p. 344 ff., preferring to use (presumably, ‘by analogy’, too) Art. 33 of the Greek Civil Code, where ‘good morals’ and ‘public order’ are intended to confront a foreign *lex causae* in the conflict of laws framework—a scenario even further removed from the situation at hand).

In reality, the proponents of the opinion that international public order is engaged in the review by the civil court are fully aware of the existence of the specific *sedes materiae* of this competence, now found in Art. 146 para. 9 (2) of law 4964/2022, where reference to both the Constitution and the ECHR is made. Their point is rather that the norms of the Constitution and the ECHR belong to—and indeed form the ‘hard core’ of—the set of values that international public order is also aimed to protect. Having the above ‘connection’ in mind, they immediately go on to postulate a canon on how possible disharmonies with the Constitution and the ECHR ought to be assessed; this is not to be performed ‘directly’ but instead ‘through’ the medium of international public order (see [Tsitselikis 2012](#), p. 407, and [Deligianni-Dimitrakou 2008](#), p. 170). Thus, at the end of the day, the decisions of the Mufti are treated ‘as if’ they were foreign decisions, or, in other words, they are ‘assimilated to quasi-foreign decisions’ ([Pamboukis 2019](#), p. 1010).

This approach does not sound convincing. For the review prescribed in Art. 146 para. 9 (2) to be tantamount to an international public order review, the match in the criteria of the reviews (i.e., the human rights enshrined in the Constitution and the ECHR) is not sufficient on its own; a match in the *object* of the reviews is moreover of the essence. It is abundantly clear that the issue of a breach of international public order under private international law gives rise to a review in which the focus of interest is less on the relevant foreign law *per se* than on the real effect of its application in the litigious case (see [Krispis 1979](#), p. 383 ff.; [Papassiopi-Passia 2012](#), p. 92 ff.; [Batiffol and Lagarde 1993](#), no. 358; [Bureau](#)

and Muir Watt 2017, no. 457; Mayer and Heuzé 2014, no. 211; Niboyet and de Geouffre de la Pradelle 2017, no. 386; Sonnenberger 2010, nos. 41, 44, and Spickhoff 1989, pp. 78, 79 ff., 83). Yet, is such a model transposable to Art. 146 para. 9 (2) regarding the review of the decision of the religious court, as it is advocated here (see, in particular, Deligianni-Dimitrakou 2008, p. 202 ff.; Kalampakou 2015, p. 347, and Pamboukis 2019, p. 1010)? Significantly, if one pauses to read Art. 146 para. 9 (2) to figure out what is being weighed up against human rights standards, it is realised that it is not about the operative part of the decision (the conclusion reached in the Mufti's syllogism); the text mentions '*the provisions applied*' in the decision (those put in the major of the Mufti's syllogism), which is Sharia family law in general. Therefore, the answer to the above question can only be negative.

The preference of an abstract over a concrete kind of review (which is moreover reflected in the review of Art. 93 para. 4 GC (see *supra* 4.1), dealing with the '*content of a statute*' and not its application; but see Kaidatzis 2014, p. 15) entails major practical consequences. The abstract review works in an absolute-axiomatic manner. Once it reveals human rights deficits in the '*provisions applied*' by the Mufti, the exequatur must be withheld outright. On the other hand, things would not be necessarily so if a concrete review were to take place instead. The concrete review is more nuanced, dealing as it does with the application of the provisions through the lens of particular circumstances. And since the constellation of facts changes from case to case, it is quite possible that the evaluation differs accordingly: an application of the provisions in one context may be offending the forum but, in another context, may be forum friendly. A main feature of the international public order is its '*elasticity*' (see Krispis 1979, pp. 371, 379 ff., and Papassiopi-Passia 2012, p. 92 ff.).

This observation will be fleshed out in the example of divorce.

4.6. The Example of Divorce

4.6.1. Unequal Distribution of the Power to Divorce between Husband and Wife

According to the divorce rules applied to the Muslim minority in Western Thrace, both husband and wife have the right to terminate a marriage. However, while a husband has a strong right against his wife, the talaq (see *infra* (i)), the wife has no reciprocal right against her husband (see *infra* (ii)); therefore, it is safe to say that the power to divorce is not evenly balanced between them. This, moreover, is not based on any objective and reasonable justification (see *infra* (iii)).

(i) A Strong Prerogative for the Husband: The Talaq

In its inception, talaq is an extra-judicial act of private will. In the past, this also used to be the practice followed in Western Thrace. A husband divorced his wife by declaring the talaq, and if the fact was disputed, it had to be evidenced in court through the admitted means of proof, most usually testimony (see ruling no. 34/1933 of the Preveza court, Themis 1934, pp. 695–96, as cited extensively in Papassiopi-Passia 1997, p. 254 ff. n. 257: in that case, the children of the deceased had successfully established against their mother that she had no entitlement on his estate, as their father had previously effected a talaq; hence, she was not his spouse at the moment of his death). However, under the pressure of the Greek administration, it soon became necessary that the private will be expressed before the Mufti (see Tsourkas 1981–1982, p. 594; Papassiopi-Passia 1997, p. 255, and Ktistakis 2006, p. 65). Moreover, it does not seem accurate that the Mufti merely registers the divorce, assuming a function '*which resembles to the one of a notary*' (but see Tsourkas 1981–1982, p. 594, and Papassiopi-Passia 1997, p. 255). Rather, the divorce is pronounced in a constitutive decision of the Mufti (see Kotzambasi 2003, p. 69, and Ktistakis 2006, p. 64 ff.). As a result, talaq, like all the other divorces granted by the religious court, to be discussed next, are anything but '*private divorces*' (see initially in this sense Jayme and Nordmeier 2008, p. 370, but also more recently in the opposite sense Jayme and Nordmeier 2018, p. 278, perceiving throughout instances of '*Privatscheidungen*').

