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The Molla Sali case: How the European Court of Human Rights escaped a legal labyrinth while holding the thread of human rights.

Introduction

Mustafa Molla Sali, a member of the Muslim minority in Thrace, Greece, passed away in 2008. Before dying he drew up a public will bequeathing the totality of his estate to his wife, in accordance with the Greek Civil Code. However, after his demise, his sisters challenged the validity of his will, by asserting that the jurisdiction of the Mufti and Sharia law should have been applied in the case under consideration, given that Mr Molla Sali was a member of the Muslim minority. On this legal basis, they had recourse to the Greek courts,¹ claiming 3/4 of his property, on the ground that the succession law applied to Muslims is based on intestacy and an Islamic will can only complement the intestacy.² Both the Court of First Instance of Rodopi and the Thrace Court of Appeal rejected their application on the basis that Mr Molla Sali was free to choose between the civil law and the Sharia law in order to arrange his last will.³ Otherwise, the implementation of the Sharia law so as to prevent a person from disposing of his property in anticipation of death would have been an unacceptable discrimination on religious grounds. The civil Supreme Court of Greece had a different opinion. In its ruling 1862/2013, the Court decided that Mr Molla Sali should have had recourse to the Mufti, and, of course, to the Sharia law in order to determine his succession. In fact, the Supreme Court of Greece decided that the Sharia law was obligatory for the members of the Muslim minority of Greece and that they did not have the option to

¹ *Molla Sali v Greece* [GC], no. 20452/14, para 12, ECHR, 19 December 2018.

² *Molla Sali v Greece*, no. 20452/14, para 11.

³ Rodopi Court of First Instance Judgment 50/2010 of 1 June 2010; Thrace Court of Appeal Judgment 392/2011 of 28 September 2011.

choose between the Greek civil law and the Sharia law for the issues enumerated in Article 5(2) of Law 1920/1991. Mrs Molla Sali claimed at the European Court of Human Rights (ECtHR) that her rights had been violated, via discrimination based on religion.

It is difficult to overstate the potential legal complexity of the seemingly simple question of who should inherit Mr Molla Sali's estate. Any question of human or civil rights law in Greece can implicate Greek civil law, European Union law, Council of Europe law and international human rights law as enacted in treaties. When there is a potential application of Islamic law involved, further issues arise, such as the appropriate interpretive methodology to follow within the Islamic tradition. Regardless of the approach taken, the law of inheritance is one of the most ornate and intricate subtopics of Islamic law. In the particular circumstances of this case, two further, historical sources of law are in play. The existence of a Sharia jurisdiction for Muslims within Thrace was a political choice of the Greek state after World War I and the subsequent signing of the relevant peace treaties which, among other provisions, demarcated the boundaries separating states and peoples in the region. Finally, because these transfers of sovereignty effectively concerned some aspects of the Ottoman constitutional order, it is necessary to maintain an awareness of that constitutional order, notwithstanding that it ceased to exist a century ago.

The rest of this article discusses the implications of the Molla Sali case in its broader context of European, international and Islamic law. Part I explains how Islamic law came to have force in part of contemporary Greece, through reference to the historical events and legal agreements arising around the transition of Thrace from Ottoman to Greek sovereignty. The article's second part examines the Molla Sali case as it was argued and decided by the ECtHR, which treated the case as primarily raising a question of jurisdiction and choice of law, encapsulated in the right of members of a recognised minority group to choose whether

or not to avail of legal protections provided for that minority. Part III explores the Molla Sali case in its broader context, encompassing public international law and international human rights law, but also Sharia and its intersections with other bodies of law. The article concludes by arguing that the Molla Sali case is not necessarily best understood as one of applying modern human rights-based jurisprudence to avert a deleterious effect of Islamic law but may instead hint at ways to bring Sharia and European law into a more practical relationship.

I. Historical and legal background

The early 1920s marked a turbulent period in European history. Dissolution of empires, shaping of nation states and forced exchange of populations have put their indelible mark on the continent. Though the end of the Great War instilled a brief moment of reserved optimism, both winners and losers were struggling to cope with new realities and to reconstruct countries and societies. In the Balkan peninsula, this process was bumpier than elsewhere; two consecutive regional wars in 1912-1913 served as an armed introduction to the First World War,⁴ and, finally, the Greek-Turkish war put an end in 1922 to ten years of hostilities among countries of the region.

The Lausanne Peace Treaty signed in July 1923, among other provisions, laid the legal and political foundations of Greek-Turkish relations for almost a century. But before this, another treaty was agreed in Lausanne in January of the same year. Its object was the

⁴ The First Balkan War coalesced Greece, Serbia and Bulgaria against the Ottoman Empire and ended with the liberation of the remaining European territory under Ottoman occupation, endorsed by the Treaty of London on 30 May 1913. The outbreak of the Second Balkan War opposed Greece and Serbia against Bulgaria and it ended with the defeat of the latter as confirmed with the Treaty of Bucharest on 10 August 1913.

exchange of populations between these two countries; Greeks and Turks were going to leave the Ottoman Empire and Greece, respectively. This is up to now the largest organised and agreed upon exchange of people in human history. Over one million Greeks left their millennia-old homeland in Asia Minor and Pontus, and were exchanged against 355,000 Turks living in various part of Greece.⁵ According to Article 2 of the January Treaty, two batches of populations were exempted from the exchange: the Greeks of Constantinople and the Muslim inhabitants of Western Thrace.⁶ The July Lausanne Peace Treaty crafted a specific protection regime for the two minorities. Articles 38 to 45 in Chapter V laid down provisions intended to safeguard the fundamental freedoms of these two groups in Greece and in what later became modern Turkey.

1. The implementation of Sharia in Thrace

In 1882, the Greek state created four centrally appointed (by Royal Decree) and state-funded positions of Muslim religious leaders, the Muftis. This was made possible through the enactment of legislation AAH/22-06-1882 “concerning spiritual leaders of the Muslim communities”,⁷ shortly after the Convention of Constantinople, which was signed on 2 July 1881 resulting in the cession of the regions of Thessaly and Arta to Greece. Muftis were

⁵ Angelos Syrigos, *Greek-Turkish relations*, (Patakis, 2015). The exact number of Greeks who were exchanged in accordance with the January 1923 Treaty of Lausanne was 190,000 persons. To this number, we have to add 862,000 Greek refugees who fled the atrocities of the war theatres in Minor Asia.

⁶ According to Article 1 of the Treaty on the Exchange of Greek and Turkish Populations, the religious criterion was used to qualify the populations to be exchanged. Notably, this was based on the Ottoman system of *millet* (‘nation’), a confessional allocation of the communities living under Ottoman rule, whereby the Muslim and the rum (Orthodox) millets were the most significant ‘nations’, followed by the Armenian and the Jewish ones.

⁷ Official Gazette of the Kingdom of Greece 59/1-7-1882.

recognised not only as spiritual and religious leaders of their community but also as “government officials”, swearing an oath of public service (the term of government official and public servant seem to be used interchangeably in contemporary legislative texts).

