# *Muftī* Courts, Minority Protection and the European Court of Human Rights

## – The Case of *Molla Sali v. Greece* –

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## Abstract

Being one of the leading cases in 2019, as described by the President of the European Court of Human Rights, this article analyzes the *Molla Sali* case in the merits as well as the just satisfaction stages. It argues that the Grand Chamber's decision did not open the door for an expansive application of Islamic religious law (*Sharī͂a*) in Europe; that the ECtHR did not impose a flat ban on religious adjudication; and that the ramifications of the decision may influence different religious minorities in general with a particularly alienating impact on Muslim Europeans. The case brought the minority protection regime that had been established in Western Thrace in the aftermath of the First World War under the ECtHR's scrutiny as to its compatibility with the principles of equality and the rule of law as set forth in the ECHR. Although the Hellenic Republic was held in violation of the ECHR, its newly introduced law amending the functioning of the *Muftī͂* courts sought to balance minority interests with the mandates of the ECHR. While the just satisfaction decision was perceived as a Pyrrhic victory, it remains to be seen whether the ongoing proceedings before Turkish courts will be politicized.


**Keywords:** Western Thrace, Treaty of Lausanne, Religious Minorities, *Muftī͂* Courts, *Sharī͂a*, ECtHR, Discrimination by Association

## A. Introduction

This article aims to analyze the intersection of religious adjudication with state law in light of the recent decision of the Grand Chamber of the European Court of Human Rights (Court), addressing the application for just satisfaction in the *Molla Sali* case,[1] juxtaposed with the former unanimous Grand Chamber decision on the merits.[2] In this case, the Court had examined the mandatory application of Islamic religious law (*Sharī͂a*) by Greek domestic courts to an inheritance dispute between Greek nationals belonging to the Muslim minority in Western Thrace. Whereas the principal judgment had held the Hellenic Republic in violation of Art. 14 (prohibition of discrimination) in conjunction with Art. 1 of Protocol No.1 (protection of property) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention)[3], the sequel decision brought down the curtain on compensation claims in the Greek chapter of the *Molla Sali* saga. Meanwhile, the ongoing proceedings undertaken by the contesting parties before Turkish courts lend them-

1 ECtHR, App. No. 20452/14, *Molla Sali v. Greece* [GC]. Grand Chamber judgments are final as per Article 44 of the Convention. Hereinafter (just satisfaction).
2 ECtHR, App. No. 20452/14, *Molla Sali v. Greece* [GC]. Hereinafter (merits).
3 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols nos. 11 and 14, opened for signature 4 November 1950, entered into force 3 September 1953, ETS No. 005, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005. (20/06/2020).



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selves to speculations of political retaliation. Besides the precise issues raised by the facts, the significance of the case stems from being the first Grand Chamber ruling on discrimination by association. Moreover, the contentious matter of whether religious law is compatible with the Convention invoked by its turn a cluster of interrelated questions. This included the overlap, or rather conflict, between the mandates of different international instruments; the scope of autonomy accorded to a recognized minority; and the hierarchy of applicable norms in the case of differing legal structures. All of this renders the decision(s) of far-reaching implications encompassing the relation between the State on the one hand, and the abstract right of individuals, apart from kinship, weighed against the entitlements of the minority as a collective on the other. Accordingly, it will be argued in the following sections that first; the decision of the Court did not open the door for an expansive application of *Sharī'a*[4] contrary to the propagated clamor in the riveting headlines[5] reporting the case. Second, the Court did not impose a flat ban on the notion of legal plurality per se, so long it endures the tests set by the Court, in contradistinction from the notion of parallel legal structures which were ruled as being at odds with the Convention.[6] Even the *sui generis* status of Western Thrace, which was induced by a complex international law background, was not an exception to this understanding, and its (mal-)functioning does not exist outside the purview of the Court's supervisory role in upholding due process and equality pursuant to the Convention. Third, while the ramifications of the decision may influence different religious minorities in relation to their adjudicatory bodies, it could be argued that it bears a particularly alienating impact on Muslim Europeans given the Court's established stance regarding *Sharī'a*, which has been reaffirmed notwithstanding the facts of the case.[7] Thus, it would not be extraneous to entertain the hypothesis that if such a stance were to be reconsidered in favor of a more reconciliatory (instead of mutually exclusive) approach, whether it would serve the purpose of a consistent compliance with the Convention in the future.[8]

Henceforth, the analysis proceeds as follows: Section B explains the legal background that gave rise to the special status in Western Thrace encompassing its domestic

4 *President Guido Raimondi*, Solemn hearing for the opening of the judicial year of the European Court of Human Rights of the Court, Opening Speech on 25 January 2019, available at: https://www.echr.coe.int/Documents/Speech_20190125_Raimondi_JY_ENG.pdf, p. 7. (20/06/2020).

5 Human rights court rules against Greece in Sharia law case, available at: https://www.washingtontimes.com/topics/chatitze-molla-sali/ (20/06/2020). ECtHR: Greece must compensate widow deprived of part of her deceased husband's inheritance by virtue of application of Sharia law, available at: https://eulawlive.com/ecthr-greece-must-compensate-widow-deprived-of-part-of-her-deceased-husbands-inheritance-by-virtue-of-application-of-sharia-law/ (20/06/2020). Hatice Molla Sali inheritance under Sharia law in Greece at risk, available at: https://apnews.com/3b0a46c20aac393a3af5a60e2e33db1f. (20/06/2020). Greece violated Muslim woman's rights: ECHR, available at: https://www.hurriyetdailynews.com/greece-violated-muslim-womans-rights-echr-139865. (20/06/2020). Christian group intervenes to 'protect' Europe from sharia law, available at: https://premierchristian.news/en/news/article/christian-group-intervenes-to-protect-europe-from-sharia-law (20/06/2020).

