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# Human Rights Issues Arising from the Implementation of Sharia Law on the Minority of Western Thrace—*ECtHR Molla Sali v. Greece*, Application No. 20452/14, 19 December 2018

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**Abstract:** The *Molla Sali* case, recently heard by the ECtHR, concerns the compatibility of the implementation of Sharia in the family and personal relations of the Muslims of Western Thrace, who remained within the boundaries of the Greek State after the exchange of populations under the Treaty of Lausanne, to the ECHR. The applicant, a Greek national of the Muslim minority of Western Thrace, complained that she could not be beneficiary by testament of her deceased husband's estate, member of the same minority, since, according to the position of the Court of Cassation, due to a series of international agreements and relevant domestic norms, the law of succession applicable to her case was the Islamic Law that prohibits the testament, instead of the civil law. However, the ECtHR found that the applicant was victim of a violation of article 14 of the ECHR in conjunction with article 1 of Protocol no 1. In this case, the ECtHR considered for the first time the question of the compatibility of a religious community's separate legal status with the ECHR. The rationale behind the decision is within the framework of the core principles of the Court's case law on the limits of the autonomy of religious communities and acknowledgement of minority rights. The Court, based on the main line of arguments which constitute the corpus of its jurisprudence on religious and minority issues, ruled that the separate legal status of the Muslim minority cannot justify divergences from the application of the General Law, to the extent that such divergences violate the Greek citizens' rights enshrined in the Constitution and the ECHR and it condemned Greece on the basis of "discrimination by association".

**Keywords:** discrimination by association; group rights; legitimate expectation; possessions; Sharia law

## 1. Introduction

On 19 December 2018, the ECtHR delivered its much-awaited judgment on the case of *Molla Sali v. Greece*, no. 20452/14. The applicant, a Greek national of the Muslim minority of Western Thrace, complained that she could not be beneficiary by testament of her deceased husband's estate, member of the same minority, since, according to the position of the Court of Cassation, due to a series of international agreements and relevant domestic norms, the law of succession applicable to her case was the Islamic Law that prohibits the testament, instead of the civil law. However, the ECtHR found that the applicant was victim of a violation of article 14 of the ECHR (hereinafter: the Convention) in conjunction with article 1 of Protocol no 1.

More precisely, *Molla Sali* concerns the compatibility of the implementation of the Sharia in the family and personal relations of the Muslims of Western Thrace, who remained within the boundaries of the Greek state after the exchange of populations under the Treaty of Lausanne, to the Convention. First of all, it should be noted that the implementation of the Sharia is not explicitly provided for in the Treaty of Lausanne as the Treaty mentions appropriate steps to be taken by the contracting parties

so that issues concerning the personal and family relations of the minority members are regulated in accordance with the customs of the minority (articles 42 and 45 of the Treaty of Lausanne). That is to say, according to the text of the Treaty, it is within the states' discretion to choose the appropriate steps for the objective set by the Treaty to be reached (the regulation of the family and personal relations in accordance with the customs of the minority) and not an obligation to make the implementation of Sharia mandatory in regulating such relations. The Treaty of Lausanne does not explicitly refer to the implementation of the Sacred Muslim Law but recognizes the special nature of the Muslim minority over the Christian majority (Ktistakis 2006, pp. 97–117).

The case law of the Greek courts differs as to whether the implementation of the Sharia is mandatory or not,[1] as regards the regulation of the family and personal relations of the Greek Muslims living in Thrace, as well as to whether the implementation of the Sharia is compatible with the Greek Constitution and International Treaties of Rights Protection which Greece has ratified.[2] However, Areios Pagos, the Supreme Court of Cassation, has held that the particular legal rules governing the family and personal relations of Greek Muslims living in Thrace constitute special interpersonal law, which aims to protect the Muslim minority, fulfills an international obligation of the country, and contradicts neither the Greek Constitution nor the Convention. Regarding any potential conflict between international obligations and the protection of rights, the Supreme Court, even indirectly, prioritizes among them as it considers that the implementation of the Sharia in specific fields (must be compatible but eventually) is not contrary to the Constitution and the Convention.[3] This judgment of the Supreme Court is based on an underlying assumption across the rationale of all relevant decisions, namely that the state assumes the role of guarantor of the identity of minority members.[4]

However, this assumption does not sit well with the essentials of ECtHR case law on the protection of minorities, as the ECtHR does not consider that the Convention establishes collective minority rights but only the right of individuals to identify themselves as regards their identity. The case law of the ECtHR recognizes the protection of a minority identity as an indispensable element for self-identification of individuals, but not as an element of an identity that defines a collectivity in relation to the majority ethnic or religious community of a country. Identity, according to the case law of the ECtHR, remains an issue that concerns the individual rather than a collectivity (Pentassuglia 2006, pp. 266–67). This point is crucial for the evaluation of the *Molla Sali* decision. It should also be noted that the *Molla Sali* case is the first case in which the ECtHR deals with the compatibility with the Convention of a legal status for the protection of a minority, which acknowledges exceptions based on religion as to the general rules applicable to the total population of a country.[5]

## 2. Religious Communities as Right-Holders According to the Case Law of the ECtHR

In order to understand the rationale of the decision in *Molla Sali*, we should first examine the essentials governing the ECtHR case law on the rights of religious communities. According to the ECtHR case law, religious communities bear religious freedoms enshrined in article 9 of the Convention. They can therefore exercise the rights enshrined in article 9 on behalf of their members.[6] Also, the issues

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1 There are diverging views in the case law of the Greek courts regarding the source of the special treatment of Greek Muslims, as there are court rulings that justify this treatment based on the Treaty of Athens (1913), which pre-dates the Treaty of Lausanne and which, according to several Greek courts, is still in force today. The issue is further complicated as the Greek legislator incorporated the provisions of the Athens Treaty into law no. 1920/1991 *Ratification of the Legislative Act of 24 December 1990 "On Muslim Clerics" (A' 182)*.