The powers bestowed upon the Muftis, apart from various managerial and supervisory tasks with regard to Muslim charitable and religious institutions, schools and places of worship, were consultative, namely “they had the consultative authority on any religious, inheritance or family issue of Muslim law”. In the first quarter of the twentieth century, the territorial reshaping of the Greek state necessitated the legislative adaptation of Greece’s new international obligations.

The Treaty of Athens signed after the two Balkan Wars was ratified by Greek Law ΔΣΙΓ’/1913.⁸ In particular, Article 11 of the Treaty stipulated that: “The Muftis, in addition to their authority over purely religious affairs and their supervision of the administration of waqf property, shall exercise *jurisdiction* over Muslims in matters of marriage, divorce, alimony (nefaca), guardianship, trusteeship, emancipation of minors, Ottoman wills, and succession to the office of Mutevelli (tevliet). The judgments rendered by the Muftis shall be executed by the proper Greek authorities”.⁹

Greek Law 147/1914 “concerning the applicable law and judicial organisation of newly acquired areas” (ΕτΚ Α’25/01-02-1914), was adopted in order to enable the implementation of the Athens Treaty. Article 4 determined that “the marriage related issues of Muslims and Israelis, such as the conditions for the conclusion and the dissolution of a marriage, as well as the relations between spouses, are governed and decided upon by their Sacred Law. With regard to the Muslims, the specific conditions of the last Treaty between

⁸ Official Gazette of the Kingdom of Greece Α’229/14-11-1913.

⁹ Emphasis added.

Turkey and Greece apply”. Subsequently, after the end of the World War I and the signing of the Sevres Treaty, Greek Law 2345/1920 set a new national framework for the competences of the Mufti. In its Article 10(1), the 1920 Law reiterated the judicial competence of the Mufti.

Three years later, the conclusion of the Lausanne Treaty, which superseded, abolished and replaced the Athens Treaty,¹⁰ and its ratification by Legislative Decree,¹¹ ΕτΚ 238/25-08-1923 created a new legal framework for the Muslims living in Greece. Its article 42 provides that “The Turkish Government undertakes to take, as regards non-Muslim 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 these minorities*”.¹²

Subsequently, in an early manifestation of what was going to become one of the most important human rights, namely the freedom of religion, article 43 of the Treaty set out that “Turkish nationals belonging to non-Muslim minorities shall not be compelled to perform any act which constitutes a violation of their faith or religious observances”. And, as Article

¹⁰ There was an unusual legal controversy between the two Supreme Courts in Greece, the Supreme Administrative Court, the Council of State, and the Court of Cassation, on the validity of the Treaty of Athens. However, as the ECtHR eloquently explained in the judgment under review, “it cannot be overlooked, moreover, that during the hearing the [Greek] Government stated that the provisions of the Treaty of Athens concerning the protection of the rights of minorities and those of the Treaty of Sevres were no longer in force, as indeed they had already accepted in the case of *Serif v. Greece* (no. 38178/97, para 40, ECHR 1999-IX)”. *Molla Sali v Greece* (no. 20452/14, para 151).

¹¹ Official Gazette of the Kingdom of Greece 238/25-08-1923.

¹² Emphasis added.

45 concludes the minorities' protection chapter, it was agreed that the rights and freedoms granted to non-Muslims in Turkey were equally conferred to Muslims in Greece.¹³

Against this legal backdrop of international provisions, the Greek government, being respectful of the customs of the Muslim minority, made the political choice to allow Muslim inhabitants living in Thrace to have their legal issues on personal status, marriage, divorce and succession governed by Sharia law, regardless of the fact that this was by no means a legal obligation for Greece.¹⁴ The provision of Article 6 of the Introductory Law of the Civil Code,¹⁵ as restored after the end of World War II with Legislative Decree 7/10-5-1946, explicitly abrogated the special legal status of Greek Jews for their family disputes, namely both the religious court and the application of the Jewish law, which the Jewish religious authorities customarily applied to the family relationships of their members. Greek Muslims remained outside the scope of this Law and continued to have the possibility to have their disputes adjudicated by the Sharia law in the designated legal categories. In 1990, in the aftermath of the demise of the Mufti of the city of Xanthi, Mustafa Hilmi Aga, the need for a new law emerged both for the procedure of appointment, as well as for the definition of his judicial competences.

¹³ Treaty of Peace with Turkey signed at Lausanne, 24 July 1923, Article 45 ("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 on its territory").

¹⁴ "The Court notes there can be no doubt that in signing and ratifying the Treaties of Sevres and Lausanne Greece undertook to respect the customs of the Muslim minority. However, in view of the wording of the provisions in question (see paragraph 64-65 above), those treaties do not require Greece to apply Sharia law. [...] More specifically, the Treaty of Lausanne does not explicitly mention the jurisdiction of the mufti, but guarantees the religious distinctiveness of the Greek Muslim community".

¹⁵ Greek Law 2783/1941, Official Gazette A' 29/30-01-1941.

Law 1920/1991, which is actually the law in force governing the Muftis' competencies in the Greek legal system, established the rules for the appointment of Muftis and simultaneously defined the issues which could be ruled by Islamic law in Thrace. Mainly reiterating the provisions of Law 2345/1920, which it formally abolished, the new Law provides for the competence of Muftis on Greek Muslims living in the region of Thrace. According to Article 5(2) of Law 1920/1991, marriage, divorce, custody, guardianship, alimony, emancipation, testament and intestate succession and issues of inheritance were to be decided upon by the Mufti for the members of the Muslim minority. Article 5(3) stipulates that the Mufti's rulings have to be endorsed by the civil courts in non-contentious proceedings. The civil courts verify that the decision has been issued within the local jurisdiction of the Mufti and whether its content is compatible with the Greek Constitution.

However, shortly after the entry into force of the new Law, serious concerns were raised by legal scholarship, international treaty bodies, non-governmental organisations and jurisprudence on various aspects of the implementation of Islamic law.¹⁶ As discussed below, these issues were related to the compatibility of Islamic law with Greece's obligations undertaken through the signature and ratification of international human rights instruments, the positioning of Sharia within the Greek legal system, and last but not least, its optional or

¹⁶ See eg, CEDAW Report (2007), *Concluding comments of the Committee on the Elimination of Discrimination Against Women: Greece*; Iris Boussiakou, Religious Freedom and Minority Rights in Greece: the case of the Muslim minority in Western Thrace, [2008] GreeSE Paper No 21, Hellenic Observatory Papers on Greece and Southeast Europe, London School of Economics; Christina Borou, 'The Muslim Minority of Western Thrace in Greece: An Internal Positive or an Internal Negative "Other"?', [2009], Journal of Muslim Minority Affairs; Anna Triandafyllidou, 'Greece: the challenge of native and immigrant Muslim population' in Anna Triandafyllidou ed. *Muslims in 21st Century Europe, Structural and Cultural Perspectives*, (Routledge, 2010); Archimandrite Nicodemos Anagnostopoulos, *Orthodoxy and Islam*, (Routledge, 2017).

obligatory character for the members of the Muslim minority. The recent decision of the Grand Chamber of the European Court of Human Rights answered directly to some of these questions. To others, it paved the way for positive change.