6 The relevant analysis will be discussed in Section D.

7 Ibid.

8 Ibid.



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and international law dynamics. Section C summarizes the facts of the cases, emphasizes the invoked legal issues, followed by a detailed analysis of the Court's reasoning regarding the establishment of discrimination by association and religious autonomy as laid down in its jurisprudence. Based on that discussion, Section D reflects upon some critical views that were projected against the Court's approach analyzed under Section C. Afterwards it focuses on the Court's posture on religious adjudication running alongside State courts, and how it weighed in defining the parameters of minority rights and the right to self-identification. The Conclusion draws the earlier arguments set in the Introduction with the analysis together in Section E, coupled with insights on the aftermath from the perspective of the minority in Western Thrace.

## B. Historical and Legal Background

A better appreciation of how the application of *Sharī͂a* in Western Thrace has become part of Greece's contemporary legal order is inseparable from the historical conception of the Greek State. Upon its independence from the Ottoman Empire,[9] Greece had become a party to a series of international treaties, thereby regulating, inter alia; the demarcation of its borders, swapping of populations with its neighbors, and more pertinently, the schemes of protection that had been envisaged for the respective minority groups that were unaffected by these developments. To that effect, Greece, driven by a commitment to ethno-nationalism as basis for nation building,[10] adopted a reversed version of the discarded Ottoman *millet* system,[11] which seemed a convenient legal model to accommodate the Muslim minorities of the nascent (Christian) Greek state.[12] Accordingly, the ensuing subsections outline the relevant international treaty provisions that set the legal bases for the protection of religious minorities, paving the way for the *Sharī͂a* jurisdiction to survive within the Greek domestic order, and how the office of the *muftī͂* turned to become a contentious issue in the Greco-Turkish relations.

### I. Legal Specificity of Western Thrace

The Convention of Constantinople marked the beginning of minority protection regimes in Greece.[13] It provided for the enjoyment of civil and political rights of Muslims as those granted to the rest of Greek citizens by birth, safeguarding the right of

9 *Pallardy et al.* (eds.).
10 *Fortna*, in: Fortna et al. (eds.), pp. 2-4.
11 *Tsitselikis*, JLR 2012, p. 341. According to this system, non-Muslim ethno-religious groups that lived under Ottoman rule enjoyed partial institutional autonomy in matters of personal status.
12 *Tsitselikis,* ILB 2019.
13 Convention of Constantinople between the Kingdom of Greece and the Ottoman Empire, regulating the annexation of Thessalia and Arta provinces by Greece (signed 2 July 1881). For the text in French language preceded by a brief English introduction, see: https://web.archive.org/web/20081120210837/http://www.mfa.gr/NR/rdonlyres/E6B34D2A-C9B3-4530-8691-8DC378A4B832/0/1881_constantinople_convention.doc (23/06/2020).



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ownership acquired via instruments of Ottoman Law.[14] It also provided for the respect for their cultural autonomy by emphasizing the obligation not to allow any obstacle that might hinder the relation between the Muslim communities and their religious leaders including the functioning of Islamic religious courts (Art. 4). This was followed by the establishment of four state appointed positions of Muslim religious leaders, i.e.; *muftīs*, recognized as both religious leaders of their communities as well as Greek government officials swearing an oath of public service.[15] After the Balkan Wars, the Treaty of Athens entailed similar provisions, more pertinently Art. 11, which discussed at length the jurisdiction of the *muftī* on a wide range of family law matters, including issues of inheritance, whereby Muslim parties may upon agreement resort to him as an arbitrator without prejudice to the available means of appeal before state courts unless expressly provided otherwise.[16] By the end of the First World War, Art. 14 of the Treaty Concerning the Protection of Minorities in Greece, which supplemented the abortive Treaty of Sèvres, obligated Greece to take all necessary measures to enable the questions of family law and personal status to be regulated according to "Moslem usage".[17] Under the aegis of the League of Nations, the notion of homogenous nation states was brought to the fore during the arduous deliberations that took place at the Lausanne Peace Conference following the end of the Greco-Turkish war of 1919-1922.[18] The emanating Convention of Lausanne enforced the

14 Ibid. Art. 3. Instruments that conferred titles on the maintenance of mosques, religious charitable endowments and schools.

15 *Iakovidis/McDonough*, OJLR 2019/8, p. 429. Translating from Greek the Legislative Act concerning spiritual leaders of the Muslim communities: Official Gazette of the Kingdom of Greece 59/1-7-1882. From that point in history and until the compulsory exchange (see infra), there had been about fifty *muftī* offices throughout Greece. Today only three *muftīs* remain functioning in the region of Thrace, each heading the respective *muftī* office. For more details on the historical accounts attributed to the receding number and their relevant territorial jurisdictions, see the Appendices in: *Tsitselikis,* Old and New Islam in Greece, pp. 557-577.

16 The Treaty of Peace between the Ottoman Empire and the Kingdom of Greece, Supplement of Official Documents, AJIL 1914, pp. 49-50. Art. 11 also explained the appointing procedure of the chief *muftī* in Greece through a joint process involving the King of Greece and '*Cheikh-ul-Islam*' in Constantinople.

