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Sharia Law in Europe? Legacies of the Ottoman Empire and the European Convention on Human Rights

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1. INTRODUCTION

Occasionally a modern human rights case arises which recalls a historical era and context that now appears both brutal and astonishingly different. *Molla Sali v. Greece*,[1] a Judgment of the Grand Chamber (GC) of the European Court of Human Rights (ECtHR) is one such case, though the original events occurred less than a century ago. It concerned those members of the Muslim minority of Greece who live in the historical area of 'Western Thrace'. Within that area, a legacy of the Ottoman Empire survives in the form of religious law (*Sharia*). Section 2 situates the issue of applying *Sharia* in contemporary legal and politicial European context. It also outlines the *Molla Sali* case and its significance. The narrow issue in *Molla Sali* concerned the application of personal status laws. Section 3 briefly examines how international human rights bodies have approached the compatibility of such laws with modern human rights instruments. Section 4 portrays the situation on Western Thrace within the wider historical, legal and social contexts of Muslims in Greece. Section 5 explains why the 'Moslem inhabitants of Western Thrace' were exempted from the compulsory population transfer under the Treaty of Lausanne (1923). It explains how the Muslims in Western Thrace came to be specifically identified as a minority, why *Sharia* continued to be applied to them and only to them, and examines their contemporary legal and human rights status. Section 6 situates the human rights issues on *Molla Sali* within the context of the approaches of the ECHR to minority rights and of the ECtHR to *Sharai*. Section 7 critiques the Judgment of the GC in *Molla Sali* in terms of both what it contains and what it does not contain. Section 8 provides a wider contextual analysis of *Molla Sali* by reference to the Greek legislative response, the substantive and procedural human rights issues that can arise in relation to the

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[1] A. 20452/14, Grand Chamber of the European Court of Human Rights (19 December 2018).

continued application of *Sharia*, and the position of Turkey. Finally, Section 9 concludes by reflecting on two critical matters. First, whether individual consent is the principled human rights solution to the kinds of issue rasied in *Molla Sali*. Secondly, the systemic implications of the case with respect to the possible future place of *Sharia* in Europe.

2. SHARIA IN EUROPE AND THE *MOLLA SALI* CASE

A. *Sharia* in Europe

Greece is the only member of the Council of Europe where elements of the institution of *Sharia*[2] have survived officially since end of the Islamic Ottoman Empire.[3] Indeed, *Sharia* is administered by State courts presided over by judges (mufti) appointed by the State.[4] While the application of *Sharia* in part of Greece is currently exceptional, the demography of Muslims in Europe is changing. In the forthcoming decades, Muslims are projected to be the world's fastest growing major religious group. The Muslim population of Europe (in 50 countries and territories) is projected to double from 5% to 10% by 2050.[5] There are four member States of the Council of Europe where Muslims constitute the majority population: Albania, Azerbaijan, Turkey and Bosnia-Herzegovina. None of them has a *Sharia*-based legal system. In Russia, there are an estimated 20 million Muslims in a total population of some

[2] For the purposes of this article, while acknowledging the complexities concerning exactly what *Sharia* means, I use the term as shorthand for Islamic law. See Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (CUP 2016) 20-40; Ahmed Akgunduz, 'Shari'ah Courts and Shari'ah Records: the Application of Islamic law in the Ottoman State' (2009) 16 *Islamic Law and Society* 202. On the Islamic law aspects of the *Molla Sali* case see Iakovis Iakovidis and Paul McDonough, 'The Molla Sali Case: How the European Court of Human Rights Escaped a Legal Labyrinth While Holding the Thread of Human Rights' (2019) 8 *Oxford Journal of Law and Religion* 427.

[3] Christine Borou, 'The Muslim Minority of Western Thrace in Greece: An Internal Positive or an Internal Negative "Other"?' (2009) 29 *Journal of Muslim Minority Affairs* 5. On the wider legacies see L Carl Brown (ed), *Imperial Legacy – The Ottoman Imprint on the Balkans and the Middle East* (Columbia University Press 1997); Rhoads Murphey, *Imperial Lineages and Legacies in the Eastern Mediterranean: Recording the Imprint of Roman, Byzantine and Ottoman Rule* (Routledge 2017).

[4] See Ian Leigh, 'Religious Adjudication and the European Convention on Human Rights' (2019) 8 *Oxford Journal of Law and Religion* 1. Until 1920, the functions of *mufti* and *cadi* were different and entrusted to two different people. The cadi, president of the religious court, made his judgments according to the law of Islam. The *mufti* was the interpreter of this law. In the 1920s, the *mufti* was granted the right to combine both functions.

[5] See 'The Changing Global Religious Landscape' Pew Research Center, (2017), available at pew.research.org.

145 million. Most of them live in the Northern Caucasus, particularly in Chechnya, Ingushetia, Dagestan and Tatarstan. In Chechnya and Ingushetia, family and property matters are usually judged under *Sharia*. Authorities in Chechnya already enforce many Muslim norms (with regard to headgear and grooming) and have pledged to introduce a full-blown *Sharia* regime.[6] However, the existence and application of *Sharia* in Europe has attracted criticism. The Parliamentary Assembly of the Council of Europe has recommended the abolition of the application of *Sharia* law in Thrace.[7] It has also expressed concern that Albania, Azerbaijan and Turkey have endorsed, explicitly or implicitly, the non-binding 1990 Cairo Declaration on Human Rights in Islam,[8] and that *Sharia*, including provisions which are in clear contradiction with the ECHR, is applied, either officially or unofficially, in several Council of Europe Member States, or parts thereof.[9] One of them is the United Kingdom.[10] In a number of other European States, there are growing nationalist or populist political parties. Significant elements of their agendas relate to resisting any further Islamification of Europe either numerically or legally via the application of *Sharia*.[11]

[6] Human Rights Watch, *You Dress According to Their Rules: Enforcement of an Islamic Dress Code for Women in Chechnya*, (10 March 2011) available at https://www.hrw.org/report/2011/03/10/you-dress-according-their-rules/enforcement-islamic-dress-code-women-chechnya#.

[7] *Freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (eastern Greece)*, PACE Resolution 1704 (2010), para 18.5. available at http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=17807&lang=en.

[8] Available at http://hrlibrary.umn.edu/instree/cairodeclaration.html. It declares, *inter alia*, that all the rights and freedoms stipulated in the Declaration are subject to the Islamic *Sharia*.

[9] *Sharia, the Cairo Declaration and the European Convention on Human Rights,* PACE Resolution 2253 (22 January 2019), text available at http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=25353&lang=2; 'Compatibility of Sharia law with the European Convention on Human Rights: can States Parties to the Convention be signatories of the 'Cairo Declaration'?' Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, Doc. 14787, 3 January 2019, available at https://www.ecoi.net/en/file/local/1456044/1226_1547028478_document.pdf. See Russell Sandberg, 'The Council of Europe and sharia: an unsatisfactory Resolution' in *Law & Religion UK*, 29 January 2019, http://www.lawandreligionuk.com/2019/01/29/the-council-of-europe-and-sharia-an-unsatisfactory-resolution/.

[10] See Section 9 (A).

[11] Attitudes to *Sharia* being incorporated into national law are more complex, see 'The World's Muslims: Religion, Politics and Society' Pew Research Center, 30 April 2013, available at http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-overview/.

B. Molla Sali v. Greece

Ms Chatitze Molla Sali (MS), a Greek national, lived in the city of Komotini in the administrative region of 'East Macedonia and Thrace', North-Eastern Greece. On the death of her husband, a Greek citizen and a member of the Muslim community of Thrace, MS inherited his entire property estate, which included property in Komotini and in Istanbul. She did so under the terms of a will drawn up by her late husband before a notary in accordance with relevant provisions of the Greek Civil Code. However, the deceased's two sisters contested the will on the grounds that their brother had belonged to the Thrace Muslim community and all matters relating to his estate were therefore subject to Islamic law (*Sharia*) and to the jurisdiction of a Muslim religious official, a mufti, who is also a judge. The Greek Civil Code was not applicable. The sisters' claims were dismissed at first instance.[12] On appeal, in September 2011, the Thrace Court of Appeal held that the decision by the deceased to request a notary to draw up a public will, determining for himself the persons to whom he wished to leave his property and the manner in which this was done, was an expression of his statutory right to have his estate disposed of after his death under the same conditions as other Greek citizens.[13] However, on 7 October 2013, the Court of Cassation (*Areios Pagos*) quashed that judgment on the ground that questions of inheritance within the Muslim minority should be dealt with by the mufti in accordance with the rules of Islamic law. Specifically, it held that the estate in question belonged to the *mulkia* category. This meant it waspublic land which had belonged to the Ottoman administration, full ownership of which had been transferred to private individuals and which had been governed by *Sharia* law during the Ottoman occupation. As a result of this categorisation, the public will in issue was voided of all legal effect.[14] The Court of Cassation remitted the case to a different bench of the Court of Appeal for fresh consideration. On 15 December 2015, the Court of Appeal ruled that the law applicable to the deceased's estate was Sharia and that the public will in question did not produce any legal effects.[15] MS appealed against that judgment on points of

[12] *Molla Sali,* paras 12-13.
[13] ibid paras 14-16.
[14] ibid paras 17-19.
[15] ibid para 20. *Sharia* provides for an Islamic will. On an earlier decision of the Greek Supreme Court to place the *Sharia* of succession above Greek civil law and thereby to annul a will see Alyssa Starr York, 'What Would Zeus Think?: Choosing Between the Freedom to Create a Will and Freedom of Religion' (2016) 8 *The Codicil - Online Companion* 93.

law but the Court of Cassation dismissed the appeal on 6 April 2017.[16] The practical consequence of the domestic proceedings was that MS was deprived of three-quarters of the property bequeathed to her by her husband.[17]

MS made an application to the European Court of Human Rights. Relying on Article 6(1) European Convention on Human Rights 1950 (ECHR) (right to a fair hearing), taken alone and in conjunction with Article 14 (prohibition of discrimination on grounds of religion), she complained of the application to her inheritance dispute of *Sharia* rather than the ordinary law applicable to all Greek citizens, despite the fact that her husband's will was drawn up in accordance with the provisions of the Greek Civil Code.[18] Under Article 1 of Protocol No. 1 ECHR (protection of property), MS contended that, by applying Islamic religious law rather than Greek civil law to her husband's will, the Court of Cassation deprived her of three-quarters of her inheritance. On 6 June 2017, in a reflection of the importance of the case, the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber [GC].[19] On 19 December 2018, the GC unanimously held that there had been a held that a violation of Article 14 ECHR read in conjunction with Article 1 of Protocol 1.

[16] *Molla Sali,* paras 21-29.

[17] As noted, part of the estate of MS's husband was property in Istanbul. The testator's sisters also applied to the Istanbul Civil Court of First Instance for the annulment of the will, in accordance with the principles of private international law enshrined in the Turkish Civil Code. They submitted that the will was contrary to Turkish public policy. As of the date of the ECtHR's judgment in *Molla Sali,* those proceedings were still ongoing. On the application of private international law rules, including EU rules, see Vassiliki Koumpli, 'Managing Religious Law in a Secular State: The Case of the Muslims of Western Thrace' , available at https://www.constitutionalism.gr/managing-religious-law-in-a-secular-state-the-case-of-the-muslims-of-western-thrace-on-the-occasion-of-the-echr-judgment-in-molla-sali-v-greece-2/.

[18] See Adéa Guillot, 'Muslim Woman Tries to Close Thrace's Inheritance Law Loophole' *The Guardian Weekly* (London, 10 April 2015).

[19] See Article 30 ECHR. Three organisations, Christian Concern, the Hellenic League for Human Rights and Greek Helsinki Monitor (GHM), were granted leave to intervene in the written proceedings as third parties. All three supported MS. See Christian Concern, *Molla Sali v. Greece*, Third Party Observations, available at www.christianconcern.com at para 38; *Molla Sali*, paras 114-5; Hellenic League for Human Rights, *Molla Sali v. Greece*, Written Submissions, September 2017, paras 1-13, available at *Molla Sali,* paras 116-8; GHM, Third Party Intervention Written Comments available at https://greekhelsinki.wordpress.com/2017/12/06/1-111/; *Molla Sali,* paras 119-21.

C. The Significance of *Molla Sali v. Greece*

In one sense, the human rights issues presented by the growing numbers of Muslims in European populations are not new. One of them has related to the possibilities for the wider application of *Sharia* and the consistency of such application with the ECHR.[20] The degree of protection that the ECHR affords to Muslims as individual religious believers,[21] as religious communities,[22] and as individuals belonging to minorities, has been raised in a variety of individual cases.[23] However, what makes *Molla Sali v. Greece* of particular interest is its bringing together of a constellation of fundamental human issues. Although the narrow factual issue concerned inheritance rights, the case raised general issues concerning the individual as the central subject of human rights law and the place of *Sharia* in the European legal space of the ECHR. Among the specific issues raised were (i) the relationship between religious and secular law; (ii) the compatibility of *Sharia* with contemporary/ modern human rights standards as reflected in the ECHR; (iii) the relationship between the individual rights in the ECHR and another human rights treaty which, at least arguably, had as one of its objectives, protecting the minority rights of a group as such; (iv) the nature of minority rights in terms of whether they are mandatory or optional/ consensual for the individuals concerned; (v) the relationship between individual and group rights, particularly in the context of laws relating to personal status; (vi) the relationship between religious autonomy and individual equality, and within the latter, gender equality; and (vii) the application and interpretation of ECHR non-discrimination obligations in a religious minority protection context. In January 2019, the then President of the European Court highlighted *Molla Sali* as one of the leading

[20] See Rex Adhar and Nicholas Aroney (eds), *Shari'a in the West* (OUP 2010); Robin Griffith-Jones (ed), *Islam and English Law: Rights, Responsibilities and the Place of Sharia* (CUP 2013) 42; Samia Bano, 'In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the ''*Sharia* Debate'' in Britain' (2008) 10 *Ecclesiastical Law Journal* 283; Lozenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (OUP 2012) 119-34.

[21] For example, on religious dress see Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (CUP 2014); *SAS v. France*, A. 43835/11 (1 July 2014).

[22] On the autonomy of Muslim religious communities see *Serif v. Greece*, A. 38178/97 (14 December 1999) (concerning who had authority, the State or the religious communities, to determine who were to be the *mufti*s in Thrace); *Hasan and Chausch v. Bulgaria*, A. 30985/96 (26 October 2000) (executive interference in the appointment of the Chief *mufti* of the Bulgarian Muslims).

[23] See Dominic McGoldrick, 'The Compatibility of an Islamic/ *Sharia* law System or Sharia rules with the European Convention on Human Rights' in Griffith-Jones (n 20) 42-71.

judgments of 2018 because it had given 'priority to the ordinary law over the religious law, in accordance with the applicant's wishes...'.[24]

3. PERSONAL STATUS LAWS AND INTERNATIONAL HUMAN RIGHTS

As of 2018, there are some 53 countries in the world that formally integrate *Sharia* (sometimes designated as Muslim Family Laws/ MFLs) into their legal systems. Of these 53, 18 are non-Muslim-majority nations.[25] At one end of the spectrum, where constitutional systems are based on *Sharia*, that body of law may apply to everyone irrespective of their religion. However, in many States the application of personal status laws means that different laws apply to different persons. The evolution of those personal status laws (*statut personnel*) is determined by the particular historical, social, religious and political context. Colonial occupation normally has had a major impact.[26] Some States have replaced such systems with universal Civil Codes or laws, but for the rest the resulting pluralistic systems[27] exhibit substantive, institutional and procedural complexity of enormous proportions.[28] In many

[24] 'Opening speech by President Guido Raimondi' Solemn hearing for the opening of the judicial year of the European Court of Human Rights, Strasbourg, 25 January 2019, p. 8, available at https://www.echr.coe.int/Documents/Speech_20190125_Raimondi_JY_ENG.pdf. The reference to the 'applicant's wishes' is presumably to the outcome of the case, rather than the legal basis for it.

[25] Yüksel Sezgin, 'The Greek *Mufti* System in a Global Perspective: Reform in the Triangle of Thrace, Athens and Strasbourg' 8 October 2018, available at https://www.aku.edu/govprogramme/papers/Documents/Sezgin_The%20Greek%20Mufti%20System_FINAL_ENGLISH.pdf.

[26] See Hadas Tagari, 'Personal Family Law Systems A Comparative and International Human Rights Analysis' (2012) 8 *International Journal of Law on Context* 231; Peter Cumper, 'Multiculturalism, Human Rights and the Accommodation of Sharia Law' (2014) 14 *Human Rights Law Review* 31; Andrew Harding, 'Malaysia: Religious Pluralism and the Constitution in a Contested Polity' (2012) 4 *Middle East Law and Governance* 356.

[27] See Javid Gadirov, 'Freedom of Religion and Legal Pluralism' in M.L.P. Loenen and J.E. Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia 2007) 85; Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton Univ Press 2002).

[28] See Tagari (n 26) (considering India, Israel, Morocco and Lebanon); Adam S. Hofri-Winogradow, 'A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State' (2010) 26 *Journal of Law and Religion* 57 (on Israel).

situations the adoption of new personal status laws are politically controversial because their operation is linked to compatibility with religious prescriptions.[29]

Ensuring the consistency of such personal laws with human rights law is an intellectual and interpretative challenge.[30] This has been recognized by the UN human rights treaty bodies, which commonly just emphasize the need for consistency. Thus the approach of the Human Rights Committee under the International Covenant on Civil and Political Rights (1966) (ICCPR) is to observe that States should give full effect to the Covenant in its domestic legal order and ensure that domestic laws, including those based on *Sharia*, are interpreted and applied, including by religious courts and authorities, in conformity with its obligations under the Covenant.[31] For example, in 2017 the Committee recommended that Jordan should consider adopting a unified personal status act that would apply to all citizens and residents of Jordan regardless of religious affiliation.[32]

A significant number of States have made general reservations to the ICCPR and the Convention on the Elimination of Discrimination Against Women (1979) (CEDAW) with reference to preserving the application, in case of any incompatibilities, of *Sharia*.[33] It is a commonplace that personal status laws significantly affect the treatment of women. Many of the reservations to CEDAW have been directed to preserving the application of personal status laws.[34] Over 30 States have entered reservations to Article 16 CEDAW which concerns marriage and family life. For example, Israel has entered a reservation to Article 16 to protect

[29] Recent examples concern Iraq, UN Docs CCPR/C/IRQ/CO/5, paras 13-14 (2015), CEDAW/C/IRQ/CO/4-6, paras 17-18 (2014) and Afghanistan, CCPR/C/AFG/Q/, paras 7, 26 (2012), CEDAW/C/AFG/CO/1-2, paras 42-3 (2013).

