

# Divorcing family law from the nation

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## Abstract

*This paper examines the contribution of law and legal narrative in the generation of national identities, using modern Greece as a case study. It explores how claims of family law continuity and unity in nineteenth century Greece became the main mode of arguing for the existence of a Greek people, culturally distinct from their Ottoman oppressors. I argue that far from embodying any truth about Greek family law, these legal historical narratives constituted a reconceptualization of social relations on the national basis giving content to the relatively new concept of the “Greek people”. These narratives also made possible and reflected the complex institutional compromises struck with the Orthodox Church after the creation of the Greek state in 1830. Using the case of a broken engagement between two heroes of the revolution, the paper illustrates the multiple alternatives that existed at the time for the regulation of marital affairs, the clashes that ensued over the jurisdictional questions and the paths not taken. Finally, the paper employs the insights of this historical analysis to question the unity and coherence of national character claims in contemporary European family law debates*

## Introduction

Family law is often said to have an exceptionally close relationship with a nation’s character. This alleged closeness of national character to family law keeps producing ideologically charged debates whenever the question of legal reform presents itself. The discussions over the potential harmonization of European family law offer one such example. A striking characteristic of these debates is that ‘national character’ or ‘national culture’ emerges almost as a solid entity, fixed in time and space. The active

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role that states have historically played in the generation of the idea of a ‘national character’ through legal regulation remains in the background, because of the underlying assumption that in the domain of family law, legal rules reflect rather than actively create national character.<sup>1</sup>

This mode of discussing the family and its legal regulation tends to overlook the dynamic interaction between legal and social norms, and overestimate the unitary character of norms and practices related to the family at the national level. Finally, the ‘national’ mode of discussing the family also underplays the political character of the regulation of the family, and the role of the state itself as a major institutional actor in the definition and imagining of communities in the national style.<sup>2</sup> This paper is a case study in the shaping of a ‘national’ body of law, allegedly uniform and closely connected to the character of its people. It offers a genealogy of modern Greek family law, analyzing the different actors and projects that clashed over its shaping and the piecemeal fashion in which a body of law assumed to be coherent and continuous was fashioned over two centuries. Prominent among these actors were western educated jurists who struggled to define national character through the construction of a legal framework for the new state. They dealt and finally compromised with the competing claims put forward by priests of the Orthodox Church who sought to reinforce their position as privileged adjudicators in marital cases.

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<sup>1</sup> See e.g. K. Boele-Woelki, *The Road Towards A European Family Law*, 1 *EUROPEAN JOURNAL OF COMPARATIVE LAW* 1 (1997)

<sup>2</sup> I am using Benedict Anderson’s conceptualization of the nation as a mode of imagining the limits and character of one’s community, which became possible with the invention of what Anderson calls “print-capitalism” and is a relatively modern phenomenon. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983).

In the first part of this paper, I go back to the nineteenth century during the initial period of the creation of the Greek state and revisit the politically charged struggle over the future of the newly created entity. Europe at that moment was firmly imagining itself as the home to all civilization, while emerging nation-states in the post-empire context were struggling to define themselves and their relationship to the emergence of the west. I describe how in that context family law became a major site of political contestation, one uniquely apt to prove or disprove claims of cultural continuity with the west, which were so vitally important for the political legitimacy of the war.<sup>3</sup> Family law also became the par excellence domain of struggle between the church and the state. The compromises of this struggle leave their traces in the way family law norms evolved over the last two centuries, but also in the legal historical narrative that lawyers and jurists constructed during the nineteenth century about the law of the Greeks during the Ottoman years.

This narrative, which I call *nomopoetic*, reorganized history on the basis of the national principle at a moment in time when the nation was only emerging. It encompassed elements of complex institutional compromises struck between the westward looking Greeks and the clergy. The clergy, previously in charge of adjudicating cases of marriage, divorce, dowry, and inheritance between Orthodox Christians, lost its

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<sup>3</sup> Greek revolutionaries used the argument of cultural continuity with ancient Greeks as a bargaining chip in the negotiation for support with European countries. The cultural continuity claim reinforced the contention that the Greek revolution was about the struggle of civilization to survive barbarism. Both arguments resonated in the imaginations of Europeans, especially European liberals, and even North Americans. For an account of the European response to the Greek revolution see WILLIAM ST. CLAIR, *THAT GREECE MIGHT STILL BE FREE, THE PHILHELLENES IN THE WAR OF INDEPENDENCE* (1974). For an account of the uses of the cultural continuity claim even after the creation of the Greek state see MICHAEL HERZFELD, *OURS ONCE MORE: FOLKLORE, IDEOLOGY AND THE MAKING OF MODERN GREECE* (1983). For a characteristic example of the perceived ideological importance of the Greek revolution in the United States see JOHN S. MEEHAN (ed.), *MR. WEBSTER'S SPEECH ON THE GREEK REVOLUTION* (1824), also available at <http://digital.library.umsystem.edu/cgi/t/text/text-idx?sid=2d820fc7b0abb6d664f4b26b9961a27d;g=c=webster;idno=web000005>

jurisdiction to the newly created courts. However, the idea that the Greek people had survived thanks to the Orthodox Church during the Ottoman years, gave the rules that the church had been trying to apply heightened legitimacy. This resulted in their adoption by the Greek state as the normative framework appropriate for the regulation of the family law of the Greek people, despite the more westernizing goals of some of the ideological proponents of the revolution. The adoption of the normative framework of the Orthodox Church by the Greek state along with the disappearance of the Ottoman authorities, the weakening of local secular leaders through processes of administrative centralization, and the establishment of an obligatory religious mediation process before divorce, resulted in an actual strengthening of the role of the Orthodox Church in the life of Greeks, which had previously been impossible to achieve-even though the church had tried hard. Thus, paradoxically, the stripping from the clergy of the power to adjudicate cases as they had before, resulted in a stronger position of the Orthodox Church in the newly established state in matters matrimonial.

In the second part of the paper, I use the case of a famously broken engagement and a dramatically unsuccessful attempt at legal action during the Greek revolution of 1821 to illustrate my claims about the centrality of family law as a site of cultural and political contestation by various participants in the revolution. Furthermore, the interpretation of this same case by two important twentieth-century legal historians helps illustrate the success of the project of using law to ‘nationalize’ Greeks and the potency of the nomopoetic narrative in hiding the underlying political struggles and stakes. Despite the many alternatives for the legal resolution of the case, both historians dealt with it as if they were looking at a clear-cut case of legally right or wrong under a well-

defined, western-looking legal framework. I argue that their interpretation is itself the product of the compromises that were struck during the nineteenth century for the creation of a national legal system to become possible. Despite the intense fragmentation in legal norms at the moment of the revolution, both twentieth-century legal historians approached the story through the interpretive lens of the theoretically western character of family law.

In the third part of the paper, I offer a preliminary articulation of the perspectives that revisiting the ‘national’ assumption and analyzing law under the nomopoetic lens allows me to take on contemporary family law debates, in Greece and Europe. Like the nomopoetic narratives of the nineteenth century, debates about legal reform in family law are ridden with claims about identity, that very often obscure the political stakes involved, and underestimate the central role that a state with the power to monopolize adjudication played in shaping this ‘national’ law and therefore ‘national identity’.

## **I. Theoretical and historical background**

In this section I start by exploring some of the literature on nations and nationalism that informs my own historical understanding and then explain the terms *ethnopoiesis* and *nomopoiesis* that I use to draw attention to the contribution of the legal field in the reconceptualization and reorganization of social relations on the basis of the national principle.

## A. Theoretical Background

### 1. Law and nationalism revisited

Modern historiography has challenged the idea of the nation as an ancient pre-eternal entity, hibernating and awaking to its political maturity. Authors like Benedict Anderson have aptly demonstrated the modernity of the concept of nationhood and the historical circumstances under which nation-states became imaginable and politically feasible.<sup>4</sup> Historians like Eric Hobsbawm have further demonstrated the novelty of traditions understood as ancient or unchanging, especially in the context of national histories.<sup>5</sup>

The legal field, however, occupies a somewhat marginal place in this literature, despite the centrality of law in the construction of modern national identities. The literature on the emergence of the nation as a new form of “imagined community”<sup>6</sup> often focuses on the more directly disciplinary aspects of law, drawing attention to the openly violent hand of the law in squashing alternative forms of community, through the use, for example, of criminal law.<sup>7</sup> Legal narrative as a narrative of ‘imagining community’, and more specifically, legal history as a mode of ‘inventing traditions’ often remains in the background. This is an important gap since the legal field has historically been intimately connected with the phenomenon of the emergence, consolidation, and legitimation of new forms of political power. To begin with, lawyers and jurists were among the most active participants in the shift towards the culture of what Anderson terms “print-

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<sup>4</sup> See ANDERSON, *supra* note 2

<sup>5</sup> Eric Hobsbawm, Introduction: Inventing Traditions, in ERIC HOBSBAWM AND TERENCE RANGER, *THE INVENTION OF TRADITION*, 13 (1992)

<sup>6</sup> Benedict Anderson, *Imagined Communities*, Verso, London-New York, Revised edition 1991, p.6-7

<sup>7</sup> Hobsbawm “Social Bandits; Xavier Rousseau, Rebels or Bandits?” in *Crime and Culture*,

capitalism”<sup>8</sup> that made the emergence of the national imaginary possible. But even further back in time, starting from the so called “re-discovery” of Justinian law in twelfth century Bologna, jurists participated in and struggled for a shift towards a culture of written law as opposed to customary, unwritten law, especially in the fifteenth and sixteenth centuries.<sup>9</sup> This movement was in turn used by the emerging princely states in the consolidation of their political power.<sup>10</sup> The production of juristic knowledge was deeply implicated in the emergence of the modern state, even before the form of the nation-state became current.<sup>11</sup>