17 Treaty Concerning the Protection of Minorities in Greece (signed on 10 August 1920), LNTS vol. XXVIII 1924 No. 711, p. 243. This was a separate Treaty based on Art. 86 of the unratified Treaty of Sèvres: Treaty of Peace between the Allied Powers and Turkey, signed at Sèvres, August 10, 1920, British Treaty Series No. 11 (1920). The text of the Treaty of Sèvres is printed in Command Paper 964 (LI). Art. 86 stipulated that: "Greece accepts and agrees to embody in a separate Treaty such provisions as may be deemed necessary, particularly as regards Adrianople, to protect the interests of inhabitants of that State who differ from the majority of the population in race, language or religion". For more details see; *Montgomery,* HJ 1972/15(4), pp. 775 ff.

18 *Ladas*, p. 335.



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principle of compulsory exchange of populations,[19] and provided for the first legally imposed large-scale exchange of populations on the basis of religious affiliation,[20] setting an agonizing precedent in international law that was subject to criticism by prominent politicians,[21] who impugned its expedience for catering to State interests over individuals and groups.[22] The exchange involved the resettlement of approximately 1.2 million Greeks from Asia Minor, Eastern Thrace, the Pontic Alps and the Caucasus, and 400,000 Muslims from Greece,[23] most of whom were made refugees and denaturalized from their homelands,[24] rendering the process in toto an act of ethnic cleansing.[25] Notwithstanding the foregoing, two sets of populations were exempted from the compulsory exchange, namely, the Greek inhabitants of Constantinople and the Muslim inhabitants of Western Thrace,[26] which was further cemented by a minority protection scheme as provided for in the Treaty of Lausanne.[27] The relevant Treaty provisions were articulately formulated in a correlative manner, whereby the rights undertaken by Turkey regarding its non-Muslim minorities were to be "similarly conferred" to Greece's Muslim minority.[28] Reading the undertaking from the Greek side, Art. 42 § 1 stipulated: "The [Greek] government undertakes, as regards [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 those minorities." Thus, the Lausanne Treaty had become the most integral legal instrument governing the post war Greco-Turkish relations, and the cornerstone upon which the exempted minorities were granted a tailored mechanism of protection underlying the legal specificity of Western Thrace,[29] which remained in effect, despite the implicit abrogation of the minority protection undertak-

19 Convention Concerning the Exchange of Greek and Turkish Populations and Protocol (signed at Lausanne 30 January 1923) LNTS vol. XXXII 1925, No. 807, p. 76. Art. 1: "As from 1st May 1923, there shall take the compulsory exchange of Turkish Nationals of the Greek Orthodox religion established in Turkish territory, and of Greek nationals of the Moslem religion established in Greek territory". Pursuant to Art. 142 of the Treaty of Lausanne: "The separate Convention concluded on the 30th of January, 1923, between Greece and Turkey, relating to the exchange of the Greek and Turkish populations, will have as between these two High-Contracting Parties the same force and effect as if it formed part of the Present Treaty".

20 *Ladas*, p. 377.

21 *De Zayas*, HILJ 1975/16(2), p. 223. Quoting the British Foreign Minister Lord Curzon 1919-1924 "a thoroughly bad and vicious solution for which the world will pay a heavy penalty for a hundred years to come".

22 *Thornberry*, p.51.

23 *Aarbakke*, The Muslim Minority of Greek Thrace, 2000/1, pp. 52-53.

24 *McGoldrick,* OJLR 2019/8, p. 528.

25 *Ouédraogo*, CYBIL 2016/54, p. 189.

26 The Exchange of Populations Convention, (fn. 19), Art. 2.

27 Treaty of Peace (signed at Lausanne July 24 1923), LNTS, vol. XXVIII 1924, No. 701, p. 11. Minority protection is discussed under Section III of Part I, Arts 37-45.

28 Ibid., Art. 45.

29 *Tsitselikis*, Die Welt des Islams 2004, p. 406.



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ings brought about by the League of Nations.[30] Consequently, the jurisdiction of the *muftī* was weaved into the Greek legal system through several stages of incorporation, shifting the fulcrum of his office from its Ottoman roots to becoming an inherent office of the Greek state vis-à-vis its Muslim minority. Hence, by virtue of Greek Law 2345/1920,[31] *Sharī'a* was established as the substantive law governing issues of marriage, divorce, emancipation of minors as well as Islamic wills and ab intestate succession exclusively in the territory of Western Thrace, as had been regulated in the Treaties of Athens and Sèvres, and reaffirmed by the Treaty of Lausanne.[32] At a later stage, Greek Law 1920/1991 replaced the aforementioned legislation,[33] yet it upheld much of the former's substantial and procedural aspects, thus the *muftī* jurisdiction continues to be legally practiced within the three designated regions of Thrace (Komotini, Xanthi and Didimotiho).[34] The civil courts exercise judicial review over the *muftī*'s decisions, whereby a first instance civil court verifies two points: first, whether the decision is rendered in the designated local jurisdiction and second, whether the substance of the decision is compliant with the Greek constitutional order.[35] The remaining subsection sheds light on the aftermath of establishing the *sui generis* status of the *muftī* and by extension the application of *Sharī'a* in Western Thrace.

## II. The Muftī: Epitome of Greco-Turkish Antipathy

Undoubtedly, Greece provides an interesting example of legal pluralism within the European legal order when considering the survival of certain attributes of the premodern Ottoman *millet* system embedded within its legal rubric alongside modern citizenship.[36] Nevertheless, the *muftī* jurisdiction as practiced in Western Thrace has invoked controversy on more than one front. Politically, the office of the *muftī*, as manifested in his title, utilized language (Turkish) and practiced religion (Islam), taken in conjunction with the aforementioned background, represents a condensed symbol

30 United Nations Economic and Social Council - Commission on Human Rights, *Study of the Legal Validity of the Undertakings Concerning Minorities* of 07/04/1950, UN Doc. E/CN.4/376, p. 56-7. Available at: https://undocs.org/E/CN.4/367 (26/06/2020).