2 According to the case law of lower courts (Courts of First Instance, Courts of Appeal) and the Supreme Administrative Court, the implementation of the Sharia is incompatible with the Constitution or with international treaties of rights protection.

3 See Areios Pagos judgment no. 1831/2013, Nomos Database.

4 In *Molla Sali* the ECtHR makes a special reference to this aspect of the case law (*MS*, § 156).

5 This delay is due to the fact that none of the states that have ratified the Convention acknowledges a similar legal status of exemption from the general rules on the basis of religion except Greece and France, which accepted such an exception only for the population of the island of Mayotte up to 2011.

6 See *Jewish Liturgical Ass'n Cha'are Shalom ve Tsedek v. France*, no. 2471/95, 27 June 2000, § 95.

concerning their internal organization should be regulated in accordance with decisions made by the religious communities themselves without state intervention.[7] Moreover, the right of religious communities to acquire legal personality[8] is an expression of collective religious freedom so that they can exercise other rights of their own, such as the right to property. The ECtHR also accepts that the autonomy of religious communities can justify discrepancies as regards the extent of the protection enjoyed by their members in relation to their individual rights, since participation in the religious community is voluntary and presupposes acceptance of the essentials of the religious doctrine.[9]

Such an approach, which is based on a combination of religious freedom and freedom of association (articles 9 and 11 of the Convention), can be supported for a number of reasons. If we accept that the state can interfere with the criteria of admission to a religious community or its internal organization, then its autonomy, which is a constituent element of its religious freedom, would be neutralized (Rivers 2010, pp. 33–72). However, only religious communities that are legally organized as associations of individuals and have clearly formulated the principles of their doctrine can invoke religious freedom as a limit to state interference. These two conditions are necessary in order for a religious community to be able to claim a status of exceptions in the name of religious freedom, since they both ensure that membership in or withdrawal of membership from the religious community is voluntary (Laborde 2017, p. 181). In addition, exceptions to general laws should only concern issues directly related to the basic purposes that a religious community is called upon to fulfill. It is also crucial to distinguish between issues relating to activities which are related to the core of the religious doctrine and activities that are regionally related to the religious doctrine. For example, exceptions relating to the principle of gender equality in staff recruitment cannot apply to all job positions (Laborde 2017, pp. 185–89).

Another dimension of the religious autonomy of religious communities includes their full competence in resolving dogmatic issues. However, the jurisdiction of religious communities can not extend beyond the issues of the religious doctrine. Courts are not competent to resolve religious issues even if solving a theological issue is necessary to resolve a dispute. This finding cannot, however, lead to total immunity of religious communities in the judicial review of their decisions under the pretext that the court does not engage in religious matters. The ECtHR, even where it acknowledged the possibility for religious communities to diverge from general rules on the basis of religion, tested these divergences and examined whether they can be justified under the Convention rules (Laborde 2017, p. 194; Leigh 2012, p. 121).[10]

These principles are confirmed in the *Molla Sali* decision. A crucial element in the rationale for the decision is that the previous regime governing the family and personal relations of members of the Muslim minority living in Thrace made it obligatory to subject such disputes to the Mufti jurisdiction without any possibility of extending to them the general laws applicable to the Greek citizens (*MS*, § 157). This regime did not respect the first condition that could justify diverging from the application of general rules to members of a community, as the implementation of the Sharia was made mandatory for all members of the minority regardless of their will. The Mufti's exclusive jurisdiction over the personal and family affairs of minority members was also inconsistent with the ECtHR case law, according to which divergences from the general jurisdiction of the courts can only be justified when dealing with issues confined to the religious doctrine. As is apparent from the case law on the application of article 6 of the Convention, the ECtHR accepts divergences from the application of the provision only in cases of clerical dismissal. In other cases, the ECtHR does not accept any divergences

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7 See *Serif v. Greece*, no. 3817/97, 14 March 2000, § 52.

8 See *Canea Catholic Church v. Greece*, no. 25528/94, 16 December 1997, §§ 41, 42.

9 The element of voluntary participation is very important in the ECtHR case law (Leigh 2012, p. 116). An example of such case law is the non-implementation of article 6 in cases involving the dismissal of priests by a decision of church authorities, see *Duda & Dudová v. Czech Republic*, no. 40224/98, 30 January 2001.

10 See *Lombardi Vallauri v. Italy*, no. 39128/05, 20 January 2010, §§ 55, 56, 71; *Schüth v. Germany*, no. 1620/03, 23 December 2010, §§ 73, 74; *Pellegrini v. Italy*, no. 30882/96, 20 July 2001, §§ 46, 47.

and considers that, even if they have a religious dimension, cases should be examined on the basis of the criteria of the Convention on the rules of article 6 (Leigh 2012, pp. 116–19). The case law of the ECtHR so far, accepting divergences from general rules and general jurisdiction due to religion only for exceptional reasons, is confirmed with *Molla Sali*.