For instance, as an example of a progressive change, in January 2018, the Hellenic Parliament, in anticipation of the decision of the ECtHR in the Molla Sali case, adopted a progressive law hinting at the optional character of the Sharia law for the members of the Muslim minority of Thrace. Law 4511/2018 stipulates in its Section 1 that the cases which were so far the competence of the Mufti will henceforth be governed by civil law provisions, unless the citizens concerned decide otherwise. Though the implementation of this new provision had initially been put under the condition of the adoption of a presidential decree, this pre-condition was later abolished by Article 48(3) of Law 4569 in October 2018 (a legal development of which the ECtHR was not timely informed and which, therefore, could not be mentioned in the judgment). The de jure establishment of the optional character of Sharia is a significant reform by the Greek government, as acknowledged by the ECtHR.¹⁷ Nevertheless, it remains to be seen how the members of the Muslim minority will react to this new legal framework. So far, there are no reliable and verifiable data on the number of Muslims in Thrace who hold a preference either for Sharia or civil law.¹⁸ Moreover, and given the fact that, usually, local societies can exert significant pressure for the

¹⁷ *Molla Sali v Greece*, para 160.

¹⁸ In an interview with Deutsche Welle, in December 2018, Yannis Ktistakis, Assistant Professor in the University of Thrace, and legal counsellor of Mrs. Molla Sali in the case under review, puts forward that 95% of Greek Muslims in Thrace are having recourse to civil law and only 5% of the minority members are using Sharia for their succession cases. “Sharia: the new law doesn’t normalize the situation”, <<http://www.skai.gr/news/greece/article/392758/saria-o-neos-nomos-gia-ti-moufteies-den-omalopoiei-tin-katastasi/>> accessed February 9, 2019.

implementation of traditional rules, it is to be expected that Sharia will not disappear from the palette of choices of Greek Muslims in Thrace soon.

3. Islamic law and the late Ottoman legal order

‘Sharia’ is often translated as the way, or the path, in the sense of a path to an oasis. It is the way in which every Muslim should live, evidenced by the words of the Quran and the teaching and examples set by the Prophet Muhammad. It is all-encompassing. As law is part of life, so is Islamic law a part of Sharia. Of the approximately 6,000 verses of the Quran, about 500 are generally held to have legal effect. As the word of God, the Quran is an infallible and complete source of law. The Prophet, to whom the Quran was revealed, was the last human capable of gaining direct access to the perfect Sharia of God. For these reasons, the words of the Quran and the Prophet’s explanations and demonstrations, including legal rulings, are the highest sources of Islamic law. Sharia is immutable, but its understanding and application by humans evolves. Without the ongoing guidance of the Prophet, we are left to our own devices to discover how it should apply as societies grow and change.¹⁹

Islamic law in the Sunni tradition

From this starting point, Sunni and Shia jurisprudence diverge. The Ottoman Empire followed the Sunni tradition.²⁰ Sunni jurisprudence attempts to systematise the derivation of legal rulings for apparently novel situations from the words of the Quran and the *sunna*, the

¹⁹ Islamic law is arguably comparable to English common law in that its rules are purportedly not created, but discovered.

²⁰ Unless otherwise indicated, all references in this article to Islamic law should be understood as referring specifically to Sunni Islam.

ways of the Prophet, evidenced by recorded reports, *ahadith*. Al-Shafi'i proposed the first formal interpretive framework, whereby a jurist should first look to the texts – the Quran and the *ahadith* - for guidance, then to rules established by unanimous consensus of the Muslims, *ijma*.²¹ If still lacking an answer, a Sunni jurist should then reason by analogy, *qiyas*. When applying *qiyas*, a jurist will consider which of the *maqasid al-Sharia*, the main purposes for which the law was revealed, the older ruling serves: protection of life, religion, family, intellect and property. These help the jurist to discover the '*illah*', the underlying reason for the reference ruling, to facilitate developing an analogy to the present case.²² Local custom, '*urf*', can demonstrate Islamic law to the extent that it does not sanction practices contrary to the texts, *ijma* or rulings based on *qiyas*.

The four main Sunni schools of jurisprudence differed in the relative emphasis they placed on these elements. All agreed the texts were the primary evidence of the law. From there, Abu Hanifa, whom al-Shafi'i debated and studied under, emphasised *qiyas*. Imam Malik, al-Shafi'i's earlier mentor, taught that since the Prophet had lived and ruled in Medina and the people there had not changed their ways since, the customs and traditions of that city should inform the interpretation of Islamic law. Ibn Hanbal, a pupil of al-Shafi'i among others, eschewed *qiyas* entirely, in favour of a strict textual interpretation of Islamic law. The Ottoman Empire and its Caliphate followed the Hanafi school, grounded in the teachings of Abu Hanifa.

A ruling of Islamic law, a *fatwa*, represents the considered opinion of a recognised jurist. *Ahkam*, judgments, are decisions rendered in cases. They are often based on *fatawa*.

²¹ The authority of *ijma* to evidence Sharia derives from the *hadith* of the Prophet, "my community will not agree on an error".

²² Wael B. Hallaq, *Sharia: Theory, Practice, Transformations*, (Cambridge U. Press, 2009) 109.

Only some rules are justiciable. Rulings can find that the performance of an act is obligatory (*wajib*), recommended (*mandub*), discouraged (*makruh*), forbidden (*haram*), or of no concern to the law (*mubah*).²³ That which is not forbidden, is generally permitted. Jurists arrive at rulings through structured reasoning, *ijtihad*, or by selecting and applying rulings of senior or earlier jurists, *taqlid*. Only the most highly trained and respected jurists may perform *ijtihad*.

The development of formal doctrines of textual interpretation was the first great maturation of Islamic law. Subsequent classical jurists developed doctrines of purposive interpretation, including principles akin to equity (*istihsan*) and the public interest (*maslahah*), to aid in reaching rulings. At the root of these doctrines are the framework of the *maqasid al-Sharia*, developed by the later classical Maliki jurist al-Shatibi. *Istihsan*, sanctioned by the Hanafi and Hanbali schools, permits a jurist faced with choosing two possible rulings to select the less well supported of the rulings if applying the better ruling would result in hardship or injustice in the particular case. *Maslahah* is similar, except that here the jurist is considering not what is most just for the individual, but what is best for society as a whole. In both cases the measure of justice is the degree to which the *maqasid al-Sharia* are advanced. Textualism and purposive approaches to interpretation represent paradigms.²⁴ In reality, a purposive jurist starts from the traditional revealed sources of law,

²³ See eg, Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qaraḥi* (E.J. Brill, 1996) 117 (jurists infer which of these categories an act falls within by the language the sources use to describe it. An act may ‘please’ God, or God may attach ‘no blame’, or He may ‘abhor’ an action, for example. When God commands an act and failure to perform it “incurs punishment or censure”, then that act is obligatory; if it is commanded but no punishment is indicated then it is merely recommended).