[30] See Helen Quane, 'Legal Pluralism and International Human Rights Law: Inherently Compatible, Mutually Reinforcing or Something in Between?' (2013) 33 *Oxford Journal of Legal Studies* 688.

[31] See Quane, ibid, 695-700. See also HRC, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', General Comment 34, pr. 4, UN Doc. CCPR/C/21/Rev.1/Add. 13.

[32] UN Doc. CCPR/C/JOR/CO/5, paras 4-5 (Jordan). See also 'Protection of the Family, the Right to Marriage and Equality of the Spouses' Human Rights Committee, General Comment 19 on Article 23 (1990), UN Doc. HRI/GEN/1/Rev.9 (Vol. I) 207.

[33] See Siobhan Mullally, 'The UN, Minority Rights and Gender Equality: Setting Limits to Collective Claims' (2007) 14 *International Journal of Minority and Group Rights* 263.

[34] See Linda M. Keller, The Impact of States Parties' Reservations to the Convention On The Elimination Of All Forms Of Discrimination Against Women' (2014) *Michigan State Law Review* 309; Jane Connors, 'Article 28' in M.A. Freeman, C. Chinkin and B. Rudolf (eds), *The UN Convention On The Elimination Of All Forms Of Discrimination Against Women: A Commentary* 591 (OUP 2012).

the application of laws on personal status that are binding on religious communities.[35] India has made an interpretative declaration that, with regard to Articles 5 (a) and 16 (1), 'it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.'[36]

CEDAW Committee has taken an increasingly universalistic stance when assessing personal status laws.[37] In its General Recommendation 29 (2013) on the 'Economic consequences of marriage, family relations and their dissolution', it noted that with respect to 'Multiple family law systems' individuals in some States have no choice as to the application of identity-based personal status laws.[38] It recalled that it had 'consistently expressed concern that identity-based personal status laws and customs perpetuate discrimination against women and that the preservation of multiple legal systems is in itself discriminatory against women. The lack of individual choice relating to the application or observance of particular laws and customs exacerbates this discrimination.'[39] Its recommendation was that:

> States parties should adopt written family codes or personal status laws that provide for equality between spouses or partners irrespective of their religious or ethnic identity or community, in accordance with the Convention and the Committee's general recommendations. In the absence of a unified family law, the system of personal status laws **should provide for individual choice** as to the application of religious law, ethnic custom or civil law at any stage of the relationship. Personal laws should embody the fundamental principle of equality between women and men and should be fully harmonized with the provisions of the Convention so

[35] See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en. See Tagari (n 26).
[36] ibid. See Farrah Ahmed, 'Personal Autonomy and the Option of Religious Law' (2010) 24 *International Journal of Law, Policy and the Family* 222 (on the Indian system of personal laws). Interestingly, in 2010. Malaysia withdrew its reservation to Article 5(a) which had subjected its application to *Sharia* on division on inherited property. In 2014, Tunisia withdrew a series of reservations to CEDAW on the basis of improvements in personal status laws.
[37] See Tagari (n 26).
[38] UN Doc. CEDAW/C/GC/29, para 12 (26 February 2013).
[39] ibid para 13.

> as to eliminate all discrimination against women in all matters relating to marriage and family relations.[40]

It is notable that the CEDAW Committee appeared to accept that a system under which individuals can opt for the application of religious law is consistent with the CEDAW. In its General Recommendation 33 on women's access to justice, the same committee recommended that States parties should ensure that, 'in settings in which there is no unified family code and multiple family law systems exist, such as civil, indigenous, religious and customary law systems, personal status laws provide for individual choice as to the applicable family law at any stage of the relationship. State courts should review decisions of all other bodies in this regard.'[41] The Human Rights Committee has suggested that States should repeal all discriminatory provisions against women in its legislation and consider adopting a unified personal status act that would apply to all persons regardless of religious affiliation.[42]

4. MUSLIMS IN GREECE: HISTORICAL, LEGAL AND SOCIAL CONTEXTS

The current situation and legal status of Muslims in Western Thrace can only be appreciated by reference to the full historical, legal and social contexts.

A. Muslims in Western Thrace

Thrace is a geographical and historical area in southeast Europe.[43] Its historical boundaries have varied. After the Roman conquest, Western Thrace belonged to the Roman province of Thrace founded in 46 AD and it remained part of the Byzantine (Eastern Roman) Empire. In 1352, the Ottoman Turks conducted their first incursion into the region. They proceeded to occupy it for nearly five centuries. Throughout the Balkan Wars and the First World War, Bulgaria, Greece and Turkey each forced respective minority populations in

[40] ibid para 15 (emphasis added).
[41] UN Doc. CEDAW/C/GC/33, para 46 (3 August 2015).
[42] UN Doc. CCPR/C/LBN/CO/3, para 16 (Lebanon) (5 April 2018).
[43] See Alexander Fol, 'Policy and Culture in Ancient Thrace' (1986) 13 *Southeastern Europe* 25. In antiquity, Thrace was also referred to as *Europe*. Arguably the most famous Thracian historical figure was Spartacus c. 111–71 BC, a gladiator, who led a major slave uprising against the Roman Republic.

the Thrace region out of areas they controlled. The Treaty of Neuilly sur-Seine 1919,[44] required Bulgaria, one of the Central Powers defeated in the First World War, to cede various territories, including Western Thrace. This territory was ceded to the *Entente powers*,[45] who, in turn, awarded it to Greece in 1920.[46] Today, Western Thrace covers an area of over 8,500 square kilometres. It has three administrative districts, Xanthi, Rhodope and Evros.

By Πακκο File:Thrace modern state boundaries.png, CC BY-SA 3.0, https://commons.wikimedia.org/w/index.php?curid=7567013

In the early period after the Lausanne Treaty the Muslims in Western Thrace adhered to a fairly conservative Islamic tradition.[47]Thereafter, there was a split between modernists,

[44] Treaty between the Principal Allied and Associated Powers and Bulgaria and Protocol, Article 48, (1920) 14(3) *AJIL*, Supplement: Official Documents, 185-188.
[45] The Allies of the First World War, or Entente Powers, were the countries that opposed the Central Powers in the First World War.
[46] This was agreed at the San Remo conference of the prime ministers of the main allies of the Entente Powers (the US was a neutral observer).
[47] Mustafa Sabri the last Şeyhülislam, the highest religious authority of the Ottoman Empire and the head of the 150s (the Ottoman elites who opposed the established of Turkey), found refuge in Western Thrace for almost a decade.

supported by Turkey, and conservatives, favoured rather than supported by Greece.[48] Today, some 90% of Muslims in Western Thrace are Sunni Muslims, as are the substantial majority of Muslims in Turkey. The latter point is important because it partly explains the strong continuing interest of Turkey of the treatment of Muslims in Thrace.

B. Identity

Modern understandings of the complexities of identity tend to stress the blurred nature of its boundaries and the problematic nature of rigid categories and definitions.[49] That is certainly the case for any historical and legal analysis of Muslims in Western Thrace.[50] There is a long history of Muslim communities in Greece. From 1453, Greece was part of the Ottoman Empire until the revolution against it began in 1821.[51] The war of independence led to the creation of the modern State of Greece in 1830. Although united by a common religious belief, the Muslims in Greece had a multicultural character in terms of using multiple languages and possessing a range of ethnic identities. Therefore, at its inception the new State of Greece contained a significant number of Muslims. The number isestimated at between 63,000 and 90,000 (9-11% of the population).[52] Up to the end of the First World War the numbers of Muslims grew via a series of territorial expansions.[53] It has been suggested that many Muslims within the Ottoman Empire considered themselves as belonging to a religious community rather than any particular nation.[54] However, the creation of new borders[55] and an

[48] See Ali Huseyinoglu, 'Impacts of Transition from an Official Greek Viewpoint: The Case of the Turkish Minority in Western Thrace (1923-1933) (2012) 39 *METU Studies in Development* 87. Tsaoussi and Zervogianni, (n 252), have suggested that the family lifestyles and attitudes of Muslims in Western Thrace are similar to those of Christian Orthodox families in Greece, at 225-6.
[49] See Jill Marshall, *Human Rights Law and Personal Identity* (Routledge 2014).
[50] See Benjamin C Fortna, 'The Ottoman Empire and After' in Benjamin C. Fortna, Stefanos Katsikas, Dimitris Kamouzis, Paraskevas Konortas (eds), *State-Nationalisms in the Ottoman Empire, Greece and Turkey – Orthodox and Muslims, 1830-1945* (Routledge 2013) 2-12.
[51] See U. Özsu, 'Ottoman Empire' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012), 429-448.
[52] Stefanos Katsikas, 'Millet Legacies in a National Environment' in Fortna et al (n 50) 47-70.
[53] See Stefanos Katsikas, 'Muslim Minority in Greek Historiography: A Distorted Story?' (2012) 42 *European History Quarterly* 444.
[54] See generally, Berdal Aral, 'The Idea of Human Rights as Perceived in the Ottoman Empire' (2004) 26 *Human Rights Quarterly* 454.
[55] See Olga Demetriou, *Capricious Borders: Minority, Population and Counter-Conduct between Greece and Turkey* (Berghahn 2013).

enlarged nation State necessarily rendered to them multiple new legal and social identities.[56] They were at once either potential Greek citizens (or at least permanent residents) and an actual physical national minority.[57]

Using religion as the defining criteria of identity, rather than ethnicity, race or language, reflected the Ottoman *millet* system of the Ottoman Empire. Under this, religious communities were granted special status.[58] It potentially provided a limited degree of protection against Greece's assimilation policies. However, in terms of legal pluralism, permitting *Sharia* to apply within a 'western' legal order, not to new immigrants but only to a select group of citizens of the State, is certainly peculiar.[59]

C. International Protection

International instruments for the protection of the Muslim communities of Greece date back to the Convention of Constantinople between Greece and the Ottoman Empire (1881).[60] This treaty obliged Greece to respect the lives, honour, properties, religious and cultural autonomy of Muslims and to recognise the validity of the Ottoman *Sharia* by allowing the functioning of Islamic religious courts in the region.[61] Similar provisions appeared in the Treaty of

[56] On Greek conceptions of human rights see Adamatia Pollis, 'The State, the Law, and Human Rights in Modern Greece' (1987) 9 *Human Rights Quarterly* 587.
[57] See Konstantinos Tsitselikis, 'The Legal Status of Islam in Greece' (2004) 44(3) *Die Welt des Islams* 130.
[58] 'The legal regulation of Muslims' personal status according to the shari´a in Thrace transforms the old fashion millet into an enclave of post-modern religious society, creating in effect a "neo-millet", in which Greek civil law has a secondary force.', Tsitselikis, ibid.
[59] See Konstantinos Tsitselikis, 'Applying Shari'a in Europe: Greece as an ambivalent legal paradigm' in Jorgen Nielsen et al, (eds), (2010) 2 *Yearbook of Muslims in Europe* 663; Malcolm Voyce and Adam Possami, 'Legal Pluralism, Family Personal Laws, and the Rejection of Shari'a in Australia: A Case of Multiple or "Clashing" Modernities?' (2011) 7 *Democracy and Security* 338; Bryan S Turner and Berna Zengin Arslan, 'Legal Pluralism and the Shari'a: A Comparison of Greece and Turkey' (2014) 62 *The Sociological Review* 439.
[60] For the text in French with a brief introduction in English see https://web.archive.org/web/20081120210837/http://www.mfa.gr/NR/rdonlyres/E6B34D2A-C9B3-4530-8691-8DC378A4B832/0/1881_constantinople_convention.doc; Nicole Immig, 'The "New" Muslim Minorities in Greece: Between Emigration and Political Participation, 1881-1886' (2009) 29 *Journal of Muslim Minority Affairs* 511.
[61] ibid, Articles III and VIII.

Constantinople (1897),[62] the Convention of Athens (1913),[63] and the unratifiedTreaty of Sèvres (1920).[64] The Treaty of Sèvres was one of the major peace treaties marking the end of the First World War.[65] Article 14(1) provides:

> Greece agrees to take all necessary measures in relation to Moslems to enable questions of family law and personal status to be regulated in accordance with Moslem usage.

Although signed by representatives of the Ottoman Empire, the treaty was unacceptable to the Turkish National Movement under General Mustafa Kemal (known as Ataturk). A Greco-Turkish War raged from 1919-22. The Treaty of Sèvres was renegotiated. It was effectively replaced by the 1923 Treaty of Lausanne.[66] This was in a sense the final treaty concluding the First World War. It recognized the Nationalist government in Turkey in return for demilitarization of the Turkish Straits, led to international recognition of the sovereignty of the Republic of Turkey as the successor State to the defunct Ottoman Empire, and returned

[62] A Treaty between the Ottoman Empire and the Kingdom of Greece, text available at https://archive.org/stream/jstor-25751113/25751113_djvu.txt. It followed the Greco-Ottoman Empire War of 1897 and mainly concerned the status of Crete.

[63] A Treaty of Peace between the Ottoman Empire and the Kingdom of Greece, See (1914) 8(1) *AJIL*, Supplement, Official Documents, pp. 46-55. Article 11 provided, inter alia, that 'The *mufti*s, in addition to their authority over purely religious affairs and their supervision of the administration of vakouf property, shall exercise jurisdiction between Mussulmans in matters of marriage, divorce, alimony (*nefaca*), guardianship, trusteeship, emancipation of minors, wills of Ottomans, and succession to the office of Mutevelli (*tevliet*).'

[64] See Treaty of Peace between the Allied Powers and Turkey, signed at Sèvres, 10 August 1920, (1921) *AJIL*, Sup. Official Documents, 179; Command Paper 964 (LI) 1920. It was signed on August 1920. Its Article 86 provided that, 'Greece accepts and agrees to embody in a separate Treaty such provisions as may be deemed necessary, particularly as regards Adrianople, to protect the interests of inhabitants of that State who differ from the majority of the population in race, language or religion.' The separate Treaty was 'The Treaty concerning the Protection of Minorities in Greece', (10 August 1920), 28 LNTS 243 (1928). See A. E. Montgomery, 'The Making of the Treaty of Sèvres of 10 August 1920' (1972) 15 *The Historical Journal* 775.

[65] See Lawrence Martin, *The Treaties of Peace 1919-1923*, Vol. II (Carnegie Endowment for International Peace 1924).

[66] Treaty of Peace with Turkey, signed at Lausanne, 24 July 1923, by The British Empire, France, Italy, Japan, Greece, Romania and the Serb-Croat-Slovene State on the one part and Turkey on the other, 28 LNTS (1924) 11; 'Treaty of Peace with Turkey and Other Instruments' UK Treaty Series 16, (1923) Cmd. 1929, available at http://treaties.fco.gov.uk/docs/pdf/1923/ts0016-1.pdf. The official text was in French. It entered into force on 6 August 1924. See Erik Goldstein, 'The British Official Mind and the Lausanne Conference, 1922-23' (2003) 14 *Diplomacy and Statecraft* 185; Phillip Marshall Brown, 'From Sèvres to Lausanne' (1923) 18 *American Journal of International Law* 113; Edgar Turlington, 'Settlement of Lausanne' (1924) 18 *American Journal of International Law* 696.

Eastern Thrace to Turkey. Crucially, Greece and Turkey also renounced claims on the other's territory.

5. THE 'MOSLEM INHABITANTS OF WESTERN THRACE'

A. Population Transfers

As we shall see, the 'Moslem inhabitants of Western Thrace' were not included in a compulsory populations exchange. The disintegration of the Ottoman Empire caused a series of mass displacements, sometimes voluntary but more often not, and usually accompanied by violence and intimidation.[67] The 'Convention Concerning the Exchange of Greek and Turkish Populations' (Convention VI) – part of the 1923 Peace Treaty of Lausanne - was signed by the governments of Greece and Turkey on 30 January 1923.[68] It provided for the first legally compulsory large-scale exchange of populations.[69] The exchange involved approximately 2 million people (around 1.3-1.5 million Greeks from Asia Minor, Eastern Thrace, the Pontic Alps and the Caucasus, and 400,000-500,000 Muslims in Greece). Most of them were forcibly made refugees and *de jure* denaturalized from their homelands.[70] Though there had been prior examples of expulsions and resettlements, the 1923 Treaty gave legal form to a radical departure in legal practice. It was also dressed with some of the formal clothing of international legitimacy. The exchange was proposed and supervised by Fridtjof Nansen, the

[67] See Eugene Rogan, *The Fall of the Ottomans: The Great War in the Middle East* (Basic Books 2015).

[68] Under Article 142 of the Treaty of Lausanne, 'The separate Convention concluded on the 30th January, 1923, between Greece and Turkey, relating to the exchange of the Greek and Turkish populations, will have as between these two High Contracting Parties the same force and effect as if it formed part of the present Treaty.'

[69] See Stephan P Ladas, *The Exchange of Minorities, Bulgaria, Greece and Turkey* (Macmillan 1932), 335-588, who notes that the Treaty chiefly served to register and confirm the established fact of the large-scale removal of Greeks from Turkey; Renée Hirschon (ed), *Crossing the Aegean: An Appraisal of the 1923 Compulsory Population Exchange Between Greece and Turkey* (Berghahn Books 2003).

[70] A legal oddity is that although they are commonly referred to as 'refugees', provision was made for them acquiring the nationality of their destination country, see Article 7 of Convention IV.

first League of Nations High Commissioner for Refugees.[71] Humanitarian organisations assisted and supervised the transfer process. A Mixed Commission for the Exchange of Greek and Turkish Populations supervised implementation from 1922 until 1934. It was composed of four members, representing each of the High Contracting Parties, and three neutral members chosen by the League of Nations. There was also provision for the Permanent International Court of Justice to provide advisory opinions to the Council of the League of Nations on the interpretation of Convention VI.[72] All this *imprimatur* was provided by the League of Nations even though Turkey did not join it until 1932.