Another aspect of the case law on the possibility of diverging from the general rules is related to the specific reasons on which the ECtHR is willing to accept that a differentiated treatment is not discriminatory. Up to now, the ECtHR, in the context of examining issues of religious freedom, has only accepted a differentiated treatment with regard to the implementation of general laws, where it boosts the individual's religious freedom.[11] Only such differentiation is considered compatible with the Convention. The ECtHR case law in these cases is based on the "negative equality" principle, which requires differentiated treatment of different cases, provided that the differentiation in treatment does not result in restricting the rights of the persons on whom the differentiated treatment applies. Negative equality cannot be considered as a basis for the differential treatment of religious groups in terms of a positive obligation of the state to protect the identity of minority groups (Pentassuglia 2006, p. 281). On the basis of this criterion, in *Molla Sali*, the ECtHR could not reach a different judgment as to the compatibility of the previous legal framework for the protection of the Muslim minority with the Convention, as this framework, making it obligatory to apply the Sharia to the minority members, restricted their religious freedom, which always has a negative aspect, that is, the right of the individual not to believe or not to follow all the doctrine rules he/she advocates. According to the ECtHR judgment in *Molla Sali*, religious beliefs of any person should not result in his/her resignation from certain rights (*MS*, § 156).

## 3. Minority Rights versus Individual Rights

Another important element of the decision is that the ECtHR was called upon to examine the relation between an international treaty acknowledging a minority status for the Muslims of Western Thrace and the Convention.[12] As has already been pointed out, the regime for the protection of Muslims in Western Thrace is a survival of the millet system of the Ottoman Empire (Tsitselikis 2012, p. 112). It is a survival which, in the name of religious autonomy of a community, allows diverging from the general law in specific fields, as well as maintaining separate schools for the minority. In this case the ECtHR avoided to take a clear stand, as it considered that the Treaty of Lausanne did not explicitly provide for the implementation of the Sharia (*MS*, § 151). Therefore, its invocation cannot justify divergence from general laws. However, the ECtHR, in several parts of the decision, takes views that allow us to understand its approach to the relation between minority and individual rights.

Minority rights fall under the category of collective rights as they concern the protection of a group of people as a whole on the basis of certain characteristics (Jackson-Preece 2005, pp. 1–18; Pettit 2000, pp. 199–205). They can therefore be considered as a typical example of collective rights. However, before looking into the relation between collective and individual rights and the tensions between them, we must first examine the rationale governing the safeguarding of collective rights (Jovanović 2012, pp. 44–66). Collective rights aim at protecting a number of individuals from "external" interventions in issues that are considered vital for the preservation of the particular identity of these individuals and to protect their identity from "internal" disputes over the elements of such identity (Kymlicka 1995, p. 35). Of course, the crucial issue is that sometimes the need for external protection translates into the need to maintain a particular identity even if preservation presupposes the

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[11] See *Thlimmenos v. Greece*, no. 34369/97, 6 April 2000, §§ 46–49. In *Thlimmenos* the ECtHR ruled that the denial of Greek Authorities to allow a Jehovah Witness to have access to the profession of charter accountant, because of his earlier conviction by a Greek Court due to his religious beliefs, is contrary to the protection of his religious freedom, enshrined by article 9 of the Convention.

[12] Up to *Molla Sali* the group dimension of religious freedom has been examined through the lenses of the organizational autonomy of religious community, since the jurisprudence of the ECtHR was quite reluctant to recognize the group dimension of religious autonomy (Evans 2010, pp. 338–42).

suppression of internal disputes. In this case the protection of minority identity can lead to a restriction of the rights of the minority members, as the application of general laws is regarded as an external intervention in issues that are considered vital for the minority. For example, the millet system can be seen as a system of protecting the particular identity of minorities, allowing elements of this identity to determine the exercise of rights by their members.

However, two issues need to be distinguished (Kymlicka 1995, p. 164). First, which minority rights can be considered compatible with individual rights? The second issue concerns the most appropriate way of resolving the conflict between individual and minority rights. Whether the protection of minority rights can restrict individual rights is different from the question of how to correct the conflict between them. To the extent that personal autonomy is considered to be the basic principle of a liberal legal order, it is not possible to accept restrictions on individual rights for the benefit of the protection of a minority identity, otherwise we would deny an essential element of personal autonomy, the individual's ability to choose him- or herself the building blocks of his or her identity. However, if one chooses to establish their identity based on elements of a minority identity, even if these elements do not correspond to the liberal model of rights protection, can the state intervene to protect individuals from their own choices (Kymlicka 1995, p. 165)?

The case law of the ECtHR does not solve the issue as it traditionally addresses the issue of minority identity as a matter of individual identity, i.e., as a matter of self-identification. When it comes to the possibility of invoking an identity which is different from that acknowledged by the State to its citizens, the ECtHR considers the relevant cases in the light of each individual's right to determine their identity, provided they do not affect the rights of others or a fundamental interest of the state.[13]

In *Molla Sali*, there has been the opportunity to judge for the first time whether individuals have the right to remain voluntarily "trapped" in a minority identity recognized by an international treaty, which deprives them of certain rights, in the name of protecting that identity. If the Court had chosen to address the issue, it would have determined whether the law no. 4511/2018, that was put into force in December 2018 and which provides for the recourse to Mufti to be optional for the minority members,[14] is in line with the Convention. However, following its settled case law, the Court only examined the compatibility of the law that was the subject of the dispute, without extending to legal regime introduced later (*MS*, § 160). The fact that the particular identity of the Muslim minority is protected by the Treaty of Lausanne, as has already been mentioned, differentiates *Molla Sali* from the headscarf affairs, as in these cases there is no international commitment that obliges the state to respect the particular religious identity of people who choose to wear a headscarf or hijab in a public place.