Second, and more importantly for my purposes here lawyers and jurists were crucial actors in the generation of the types of narratives of “memory and forgetting”<sup>12</sup> that became necessary for producing a sense of national selfhood. Again long before the form of the nation-state became current jurists participated in a shift from divine legitimation of law to princely authority legitimation, which was boosted by the implicit claims of continuity with the princely authority of the venerable Roman emperors.<sup>13</sup> Law in this process was not only or mainly used as a tool of overt ‘twisting of arms’ but also as a mechanism for the generation of narratives of continuity that produce a sense of

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<sup>8</sup> Benedict Anderson, *Imagined Communities*, p. 18

<sup>9</sup> M.P. Gilmore, *Argument from Roman Law in Political Thought, 1200-1600*, Harvard University Press, Cambridge, MA, 1941

<sup>10</sup> For the use of Roman public law in consolidating princely authority from the early days of the ‘rediscovery’ of Roman law in Bologna see Franz Wieacker, *A History of Private Law in Europe*, with particular reference to Germany, translated by Tony Weir, Clarendon Press, Oxford, 1995, p. 99

<sup>11</sup> Franz Wieacker, *A History of Private Law in Europe*, pp. 65-67

<sup>12</sup> Benedict Anderson, *Imagined Communities*, p. 187

<sup>13</sup> For the influence of the idea of *translatio imperii* from the Romans which justified the exercise of political power see Franz Wieacker, *A History of Private Law in Europe*, p. 31; also Joseph P. Canning, *Ideas of the state in Thirteenth and Fourteenth-Century Commentators on the Roman Law*, *Transactions of the Royal Historical Society, Fifth Series*, Vol. 33, (1983), pp. 1-27, at 19. For a less cynical view on medieval lawyers see James Q. Whitman, *The Lawyers Discover the Fall of Rome*, *Law and History Review*, Vol. 9, No. 2 (Autumn, 1991), pp. 191-220, at 193; the author sees lawyers not as power legitimizers but as good faith believers in the ideal of Rome struggling initially without success to impose a pure version of Roman law against competing bodies, like customary law coming from the Lombards.

collective identity. Thus, law was a crucial piece of the “technologies of self”<sup>14</sup> that made coordination between large numbers of previously uncoordinated masses possible, first under the princely states and eventually under the nation-states.<sup>15</sup> Finally, narratives of collective selfhood within the legal domain are particularly interesting because, they often encompass elements of complex institutional compromises struck in the process of the historical emergence of these forms.<sup>16</sup>

## **2. Ethnopoiesis and nomopoiesis**

Following Anderson, I take the nation to be a mode of imagining the political community that is relatively new, rather than ancient or pre-eternal. Furthermore, I also understand the national mode of imagining the political community as having become possible through the rise of what Anderson calls print-capitalism and the work of a newly emergent literate bourgeoisie which constructed narratives of pre-eternal continuity. This was certainly true in the case of Greece, where a whole generation of Greek students educated in the west invested considerable energy in the project of describing the ‘awakening’ of the nation dormant under the Ottomans, providing ideological fuel for the insurrections that later broke out.<sup>17</sup> However, articulations of this mode of consciousness at least in the early nineteenth century seem to have been polemical rather than

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<sup>14</sup> Martin, Gutman, Hutton, *Technologies of the Self*, A Seminar with Michel Foucault, The University of Massachusetts Press, Amherst, at 16

<sup>15</sup> See i.e. Alexis Politis, *From Christian Roman emperors to the glorious Greek ancestors*, in David Ricks and Paul Magdalino, *Byzantium and the Modern Greek Identity*, Publications for the Centre for Hellenic Studies, King’s College London, vol. 4, 1998, pp. 1-14

<sup>16</sup> On the work of lawyers in deconstructing the structures of feudalism in Germany through the use of Roman law for instance, see Law and Politics: The New state in Gerald Strauss, *Law, Resistance, and the state, The Opposition to Roman Law in Reformation Germany*, Princeton University Press, Princeton New Jersey, 1986, pp. 136-164

<sup>17</sup> The authors of these eighteenth and nineteenth century texts are now considered part of the movement that became known as Neohellenic Enlightenment. See e.g. DIMARAS, *NEOHELLENIC ENLIGHTENMENT* (1993) [in Greek]



representative in nature. The extent to which the national mode of consciousness had taken root, even at the time of the so called European “national” revolutions should be open to question rather than taken as a given.

Again in the example of Greece, the ‘national’ character of the insurrections that within a year became known to the outside world as the Greek Revolution was more of a desired goal on the part of its ideological proponents than a description of the consciousness of its participants. The peasantry which took up arms in the insurrections was characterized by a mostly local and religious consciousness, while the local secular and military leaders had their own distinct emancipation projects that often involved little other than a replacement of existing power structures with their own local rule.<sup>18</sup> The ethnolinguistic nationalism that Anderson refers to took a long time to take root and specific shape, long after the revolution that gave birth to the Greek state had died out and only after the state established itself as the central mechanism for sociocultural inculcation, which included the privilege of writing the history of the Greek nation and of its revolution.

This is precisely why the construction of a Greek legal system within the context of state building became a central element not only of the construction of a state entity, but of the production and inculcation of a new type of consciousness in the national mode. Legal history served as the narrative of the national self through the lens of law that helped consolidate the very concept of the Greek people itself, helping this Greek

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<sup>18</sup> DAVID RICKS and PAUL MAGDALINO (eds.), *BYZANTIUM AND THE MODERN GREEK IDENTITY* (1998)

people emerge intact through four hundred years of ‘foreign’ rule, complete with an “invented” legal tradition.<sup>19</sup>

In order to capture both the historical centrality of the Greek state in the process of imagining the Greek nation, as well as the crucial role that law was called upon to play in this process, I use the terms *ethnopoiesis* and *nomopoiesis* respectively. Both terms include the root *poiesis*, in order to draw attention to the creative nature entailed in describing and analyzing the legal past of various Greek communities in national terms. Despite widespread popular participation in the insurrections that consolidated into what came to be known as the Greek revolution of 1821, nationhood and national consciousness remained elite projects; and even within the elites, its contents did not consolidate until the second half of the nineteenth century. Nationhood also remained a project dramatically incomplete until the consolidation of power by the state with the means to influence the consciousnesses of the masses in the national direction. Even describing “the Greek revolution” in national terms then entails in it the kinds of memory and forgetting invariably found in narratives of national selfhood. It also entails the effacement of the intense political struggles that took place before the project of the Greek nation-state could take root, as against other locally based projects of liberation from the Ottomans. It took the process of *ethnopoiesis*, of narrating the imagined community of the nation, in order for the “Greek revolution” to be produced and it now takes a description of the elements of *ethnopoiesis* in order to draw attention to the underlying struggles and political stakes of the process of creating a state on the basis of the national principle.

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<sup>19</sup> HOBSBAWM, *supra* note 5

The processes of imagining the Greek nation, building the Greek state and creating a legal system involved the intervention of a multiplicity of actors, who, in pursuing their own projects, contributed to the creation of a new political community in the national mode. “Poesis” in both terms is therefore meant to stress the human actions that purposefully or inadvertently contributed to the solidification of both a narrative of Greek nationhood and the set of sociolegal institutions that came to be identified with it.

Constructing a parallel with the term *ethnopoiesis*, I use the term *nomopoiesis* to describe the participation of lawyers and jurists in the broader process of *ethnopoiesis*. *Nomopoiesis* was the process of reconceptualizing and then reorganizing a host of different social relations previously understood and regulated mostly at the local level, by constructing a domain understood to be legal and therefore pertaining to the exclusive authority of the state. Despite intense local fragmentation in social practices, lawyers, legal scholars and major state actors, started imagining and articulating law and the legal in national terms, thus reorganizing the conceptual basis of a host of different social practices and relations. Investigating the law of the Greek people, the *par excellence* mission of the discipline of legal history, implicitly carried with it the naturalization of the concept of the Greek people themselves, along with the idea of the regulation of their relations on the national basis by the state. To repeat the famous “mutual constitution” formulation, the legal domain constructed and was constructed by a new style of imagining and organizing social relations, the national, which in turn contributed to the emergence of a new group, whose production of a knowledge narrative was at the basis of its social power. Finally, the term ‘*nomos*’ in *nomopoiesis* is meant to signify not merely the process of creating a legal system, meaning the accumulation of procedural

and substantive rules and standards, but rather the generation of a sense of a “normative world” in which, to use Robert Cover’s words “law and narrative are inseparably related”.<sup>20</sup> Their link is more precisely located in the generation of a sense of a world to inhabit,<sup>21</sup> of a background understanding that produces a sense of normative order.

Nomopoesis therefore contains two distinct elements, one of imagining the nation through law, and the second of actually trying to reorganize a host of different legal relations on the basis of the national. The efforts of the emerging Greek state to quench armed resistance by bands of “brigands”- by either jailing them or enlisting them in the Greek army-<sup>22</sup> and establish itself as the last degree of imperative coordination<sup>23</sup> belongs in this category. This aspect of the contribution of the legal domain to ethnopoesis has been adequately understood and described. The aspect of nomopoesis that I will be concerned with here is related to what today would go under Greek private law and especially rules that today would go under family law broadly understood.