²⁴ See eg, Muhammad Khalid Masud, ‘The changing concepts of caliphate – Social construction of Shari’a and the question of ethics’ in Kari Vogt et al., eds, *New Directions in Islamic Thought* (I.B. Taurus & Co, 2009) 187-205 at 203 (describing the immutable law through the theology of Imam Shafi’i, and the purposive through Abu Ishaq al-Shatibi’s theory of *maqasid*).

and even early traditionalists understood and applied the principles with which al-Shatibi constructed his alternative approach.

Sharia was originally revealed to a tribal society with minimal administrative structures. As the Islamic community coalesced and rapidly grew into a vast empire, jurists developed theories of Islamic government. A later classical jurist of the Hanbali school, Ibn Taymiyyah, introduced *siyasah Sharia*, which divides jurisdiction between the Islamic jurists (imams or muftis) and the civil authorities. According to this theory, Sharia is all-encompassing, but the duly established temporal ruler enjoys considerable discretion to regulate affairs in the public space. The formal role of Islamic law in the late Ottoman Empire consisted of an overarching constitutional duty for the Sultan to pledge before parliament to respect Sharia; a degree of oversight of laws by the Grand Mufti; recognising Islam as the state religion; and reserving to Sharia courts' jurisdiction over personal and family matters, including marriage and inheritance. In terms of *siyasah Sharia*, the discretion of the Sultan (political leader) to declare law and govern within Sharia passed eventually to the Greek temporal authorities, implicit in the transfer of territorial sovereignty by treaty. In the western regions of the Ottoman Empire, including those now within Greece, the prevailing interpretation of Islamic law was the Hanafi school.

Islamic law of inheritance

The Islamic law of inheritance is complex. It rests on the importance of distributing wealth within a family, and changed prior practice by guaranteeing female relatives a share in inheritance. Central to this law is a set of fractional assignments of rights in an estate based on the degree of relationship to the deceased. As these are set forth in the Quran,²⁵ they are

²⁵ Quran 4:11-12.

not readily susceptible to modification. A *hadith* of the Prophet permits the creation of an Islamic will to distribute up to 1/3 of the estate at the testator's discretion, subject to some restrictions, such as the inheritors according to the Quranic formula may not additionally inherit via this bequest. According to the standard formula, Mr Molla Sali's wife would receive 1/4 of his estate, with each of his two sisters entitled to 1/6 and the remainder passing as a residuary to his nearest male relative, or lacking a male relative – as apparently was the case – to his nearest female relatives, ie his sisters.

Despite these apparently immutable rules, Islamic contract and property law, particularly in the Hanafi tradition, may provide some useful context. The Islamic law of inheritance does not stand in isolation. Rather, it is a component of a system of property rights, originally aimed at ensuring that the vulnerable are not left destitute, and that ownership of assets between tribes remains clear. Requiring that women and children share in inheritances is part of this system, as are other rules such as the requirement that husbands provide the family's sustenance and wives retain ownership of their own property. This suggests room for reform, as institutions such as social welfare and policing make the prosperity and protection of an extended family much less critical to survival than they were in 7th century Arabia. However, even the most creative Islamic jurist would find it challenging to arrive at a purposive ruling that contravenes the plain words of the Quran. Alternatively, in the Hanafi interpretation, as women have the right to contract under Islamic law, a woman could negotiate a large enough bride price to compensate for her husband's inability to bequeath her his entire estate at Islamic law; the remainder of the bride price would be a debt, which the estate must settle prior to distributing to heirs. With careful guidance from a mufti, it is possible, at least in principle, for a Muslim couple to arrive at a property arrangement equivalent to that which the Molla Salis sought via Greek civil law.

II. The Molla Sali case

Mrs Molla Sali claimed that the decision of the Greek Civil Supreme Court to nullify her husband's civil will in favour of the jurisdiction of the Mufti violated her rights to a fair legal determination and against discrimination under articles 6(1) and 14 of the European Convention on Human Rights (ECHR), and her property rights according to article 1 of Protocol No 1. In her view, the Greek Court of Cassation had denied rights to her and her husband that were generally available to Greek citizens, based on the ancestral religion of her husband. This, she argued, is discriminatory.

Ultimately, this was a choice of law case. Should the disposition of Mr Molla Sali's estate be governed by Greek civil law, by Islamic law, or by some combination of these? His sisters argued for Islamic law, contending that its implementation is based on the treaty commitments Greece made regarding the Thrace Muslim minority. Mrs Molla Sali asserted Greek civil law, the will having been duly made and approved under that law, and herself and Mr Molla Sali being Greek citizens as well as members of the Thrace Muslim community. She argued that it was open to her husband to forego the available Islamic jurisdiction and choose to exercise his civil law prerogative to devise his estate by written will.

Proceedings in Greece

The Rodopi Court of First Instance rejected the sisters' application to nullify the will. The Court reasoned that the purpose of the Islamic law in Thrace was to protect the rights of members of the Muslim community, not curtail them. A Greek citizen has the right under civil law to dispose of his property. Requiring that the estate of Mr Molla Sali be handled

according to the decision of a Mufti applying Islamic law would discriminate against him based on his religion.²⁶ The Thrace Court of Appeal upheld this judgment, finding that Mr Molla Sali was free to choose to make a civil will rather than defer to the Islamic law of inheritance. His registration of the will cut off the Mufti's jurisdiction. Any other result would represent discrimination against Mr Molla Sali based on his religion, in denying him a right recognised in the Greek Civil Code.²⁷

On further appeal, the Court of Cassation ruled that the courts below had erred. A provision of an international treaty ratified by Greece has constitutional status pursuant to article 28(1) of the Greek constitution. It was not open to the Court of Appeal to give priority to its interpretation of article 5(2) of Law no 1920/1991 over such a provision, and thus to set aside the Islamic law of succession, which does not recognise wills.²⁸ Since the land ceded to Greece under the treaties had previously belonged to the sovereign during Ottoman occupation and was thence transferred to private individuals, the Islamic law prevailing at the time of transfer continued to apply.²⁹ On remittal, the Court of Appeal ruled in accordance with this interpretation, and further ruled that as a special body of law applicable to Muslims in Thrace, the applicable legislation was intended to protect their right to be governed under Islamic law and therefore did not breach the principle of equality enacted in the Greek constitution or the rule of access to court of article 6 ECHR.³⁰

²⁶ *Molla Sali*, paras 12-13.

²⁷ *ibid*, para 15.

²⁸ Exceptionally, under Islamic law a testator may devise 1/3 of their property by will, but not to the exclusion of relatives' mandatory shares.

²⁹ *Molla Sali*, para 18.

³⁰ *ibid*, para 20.