In *Molla Sali*, the ECtHR emphasized the fact that the previous legal regime in Greece, as practiced by the courts, did not respect the principle of self-identification of the minority members, a principle enshrined in Framework Convention of the Council of Europe on Minorities, which renders participation in a minority voluntary and not compulsory (*MS*, § 157). According to the ECtHR, this was the crucial element that made the previous legal status for Muslims in Western Thrace incompatible with the Convention. Based on this finding, the ECtHR seems to open up the possibility that the status of the new law is not opposed to the Convention, since according to the new law the enforcement of Sharia is not compulsory any more for the members of Muslim minority. However, the ECtHR has abstained from taking stand on the issue, and it is of course important not to overlook that in other judgments it has settled that the Sharia itself is incompatible with the Convention.[15]

As is clear from the ECtHR judgment in the *Refah Partisi* case, acknowledging the organizational autonomy of religious communities does not mean justifying the existence of many parallel regimes for

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[13] See *Sidiropoulos and Others v. Greece*, no. 57/97, 10 July 1998, §§ 42–46; *Stankov and United Macedonian Association Ilinden v. Bulgaria*, nos. 29221/95 and 29222/95, 2 October 2001, §§ 90–105.

[14] See law no. 4511/2018 *Amendment of Article 5 of Legislative Act of 24 December 1990 "On Muslim Clerics" (A' 182), ratified by the Sole Article of Law 1920/1991 (A' 11)*.

[15] *Refah Partisi (the Welfare Party) and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98, 41344/98, 13 February 2003, §§ 123–29.

regulating legal relationships between citizens, based on the religious beliefs of different communities. The autonomy of religious minorities may act as an external restriction aimed at protecting the minority against the majority, but cannot act as an internal restriction for members of the minority. Religious autonomy is safeguarded against the state, but when the state acknowledges a separate legal status to religious communities, assigning areas of responsibility of the state, then religious communities are perceived as forms of state authority that should respect the religious freedom of their members by form of negative religious freedom.

Yet, there is a differentiation between *Molla Sali* and other relevant cases. The ECtHR has condemned the compulsory application of Sharia and not Sharia Law itself. The Court did not invite the Greek Authorities to abolish the implementation of Sharia in Western Thrace. According to the ruling of the Court, the Convention is not per se against granting the members of a Muslim minority the freedom to be governed by the Sharia, when such choice is an optional one for the members of minority. The essential point of the content of Sharia is not assessed, as in other cases. The Court addresses the issue from the point of view of self-identification, which cannot justify the locking of the members of a minority inside it, but may justify the waiving of certain rights for religious reasons, if such waiving is based on the free consent of the individuals (*MS*, §§ 154–57). At this point, the Court's reasoning relies on its jurisprudence about minority rights and the distinction between positive and negative aspects of minority rights. The Court does not clarify whether or not Sharia as such is compatible to human rights, as in the *Dahlab* case.[16] Further on the Court does not clarify to what extent the enforcement of Sharia might be compatible to the Convention. Should Sharia be enforced voluntarily only with regard to family matters or the optional enforcement can be extended to any aspect of life, unless a vital public interest is concerned? The Court's judgment is not clear on this issue, as in the *S.A.S.* case,[17] in which the public interest is clearly considered as a source of a legitimate limitation to religious freedom. By placing the dispute in the context of obligatory/optional enforcement of the Sharia, the Court examines the case through the lenses of minority rights and recognizes a form of collective identity protection—a position that deviates from its former jurisprudence on the compatibility of Sharia to the core values of the Convention.

## 4. The Legal Position of the Applicant Due to the Implementation of Sharia

The Greek state is condemned for violation of the rights of the applicant stemming from article 14 of the Convention in conjunction with article 1 of the 1rst Protocol to the Convention (*MS*, § 162).

### *4.1. Article 1 of the 1rst Protocol to the Convention*

Article 1 of Protocol no. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. [...]"

The ECtHR does not have any difficulty noticing that the consideration of the testament as devoid of effect and the application of Sharia instead impacts adversely on the financial situation of the applicant. More precisely, that the applicant—as she submits (*MS*, §§ 84, 97)—is deprived of 3/4 of the property bequeathed (*MS*, §§ 30, 122, 145). This is because while the testament passes all the estate to her, the Sharia intends for herself only the 1/4 in the presence of the deceased's sisters. All the rest—the 3/4—accrue to their assets. Hence, the decision of the Court of Cassation "had radically altered the apportionment of the estate between herself and the deceased's sisters" (*MS*, § 97); its major fraction had changed hands and only its smaller fraction had not, even though the mode of devolution thereof

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[16] *Dahlab v. Switzerland*, no. 42393/98, 15 February 2001.
[17] *S.A.S. v. France*, no. 43835/11, 1 July 2014.

was certainly affected: as per the decision of the Court of Cassation the applicant should be entitled to that part not by virtue of private will (the testament) but by operation of law (the Sharia).