Both the Greek and Turkish governments were of the view that minority treaties or minority protection provisions in a peace treaty would not suffice to ameliorate ethnic tensions after the First World War and would not be sufficient to ensure order.[73] Compulsory population exchange provided a technocratic and managerial solution that addressed economic instability and contributed to regional security. They even managed to convince themselves that, in some respects, it represented a humanitarian solution. Turkey closely associated the idea of mandated territories with colonialism and the history of foreign interventions to which the Ottoman Empire had been subjected.[74] Any idea of protecting kin-States carried echoes of the Capitulations regime, which accorded privileges and immunities for foreigners.[75] Turkey strongly asserted its position that, as a new State, it should be treated on the basis of equality and respect for its sovereignty. Thus, both Greece and Turkey were committed to ethno-nationalism as the basis for nation building.[76] The population exchanges were viewed as part of the range of measures necessary to make space for respective Greek and Muslim populations who had been expelled, to cement national statehood in Greece and in the new Republic of Turkey, and to enhance economic stability and peace in an area of

[71] It has been observed that 'all the participants in the Lausanne Conference favoured his suggestion on different grounds' but that none of the negotiators wanted to take responsibility for the idea, see Giorgos Kritikos, 'Motives For Compulsory Population Exchange In The Aftermath Of The Greek-Turkish War (1922-1923)' *ΔΕΛΤΙΟ ΚΜΣ*, 13 (1999–2000) 209, available at https://ejournals.epublishing.ekt.gr/index.php/deltiokms/article/viewFile/2528/2293.pdf.
[72] It did so in the *Exchange Case*, (n 84).
[73] See Umut Özsu, 'Fabricating Fidelity: Nation-Building, International Law, and the Greek-Turkish Population Exchange' (2011) 24 *Leiden Journal of International Law* 823.
[74] See Susan Pederson, *The Guardians – The League of Nations and the Collapse of Empire* (OUP 2015) 17-44.
[75] See James B. Angell, 'The Turkish Capitulations' (1901) 6 *The American Historical Review* 254. The Capitulations in Turkey were abolished by Article 28 of the 1923 Peace Treaty.
[76] See Fortna et al, (n 50).

imperial friction.[77] The population exchange was supported by the Great Powers which regarded the Near East as peripheral but also unstable. Compulsory population exchanges were thus promoted as the only viable option.[78] In modern day terms, the compulsory exchange of populations was undoubtedly an experiment in 'ethnic cleansing'.[79] However, at the time of its adoption there was no fundamental legal challenge to the international legality of the compulsory population transfer.[80] The principle of self-determination was only in its infancy.[81] Only after 1948 did international treaties seek to prohibit population transfers in particular contexts.[82]

B. Exemptions from the Population Exchange Treaty

Given the considerations for compulsory population exchange, it is interesting that the Muslim and Greek populations were exempted from the process. Under Article 2 of the Treaty of Lausanne, the 'Moslem inhabitants of Western Thrace' were not to be included in the compulsory population exchange and 'All Moslems established in the region to the east of the frontier line laid down by the Treaty of Bucharest'[83] were to be 'considered as Moslem inhabitants of Western Thrace'. Their numbers were estimated at some 110,000. A 1919-20 census recorded the Muslim population as 73,220 Turks, 11,379 Pomaks and 1834 Gypsies (Roma). Also exempted were the 'Greek inhabitants of Constantinople' (Istanbul) who were

[77] See Umut Özsu, *Formalizing Displacement: International Law and Population Transfers* (OUP 2015). Passage through the Turkish Straights was also a critical part of the security and stability arrangements.
[78] See Bruce Clark, *Twice a Stranger: The Mass Expulsions That Forged Modern Greece and Turkey* (Harvard University Press 2006).
[79] Émile Ouédraogo, 'Le "nettoyage ethnique" en droit international' (2017) 54 *Canadian Yearbook of International Law* 188.
[80] See Alfred De Zayas, 'International Law and Mass Population Transfers' (1975) 16 *Harvard International Law Journal* 207.
[81] An analysis of the Lausanne Treaty from the standpoint of self-determination is provided in Catriona J Drew, 'Population Transfer: The Untold Story of the International Law of Self-Determination' (PhD dissertation, University of London 2005), 93–110.
[82] See Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Art 2; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Arts 49, 147. See generally Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Nijhoff 1995).
[83] The Treaty of Bucharest, signed on 10 August 1913, ended the Second Balkan War (1913), in which Bulgaria was defeated by the combined forces of Serbia, Greece, and Romania. It provided for a series of territorial adjustments.

'established'[84] in the city before 30 October 1918'[85] and the Aegean Islands of Imbros (Gökçeada) and Tenedos (Bozcaada).[86] Turkey would have preferred to there to be no exemptions. It sought to have a plebiscite in Western Thrace but this was refused. The major powers considered that the contribution of the Greek Orthodox community in Constantinople to commerce and industry was crucial and their exchange would have been detrimental to the domestic economy.[87] Another factor was concern regarding Greece's ability to absorb a substantial additional number of refugees (the Greek population of Istanbul was estimated at 110,000).[88] The Muslim community in Western Thrace thus represented a counter-balance to the Greek community remaining in Istanbul.

Whatever the motives or explanations, there is no doubt that the exemptions in the Lausanne Treaty represented a limited form of minority protection.[89] Indeed, Part 1, Section 3, of the Lausanne Treaty (Articles 37-45) explicitly concerned the 'Protection of Minorities'. It reflected the substance of the general minority treaties of the League of Nations but was limited to religious rather than ethnic minorities. It contained a number of provisions relating, *inter alia*, to the protection of life and liberty, the free exercise, whether in public or private, of any creed, religion or belief, freedom of movement and of emigration, the same treatment

[84] The Permanent International Court of Justice delivered an Advisory Opinion on the meaning of 'established' in Article 2. See PCIJ, Advisory Opinion 10, *Exchange of Greek and Turkish Populations* (21 February 1925), discussed in Özsu (n 77) 99-120. Both Greece and Turkey complied with the Permanent Court's Opinion and eventually resolved outstanding compensatory questions through treaty, see Convention regarding the Final Settlement of the Questions resulting from the Application of the Treaty of Lausanne and of the Agreement of Athens relating to the Exchange of Populations, signed at Ankara, 10 June 1930, 108 LNTS 233.

[85] Constantinople (Istanbul) was regarded by Greeks living there as a sophisticated, multicultural, highly cultured city with extensive economic opportunities. For these reasons, it was much preferred over Athens. See Dimitris Kamouzis, 'A Minority in State of Flux: Greek Self-Administration and Education in post-Lausanne Istanbul (CA.1923-30)' in Fortna et al (n 50) 101-31.

[86] The two islands were to remain under Turkish sovereignty but with a 'special administrative organisation'. See the report by Mr Andreas Gross (Switzerland, SOC), 'Gökçeada (Imbros) and Bozcaada (Tenedos): preserving the bicultural character of the two Turkish islands as a model for co-operation between Turkey and Greece in the interest of the people concerned', PACE, Doc. 11629, 6 June 2008.

[87] See Sule Chousein, *Minority Rights in Europe and the Muslim Turkish Minority of Greece* (Lambert 2006) 84.

[88] ibid.

[89] See Iris Boussiakou, 'Religious Freedom and Minority Rights in Greece: the case of the Muslim minority in western Thrace' (London, Hellenic Observatory, LSE, 2008); Fatih Alev, 'Islamic law in Western Thrace An anachronism or a requisite solution?' available at http://alev.dk/wp-content/uploads/2010/08/Islamic-law-in-Western-Thrace-Fatih-Alev.pdf.

and security in law and in fact to freedom of religion, non-discrimination on grounds of religion, the establishment, management and control at their own expense of any charitable, religious and social institutions, any schools and other establishments for instruction and education, with the right to use their own language and to exercise their own religion freely therein. Article 42 provided, in part, that 'The Turkish Government undertakes to take, as regards non-Moslem minorities, in so far as concerns their family law or personal status, measures permitting the settlement of these questions in accordance with the customs of those minorities.' Finally, Article 45 provided that 'The rights conferred by the provisions of the present Section on the non-Moslem minorities of Turkey will be similarly conferred by Greece on the Moslem minority in her territory.'

Both Greece and Turkey read 'similarly conferred' as a reciprocity provision, to be used as a means of putting pressure on each other and in a negative, retaliatory manner.[90] On that basis they each responded to measures (or perceived measures) against their respective minorities by taking repressive measures against the minority in their State.[91] They also sought to condition the availability of rights on the basis of reciprocal availability.[92] In a number of cases the European Court of Human Rights declined to consider *in abstracto* whether the application of the principle of reciprocity in Turkish law is compatible with the European Convention, but held that in any event its application did not meet the requirement of legality because the application of the relevant substantive law could not be regarded as sufficiently foreseeable.[93] The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe has observed that the recurrent invocation by Greece and Turkey of the principle of reciprocity as a basis for refusing to implement the

[90] See Oran (n 142); *Greece- Status of Minorities*, US Library of Congress (October, 2012).
[91] Chousein (n 87) 69-163; Baskin Oran, 'The Story of Those Who Stayed: Lessons From Articles 1 and 2 of the 1923 Convention' in Hirschon (n 69) 97-115; Willy Faure, *Report on Ethnic Turks in Greece, a Muslim Minority* (Human Rights Without Frontiers (2012), available at https://hrwf.eu/wp-content/uploads/2014/11/Ethnic-Turks-in-Greece-a-Muslim-Minority.pdf.
[92] See Ali Dayıoğlu and İlksoy Aslım, 'Reciprocity Problem between Greece and Turkey: The Case of Muslim-Turkish and Greek Minorities' (2015) 1 *Athens Journal of History* 37. The Greek–Turkish Cultural Protocol (1968) emphacised the principle of reciprocity
[93] See *Apostolidi and Others v. Turkey*, A. 45628/99 (27 March 2007); *Nacaryan et Deryan v. Turkey*, A. 19558/02 and 27904/02 (8 January 2008); *Fokas v. Turkey*, A. 31206/02 (29 September 2009). Interestingly, in the latter case the Greek government argued that 'the principle of reciprocity did not apply in matters of protection of human rights', at para 30. The long established jurisprudence of the Court is that the ECHR creates objective requirements with a collective guarantee that goes beyond bilateral synallagmatic commitments.

rights secured to the minorities concerned by the Treaty of Lausanne was 'anachronistic' and could jeopardise each country's national cohesion.[94]

It is generally accepted that, because of the fundamental change of circumstances, the regime of Minorities Treaties did not survive the demise of the League of Nations.[95] The one exception is the Treaty of Lausanne which is considered by both Greece and Turkey to have survived. One possible legal explanation for its continuing validity is that the Treaty was not imposed as a 'condition of recognition'.[96] The relationship between the Treaty of Lausanne and later human rights treaties such as the ECHR (1950) and the ICCPR (1966) is a more difficult issue.

C. The Legal and Human Rights Status of the Muslim Population in Western Thrace

The current Muslim population in Western Thrace is estimated at some 120,000. Thus, they constitute an estimated third of the entire population of Western Thrace, some 370,000. The legal status of the Muslim population is contested. Most Thracian Muslims are of Turkish ancestry and speak Turkish. However, it has been observed that '[t]he terms "Muslims of Turkish origin" and "Turkish-speaking Muslims" which are often given to the majority ethnic group of the Muslim minority, are problematic'.[97] The reality is more complex. The Muslim population? remains composed of three major but different groups, namely Turks, Pomaks and Gypsies (Roma).[98] Within the Greek legal and political system, it is officially known as the 'Muslim Minority of Greece'. Greece views the Muslims in Western Thrace as comprising three or more distinct communities and has arguably pursued a strategy of divide and rule in relation to them. Its view is that the Treaty of Lausanne, which established the status of the minority in Thrace, refers to it as being a religious minority, the Muslim faith being the common denominator of its components. It has been suggested that it was in the interests of the Greek government to maintain *Sharia* for the Turkish-speaking minority because it emphasized their religious identity more than their ethnic and linguistic [Turkish]

[94] *Freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (Eastern Greece)*, Doc 11860, 21 April 2009.
[95] This was the conclusion of the 'Study of the Legal Validity of the Undertakings Concerning Minorities' UN Doc. E/CN.4.367, paras 56-7 (UN Secretariat, 1950), available at http://repository.un.org/handle/11176/259698. See Stavros (n 132).
[96] Chousein (n 87) 86.
[97] See Katsikas (n 53) 450.
[98] See István Pogány, 'Minority Rights and the Roma of Central and Eastern Europe' (2006) 6 *Human Rights Law Review* 1.

identity'.[99] Greece does not consider it acceptable to attempt to establish a single ethnic identity for the entire Muslim minority in Thrace, so as to subsume Pomak and Roma persons under a Turkish identity.[100] Thus, the 'Muslims of Western Thrace' is the only minority that Greece recognises. Its official position is that the territorial scope of the provisions of the Lausanne Treaty is limited to the Muslim minority that resides in Western Thrace.[101] Greece does not recognize the minority status of other communities, including Muslims outside of Western Thrace.[102] Greece considers that the claims of the existence of other minorities are unsubstantiated and politically motivated.[103] By contrast, the ethnic Turks in Western Thrace who have been living within the borders of the Ottoman Empire since at least the 14th century reject being defined only as a religious minority. Rather they identify themselves as 'Turkish' or 'Muslim Turkish'.

One reason that Greece supports the Muslim minority in Western Thrace as a religious community, but not as a national minority, relates to the concern that they could potentially raise secessionist claims and threaten the territorial integrity of Greece.[104] The general issue is very politically sensitive,[105] as is the specific language used.[106] From the 1920s until the early 1970s, the official Greek discourse used the terms 'Muslim minority' or 'Turkish minority' in Western Thrace interchangeably. The Greek authorities then changed their policy. They banned the use of 'Turkish minority' and referred to a Muslim minority

[99] Yuksel Sezgin, as cited in Nikolia Apostolou, 'Hatice Molla Sali Inheritance under Sharia Law at Risk' *The Washington Times*, 19 December 2018.
[100] UN Doc. CCPR/CO/83/GRC, para 190 (25 April 2005).
[101] See *Greece - Status of Minorities*, at 43-44, Library of Congress (October, 2012). The Supreme Court of Greece has held that the Treaty of Lausanne applies to the entire territory of Greece, except the area of the Dodecanese Islands, which falls under the Peace Treaty of Paris of 1947.
[102] See Konstantinos Tsitselikis, *Old and New Islam in Greece: From Historical Minorities to Immigrant Newcomers* (Brill 2012).
[103] See Report of the UN independent expert on minority issues, Gay McDougall, Mission to Greece, (8-16 September 2008), UN Doc. A/HRC/10/11/Add.3.
[104] Stefanos Katsikas, 'Hostage Minority The Muslims of Greece (1923-41)' in Fortna et al (n 50) 152-75 at 162. On understanding religious claims as ultimately being political claims with ramifications for understandings of Statehood see Jean-Francois Gaudreault-DesBiens, 'Religious Courts, Personal Federalism, and Legal Transplants' in Adhar and Aroney (n 20) 159-80.
[105] There were independent minority candidates for the first time in the 1985 national elections. In 1990, two were elected to the Greek Parliament.
[106] See Dimitri Christopoulos, 'Misleading perceptions on Minority Rights in Greece' in Sai Felicia Krishna-Hensel (ed), *The New Millennium: Challenges and Strategies for a Globalizing World* (Ashgate 2000) 149-172.

composed of three different subsets, that is, those of Turkish origin, Pomaks and Romaiv.[107] Although Greece's official practices have varied over time, since the 1970s in particular, it has rejected any designation of Muslims in Western Thrace as a 'Turkish minority'. For example, its refusal to register three long established associations with the term 'Turkish' or 'Minority' in their title has led to three findings of violations of freedom of association (Article 11 ECHR) by the European Court of Human Rights.[108] In the *Xanthi* and *Emin* cases the European Court did not accept the Greek government's argument that use of the term constituted a threat to public order and democratic society, even supposing the association in question sought to promote the idea that there was an ethnic minority in Greece.[109] In *Ahmet Sadik v. Greece*,[110] a politician had been prosecuted, convicted and sentenced to prison and a fine, for publicly designating the minority in Western Thrace as 'Turkish'. This was considered to be inflammatory, provoking discord and violence between the religious communities. A majority of the European Court held the application inadmissible because the alleged violation of Article 10 ECHR had not specifically been raised in the domestic proceedings.[111] The UN CERD Committee has also been concerned about obstacles encountered by some ethnic groups in exercising their freedom of association. The Committee has noted information on the forced dissolution and refusal to register some associations, including those whose name included words such as 'minority', 'Turkish or 'Macedonian' and recommended that Greece adopt measures to ensure the effective enjoyment by all persons of their right to freedom of association and their cultural rights,

[107] Tsitselikis (n 159) 46.
[108] *Tourkiki Enosi Xanthis v. Greece*, A 26698/05 (Xanthi Turkish Union), A 34144/05 (Cultural Association of Turkish Women of Rodopi)), *Bekir-Ousta and others v. Greece*, A 35151/05 (Evros Minority Youth Association). Greece has provided some evidence to the Committee of Ministers that the case law is evolving and that the words 'Muslim minority' or 'minority' appear in the title of many associations that have been registered. See Ministers deputies, 1280th meeting, 7-10 March 2017 (DH), H46-13 *Bekir-Ousta and others group v. Greece*, A. 35151/05, Supervision of the execution of the European Court's judgments, available at https://rm.coe.int/16806dda24. Interestingly, Greece has permitted the registration of associations with 'Pomak' in their title.
[109] Cf *Gorzelik v Poland*, A. 44158/98, where the Court accepted the State's refusal to register the association was designed to counteract a particular, albeit only potential, abuse by the association of its status. See Eric Metcalfe, 'Gorzelik v Poland: Free Association and Minority Rights' (2004) *European Human Rights Law Review* 314.
[110] A. 18877/91 (15 November 1996).
[111] Judges Marten and Foighel dissented. They would also have found a violation on the merits.

including the use of mother languages.[112] The UN Human Rights Committee (HRC) has expressed similar concerns to those of the CERD Committee.[113]

It is notable that Greece and Turkey are not parties to the Council of Europe's Framework Convention on the Protection of National Minorities (1993).[114] Similarly, Greece and Turkey are not parties to the European Charter for Regional and Minority Languages (1992).[115] However, both Greece (since 1997) and Turkey (since 2003) are parties to the International Covenant on Civil and Political Rights (1966).[116] Particularly important in this context is its Article 27 which provides that, 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.[117] The Muslim minority in Western Thrace is obviously a religious minority both within Greece, and within Western Thrace,[118] and is recognised by Greece as such, but only as such. However, within that minority are three groups which, in terms of the categories in Article 27 ICCPR, have different ethnic, cultural and linguistic backgrounds: the Turkophones/of Turkish origin/ Turks/ethnic Turks/minority Turks; the Pomaks, and the the Roma/Athinganoi/ Gypsies/ Katsiveli. Greece does not recognize any of these groups as ethnic minorities.