On second appeal to the Court of Cassation, Mrs Molla Sali argued that this judgment disregarded the key question of whether her husband had been a practising Muslim. In implementing the previous ruling of the Court of Cassation, the Court of Appeal had extended the law regarding Greek Muslims to encompass also those in the Muslim community who did not choose to follow Islamic doctrine. She also raised article 6(1) and article 1 of Protocol No 1 of the ECHR. The Court of Cassation denied her appeal, ruling that the question of her husband's adherence to Muslim beliefs was legally irrelevant, and that his Greek nationality did not prevent the application of Islamic law to his estate.³¹ As a result, the will was invalid and Mrs Molla Sali could inherit only the 1/4 fraction of her husband's estate specified in the Quran.³²

Proceedings at the ECtHR

Mrs Molla Sali complained to the ECtHR, claiming that invalidating her husband's will deprived him of a right all Greek citizens are entitled to, and herself of a vested property interest, based on his religion.³³ The ECtHR's judgment focused on this discrimination, analysing the Court of Cassation's decision as a possible violation of article 14's anti-discrimination rule, in relation to her property rights guaranteed by article 1 of Protocol No 1.³⁴ The test of whether article 14 is violated in relation to such a property right "is whether,

³¹ *ibid.*, para 27.

³² Quran 4:12.

³³ *Molla Sali v Greece*, para 84. The Court explicitly agreed with Mrs Molla Sali on this: "In her submission, imposing on someone, against his or her wishes, a right protecting the religious minority to which he or she belonged encompassed an element of discrimination on grounds of religion and did not pursue a legitimate aim". *ibid.*, para 101.

³⁴ The Court found that her interest in the will constituted a property right. *Molla Sali v Greece*, paras 128-32.

but for the alleged discrimination, the applicant would have had a right, enforceable under domestic law, in respect of the asset in question”.³⁵ Once the claimant shows a difference in treatment, the burden shifts to the opposing party to demonstrate that this is justified, within an appropriate margin of appreciation.³⁶

The Court compared Mrs Molla Sali’s situation to that of a married woman who stands to benefit from a non-Muslim Greek husband’s will. By denying effect to this will, according to the Court, the Court of Cassation had applied different treatment based on the husband’s religion.³⁷ In assessing whether this was justified, the Court declined to pronounce on the legitimacy of the aim the Greek government pursued, finding instead in favour of Mrs Molla Sali because regardless of that legitimacy, the means applied were “not proportionate to the aim pursued”.³⁸ The Court observed that the treaties in question did not actually require Greece to apply Islamic law, and that article 5(2) of Law no 1920/1991, concerning the Mufti’s jurisdiction over inheritance, specifies “Islamic wills and intestate succession” not “other types of inheritance”.³⁹ On that basis, the Court found no proper justification for the different treatment applied to the Molla Sali estate.⁴⁰ It emphasised “the cardinal principle” that minorities must have the right to free self-identification, allowing them to choose not to identify with a minority group or to be subject to special laws applicable to that group.⁴¹

³⁵ *ibid.*, para 127.

³⁶ *ibid.*, paras 136-137.

³⁷ *ibid.*, paras 140-141.

³⁸ *ibid.*, para 143. A justification fails this test “if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised”.

Para 135, citing *Fabris*.

³⁹ *ibid.*, paras 151-152.

⁴⁰ *ibid.*, para 161.

⁴¹ *ibid.*, para 157.

This reasoning is slightly circular. The question in the case is whether the will was valid when created. If there was never a lawfully created will, then Mrs Molla Sali was not treated differently in relation to article 1 of Protocol No 1, as there was no property right to violate. The question would then become whether her husband's estate should be subject to the Islamic or to the Greek law of intestate succession. With Muftis holding jurisdiction over Islamic succession, this would have presented a simple binary choice of law question. However, the Court accepted Mrs Molla Sali's bootstrapping argument, that the recognition by Greek authorities of the civil will created a property right that the subsequent invalidation of the will violated.

In the separate, concurring opinion, Judge Mits supports the idea that the Court should have considered whether Mrs Molla Sali had suffered different treatment based not solely on her husband's religion, but also on hers. It should have asked whether she as a Muslim beneficiary of a Muslim husband's will had been treated differently than a non-Muslim beneficiary of a non-Muslim husband's will. Judge Mits disagreed with the Court in finding that the aim of protecting the rights as Muslims of the family members is a legitimate aim, but agreed with the result of the case on the grounds that the invalidation of the will was disproportionate particularly because it denied the right to choose not to self-identify as a member of a protected minority group.⁴²

The law beyond the ECHR

With its jurisdiction being coextensive with the ECHR, the ECtHR did not delve into broader questions of whether Islamic law, Greek civil law or some blend thereof should govern the family and personal status of Thrace Muslims. The Greek courts that addressed

⁴² *Molla Sali*, Separate opinion, paras 10-11.

the case ruled essentially between two points of view: either the Mufti's jurisdiction over inheritance is plenary for Thrace Muslims; or a Greek citizen cannot be denied the effect of a civil will on grounds of membership in the Thrace Muslim community. There is no room for compromise between these two views. Wisely, the ECtHR confined its analysis to whether the Court of Cassation's decision had resulted in a discriminatory violation of a particular property right.

How does this case look against the broader legal landscape? The ECtHR reviewed the main applicable rules of the intersecting legal regimes: Greek civil law and case law, Islamic, EU law and the ECHR, as well as the views of *amici curiae*. Given its limited jurisdiction, the Court could not realistically delve into how these regimes might coexist or conflict. Nor did it explore the general question of the compatibility of Islamic law with the ECHR, which could easily have raised considerable doctrinal as well as political complexity. Nonetheless, as Europe becomes ever more cosmopolitan, but there is arguably room for a broader discussion of the relationship between Sharia and European human rights law. Indeed, facing a case with just slightly different facts, a future court might have no choice but to begin to try to reconcile these.

Mr and Mrs Molla Sali had some affinity to Islamic law, as their marriage was conducted and regulated under the Mufti's jurisdiction.⁴³ For example, in private international law, an early choice of law can sometimes be a seminal factor for the determination of the law to be implemented. The ECtHR reviewed the salient points of the Islamic law of inheritance, but did so in isolation, without reference to the broader system of property rights

⁴³ Separate opinion, para 2 ("the applicant married her husband under Islamic religious law and . . . all persons involved in the domestic inheritance proceedings (that is to say, the applicant, her husband and the husband's two sisters) were members of the Muslim minority of Thrace").

of which the law of inheritance forms a part. Nor were the detailed circumstances of the Molla Sali marriage entered into the Court's record. A Hanafi marriage overseen by a mufti would normally entail a negotiated contract, an agreed sum irrevocably paid over by the husband to the wife, provision by the husband for the wife's housing and upkeep during the marriage, and sequestering the wife's property separately from the husband's or the families, reserved entirely to her own use. If all these elements were present in the Molla Sali marriage, then restricting Mrs Molla Sali's inheritance to the Quranic 1/4 of her husband's estate could represent a smaller injustice to her than it might seem at first glance. Similarly, Mr Molla Sali's sisters may well have had a longstanding expectation – once it became clear that the couple would have no children, and their parents had passed - to inherit at least their Quranic share of the estate, 1/6.