Talaq is considered an absolute right of a husband that he is entitled to exercise at any moment at his discretion. Admittedly, an opinion (fetwa) of the Mufti of Komotini

dated from 10.05.2000 (cited in [Ktistakis 2006](#), p. 58) creates a different first impression, since it states that the talaq is available (only) ‘for various serious reasons’. Indeed, in the—few—decisions of the Mufti dealing with a talaq, the husband always alleges some reason. However, the Mufti never bothers to examine it (see [Ktistakis 2006](#), p. 64). This is because, in substance, the reason is irrelevant for the talaq (cf. [Papadopoulou 2010](#), p. 401). It could be argued that the abovementioned fetwa reflects the spirit of the law. The idea is that talaq should occur ‘under circumstances that truly preclude the continuation of the marriage’ or otherwise be discouraged, in compliance with the hadith depicting it as ‘the most abominable of permitted things’ (see [Tucker 2008](#), p. 112).

(ii) No Reciprocal Prerogative for the Wife

However, whatever the expectations are for a husband to show restraint in the exercise of his prerogative, it remains that the Sacred Muslim Law in Western Thrace fails to provide any reciprocal prerogative in favour of a wife. The following lines illustrate this:

- The Delegated Talaq (*Tafwid*)

In theory, the wife may also hold the right to talaq, if the latter has been delegated upon her by her husband (*tafwid*) (see [Tucker 2008](#), p. 91 ff.). Although such cases have not been reported in Western Thrace, the fetwa of the Mufti is unequivocal: the right to talaq belongs to the husband ‘unless it has also been given to the wife in the pre-marital contract’ (*nikah*) (see [Ktistakis 2006](#), p. 58). Of course, this does not set the parties on an equal footing, as long as the power to divorce of the wife is contingent upon the will of the husband, whereas, in contrast, the man is attributed the power of divorce ipso jure regardless of the will of the woman, even despite her strong disagreement.

- Divorce on Mutual Consent (*Khul*)

The same observation applies if one brings *khul* to the forefront. This is the most common form of divorce used by a wife. In *khul*, both herself and her husband request the Mufti to put an end to their marriage (see [Ktistakis 2006](#), p. 59 ff.), with the process being initiated either by herself or by her husband, making an offer for *khul* that requires the acceptance of the other (see [Tucker 2008](#), p. 99). At any rate, the wife is obviously unable to achieve the *khul* without the consent of the husband. Of course, the legal position of the husband within the said framework is structurally similar to that of the wife, in the sense that he is likewise subject to her possible veto, aimed at frustrating the *khul*. Yet, what is essential is that the husband may always shift to the path of talaq, which does not hinge on the consent of the wife. The differences then become prevalent as soon as *khul* is juxtaposed to talaq. Given that *khul* and talaq hardly compare in terms of margin of manoeuvre left to the wife and the husband, respectively (see [Fortier 2012](#), p. 160), the conclusion to be drawn is that ‘there is no precise parity for the wife’ ([Pearl and Menski 1998](#), p. 284).

In that connection, the compensation that the wife must pay to the husband for the *khul* constitutes an additional factor of inequality. As it is rightly noticed, the *khul* involves some sort of ‘ransom’ by which the wife buys herself out of the marriage ([Tsaoussi and Zervogianni 2008](#), pp. 216–17; [Papadopoulou 2010](#), p. 401; [Kotzambasi 2003](#), p. 69 speaks of a ‘right to self-purchase’). What exactly is wrong with that? The answer should not ignore that, in talaq, in reverse, it is the husband he who must pay to the wife her *mahr* (dower) as well as her *nefaqua* (maintenance). The relevant judgments of the Sharia courts in Western Thrace remind us that divorce comes at a price for both the woman (seeking a *khul*; see [Ktistakis 2006](#), p. 59 ff.) and the man (seeking a talaq; see [Ktistakis 2006](#), p. 57 ff., 65 ff.). Still, the truth is that the woman’s sacrifice is more onerous than the man’s, in a sense further specified below.

The basic remark is that, whereas the financial consideration for the husband is ordered alongside talaq, as a consequence thereof, it is not exactly so for the wife; namely, most of the concessions that the wife has to agree upon for the *khul* entail disposal of acquired rights performed in advance, as a *condition precedent* for the *khul*. This is most important, speaking of the power to divorce placed in each spouse’s hands. As for the husband, the

non-discharge of his debt engages his civil liability. As for the wife, the failure to do her part results in her remaining trapped into the marital status. Additionally, there are reasons to assume that she may not always afford the cost:

It is noticeable that, traditionally, women are homemakers financially dependent on men, who are the main breadwinners in the family; presumably, this applies with greater force to a typical family of the Muslim minority. Therefore, the grim prospects that women are facing post-divorce anyway—even by retaining their mahr and nafaqa—because they will probably remain unemployed due to a lack of vocational skills, a lack of experience, and age (see [Tsaoussi and Zervogianni 2008](#), p. 226 ff.), are further deteriorated when they also have to sustain the losses built into a khul divorce. That is why they may be discouraged from pursuing a khul divorce in the first place (cf. [Tsavousoglou 2015](#), p. 254).

A supplementary dimension of this vulnerability is the fact that—unlike with the financial consideration in talaq, which consists of roughly determined amounts of mahr and nafaqa—the concessions in khul are intended *to extract the consent of the husband*. By definition, there is no cap on this figure. Usually, it is enough for the wife to waive on her mahr and nafaqa (see [Ktistakis 2006](#), p. 60). However, in other cases, the wife may be under pressure to settle for extra monies (see [Tsavousoglou 2015](#), p. 254), or even for the custody of the children (see three relevant older khul judgments of the Mufti cited in [Ktistakis 2006](#), p. 61 n. 117; it should be noted that, after the civil courts stripped the Mufti of his jurisdiction to regulate custody in general (see *supra* 3), renunciations of custody cannot be validated by him either, although this does not preclude renunciations of custody from still happening informally (see [Tsavousoglou 2015](#), p. 254 n. 60)). Against this backdrop, ‘a recalcitrant husband’ has the possibility to ‘abuse his demands’ (see [Tsavousoglou 2015](#), p. 254) and undermine the feasibility of a khul for the wife.