31 *Tsitselikis,* ILB 2019. Translating from Greek: Legislative Act on the Interim Arch-Muftī of the Muslims within the State and on the Administration of the Muslim Communities [E.K.E.D.] 1920, A No. 148.

32 *Katsikas*, in: Fortna et al. (eds.), p. 156-7. Treaty of Sèvres abolished *Sharī'a* judicial powers of the *muftī*, however it was not ratified by the Greek Parliament, then later replaced by Arts. 42 and 45 of the Treaty of Lausanne. The scope is territorially confined to Western Thrace without applying to Muslims living in the other regions of Greece.

33 *Kalampakou*, MDPI 2019/10(4), p. 261. Translating from Greek: Legislative Act, 24 December 1990 "On Muslim Clerics" (A' 182) ratified by the sole Article of Law 1920/1991 Official Gazette of the Hellenic Republic, 1991, Issue A' no 11. Pursuant to Art. 5, he is a Greek civil servant holding the rank of Director-General of Administration who is appointed by presidential decree on a proposal by the Minister of Education and Religious Affairs.

34 *Tsitselikis*, The Legal Status of Islam in Greece, p. 416.

35 *Iakovidis/McDonough*, OJLR 2019/8, p. 431.

36 *Tsitselikis,* Oñati Socio-legal Series 2012, p. 109.



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charged with negative connotations attributed to the historical Ottoman ''Other''.[37] In a way, the contention over the *muftī* mirrored the ebbs and flows of the Greco-Turkish relations. Whereas during the 1930-1950s the secular government ruling the new Turkish republic called for abolishing the *muftī* jurisdiction in Greece, the 1980s witnessed a surge in Turkish interest.[38] Its consulate in Komotini overtly supported independent parliament candidates under the emblem of Turkish ethnic identity, vying for recognizing Thracians as a national ''ethnic minority'' and not just a "religious minority''.[39] This politicization of the minority cause spilt over to the appointment procedure of *muftīs*, who were formerly assigned their positions pursuant to an agreement between the minority's elders and the Greek government.[40] However, after the parliamentary elections of 1985, the Greek authorities were weary of the escalating Turkish encroachments and passed the aforementioned 1920/1991 Act, in a bid to control and supervise the appointment of *muftīs*, which by its turn reignited the political tensions between the two countries.[41] In the same vein, this led to strong confrontations within the minority itself that resulted in a case of parallel *muftīs*, one appointed by the Greek state and another elected informally by the community.[42] President Erdogan's visit to Thrace in 2017 and his comments also weighed in the simmering tensions.[43] Such entangled layers of political dissonance lend themselves to an overwhelming sentiment among Greeks that the distinctiveness of Thrace is perceived as a Trojan horse concealing secessionist claims to the benefit of Greece's nemesis,[44] threatening the unity of both Greek land and identity.[45] On the constitutional level, there are caveats pertaining to the substantive and procedural compatibility of *Sharī'a* with a uniform Greek and European legal order, when applied via the *muftī* jurisdiction. Whereas the *muftī* discharges his legal functions as both a spiritual leader and religious judge, the educational qualifications of the *muftī* and the type of training he receives are not on par with that of a civil judge, notwithstanding his appointment by the government.[46] What is even more perplexing is that there is no clarity

37 *Borou,* JMMA 2009/29(1), p. 18.
38 *Tsitselikis,* Sharī'a in Greece Part 1.
39 *Borou,* JMMA 2009/29(1).
40 *Aarbakke*, The Muslim Minority of Greek Thrace, 2000/1, pp. 326-338.
41 Ibid.
42 *Tsitselikis,* Sharī'a in Greece Part 1. This was followed by a series of applications before the Court, whereby it held Greece in violation of Arts. 6 and 9 of the Convention for interfering with the applicant's rights to be recognized as religious leaders by their own community, which was unnecessary in a democratic society for the protection of public order. ECtHR, Application Nos. 50776/99 and 52912/99, *Agga v. Greece*; ECtHR, Application No. 32186/02, *Agga v, Greece*; ECtHR, Application No. 33331/02, *Agga v. Greece*; and ECtHR, Application No. 38178/97, *Serif v. Greece*.
43 First visit of a Turkish President to Greece for 65 years during which he criticized the appointment of *muftīs* in Western Thrace.available at: https://www.dailysabah.com/politics/2017/12/18/greece-accelerates-efforts-to-resolve-mufti-issue-in-western-thrace-after-erdogans-criticism (27/06/2020).
44 *Katsikas*, EHQ 2012, p. 445.
45 *Borou,* JMMA 2009/29(1), p. 16 (translating from Turkish the pledge of the founder of the Turkish Republic to unite Western Thrace with the Motherland).
46 *Tsitselikis,* Sharī'a in Greece Part 1.