<sup>20</sup> Robert Cover, *Nomos and Narrative*

<sup>21</sup> Robert Cover, 6

<sup>22</sup> John Koliopoulos, *Brigands with a cause; The state’s efforts to quench brigandage were only partially successful and the social practice itself continued well into the second half of the nineteenth century, winning the Greek government endless embarrassment for not being able to curtail the barbaric practice. In 1870 the murder of two English officers by Greek brigands caused and international outcry and endless discussions about Greece’s capacities as an organized state. The brigands were finally captured and decapitated but the damage to Greece’s reputation was profound. The Greek state initially tried to pin the murders on ‘foreigners’. See Romilly Jenkins, *The Dilessi Murders*, 1998. The New York Times noted on the occasion that “independence, British protection from external foes, and constitutional government, appear alike ineffectual to put a stop to the habits of robbery that have become the chronic scourge of the soil which bore LYCURGUS and MILTIADES”. See *The Greek Brigands*, The New York Times, December 25, 1870. It is important to note that the brigands who became the targets of the Greek state were the same groups of men who had taken up arms against the Ottomans, many of whom refused to enlist in the regular Greek army. The way that the Greek state managed this issue ideologically was through a distinction between the ‘klephts’/brigands who had participated in the Greek revolution as representatives of the true Hellenic spirit and the ones who were still operative, who were rationalized either as foreigners (Albanians, Koutsovlachs) or as the remaining effects of longstanding Turkish barbarism. See Michael Herzfeld, *Ours Once More, Folklore, Ideology, and the Making of Modern Greece*, New York, Pella Publishing Company, 1986, pp. 66-74*

<sup>23</sup> Max Weber, *The Theory of Social and Economic Organization*, 152

This is the trickiest part of the nomopoetic process because the effects of imagining the nation through the legal field have been most successfully naturalized simply as the legal history of the Greek people in these domains. The reason why this has been so is closely connected on the one hand, to the narration of the Greek nation through its supposedly distinct legal history within the Ottoman empire, and on the other hand, to the institutional struggles for jurisdictional control that ensued after the revolution broke out between western educated Greeks, priests and secular or military local leaders. The stabilization of the institutional compromises struck between state actors, the church and local secular authorities, at the same time stabilized the contents of the legal historical narrative of Greek continuity in which both church and state law had important roles to play. The narrative that entailed elements of this compromise became quite simply the legal history of the Greek people under the Ottomans, so that a specific politics was fashioned on the ‘fictions’ of history, and a specific history was fictioned on the basis of contemporary politics.<sup>24</sup>

### **3. Revisiting the Greek revolution**

According to the mainstream, nationalist account of the Greek Revolution, the Greeks comprised a cohesive cultural entity, tracing their roots through the Byzantine and Roman Empires all the way back to classical Greece.<sup>25</sup> They endured approximately four hundred years of barbaric oppression by the Ottomans (1453-1821), until they rose in revolt in 1821, demanding and eventually getting a state of their own in 1830. Even though Greeks very much desired a republic the foreign allied powers, which had made

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<sup>24</sup> Foucault, *Power/Knowledge*, 193

<sup>25</sup> For a concise account of the national continuity idea see APOSTOLOS E. VAKALOPOULOS, *ORIGINS OF THE GREEK NATION: THE BYZANTINE PERIOD, 1204-1461* (1970)

the creation of the Greek state possible, imposed a Bavarian king who proceeded to lay the foundations of the Greek state.<sup>26</sup>

This description of “the Greek revolution” in national terms entails in it the kinds of “memory and forgetting” invariably found in narratives of national selfhood.<sup>27</sup> It also entails the effacement of the intense political struggles that took place before the project of the Greek nation-state could take root, as against other locally based projects of liberation from the Ottomans. Without the ethnopoetic narratives that the nationalist historians of the nineteenth and twentieth centuries propagated, the Greek Revolution loses its capital r and starts looking like a Noah’s arc with no Noah aboard, packed with animals that will inevitably, sooner or later kill each other out, for lack of appropriate caging. The Noahs of the Greek revolution came aboard later on, with the creation and consolidation of the Greek state, and quite purposefully arranged for the appropriate caging of actors and actions, lest they all kill each other out. They produced narratives through which the animals of the Greek revolution were caged, precisely by being cast under the unifying light of “The Greek Revolution”, “the first Civil Wars”, “the persistence of localism”, “the historical continuity of the Greek Nation” and so on and so forth. Through these narratives, brigands turned into national heroes, struggles against the national project turned into Anderson’s “reassuringly fratricidal wars”, the lifestyle of pillaging and piracy were domesticated and nationalized through criminalization, law

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<sup>26</sup> JOHN A. PETROPOULOS, *POLITICS AND STATECRAFT IN THE KINGDOM OF GREECE*; PRINCETON UNIVERSITY PRESS (1968)

<sup>27</sup> ANDERSON, *supra* note 2 at 11

without a state turned into folklore and all this ‘naturally’ died away as the nation marched toward its destiny: the West.<sup>28</sup>

In reality, the Greek revolution resulted from the precarious alignment of a variety of different actors, some of whom remained important political forces even after the creation of the Greek state.<sup>29</sup> I will briefly outline the main actors in the insurrections that led to what is now known as the Greek Revolution, to provide the necessary background for understanding the institutional struggles that ensued.

One of the most important categories of actors in the Greek revolution was the so-called Phanariots.<sup>30</sup> The Phanariots were Greek speaking administrative elites of the Ottoman administration, who had started out as translators for the High Porte and had managed to acquire high administrative positions, as Princes in the Eastern European or Balkan regions of the Empire. Some of their progeny had been educated in the west and were dreaming of a western type state, while others were merely looking to replace the

<sup>28</sup> The par excellence Noah of the Greek revolution is Konstantinos Paparregopoulos, who is considered by historians and literary critics as having constructed the most coherent version of Greek history. See DEMOSTHENES KONTOS, KONSTANTINOS PAPARRIGOPOULOS AND THE EMERGENCE OF THE IDEA OF A GREEK NATION, PhD thesis, University of Cincinnati, 1986

<sup>29</sup> On the precariousness of loyalty among the ‘military arm’ of the nation, that is the captains, see Kostas Papagiorgēs, *Ta Kapakia* (Athens: Kastaniotēs, 2003) [in Greek, The ‘Kapak’ Agreements, the word comes from Turkish and it means reconciliation]. Papagiorgēs describes the multiple shifts in loyalty on the part of the ‘military captains’ who would shift allegiance often more than once, contracting a *kapak* agreement with the Ottoman authorities, then with the revolutionaries and so on. Ethnopoetic narratives have provided an explanatory framework for that behavior using the concepts of betrayal and national loyalty. Theodoros Kolokotronēs whose faith in the national goal did not waver during the revolution (even though he did conspire against the first regency in 1832) has become the paradigmatic figure of national loyalty. See Paparrēgopoulos, *Concise History of the Greek Nation*, p. 588. Apostolos Vakalopoulos has gone as far as to argue that the change in allegiance of the military captains was a ruse of the truly loyal military men who were trying to trick the oppressor. See Apostolos Vakalopoulos, *Ta hellenika stratevmata tou 1821: Organosi, Hegesia, Taktike, Ethe, Psychologia* (Thessaloniki, 1948) [in Greek, The Greek Armies of 1821: Organization, Tactics, Ethics, Psychology] 103. On the reluctance of the local primates and higher clergy to participate in the insurrections see Finlay, *History of Greece*, v VI., p. 143-144. On their social organization and precarious attachment to the national cause see John Koliopoulos, *Brigands with a Cause*, pp. 20-66

<sup>30</sup> They were named after the neighborhood in Istanbul where they resided, Fener, which was also the seat of the Patriarchate, with which they had close links. See George Finlay, *A History of Greece*, v. V, 243-245; Steven Runciman, *The Great church in Captivity, A Study of the Patriarchate of Constantinople from the Eve of the Turkish Conquest to the Greek War of Independence* (Cambridge University Press, 1968), 360-385; Cyril Mango, 'The Phanariots and the Byzantine Tradition', *Byzantium and its Image. History and Culture of the Byzantine Empire and its Heritage*, Variorum Reprints, London, 1984, XVIII, pp. 41-66

Sultan's administration for their own; yet others were openly hostile to the revolution and its goals.

The Greek revolution also found immense ideological support from the nouveau riche merchant class,<sup>31</sup> whose children had been educated in the best universities in Europe and had started dreaming of a bold project of reviving "Hellenism". Their outlook was westernizing and philhellenic. In accordance with the classicist and romantic philhellenic ideas circulating in the Europe of their time, they regarded modern Greeks as the heirs to a glorious ancient civilization who had been corrupted through contact with the barbarian Ottoman. Their project was one of "restoration" and "resurrection". This project provided the language that predominated in the first years after the revolution. The most prominent of the merchant class was Adamantios Koraēs, whose work on the Greek classics preached ideas of Hellenic regeneration to the 'degraded' nation.<sup>32</sup>

To these actors we should add the so-called military leaders of the revolution, who were none others than the brigand groups that the Ottoman regime had been using for purposes of keeping the order in inaccessible areas such as the Peloponnese and Heperus.<sup>33</sup> They had been enjoying a semi-autonomous status even before the revolution, profiting from precarious alliances and pillaging opportunities. Their vision was one of

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<sup>31</sup> On the development of a Greek merchant class in Europe see Stanley D. Chapman, *Merchant Enterprise in Britain, From the Industrial Revolution to World War I* (Cambridge University Press, 1992) 153-161; See also Traian Stoianovich, The Conquering Balkan Orthodox Merchant, *Journal of Economic History*, 1960, vol 20: 234-313

<sup>32</sup> K Dimaras, O Koraēs kai I Epochi tou (Athens: Zacharopoulos, 1974) [in Greek, Koraēs and his Times,]; On the work of Koraēs see also Elie Kedourie, *Nationalism in Asia and Africa* (London: Frank Cass, 1974) 37-52

<sup>33</sup> John Petropoulos, *Politics and statescraft*, 24; John Koliopoulos, Brigands with a Cause, 20-35; Achilles Batalas, "Send a Thief to Catch a Thief: state-Building and the Employment of Irregular Military Formations in Mid-Nineteenth-Century Greece" in eds. Diane E. Davis and Anthony W. Pereira, *Irregular Armed Forces and Their Role in Politics and state Formation* (Cambridge University Press, 1992) 149-178



preserving their already established freedom of action; later sneering at the state's offers to enlist them as a regular army.