It is notable that Greece made no reservation to Article 27 ICCPR.[119] In its Initial Report to the HRC in 1994, Greece explained that 'In recent years the basic guiding

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[112] Concluding Observations on Greece, UN Doc. CERD/C/GRC/CO/16-19, para 15 (24 August 2009).
[113] Concluding Observations on Greece, UN Doc. CCPR/C/GRC/CO/2, paras 43-4 (3 December 2015).
[114] 2151 UNTS 246. Greece signed it in 1997 but not ratified it. See Julie Ringelheim, 'Minority Rights in a Time of Multiculturalism -The Evolving Scope of the Framework Convention on the Protection of National Minorities' 10 *Human Rights Law Review* (2010) 99; Marc Weller, *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2006).
[115] 2044 UNTS 246. See https://www.coe.int/t/dg4/education/minlang/,
[116] See Tove H Molloy, 'Dialogue with the Unwilling: Addressing Minority Rights in So-called Denial States' Paper 77, (European Centre for Minority Issues 2014) available at http://www.ecmi.de/uploads/tx_lfpubdb/ECMI_WP_77.pdf.
[117] See also Human Rights Committee's General Comment 23, 'The Rights of Minorities' UN Doc. CCPR/C/21/Rev.1/Add.5 (1994).
[118] Cf. *Ballantyne and Others v. Canada* in which the Human Rights Committee took the that the status of minority could only be assesses *vis-a-vis* the whole State, not a part of it, Cmns Nos. 359/1989 and 385/1989, UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1, (5 May 1993).
[119] The Republic of Turkey reserved, 'the right to interpret and apply the provisions of Article 27 of the International Covenant on Civil and Political Rights in accordance with the related

principles of the Greek policy vis-à-vis the Muslim minority have been those of moderation and consensus. This is especially true since 1991, when the Government solemnly declared the principles of 'isonomia' i.e. equality before the law and 'isopoliteia', i.e. equality of civil rights, as the basis of the treatment of the Muslims in Thrace.'[120] However, it stressed that the Lausanne Treaty formed the legal basis for the protection of this minority.[121] Irrespective of the existence of two other different groups within that minority, Greece views the attempt to identify the entire Muslim minority of Thrace as 'Turkish' as unjustifiable and against the spirit and purpose of Article 27 as well as the Council of Europe's Framework Convention.[122] However, the HRC rejected Greece's assertion that there were no ethnic, religious or linguistic minorities in Greece other than the Muslims in Thrace.[123] This is consistent with the HRC's view that 'The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.' [124] Thus, the HRC observed that Greece should review its practice in light of Article 27 ICCPR.

The HRC also expressed concern about the impediments that Muslim women might face because of the non-application of the general law of Greece to the Muslim minority on matters such as marriage and inheritance. It urged Greece to increase the awareness of Muslim women of their rights and the availability of remedies and to ensure that they benefitted from the provisions of Greek civil law.[125] With respect to the application of *Sharia* in family and inheritance law matters of members of the Muslim minority in Thrace, Greece explained to the HRC that the choice whether to use *Sharia* or the Greek Civil Code in these matters was made by the members of the Muslim minority themselves. The option was a fact of life in Thrace. If members of the Muslim minority in Thrace chose *Sharia*, this would be implemented to the extent that its rules were not in conflict with fundamental values of the

provisions and rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923 and its Appendixes.' Text available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec.

[120] UN Doc. CCPR/C/GRC/2004/1, para 897.

[121] ibid para 899.

[122] ibid para 903. It is interesting the Greece references the Framework Convention even though it has not ratified it.

[123] UN Doc. CCPR/CO/83/GRC, para 20 (25 April 2005); CCPR/C/GRC/CO/2 (3 December 2015), paras 43 and 44.

[124] GC 23 (n 117) para 5.2.

[125] UN Doc. CCPR/CO/83/GRC, para 8 (25 April 2005).

Greek society and the Greek legal and constitutional order.[126] Greek law provided that the courts should not enforce decisions of the muftis that were contrary to the Greek Constitution. In this respect, derogations from civil law provisions were minor: concepts such as polygamy, marriage below legal age without court permission, marriage by proxy, repudiation, etc. were not allowed. Greece was firmly committed to strengthening the substantive review and control, by domestic courts, of muftis' decisions on these matters, thus ensuring that their legal effect and/or implementation did not contravene the Constitution and the relevant universal and regional human rights treaties, particularly as regards the rights of women and children. Bearing in mind the expressed preferences and visible trends within the majority of the Muslim minority on religious, social and legal matters, Greece would also consider and study possible re-adjustments with regard to the application of *Sharia* in Thrace, taking into account its legal obligations and the potential changes of the wishes of the Muslim minority itself.[127]

However, it has been submitted that '99% of the muftis' decisions are ratified by the Greek courts, even where they infringe women's and children's rights as laid down in the constitution or the ECHR'.[128] Between 1991 and 2006, decisions had only been denied enforceability in 11 out of 2,679 cases.[129] Decisions of muftis on *Sharia* are applied even though they would not be applied if they were decision by a foreign court because of inconsistency with Greek public order norms.[130] The keeping in place the institution of *Sharia* has been described as an 'ambiguous privilege' for Muslim minority as it 'currently appears dysfunctional, antiquated and runs counter to the international agreements and the Greek Constitution in a manner opposite to the protection of human rights as its correct application and interpretation remains problematic.'[131] Similarly it has been submitted that 'the Lausanne minority protection system…needs to be adapted to the modern trends of

[126] See Eirini Kakoulidou 'The Application of *Sharia*h in Western Thrace: Protecting the Religious Freedom of the Muslim Minority or Dismantling the Greek Constitution?' (2017), available at https://de.scribd.com/document/118316950/The-application-of-Shari-ah-in-Western-Thrace. On conformity of aspects of *Sharia*, and the practices of private religious bodies, with Irish constitutional law and principles see Máiréad Enright, 'Preferring The Stranger? Towards an Irish Approach to Muslim Divorce Practice' (2013) 49 *The Irish Jurist* 65. See also *McGrath and O'Ruairc v. The Trustees of Maynooth College* [1979] *Irish Law Times Reports* 166 on the domain of recognition in terms of respecting religions and the autonomy of their organisations.

[127] Second Report of Greece, UN Doc. CCPR/C/GRC/2, paras 59-62 (26 February 2014).

[128] Konstantinos Tsitselikis, cited in Hinault (n 147).

[129] Tsaoussi and Zervogianni (n 252) citing research published in Greece.

[130] Tsaoussi and Zervogianni, ibid, 220.

[131] Borou (n 3) 19.

international law" as 'it currently appears dysfunctional, unfair for some, fragmentary, and antiquated'.[132]

Obviously, the demographic composition of Greece has changed significantly since 1923.[133] There has been an increasing number of Muslims immigrating from Africa and Asia. The refugee and migrant crisis since 2014 has accentuated this state of affairs.[134] There is a sense in which these developments have made obsolete the concept of the 'Muslim minority of Greece' as existing purely within Western Thrace, but Greece's view is that the application of the Lausanne Treaty makes identification of that minority a continuing necessity. More generally, though, Greece's approach to minority protection has been challenged. In 2008, Gay McDougall, the then UN independent expert on minority issues, visited Greece, *inter alia*, to promote implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[135] She observed that whether a State officially recognized a minority was not conclusive with regard to its obligations towards minority populations. She urged Greece to consider its obligations with respect to minority populations as arising within the post-1945 legal framework of modern human rights treaties and jurisprudence based on the principle that protection of human rights and fundamental freedoms, including those of persons belonging to minorities, was the responsibility of the State in which the persons and/or minority groups reside. These rights were universal and were elaborated in multilateral treaties and other documents that constituted core aspects of human rights law, including minority rights. In this regard, States should no longer be guided merely by bilateral agreements with specific countries, although within the context of respect for the rights of non-discrimination and equality before the law, bilateral arrangements could offer enhanced entitlements over the minimum obligations. She also urged Greece to withdraw from the debate over whether there was a Turkish minority in Greece and focus on protecting the right to self-identification.[136]

[132] See Stephanos Stavros, 'The Legal Status of Minorities in Greece Today: The Adequacy of their Protection in the Light of Current Human Rights Perceptions' 13 (1959) *Journal of Modern Greek Studies* 9 at 24; Konstantinos Tsitselikis, 'Seeking to Accommodate *Sharia* Within A Human Rights Framework: The Future of The Greek *Sharia* Courts' (2013) 28 *Journal of Law and Religion* 341.
[133] Stavros, ibid
[134] For continuously updated figures on the refugee situation see 'Mediterranean Situation' UNHRC, https://data2.unhcr.org/en/situations/mediterranean?id=83.
[135] General Assembly Resolution 47/135 of 18 December 1992.
[136] McDougall (n 103).

On 14 February 2011, Greece submitted its report to the UN Universal Periodic Review. With respect to minorities it reaffirmed its view on the Muslim minority in Thrace:

> The status of [that] minority is regulated by the 1923 Treaty of Lausanne. Further to fully complying with the relevant provisions of the Lausanne Treaty, Greek policy and legislation reflect and implement contemporary human rights norms and standards, as well as the European Union *acquis*, aimed at improving the living conditions of the members of this minority and their smooth integration into all aspects of both local and national society.[137]

It is notable that Greece accepts that contemporary human rights standards apply alongside the Lausanne Treaty. One of the key issues in the *Molla Sali* case was to determine their interplay. It is also notable that Nils Muiznieks, the then Council of Europe Commissioner for Human Rights did not intervene in the *Molla Sali* case.[138] Before the judgment, he had been reported as commenting that 'The Greek authorities shouldn't wait for a ruling before improving the situation' and that 'There is already ample national and international documentation condemning the anachronism inflicted on many Greek citizens by enforcement of *Sharia*.'[139] In a Report in 2008 the then Commissioner, Thomas Hammarberg, had recommended that 'any obligations that may arise out of the 1923 Lausanne Peace Treaty, or any other early 20th century treaty, should be viewed and interpreted in full and effective compliance with the subsequent obligations undertaken by the ratification of European and international human rights instruments.'[140]

D. Relations between Greece and Turkey

Although the Treaty of Lausanne agreed clear mainland territorial borders between Greece and Turkey,[141] the status and perception of the Muslim minority of Thrace have been strongly

[137] UN Doc. A/HRC/WG.6/11/GRC/1, vii (14 Feb 2011). The information was updated in the national report for the second cycle, see UN Doc. A/HRC/WG.6/25/GRC/1, paras 82-8 (22 February 2016).
[138] He could have done so under Article 36(3) ECHR.
[139] As cited in Guillot (n 18).
[140] *Human Rights of Minorities*, Report by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe Following his visit to Greece on 8-10 December 2008, para 41, available at https://rm.coe.int/16806db821.
[141] Maritime boders between the two States are not agreed.

linked to the often-troubled evolution of relations between Greece and Turkey.[142] Greece refers to the geographical area simply as 'Thrace', which no implication of it being part of a wider geographical region. Turkey always refers to 'Western Thrace', which carries the reverse implications. Convention VI placed the Muslims of Western Thrace under the political protection of a rapidly developing and increasingly powerful neighbouring kin-State, Turkey.[143] During periods when relations were poor,[144] the Muslim minority in Western Thrace were negatively perceived as a potential threat to Greece's developing national identity and[145] national unity[146] and as agents of the kin-State of Turkey with secessionist ambitions.

Greece has imposed significant restrictions on the Administrative Councils of the Muslim Community.[147] As with the muftis, they are appointed rather than elected. Rather than recognising their broad administrative autonomy, their activities have been restricted to dealing with income and property management via private religious foundations (*waqfs*). There have also been issues relating to freedom of education and schooling,[148] restrictions on the autonomy of minority schools and who can teach in them, the teaching of and use of the Turkish language in schools and more generally, the nationalization of property, and employment as civil servants (very few Muslim are appointed), the expatriation and

[142] See Baskin Oran, 'Reciprocity in Turco-Greek Relations: The Case of Minorities' in S. Akgönül (ed), *Reciprocity: Greek and Turkish Minorities, Law, Religion and Politics* (İstanbul Bilgi University Press 2008) 45.
[143] In 1924, a Turkish consulate was established in Komotini, the main city in Thrace.
[144] See Chousein (n 87) 92-106.
[145] See Adamantia Pollis, 'Greek National Identity: Religious Minorities, Rights and European Norms' (1992) 10 *Journal of Modern Greek Studies* (1992) 174.
[146] See Dia Anagnostou, 'Breaking the Cycle of Nationalism: The EU, Regional Policy, and the Minority of Western Thrace' (2001) 6 *South European Society and Politics* 102.
[147] See Michel Hinault, *Freedom of Religion and other Human Rights for Non-Muslim Minorities in Turkey and for the Muslim Minority in Thrace (Eastern Greece)*, Council of Europe, Committee on Legal Affairs and Human Rights, Doc. 11860, 21 April 2009.
[148] See Thalia Dragonas and Anna Frangoudaki, 'Educating the Muslim Minority in Western Thrace' (2006) 17 *Islam and Christian-Muslim Relations* 27; Sebahattin Abdurrahman and Ali Huseynoglu, 'The (Dys-) Functional Autonomy of the Muslim Turkish Minority in Western Thrace, Greece' in Levente Salat, Sergui Constantin, Alexander Osipov and István Gergő Székely (eds), *Autonomy Arrangements around the World: A Collection of Well and Lesser Known Cases* (Romanian Institute for Research on National Minorities 2014) 417-442; Iris Kalliopi Boussiakou, 'The Educational Rights of the Muslim Minority under Greek Law' (2007) 6 *Journal on Ethnopolitics and Minority Issues in Europe* 1. *Fener Rum Erkek Lisesi Vakfi v. Turkey*, A. 34478/97 (9 January 2007) concerned an educational foundation dating from the Ottoman era. The European Court found that the annulment of the applicant foundation's title to a property did not comply with the requirement of lawfulness and thus breached the foundation's right to the peaceful enjoyment of its possessions.

deprivation of citizenship of between 40,000 and 60,000 persons between the mid-1950s and the late 1990s,[149] and restrictions on the purchase of real estate.[150] Indeed, the long history of repressive and discriminatory measures against the Muslim minority in Thrace may have served to promote the predominantly Turkish consciousness of that minority.

For its part, Turkey has been keen to promote and support the minority group's rights both politically and financially.[151] Thus, 'For the majority of Greeks, the Muslims of Western Thrace are seen as a *Trojan horse*, an ethnically and religiously alien group, akin to the country's perceived biggest national enemy, namely Turkey, which could in the long term question the state sovereignty in that region.'[152] Fears of Islam and the Muslim 'Other' still play a critical role in the Greek public sphere.[153] They have been accentuated by the mass migration of Muslims into Greece from the Balkans, North Africa and the Middle East.[154]

With respect to both Greece and Turkey, exposure to wider European norms and institutions has facilitated a degree of internalization of minority protection standards and provided institutional mechanisms of reporting and review. There is some evidence that the EC/ EU has had a moderating influence on Greece (which has been a member since 1981)[155] and, to a lesser degree, on Turkey (as both a prospective member since 1987, part of a customs union since 1995, and an official candidate for membership since 1999).[156] Western

[149] Nikolaos Sitaropoulos, 'Discriminatory Denationalisations Based on Ethnic Origin: The Dark Legacy of Ex Article 19 of the Greek Nationality Code' in Prakash Shah and Werner Menski (eds), *Emigration, Diasporas and Legal Systems in Europe* (Routledge 2006) 107-125.

[150] See 'US Department of State: 2016 Report on International Religious Freedom Greece' 15 August 2017 (available at ecoi.net) http://www.ecoi.net/local_link/345277/476428_en.html (accessed 16 January 2018).

[151] See Dia Anagnostopoulou and Anna Triandafyllidou, 'Regions, Minorities and European Integration: A Case Study on Muslims in Western Thrace, Greece' 7 *Romanian Journal of Political Science* (2007) 100; Borou (n 3) 14-15.

[152] Katsikas (n 53) 444.

[153] Alexandros Sakellariou, 'Fear of Islam in Greece: Migration, Terrorism, and "Ghosts" from the Past' (2017) 45(4) *Nationalities Papers* 511; Richard Pine, 'Ancient Fear of the 'infidels' Reawakened by Muslim Refugees' *The Irish Times* (Dublin, 7 December 2017).

[154] See 'Mediterranean Situation' (n 134).

[155] See Turgay Cin, 'The Current Problems of the Turks of Western Thrace in Greece as a Member of the European Union' (2009) 9(4) *Ege Academic Review* 1527, available at http://www.acarindex.com/dosyalar/makale/acarindex-1423877011.pdf.

[156] See Norah Fisher Onar and Meriç Özgüneş, 'How Deep a Transformation Europeanization of Greek and Turkish Minority Policies' (2010) 17 *International Journal on Minority and Group Rights* 111, which also notes impact of the development of minority standards under the OSCE system; Dia Anagnostou, 'Deepening Democracy or Defending the Nation?: The Europeanization of Minority Rights and Greek Citizenship' (2005) 28 *West*

Thrace has benefitted extensively from EU structural funds, the impetus of which tends to promote decentralisation and strengthen minority interest in social and economic development.[157] Both Greece and Turkey are members of the Organisation for Security and Cooperation in Europe (OSCE) since its inception in 1975 (as the CSCE). It has played a significant role in the development of politically binding minority standards and mechanisms and there has been some limited discussion of the situation of Muslims in Western Thrace.[158] Greece and Turkey are members of NATO, which is significant in terms of security cooperation.

6. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. The ECHR and Minority Rights

Both Greece and Turkey became parties to the ECHR on 9 August 1949. Greece's participation was interrupted by its withdrawal from membership of the Council of Europe during the Greek military junta of 1967-74. Both Greece and Turkey have been involved in inter-State cases but neither has brought a case against each other in relation to their respective minorities. Since the acceptance of the right of individual petition from November 1985 for Greece and in January 1987 for Turkey, opportunities for review under the ECHR have existed for individual members of the respective minorities.[159] Of course, the ECHR has no specific provision on minority rights[160] and 'the thrust of the Convention is the securing of

European Politics 342. The 1993 Copenhagen Criteria for eligibility to join the European Union includes respect for and protection of minorities. See Stephanie Berry, 'The Continuing Relevance of the Copenhagen Document - Muslims in Western Europe and the Security Dimension' (2016) 15 *Journal of Ethnopolitics and Minority Issues in Europe* 78; Ioannis G. Grigoriadis, 'On the Europeanization of Minority Rights Protection: Comparing the Cases of Greece and Turkey' (2008) 13 *Mediterranean Politics* 23.

[157] See Anagnostou (n 146) 119.

[158] See Onar and Özgüneş (n 156); Othon Anastasakis, Kalypso Nicolaidis and Kerem Oktem (eds), *In the Long Shadow of Europe: Greeks and Turks in the Era of Postnationalism* (Nijhoff 2009).