For article 1 Protocol no. 1 to be engaged in the applicant's favor, it is required that the said portion of the 3/4 of the estate can be regarded as her *"possession"*. The ECtHR constantly holds this concept to encompass both "existing" property and "legitimate expectations" to enjoy property, but not to stretch to any purely speculative proprietary interest, since article 1 Protocol no. 1 is intended to guarantee the right to possessions acquired beforehand and not the right to acquire possessions in the first place (see *Fabris v. France*, no. 16574/08, 7 February 2013, § 50 and the further citations therein; also Sermet 1998, p. 11). In the instant case the ECtHR affirms that the proprietary interest on the 3/4 of the estate is of such nature as to fall within the ambit of the provision (*MS*, § 132). The judgment is unequivocal as to what the applicant's vested right on this quota consists of: any idea of an existing ownership is rejected out of hand and the legitimate expectations to enjoy ownership take center-stage.

It is essential to keep in mind that the ECtHR is not willing either to advocate or to oppose the view that the testament is null and void and must be superseded by the Sharia. To be sure, this view is not self-evident and encounters disagreement (see below). However, as long as it is not "arbitrary or manifestly unreasonable", it is not for the ECtHR to further evaluate it—it is primarily the task of the national authorities to resolve matters of interpretation of domestic legislation (*MS*, §§ 142, 149). Therefore, one has to set out from the assumption that the 3/4 of the estate were *never* transferred to the applicant but were immediately seized by the deceased's sisters as soon as the succession "opened" at the time of death. The implication in the present context is that the applicant cannot assert a possession in form of an existing right for the purposes of article 1 Protocol no. 1.

Therefore, only the possession in form of a "legitimate expectation" remains as a possibility. That leads to the question if the proprietary interest generated by the testament proves to be strong enough to establish at least the "'beginnings' of proprietary title" (Van Drooghenbroeck 2000, p. 439), which is likely to materialize. This would then be already an "asset". A claim of such quality obtains, provided that it satisfies the test enounced in *Kopecký v. Slovakia*, no. 44912/98, 28 September 2004, § 52, in particular:

> "where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it." [18]

In *Molla Sali* the legitimate expectation of the applicant is built mainly on the judgments no. 50/2010 of the Rodopi Court of First Instance and no. 392/2011 of the Thrace Court of Appeal, that had adjudicated the challenge brought by the deceased's sisters, by approving the testament (*MS*, § 130). From this the ECtHR does not hesitate to infer that:

> "the applicant's proprietary interest in inheriting from her husband was of a sufficient nature and sufficiently recognised to constitute a "possession" within the meaning of the rule laid down in the first sentence of the first paragraph of Article 1 of Protocol No. 1 [...]". (*MS*, § 131)

This is not a solid conclusion:

To start with, on an view strictly circumscribed to the litigation from which *Molla Sali* originates—as is here the view of the ECtHR—it does not sound plausible to suggest that the applicant's legitimate expectation was warranted by the lower courts' judgments, as long as recourse to the Court of Cassation was still available to the aggrieved parties, let alone after these had eventually initiated proceedings and the issue was pending before the Court of Cassation. Under these conditions, the decision of the Thrace Court of Appeal as well as the decision of the Rodopi Court of First Instance risked being set aside in turn, therefore neither of them could be said to offer any reliable guarantee that their own

[18] See also the ECtHR case law after *Kopecký* in Beeler-Sigron 2018, p. 854 at n. 8.

approach on the disputed testament would prevail. The formation of a legitimate expectation to this effect was put on hold and failed to crystalize until the points of law were clarified at the final level of jurisdiction (cf. *Kopecký*, § 59).

It is surely conceivable that this outcome retained only minimal importance, because a legitimate expectation of the applicant had become *fait accompli* irrespective of it. This clearly presupposes support of the claim by previous authorities lending it the appropriate recognition, i.e., such that either taken alone or accumulated to the recognition derived from the actual decisions of 2010 and 2011, is instrumental in bringing about for the claim a "sufficient basis in national law". However, this is not evidenced in practice. On the one hand, for a number of legal commentators the religious and the secular normative orders were concurrent, in the sense that the members of the minority enjoyed freedom of choice between them (see for example Tsitselikis 2001, pp. 584, 588, 590 et seq., 592 et seq.; Papassiopi-Passia 2001, p. 406; Ktistakis 2006, pp. 39, 155; Tsaoussi and Zervogianni 2008, p. 214; Papadopoulou 2010, p. 409). On the other hand, the opinion generally echoed in the case law was quite opposite, it being considered that the Sharia was the only applicable law on the succession of the members of the minority. This was the predominant view in the lower court's case law (see for example, as regards the Thrace Court of Appeal, the research conducted by Sakaloglou 2015, p. 1383, according to which the judgments prioritizing the Sharia as confronted to the judgments prioritizing freedom of choice during the period 1986–2009 were in a ratio of 10:2, while the most recent of the judgments are not in the same direction and do not imply any turn in the case law), and also the view unwaveringly endorsed in the case law of the Court of Cassation, through an uninterrupted series of judgments since 1960 (see *MS*, § 55). What the above picture reveals is that a legitimate expectation of the applicant to be the sole heir pursuant to the testament was unfounded, not merely owing to existence of serious doubts as to whether the law was on her side, but, a fortiori, *owing to entrenched quasi-certainty that the law was against her*, since from the point when the testament was drawn up onwards it had been completely foreseeable that the deceased's sisters would be co-heirs by 3/4 under Sharia. No one should anticipate that the Court of Cassation would suddenly reverse its position on this occasion (see also the argument raised by the Government along these lines: *MS*, §§ 107 and 108).