The local community leaders, who had for a long time been mediating between the Ottoman Porte and their own provinces, towns and villages, were also important in both the revolution and the state building project. Some of them participated in the revolution hoping to get complete autonomy from the Ottomans, but preserve their own political and socioeconomic position.<sup>34</sup> They were antagonistic to the westernizing Phanariots and merchants and they sought alliances with the brigands and the local clergy. The extent to which these antagonisms were central to the political processes can be highlighted by the assassination of the first governor of Greece Ioannis Kapodistrias in 1832 by members of the Peloponnesian Mavromichalis clan, whose interests had been hurt by the governor's staunch centralizing policies.<sup>35</sup>

The Orthodox Church officially opposed the revolution, as an institution that was both deeply embedded in the Ottoman administration and ideologically opposed to a nationalist discourse that seemed to antagonize the church's ecumenical self-perception. Individual priests, however, depending on the contingencies of their geographical and political location, did participate in the revolution, often lending ideological legitimation to the uprisings.

Even though the projects of all these actors in the revolutionary and post-revolutionary Greece varied greatly in content and strategic approach we can classify them –simplifying of course- in roughly speaking two opposing camps: the westernizers

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<sup>34</sup> Finlay, *History of Greece*, v. VI, p. 143-144

<sup>35</sup> On the opposition to Kapodistrias, which led to his death see Chrestos Loukos, *He antipoliteuse kata tou Kyvernete Iō. Kapodistria*, 1828-1831 (Athens: Themelio, 1988) [in Greek, The Opposition to Governor Io.Kapodistria]

and the supporters of the pre-existing Ottoman status quo. Their interests were and remained for a long time deeply antithetical, creating tensions in the newly created state that were constantly reemerging and in need of negotiation.

#### **4. Narrating the Greek People through family law**

Investigating the law of the Greek people, the par excellence mission of the discipline of legal history, implicitly carried with it the naturalization of the concept of the Greek people themselves, along with the idea of the regulation of their relations on the national basis by the state. Narrating the distinctness of the legal system and norms of the Greeks as a nation under the Ottomans became one of the main modes of narrating the separateness of the Greek nation tout court vis-a-vis the Turks and therefore of narrating the existence of the Greek nation itself. Arguing for this separateness in turn meant performing the conflation of the Orthodox millet with the Greek nation.

The so-called millet system of the Ottoman Empire was repeatedly portrayed as the main mechanism through which the Greek nation managed to survive through centuries of “turcocracy”.<sup>36</sup> This allowed the projection of the Greek nation back in time, at least as far back as the Greek speaking Byzantine Empire. At the same time, the existence of the millet system enabled a disregard for the intense local fragmentation both in terms of norms and in terms of jurisdictional arrangements for the adjudication of cases between Greeks that had resulted from the breakdown of Ottoman political power

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<sup>36</sup> For religious as well as political reasons the Ottomans allowed a certain degree of self-regulation to their conquered peoples by dealing with them as autonomous communities, or millets, headed by their religious leaders. This is what is known as the millet system of Ottoman administration. The degree of systematization and coherence of the millet has been challenged but is still widely assumed in Ottoman history. See Shaw, *The Ottoman Millet System: an Evaluation*. There are other Ottoman historians who also subscribe to the more fluid notion of the millet in the Ottoman Empire see Rodrigue, *French Jews, Turkish Jews*, 29

and the simultaneous rise of local political authority, of the secular or religious kind. The millet then discursively allowed for the unification of the Greek nation under the coherent umbrella of the Orthodox Patriarchy as the institution guardian angel of the Greek nation.<sup>37</sup>

According to this nomopoetic narrative, substantive rules of law had been preserved by the Greek Orthodox Church during the four hundred years of oppression thanks to the millet system of administration.<sup>38</sup> Under the millet, the Ottomans regarded rules related to marriage, divorce, dowry, and inheritance as religious, and therefore subject to religious regulation by the leaders of each religious group present in the premises of the Ottoman Empire. The adjudicative function of the church in these matters, as well as the privileges of self-government accorded to some regions by the sultan, was what allowed the Greeks to preserve their coherent, unitary, and national character, which distinguished them from their barbaric oppressors.<sup>39</sup>

Unlike the Ottomans-again according to this narrative- Greeks practiced monogamy, equality of inheritance between males and females, restricted their number of divorces to two, forbade unilateral divorce, and finally, Greeks respected the free will of

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<sup>37</sup> Maurer as the initiator Maurer's nomopoetic ideas reflected the basic elements of an institutional compromise with the other major players vying for control over solving disputes in the newly created state. More specifically, Maurer's legal historical narrative included the idea of the church's role in "preserving" the Greek nation, which then served as legitimating reason for accepting the laws that the church was proposing as the nation's own in cases related to marriage, inheritance, and dowry. "The Greek People" retrospectively cast the interpretive lens of Greek nationhood onto a past that didn't quite fit the picture. In doing so Maurer's posture laid the foundations for some of the most persistent mental habits of legal historians of modern Greeks which includes the projection of both the concept of the Greek people and the concept of the definition of the legal domain that Maurer was working to establish anachronistically onto the past.

<sup>38</sup> See e.g. SPYROS TROIANOS, & IOULIA VELISSAROPOULOU-KARAKOSTA, *LEGAL HISTORY: FROM ANCIENT TO MODERN GREECE* (1997), [in Greek]

<sup>39</sup> Panagiotis Zepos observes that "Byzantine Civil Law was for centuries after the Fall of Constantinople to the Turks in 1453 in force among the Greeks, and thus it was this law which above all represented the genuine, national civil law" in Panagiotis Zepos, *The New Greek Civil Code of 1946*, 29 *JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW* 57 (1946)

the deceased by allowing free property disposition through wills. These rules were based on the Byzantine codifications that the church had started applying in the twelfth-century and continued through the four hundred years of occupation. When the Greek state was created, there was a body of jurisprudence developed by the Orthodox Church that was readily available for use by the newly created state.<sup>40</sup> Indeed, after contemplating and even authorizing the application of local customs where they had prevailed, the Greek state finally legislated the application of Byzantine law as far as family law was concerned, until the introduction of a civil code one hundred and twenty years after the creation of the Greek state.<sup>41</sup>

This narrative of the centrality of a theoretically coherent “Greek” body of family laws preserved by the Orthodox Church is part of the nomopoetic narrative first systematized in the work of Georg Ludwig von Maurer, the regent in charge of judicial organization in the young Greek state, who also brokered the fundamental arrangement between the Orthodox Church and the nascent Greek state. In his seminal book “The Greek People” Maurer recounted the legal history of the Greeks in a manner that made the marriage, divorce, dowry, and inheritance rules theoretically applied by the Orthodox Church on an exclusive basis central to the production of the idea of a Greek people during the Ottoman years.<sup>42</sup>

This narrative, however, was full of the patches of the “memory and forgetting” that are characteristic of narratives constitutive of nationhood.<sup>43</sup> Maurer produced the very idea of a Greek people through the notion of their legal history, but in order to do so

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<sup>40</sup> *Id.* at 57

<sup>41</sup> *Id.* at 58

<sup>42</sup> von Maurer, *Das griechische Volk in öffentlicher, kirchlicher und privatrechtlicher Beziehung vor und nach dem Freiheitskampfe bis zum 31. Juli 1834*, [in German, hence The Greek People].

<sup>43</sup> Benedict Anderson, *Imagined Communities*, 187

he had to choose the elements of the factual situation that fit the ideological picture of Greeks as the heirs to a glorious ancient civilization, and gloss over ‘or forget’ the elements of the factual situation that did not. More specifically, Maurer had to background the direct and indirect influence of Ottoman law, especially so in the domain of family law rules. Maurer’s nomopoetic narrative left marriage and divorce completely out of the purview of Ottoman law, claiming that canon law was the law applied to all Greeks. However, the law applied by the Ottoman courts in marriage and divorce was quite significant in several areas of the territories inhabited by Greek speaking Orthodox Christians for two reasons. First, a type of a civil marriage contracted in front of the Ottoman judge (kade) called *kiambin* (κεπήνιον) was quite common amongst Christians marrying Muslims and even Christians marrying other Christians, when contracting an un-canonical marriage or when trying to take advantage of financial provisions of Islamic law. Second, the existence of this type of marriage forced the Orthodox Church itself to become quite indulgent in the application of its own canon law out of fear that a strict application of its “holy canons” would lead to conversions. Greek speaking Orthodox Christians also appealed to the kade in inheritance cases on an opportunistic basis and depending on the vagaries of local inheritance customs.

The general ideological framework of the revolution mandated by definition the expunging of certain local customs that were considered either a relic of a medieval past or an evil influence of the barbaric conqueror. Such customs included the practice of polygyny in the region of Mani, aimed specifically at the production of a male offspring, and the widespread in some areas practice of cohabitation of engaged couples, which the church had been trying to control and limit.

The overall picture of Greek family law at the creation of the Greek state, was that it did not exist. Even though the church had been trying to impose its authority as the sole regulator of family life of the Orthodox, competition from both the Ottoman authorities, and local secular authorities, which in some cases had begun to compete even in cases of marriage and divorce, as well as local idiosyncratic practices and customs, made for an extremely fragmented picture, that certainly beat description in national terms.

Most interestingly, Maurer's narrative was also in conformity with his institutional solution to the church/state relations problem that he himself, as the regent in charge of judicial affairs, helped broker. From the revolution's break-out to the arrival of the young Bavarian king (1821-1832) and his regency the question of who will be doing what in relationship to marital and familial disputes became the focal point of a jurisdictional struggles that involved the Orthodox Patriarchy in Istanbul, the priests who participated in the revolution and sought to continue or re-establish their role as adjudicators, western minded Greek revolutionaries in the various ministries of the revolutionary governments, and local secular leaders who also tried to retain the powers they had managed to gain against the adjudicative functions of the church. There were several plans for the regulation of church-state relations that included different solutions to the question of the church's adjudicative role. Priests certainly defended their monopoly, westernizing Greeks defended the state's monopoly, and several state actors proposed an intermediate solution that would include mixed courts. Local actors tried to assert their own power in marital disputes, but eventually lost out to the church/state alliance.