- Divorce on Grounds (*Tafriq*)

Finally, no dramatic turn is observed with the remaining type of divorce option available (to both spouses): the divorce on grounds (*tafriq*). This divorce—in contradistinction to the aforementioned delegated talaq and khul—is not dependent on the consent of the husband. Moreover, the grounds on which it can be upheld appear quite extended. On that point, the religious bodies in Western Thrace do not follow the majority Hanafi position according to which tafriq should be restricted only to cases where the husband fails to meet his matrimonial duties without being at fault, notably because of his impotence, sterility, or mental illness. They rather accept the majority Maliki position according to which tafriq embraces also other serious reasons of marriage breakdown, such as the abandonment of the marital home, the entering into an extra-marital affair, the non-harmonious cohabitation, the lack of sexual intercourse, the conversion to Christianity, the bigamy of the husband, the non-payment of maintenance to the wife, or any act of violence committed against the wife (see [Ktistakis 2006](#), p. 61 ff., but see also [Tsavousoglou 2015](#), p. 255, who contends that the religious bodies in Western Thrace have systematically denied women the tafriq divorce, implicitly encouraging them instead to look for a khul divorce, which implies deprivation of their property rights). Yet, even under its liberal version, tafriq proves insufficient to create a level playing field with talaq, as long as the latter is unconditional, i.e., not premised on extra requirements besides the will of the husband.

(iii) No Objective and Reasonable Justification for the Inequality

Why does the ultimate power of divorce lie in the hands of the husband? The explanation offered by some Islamic jurists to the effect that the wife is ‘quicker to anger and less forbearing’ than the husband owing to her ‘natural disposition’ and might therefore leave the marriage at the first sign of trouble if she had been bestowed a parallel power (see the citations by [Tucker 2008](#), p. 112), cannot be deemed as an objective and reasonable justification. In fact, it only adds insult to injury. As a consequence, the major conclusion is that ‘divorce law is [. . .] highly gendered and clearly discriminatory’ ([Tucker 2008](#), p. 131).

4.6.2. Refusal of Exequatur Due to Gender Discrimination

From the above, it follows that a Mufti divorce is not eligible for an exequatur according to Art. 146 para. 9 of law 4964/2022, first and foremost because ‘the provisions applied’ for such a divorce are at odds with the principle of non-discrimination between men and women found in Art. 4 para. 2 GC. The same conclusion is drawn on the basis of Art. 14 ECHR in conjunction with Art. 8 ECHR or Art. 12 ECHR, on the assumption that the ECHR can be understood as conferring something like ‘a right to divorce’. The ECtHR has firmly dismissed this interpretation in the past (see *Johnston and Others v. Ireland*, Application no. 9697/82, 18 December 1986, paras. 53–54, 57), although in a position it took more recently, it did not exclude that, with the ECHR being ‘a living instrument’, it might need to reconsider the matter further down the line ‘in the light of present-day conditions’ (see *Babiarz v. Poland*, Application no. 1955/10, 10 January 2017, para. 49). If this proves to be the case, then it will become possible to counter the Mufti divorce also in terms of Art. 14 ECHR in conjunction with Art. 8 ECHR or Art. 12 ECHR and, besides, in terms of Art. 5 of Protocol no. 7 to the ECHR (ratified by Greece with law 1705/1987, Official Gazette A 89/12.06.1987). The evolutive approach does not leave the Protocol unaffected, but, on the contrary, opens the way for reading the precept of spousal equality in the enjoyment of the right to divorce into it as well (contra the Explanatory Report, para. 39).

This may be contrasted with the review normally required for a foreign act of repudiation to extend its legal effects in the forum. Here, it is suggested that the competent judge should disregard that the act was based on discriminatory law if he is convinced that the wife consented unequivocally and without compulsion to her repudiation or if it is the wife she who actually pursues recognition of her repudiation by initiating the relevant proceedings. The expression of her will either way is said to ‘purge the repudiation from its discriminatory character’ (Niboyet and de Geouffre de la Pradelle 2017, no 386 and n. 27) in a manner that it no longer injures the sense of justice in the forum. Moreover, the situation is comparable whenever the conditions for a divorce in the *lex fori* are anyway met.

Admittedly, the Greek courts have not followed the above *modus operandi* with consistency. Thus, in 1995, the Athens court of appeal ruled against the acceptance of a Sudanic talaq (see the decision no. 10719/1995, Nomos Database), while in 2017, the Thessaloniki court of first instance ruled against the acceptance of an Egyptian talaq (see the decision no. 19868/2017, Nomos Database, and, for a summary in English with comments, Anthimos 2018a, 2018b), although, in both instances, the recognition of the talaq had been requested by the (Greek) wives themselves. In response, it was held that ‘the recognition of a *res judicata* of such a content [. . .] causes a profound disturbance to the Greek legal order’, which ‘is not negated by the fact that the [appellant/applicant] desires the dissolution of [her] marriage [. . .]’. However, when the Thessaloniki court of first instance was called to revisit the same case under a different composition, it did not hesitate to change tack (see the decision no. 8458/2019, Nomos Database and, for a summary in English with comments, Anthimos 2019). It now ruled that it does not matter if talaq appears misaligned with the human rights framework on gender and spousal equality, since the crucial consideration lies rather in the positive attitude of the major stakeholder—the wife—towards talaq, bearing witness that her position is sufficiently protected. This was the very first time that the Islamic institution underwent a concrete review (also endorsed within the Greek doctrine: see Anthimos, *op. cit.*; Tsouka 2016, no. 67 n. 166, and already Papassiopi-Passia 2000, p. 1235).