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on whether he is duly trained in Islamic jurisprudence or whether he relies on admissible textual references,[47] for unlike Muslim majority countries, the Greek *muftīs* are neither graduates of state sanctioned Islamic theology schools nor trained in state judicial process. Instead, they seek training in Islamic sciences in other countries, Turkey and Saudi Arabia included,[48] but even when they do, such training would still lack the proper nexus with the Greek domestic law.[49] To that effect, Greek *muftīs* could adjudicate based on a personal vague understanding of the Islamic tradition, usually confined to unwritten inherited Ottoman interpretations of the *Hanafi* School,[50] especially in the absence of any guidance in Greek legislation or courts, or from comparable jurisdictions that apply the same school of Islamic jurisprudence.[51] Further substantive concerns were voiced before the Human Rights Committee[52] as to the extent of the application of *Sharīʿa* to family law. However, the official State response made it clear that the implementation of *Sharīʿa* is valid only to the extent that its rules are not conflicting with the fundamental values of Greek society, as well as Greek legal and constitutional order, thus limiting derogations from civil law.[53] Accordingly, practices such as polygamy, marriage by proxy, marriage under age and unilateral repudiation, are not allowed and are unenforceable.[54] However, it has been submitted that in practice, the sweeping majority of the *muftīs*' decisions are ratified by Greek courts, even when women's and children's rights as laid down in the Greek Constitution or the Convention are transgressed.[55] This inconsistency led some to accuse the Greek government of granting an "ambiguous privilege" to the Muslim minority, despite the functioning of an antiquated system running at odds with Greek's constitutional order besides undermining the protection of human rights, and while assuming its correct application and interpretation at some point, it

47 Ibid.
48 Ibid.
49 A judge in Islamic tradition is called a "*Qāḍī*", as distinguished from the *muftī* (jurisconsult). Whereas the former is strictly a judge, trained in the legal theory of a particular school of jurisprudence, its applications and probably one of its masters, rendering binding judgments enforceable by state apparatus, the latter is a high-ranking scholar, an expounder of the law who issues authoritative yet non-binding opinions (*Fatwa*) to individuals, state authorities as well as judges. After the fall of the Ottoman Empire, this distinction ceased to exist, and in Greece, the functions of the *qāḍī* were subsumed into the *muftī's.* For more on the distinction between the two see; *Hallaq*, pp. 164-182. For a brief overview of the different organs, documentation of legal records, admissibility, as well as the form and content of judicial decisions in the Ottoman legal system see; *Akgündüz*, ILS 2009/16, pp. 202 ff.
50 *Kakoulidou*, p. 10. Available at: https://www.scribd.com/document/118316950/The-application-of-Shari-ah-in-Western-Thrace (27/06/2020). The *Hanafi* School was the official school of jurisprudence adopted in Ottoman Empire, comprising one of the major schools of *Sunni* Islam.
51 *Tsitselikis,* Sharīʿa in Greece Part 1.
52 The treaty body established under Art. 28 ff. ICCPR.
53 Human Rights Committee, *Second Periodic Reports of States Parties Due in 2009 – Greece*, of 21/01/2014, UN Doc. CCPR/C?CRG/2, paras. 59-61.
54 Ibid.
55 *Hunault*, p. 13.



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remains nonetheless problematic.[56] In the following sections, the veracity of this ambiguous privilege will be further scrutinized in light of the *Molla Sali* case.

## C. Bringing the Case to Strasbourg

Against the foregoing legal background, the next subsections summarize the facts of the *Molla Sali* case, highlight the central issues raised in the merits phase, and elaborate on the jurisprudence underlying the Court's reasoning in arriving at its conclusions in both the merits as well as the just satisfaction decisions respectively.

### I. Legal Proceedings

The applicant's deceased husband, a member of the Muslim community in Western Thrace, had drawn up a notarized public will in accordance with the relevant provisions of the Greek Civil Code, bequeathing his entire estate, comprising properties in Komotini and Istanbul, to his wife.[57] This was followed by a transfer of property to the applicant after having the will had been approved by the Komotini Court of First Instance.[58] Meanwhile, the deceased's two sisters had challenged the validity of the will, claiming a three-quarters share of the bequeathed property, arguing that any questions relating to his estate were subject to *Sharī'a* rules of succession and the jurisdiction of the *muftī*, pursuant to Art. 14 § 1 of the 1920 Treaty of Sèvres, and Arts. 42 and 45 of the 1923 Treaty of Lausanne, which set the framework of applying Muslim customs and *Sharī'a* law to Muslim Greeks.[59] Upon rejection of their challenge, the Thrace Court of Appeal followed suit in asserting that the *muftī* jurisdiction did not apply to public wills regardless of the religion of the testator and that it cannot be exercised contrary to his wishes, otherwise it would amount to discrimination on grounds of religion.[60] However, the Court of Cassation reversed the lower courts' decisions, based on Section 10 of Law no. 2345/1920, which had incorporated Art. 11 of the 1913 Treaty of Athens, and Section 5 (2) of Law no. 1920/1991, emphasizing that governing the interpersonal relations among Greek nationals of Muslim faith by the *muftī* jurisdiction is in consonance with Art. 28 § 1 of the Greek Constitution, forming an integral part of Greek domestic law and prevailing over any other legal provision to the contrary.[61] It noted further that the estate in question which had been historically governed by *Sharī'a* law (classified under the *mulkia* category of public land during the Ottoman era) even after the transfer of ownership to private individuals, rendering the impugned public will invalid and devoid of legal effect on the grounds that *Sharī'a* law recognized no such institution.[62] The decision was followed

56 *Borou,* JMMA 2009/29(1), p. 19.
57 *Molla Sali*, merits, (fn. 2), para. 9.
58 Ibid., para. 10.
59 Ibid., para. 11.
60 Ibid., paras. 15-16.
61 Ibid., para.18.
62 Ibid.