[159] See Konstntinos Tsitselikis, 'Minority Mobilisation in Greece and Litigation in Strasbourg' (2008) 15 *International Journal on Minority and Group Rights* 27. *Yagtzilar and others v. Greece*, A. 41727/98 (6 December 2001 and 15 January 2004), was tangentially related to the population transfer as it concerned land expropriated to provide land to settle the refugees involved in the exchange of populations.

[160] See Stephanie Berry, 'The Siren's Call? Exploring the Implications of an Additional Protocol to the European Convention on Human Rights on National Minorities' (2016) 23(1) *International Journal of Minority and Group Rights* 1.

individual rather than group rights'.[161] The jurisprudence on minority issues has largely been developed by reference to Articles 3 (ill-treatment), 8 (home), 9 (religion), 10 (expression), 11 (association) and 14 (non-discrimination) of the ECHR.[162] The Court avoids as much as possible non-discrimination analysis in cases on claims to official recognition of separate identities and ways of life of ethnic and religious minorities.[163] There have been a number of applications relating to Muslims in Greece, but none in relation to Orthodox Christians in Turkey. As of 2018, among Greece's minority groups, the lead lodger of Greek cases at the Court is the Turkish/Muslim minority, with over 30 applications.[164]

B. The ECHR and *Sharia*

In *Refah Partisi v. Turkey*,[165] the Turkish Constitutional Court had ordered for the dissolution of a political party, Refah Partisi (the Welfare Party), that had been advocating for some of *Sharia's* private-law rules to a large part of the population in Turkey (namely Muslims), within the framework of a plurality of legal systems. The Grand Chamber of the European Court held that this decision was compatible with the ECHR. In no uncertain terms it held

[161] David Harris et al (eds), *The Law of the ECHR*, 4th edn, (OUP 2018) 792.
[162] See Geoff Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights' (2002) 24 *Human Rights Quarterly* 736; Gaetano Pentassuglia, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?' (2012) 19 *International Journal on Minority and Group Rights* 1. To date there has never been a finding of a violation based on the prohibited ground of 'association with a national minority'.
[163] K. Henrard, 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?' (2016) 34 *Nordic Journal of Human Rights* 157.
[164] Tsitselikis (n 159) 39, notes that the vast majority of the cases lodged in Strasbourg are guided or at least approved by the kin-State, Turkey, which files cases as a diplomatic weapon in the bilateral relations with Greece. In relation to Western Thrace the cases have mainly concerned the appointment of muftis (n 22), registration of associations with a Turkish name or identity (n 108), the use of the name 'Turk' to describe the Muslim minority in political speeches and campaigns (n 110), deprivation of Greek citizenship (n 149), exclusion from professional associations and minority education. A number of the cases were held inadmissible for failure to exhaust domestic remedies. See Margarita Markoviti, 'The Court as a Venue for Greco-Turkish Relations: The Treaty of Lausanne and the Muslim Minority in Western Thrace' available at http://grassrootsmobilise.eu/wp-content/uploads/2017/05/GRM-Working-Paper-3-The-Court-as-a-venue-for-Greco-Turkish-relations.pdf; Marie-Bénédicte Dembour, *When Humans Become Migrants* (OUP 2015).
[165] A. 41340/98, 41342/98, 41343/98 et al, Grand Chamber (13 February 2003). On the risks of the ECtHR's negative stereotyping of Muslims, Muslim women and Islamic rules see Lourdes Peroni, 'Religion and Culture in the Discourse of the European Court of Human Rights: the Risks of Stereotyping and Naturalising' (2014) 10 *International Journal of Law in Context* 195.

that *Sharia* was incompatible with the fundamental principles of democracy, as set forth in the ECHR. It concurred with a Chamber's view that a plurality of legal systems, as proposed by *Refah*, could not be considered to be compatible with the ECHR system.[166] It also concurred with the Chamber's view that:

> It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on *Sharia*, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.'[167]

The Court observed that when the former Islamic theocratic regime under Ottoman law was dismantled and the republican regime was being set up, Turkey had opted for a form of secularism that confined Islam and other religions to the sphere of private religious practice. Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considered that the Constitutional Court was justified in holding that *Refah*'s policy of establishing *Sharia* was incompatible with democracy.[168] The Court reiterated that freedom of religion, including the freedom to manifest one's religion by worship and observance, was primarily a matter of individual conscience. It stressed that the sphere of individual conscience was quite different from the field of private law, which concerns the organisation and functioning of society as a whole. Turkey, like any other Contracting Party, could legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes, such as rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession. The freedom to enter into contracts could not encroach upon the State's role as the neutral and impartial organiser of the exercise of religions, faiths and beliefs.[169]

[166] *Refah Partisi*, ibid para 119.
[167] ibid para 124.
[168] ibid para 125.
[169] ibid para 128.

In 2013, the Court reiterated this general position with respect to *Sharia* in *Kasymakhunov and Saybatalov v. Russia*.[170] However, the Court has accepted that peaceful advocacy for the introduction of *Sharia* may be protected expression under Article 10 ECHR.[171] By contrast, 'hate speech', by defending *Sharia* while calling for violence to establish it, was considered to be incompatible with the values underlying the Convention.[172] With respect to more specific *Sharia* related rules, in *Serife Yigit v. Turkey*[173] the Court rejected a discrimination claim brought by a Muslim woman denied surviving spouse benefits because she was religiously but not civilly married. The Court noted that in adopting the Civil Code in 1926, which instituted monogamous civil marriage as a prerequisite for any religious marriage, Turkey aimed to put an end to a marriage tradition which placed women at a clear disadvantage, and in a situation of dependence and inferiority, compared to men.[174]

Even reading *Refah Partisi* and the rest of the ECtHR's *Sharia*-related jurisprudence in their particular factual contexts, the Court has been decidedly negative as to the possible consistency of *Sharia* with the ECHR.[175] It was particularly concerned as to State-sanctioned differential treatment based on religious affiliation. As we will see, the factual and legal contexts in *Molla Sali* were much narrower than in *Refah Partisi*.

7. CRITIQUE OF THE JUDGMENT IN *MOLLA SALI v. GREECE*

A. Admissibility Issues and the Characterisation of Molla Sali's Claims

MS alleged a violation of Article 6(1) ECHR taken alone and in conjunction with Article 14 and Article 1 of Protocol No. 1. The Court observed that it was 'master of the characterisation to be given in law to the facts of a case'[176] and referenced the *jura novit curia* principle (the

[170] A. 26261/05 and 26377/06 para 111 (14 March 2013). See also *Vasilyev and Others v. Russia*, A. 38891/08 (communicated case) (16 May 2012).
[171] *Gündüz v. Turkey*, A. 35071/97 (4 December 2003).
[172] *Refah* (n 165) paras 123-124, *Belkacem v. Belgium*, A. 34367/14, inadmissibility decision (20 July 2017).
[173] A. 3976/05, para 81 (2 November 2010).
[174] In an individual opinion Judge Kovler, the Judge of Russian nationality, regretted that the majority had not refrained, 'from making any assessment of the complexity of the rules of Islamic marriage, rather than portraying it in a reductive and highly subjective manner'.
[175] See Patrick Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-determination' (2006) 4 *International Journal of Constitutional Law* 497; and the essays by Bratza, McGoldrick and Baderin in Griffiths-Jones (n 20) 38-93.
[176] *Molla Sali,* para 85.

Court knows the law). It considered that since the main focus of the case was the Court of Cassation's refusal to apply the law of succession as laid down in the Civil Code for reasons linked to the Muslim faith of the MS's husband. The primary issue was whether there was a difference in treatment potentially amounting to discrimination with regard to the application of the law of succession, as laid down in the Civil Code, to those seeking to benefit from a will as drawn up by a testator who was not of Muslim faith. It therefore considered the case solely under Article 14 ECHR (non-discrimination) read in conjunction with Article 1 of Protocol 1 (right to property).[177] This is striking because Court usually prefers to examine a complaint under a substantive right rather than under Article 14.[178] This decision also meant that the potential Article 6 issues - such as access to court, equality of arms, procedural equality, and fair trial – were not addressed.[179]

B. Discrimination

The Court observed that MS would have inherited her husband's whole estate had he, as the testator, not been of the Muslim faith. In the circumstances, MS's proprietary interest in inheriting from her husband was considered to be of a sufficient nature and sufficiently recognised to constitute a 'possession' within the meaning of Article 1 of Protocol 1.[180] This finding was sufficient to render Article 14 applicable. In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous or relevantly similar situations. The requirement to demonstrate an analogous position does not require that the comparator groups be identical. Not every difference in treatment will amount to a violation of Article 14. Only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination. However, the words 'other status' have generally been given a wide meaning in the case-law and their interpretation has not

[177] *Molla Sali,* para 86. With respect to the objection that MS lacked victim status, the Court considered that in the particular circumstances of the case, the Government's objection was so closely linked to the substance of MS's complaint under Article 14 ECHR read in conjunction with Article 1 of Protocol No. 1 that it should be joined to the merits, *Molla Sali,* paras 92-95. The Court also rejected the Government's objection that domestic remedies had not been exhausted.

[178] Though this position is evolving and the number of important Article 14 judgements is growing, see Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-discrimination in the ECHR' (2009) 29 *Legal Studies* 212; Harris et al (n 161) 764-804.

[179] See Section 8 (E-F).

[180] *Molla Sali,* para 131, citing *Fabris v. France* [GC], A. 16574/08, para 51 (7 February 2013).

been limited to characteristics which are personal in the sense that they are innate or inherent. For example, a discrimination issue arose in cases where the alleged basis for discriminatory treatment was determined in relation to the applicants' family situation, including matters such as their children's place of residence.[181] It thus followed, in the light of its objective and the nature of the rights which it sought to safeguard, that Article 14 also covered instances in which an individual was treated less favourably on the basis of another person's status or protected characteristics.[182] As Judge Mits observed in his concurring opinion, this was the first time that the GC had endorsed the concept of discrimination by association. The concept had been established in a number of Chamber judgments concerning discrimination by association in relation to disability,[183] race[184] and nationality.[185] As the Court noted, the concept of 'discrimination by association' has been accepted by the UN Committee on the Rights of Persons with Disabilities,[186] and the Court of Justice of the European Union.[187]

The Court went on to confirm that Article 14 afforded protection against different treatment, without an objective and reasonable justification, of persons in similar situations.[188] For the purposes of Article 14, a difference of treatment was discriminatory if it had no 'objective and reasonable justification', that is, if it did not pursue a 'legitimate aim' and/or there was no 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised. The Contracting States enjoyed a certain margin of

[181] Citing *Efe v. Austria*, A. 9134/06, para 48 (8 January 2013) (applied as a criterion for the differential treatment of citizens, the 'country of residence' of E's children constituted an aspect of personal status for the purposes of Article 14. No discrimination on the facts).
[182] *Molla Sali,* para 134.
[183] *Guberina v. Croatia*, A. 23682/13, para 78 (22 March 2016) (alleged discriminatory treatment of the applicant on account of the disability of his child, with whom he had close personal links and for whom he provided care, was a form of disability-based discrimination covered by Article 14).
[184] *Škorjanec v. Croatia*, A. 25536/14, para 55 (28 March 2017) (the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence extended to acts of violence based on a victim's presumed association or affiliation with another person who actually or presumably possessed a particular status or protected characteristic);
[185] *Weller v. Hungary*, A. 44399/05, para 37 (31 March 2009) (the entitlement to an allowance due to a family could not be dependent on which of the two biological parents of the children was a Hungarian national).
[186] Citing General Comment 6 on equality and non-discrimination, CRPD/C/GC/6, para 20 (26 April 2018).
[187] Citing C-303/06, *S. Coleman v Attridge Law and Steve Law*, ECLI:EU:C:2008:415; C-83/14, *CHEZ Razpredelenie Bulgaria* AD, ECLI:EU:C:2015:480. On the complexities of applying the concept see Michael Malone, 'The Concept of Indirect Discrimination by Association: Too Late for the UK?' (2017) 46 *Industrial Law Journal* 144.

appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin would vary according to the circumstances, the subject matter and its background. As to the burden of proof in relation to Article 14, once the applicant had demonstrated a difference in treatment, it was for the Government to show that the latter was justified.

When applying these principles the Court held that MS, a married woman who was a beneficiary of her Muslim husband's will, was in an analogous or relevantly similar situation to that of a married female beneficiary of a non-Muslim husband's will. The ruling of the Court of Cassation had placed MS in a different position from that of a married female beneficiary of the will of a non-Muslim husband. It specifically noted that several international bodies (CEDAW Committee, HRC, Commissioner for Human Rights of the Council of Europe, Committee on Legal Affairs and Human Rights of the Parliamentary Assembly) had highlighted this issue.[189] In the view of the Court, MS was treated differently on the basis of 'other status', namely the testator's religion.[190]

C. Discrimination by Association

The Court appeared to re-frame the issue as one in which MS's husband was being discriminated against based on his religion and she was then the subject to discrimination by association. Normally in cases of discrimination by association, the person alleging discrimination does not bear the protected characteristic and does not themselves belong to the disadvantaged group. But Molla Sali did share the discriminatory characteristic. That is, she was a Muslim in Western Thrace. Moreover, the way the Court expressed the issue was not clear. It did not explicitly use the term discrimination by association. None of the international bodies referred to by the Court for having highlighted the issue of the application of *Sharia* to Greek Muslims in Western Thrace had used the concept of discrimination by association. The argument appears to be that as MS's husband had drawn up a will in accordance with the Civil Code, this displaced any argument that he had accepted that the *Sharia* regime would apply to him. Nevertheless, it is at least odd to argue that applying that regime to him would have been discriminating against him and that this would only have been permissible if he had waived his right, or that of his beneficiaries,

[189] *Molla Sali,* para 140, referring to paras 71-78.
[190] ibid, paras 138-41.

not to be discriminated against on the basis of his religion. There is Convention jurisprudence that supports the view that States can take reverse discrimination or positive measures taken by states to remedy discrimination or protect minorities if they have a reasonable and objective justification.[191] The Court stated that a person's religious beliefs could not validly be deemed to entail waiving certain rights if that would run counter to an important public interest.[192] Its authority for that was *Konstantin Markin v Russia*, where it rejected the government's argument that, by signing a military contract, KM had waived his right not to be discriminated against on grounds of sex. No waiver of the right not to be subjected to sex discrimination could be accepted, as it would be counter to an important public interest. However, even if being subject to a *Sharia* regime was discriminating against an individual, there must at least have been a stronger argument that the regime did reflect an 'important public interest', namely the protection of a religious minority based on an international treaty. Therefore, the argument that there was no possibility of waiver was not an overwhelming one. As discussed below, under the new Greek law of 2018 it will be possible for the *Sharia* regime to apply if all the parties consent.[193] Therefore, it is appears clear that the parties can, if they all agree, waive any right not to be discriminated against. Yet the Court noted the new law 'with satisfaction'.[194]

There was also some force in the concurring opinion of Judge Mits that the Court's approach effectively made MS invisible or partly invisible.[195] MS was not discriminated against directly but only by association. If MS's husband had not made a will under the Civil Law at all, or made a will directing that his property be divided according to *Sharia*, then it would be much more difficult to maintain any argument that he was being discriminated against on account of his religion. Could MS have then complained that as a beneficiary she was being discriminated against because she would receive less under the *Sharia* than she would have done under the Civil Law? Could she, as a beneficiary, also claim the negative right of self-identification (considered below), that is, not to be subject to *Sharia*? As noted

[191] See Harris et al (n 161) 801. There is a range of treaty law and human rights jurisprudence that supports the same view. See eg Committee on the Elimination of All Forms Racial Discrimination, General Recommendation 32 'The meaning and scope of special measures' UN Doc. CERD/C/GC/32 (24 September 2009)); Committee On The Elimination Of Discrimination Against Women, General Recommendation 25 'Temporary Special Measures' (18 August 2004).
[192] *Molla Sali,* para 156, citing *Konstantin Markin*, *v. Russia* [GC], no. 30078/06, § 150, ECHR 2012.
[193] See Section 8 (A).
[194] *Molla Sali,* para 160.
[195] See text to (nn 218-220).

below, the terms of the new Greek law of 2018 suggest that the testator has the sole right to determine the applicable law.[196]

D. Justifying Discrimination

In terms of whether the treatment was justified, the Court confirmed that it was not its role to rule on the correct interpretation of the domestic legislation. Rather, it had to determine whether the manner in which the legislation had been applied infringed the rights secured to the applicant under Article 14. Its task was thus to decide whether there was objective and reasonable justification for the difference in treatment in question, which had its basis in the application of domestic law.[197]

The Court then proceeded to assess whether the difference in treatment of MS was justified. As for the pursuit of a legitimate aim, Greece had submitted that the settled case-law of the Court of Cassation had pursued the aim of protecting the Thrace Muslim minority. Although the Court understood that Greece was bound by its international obligations concerning the protection of this minority group, it doubted that the impugned measure regarding MS's inheritance rights would achieve that aim.[198] The Court did not explain the basis of any of its doubts. Rather, it cryptically took the view that it was not necessary for it to adopt a firm view on that issue because, in any event, the impugned measure was not proportionate to the aim being pursued.

E. The Interpretation of Treaty Obligations

One of the issues the Court was expected to address in *Molla Sali* case was how to address potential inconsistencies with the ECHR that stem from compliance with pre-existing international legal obligations.[199] Generally, the Court seeks to interpret the ECHR in a manner that avoids such norm conflicts.[200] As noted, Greece's view, supported by a decision of the Greek Supreme Court, was that the Lausanne Treaty applied as a *sui generis* law to

[196] See Section 8 (A).
[197] *Molla Sali,* para 142.
[198] ibid, para 143.
[199] The issue of incompatible legal obligations arose for the UK in the *Soering v UK* where the pre-existing obligation arose under a bilateral extradition treaty with the US, a non-State party to the ECHR. The practical consequence of the *Soering* case has been that States parties to the ECHR have given it precedence over pre-existing international legal obligations. See David Anderson and Clive Walker, *Deportation With Assurances*, Cm 9462 (2017).
[200] See Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke JICL* 69; Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66 *International and Comparative Law Quarterly* 557.

cover the Muslim minority in Western Thrace. However, it did not deny the general application of the ECHR. For both Greece and Turkey the ECHR represents a later successive treaty and, in accordance with Article 30 of the Vienna Convention on the Law of Treaties, when 'the earlier treaty is not terminated or suspended…, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'. The Court made specific reference to this provision in the section of its judgment on 'international law and practice', but, rather surprisingly, it does not otherwise feature in its assessment.