Nevertheless, the above discussion unfolds on the side of the international public order and the interpretation thereof (cf. also Gössl 2016, p. 91 on this tension between a ‘rule-oriented’ and a ‘result-oriented’ perspective of the international public order in other European jurisdictions). It has no relevance for the review exercised on the Mufti decision of divorce in Western Thrace, according to Art. 146 para. 9 of law 4964/2022. To be sure, the submission of a family dispute to the Mufti is valid if the adversaries resort to him either with a common application or with separate applications (see *infra* 5). It may therefore be

assumed that the wife who applies in concert with her husband, in one way or the other, takes no issue with the Sharia law of divorce. Still, the lack of equality operating to her detriment within this system raises a bar to the exequatur.

4.6.3. Refusal of Exequatur and Affinity with Regulation Rome III

It is worth noting that the style of review adopted in Art. 146 para. 9 of law 4964/2022 is also the one preferred by the Council Regulation (EU) no. 1259/2010 of 20 December 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Regulation Rome III). Its Art. 10 reads:

‘Where the law applicable pursuant to Article 5 [choice of applicable law by the parties] or Article 8 [applicable law in the absence of a choice by the parties] does not grant one of the spouses equal access to divorce [. . .] on grounds of their sex, the law of the *forum* shall apply.’

It is debated whether the above provision requires an abstract or a concrete screening of the *lex causae* (see, indicatively, [Lein 2020](#), nos. 5, 24). The more convincing view is that the intended screening is abstract (see [Lein 2020](#), nos. 6, 25; [Möller 2014](#), pp. 469, 470; [Gössl 2017](#), p. 71 ff., and [Winkler von Mohrenfels n.d.](#), p. 7 ff.). This conclusion can be inferred from the wording of Art. 10; its history; and, quite characteristically, its correlation with Art. 12, where Regulation Rome III has placed a broad-spectrum reservation to fend off the *lex causae* ‘if [its] application is manifestly incompatible with the public policy of the forum’ (i.e., ‘in a given case’: see recital 25). Certainly, if the discrimination of the spouses ‘on grounds of their sex’ had to be dealt with on the basis of ‘public policy’ of Art. 12, then there would be no need for an additional Art. 10, doing nothing else than technically duplicating Art. 12 for a special purpose. Indeed, Art. 10 becomes meaningful only if it is seen as shifting the threshold of Art. 12 to capture a *lex causae* that is ‘gender-biased in general’. Hence, it is not tantamount to a ‘public policy’ clause, at least in the strict sense of the term—at most, one might speak of an ‘innovative public policy clause’ ([Möller 2014](#), p. 462), radically different from that of Art. 12. Such is also the understanding of the Advocate General in his Opinion in the Case C-372/16 *Soha Sahyouni v. Raya Mamisch*, although this concerned a ‘private’ divorce, not falling within the substantive scope of Regulation Rome III, as the Advocate General himself suggested (AG Saugmandsgaard Øe, Opinion, paras. 52 ff. (67)) and the CJEU eventually accepted in its judgment of 20 December 2017. However, he took care to clarify, ‘for the sake of completeness’, that Art. 10 exclusively addresses the abstract (theoretical) inequality, irrespective of any concrete (actual) inequality, between husband and wife regarding access to divorce in the *lex causae* (op. cit., paras. 70 ff. (89)).

As a consequence of the dismissal of religious law because of its discriminatory traits under Art. 10 of Regulation Rome III, the seised court will immediately implement the *lex fori*. At this point, the parallelism drawn with Art. 146 para. 9 of law 4964/2022 comes to an end. In Art. 146 para. 9 of law 4964/2022, the negative effect of the refusal of the exequatur by the court of first instance is all there is; no further positive effect occurs, namely the court of first instance will not substitute Sharia law with secular law in order to grant the divorce at the present stage of proceedings. Secular law may be put forward later on, provided that the parties are willing to pursue a divorce by capitalising on Arts. 1438 ff. of the Greek Civil Code.

4.7. Assessment

The present subsection proceeds to appraise the implications of the in abstracto approach to Sharia law by the civil court.

4.7.1. Abstract Review and Private Interests

A common objection to the principled rejection—in the name of ‘equality’—of the recognition of a *talaq* approved by the wife is that it practically leads to an ‘absurdity’; it ends up in forcing on her a marriage that she does not wish to maintain, until she finally

sorts out the situation with a new divorce granted according to the rules of the forum, which will imply ‘additional proceedings and costs [only] to attain the already achieved result’ (see thus Thessaloniki court of first instance, *op. cit.*). For these reasons, it is observed that, far from bringing any serious improvement, “the abstract ‘human rights approach’” rather ‘turn[s] itself against the person it intends to protect’ (Rohe 2016, p. 65).

On the face of it, the same applies whenever a Mufti divorce is refused the *exequatur*. Here, too, the wife does not obtain immediate satisfaction but needs to resume her efforts for a divorce before the competent civil judge (for an adversarial divorce, see Art. 1439 of the Greek Civil Code) or notary (for a consensual divorce, see Art. 1441 of the Greek Civil Code). However, one cannot ignore the fact that, within the minority context, the wife has a hold over which jurisdiction will handle her case. This makes a crucial difference. The wife will simply not try an option that she anticipates—with the advice of her legal counsel—to be unsuccessful. To avoid all the inconvenience, she will prefer the civil judge or the notary in the first place.