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by a remand to the Thrace Court of Appeal, which deferred to the Cassation ruling, while stressing that the protection of Greek nationals of Muslim faith pursuant to the relevant provisions breached neither the principle of equality (Art. 4 Greek Constitution) nor the right to fair trial (Art. 6 Convention). A second appeal to the Court of Cassation on points of law was dismissed without any reference to the Convention, bringing the proceedings regarding the property located in Greece to an end.[63]

In a bid to secure their interests with respect to the estate in Turkey, the testator's sisters applied to the Istanbul Civil Court of First Instance for the annulment of the will, pursuant to the principles of private international law enshrined in the Turkish Civil Code, arguing that said will is contrary to Turkish public order.[64] Meanwhile, the applicant's attempt to enforce the will before Turkish courts was adjourned, pending a fresh appeal to be lodged before the Greek Court of Cassation on points of law, on the account of the irrevocability of the decision of the former Thrace Court of Appeal rendered after remand.[65]

Consequently, the applicant lodged an application to the European Court of Human Rights against Greece, claiming a violation of Art. 6 § 1 of the Convention taken alone, and in conjunction with Art. 14 and Art. 1 of Protocol No. 1, submitting that by applying *Sharī'a* law to her husband's will instead of Greek Civil law, the Court of Cassation had deprived her of three-quarters of her inheritance.[66] On the merits, the Court held unanimously that there had been a violation of Art. 14 of the Convention in conjunction with Art. 1 of Protocol No. 1.[67] Whereas the decision on just satisfaction pursuant to Art. 41 of the Convention was postponed to a later stage, the Court's ruling on just satisfaction only involved the deceased's property located in Greece without extending its effects to the remaining property in Turkey.[68] It reaffirmed the merits decision, unanimously entitling the applicant to pecuniary damage plus any chargeable tax, due within one year in case of failure on Greece's side to enable the applicant to restore and retain ownership of the property located in Greece, which had been bequeathed to her by the testator.[69] It also awarded non-pecuniary damage as well as a sum for incurred costs and expenses plus chargeable taxes due within three months.[70]

## II. Analysis – General Principles

It can be discerned that two simultaneous strands were underlying the Court's approach in resolving the *Molla Sali* case. While the Court was addressing the precise issue of discrimination stifling access to the right to property, it also approached the

63 Ibid., paras. 21-30.
64 Ibid., para. 31.
65 Ibid., paras. 87-88.
66 Ibid., para. 84.
67 Ibid., para. 162.
68 *Molla Sali v. Greece*, just satisfaction, (fn. 1), paras. 47-53.
69 Ibid., pronouncement of the decision, p. 14.
70 Ibid., p. 15.



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broader question of the compatibility of religious adjudication under the penumbra of religious minority rights. In so doing, first, it examined the question of whether the applicant was subjected to a difference in treatment amounting to a violation of Art. 14 on grounds of association to her deceased husband's religion, and if such difference in treatment were to be established, would it survive the Court's scrutiny as to its legitimacy, justifiability and the proportionality of adopted means. In the same vein, the Court examined the applicant's entitlement to her property rights in light of the decision of the Greek Court of Cassation, which rendered the application of *Sharī'a* law mandatory to members of the Western Thrace minority, and whether such application violated the equality principle as perceived by the Convention. Second, the Court demarcated the scope of religious minority rights within the bounds of the right to free self-identification, whereby individuals belonging to religious minorities must fully enjoy its positive dimension (to voluntarily opt for and benefit from ordinary law) as well as its negative dimension (the right to choose not to be treated as a member of a minority), otherwise denying such right amounts to a breach of a right of cardinal importance in the field of protection of minorities, let alone discriminatory treatment.[71] The application of the following general principles encapsulated the Court's approach.

### 1. Admissibility

The Court exercised its prerogative as the master of the characterization to be given in law to the facts of the case unhampered by the characterizations of the applicant or the respondent government. Thus by virtue of the *jura novit curia* principle, it considered the case solely under Art. 14 read in conjunction with Art. 1 of Protocol No. 1, while excluding the application pursuant to Art. 6 § 1.[72] This formulation was attributed to the focus on the Greek Court of Cassation's refusal to apply the law of succession as laid down in Greek Civil code for reasons linked to the testator's Muslim faith. Accordingly, the primary issue became whether there was a difference in treatment potentially amounting to discrimination of the applicant in applying the law of succession, as laid down in the Civil Code, compared to those seeking to benefit from a will as drawn up by a testator who was not of Muslim faith.[73]

### 2. Establishing Discrimination

It is submitted that not every difference in treatment amounts to discrimination, for the Court had stated that discrimination stands for "treating differently, without an objective and reasonable justification, persons in relatively similar situations".[74] The Court has generally approached the interpretation of Art. 14 by applying the "ambit

71 *Molla Sali*, merits, (fn. 2), para. 157.
72 Ibid., para. 85.
73 Ibid., para. 86.
74 *Harris et al.*, p. 786.



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test", whereby the applicant may establish a violation of Art. 14 even if she cannot show or does not claim the violation of another right, provided that her claim falls within the ambit of another Convention right.[75] More pertinently, in cases concerning property rights, the test becomes whether, but for the discriminatory ground about which the applicant complains, she would have had an enforceable right under domestic law in respect of the asset or the benefit in question.[76] In the same vein, even if the domestic laws of a State do not recognize a particular interest as a "right", it does not necessarily prevent the interest in question from being regarded as "possession" within the meaning of Art. 1 of Protocol No. 1.[77] Thus, the Court may recognize in certain circumstances a proprietary interest under a contract having no legal effect pursuant to national law.[78] By applying this formula to the case, the Court accepted that the applicant's standing as to her claim to proprietary interest in inheriting from her husband was of sufficient nature and duly recognized to constitute a "possession" within the meaning of Art. 1 of Protocol No. 1,[79] despite the invalidation of the will by the Court of Cassation on grounds of *Sharī'a* rules of succession being the applicable law to the will. This finding was sufficient to trigger the application of Art. 14, taken in conjunction with the fact that if it were not for this court decision annulling the will, the applicant would have fully enjoyed the rights bequeathed to her, therefore satisfying the element of deprivation of her proprietary possession.