The Court observed that, by depriving her of three-quarters of the inheritance, the application of *Sharia* had serious consequences for MS. Moreover, in the Court's view, the justification which Greece derived from *Sharia* or from its international obligations was not persuasive. It did not doubt that, in signing and ratifying the Treaties of Sèvres and Lausanne, Greece undertook to respect the customs of the Muslim minority. However, in view of the wording of the provisions in question, those treaties did not 'require Greece to apply *Sharia* law.'[201] Indeed, the Government and MS agreed on that point. The Treaty of Lausanne did not explicitly mention the jurisdiction of the mufti, but guaranteed the religious distinctiveness of the Greek Muslim community. Furthermore, the Treaty did not confer any kind of jurisdiction on a special body in relation to such religious practices. It could not be overlooked, moreover, that during the hearing in MS the Government stated that the provisions of the Treaty of Athens concerning the protection of the rights of minorities and those of the Treaty of Sèvres were no longer in force, as they had already accepted in *Serif v. Greece*.[202] The Court also noted that the Council of Europe Commissioner for Human Rights, the UN Committee on the Elimination of Discrimination against Women and the Human Rights Committee had expressed concerns regarding the application of *Sharia* to Greek Muslims in Western Thrace. In particular, these bodies had observed the discrimination meted out against women and children, not only within that minority as compared with men, but also in relation to non-Muslim Greeks.[203] The Court highlighted that several international bodies had recommended that the Greek authorities interpret the Treaty of Lausanne and any other early twentieth-century treaty in compliance with the obligations flowing from more recent international and European human rights instruments.[204]

Commented [A1]: This is about whether the aim will be realised? Same as above? Needs to be thought about more carefully…

[201] *Molla Sali,* para 151. One of the intervenors, Greek Helsinki Monitor, had argued that there was no international obligation to implement *Sharia*. Rather its application was based on a domestic law (n 19).
[202] A. 38178/97, para 40, ECHR 1999-IX.
[203] *Molla Sali,* para 154.
[204] ibid.

The Court's reasoning in relation to obligations under the three international treaties was rather formalistic and dubious to say the least. It did not discuss the relationship between the three treaties and the ECHR. It avoids the normative conflict by an unconvincing literal interpretation of Greece's treaty obligations relating to the Muslims in Western Thrace. In *Serif v. Greece*, Greece had argued that the Treaty of Athens, which had been concluded when Thrace was not part of Greece, became devoid of purpose after the compulsory exchange of populations in 1923. In the alternative, the Government argued that Treaty of Athens had been superseded by the provisions of the Treaty of Sèvres and the Treaty of Peace of Lausanne. It maintained this position in the oral hearings in *Molla Sali*. However, although the position under the Treaties of Athens and Sevres may have been open to doubt, Greece has consistently maintained that its obligations under the Treaty of Lausanne remain extant. It is correct that none of the three Treaties explicitly required Greece to apply *Sharia*. However, that is how they had been understood and applied in both prior and subsequent practice for over a century with respect to measures permitting the settlement of questions of family law or personal status 'in accordance with the customs of those minorities'.[205] As Judge Mits observed in his concurring opinion, 'the whole point of the applicability of Sharia law in Thrace was to respect the distinct identity of the Muslim minority and to allow the application of a distinctive legal regime in the defined areas of interpersonal relations, including inheritance, among the members of this minority.'[206]

F. Divergencies in National Case Law

The Court noted that, as in MS's case, there were divergences in the case-law of the Greek courts as regards, in particular, the question whether the application of *Sharia* was compatible with the principle of equal treatment and with international human rights standards. Such divergences existed among courts of the same judicial branch, as well as between the Court of Cassation and the civil courts and between the Court of Cassation and the Supreme Administrative Court, but also within the Court of Cassation itself. The divergences created legal uncertainty, which was incompatible with the requirements of the rule of law. In the

[205] To use the language in the Lausanne Treaty. On subsequent practice in the interpretation of treaties see the draft Conclusions of the International Law Commission on 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties' ILC Report of Work on 70th session (2018), UN Doc. A/73/10, Ch. IV; Irina Buga, *Modification of Treaties by Subsequent Practice* (OUP 2018) 16-106.
[206] Concurring Opinion of Judge Mits, para 5.

Court's view, this undermined the Government's main argument that it had a duty to honour its international obligations and the specific situation of the Thrace Muslim minority.[207] The Court's observations on the divergences in the case-law of the Greek courts are only slightly more convincing than its literal approach to the interpretation of treaty obligations.[208] They are also ultimately rather beside the point. Even if the domestic jurisprudence had been clearly and consistently to the effect that *Sharia* applied in cases like MS's, the Court's subsequent analysis suggests that the application of the law was disproportionate to any legitimate aim.

Commented [A2]: But, where the law is inconsistent with the RoL it is not proportionate… isn't this is a general point that points to disproportionate differential treatment. I don't think that this is problematic.

G. A Special Status for Religious Communities

The Court reiterated that, according to its case-law, freedom of religion did not require States create a particular legal framework in order to grant religious communities a special status entailing specific privileges. Nevertheless, a State that had created such a status must ensure that the criteria established for a group's entitlement to it are applied in a non-discriminatory manner.[209] Whilst Greece may not have been required by Article 9 ECHR 'to create a particular legal framework in order to grant religious communities a special status entailing specific privileges', was it prohibited from creating such a framework, in this case for the application of *Sharia*? The absence of any negative reference to a plurality of legal systems, per *Refah Partisi*, is notable. The clear implication is that there is no such prohibition. However, having created such a status, a State must ensure that the criteria established for a group's entitlement to such a status is applied in a non-discriminatory manner. The regime in Western Thrace could be challenged as discriminatory on the basis that it only applied in that geographical area and did not apply to all Muslims in Greece or any other religious grouping in Greece. However, in *Molla Sali,* no one was directly challenging the existence of the special regime for Muslims in Western Thrace. If there were such a challenge, the Court

[207] *Molla Sali,* para 153.
[208] One of the intervenors, The Hellenic League for Human Rights, reviewed at length the complex and inconsistent domestic case-law regarding the interpretation on the application of the Civil Code to personal and succession cases. In its view, the divergences in that case-law undermined the 'requirement of legal certainty, a basic element of the rule of law.' See Hellenic League for Human Rights, (n 19) paras 1-13, available at *Molla Sali*, paras 116-8.
[209] *Molla Sali,* para 155, citing *İzzettin Doğan and Others*, *v. Turkey* [GC], A. 62649/10 para 158, (26 April 2016).

would have had to decide if the historical circumstances and the Treaty obligations provided a reasonable and objective justification.[210]

H. Discrimination and Minority Rights

As noted, the Court considered that a person's religious beliefs could not validly be deemed to entail waiving certain rights if that would run counter to an important public interest.[211] Nor could the State take on the role of guarantor of the minority identity of a specific population group to the detriment of the right of that group's members to choose not to belong to it or not to follow its practices and rules. Refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounted not only to discriminatory treatment but also to a breach of a right of cardinal importance in the field of protection of minorities: the right to free self-identification. As reflected in Article 3(1) of the Framework Convention for the Protection of National Minorities, the negative aspect of this right, namely the right to choose not to be treated as a member of a minority, was not limited in the same way as the positive aspect of that right.[212] If it was an informed choice, then it was a completely free choice and must be respected both by the other members of the minority and by the State itself. Article 3(1) of the Framework Convention provides that 'no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.' The Court also noted that the right to free self-identification was not only protected by the Framework Convention. It was the 'cornerstone' of international law on the protection of minorities in general. This applied especially to the negative aspect of the right. No bilateral or multilateral treaty or other instrument required anyone to submit

[210] In *İzzettin Doğan and Others*, *v. Turkey*, ibid, the Court held that there was no objective and reasonable justification for the glaring imbalance between the status conferred on the majority understanding of Islam, in the form of religious public services (religious leaders being recognised as such and recruited as civil servants; places where religious ceremonies were practices being granted the status of places of worship; and that State subsidies be made available to the religious community), and the almost blanket exclusion of the Alevi community from those services, and also the absence of compensatory measures.
[211] See Section 7(c) (text to nn 192-195).
[212] *Molla Sali,* para 157, referring back to the citation earlier in the judgment of the Explanatory Report on the Framework Convention that Article 3(1) 'does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity', para 35, available at https://rm.coe.int/16800cb5eb.

against his or her wishes to a special regime in terms of protection of minorities.[213] In addition, the Court noted that Greece was the only country in Europe that, up until the material time, applied *Sharia* to a section of its citizens against their wishes. This was particularly problematic in the present case because the application of *Sharia* caused a situation that was detrimental to the individual rights of a widow who had inherited her husband's estate in accordance with the rules of civil law but who then found herself in a legal situation which neither she nor her husband had intended.[214] In that regard, the Court noted that generally in Member States of the Council of Europe *Sharia* was applied as a foreign law within the framework of private international law. Only France had applied *Sharia* to the population of the territory of Mayotte. However, that practice ended in 2011. In the United Kingdom, the application of *Sharia* by the *Sharia* councils was accepted only insofar as recourse to it remained voluntary.[215]

Ultimately, the Court found that that the difference of treatment suffered by MS, as a beneficiary of a will drawn up in accordance with the Civil Code by a testator of Muslim faith, as compared to a beneficiary of a will drawn up in accordance with the Civil Code by a non-Muslim testator, had no objective and reasonable justification and found that there had been a violation of Article 14 read in conjunction with Article 1 of Protocol 1.[216] In his Concurring Opinion, Judge Mits of Latvia submitted that the case had concentrated solely on the question of the will drawn up by the testator, MS's husband of Muslim faith. In doing so, it had lost an important aspect that of the religion of MS, a wife of a Muslim faith, as well as the overall minority rights context.[217] The application of *Sharia* was introduced in Thrace in order to enable the Muslim minority to maintain its identity by following a separate legal regime. Given the historical events and the broader minority rights context that had led to the current situation, he considered that the aim of minority rights protection was a legitimate one. However, he agreed with the Court's analysis that by denying the opportunity to choose to not to be subjected to the specific legal regime intended to protect the Muslim minority, Greece's actions did not meet this legitimate aim.[218] Thus, in his view, there had been a

[213] ibid para 157.
[214] ibid para 158.
[215] ibid para 159. See Section 9 (A).
[216] ibid para 162. In the circumstances of the case, the Court found that the question of the application of Article 41 of the Convention (just satisfaction) was not ready for decision.
[217] Concurring Opinion of Judge Mits, (n 206) para 1.
[218] ibid paras 10-11.

violation of Article 14 in conjunction with Article 1 of Protocol No. 1 on the grounds of MS's *husband's* and *her* religion.[219]

I. The Right to Self-Identification

It is submitted that the real jurisprudential innovation or substance in the Court's decision is in relation to the weight and significance attached to the 'right to free self-identification'. The right must be respected both by the other members of the minority and by the State itself. As a general principle that makes sense. However, there was no evidence that MS or her husband had chosen not be treated as a member of a national minority. The couple had undergone a marriage under Islamic religious law. MS's husband simply did not wish his bequest on death to be regulated by the legal regime that applied to members of the national minority. He wanted to pick and choose the applicable legal regime for different aspects of his life. As noted, neither Greece nor Turkey is a party to the Framework Convention.[220] However, that was deemed to be of little significance by the Court because the right to free self-identification was not considered a right specific to the Framework Convention. Rather, it was held to be the 'cornerstone' of international law on the protection of minorities in general. Yet no evidence for this cornerstone from that international law of minorities was provided. In effect, the regime under the Lausanne Treaty was rendered entirely voluntary and individualistic for each member of the Muslim community in Western Thrace.

In religious contexts, the usual scenario is that of the individual asserting their claim that, as a member of a religious community, they have rights to act and be judged in accordance with their religious beliefs. The factual matrix in *Molla Sali* was intriguing because she was arguing that, although she was a Muslim, and had undergone an Islamic marriage, she did not want to be subjected to *Sharia*. Nor did her husband. In this sense, the case is similar to the HRC's decision in *Lovelace v. Canada*.[221] In both *Lovelace* and *Molla Sali,* the State was seeking to uphold the application of the particular minority regime to members of the respective minorities.[222] In *Lovelace*, L sought not to have the tribal laws of her native Indian

[219] ibid para 13 (emphasis in original).
[220] See (n 114).
[221] Cmn No. 24/1977, (30 July 1981), UN Doc. CCPR/C/13/D/24/1977. See Anne Bayefsky, 'The Human Rights Committee and the Case of Sandra Lovelace' (1982) 20 *Canadian Yearbook of International Law* 244; Karen Knop, *Diversity and Self-Determination in International Law* (CUP 2002) 358-72.
[222] See Oran (n 91) 107-09.

community applied to her with the effect of excluding her and her children from returning to her reservation to live, after a non-Indian had divorced her. The HRC held that, on the basis of her right to enjoy her own culture under Article 27 ICCPR, she should be able to return. Canada subsequently amended the applicable laws. The HRC did not determine whether the laws were also discriminatory under Article 26 ICCPR, on the basis that the alleged violation had occurred in 1970, which was before the entry into force of the ICCPR for Canada in 1976.[223] L made two claims. First, the positive aspect of self-identification as an Indian. Second, that the minority protection regime should not be applied to her so as to prevent her enjoying her culture. The HRC held that restrictions on the right to residence, by way of national legislation, could be ruled out under Article 27 ICCPR. It recognized the need to define the category of persons entitled to live on a reserve, for such purposes as the protection of its resources and preservation of the identity of its people. However, statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned must have both a reasonable and objective justification and be consistent with the other provisions of the ICCPR. To deny L the right to reside on the reserve was neither reasonable nor necessary to preserve the identity of the tribe.[224] In contrast, MS was claiming a negative aspect of self-identification but with a similar aim inasmuch as she did not want to be subjected to a particular aspect of the relevant national and international law protecting the Muslim minority. The Court held that there was no reasonable and objective justification for the differential treatment of MS because it was not proportionate to the aim pursued. However, the fact that you are worse off because of the application of the applicable law does not, of itself, make it discriminatory. If the reason that a particular law applies to you is that you are, both objectively and subjectively, a member of a protected minority, it is difficult to say that that is discriminatory either.

J. Religious Autonomy

[223] One member, Bouziri, dissented on the basis that L was still suffering from the adverse discriminatory effects of the national legislation. See also Kristin Henrard, 'The Protection of Minorities through the Equality Provisions in the UN Human Rights Treaties: The UN Treaty Bodies' (2007) 14 *International Journal on Minority and Group Rights* 141.
[224] *Lovelace v. Canada* (n 221) paras 16-17.

It is notable that the judgment in *Molla Sali* does not refer to religious autonomy.[225] The Court has developed an increasingly sophisticated, but often divided, jurisprudence on the relationship between Church/ religious autonomy and the individual rights to private and family life (Article 8 ECHR) and to freedom of religion (Article 9 ECHR).[226] It has considered that respect for the autonomy of religious communities implies that States should accept the right of such communities to govern themselves in accordance with their own rules and interests. Concerning the internal autonomy of religious groups, Article 9 does not enshrine a right of dissent within a religious community.[227] In the event of any doctrinal or organisational disagreement between a religious community and one of its members, the individual's freedom of religion is to be exercised by the option of freely leaving the community.[228] But, of course, neither MS nor her husband wanted to leave their religious community. They did not want a right of exit.[229] Many of the Article 8 and 9 cases have concerned the loyalty to the church of employees or office holders. MS was neither of these. She was simply a member of a religious community. Although the Court has given significant weight to church autonomy, it has not been prepared to accept that a mere allegation by a religious community that there was an actual or potential threat to its autonomy is sufficient. There has to be a thorough balancing exercise between the competing interests at stake and it had to have been conducted by the national authorities and courts.[230]

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[225] It was referred to by two of the interveners but both submitted that it did not justify restricting the fundamental rights of those members of the minority who had decided not to follow its rules and practices, (n 19).

[226] See Ian Leigh, 'New Trends in Religious Liberty and the European Court of Human Rights' (2010) 12 *Ecclesiastical Law Journal* 266; Carolyn Evans and Anna Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the US and the European Court of Human Rights' (2012) 1 *Oxford Journal of Law and Religion* 91; Johan D van den Vyver, 'State Interference in the Internal Affairs of Religious Institutions' (2012) 26 *Emory International Law Review* 1.

[227] *Fernandez Martinez v. Spain*, A. 56030/07 para 128 (12 June 2014).

[228] This point on dissent is interesting because in *Eweida and Others*, A. 48420/10, 59842/10, 51671/10 and 36516/10 (15 January 2013), the Court moved its jurisprudence more firmly into the necessity for balancing and away from notions of non-interference, see Megan Pearson, 'Article 9 at a Crossroads: Interference Before and After Eweida' (2013) 13 *HRLR* (2013) 580.

[229] See Susan Moller Okin, 'Mistresses of their own Destiny? Group Rights, Gender and Realistic Rights of Exit' (2002) 112 *Ethics* 205.

[230] See the ECtHR's balancing approach in relation to lay persons in *Obst v Germany*, A. 425/03 (23 September 2010), *Schüth v Germany*, A. 1620/03 (23 September 2010) and S*iebenhaar v Germany*, A. 18136/02 (3 February 2011). See Ian Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1 *Oxford Journal of Law and Religion* 109.

The Court has used the margin of appreciation as an instrument of supervision, particularly if the case involves the balancing of Convention rights. The Court's shift from simply respecting the autonomy of religious organisations to a less protective one that requires a detailed consideration of the balancing of interests in individual cases has been a subtle one. However, even where the Court is clear that there is an area where States have a margin of appreciation, reasonable judges may disagree on whether a fair balance has been struck in an individual case.[231]

8. MOLLA SALI: STATE RESPONSES AND CONTINUING ISSUES WITH THE APPLICATION OF *SHARIA* IN EUROPE

A. The New Greek Law of 2018

One might suspect that Greece was as content with the Court's finding a violation in *Molla Sali* as Canada arguably was in the *Lovelace* case. It could then have presented to Turkey the imperative need to change the position under the Lausanne Treaty as being required by the ECHR rather than as a matter of political choice. Greece had actually legislated for change after the oral hearing before the Court but before the Judgment was delivered.[232] The relevant provisions of Law No. 4511/2018,[233] which came into force on 15 January 2018, provide that the matters referred to in section 5 of the Legislative Act of 24 December 1990 (marriage, divorce, maintenance payments, guardianship, trusteeship, capacity of minors, Islamic wills and intestate succession, where such matters are governed by Islamic holy law),

> ...shall be governed by the provisions of ordinary law, and shall only exceptionally come under the jurisdiction of the mufti, that is to say where both parties jointly request that he settle a dispute in accordance with Islamic holy law If one of the parties does not wish to submit the case to the mufti, that party may apply to the civil courts which are deemed to have jurisdiction in all cases.