4.7.2. Abstract Review and Limits of Accommodation of the Sacred Muslim Law

It must be conceded that the abstract review of Mufti decisions serves a ‘supra-individual meaning’, which is regarded as more important than the desire of the particular litigants to obtain the *exequatur*. In substance, it might be read as a ‘political statement’ asserting key ‘values or morals’ of the legal community as a whole, towards an alien normative order informed by diametrically opposite ‘values or morals’ (cf. Gössl 2017, p. 73). What motivates it is an imperative of ‘cultural self-defense’ (cf. Rohe 2016, p. 65). Therefore, here is a point where the accommodation of Sharia family law reaches its limits. Of course, if the *exequatur* is steadily not forthcoming under strict and inflexible abstract review, then the accommodation scheme itself is dramatically reduced. In fact, we speak of the mere possibility offered to the parties to initially opt in for Sharia family law and thus to set the background for the final hearing scheduled to take place before the civil court; however, according to the verdict of the civil court, they will never avail of any religious regulation of their family relations. Curiously enough, the system pulls them into a vicious circle and allows them, at best, to experience a sham accommodation. The most reasonable response from their side is to decline this ‘opportunity’ (see also *supra* 4.7.1). Does an alternative to the resulting deadlock exist?

4.7.3. Abstract Review and Self-Reform of the Sacred Muslim Law

The above question is capable of an affirmative answer, on the condition that Islamic law in Western Thrace undertakes appropriate self-reform, such that it no longer defies the Constitution and the ECHR. This, it has to be stressed, does not forcibly imply its ‘assimilation’. Islamic law is not monolithic, and the idea is precisely that it may be available in a different version which is receptive to secular frames and discourses. The latter also forms part of its own history and tradition. The rules on divorce, again, seem well placed to exemplify the matter. Today, there are several Muslim countries worldwide who give the wife the right to a *khul* divorce not requiring the consent of the husband. Egypt was the first to introduce the new *khul* in its statutory law in 2000 (law 1/2000: see mainly Welchman 2007, p. 112 ff.). Unsurprisingly, law 1/2000 provoked a fierce controversy over its conformity with the Sharia, and it even became subject to relevant constitutional challenge shortly after its passage. Its opponents contended that no established school of thought accepted the new *khul*. The issue was resolved by the Supreme Constitutional Court of Egypt at the end of 2002, holding, on the contrary, that the new *khul* finds support in the sacred texts (see Tucker 2008, p. 129). More than three decades earlier, in 1967, the Supreme Court of Pakistan had come to the same conclusion in the leading case *Khurshid Bibi v. Muhammad Amin* (see Pearl and Menski 1998, p. 320 ff.). What is remarkable in these approaches is their direct appeal to the primary sources of the Sharia, i.e., the Quran and the Sunna, to bypass the readings of the classical jurists and to further develop Islamic law with an eye to gender equality (see Rehman 2007, p. 120 ff.). To be sure, the new *khul*, a unilateral

divorce under the control of the wife, counter-balances talaq, the unilateral divorce under the control of the husband, and it thereby manages to restore ‘equal access’ to divorce between spouses (see [Welchman 2007](#), pp. 109, 113, 131). The fact that the two mechanisms are not identical is of little significance; ‘equal access’ to divorce should be understood in terms of ‘equal circumstances’ under which the spouses are permitted to terminate the marriage (see [Möller 2014](#), pp. 465, 482, and [Gössl 2017](#), p. 74). As such, the path is open for the Muftis in Western Thrace too to liberalise their corpus juris through the practice of critical-independent reasoning (ijtihad: see [Tsitselikis 2012](#), p. 415, 400; [Kalampakou 2015](#), p. 341, and [Deligianni-Dimitrakou 2008](#), p. 168). If they remain irresponsive, they stand to lose their ability to provide legal services to the members of their community and see their jurisdiction wither away (on the function of this existential threat as the major driver for ‘transformative accommodation’, see more generally [Shachar 2001](#), p. 117 ff., and [Sezgin 2018](#), exploring the paradigms of Greece and Israel).

5. Review on the Issues Raised by Art. 12 Para. 2 and Para. 3b of Presidential Decree 52/2019

Art. 12 of presidential decree 52/2019 does not merely repeat the requirements of the exequatur that the analysis has so far tackled (see Art. 12 para. 3a (review of scope of jurisdiction) and Art. 12 para. 3c (review of compatibility with the Constitution and the ECHR)), but it develops this structure further on with the addition of two more items in the agenda of the review. Using a negative formulation, it states that the decision of the Mufti ‘shall not be declared enforceable’ by the court of first instance ‘if it has not been served to the parties’ (Art. 12 para. 2) and ‘if the provisions of law 4511/2018 (A’2) [and now of law 4964/2022] and of the present decree on the procedure of submission to the jurisdiction of the Mufti have not been observed’ (Art. 12 para. 3b).