Within the Molla Sali case lurks an unaddressed question: may members of a religious minority protected by special laws avail themselves of those laws at times, but also at times choose to be treated under general laws applicable to all citizens? Is such 'forum shopping' allowed for minority members? Is this a choice they must make once, or may they select between the two legal regimes ad hoc, from one situation to the next? How should, may or must Muslims express their preference for personal status and family matters to be governed by Sharia or by civil law? Was it open to Mr Molla Sali to opt for an Islamic marriage and a civil will? If he had died intestate as the husband in a civil marriage, could his relatives have argued for distribution of his assets according to Sharia? What if Mr Molla Sali had written a will that excluded the wife, and she pleaded for her 1/4 Quranic share? (Raising a hypothetical point the Court did not address, Mrs Molla Sali argued that it would be discriminatory to require Muslims to surrender their protections under Sharia in order to gain

access to the civil courts.⁴⁴) What if there is disagreement within a family over which body of law should govern their affairs? And, what might Islamic law say about this? All of these issues and more are potentially implicated in the question of how exactly to interpret “Greek citizens of Muslim faith” in section 5(2) of the Greek Law 1920/1991 on Muftis.

III. Molla Sali: Beyond the ECHR

The ECtHR ruled unanimously in the Molla Sali case, finding in the applicant’s favour due to discriminatory treatment regarding her property rights. However, it also noted with approval the views of several commentators that the application of Sharia to matters of family and inheritance law may be incompatible with Greece’s international human rights commitments, including treaties aimed at protecting women’s and children’s rights.⁴⁵ The reality may be more nuanced. In the actual ruling, the ECtHR chose not to follow its prior jurisprudence that had suggested that Sharia and European human rights law could not coexist. This still left the Court to face two challenging issues: whether discrimination by association extends to religious discrimination, and the legal implications that arise when members of a protected minority may choose not to self-identify with that minority.

Reverting to an earlier construction

In its ruling in *Refah Partisi and Others v. Turkey*,⁴⁶ the ECtHR, in 2003, adopted a categorical position with regard to the nature of Sharia and its compatibility with the values of the European legal civilisation. In January 1998, the Turkish Constitutional Court, condoning a decision made by proponents of the Turkish secular tradition to oust the Islamist

⁴⁴ *Molla Sali*, para 104.

⁴⁵ *ibid*, para 154.

⁴⁶ *Refah Partisi and Others v Turkey*, Grand Chamber, 41340/98 and 3 others, ECHR, 2003-II.

Prime Minister Necmettin Erbakan, outlawed the Refah Partisi (RP-Welfare Party) which was the ruling Islamist party in Turkey, on grounds of human rights concerns, based in part on statements by its MPs for the implementation of Sharia.⁴⁷ The Grand Chamber then considered that “taking into account the principle of secularism for the democratic system in Turkey [...] Refah’s dissolution pursued several of the legitimate aims listed in Article 11, namely protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others”.⁴⁸ Proceeding to an evaluation of Sharia, the Court, agreeing with the Chamber,⁴⁹ stated that “Sharia is incompatible with the fundamental principles of democracy”,⁵⁰ relaying this way the observation of the Turkish Constitutional Court that “democracy is the antithesis of the sharia”.⁵¹

In the *Molla Sali* case, the Court proceeded in a different way. Accepting the Greek government’s invitation to dissociate the two cases, the Court embraced a distinct interpretation of the legal co-existence of civil law and Sharia. Reminding that the Greek government suggested that this case should be assessed *in concreto*, and not *in abstracto* as of the compatibility of the Sharia system with the rules and principles of the European Convention of Human Rights, the Court accepted this way of thought, preferring a case by case examination of each rule of Sharia law. Putting forward the “complexity of the ‘modern identity’ of the inhabitants of Europe”,⁵² the Court avoided juxtaposing Islamic with

⁴⁷ *ibid*, paras 12, 34 and 37.

⁴⁸ *ibid*, para. 67.

⁴⁹ On 31 July 2001, there was an initial judgment in the case by a Chamber of the First Section of the Court, which held that there was no violation of Article 11 of the European Convention on Human Rights. The applicants requested the case to be referred to the Grand Chamber and the Court agreed.

⁵⁰ *Refah Partisi and Others v. Turkey*, para. 123.

⁵¹ *ibid*, para. 40.

⁵² *Molla Sali v. Greece*, para. 111.

European law, thus advancing a more diplomatic approach to the matter. Bearing in mind that over 25 million Muslims live on the European continent,⁵³ the Court, through this approach, shows the way forward to a European multicultural landscape which can be drawn through the mutual understanding of each other and the tolerance of diversity. While acknowledging the well-founded basis of some serious concerns expressed by human rights treaty bodies (mainly CEDAW and HRC) and other Council of Europe instances on the judicial competences of the Mufti,⁵⁴ the ECtHR, on the basis of Article 14 ECHR, proceeded to the prudent sanctioning of the obligatory Sharia implementation by the Greek courts, thus allowing a political and legal breathing space for a different opinion.

Discrimination by association

With regard to international human rights law, one of the most important contributions of the *Molla Sali v Greece* decision is that it puts under the spotlight the notion of discrimination by association. In the part of the decision where it examines international law, the Court makes reference to the General Comment No. 6 of the Committee on the Rights of Persons with Disabilities where it is stated that the concept of discrimination includes discrimination against those who are associated with a person with a disability. The Court of Justice of the European Union (CJEU) has addressed the issue in two cases, in 2008 and 2015. In *Coleman v Attridge Law*,⁵⁵ the CJEU, though avoiding the term ‘discrimination by association’, accepted that a mother who was dismissed from her employment because she

⁵³ The Pew Research Centre estimates that by 2016, over 25 million Muslims were living on the European continent, Pew Research Centre, (29 November 2017), <<http://www.pewforum.org/2017/11/29/europes-growing-muslim-population/>>, accessed on 28 January 2019.

⁵⁴ *ibid*, paras 70-77, 154.

⁵⁵ *Coleman v Attridge Law and Steve Law*, C-303/06 [2008] ECRI-5603 (ECLI:EU:C:2008:415).

had a disabled child suffered discrimination in the terms of Council Directive 2000/78/EC (establishing a general framework for equal treatment in employment and occupation). In the case *CHEZ*,⁵⁶ the Grand Chamber of the CJEU accepted that a person, though not belonging to the ethnic or racial group which was discriminated against, can suffer less favourable treatment on the same grounds. It did not go as far as the Advocate General suggested, ie to recognise the concept of “discrimination by association”, but the principle was correctly implemented in the case.⁵⁷

The first documented instance of discrimination by association was at the onset of World War II. When the Nazi troops invaded Netherlands, and as they did in all countries they occupied, they issued orders of dismissal for the Dutch Jews who were holding significant positions in the state mechanism or elsewhere. One of the victims of this anti-Semitic policy was Professor of Law at the University of Leiden, Eduard Maurits Meijers. In a rare act of courage, his colleague Professor Rudolph Cleveringa, Dean of the Faculty of Law of Leiden, delivered on November 26, 1940, a famous speech of protest against the dismissal of Prof. Meijers.⁵⁸ In what was going to become one of the first public acts of resistance against the occupiers, Prof. Cleveringa extolled the academic excellence of his Jewish colleague, expressing the hope for his swift return to his post. As Professor Rick Lawson highlighted in his lecture at the Eötvös Loránd University in November 2018, the

⁵⁶ *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14 [2016] 1 CMLR 14 (CJEU (Grand Chamber)) (ECLI:EU:C:2015:480).