In setting the comparator element, the Court established that the applicant was in an analogous or relevantly similar situation to that of a beneficiary of a will made in accordance with the Civil Code by a non-Muslim testator, and that she had been treated differently on the basis of "other status", namely the testator's religion, thus establishing the differential treatment.[80] In evaluating the differential treatment, the Court applied a test comprised of two prongs:[81] First, an assessment whether there was a legitimate aim for the difference in treatment, which is the obligation of the state to establish; and second, an assessment of whether there is a "reasonable relationship of proportionality" between the difference in treatment and the legitimate aim pursued, with the burden of proof shifting to the applicant to establish deficient proportionality.[82] The Greek government justified the Court of Cassation's decision on the basis of Greece's duty to honor its international obligations regarding the preservation

75 Ibid., p. 787.
76 Ibid., citing ECtHR, Application No. 16574/08, *Fabris v. France [GC]*, para. 52; ECtHR, Application No. 55707/00, *Andrejeva v. Latvia [GC]*, paras. 76-9; and ECtHR, Application Nos. 65731/01 and 65900/01, *Stec and Others v. the United Kingdom [GC]*, paras. 54-5.
77 *Molla Sali*, merits, (fn. 2), para. 126.
78 *Harris et al*., p. 865. Citing ECtHR, Application No. 33202/96, *Beyeler v. Italy [GC]*, para. 105.
79 *Molla Sali*, merits, (fn. 2), para. 131. Citing *Fabris v. France* (supra fn. 76).
80 Ibid., paras. 122 and 141.
81 *Harris et al*., p. 792. Citing ECtHR, Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in BELGIUM" v. BELGIUM*.
82 Ibid.



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of the status of the Thrace Muslim minority.[83] The Court observed, however, that the divergence in the Greek case-law across the different judicial branches regarding the compatibility of *Sharī'a* law with the principle of equal treatment and with international human rights standards was pervasive in a manner that created legal uncertainty, rendering it incompatible with the requirements of the rule of law.[84] Accordingly, the proportionality between the impugned measure and the aim pursued as put forth by the Government was undermined.[85] Consequently, the Court concluded that the difference in treatment suffered by the applicant had no objective and reasonable justification.[86]

### 3. Religious Autonomy and Minority Rights

It is submitted that the Convention does not contain a dedicated provision for addressing minority rights in general terms resembling Art. 27 of the International Covenant on Civil and Political Rights.[87] Moreover, while Convention Art. 14 (also Art. 1 of Protocol No. 12) entails "association with a national minority" as one of the forbidden brands of discrimination, "minority" has, however, remained an undefined concept, as is the case with other international instruments dealing with minority rights,[88] including the Framework Convention for the Protection of National Minorities (Framework Convention) adopted by the Council of Europe.[89] This does not necessarily mean that minorities cannot benefit from the protection of the Convention, albeit in an indirect manner,[90] because Member States are obliged to "uphold international standards in the field of human and minority rights".[91] Whereas States

83 Ibid., para.146. Whether honoring the relevant international obligations was considered a legitimate aim, the Court expressed a scant understanding that Greece was in fact bound by its international obligations notwithstanding the evasive language, before shifting the focus on the proportionality between the impugned measure and the aim pursued. Para. 143: "Be it as it may, it is not necessary for the Court to adopt a firm view on this issue because in any event the impugned measure was in any event not proportionate to the aim pursued". The Court then engaged in interpreting Greece's international obligations. This point will be further discussed under Section D (III).

84 *Molla Sali*, merits, (fn. 2), para. 153.

85 Ibid.

86 *Molla Sali*, merits, (fn. 2), para. 161.

87 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 (ICCPR). Art. 27 states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". For comparing the protection of minority rights in both systems see: *Pentassuglia*, BYIL 2006/6.

88 *Gilbert*, HRQ 1996/18(1), p. 736.

89 Framework Convention for the Protection of National Minorities, opened for signature 1 February 1995, entered into force 1 February 1998, CETS No.157. It does not include a complaint mechanism for individuals or groups.

90 *Gilbert*, HRQ 1996/18(1), p. 737.

91 ECtHR, Application Nos. 25316-25321/94 and 27207/95, *Denizci and Others v. CYPRUS,* para. 410.



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may insist that minorities are obliged to respect the enshrined Convention rights of others,[92] the main thrust of the Convention aims at securing individual rather than establishing collective group rights.[93] In other words, as a general standard, for minority groups to assert rights of their own these must correspond to a Convention individual right,[94] without prejudice to the right of individuals to identify themselves as members of that minority.[95]

There is also guidance in the Court's jurisprudence as to the principles governing the scope of autonomy of religious communities, in as much as it provides for a framework addressing human rights claims of minorities. In the liberal democratic model, religious communities may enjoy institutional autonomy, which emanates from State neutrality towards different religious groups,[96] whereby the State exercises its (negative) obligation as the unbiased guarantor of the right to freedom of religion pursuant to Art. 9 ECHR.[97] Accordingly, ecclesiastical and religious bodies are entitled to acquire legal personality,[98] since the "collective dimension" is the key element,[99] and that the autonomous existence of religious communities is indispensable for pluralism in a democratic society, thus rendering it an issue at the very heart of the protection Art. 9 affords.[100] By the same token, and while assuming the element of voluntariness of membership, they can exercise on behalf of their adherents the rights guaranteed by Art. 9 interpreted in the light of Art. 11,[101] which protects the associative aspect of practicing the forum externum of freedom of religion against unjust interference from the state.[102] Religious institutions are thus entitled to manage their internal organization without state interference, which includes, inter alia, the choice of religious leaders and appointment of ministers,[103] and more pertinently, the oper-