To begin with the last point, ‘the procedure of submission to the jurisdiction of the Mufti’ refers to the application(s) that ‘both parties’ need to file before the Mufti for the resolution of a dispute ‘according to the holy Muslim law’ (see Art. 1 of law 4511/2018 adding a new para. 4a to Art. 5 of law 1920/1991 and now Art. 146 para. 10a of law 4964/2022). In presidential decree 52/2019, it is specified—inter alia—that there may be one common application or two separate applications (see Art. 7 and Art. 8 para. 4 (as interpreted in [Koumoutzis 2021](#), p. 175 ff.) on separate applications: when the application of one party precedes, a *lis pendens* will be established as soon as the application of the other party follows). In this context, the importance of the review of the civil court cannot be overestimated. If the Mufti makes a decision based on the consent of only one litigant, then the litigant on whom the regime of the religious minority is forced, is notably deprived of the choice to not exercise their rights to freedom of religion (see Art. 13 para. 1 GC; Art. 9 ECHR) and ‘self-identification as a member of a minority’ (see *Molla Sali v. Greece*, Application no. 20452/14, 19 December 2018, para. 157), meaning that the ‘negative aspect’ of their rights is breached (see overall [Koumoutzis 2021](#), p. 170). Moreover, arguably, a rather similar situation occurs in cases where a consent formally exists which, nevertheless, has been extracted under ‘duress’, coming perhaps from social pressure to accept the normative order of the community (see [Leigh 2019](#), pp. 25, 27). Such cases—of vitiated consent—are not covered by Art. 12 para. 3b of presidential decree 52/2019, as they are not envisaged by ‘the provisions’ mentioned therein (these, in fact, are ‘not observed’ on the condition of an absolute lack of consent). Therefore, they should be placed under the review of the civil court by way of analogy. In any event, it is clear that the review of the foundation of the Mufti jurisdiction is distinct from, and even has logical priority over, the review of the scope of the Mufti jurisdiction, which is why it had to be addressed in a free-standing rule.

On the other hand, it is difficult to understand the purpose behind Art. 12 para. 2 of presidential decree 52/2019, precluding the exequatur ‘if [the review shows that the decision of the Mufti] has not been served to the parties’. It is of note that the decision of the Mufti is served by anyone of the parties to the other (see Art. 10 para. 5 of presidential

decree 52/2019), which means that, in the scenario considered here, one of them will have resorted to the civil court for the *exequatur* without the other probably knowing about it. This might cause a problem, especially to an absent party who would like to bring up an issue of duress, as above, and thus has a legal interest in attending the civil trial to explain their personal circumstances. Yet, it is more than certain that the possibility for someone to find themselves in the said position is not contingent upon the question of whether they have or have ‘not been served’ with the decision of the Mufti; it is rather owed to the fact that they do not have to be notified with the introductory document of the civil trial that their opponent is willing to expedite. If that is how it is, the problem appears common for served and non-served litigants; hence, its treatment should be the same for all. In particular, the Greek Code of Civil Procedure provides that *they can be summoned to the hearing* (Art. 748 para. 3). The exception of the automatic rejection of the *exequatur* (*vis à vis* the non-served, contrary to the served, litigants) makes no sense; it is a disproportionate measure that the civil court ‘shall be bound not to apply’ (see Art. 93 para. 4 GC).

6. A Final Remark: No Review for Judicial Errors

The above sections took a thorough look into the framework arranged in law 4964/2022 and presidential decree 52/2019 for the judicial review of Mufti decisions. As the analysis now comes to a close, another emerging feature deserves to be emphasised. This is the neutrality of the regulation in place towards judicial errors. With a single exception, when it verifies the consent of the parties to the jurisdiction of the Mufti (see *supra* 5), the civil court is not intended to function as a court of appeal; namely, it does not pronounce itself on questions such as whether the Mufti implemented the substantive law and the procedural law correctly or assessed the evidence correctly (cf. [Tsourkas 1981–1982](#), p. 590, and [Ktistakis 2006](#), p. 118 and n. 327). Moreover, there is no court of appeal *within* the system of Islamic justice either. Interestingly, under law 2345/1920, Mufti decisions had to be submitted ‘for consideration’ before an Arch-Mufti and next—after they had been ‘considered’ by the latter—become ready for the *exequatur* (Art. 10 para. 2 (1, 2)). However, this remained only on paper, as the Arch-Mufti was never appointed and the relevant institution was also at some point formally abolished.

It would not be accurate to criticise the lack of a right to appeal as a ‘violation’ *per se* of the principle of efficient judicial protection (contra: [Papadopoulou 2010](#), p. 404). In general, it is accepted that neither the Constitution (Art. 20 para. 1) nor the ECHR (Art. 6 para. 1) go so far as to establish a positive obligation of the state to offer a right to appeal (see [Kerameus 1986](#), p. 452, and [Nikas 2016](#), § 2 no. 16 and § 108 nos. 4 ff.). This was recently confirmed in the ruling no. 1820/2020 of the Plenary Session of the Council of State (Nomos Database), dealing specifically with Mufti decisions (see para. 20). There is a caveat, though, with respect to a certain class of judicial errors that are grave enough to become relevant in terms of the Constitution and the ECHR. Attention is notably drawn to due process failures occurring, for example, because the Mufti treated the parties unequally, held a hearing for which they were not properly notified, thereby losing the opportunity to present their case, ignored their pleadings and evidence, or did not allow them to adduce evidence in the first place—all this contrary to presidential decree 52/2019. The problem with these anomalies is that, since they are not literally imputable to ‘the provisions [to be] applied’ by the Mufti, they tend to escape human rights review. Hence, a legal gap appears. What the civil court must do then is pay heed to them anyway and refuse the *exequatur* upon finding that they really had an impact on the final judgment (cf. [Tsitselikis 2001](#), p. 592).