Surprisingly, the ECtHR fails to properly appreciate this objection, although it is fully aware that, in order to ascertain if the applicant is holder of a "possession" within the meaning of article 1 Protocol no. 1, "the circumstances of the case, considered as a whole" need to be taken into account (*MS*, § 125).

Nevertheless, even if this objection is understood to be blocking the way of the applicant to article 1 Protocol no. 1, her material interest is not excluded from the protection system of the Convention altogether. Significantly, in *Marckx v. Belgium*, no. 6833/74, 13 June 1979, § 52 and in *Pla and Puncernau v. Andora*, no. 69498/01, 13 July 2004, § 26, it was accepted that the matters of succession ab intestat and through voluntary disposition between family members "prove to be intimately connected with family life [and that the latter] does not include only social, moral or cultural relations". Therefore any restriction of the ability to inherit, for example under the will of the parent (as is the case in *Marckx*), under the will of the grandparent (as is the case in *Pla and Puncernau*) or under the will of the spouse (as is the case in *Molla Sali: MS*, § 128), *amounts to an interference with this particular dimension and comes within the sphere of article 8 of the Convention.*

### *4.2. Article 14 of the Convention*

Article 14 prohibits discrimination:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

First, the ECtHR discusses whether there has been a difference in treatment of the applicant as compared to persons in analogous or relevantly similar situations (*MS*, §§ 138 et seq.). The applicant

is an instituted heir in a will made in accordance with the Civil Code by a testator of Muslim faith, which brings her to an analogous or relevantly similar position to an instituted heir in a will made in accordance with the Civil Code by a non-Muslim testator (*MS*, § 141). Yet, despite this connection of the two beneficiaries, no parity between them exists. Unlike the heirs selected by the non-Muslim testator, the heirs selected by the testator of Muslim faith do not derive any inheritance right from the will settling the estate in their favor; since in this case specific ab intestat rules of the Sharia law must apply, the will is prohibited, it is declared null and void (pursuant to article 174 of Greek Civil Code) and is deemed as if it had never taken place (pursuant to article 180 of Greek Civil Code).

After affirming the differential treatment of the applicant, the ECtHR examines whether it was justified (*MS*, §§ 142 et seq.), to conclude that it was not (*MS*, § 161). The thoughts underpinning this finding turn around the wrong committed to the Muslim testator once he is considered to come under Sharia law and be walled-off from the instruments (ordinary or extraordinary will, and logically, donation mortis causa) with which the civil law equips the individuals interested in determining the fate of their succession (*MS*, §§ 156 and 157). What has to be emphasized here is that the main aim of this discussion is not so to highlight the infringement of the "right of self-identification" of the testator, as to address the repercussions felt on the side of the applicant, namely, her so-called discrimination *"by association"* with the testator.

This form of discrimination is undeniably contained in the words *"by other status"* in article 14. These do not necessarily refer to "characteristics which are personal in the sense that they are innate or inherent" but are given a wide interpretation so that article 14 "also covers instances in which an individual is treated less favorably on the basis of another person's status or protected characteristics" (*MS*, § 134). At this point the ECtHR reiterates a statement it had initially made in *Guberina v. Croatia* no. 23682/13, 22 March 2016, § 78 and subsequently in *Škorjanec v. Croatia*, no. 25536/14, 28 March 2017, § 55, but which seems to be already implicit in *Weller v. Hungary*, no. 44399/05, 31 March 2009, § 37, all cases where the ECtHR had found discrimination by association on account of the disability of the son (in *Guberina*), the ethnic origin of the male partner (in *Škorjanec*), the parental status of the father and the nationality status of the mother (in *Weller*).[19] In *Molla Sali* the "other status" refers to the testator's religion (*MS*, § 141).

An interesting peculiarity featuring in *Molla Sali* is that the testator's religion, which lies at the root of the applicant's discrimination by association, *is also her own religion, as she, too, is a Muslim of the minority population of Western Thrace.* This is most uncommon; in the typical scheme—reflected in the abovementioned ECtHR cases, in the CJEU cases *S. Coleman v. Attridge Law and Steve Law* (ECLI:EU:C:2008:415), *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia* (ECLI:EU:C:2015:480) (see *MS*, §§ 80, 81), and, last but not least, in § 20 of the General Comment no. 6 of the United Nations Committee on the Rights of Persons with Disabilities (see *MS*, § 69)—the person suffering discrimination by association does *not* bear the protected characteristic and does *not* belong to the disadvantaged group him- or herself. However, the inverse is not impossible.