[231] See the discussion in Dominic McGoldrick, 'Religious Rights and The Margin of Appreciation' in Petr Agha (ed), *Human Rights Between Law and Politics, The Margin of Appreciation in Post-National Contexts* (Hart 2017) 145 at 159-68.
[232] See Helena Smith, 'Greece's Muslim minority hails change to limit power of *Sharia* law' *The Guardian* (London, 11 January 2018).
[233] Law No. 4511/2018 amending section 5 of Law No. 1920/1991 ratifying the Legislative Act of 24 December 1990 on Muslim ministers of religion, translation available at https://www.minedu.gov.gr/publications/docs2018/Law_4511_2018_Reform_on_Mufti_jurisdiction_Sharia_law.pdf

Thus, under the new law, a Muslim family will still be able organise its affairs on *Sharia* principles if it wants to, but only by the freely given consent of all interested parties. They must make a specific request to the mufti to settle a dispute. In the absence of such consent, Greek civil law will have jurisdiction by default.[234] The 2018 Law is even more specific and prescriptive in relation to inheritance matters. These shall be governed by the provisions of the Civil Code, unless the testator makes a 'notarised declaration of his or her last wishes explicitly stating his or her wish to make the succession subject to the rules of Islamic holy law.' MS's husband had obviously not done this. However, the 2018 Law does not appear to have retrospective application. With respect to future situations the 2018 Law provides that 'Any wills drawn up before the entry into force of this Law in respect of which the property has not yet been transferred shall normally take legal effect at the time they are opened.' That means they will be subject to the provisions of the 2018 Law.

It has been suggested that the new law reflects anecdotal evidence suggesting that huge numbers of Thracian Muslims would prefer to use secular legal system if they can.[235] Greek officials were at pains to stress that they were not abolishing *Sharia*, merely making it a matter of free choice. It has been suggested that Greece introduced the new law because it anticipated that the Court would find a violation.[236] In political terms, the fact that Greece had already changed its national law made it relatively easy for the Court to find a violation. The Court noted 'with satisfaction' that on 15 January 2018 the new Greek law abolishing the special regulations imposing recourse to *Sharia* for the settlement of family-law cases within the Muslim minority came into force.[237] Recourse to a mufti in matters of marriage, divorce or inheritance was now only possible with the agreement of all those concerned. Nonetheless, the provisions of the new law had no impact on the situation of MS. Her case was decided with final effect under the old system in place prior to the enactment of that law.[238]

B. Individual Rights versus Minority Protection in Greece

[234] 'Greece prepares to do away with compulsory Sharia in Western Thrace' *The Economist*, 28 November 2017, available at https://www.economist.com/blogs/erasmus/2017/11/jurisprudence-eu.
[235] ibid.
[236] Nektaria Stamouli, '*Shariah* Law Puts Greece at Odds with European Court and With Turkey;' *Wall Street Journal (Online)* (New York, 8 Dec 2017).
[237] *Molla Sali,* para 160.
[238] ibid.

Religious personal laws have come to serve 'an important role in regulating membership boundaries'.[239] Personal status and family matters are often core to a religious community's collective identity and its desire to perpetuate itself.[240] Adjudication by the mufti on the basis of *Sharia* has been the practice in Western Thrace for over a century and appears to be of 'undeniable importance for the preservation of the identity of the Muslim communities in Thrace'.[241] Devout followers may consent and will doubtless be under social pressure from members of their religious community to do so. In one sense, the new Greek Law of 2018 is strongly individualistic. Only if all of the interested parties consent can the mufti can exercise jurisdiction and apply *Sharia*. The view of any one interested party can thus prevail over all others. Moreover, in inheritance matters, MS's husband's view, as expressed in his civil will, would now prevail over that of his wife (MS) and two sisters. Only an express declaration by MS's husband that *Sharia* applied would have sufficed.

Even for devout Muslims, however, their financial and property needs may prevail over any broader allegiance to their religious community. The risk for the Muslim community in Thrace is that the legislative changes introduced by Greece in 2018 and the Judgment in *Molla Sali* are the thin end of the wedge. Of course, Muslims who support the continued application of *Sharia* might not have supported MS's case or indeed any involvement by the Court. Rather, 'For the Muslims in Thrace the abolishment of *Sharia* would in fact constitute an abolishment of their minority right - this is how they see it. They do not see it as part of a wider human rights issue, rather (they see it) as their right as a minority.'[242] If a significant part of the Islamic community opt out of the application of *Sharia* then that element of group identity is lost or at least significantly diminished.

C. The Position of Turkey

Turkey did not seek to intervene in the *Molla Sali* case but it was necessarily placed in an interesting position with respect to it. As noted, it views itself as the kin-State of the Muslim

[239] Ayelet Shachar, 'State, Religion, and the Family: The New Dilemmas of Multicultural Accommodation' in Adhar and Aroney (n 20) 117 at 121 (stressing that this applies particularly in non-territorial religious communities).
[240] Gaudreault-DesBiens (n 104).
[241] Stavros (n 132) 23.
[242] Markoviti (n 164) 11, citing the views of an adviser to the Greek Ministry of Foreign Affairs.

minority in Western Thrace. It has historically raised issues concerning their treatment. There has long been a Turkish consulate in Komotini and it plays a major role in matters relating to the Muslim minority in Western Thrace and in preserving the link with Turkey and Turkish identity. However, Turkey has not applied *Sharia* since 1926. In the 1930s and 1950s, Turkey, in the spirit of the Kemalist reforms, had suggested the abolition of the muftis jurisdiction in Western Thrace. The then Greek governments denied that request in the name of minority protection.[243] The European Court found that applying the Lausanne Treaty as interpreted by Greece, namely the compulsory application of *Sharia* to MS's husband, violated the ECHR. As both Greece and Turkey are parties to the ECHR this might effectively preclude Turkey from arguing that Greece should continue to enforce the compulsory application of *Sharia*.

Article 42 of the Treaty of Lausanne provided that the measures permitting the settlement of questions of family law or personal status in accordance with the customs of those minorities 'will be elaborated by special Commissions composed of representatives of the Turkish Government and of representatives of each of the minorities concerned in equal number.' After Turkey adopted a new secular based Civil Code in 1926, it persuaded the representatives of the major Greek religious communities in Istanbul (Christian Orthodox, Armenian and Jewish) to renounce the protection of family law and personal status under Article 42 .[244] Those matters were then to be regulated by the new Civil Code. Given that Turkey acted on the basis that the consent of the communities would preclude any violation of Article 42, it would be inconsistent for it to argue that the Muslim community in Western Thrace could not similarly agree to have such matters regulated by the Greek Civil Code. However, the position is not so clear if the measures were adopted without the consent of that community, but rather in support of individual members of that community who do not want particular family and personal status issues be regulated by *Sharia*. There was no formal consultation process in Western Thrace but the legislation was overwhelmingly supported in the Greek parliament including by the members from Western Thrace. The only opposition was from the right wing Golden Dawn party but not because they supported the use of Muslim laws in Greece. Quite the opposite.

The sensitivities of the issues in Thrace were evident in Turkish President Erdogan's visit to Greece in 2017, the first such visit in 65 years. He raised issues concerning the status

[243] See Tsitselikis (n 132) 343.
[244] See Kamouzis (n 85).

of Muslims and accused Greece of violating the Treaty of Lausanne. His main focus appeared to be on the issue of the appointment of the muftis.[245] He also questioned the borders as defined by the Lausanne Treaty.[246] He asked for the Treaty of Lausanne to be revised and modernised so that it became relevant again.[247] It was not clear what he meant by revision and modernisation.

D. Substantive Issues under *Sharia*

It has been suggested that the muftis in Western Thrace do not apply *Sharia* strictly and there is some blending to comply with modern standards.[248] However, there is no doubt that the broader application of *Sharia* in the area raises a host of substantive under the ECHR[249] (and under the ICCPR). For example, these might concern the custody[250] and upbringing of children,[251] favouring male over female children or heirs,[252] non-inheritance by illegitimate or adopted children,[253] the meaning of 'family', and the equality of women.[254] Moreover, the particular substantive rule applied in MS's case was not necessarily problematic.[255] Islamic

[245] See Nektaria Stamouli, 'Tensions Emerge During Erdogan Visit to Greece; Turkish president says Greek authorities have failed to ensure the rights of the country's Muslim minority' *Wall Street Journal (Online)* (New York, 7 Dec 2017).
[246] See Eleni Konidari, 'Western Thrace: Where your Way of Life is Governed by a Hundred Year Old Treaty' 28 December 2017, available at https://www.opendemocracy.net/can-europe-make-it/eleni-konidari/western-thrace-where-your-way-of-life-is-governed-by-hundred-year-. More widely, there have been regular disputes between Turkey and Greece over airspace and maritime borders.
[247] See also Nick Danforth, 'Turkey's New Maps are Reclaiming the Ottoman Empire' Foreign Policy, October 23, 2016: http://foreignpolicy.com/2016/10/23/turkeys-religious-nationalists-want-ottoman-borders-iraq-erdogan/). For the reaction of the Greek Foreign Ministry see http://www.ekathimerini.com/212433/article/ekathimerini/news/erdogan-disputes-treaty-of-lausanne-prompting-response-from-athens.
[248] See Boussiakou (n 89) 25; Tsaoussi and E. Zervogianni (n 252).
[249] In 2013 the CEDAW Committee recommended that Greece 'Fully harmonize the application of local *Sharia* law and general law in the State party with the provisions on non-discrimination of the Convention, in particular with regard to marriage and inheritance', UN Doc. CEDAW/C/GRC/CO/7, para 37.
[250] 'Under *Sharia*h, mothers have custody of girls until the age of 10 and boys until 8, but after that, children must move in with their father. In one case in Greece, the *Mufti* ruled against a woman who was seeking to regain custody of her child from her mother-in-law', Stamouli (n 236).

law does not recognise civil wills (as distinct from Islamic ones).[256] The effect of the application of *Sharia* was that the property of MS's husband was shared among members of his family rather than going solely to this wife. However, in MS's case there was nothing intrinsically unfair about the application of *Sharia* that produced that result. It could, in particular circumstances, have been be unfair if MS had been a dependent.[257] Many States have legal regimes under which dependent persons who can challenge in such circumstances.[258] In addition, the substantive law applied in the *Molla Sali* case was not gendered. The facts concerned three women, MS and MS's husband's two sisters.[259] A number of the judges in the Grand Chamber of the Court raised the issue of whether MS's husbands' sisters had a legitimate expectation under *Sharia* of receiving part of the property. If the original decision of the Greek courts to apply the will and for all the property to pass to MS had stood, then, in principle, they could equally have brought a case alleging a violation of their ECHR property rights.

On the facts, MS's situation was not as dramatic as that of *Lovelace*.[260] MS faced a reduced inheritance. By contrast, L had lost her Indian status, as had her children. She was no

[251] In *EM v Lebanon*, [2008] UKHL 64; [2009] 1 All ER 559, Lord Hope, para 6, their Lordships approved a description of *Sharia* law relating to child custody as 'arbitrary and discriminatory' if measured by the human rights standards in the ECHR.

[252] 'Male heirs have double the share in the estate as compared with female heirs. They are treated as "autonomous" heirs and are entitled to the portion of the estate remaining after those entitled to fractional shares have received them. The widow and daughters of the deceased are deemed to be entitled to fractional shares in the estate. Six types of fractional shares are possible: one-half, one-quarter, one-eighth, one-third, two-thirds and one-sixth. Thus, the widow will receive one-eighth of the estate, if there are any children, and one-quarter if there are none. If the deceased's only child is female, she is entitled to half of the estate. If the deceased also has brothers and a mother, his daughter will receive one-sixth.', *Molla Sali,* para 36. See Aspasia Tsaoussi and Eleni Zervogianni, 'Multiculturalism and Family Law: The Case of Greek Muslims' in Katharina Boele-Woelki and Tone Sverdrup (eds), *European Challenges In Contemporary Family Law* (Intersentia 2008) 209.

[253] See Shabnam Ishaque, 'Islamic Principles on Adoption' (2008) 22 *International Journal of Law, Policy and Family* 393; *Pla and Puncernau v. Andorra*, A. 69498/01 (13 July 2004) (very weighty reasons needed to be put forward before a difference in treatment on the ground of birth out-of-wedlock could be regarded as compatible with the Convention). Though two dissenting judges, Bratza and Garlicki, considered that this applied to differences stemming from decisions and actions of State institutions, but not to private individuals. The ECtHR's jurisprudence was applied in *Hand and another v George and another* [2017]

longer entitled to live on the reservation and could not be buried there. She could not inherit a possessory interest in the land from her parents. She could not borrow money from the Indian Council. Thus, MS's case was not directed at a substantively unfair rule concerning the distribution of MS's husband's assets. Rather it was directed at how the applicable law was determined, hence the Article 6/ Article 14 complaint, and at the application of religious law as such, which resulted in deprivation of property she would otherwise have received, hence the Article 1 of Protocol 1 complaint.

E. The Applicability of Article 6 ECHR

Although the GC did not frame *Molla Sali* in Article 6 terms, a threshold issues would be whether a person such as MS had any 'civil right' for the purposes of Article 6? A right to property clearly has a pecuniary character and would normally constitute a civil right for the purposes of Article 6. In a striking and unusual Judgment in *Nagy v. Hungary*[261] the Grand Chamber of the Court, by a majority of 10-7, found that N, a dismissed pastor of the Hungarian Reformed Church had no arguable right to compensation in domestic law, as his appointment fell under ecclesiastical and not civil law. Therefore, his application was inadmissible. The majority considered that given the overall legal and jurisprudential

EWHC 533 (Ch) to allow adopted children to benefit from a 1946 will in favour of 'children'.

[254] There was 'no place in it for equal rights between men and women', *EM v Lebanon* (n 251). For a wider critique see Elham Manea, *Women and Shari'a Law* (Taurus, 2016).

[255] Cf. It has been reported that 'as Greece's Supreme Court ruled the application of *Sharia*h as compulsory, a number of local Muslims presented legal challenges to wills that had been considered settled. In one case, a man successfully challenged his father's will that left all his belongings to his wife', see Stamouli (n 236).

[256] 'the Court of Cassation agreed that a will was valid if it was accepted by all those holding the status of heirs under *Sharia* law. However, in the instant case the consent of the deceased's sisters to the impugned will had been lacking.' *Molla Sali,* para 112.

[257] M and her husband had no children.

[258] For example, see the UK position see Inheritance (Provision for Family and Dependants) Act 1975, considered in *Ilott v The Blue Cross and others* [2017] UKSC 17. In Ireland direction in wills concerning children's education and religious upbringing can be declared void because they conflict with Article 42 of the Constitution which provides that parents have the principal authority and responsibility for educating them, see *Burke and O'Reilly v. Burke and Quail* [1951] IR 216.

[259] In his concurring opinion Judge Mits observed that, 'In view of the facts of the case, the Grand Chamber was not required to examine potential discrimination against MS on the grounds of her sex either in relation to Muslim men, or non-Muslim women.', (n 206) para 12.

[260] (n 221).

[261] A. 56665/09 (14 September 2017).

framework existing in Hungary at the material time when N lodged his civil claim, the domestic court's conclusion that N's pastoral service was governed by ecclesiastical law and their decision to discontinue the proceedings could not be deemed arbitrary or manifestly unreasonable. By analogy it could be argued that, as in *Nagy*, the national courts had determined that MS's case was governed by a form of ecclesiastical law (*Sharia*) rather than Greek civil law, as so she had no 'right' which could be said, at least on arguable grounds, to be recognised under domestic law. Therefore, Article 6 would not apply, and the related Article 14 complaint would arguably fall away. Within the 'overall legal and jurisprudential framework' existing in Greece, could the decision of the national court to direct that *Sharia* applied be deemed 'arbitrary or manifestly unreasonable'? That is a high threshold to meet. Although it could be suggested that if the decision on applicable law is discriminatory (as the Court found) then it is inevitably 'arbitrary or manifestly unreasonable'. That the threshold was not met was supported by the Greece's argument that, although the choice whether to use *Sharia* or the Greek Civil Code in family and inheritance law matters was made by the members of the Muslim minority, if they did choose it, then *Sharia* was only applied to the extent that its rules were not in conflict with fundamental values of the Greek society and the Greek legal and constitutional order. In order to reconcile Islamic law with the Greek public order and the international obligations assumed by Greece, in particular, in the field of gender equality, Article 5 (3) of Law 1920/1991 provided that the courts shall not enforce decisions of the muftis which are contrary to the Greek Constitution. In this respect, derogations from civil law provisions were presented as minor: concepts such as polygamy, marriage below legal age, marriage by proxy, were not permitted. [262]

F. Procedural Issues under *Sharia* - Fair Hearing

Assuming that Article 6 ECHR did apply, the application of *Sharia* potentially raises procedural issues under the ECHR, particularly in relation to the fair hearing guarantee.[263]

[262] UN Doc. CCPR/C/GRC/2004/1, para 911.

[263] PACE Resolution 2253 (n 9) para 7, regretted that 'muftis continue to act in a judicial capacity without proper procedural safeguards'. In 2008 the then Commissioner for Human Rights of the Council of Europe has stated that he was, 'favorably positioned towards the withdrawal of the judicial competence from Muftis, given the serious issues of incompatibility of this practice with international and European human rights standards' Report by Mr Thomas Hammarberg, following his visit to Greece on 8–10 December 2008 (CommDH(2009)9, 19/2/2009, Issue reviewed: human rights of minorities, 1.

Under the New Greek Law of 2018, the jurisdiction of the muftis was not abolished so Article 6 issues remain open to challenge. If, in accordance with the new law, the relevant parties have all consented to rulings by the mufti based on *Sharia*, the Court might find that an applicant did not have victim status. It has accepted that the right of access to a court under Article 6(1) can be waived, provided there was no coercion or constraint, the waiver was unequivocal and it was attended by minimum safeguards commensurate to its importance. Impartiality could still be challenged, as could aspects of procedural justice and equality of arms. The Court has already applied these principles to cases involving arbitration.[264]

In 2001 the Greek National Committee for Human Rights stated that the abolition of the judicial and administrative responsibilities of the mufti and the restriction of his responsibilities to religious ones was seen as an imperative measure for the modernization of the institution.[265] The HRC has taken a strict view of the requirements for religious courts. In its General Comment on Article 14 ICCPR, Right to Equality Before Courts and Tribunals and to Fair Trial, it stated:

> such courts cannot hand down binding judgments recognised by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.'[266]

[264] *Suovaniemi and others v. Finland*, A. 31737/96 (23 February 1999).
[265] Available at: www.fundacionmujeres.es/violenciasporhonor/upload/doc92_final%20shehrezad_form_eng.doc.
[266] GC 32, para 24 on Article 14 ICCPR, UN Doc. CCPR/C/GC/32 (23 August 2007). On the operation of religious tribunals in Ireland, see Enright (n 126).