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References

- Anthimos, Apostolos. 2018a. No Recognition of an Egyptian Talaq on Public Policy Grounds. Available online: <http://icl-in-greece.blogspot.com/2018/08/no-recognition-of-egyptian-talaq-on.html> (accessed on 5 May 2023).
- Anthimos, Apostolos. 2018b. Talaq v Greek Public Policy: Operation Successful, Patient Dead Available online: <https://conflictoflaws.net/2018/talaq-v-greek-public-policy-operation-successful-patient-dead/> (accessed on 5 May 2023).
- Anthimos, Apostolos. 2019. Talaq Reloaded: Repudiation Recognized If Application Filed by the Wife. Available online: <https://conflictoflaws.net/2019/talaq-reloaded-repudiation-recognized-if-application-filed-by-the-wife/> (accessed on 5 May 2023).
- Batiffol, Henri, and Paul Lagarde. 1993. *Traité de Droit International Privé*, 8th ed. Paris: Librairie générale de droit et de jurisprudence, vol. 1.
- Bureau, Dominique, and Horatia Muir Watt. 2017. *Droit International Privé*, 4th ed. Paris: Presses Universitaires de France, vol. 1.
- Chrysogonos, Kostas. 2001. *The Incorporation of the European Convention on Human Rights in the National Legal Order: The Greek Difficulties of Adaptation to the European Public Order of Human Rights*. Athens-Komotini: Ant. Sakkoulas. (In Greek)
- Deligianni-Dimitrakou, Christina. 2008. *Comparative Law and Legal Pluralism*. Athens-Thessaloniki: Sakkoulas. (In Greek)
- Dimitriou, Dimitrios. 2007. The Legal Consequences of Mufti Decisions (Types—Time of Occurrence). *Chronicles of Private Law* 8: 769–76. (In Greek).
- Fortier, Corinne. 2012. The Right to Divorce for Women (khul') in Islam: Comparative Practices in Mauritania and Egypt. In *Interpreting Divorce Laws in Islam*. Edited by Rubya Mehdi, Werner Menski and Jørgen S. Nielsen. Copenhagen: DJØF Publishing, pp. 155–75.
- Fragistas, Charalambos. 1963. Article 6 of the Introductory Law of the Civil Code. In *Interpretation of the Civil Code*. Athens, n.p. (In Greek)
- Gössl, Susanne Lilian. 2016. The Public Policy Exception in the European Civil Justice System. *The European Legal Forum* 4: 85–92.
- Gössl, Susanne Lilian. 2017. Open Issues in European International Family Law: *Sahyouni*, “Private Divorces” and Islamic Law under the Rome III Regulation. *The European Legal Forum* 3: 68–74.
- Hirschl, Ran, and Ayelet Shachar. 2014. The Constitutional Boundaries of Religious Accommodation. In *Constitutional Secularism in an Age of Religious Revival*. Edited by Susanna Mancini and Michel Rosenfeld. Oxford: Oxford University Press, pp. 175–91.
- Jayme, Erik, and Carl Friedrich Nordmeier. 2008. Griechische Muslime in Thrazien: Internationales Familien- und Erbrecht in europäischer Perspektive. *Seminare an der Demokrit-Universität von Thrazien in Komotini. Praxis des Internationalen Privat- und Verfahrensrechts* 28: 369–70.
- Jayme, Erik, and Carl Friedrich Nordmeier. 2018. Griechische Muslime in Thrazien: Rechtsspaltung und neues Wahlerfordernis im Familien- und Erbrecht. *Praxis des Internationalen Privat- und Verfahrensrechts* 38: 277–79.
- Kaidatzis, Akritas. 2014. Greece’s Third Way in Prof. Tushnet’s Distinction between Strong-Form and Weak-Form Judicial Review, and what we May Learn from it. *Jus Politicum* 13: 1–21.
- Kalampakou, Eleni. 2015. Equality versus Religious Pluralism: Religious Exemptions from Neutral, General Laws. Ph.D. thesis, Aristotle University of Thessaloniki, Thessaloniki, Greece. (In Greek).
- Kerameus, Konstantinos. 1986. *Civil Procedural Law: General Part*. Athens-Thessaloniki: Sakkoulas. (In Greek)
- Kotzambasi, Athina. 2003. The Field of Application of the Sacred Muslim Law in the Family Legal Relationships of the Greek Muslims. *Elliniki Dikaiosiini* 44: 57–72. (In Greek).
- Koumoutzis, Nikos. 2021. Consensual Accommodation of Sharia Law and Courts in Greece. *European Journal of Law Reform* 23: 167–84. [CrossRef]
- Koumpli, Vassiliki. 2022. Managing Religious Law in a Secular State: The Case of the Muslims of Western Thrace. In *Normativity and Diversity in Family Law: Lessons from Comparative Law*. Edited by Nadjma Yassari and Marie-Claire Foblets. Cham: Springer, pp. 327–49.
- Krispis, Elias. 1979. *Private International Law: General Part*. Athens-Komotini: Ant. Sakkoulas. (In Greek)
- Ktistakis, Yannis. 2006. *Sacred Law of Islam and Muslim Greek Citizens: Between Communitarianism and Liberalism*. Athens-Thessaloniki: Sakkoulas. (In Greek)
- Ktistakis, Yannis. 2020. The Stance of the Courts of First Instance of Thrace towards the Decisions of the Religious Courts of Thrace [2013 up to 2019]. Available online: https://www.constitutionalism.gr/wp-content/uploads/2020/06/2020.06_Ktistakis-ierodikeia.pdf (accessed on 5 May 2023). (In Greek).
- Leigh, Ian. 2019. Religious Adjudication and the European Convention on Human Rights. *Oxford Journal of Law and Religion* 8: 1–27. [CrossRef]
- Lein, Eva. 2020. Article 10 Rome III Regulation—Application of the Law of the Forum. In *Rome Regulations: Commentary*, 3rd ed. Edited by Gralf-Peter Calliess and Moritz Renner. Alphen aan den Rijn: Kluwer Law International, pp. 916–25.
- Mayer, Pierre, and Vincent Heuzé. 2014. *Droit International Privé*, 11th ed. Paris: Librairie générale de droit et de jurisprudence.
- Möller, Lena-Maria. 2014. No Fear of ṬalĀQ: A Reconsideration of Muslim Divorce Laws in Light of the Rome III Regulation. *Journal of Private International Law* 10: 461–87. [CrossRef]
- Niboyet, Marie-Laure, and Géraud de Geouffre de la Pradelle. 2017. *Droit International Privé*, 6th ed. Paris: Librairie générale de droit et de jurisprudence.
- Nikas, Nikolaos. 2016. *Manual of Civil Procedure*, 2nd ed. Athens-Thessaloniki: Sakkoulas. (In Greek)