⁵⁷ Michael Malone, The concept of indirect discrimination by association: too late for the UK?, (2017) *Industrial Law Journal*, Volume 46, Issue 1, <https://doi-org.ezproxy.eui.eu/10.1093/indlaw/dww047>.

⁵⁸ Protest address by Professor Cleveringa, University of Leiden, <<https://www.universiteitleiden.nl/binaries/content/assets/algemeen/oraties/cleveringa-oratie/teksten/protest-speech-rudolph-cleveringa.pdf>>, accessed on February 6, 2019.

imprisonment of Rudolph Cleveringa, on the ground of his speech, was the first case of discrimination by association. In that case, the discriminated group was the Jewish population of the Netherlands, and Prof. Cleveringa was discriminated against because both himself and his persecutors associated him to them.

According to the ECtHR, Mrs Molla Sali was not discriminated against because she is a member of the Muslim minority of Thrace. The discrimination she suffered emanated from her late husband's religion and his membership of the Muslim minority in Thrace. In its decision *Guberina v Croatia*,⁵⁹ the only other ECtHR case where the notion of the discrimination by association has been implemented, the ECtHR considered that "the alleged discriminatory treatment of the applicant [the father] on account of the disability of his child, with whom he has close personal links and for whom he provides care, is a form of disability-based discrimination covered by Article 14 of the Convention".⁶⁰ In the same vein, the Court stipulated that Mrs Molla Sali "was treated differently on the basis of the "other status", namely the testator's religion".⁶¹ The appropriation by the Court of the principle of discrimination by association is a welcome development, since it considerably extends the scope of human rights protection against ethnic or racial discrimination.

In his concurring opinion, Judge Mits observes that "[t]his is the first time the Grand Chamber has examined and found discrimination by association".⁶² Though the Court artfully eschewed the question of whether there was a legitimate aim for the difference of treatment,⁶³ Judge Mits considered that the existence of a separate legal regime pursues a legitimate aim

⁵⁹ *Guberina v Croatia*, no 23682/13, ECHR-2016.

⁶⁰ *ibid*, para. 79.

⁶¹ *Molla Sali v. Greece*, no 20452, ECHR, para. 141.

⁶² *Molla Sali v Greece*, Separate Opinion Mits, para. 7.

⁶³ *ibid*, para. 143.

by the Greek government, which is the protection of the Muslim minority of Thrace.⁶⁴ However, he agreed that the measures employed were disproportionate to the aim, and, therefore, concurred that there was a violation of Article 14. The interesting point is that he considered that the discrimination took place not only by association, because of the religion of the husband, but also on the ground of the applicant's religion.

Self-identification

The foundational element of the decision of the Court is that no-one can be forced against their will to be subject to a specific legal regime that was devised for their protection. The 'self-identification' principle constitutes the cornerstone of minorities' protection regimes. The reminder by the Court of the provisions of the Convention Framework on National Minorities is not coincidental. Though Greece has only signed but not ratified this Convention and despite the fact that in the Molla Sali case there was clearly no national minority involved, the ECHR did not miss the opportunity to underline the significance of the right to belong or not to belong. In paragraph 67 of the judgment, the Court recalled article 3(1) of the Framework Convention, which dictates that:

“Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice”.

Though it is indisputable that the linkage to a minority observes some objective criteria,⁶⁵ it is the free choice of every individual to decide whether to be under the protection regime of the Convention. At a later stage of the decision, the Court stressed that “[r]efusing

⁶⁴ *Molla Sali v. Greece*, Separate Opinion Mits, para. 10.

⁶⁵ Explanatory report of the Framework Convention, para. 35.

members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts not only to discriminatory treatment but also to a breach of a right of cardinal importance in the field of the protection of minorities, that it to say the right to free self-identification. The negative aspect of this right, namely the right to choose not to be treated as a member of a minority, is not limited in the same way as the positive aspect of that right”.⁶⁶

But is Sharia compatible with the ECHR?

In order to have a more comprehensive perception of the topic, it is useful to view the *Molla Sali v Greece* judgment against the backdrop of Resolution 2253 (2019), *Sharia, the Cairo Declaration and the European Convention on Human Rights*, adopted by the Parliamentary Assembly of the Council of Europe (PACE) in January 2019.⁶⁷ The Resolution recalls that “pluralism, tolerance and a spirit of openness are the cornerstones of cultural and religious diversity”.⁶⁸ Reminding that Article 9 of the Convention and the right it enshrines, ie the right to freedom of thought, conscience and religion, constitutes one of the foundations of a democratic society, the Assembly stresses that the right to manifest one’s religion is a qualified right “whose exercise may be limited in response to certain specific public interests and, under Article 17 of the Convention, may not aim at the destruction of other Convention rights or freedoms”.⁶⁹ The rapporteur of the Resolution, Antonio Gutiérrez, reminds in the

⁶⁶ *Molla Sali v Greece*, para. 157.

⁶⁷ Resolution 2253 (2019), Parliamentary Assembly of the Council of Europe, <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25353&lang=en>>, accessed on February 6, 2019.

⁶⁸ *ibid*, para. 1.

⁶⁹ *ibid*, para 2. Article 17 provides: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.

Addendum to the Report that the Court ruled that “[a] person’s religious beliefs cannot validly be deemed to entail waiving certain rights if that would run counter to an important public interest”.⁷⁰ In this context, he wonders whether equal treatment of men and women is such an ‘important public interest’ or to what extent Muslim believers may voluntarily subject themselves to Sharia rules deviating from this principle. In paragraph 7 of the Resolution, and with regard to the case under consideration, the Parliamentary Assembly expressed its regret that Greece has not yet abolished Sharia, as was suggested in a 2010 Resolution.⁷¹

The idea that Sharia is inimical to modern human rights standards, or even narrowly to the principle of equality between men and women, is controversial in the Arab world. While not a binding text, the Cairo Declaration, which constitutes the object of serious criticism by the Parliamentary Assembly of the Council of Europe, carries the political endorsement of the foreign ministers of the 57 states of the Organization of Islamic Cooperation. The text adopted in 1990 in the Egyptian capital purports to recognise many of the same rights as the international human rights treaties do, such as the rights to life, equality before the law and fair trials, protection against torture or inhuman treatment, and freedom of expression.⁷² The Declaration also seems to guarantee, at least in principle, equality and non-discrimination in general, including based on sex, and equality of men and women in human

⁷⁰ Compatibility of Sharia law with the European Convention on Human Rights: can States Parties to the Convention be signatories to the “Cairo Declaration”?, Addendum to the Report, Doc. 14787 Add., 21 January 2019, <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=25298&lang=2>>, accessed on 6 February, 2019.