Maurer came up with a jurisdictional division of labor by which priests formally lost most of their adjudicative power. Nonetheless, Maurer simultaneously espoused Byzantine norms as the norms of Greek law, based on the idea that they were the norms which helped retain Greekness through the Ottoman years. This fact, together with the disappearance of the Ottoman authorities, and the lack of a secular procedure for getting married, eventually led to a more uniformly powerful position for the new church than ever before. The church was now the only authority that could effectuate a marriage between Orthodox Christians and the courts were now only applying the church's framework for dissolving a marriage, making dissolution much harder than it had ever been before. More importantly, as the institution considered 'responsible' for the preservation of Greekness through the Ottoman years, it was granted considerable symbolic power, translated into direct power to intervene in the lawmaking process on issues related to marriage and divorce.

The nomopoetic narrative of Greek continuity through the preservation of family law rules, which conveniently linked Greeks to Christianity, encapsulated the basic church/state alliance that became necessary for sustaining the idea of a homogeneous Greek people in the nineteenth century. This in turn, allowed the effacement of local authorities that were also standing in the way of the consolidation of the nascent Greek state.

## **II. Illustrating the paths not taken in church/state relations: the Mando/Demetrios affair**

The love story of two heroes of the revolution and the legal case that ensued allows me to illustrate the state of normative fragmentation that prevailed at the moment of the creation of the Greek state, the competing projects that coexisted in relationship to the regulation of marital affairs, and the alternative paths that ended up not being taken. Besides exemplifying the centrality of the jurisdictional problem between the church and the state in issues matrimonial, the story of this failed petition for breach of promise to marry also speaks to the competing norms that different actors in the revolutionary context were seeking to recognize as Greek law. Furthermore, this story points to the central role that lawyers and legally trained officials played in enforcing and implementing the idea of a national legal system based on national legal norms of the western style.<sup>44</sup> Finally, the interpretation of the same love story by two twentieth century historians allows me to illustrate the claim that legal scholars are largely operating within the mainstream framework of interpretation, which is itself the result of the process of building a nation through law, taking for granted that there was a right or wrong answer for this case, and assuming that the jurisdictional question naturally had to be answered the way it was.

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<sup>44</sup> At this point my work relates to the literature on legal pluralism, and the relationship between official law and social practices. See for instance SANDRA BURMAN AND BARBARA HARRELL-BOND (EDS.) *THE IMPOSITION OF LAW* (1979).



## A. The love story

Mando Mavrogeni (hence Mando) was born in 1796 or 1797, the youngest daughter of Nikolaos Mavrogenis, who was a rich merchant from a prominent family of the island of Mykonos.<sup>45</sup> Mando was born and educated in Triest, while her father pursued his commercial activities. Mando appears to have spent some years before the revolution broke out on the island of Tenos, but moved to her family's native island of Mykonos right after the first insurrections took place.<sup>46</sup> There she apparently undertook the task of convincing the inhabitants of the island to join the revolution, while she personally financed the arming of two ships to join the Greek naval expeditions against the Ottomans, over the objections of her mother.<sup>47</sup> She is also reputed to have personally fought against an impending Algerian incursion of her island,<sup>48</sup> and to have participated in the expedition against the Turkish forces on the island of Euboea.<sup>49</sup>

Early on in the revolution, Mando gained fame in European circles, by writing passionate letters addressed to English and French women, seeking their financial support in the name of liberty and civilization.<sup>50</sup> In fact, it seems that Europeans were the ones who preserved the interest in Mando as a national heroine. Historian Blancard, in his 1893 account of Mando's biography observed that it was only the philhellenic foreigners

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<sup>45</sup> Most information on Mando's biography comes to us from Frenchman Theodore Blancard's volume on the Mavrogeni family. Writing in 1893, Blancard summarized all available information on Mando, coming mostly from the accounts of philhellenic foreigners traveling in Greece during the revolutionary period, such as Ginouvier, Pouqueville and Blaquieres. See Theodore Blancard, *Les Mavroyeni, Essai D'etude Additionnelle A L'histoire Modern De La Grece, De La Turquie Et De La Roumanie*, (Paris: Editions Flammarion, 1893)

<sup>46</sup> Blancard, *Les Mavroyeni*, 637

<sup>47</sup> *Idem*, 638

<sup>48</sup> *Idem*, 639

<sup>49</sup> Philhellene writer Pouqueville reports that Mando was a crucial actor in the expedition, cited in Blancard, *Les Mavroyeni*, 643

<sup>50</sup> *Idem*, 650

who reported on Mando's military and financing activities in support of the revolution.<sup>51</sup> Greek historians writing the epic of the revolution towards the end of the nineteenth century invariably skipped her name, and among them only Dragoumes reported that she attended the third national convention.<sup>52</sup>

The effacement of Mando from ethnopoiesis, no matter what the underlying reasons for it were, was probably made easier by the obscurity in which Mando spent the later years of her life. As early as 1825, Mando started petitioning the revolutionary government for recognition of her financial and personal contributions to the national cause.<sup>53</sup> Blancard reports that she practically spent her family's entire fortune paying for soldiers and ships and that her family blamed her for their declined state.<sup>54</sup> Relations with her family seemed to have been strained towards the end of her life, precisely because of that. There is a surviving letter from her mother Zacharati, in which she complained of her daughter's financial abuses and gave a list of the items, including jewelry and clothes that Mando sold or pawned in order to finance the revolution.<sup>55</sup>

In 1840 Mando petitioned the Bavarian King of Greece, Otto, asking him for an "endowment", similar to the one given to the other "fighters of the revolution", so that she wouldn't become the "only fighter left to complain".<sup>56</sup> In the letter she noted that it had been suggested she take a widow's pension, which she denied noting that she had

<sup>51</sup> *Idem*, 626-628

<sup>52</sup> Nikolaos Dragoumēs, *Historical Memories*, 24. The interest in Mando as a national heroine revived after the publication of Theodore Blancard's history of the Mavrogenis family and Mando in particular.

Feminist activist Sotēria Alibertē popularized Mando as a tragic heroine by translating parts of Blancard's account to Greek in 1932. Earlier she had included Mando as an example of the neglect with which the state had treated its female revolutionaries, in a passionate petition for constructing a national monument honoring women's contribution to the national revolution. See Sotēria Alibertē, Petition [in Greek], 25<sup>th</sup> November 1911, reprinted in Sotēria Alibertē, *Mando Mavrogenous* (Athens: Tarousopoulou editions, 1931) 63-69.

<sup>53</sup> Archives Of The Greek Regeneration, v. 14, 234

<sup>54</sup> Blancard, *Les Mavroyeni*, 668

<sup>55</sup> *Idem*, 668

<sup>56</sup> Alibertē, *Mando Mavrogenous*, 59

never been married. We don't know if her petition was granted but Mando died on the island of Paros from typhoid fever, during a sojourn with relatives. She had lived the later years of her life in a reported state of poverty and neglect.<sup>57</sup>

Demetrios Ypsilantes was born in 1793 in Istanbul, son of an important Phanariot family.<sup>58</sup> In 1821, his brother Alexandros Ypsilantes led a small army of volunteers, comprising mostly of Greek speaking students in the west and disillusioned European liberals, against the Ottoman rule in Moldovlachy.<sup>59</sup> This part of the revolution failed, but news of the revolution helped the conspiratorial group "Friendly Society", which had been planning a revolution against the Ottomans for years, to ignite the insurrections that would eventually lead to the Greek revolution in the Peloponnese.<sup>60</sup>

Demetrios had studied in France and served in the Russian army, taking part in the Napoleonic wars and reaching the rank of corporal. At the outbreak of the revolution Demetrios was in Kiev, protector of his mother and sister. Soon, however, he left for Greece bearing a letter written by his brother, naming him military leader of the insurrections in the Peloponnese. He arrived in the Peloponnese in June 1821. Local leaders and military captains received him with mixed feelings of caution and respect, largely due to his well known family name and to the trunk he was carrying with him, which everyone imagined was filled with money.<sup>61</sup> Demetrios allied with the military captains, but openly antagonized the local leaders, as heirs to the oppressive Ottoman rule. This was a mistake that cost him his leadership position. A much more adept

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<sup>57</sup> *Idem*, 58

<sup>58</sup> On the Phanariots see *supra* page 73

<sup>59</sup> Chrēstos Stasinopoulos, *Lexicon tēs Hellenikēs Epanastaseos*, (Athens: Leventia, 1970) 596 [in Greek, *Lexicon Of The Greek Revolution*]

<sup>60</sup> Tassos Vournas, *Philikē Hetairia, Historiko Chroniko 1814-1820* (Athens: 20<sup>th</sup> century Editions, 1959) [in Greek, *Philike Hetairia, Historical Chronicle*]

<sup>61</sup> Stryidon Trikoupsēs, *History Of The Greek Revolution*, 22

revolution hopeful, Alexandros Mavrokordatos, another Phanariot, allied with the local primates and thwarted Demetrios' plans for leadership.

From that point on, Demetrios' attitude won him a peculiar hagiographical position in the history of the national revolution. According to this historiographical tradition, Demetrios stayed clear of the political conspiracies, alliances and backstabbing that led to three different occasions of what today counts as "reassuringly fratricidal wars", within the span of four years.<sup>62</sup> He remained in charge of military operations at various moments between 1821 and 1829. It was under Demetrios' leadership that Greece won the last battle of Peta, which 'cleared' Central Greece of the last remaining Turkish presence.<sup>63</sup> His health, fragile since his first arrival, finally betrayed him in 1832. He died of bronchitis in Nafplion, the first capital of Greece, in 1832.