Although the European Court has found violations relating to the State's prosecution of muftis appointed by religious communities,[267] in Greece's view the Court did not deal with the overall competencies of the muftis and whether the relevant Greek legislation regulating their appointment was in conformity with the ECHR.[268]

The Court has also developed a distinct and narrower jurisprudence that focuses on Article 6 in the context of the role of States courts in applying and giving effect to the decisions/ judgments of religious courts or tribunals. This is important because MS's application was partly framed on the basis of Article 6 taken alone and in conjunction with Article 14. *Pellegrini v. Italy*[269] concerned a decision of the Italian Court of Appeal authorising enforcement of the decision of an Ecclesiastical Court of Appeal (*Roman Rota*), a Vatican Court which is the highest ecclesiastical court of the Roman Catholic Church. It had annulled P's marriage on grounds of consanguinity. Under Article 8(2) of the Concordat between Italy and the Vatican, as amended, a judgment of the ecclesiastical courts annulling a marriage, which had become enforceable by a decision of the superior ecclesiastical review body, may be made enforceable in Italy at the request of one of the parties by a judgment of the relevant court of appeal. The Court of Appeal must check: (a) that the judgment had been delivered by the correct court; (b) that in the nullity proceedings the defence rights of the parties had been recognised in a manner compatible with the fundamental principles of Italian law; and (c) that the other conditions for a declaration of enforceability of foreign judgments had been satisfied. As the Vatican had not ratified the ECHR,[270] the Court's task was not to examine whether the proceedings before the ecclesiastical courts complied with the right to a fair trial (Article 6 ECHR), but whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. The Court found a violation of Article 6(1) because the Italian courts breached their duty of satisfying themselves, before authorising enforcement of the Roman Rota's judgment, that P had had a fair trial in the proceedings under canon law. It was not satisfied by the reasons given by the Italian courts in concluding that P had had the benefit of an adversarial trial. P had not had the possibility of examining the evidence

[267] See (n 22).
[268] UN Doc. CCPR/C/GRC/2004/1, para 915. See Ali Dayioğlu, 'An Ongoing Debate in the Turkish-Greek Relations: Election of the Muftis in Greece' (2019) 8 *Journal of Balkan Research Institute* 37.
[269] A. 30882/96 (20 July 2001).
[270] In substance though it seems clear that if the Holy See were a party to the ECHR it would have been held to have violated Article 6.

produced by her ex-husband and by his witnesses, or of examining the case file. In addition, in the circumstances, the Ecclesiastical Courts had a duty to inform her that she could seek the assistance of a lawyer before she attended for questioning.[271]

Pellegrini is analogous to the *Molla Sali* case. The Court took a strong position in holding that enforcement of the judgment of the Vatican court, a court of a non-State party to the ECHR, violated Article 6. *Pelligrini* was concerned with the review of the proceedings of what was technically a foreign court. In terms of principle, as the courts operate within its territorial jurisdiction, Greece would expect to be held to a higher level of responsibility. As noted, under Greek legislation the courts are obliged to check that the substantive rules being applied are not in conflict with fundamental values of the Greek society and the Greek legal and constitutional order.[272] One of the arguments in the MS case was that role of national courts in ensuring that decisions of the mufti complied with the Greek constitution and human rights was formalistic and ineffective. The Court cited academic evidence that those courts do not in fact perform a proper review of constitutionality, but in most cases just formally ratify the mufti's decision. It observed that between 2007 and 2014, for example, the Xanthi and Rodopi courts declared enforceable 390 decisions by the mufti of Xanthi and 476 decisions by the mufti of Komotini respectively, and refused to do so in 34 and 17 cases respectively.[273]

The Greek law of 2018 was to be accompanied by a detailed presidential decree.[274] Published over a year later, the decree clarifies the subject-matter, territorial and personal jurisdiction of the mufti and the circumstances in which it is exclusive (Articles 1-2). It sets the minimum age of marriage at 18 but allows the mufti to authorize underage marriages with permission from the minors' legal guardians (Article 3). Each party appearing before the mufti must be represented by a lawyer and those who cannot afford a lawyer may request free legal aid (Article 5). The parties must be treated equally and proceedings before the mufti must follow a written format and mufti decisions must be published (Artile 6). Proceedings before the mufti must be conducted in the Greek language (Article 7). If parties do not know

[271] *Pellegrini* (n 269) paras 44-47.
[272] See (n 126).
[273] *Molla Sali,* para 48, citing Georgia Sakaloglou, 'Competence of the *mufti* in family, personal and inheritance cases among Greek Muslims in the area of jurisdiction of the Thrace Court of Appeal' (2015) 63 *Nomiko Vima* 1366. See also İlker Tsavousoglou, 'The Legal Treatment of Muslim Minority Women under the Rule of Islamic Law in Greek Thrace' (2015) 2(3) *Oslo Law Review* (Special Issue: Legal Pluralism) 241.
[274] The decree was published on the 11th of June 2019, and is available at http://www.nomotelia.gr/photos/File/90%CE%91-19.pdf. See Sezgin (n 25).

Greek, a translator is recruited (Article 9). Mufti decisions are issued in the Greek and Ottoman languages (Article 10) Mufti decisions cannot be enforced without a decree issued by the local single-member court of first instance (Article 10). The civil court must examine whether the mufti's judgment has been issued within his jurisdiction, and whether it contravenes the Greek Constitution or the ECHR (Article 12). An appeal against the decision of a single-member court can be brought before a multi-member court of first instance (Article 12). Finally, each mufti tribunal will be appointed a legal adviser trained in secular law in order to assist the mufti (Article 17). Many of the provisions in the decree appear to be directed at meeting possible Article 6 challenges analgous to those in *Pellegrini*.

9. CONCLUDING REFLECTIONS:

A. Is Individual Consent the Principled Human Rights Solution?

In human rights terms, creating choices or options for individual is generally better. They reflect consent, self-determination and party autonomy.[275] The HRC has observed that Greece was required to inform women who might face the non-application of the general law of Greece on matters such as marriage and inheritance of their legal options.[276] However, as a form of alternative dispute resolution,[277] the new Greek law of 2018 creates its own challenges in terms of how realistic and effective the choice is in the light of the vulnerability of particular individuals, prevailing socio-economic factors such as family, social and community expectations, resources, education, access to lawyers or legal advice, access to courts, and the equality of the substantive and procedural norms applied by religious jurisdictions.[278] In Ontario, Canada, a proposal for binding religious arbitration caused

[275] See Rhoda E. Howard-Hassmann, 'The "Quebec Values" Debate of 2013: Minority Versus Collective Rights' (2018) 40 *Human Rights Quarterly* 144.
[276] Concluding Observations of HRC on Greece, UN Doc. CCPR/CO/83/GRC (2005), para 8; Concluding Comments of CEDAW on Greece, UN Doc. CEDAW/C/GRC/CO/6 (2006), para 33.
[277] See Laura McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26 *The European Journal of International Law* 607.
[278] See *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, (International Council on Human Rights Policy 2009) available at: www.ichrp.org/files/reports/50/135_report_en.pdf; Tagari (n 26) 242-5.

enormous controversy and was ultimately legislatively prohibited, notwithstanding that it would only have applied to consenting parties.[279]

As noted, the Court highlighted the voluntary nature of the application of *Sharia* in the UK.[280] However, they are of growing significance. It is estimated that there are over 85 *Sharia* Councils in the UK.[281] PACE Resolution 2253 expressed concerned about the 'judicial' activities of 'Sharia Councils' in the UK.[282] Particular concerns have related to discrimination against women. Baroness Cox's Arbitration and Mediation Services (Equality) Bill [HL] 2016-2017, first introduced to the House of Lords as a Private Members' Bill in 2011, received a second reading in the House of Lords on 27 January 2017 but did not make any further progress.[283] The Bill aimed to protect women from religiously sanctioned gender discrimination. It contained provisions regarding the application of equalities legislation to arbitration and mediation services. At its second reading, the government contended that there are aspects of the Bill that were legislatively unnecessary because of existing legislation, as well as issues which should be considered in light of an Independent Review. In 2018, that *Independent review into the application of Sharia law in England and Wales* was published.[284] It considered 'whether *Sharia* law is being misused or applied in a way that is incompatible with the domestic law in England and Wales, and in particular whether there were discriminatory practices against women who use *Sharia* councils'. The report explained that

> '*Sharia* councils have no legal status and no legal binding authority under civil law. Whilst *Sharia* is a source of guidance for many Muslims, *Sharia* councils have no legal jurisdiction in England and Wales. Thus if any decisions or recommendations are made by a *Sharia* council that are inconsistent with domestic law (including

[279] See Natasha Bakht, 'Were Muslim Barbarians Really Knocking at the Gates of Ontario? The Religious Arbitration Controversy Another Perspective' (2006) *Ontario Law Review* Special 40th Anniversary Edition, 67; Marion Boyd, 'Ontario's 'shari'a court': Law and Politics Intertwined', in Griffith-Jones (n 20) 176-86.
[280] Text to (n 215).
[281] See Samia Bano, *Muslim Women and Shari'ah Councils* (Palgrave, 2012); Samai Bano, (ed), *Women, Mediation and Religious Arbitration: Thinking Through Gender and Justice in Family Law Disputes* (University Press of New England 2017); Dennis MacEoin, *Sharia Law or 'One Law for All?*' (Civitas 2009); *Independent Review* (n 284) 4.
[282] See (n 9) para 8.
[283]See https://services.parliament.uk/bills/2016-17/arbitrationandmediationservicesequality.html; John Eekelaar, 'The Arbitration and Mediation Services (Equality) Bill' (2011) *Family Law* 1209; Ralph D Grillo, *Muslim Families, Politics and Law: A Legal Industry in Multicultural Britain* (Routledge 2016).
[284] Cm 9560, February 2018.

> equality policies such as the Equality Act 2010) domestic law will prevail. *Sharia* councils will be acting illegally should they seek to exclude domestic law. Although they claim no binding legal authority, they do in fact act in a decision-making capacity when dealing with Islamic divorce.'[285]

It found that the vast majority, in fact nearly all people using *Sharia* councils, were women. In over 90% of cases, they women were seeking an Islamic divorce. A key finding was that a significant number of Muslim couples fail to civilly register their religious marriages and therefore some Muslim women have no option of obtaining a civil divorce. The review made three recommendations: (1) amendments to marriage law to (a) ensure that civil marriages are conducted before or at the same time as the Islamic marriage ceremony and (b) establish the right to a civil divorce; (2) developing programmes to (i) raise Muslim couples' awareness that Islamic marriages do not afford them the protections under the law that come with a civil marriage because their partnership is not recognised as a legal marriage; and (ii) encourage Muslim couples that have or are having an Islamic marriage to register for a civil marriage as well and (3) regulating *Sharia* councils through the creation of a State established body that would create a Code of Practice for *Sharia* councils to accept and implement. In response, the Government stated that it would carefully consider the review's findings. However, it rejected the third recommendation because it would

> confer upon them legitimacy as alternative forms of dispute resolution. The Government does not consider there to be a role for the State to act in this way. Britain has a long tradition of freedom of worship and religious tolerance and regulation could add legitimacy to the perception of the existence of a parallel legal system even though the outcomes of *Sharia* Councils have no standing in civil law, as the independent review has made clear. Many people of different faiths follow religious codes and practices and benefit from their guidance. The Government has no intention of changing this position and for this reason cannot accept recommendation three.[286]

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[285] ibid para 20.

[286] Government response: Amber Rudd (The Secretary of State for the Home Department) Faith Practices: Written Statement House of Commons, Written Statement 442, 1 February 2018. See also HM Government, *Integrated Communities Strategy Green Paper: Building Stronger More United Communities* 58 (March 2018).

The review found some evidence of *Sharia* councils forcing women to make concessions to gain a divorce, of inadequate safeguarding policies, and a failure to signpost applicants to legal remedies. This was not considered acceptable. Where *Sharia* councils existed, they must abide by the law. Legislation was in place to protect the rights of women and prevent discriminatory practice. The Government would work with the appropriate regulatory authorities to ensure that this legislation and the protections it established were being enforced fully and effectively.[287] The UK's position is strikingly different from that of Greece. In both States the nature of their religious jurisdictions is voluntary. However, the Greek Presidential Decree of 2019 now provides a degree of procedural protection and safeguards, while the UK in unwilling to establish state regulation for fear that it confers 'legitimacy'. It is submitted that, even if individual consent is a principled human rights solution, it needs appropriate state regulation to support it.

B. The Systemic Implications of *Molla Sali*: *Sharia* in Europe?

As noted, the Parliamentary Assembly of the Council of Europe has expressed concern at the official or unofficial application of *Sharia* in Europe.[288] In 2019, it noted the legislative change in Greece which made the practice of Islamic *Sharia* in civil and inheritance matters optional for the Muslim minority. It called on the Greek authorities to monitor whether this legislative change would be sufficient to satisfy the requirements of the ECHR, and allow the Muslim minority to choose freely its muftis as purely religious leaders (that is, without judicial powers), through election or appointment, thereby abolishing the application of *Sharia*, as already recommended in Resolution 1704 (2010).[289] Prior to *Molla Sali* the Court had been decidedly negative as to the possible consistency of *Sharia* with the ECHR.[290] That negativity was not repeated in *Molla Sali*. There was complete silence. MS's legal victory was widely welcomed. She will ultimately receive just satisfaction.[291] However, curiously the systemic concern is whether by the silence, by not repeating its negative assessment, and by noting 'with satisfaction' the requirements of the Greek Law of 2018, the Court has potentially opened the door to the limited application of *Sharia* within the legal space of the

[287] ibid.
[288] See (n 9).
[289] ibid para 13.
[290] See Section 6 (B).
[291] The Court reserved the question of just satisfaction under Article 41, *Molla Sali,* para 166. As of November 2019 there had been decision on it.

ECHR.[292] The restrictions in the Greek law in terms of both the application of *Sharia* and the jurisdiction of the mufti will probably limit the number of times *Sharia* is applied. Its strongly consensual basis may avert ECHR challenges by reference to waiver and the absence of victim status. The terms of the accompanying Presidential Decree will increase the likelihood of compliance with the fair hearing requirements of Article 6 ECHR. At some point though the Court will have to decide whether its seeming acceptance means that, if all the parties have consented or a testator has made a 'notarised declaration of his or her last wishes explicitly stating his or her wish to make the succession subject to the rules of Islamic holy law', then *Sharia* can exist within the European legal space, even if some of the substantive *Sharia* rules are clearly inconsistent with the ECHR.

It is interesting to contrast Molla Sali with the 2018 judgment of the African Court on Human and Peoples' Rights Court in *Association Pour Le Progrès Et La Défense Des Droits Des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa (IHDRA) v. Republic of Mali*.[293] In that case, the Court found that the Islamic law applicable in Mali in matters of the minimum age for marriage, the right to consent to marriage and the right to inheritance for women and children born out of wedlock, was not in conformity with international human rights instruments ratified by Mali (the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, the African Charter on the Rights and Welfare of the Child, and the CEDAW), even if, in relation to inheritance, the testator could specify via a notary that religious and customary law was not to be the applicable regime.[294] The State was obliged to amend its legislation to bring it in line with the relevant provisions of the applicable international instruments.[295]

It is always easy to be critical of a judgment of the European Court, even a unanimous one. Like other courts, it tends to answer individual problems rather than address potential systematic issues. However, the place, if any, of *Sharia* in Europe is a systemic issue and demographic trends will give it added saliency.[296] In his concurring opinion, Judge Mits

[292] See Grégor Puppinck, '*Sharia*: What Emerges from the Molla Sali v. Greece Judgment' 22 January 2019, available at https://aclj.org/human-rights/*Sharia*-what-emerges-from-the-molla-sali-v-greece-judgment; Karine Bechet-Golovko, 'Affaire Molla Sali La CEDH ouvre la voie à l'islamisation du droit en Europe "par consentement mutual"' *Comité Valmy*, 29 December 2018, available at http://www.comite-valmy.org/spip.php?article10757.
[293] A. 046/2016, available at http://www.african-court.org/en/index.php/56-pending-cases-details/942-app-no-046-2016-apdf-ihrda-v-republic-of-mali-details.
[294] ibid paras 96-115.
[295] ibid, para 130.
[296] See Section 2 (A).

observed that, in view of the facts of the case, the Court did not have to 'address the broader question of the consequences of applying a legal regime such as *Sharia* law, developed in an environment of different cultural and legal traditions, in the European legal space.'[297] However, in January 2019 the then President of the European Court, Guido Raimondi, who presided in *Molla Sali*, appeared to suggest that the Court was conscious of the systemic problem. The judgment in *Molla Sali* 'gave rise to erroneous interpretations, with some commentators suggesting that our Court wanted to pave the way for the application of *Sharia* in Europe. However, the *Molla Sali* judgment leads to precisely the opposite conclusion.'[298] In his view, this was because, in accordance with the applicant's wishes, the Court had given priority to the ordinary law over the religious law.[299] However, the case graphically re-emphasises the limitations of the ECHR in terms of the protection of minority groups. The ECtHR perceives minority identity as predominantly just an aspect of individual identity. There is an individual right to identify or not to identify with a minority group, seemingly on an issue-by-issue basis. Individual self-identification or non-identification is the critical element. Non-identification by one individual can render identification by any number of other persons irrelevant. In practical terms, that approach has the potential to destroy any minority as a collective.[300]

[297] See (n 206) para 12.
[298] Raimondi (n 24) 7.
[299] ibid 8. In support of the consensual approach see Konstantinos Tsitselikis, 'Muslims of Greece: a Legal Paradox and a Political Failure' in Norbert Oberauer, Yvonne Prief and Ulrike Qubaja (eds), *Legal Pluralism in Muslim Contexts* (Brill, 2019) 63–83.
[300] See Nikos Koumoutzis and Christos Papastylianos, 'Human Rights Issues Arising from the Implementation of Sharia Law on the Minority of Western Thrace—ECtHR Molla Sali v. Greece' (2019) 10(5) *Religions* 300; Eleni Kalampakou, 'Is There a Right to Choose a Religious Jurisdiction over the Civil Courts? The Application of Sharia Law in the Minority in Western Thrace, Greece' (2019) 10(4) *Religions* 260.