⁷¹ Resolution 1704 (2010).

⁷² Respectively articles 2, 19, 20, 22.

dignity.⁷³ At the same time, the Declaration appears to hedge some of its guarantees based on the structures of Sharia, as for example it mentions rights and duties of men and women but without stating they are the same; limits freedom of expression to expression that does not violate principles of Sharia; and indicates that Sharia supersedes its provisions and provides its interpretive context.⁷⁴ Many commentators have asserted that these caveats render it unlikely the Declaration fits comfortably alongside the international human rights framework.⁷⁵ Yet, others argue that Sharia does not bar the recognition of human rights given that it encapsulates a human rights framework of its own, expressed in part in duties humans owe each other but also as free-standing rights.⁷⁶

It is also instructive to consider the adherence of Islamic states to international human rights treaties. If Sharia and international human rights were broadly incompatible, these states could not in good conscience adhere to such treaties – indeed, to do so in bad faith would violate Sharia.⁷⁷ However, political reality may differ: it is hardly unprecedented for states that reportedly committed serious human rights violations to commit, within the framework of the United Nations, to the implementation of international human rights standards, only to show the world that they are belong to the cohort of the human rights defenders. Of the 24 states whose constitutions either declare an Islamic state or institute Islam as the state religion, 17 have adhered to the ICCPR, albeit several with reservations. In the same vein, another human rights document, the Arab League’s Charter on Human Rights

⁷³ Articles 1, 6.

⁷⁴ Articles 6, 22, 24, 25.

⁷⁵ See eg, Ann Elizabeth Mayer, *Islam and Human Rights*, 4th ed. (Westview Press, 2007).

⁷⁶ Ebrahim Moosa, ‘The Dilemma of Islamic Rights Schemes’, *XV Journal of Law & Religion* 1/2 (2001) 185-215.

⁷⁷ See eg, C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Macmillan, 1988) 132.

expressly reaffirms the Universal Declaration of Human Rights, the ICCPR and the Cairo Declaration, while still avowing fealty to the principles of Sharia.⁷⁸ Being ratified as of today by half the member states of the Arab League, and therefore now in force as a binding treaty, the content of the Charter resembles that of the international instruments, including rights to life, liberty, expression and belief, fair trial rights, protections against arbitrary arrest or cruel punishments, and equality and non-discrimination clauses.⁷⁹ It is likely that the revision of the Cairo Declaration aimed at creating a new OIC Declaration of Human Rights will adopt a similar approach as previous Muslim human rights documents have.

Conclusion

In its January 2019 Resolution, the Parliamentary Assembly of the Council of Europe noted with approval “the legislative change in Greece which made the practice of Islamic sharia law in civil and inheritance matters optional for the Muslim minority”, called “on the Greek authorities to rapidly and fully implement the Grand Chamber judgment of the European Court of Human Rights in the case of *Molla Sali v Greece* and in particular, to monitor whether the above-mentioned legislative change will be sufficient to satisfy the requirements of the Convention”.⁸⁰ As far as it goes, the modified Greek legal regime seems likely to partially satisfy the Assembly: effectively, Muftis in Thrace will no longer have

⁷⁸ Arab Charter on Human Rights (1994), preamble.

⁷⁹ Emulating article 2 of the ICCPR, article 2 of the Charter promises the rights “without any distinction on grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status and without any discrimination between men and women”.

⁸⁰ Resolution 2253 (2019), para. 13.

jurisdiction over inheritance, except in the unlikely circumstance that an intestate Muslim's heirs collectively agree to replace civil law with the Quranic rules of inheritance.

It is no wonder that two organs of the Council of Europe, the Court and the Assembly, adopted seemingly diverging positions on this topic of societal organisation in Europe. Their differentiated approach is easily explained by their varied missions. Members of the Assembly, who are members of national parliaments, are elected in general elections and their designation is based on an internal national parliamentary process. They are accountable only to their voters, a reality which, more often than not, guides their statements, actions and voting patterns. The Resolutions, though not legally binding, carry significant political weight as the expression of the views of the peoples of Europe. By contrast, the ECHR is a legal and not a political organ, bound by the content of the Convention and its Protocols. The mission of the Court is "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto".⁸¹

If nothing else, this article has demonstrated that the Molla Sali inquiry was potentially not nearly as simple as the ECtHR made it. This does not reflect at all poorly on the Court; not only would it have faced daunting questions of substantive law if it had tried to rule more broadly, but it might also have risked exceeding its jurisdiction to do so. In the circumstances, a narrow finding of a discriminatory violation of property rights was quite complex enough, implicating as it did the principles of discrimination by association and rights of protected minorities to forego those protections. As Europe becomes more cosmopolitan and the number of Muslim Europeans steadily increases, courts and legislatures may wish to consider the broader implications of Molla Sali.

⁸¹ Article 19 ECHR.

Against the backdrop of the *Refah Partisi* jurisprudence, which remains always active, should someone propose a wider societal implementation of the Sharia on the European continent, the European Court demonstrated a rare adaptive flexibility to today's geopolitical realities. The Strasbourg judges have reiterated the possibility for a member state to create a particular legal framework in order to provide religious communities a special status entailing special privileges. A similar provision can be found in article 75 of the French Constitution of the Fifth Republic.⁸² This constitutional provision allowed the existence of customary law with elements of Islamic and African traditions in Mayotte, an archipelago between Madagascar and Mozambique, as well as in other overseas French territories.⁸³ The ECtHR upheld religious freedom and showed respect for traditional customs of other cultures, while at the same giving prominence to European fundamental legal norms, such as the prohibition of discrimination as described in article 14 of the European Convention.

When Theseus entered Daedalus' labyrinth, he knew he could count on Ariadne's clew to kill the Minotaur and get out in one piece. For the European Court it was a far more difficult mission to draw a successful ruling in this complex case. In the Molla Sali maze, the ECHR has been confronted, on the one hand, with the legal past of *Refah Partisi* and calls to condemn Sharia *en bloc*, and, on the other, with the need to guarantee the implementation of the Convention and safeguard the fundamental freedoms on our continent. The Strasbourg

⁸² *Les citoyens de la République qui n'ont pas le statut civil de droit commun, seul visé à l'article 34, conservent leur statut personnel tant qu'ils n'y ont pas renoncé.* (The citizens of the Republic who do not have the civil status of common law, solely described in article 34, maintain their personal status as long as they have not renounced it).

⁸³ Elements of customary law are recognised also in the Territory of Wallis and Futuna islands and in New Caledonia (see French Law 99-209 of 19 March 1999).

Grand Chamber, following Daedalus' instructions (go forward, never left or right), entered the heart of the problem and, thereby, justice has been served.