Sometime around 1823 Mando became involved in a very public love affair with Demetrios. The affair allegedly infuriated his followers who put Mando on a ship and exiled her back to her native island, in order to keep her away from Demetrios. We do not know much about the events that followed except that Demetrios eventually cut the relationship short, and allegedly also stole from Mando the letter he had written to her, in which he promised to marry her.

What we do know about the affair comes from the account of a couple of historians and the series of documentary fragments discovered in the archives of the ministry of justice at the beginning of the twentieth century.<sup>64</sup> It seems that Mando,

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<sup>62</sup> Anderson, *Imagined Communities*, 200

<sup>63</sup> The *de facto* victory against the Ottoman Empire had been won over the previous years at the diplomatic level, sealed by the naval battle of Navarino (1827), in which the thus far involvement of European powers in the revolution finally became explicit.

<sup>64</sup> Konstantinos D. Triantafyllopoulos, *On the Protection of Women During the Times of Kapodistrias*, 3 ARCHIVES OF PRIVATE LAW 266 (1936).

thwarted in her hopes of marrying Ypsilantes and in a state of financial ruin, petitioned a variety of different entities inside the revolutionary government(s), seeking to enforce an alleged contract that obligated Ypsilantes to pay damages for his breach of promise to marry. She appears to have petitioned first the Ministry of Religion of the revolutionary government in 1825, asking for the appointment of an “ecclesiastical committee” to adjudicate “her rights.”<sup>65</sup> In 1827, she reportedly sat in the third national convention, the only woman present, waiting for her petition against Ypsilantes to be read, waiving to the President of the convention. The petition did not survive and was never read aloud. In 1828, she petitioned the newly arrived first governor of Greece asking for the appointment of an ecclesiastical committee. Finally, in 1830 she petitioned the Minister of Justice asking him to see that an ecclesiastical committee be appointed to adjudicate her case against Demetrios. From all these petitions, we only have the 1828 letter to the governor and the 1830 answer of the minister of justice to her petition.<sup>66</sup>

The published response of minister Gennatas is as follows:

If indeed she has a confession according to which Mr Demetrios accepts to pay however much Ms Mando asks, if after Greece’s liberation he doesn’t marry her, what kinds of rights can flow from this? [The right for him] to marry her? Can the church force a marriage? If this is not a simple agreement, but is accompanied by loss of virginity, what kinds of powers does the Ecclesiastical Authority have? It owes either a civil or a criminal answer. If the Ecclesiastical Authority were to decide in the civil manner, which Civil Authority owes the execution of its decisions? The same problem with the criminal manner. For these reasons the application of the petitioner is absolutely inadmissible. If she wants a compromise, let it be; except that this Government cannot give away the duties of the Judiciary to the Ecclesiastical Authority. That’s my official opinion. Let the documents be forwarded to the Secretary of Ecclesiastical Affairs for him to act appropriately<sup>67</sup>

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Menelaos Tourtoglou, Report of Mando Mavrogenous against Demetrios Ypsilantes, 5 Centre for the Study of the History of Greek Law 157 (1957)

<sup>65</sup> Tourtoglou, *id.* at 157

<sup>66</sup> The first was published in 1957 and the second in 1936 by Tourtoglou and Triantafyllopoulos respectively, *supra* note 15

<sup>67</sup> *Idem*, 294

Triantafyllopoulos also published a note in the Ministry's registry of incoming petitions which clarifies what she was petitioning for:

Mando Mavrogeni to His Excellency. That an order be given to the Secretariat of Justice to send her documents to the Ecclesiastical Secretariat so that her case can be reviewed

The second fragment of the legal story became known in 1957, when Greek legal historian, Menelaos Tourtoglou, discovered the actual text of two additional petitions by Mando pre-dating the 1830 petition. These petitions, dating both from February 1828 were addressed to Ioannis Kapodistrias, the first Governor of Greece:

Report of Mando Mavrogenous to the Governor

Your Excellency Governor of Greece,

After having been informed that Mr. Demetrios Ypsilantes passed from here, I ask your excellency to order [him] to write to Mr Panayotaki Anagnostopoulo one of his men so that you can deliver to my man who I sent on purpose to Nafplion the document of my engagement, according to the included copy of his promise to Mr Demetrios and to myself. Because it's been a year since he rejected me without reason, with the cruelest contempt, and he didn't want to give the document to Mr. Georgio Mavromati, who before the Nafplion turmoil asked him to go ask it. I ask moreover for an ecclesiastical committee to be appointed in order to review the stolen documents, as the proofs at hand, in order to justly decide my demand, which already it has been three years that I gave a report to the Ministry of Religion but my rights were not adjudicated despite the fact that [it/he?] was appointed and by this year's national convention it was again not acted upon. This is what I sign onto with deep respect,

The patriot Mando Mavrogenous<sup>68</sup>

In Aegina on the 1<sup>st</sup> of February 1828

The language in Mando's petition is filled with grammatical mistakes and ellipses that make its meaning at points hard to discern.<sup>69</sup> When she says for instance, "I ask

<sup>68</sup> Menelaos Tourtoglou, "Report of Mando Mavrogenous against Demetrios Ypsilantēs", 157

<sup>69</sup> Referring to Mando's petition to the National Convention of Troezena, Blancard, reported that her petition had been written by the "lawyer Mavrokephalos." Attributing the lawyerly profession to Mavrokephalos is a historical projection of the late nineteenth century, since the only lawyers existing at the time in Greece were all brought in from the Ionian islands to serve in the government. The origin of the lawyerly profession in Greece does indeed come from the kind of activity that Mavrokephalos was undertaking which was basically to transcribe in writing the complaints of the illiterate population. Could it be that these petitions had been written by Mavrokephalos as well? Assuming that they were, this indicates that Mando, the Greek national heroine, was not comfortable writing in Greek herself; even

moreover for an ecclesiastical committee to be appointed in order to review the stolen documents, as the proofs at hand”, it is not clear whether she is asking for the review of two different sets of documents, the ones stolen and the ones at hand, or whether she is asking for the stolen documents to be found and reviewed as proofs. The contrast between the “stolen” and the “at hand” phrases, as well as the position of the sentence, make it likelier, however, that Mando is claiming that she herself is holding some proofs of Demetrios’ promise to marry her, in addition to the ones that Mando claims Demetrios stole. The story of the stolen documents is reported by Theodore Blancard. He reports that some people were saying that Demetrios bribed Mando’s servant in order to retrieve some letters he had addressed to her in which he was making “the most solemn promises.”<sup>70</sup> Blancard himself, however, reports this as a rumor whose veracity could not be verified. In the last sentence of the petition it is unclear who or what has been appointed, but it seems likely that Mando is claiming that an ecclesiastical committee had been appointed to review her case, but never actually did that.

This 1828 petition was accompanied by a letter dating from the same day:

Your Excellency,

I ask on my knees to the mercy of his justice that an ecclesiastical committee with the saint archbishops of Artā, Brestheni and Karistos, be appointed to review the case contained in my report here in Aegina as soon as possible, because my unfortunate mother has been reduced to a state near death from the injustice that the good patriot caused to my character and she is in bed from that time on, and for this I find myself in a hurry until [he, Ypsilantes/it, the Committee?] gives an end so that I can leave for my homeland. I will pray to saintly God for his [Excellency’s] lengthy good health knowing the liberation of my lengthy imprisonment by the savior of Greece, who saint God has sent for both the freedom and peace of our nation.

I remain a humble slave of his excellency

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though she was quite comfortable addressing elegant nationalist letters in beautiful French and English. It also suggests that the person who made it a profession to write reports on behalf of the illiterate population had himself less than a full command of the Greek language. See Blancard, *Les Mavroyeni*, 665

<sup>70</sup> *Idem*, 665

Mando Mavrogenous

In Aegina on the 1<sup>st</sup> of February 1828<sup>71</sup>

Attached to them was a copy of a document that a middleman named Anagnostopoulos had signed. Anagnostopoulos was one of the founders of the Philike Hetairia, the conspiratorial group that started the revolution, and a trusted friend of Demetrios. Apparently, he was appointed safe keeper of a sealed letter agreeing to give both Mando and Demetrios a copy if *both* agreed. Mando included it in her petition despite the fact that it was obvious that Demetrios was not agreeing to the opening of the letter:

I the undersigned declare that I received from his brilliance the Prince Mr. D. Ypsilantes a sealed letter whose contents I ignore and which I promise to hand in then, when it will be asked me by both the parties; and as proof I gave the present [letter] and I sign.

P.A. Anagnostopoulos

On the 22nd of October 1825 in Nafplio

## **B. The legal outcome of Mando's case**

The 1830 reply of the minister of Justice dismissed Mando's petition due to lack of subject matter jurisdiction, since the ministry was not a court. Addressing the substantive question of the validity of a penalty clause for breach of promise to marry, he specifically said that even if Mando came up with the alleged letter where Demetrios promised marriage to her, he, the minister of Justice did not know what kinds of rights could flow from that, because the church could not force anyone to get married. He also noted that if she was seeking either civil or criminal redress, she should go to the courts, because the church did not have any adjudicative powers. He then said the petition was

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<sup>71</sup> Tourtoglou, "Report of Mando Mavrogenous against Demetrios Ypsilantēs, 157



dismissed but he ordered that the documents of the case be forwarded to the secretary of ecclesiastical affairs “for him to act appropriately.”

### **C. An alternative explanation of Mando’s case: the path not taken**

Why did Mando petition almost everyone asking an ecclesiastical committee to be appointed in her case? In addition, why did the minister of Justice reject her petition? Mando’s petitions are reasonable from a substantive and procedural point of view, based on a pre-revolutionary framework.