- Pamboukis, Charalambos. 2019. La charia, le droit successoral et les droits fondamentaux. *Revue Critique de Droit International Privé*, 1002–11. Available online: <https://www.cairn.info/revue-critique-de-droit-international-privé-2019-4-page-1002.htm> (accessed on 5 May 2023). [CrossRef]
- Pantelidou, Kalliroi. 2013. The Applicable Law to Greek Muslims. Family and Succession Law (On the Occasion of Thrace Court of Appeal no. 489/2011 and Xanthi Court of First Instance no. 102/2012). *Efarmoges Astikou Dikaïou* 4: 290–301. (In Greek).
- Papadopoulou, Lina. 2010. Trapped in History: Greek Muslim Women under the Sacred Islamic Law. *Annuaire International des Droits de l'Homme* 5: 397–418.
- Papassiopi-Passia, Zoé. 1997. *The Applicable Law on Divorce in the Greek and International Conflicts of Laws*. Athens-Thessaloniki: Sakkoulas. (In Greek)
- Papassiopi-Passia, Zoé. 2000. The Applicable Law on Divorce and the “Ordre Public” Reservation in Greek Conflict of Laws. *Louisiana Law Review* 60: 1227–39.
- Papassiopi-Passia, Zoé. 2001. Reflections on the Scope of Implementation of the Interpersonal Law in Greece and the Jurisdictional Competence of the Mufti. *Koinodikion* 7: 391–412, (In Greek with a Summary in English).
- Papassiopi-Passia, Zoé. 2012. *Private International Law*, 5th ed. Edited by Anastasia Grammatikaki-Alexiou, Zoi Papassiopi-Passia and Evangelos Vassilakakis. Athens-Thessaloniki: Sakkoulas, pp. 41–53, 87–102. (In Greek)
- Pearl, David, and Werner Menski. 1998. *Muslim Family Law*, 3rd ed. London: Sweet & Maxwell.
- Rehman, Javaid. 2007. The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq. *International Journal of Law, Policy and the Family* 21: 108–27. [CrossRef]
- Rohe, Mathias. 2016. Family and the Law in Europe: Bringing Together Secular Legal Orders and Religious Norms and Needs. In *Family, Religion and Law: Cultural Encounters in Europe*. Edited by Prakash Shah, Marie-Claire Foblets and Mathias Rohe. London and New York: Routledge, pp. 49–78.
- Sakaloglou, Georgia. 2015. Jurisdiction of the Mufti in Family, Personal and Inheritance Cases among the Greek Muslim Citizens in the District of the Thrace Court of Appeal. *Nomiko Vima* 63: 1366–86. (In Greek).
- Sezgin, Yüksel. 2018. Muslim Family Laws in Israel and Greece: Can Non-Muslim Courts Bring about Legal Change in Shari’a? *Islamic Law and Society* 25: 235–73. [CrossRef]
- Shachar, Ayelet. 2001. *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*. Cambridge: Cambridge University Press.
- Shachar, Ayelet. 2008. Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law. *Theoretical Inquiries in Law* 9: 573–607. [CrossRef]
- Skouris, Vassilios, and Evangelos Venizelos. 1985. *Judicial Review of the Constitutionality of Laws*. Athens-Komotini: Ant. Sakkoulas. (In Greek)
- Sonnenberger, Hans Jürgen. 2010. Art. 6 EGBGB. In *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 5th ed. Edited by Hans Jürgen Sonnenberger. Munich: Beck, vol. 10.
- Spickhoff, Andreas. 1989. *Der ordre public im internationalen Privatrecht: Entwicklung-Struktur-Konkretisierung*. Neuwied and Frankfurt: Alfred Metzner.
- Tsaoussi, Aspasia, and Eleni Zervogianni. 2008. Multiculturalism and Family Law: The Case of Greek Muslims. In *European Challenges in Contemporary Family Law*. Edited by Katharina Boele-Woelki and Tone Sverdrup. Antwerp, Oxford and Portland: Intersentia, pp. 209–39.
- Tsavouoglou, Ilker. 2015. The Legal Treatment of Muslim Minority Women under the Rule of Islamic Law in Greek Thrace. *Oslo Law Review* 2: 241–62. [CrossRef]
- Tsitselikis, Konstantinos. 2001. The Jurisdiction of the Mufti as a Religious Judge. On the Occasion of the Judgment no. 405/2000 of the First Instance Court of Thiva. *Nomiko Vima* 49: 583–93. (In Greek).
- Tsitselikis, Konstantinos. 2012. *Old and New Islam in Greece: From Historical Minorities to Immigrant Newcomers*. Leiden: Martinus Nijhoff.
- Tsouka, Chrysafo. 2016. Article 33. In *Civil Code: General Principles*, 2nd ed. Edited by Apostolos Geordiades and Michael Stathopoulos. Athens: P.N. Sakkoulas, vol. IA. (In Greek)
- Tsoukalas, Efstathios. 1988. The Jurisdiction of the Muftis. *Elliniki Dikaïosini* 29: 1655. (In Greek).
- Tsourkas, Dimos. 1981–1982. Les juridictions musulmanes en Grèce. *Hellenic Review of International Relations* 2: 581–98.
- Tucker, Judith E. 2008. *Women, Family, and Gender in Islamic Law*. Cambridge: Cambridge University Press.
- Welchman, Lynn. 2007. *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*. Amsterdam: Amsterdam University Press.
- Winkler von Mohrenfels, Peter. n.d. Das neue internationalen Scheidungsrecht (Rom III-VO). Available online: <https://docplayer.org/5958289-Das-neue-internationalen-scheidungsrecht-rom-iii-vo.html> (accessed on 5 May 2023).

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