In general, a discrimination of A by association with B may occur when A happens to share the condition of B, yet this inherent condition is not taken into account and cannot explain the unequal treatment of A, which is monocausal, hinging exclusively on the association with B. The reason behind this is either that the inherent condition does not become perceived so as to give rise to discrimination of A (only the association with B does), or that the inherent condition is not per se relevant to the actual discrimination of A (only the association with B is). The second can be demonstrated in respect of the Muslim applicant in *Molla Sali*. The pronouncement of the Court of Cassation that the inheritance shall be governed by Sharia and not civil law was not based on the applicant's religion, as was accurately put forward by the Government in their submissions (*MS*, §§ 92, 110) (admittedly, of course, in their

[19] The above cases are usefully summarized in European Union Agency for Fundamental Rights and Council of Europe 2018, pp. 51 et seq. and 187 (*Guberina*), 84 (*Škorjanec*), 52 (*Weller*).

effort to defend the applicant's lack of victim status altogether, a preliminary objection that was rightfully joined to the merits and dismissed as inconclusive by the ECtHR, given the discrimination by association with the Muslim testator (*MS*, §§ 95, 162)). In the same vein the ECtHR identifies the applicant "as the beneficiary in will made in accordance with the Civil Code by a testator of Muslim faith" (*MS*, §§ 122, 141, 161; *adde* § 86), namely, in purely neutral terms, irrespective of her religious affiliation. In fact, it is understandable that the ECtHR would have delivered no different verdict in respect of other potential beneficiaries named in the will of the Muslim testator who would not have the religious affiliation of the applicant, for example in respect of a Christian or an atheist friend or a relative converted to Christianity or to atheism. The will being at any rate defective (as dictated in articles 174 and 180 of Greek Civil Code), these beneficiaries would as well have faced discrimination by association with the Muslim testator—not to mention that the consequences for them would have been even more far-reaching, since they would not merely be entitled to less (as the Muslim applicant is) but they would be entitled to nothing under Sharia.[20]

In view of the preceding remarks, the concurring opinion (of Judge *Mits*) annexed to the ECtHR judgment, holding that "the proper comparator which the Grand Chamber should have used is whether 'a married *Muslim* woman who was a beneficiary of her Muslim husband's will, was in an analogous or relevantly similar situation to that of a married *non-Muslim* female beneficiary of a non-Muslim husband's will'" (§ 7) and that, eventually, "there has been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1 on the grounds of the applicant's *husband's* and *her* religion" (§ 13), cannot be applauded.[21]

## 5. Concluding Remarks

In *Molla Sali*, the ECtHR considered for the first time the question of the compatibility of a religious community's separate legal status with the Convention. The rationale behind the decision is within the framework of the core principles of the ECtHR case law on the limits of the autonomy of religious communities and acknowledgement of minority rights. Acknowledgement of a separate legal status in a religious community is linked to two separate issues: (a) the organizational autonomy that a religious community must enjoy vis-à-vis the state so that the majority cannot affect its members' religious freedom; and (b) the limits of acknowledging a separate minority identity to members of this religious community, i.e., whether a separate religious identity can be the basis for recognizing a different legal status for members of the religious community.

For both issues, the ECtHR has formulated a specific framework of principles according to which the protection of a religious community vis-à-vis the state guarantees its organizational autonomy vis-à-vis the state, setting the individual rights of the community members as a limit. Organizational autonomy is strictly limited to issues of internal organization of the community. But this autonomy cannot lead to restricting the rights of the community members. The ECtHR case law on the dismissal of staff working in religious communities, to which we have already referred, is clear about the limitation between autonomy and the rights of community members. Joining a religious community cannot result in the individuals being denied of their rights. As far as acknowledgement of a right to a minority identity is concerned, the ECtHR case-law clearly states that such acknowledgement may only concern an individual right to self-identification, not a right to acknowledge a collective identity for a group of people. The possibility of self-identification is established on the individuals' autonomy to select their identity, if this does not affect the rights of others or a fundamental state interest. However, the possibility of self-identification does not go so far as to establish a separate legal status for individuals identified on the basis of minority identity. As is clear from the ECtHR case law,

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[20] Under Sharia only a Muslim can inherit a Muslim (see Pantelidou 2014, pp. 810, 816).
[21] The highlights are in the original text.

self-identification of individuals through recognition of a minority identity cannot lead to a separate legal status that leads to hetero-identification of the persons bearing that minority identity.

These two aspects of case law are evident in *Molla Sali*. The separate legal status of the Muslim minority in Thrace cannot justify divergences from the application of the General Law, to the extent that such divergences violate the rights of Greek citizens enshrined in the Constitution and the Convention. The principle of pluralism can only be perceived by the ECtHR as a principle based on the non-intervention of the state in the religious freedom of citizens. Acknowledging a separate legal status in a religious community cannot "capture" members of this community in the collective without allowing them to choose whether they wish or not to belong therein. Just as with religious freedom, in the case of acknowledging a right to a minority identity, divergences are permitted only when they operate in favor and not at the expense of the freedom of the individual. Differentiated treatment is only allowed if it is intended to remove inequalities that affect the freedom of individuals (negative equality). In this respect, the *Molla Sali* judgment can be seen as a continuation of ECtHR case law on religious autonomy and the relation between individual and collective rights. Pluralism, as the principle governing relations between religious communities, is limited by the neutrality of the state over the religious beliefs of the individuals. Only neutrality can safeguard the individual's autonomy, which seems to be the cornerstone of the protection of rights under the Convention. However, this approach is based on a very specific attitude of the elements that constitute the identity of an individual, an attitude that completely rejects the community aspect in the formation of the individual identity.