#### **1. Substantive and procedural situation before the revolution**

##### *a. Substantive grounds*

From a substantive point of view, Mando’s petition would not have been considered unusual in many parts of the revolutionary territories, because damages for breach of promise to marry were a common practice based on ecclesiastical or local customary rules. Mando was claiming that Demetrios had promised marriage in the stolen letters and that he had agreed to pay damages in case of his breach of promise. Assuming this was true, this promise had been enforceable according to local customs in many different parts of the revolutionary territories. Perhaps even more surprisingly there were parts especially of the Peloponnesus where specific performance of such promises could be enforced with means civilized and uncivilized and the direct or indirect cooperation of the local priests. The unusual piece of this case is that this seems to be a promise exchanged between the parties themselves, whereas in most cases it would have

been the families of the prospective couple who would be making the agreement. Even if Ypsilantes had not agreed to damages, but had agreed to marry Mando, he would have been liable to a penalty based on the rules that the church had in the past applied to similar cases, which were to be found in ecclesiastical rules based on Byzantine law.<sup>72</sup>

***b. Procedural grounds***

From a procedural point of view, even though Mando petitioned almost every possible authority she could think of her main aim was to get an ecclesiastical committee appointed. This was because priests in the pre-revolutionary period were commonly called upon to resolve matrimonial disputes, either as adjudicators or as mediators in the pre-revolutionary period. In many communities, they would commonly be adjudicating on the understanding that such disputes belonged to the church's theoretically exclusive jurisdiction. In many other communities, however, where local civilian authorities had been awarded privileges of self-government *de lege* or *de facto*, priests would often have to sit in as committee members in mixed, civilian/ecclesiastical committees charged with resolving local disputes on an arbitral basis. What would the new state do in regards to these adjudicative functions of the priests in cases matrimonial? The minister of justice clearly thought such cases should be now taken to the courts, but Mando's own understanding looked to the priests for dispute resolution.

**2. Considering the revolutionary context**

How did her petitions fare, if one considers that the story unfolded after the breakout of the revolution and after the establishment of a revolutionary government?

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<sup>72</sup> Cite the *Ecloga* and *Armenopoulos* compilations

Mando's first petition, which allegedly took place in 1825, was addressed to the ministry of Religion of the revolutionary government. At this point, there were already two constitutional texts that had been voted by revolutionary conventions, which foresaw that the form of the government of Greece was going to be republican and that governmental powers were to be divided between the executive, the legislative and the judiciary.<sup>73</sup> If we were to extrapolate from the social and political conditions of the time and judge Mando's petition based solely on this formal constitutional framework, we might conclude that Mando's petition was clearly addressed to the wrong forum, since her case involved a judiciable dispute and the constitution provided for court jurisdiction over private disputes. Indeed, this is what the minister of Justice in his 1830 response seemed to be doing. However, there are several problems with this approach.

*a. No coherent constitutional mandate concerning jurisdiction over marital disputes*

First, the political legitimacy of the constitutions and of the government established by them at the time was highly doubtful. Shortly after the revolutionary conventions voted these constitutions into effect, civil wars ensued, and the position of the revolutionary governments was beleaguered, at best. In 1825, the Egyptian armies rolled over the Peloponnesus and pretty much seemed to have ended the hopes for the Greek cause.<sup>74</sup>

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<sup>73</sup> Constitutional texts of Epidaurus (1822) and Astros (1823). For a quick version of the official story see <http://www.parliament.gr/english/politeuma/default.asp>

<sup>74</sup> See generally THOMAS GORDON, HISTORY OF THE GREEK REVOLUTION (1844)

However, even if we were to somehow forget about these realities and take the Constitutions at face value, the question of what would happen to the church's traditional involvement in marriage related disputes was nowhere near being resolved by the constitutional texts, despite their assignment of *judicial* disputes to the courts. The reason for that is that throughout the revolutionary years and until the final imposition of a Bavarian regency by foreign powers, the question of whether disputes related to marriage and divorce were of the state's exclusive jurisdiction was open and the source of much conflict even within the confines of the revolutionary governments.

During the period 1821-1827, the ministries of Religion and Justice kept clashing over competing *de facto* jurisdiction over disputes relating to marriage, divorce, dowry and inheritance-since courts were practically inexistent. The clash had more or less force, depending on the specific people serving at their head. Even when an ordinance on the organization of the courts was promulgated in 1828, which provided that disputes related to inheritance and the family should go to the courts, this still did not resolve the question of what would happen to disputes related to marriage and divorce. "Familial" disputes at the time meant disputes between kin members rather than between spouses or potential spouses.

***b. Non-existence of courts***

Finally, even if we were to accept that there was a coherent constitutional mandate that courts should have jurisdiction over marital disputes, which is highly doubtful, no courts existed for most of the time that Mando was petitioning the government. Instead the Ministry of Justice and Religion of the executive branch would take over any disputes and either adjudicate directly or send to an ad hoc committee for

mandatory mediation. Cases involving disputes over engagements, marriages and divorces were often sent to committees comprising exclusively of priests or of priests and local leaders alike. The two ministries directly clashed on several occasions over the question of which one should retain jurisdiction. So at least as her first petition goes, Mando could very well have expected that her case would or should be taken up by the Minister of Religion as a matter of jurisdictional practice. The fact the Mando did not have any written proof in her hands should not have been much of a problem either, since the government relied on oral testimony and the cooperation of the church in procuring oaths for the purposes of proof throughout this period.

*c. No right answer: creating by doing*

The minister of Justice's answer then, far from constituting a "correct" legal answer against a well-defined legal framework was an attempt to define the legal framework itself against high political conflict and a less than certain legal context. The minister seemed to push further his own version of what the jurisdiction of courts vs. the church should be, even though there is historical evidence that he was not completely decided on the jurisdictional issue. At about the same time he answered Mando's petition, the same minister of justice submitted a draft scheme of church-state relations to the governor Kapodistrias, in which he suggested that mixed courts comprising of civilians and priests should adjudicate marital cases, and the priests' opinion should prevail in cases of disagreement.<sup>75</sup> This would seem to suggest that even in his own version of religious vs. civil disputes the priesthood should retain a residue of jurisdiction over such cases.

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<sup>75</sup> Menelaos Tourtoglou, church to state Relations (attempt to regulate them in Kapodistrias time), in Peloponnesiaka, volume ις. 1985-1986, p.85

From a substantive point of view, Mando's petition presupposed the application of a norm that would allow enforcement of an alleged penalty clause for breach of promise to marry. Such clauses were customarily enforced before the revolution. The revolutionary constitutions provided that the laws of "our Byzantine emperors" would be the law of the land and in those laws one could find the textual basis both for applying and for not applying customary law.<sup>76</sup> Even if one was to come to a definitive conclusion about which laws those Byzantine laws were, there was a lot of room for accepting or rejecting a specific practice based on the texts.

The minister's answer seems to suggest that specific performance of a promise to marry was not possible. This was contrary to at least some customary practices in the Peloponnesus where local leaders and priests would combine forces to compel compliance with the marriage contracts. The minister's suggested that such practices would not be tolerated anymore, even though it is unclear on what basis he would found his decision. What is clear is that the nomopoetic understanding which connected Greekness to western civilization in contrast to barbarity, by definition excluded this and other customary practices, such as the practice of bigamy and blood vengeance by the inhabitants of Mani. As to the marriage penalty, his answer left the prospect open, hinging upon the existence or not of the alleged letter.

The point here is that from a substantive, as well as a procedural point of view, there were multiple different options available for resolving the specific dispute, involving the highly disputed at the time position of the church as adjudicator. Discussing the case in terms of legal "right" or "wrong" at a moment in time when the existing legal

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<sup>76</sup> Depending on how one interpreted what laws are the "Byzantine laws" in question. The provision about Byzantine law was in all three constitutional texts of 1822, 1823 and 1827. Legal scholars remained in deep disagreement about the meaning of the provision throughout the nineteenth century.

framework was vague at best, and definitely highly contested means that one is overlooking the immense struggles and the really high stakes underlying disputes related to engagement, marriage, divorce, not only for parties to a specific dispute, but also for the future of the fledgling Greek state itself.

In this specific case, the minister of justice made sure to clarify the idea that the church could not force anyone to marry, since marriage was a matter of free choice. This was not factually representative of practices in some regions of the Peloponnese, however, even though it was very important for the minister to treat the issue as self-evident. Given the ideological legitimacy that the war had acquired in the west through an appeal to the idea of unbroken continuity between the ancient and the modern Greeks, practices that placed the Greeks closer to their ‘oppressors’ and further from their ‘liberators’ were particularly hard to accept.

Furthermore, in ‘clarifying’ the jurisdiction of the church vis-à-vis the courts, the minister of justice was engaging in an act of constructive legal interpretation, driven more by his ideological commitment to the idea of Greece as a western entity, than from any properly constraining legal framework. It is not clear at all, that even if Greeks had agreed to a tri-partite division of powers, they would have necessarily thought that such disputes should go to the courts as opposed to the church. The minister himself, however, seems to have been perfectly clear on this occasion of the importance of gaining back jurisdiction from the church. For the bigger part of the nineteenth century, the majority of private disputes concerned marriages, divorce, dowry and inheritance. Indeed, property cases were most of the time related to the resolution of dowry and inheritance issues. Gaining control over the resolution of property disputes was at the

time largely an overlapping issue with gaining control over family related disputes. Leaving jurisdiction of such cases to the church would have effectively meant giving up on the idea of courts as the appropriate venue for the resolution of private disputes and would have placed Greece closer again to what was considered the ‘theocratic’ system of the Ottomans.

#### **D. Twentieth-century interpretation of Mando’s case**

Mando’s affair and Mando herself were forgotten, only to be rediscovered towards the end of the nineteenth century through the memoirs of western historians, who remembered Mando as an unfairly forgotten Greek heroine.<sup>77</sup> In 1936 a prominent Greek lawyer and legal academic, Triantafyllopoulos, discovered the minister of justice’s 1830 response to Mando’s petition and published it along with a short commentary.<sup>78</sup> In 1957 another important legal historian, Tourtoglou, discovered the earlier Mando letters to the governor and published them along with commentary.<sup>79</sup> Both commentators’ notes are particularly short, but they both completely gloss over the historical and political context existing at the time and place the case unfolded. More specifically, both commentators took for granted the idea that the minister of justice was supplying the “correct” legal answer, at least from the point of view of jurisdiction.