The jurisprudence of the ECtHR on religious and minority issues reveals that the Court's underlying reasoning is based on a certain conception of democracy in which the core element is individual autonomy. Yet, the Court relies on a very thin and abstract conception of the individual, which excludes from the protective range of the Convention's implementation all the claims of individuals which are based on collective values or beliefs.[22] Individuals can form their identity upon their personal beliefs, but their beliefs should remain an issue concerning strictly the individual, on which the state cannot interfere. Their beliefs cannot formulate a collective identity which deserves protection per se. *Molla Sali* did not break with this line of reasoning. The Court did not deliver a judgment on the issue of whether or not the Convention could protect some form of collective rights, especially rights which are guaranteed by international conventions, such as the Lausanne Treaty, for two reasons: (a) According to the Court the Lausanne Treaty does not make the implementation of Sharia compulsory and (b) The Court could not deliver a judgment regarding the new law, since this has not been implemented in the case at hand. Yet, the Court will be perhaps faced with such a difficult case in the future, if there is an application with regard to the new law which makes optional the implementation of Sharia for the members of Muslim minority. It will then have to test the limits of an individualistic approach on religious freedom which is the dominant one until now.

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## References

Beeler-Sigron, Maya. 2018. Chapter 17. Protection of Property. In *Theory and Practice of the European Convention on Human Rights*, 5th ed. Edited by Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak. Cambridge, Antwerp and Portland: Intersentia, pp. 851–88.

[22] The issue concerning the relation between the recognition of group rights and claims of justice and democracy is beyond the scope of this article. For further information see, among others, (Deveaux 2000, especially pp. 67–110; Bhramra 2011, especially pp. 85–99; Pavlakos 2008, pp. 164–71).

Bhramra, Meena K. 2011. *The Challenges of Justice in Diverse Societies: Constitutionalism and Pluralism*. Farnham: Ashgate Publishing.

Deveaux, Monique. 2000. *Cultural Pluralism and Dilemmas of Justice*. Ithaca and London: Cornell University Press.

European Union Agency for Fundamental Rights and Council of Europe. 2018. *Handbook on European Non-Discrimination Law*. Luxembourg: Publications Office of the European Union.

Evans, Carolyn. 2010. Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture. *Journal of Law and Religion* 26: 321–43. [CrossRef]

Jackson-Preece, Jennifer. 2005. *Minority Rights*. Cambridge and Malden: Polity Press.

Jovanović, Miodrag A. 2012. *Collective Rights: A Legal Theory*. Cambridge: Cambridge University Press.

Ktistakis, Yannis. 2006. *Sacred Law of Islam and Muslim Greek Citizens: Between Communitarianism and Liberalism*. Athens-Thessaloniki: Sakkoulas Editions. (In Greek)

Kymlicka, Will. 1995. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. New York: Oxford University Press.

Laborde, Cécile. 2017. *Liberalism's Religion*. Cambridge: Harvard University Press.

Leigh, Ian. 2012. Balancing Religious Autonomy and Other Human Rights under the European Convention. *Oxford Journal of Law and Religion* 1: 109–25. [CrossRef]

Pantelidou, Kalliroi. 2014. The Regulation of Inheritance Relations of the Greek Muslims. *Efarmoges Astikou Dikeou* 7: 809–21. (In Greek)

Papadopoulou, Lina. 2010. Trapped in History: Greek Muslim Women under the Sacred Islamic Law. *Annuaire International des Droits de l'Homme. Religions et Droits de l'Homme* 5: 397–418.

Papassiopi-Passia, Zoi. 2001. Reflections on the Scope of Implementation of the Interpersonal Law in Greece and the Jurisdictional Competence of the Mufti. *Koinodikion* 7: 391–412. (In Greek with a summary in English)

Pavlakos, George. 2008. Non-Individualism and Rights. In *The Tension between Group Rights and Human Rights: A Multidisciplinary Approach*. Edited by Koen De Feyter and George Pavlakos. Oxford and Portland: Hart Publishing, pp. 147–73.

Pentassuglia, Gaetano. 2006. Inside and Outside the European Convention: The Case of Minorities Compared. *Baltic Yearbook of International Law* 6: 263–91. [CrossRef]

Pettit, Philip. 2000. Minority Claims under Two Conceptions of Democracy. In *Political Theory and the Rights of Indigenous Peoples*. Edited by Duncan Ivison, Paul Patton and Will Sanders. Cambridge: Cambridge University Press, pp. 199–215.

Rivers, Julian. 2010. *The Law of Organized Religions: Between Establishment and Secularism*. Oxford: Oxford University Press.

Sakaloglou, Georgia. 2015. Jurisdiction of the Mufti in Family, Personal and Inheritance Cases among the Greek Muslim Citizens in the District of the Thrace Court of Appeal. *Nomiko Vima* 63: 1366–86. (In Greek)

Sermet, Laurent. 1998. *The European Convention on Human Rights and Property Rights. Human Rights Files, No. 11 rev.*. Strasbourg: Council of Europe Publishing.

Tsaoussi, Aspasia, and Eleni Zervogianni. 2008. Multiculturalism and Family Law: The Case of Greek Muslims. In *European Challenges in Contemporary Family Law*. Edited by Katharina Boele-Woelki and Tone Sverdrup. Antwerp, Oxford and Portland: Intersentia, pp. 209–39.

Tsitselikis, Konstantinos. 2001. The Jurisdiction of the Mufti as a Religious Judge. On the Occasion of the Judgment no. 405/2000 of the First Instance Court of Thiva. *Nomiko Vima* 49: 583–93. (In Greek)

Tsitselikis, Konstantinos. 2012. Aspects of Legal Communitarianism in Greece: Between *Millet* and Citizenship. *Oñati Socio-Legal Series* 2: 106–18.

Van Drooghenbroeck, Sébastien. 2000. The concept of "possessions" within the meaning of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. *The European Legal Forum* 7: 437–44.