Triantafyllopoulos, for instance, noted:

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<sup>77</sup> THEODORE BLANCARD, *LES MAVROYENI* (1909). Greek feminists in the first half of the twentieth century demanded and succeeded in getting Mando’s recognition as a major benefactress of the revolution.

<sup>78</sup> *Supra* note 14

<sup>79</sup> *Id.*



The ecclesiastical authority, whose judgment the petitioner is asking for, doesn't have jurisdiction, neither for the first nor for the second claim and that is why her petition is rejected as inadmissible.<sup>80</sup>

The 1957 analysis by Menelaos Tourtoglou of the newly discovered 1828 petition is equally short and is mainly concerned with clarifying the chronology and nature of Mando's petitions against Demetrios, given the new document that came to light. It, too, however, takes for granted that the jurisdictional issue was correctly decided by Gennatas, either assuming a constraining legal framework or a specific version of western statehood that the Greeks as western correctly abided by. Tourtoglou complimented Gennatas for having correctly concerned himself with clarifying jurisdiction, or lack thereof, over the case:

In his official opinion Gennatas is mostly concerned, *and rightly so*, with proving the initial lack of jurisdiction of the Ecclesiastical Authority over the case, without going into the more specific issues whose examination would be for us of equal legal interest.<sup>81</sup>

Both scholars therefore missed a much more obvious, bigger picture; that of the almost complete lack of a solid court system or of a solid normative framework in the fledgling yet already floundering Greek state. Neither one of them was concerned with the lack of a stable political order, the scarcity or near inexistence of courts, the vagueness of the then existing legal framework and the difficulty in defining a legal framework in reference to which the minister of Justice could plausibly pronounce his lack of jurisdiction. In addition, both assumed that there was a definitely correct answer out there, one of taking away jurisdiction from the priests and awarding it to the courts. Courts, laws and judges appeared in their stories almost as a natural, preexisting phenomenon that needed not be questioned.

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<sup>80</sup> *Idem*, 267

<sup>81</sup> Menelaos Tourtoglou, Report of Mando Mavrogenous against Demetrios Demetrios, in Centre for the Study of the History of Greek Law, volumes 5-8, 1957, p.160

My argument is that these legal historians were showcasing the effects of the long process of producing a nation and a state through law on their legal consciousness, while at the same time reinforcing the effect, through their ahistorical legal analysis, of a pre-existent nation and a floundering but existent national political order. Historical analysis complexifies or even makes the legal arguments put forth by the legal historians implausible. Just as there was no right or wrong answer to the jurisdictional issue at the time, despite the nonchalant way in which both commentators take the minister's answer to be right, there was no definite answer as to the desirability of awarding damages for breach of promise to marry. This was certainly common in many areas of the revolutionary territories and Greek courts themselves later on accepted such suits and awarded damages in many cases. Such damages were only later prohibited as too restrictive of individual autonomy through case law reversal by the same courts that had accepted such suits until about the middle of the nineteenth century. Twentieth-century lawyers, however, were already inculcated with the westward looking legal historical narratives produced in the previous century, by which the state naturally deprived the church of adjudicative functions at the creation of the Greek state, since the church had only been performing those for the lack of a Greek state during the Ottoman years. In the typical legal consciousness of the twentieth century, disputes over engagements and marriages were judicial and naturally belonged to the judiciary. Minister Gennatas, then rightly-if anachronistically, dismissed the petition, since it was addressed to an altogether wrong forum.

### III. Will history teach something?

The past is a foreign country, indeed.<sup>82</sup> What is it that we can gain from our journey to this specific foreign land? Perhaps one does not need to draw conclusions about the direct relevance of this rich past onto the presence, but I would like to take a shot at figuring out at least some general directions in which the story of the piecemeal construction of national identity through family law can inform our present choices in legal reform.

First, revisiting Mando's story allows me to highlight and challenge certain underlying assumptions about the nature of family law as national, continuous and unitary and illustrate the immense process of construction that the Greek state undertook even in the field of law generally assumed to have survived four hundred years. It also allows me to highlight the highly political character of the stakes involved in the process of defining family law norms for the newly created state. Finally, the analysis of the way in which the two twentieth century legal historians treated the Mando affair evidences the kind of unitary understanding of the nation and its *Volksgeist* that I argue is still predominant in legal discussions.

The implications of this alternative understanding of family law and the process of its creation are not immediately obvious, but they are worth exploring. The 'national' essence supposedly found in family law rules emerges out of Mando's story as a piecemeal construction involving complex negotiations between a variety of different

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<sup>82</sup> Leslie Poles Hartley, *The Go-Between*,

institutional and institutional actors. The destabilization of the idea of a legal Volksgeist found par excellence in the field of family law opens the space for a refocusing on the potential and actual consequences of legal rules rather than their origin, which becomes particularly important at a moment in time when claims of national identity are playing an especially important role in legal reform debates, in Greece and Europe alike.

### **A. Greek family law debates**

In contemporary Greek family law scholarship, certain legal institutions are taken to be particularly closely connected to the Greek people, having survived four hundred years of foreign rule. One striking example is the organization of the property regime for spouses as a separate property system. Feminist proposals for the establishment of a community property system-which aimed at assuring better results for homemakers upon divorce-were quickly dismissed by the vast majority of scholars as a proposal foreign to the character of the Greek people, when the opportunity for a revision of the civil code arose.<sup>83</sup> Discussions on the topic have ever since died out, despite the fact that the current marital property regime has arguably been unfair to divorcing homemakers.<sup>84</sup>

A skewed understanding of history and its relationship to the regulation of the Greek family is, of course, not the sole, or even the main underlying reason for the

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<sup>83</sup> The opportunity arose in 1983 when under the influence of the European Communities the Greek Civil Code was reformed to embody a principle of formal equality between the spouses, as opposed to the previous, formally unequal framework that recognized the husband as “the head of the household”.

<sup>84</sup> The solution that legislators opted for in the 1983 reforms addressing the issue was the adoption of an article that purports to make possible a post-divorce distribution of the “increase in wealth” happening during the marriage. The application of this article (article 1400) has been quite narrow and has not had the result hoped for, at least by feminists. See ASPASIA TSAOUSSIS-HATZIS, *THE GREEK DIVORCE LAW REFORM OF 1983 AND ITS IMPACT ON HOMEMAKERS: A SOCIAL AND ECONOMIC ANALYSIS* (2003). See Aspasia Tsoussis-Hatzis, *The Greek Divorce Law Reform of 1983 and Its Impact on Homemakers: A Social and Economic Analysis*. Athens-Komotini, Ant. N. Sakkoulas Publishers, 2003.

*naufnage* of community property proposals. Tradition, for instance did not stop the legislature from banishing the institution of the dowry with one stroke of the pen from Greek family law during the same reforms. Nonetheless, in the context of the debate over marital property, the claim that separate properties has *always* been the system of choice for Greeks seems to have successfully pulled the plug for the proposed reforms. The lack of challenge to the coherence of the historical claim made the tradition argument trump even though it was weak and contradictory.

## **B. Harmonization of European family law**

The notion that family law bears and should bear a close relationship to national character is by no means limited to the Greeks. The debates over the potential harmonization of European family law exhibit the same implicit assumption. Opponents of harmonization claim it will harm national specificities, which nations hold dear.<sup>85</sup> Supporters claim that European nations have naturally converged towards a common core of norms, encapsulated in freedom and equality, and harmonization can therefore do no harm.

Below the surface of this debate over cultures, lie some very high stakes such as the recognition of same-sex partnerships, or marriages, and the treatment of marital wealth upon divorce. Both positions assume the special relationship of family law to the nation, holding this relationship to be normatively important. The same is not true when it comes to the harmonization of market rules, which is a process already well advanced and for which little objection is currently being made based on the idea of national specificity. Both positions also underestimate the internal struggles and contradictions

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<sup>85</sup> Maria Rosaria Marella, The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law, 12 EUROPEAN LAW JOURNAL 78 (2006)

that exist within any single legal system and tend to focus attention on legal systems as solid, national packages that cannot be easily disentangled. The position that proposes a common core of rules that European legal systems have naturally converged towards is particularly unselfconscious, as it overlooks the immense impact that the European Union itself has had in this process of natural convergence.

The argument that I am exploring is not that such an understanding would necessarily lead to better results in terms of the family law rules that are eventually chosen. It would, however, open more space towards a more politically vibrant debate about the shape of family laws to come, as well as a debate more focused on concrete legal consequences and the realities of family law in action.

## **Conclusions**

In this paper, I explored the role that law and lawyers played in the construction of national identity by the generation of a legal narrative of historical continuity in family law. Despite the deep ruptures produced by the creation of the Greek state in the legal regulation of family affairs, the narratives of continuity remain largely unchallenged, demonstrating the strength of the narrative and the success of the project of building a national state through law. I used the story of failed petition for damages in a case of breach of promise to marry between two revolutionary heroes to illustrate the multiple possible solutions that could have been given to the case, precisely because a national field of Greek family law was only at the initial stages of being constructed. Reactions to

the case by two twentieth century scholars allowed me to analyze the naturalization of certain assumptions in Greek family law, heralding it as a coherent body of rules closely related to national character. Both parts of the paper constitute a methodological intervention, a mode of analyzing family law institutions that looks critically at claims of national character and national continuity. Some of these claims seem to be reappearing in contemporary family law debates in Greece and Europe, making it urgent that we start taking a critical look at claims of national character in regards to family law, analyzing instead actors, political projects and potential effects of proposed reforms.