92 *Poulter*, ICLQ 1987 /36(3), p. 614.
93 *Harris et al*., p. 810
94 Ibid., p. 811.
95 *Koumoutzis/Papastylianos*, MDPI 2019/10(5), p. 302.
96 *Ahdar and Leigh*, pp. 54-61.
97 *Directorate of the Jurisconsult - Council of Europe*, Guide on Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion, 2020, pp. 52-69. Available at: https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf (29/06/2020).
98 ECtHR, Application No. 30985/96, *Hassan and Chaush v. Bulgaria [GC]*, para. 62: "… religious communities have traditionally and universally existed in the form of organized structures"; and ECtHR, Application No. 5528/94, *Canea Catholic Church v. Greece,* paras. 40-2.
99 ECtHR, Application No. 45701/99, *Metropolitan Church of Bessarabia and Others v. Moldova*, para. 118.
100 Ibid.
101 *Harris et al*., p. 597. Citing ECtHR, Application No. 27417/95, *Cha'are Shalom Ve Tsedek v. France [GC]*, para. 72; and European Commission of Human Rights, Application No. 12587/86, *Chappell v. UK*.
102 *Hassan and Chaush v. Bulgaria,* (fn. 98).
103 ECtHR, Application No. 38178/97, *Serif v. Greece*, para. 52; ECtHR, Application Nos. 50776/99 and 52912/99, *Agga v. Greece*; ECtHR, Application No. 32186/02, *Agga v, Greece*; ECtHR, Application No. 33331/02, *Agga v. Greece*. (Despite referencing these cases supra at fn. 42, they were restated here to facilitate the flow for the reader).



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ation of the minority legal order that encompasses religious adjudication.[104] In practice, the religious autonomy could exceptionally justify divergences from general State laws that may arise from the functioning of its internal adjudication apparatus, provided that two major elements are satisfied. First, voluntariness to freely join and exit the religious community.[105] Second, that the religious community is legally recognized as such, practicing a belief that has attained "a certain level of cogency, seriousness, cohesion and importance".[106] Accordingly, State authorities, for example, are not competent to assess the legitimacy of religious beliefs or rule on theological and doctrinal issues even if addressing such issues is necessary to resolve a dispute.[107]

Notwithstanding the foregoing, the Court's jurisprudence indicates that religious autonomy is not unconditional, the determinations of religious adjudicatory organs are not immune from the State's judicial oversight given the State's margin of appreciation,[108] and, more importantly, they are subject to the standards of procedural and substantive scrutiny prescribed by Art 6. of the Convention.[109] This was clearly reflected in the *Molla Sali* case, which neither raised a theological question nor involved the arbitrary dismissal of a religious minister.[110] The Grand Chamber found that the right of the applicant to choose not to be treated as a member of a minority was critical to establish the discriminatory treatment and breach of the right to self-identification.[111] Despite being a recognized religious minority in Greece, the compulsory imposition of the *mufti*-jurisdiction on the personal relations of the Muslim minority in Western Thrace without giving leeway for those members opting to benefit from the general laws applicable to all Greek citizens violated the principle of voluntariness.[112] Where the voluntariness element is eliminated, the principle of religious autonomy can no longer be invoked to govern the relationship between the individual and her religious community vis-à-vis the constitutional rights guaranteed by the State,[113] and more significantly, it will not suffice to justify derogations from those rights arising from the application of the minority legal order.

104 *Leigh,* OJLR 2019/8, p. 2. The notion of the minority legal order will be discussed with some detail in the following section.
105 *Leigh*, OJLR 2012/1(1), p. 116.
106 *Laborde*, p. 181. ECtHR, Application Nos. 7511/76, 7743/76, *Campbell and Cosans v. UK*, para. 36.
107 *Koumoutzis/Papastylianos*, MDPI 2019/10(5). ECtHR, Application Nos. 76836/01 and 32782/03, *Kimlya and Others vs. Russia*, para. 79; ECtHR, Application No. 18748/91, *Manoussakis v. Greece*, para. 47; and *Hassan and Chaush v. Bulgaria,* (fn. 98), para. 78.
108 *Laborde*, p. 194.
109 *Leigh*, OJLR 2012/1(1), p. 117. Further discussion on Art. 6 follows below.
110 *Koumoutzis/Papastylianos*, MDPI 2019/10(5).
111 *Molla Sali*, merits, (fn. 2), paras. 157-8
112 Ibid.
113 Framework Convention for the Protection of National Minorities, (fn. 8), Art. 3 § 1: "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." It is worth noting the Greece has signed but not ratified this convention. *Molla Sali*, merits, (fn. 2), para. 67.



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## 4. Just Satisfaction

Turning to the Court's decision on just satisfaction claims, the Court had duly considered in the merits stage that addressing the question of the application of Art. 41 ECHR was to be reserved in whole, given the pending proceedings in Turkey as well as those ongoing in Greece at the time, and also to enable a period of three months following the merits decision for the applicant and the respondent State to reach an agreement.[114] However, the applicant sought just satisfaction under Art. 41 of the Convention in respect of the pecuniary and non-pecuniary damage she had incurred based on the violations established in the merits decision, as well as claiming the reimbursement of costs and expenses, in light of two main reasons.[115] First, the Greek Code of Civil Procedure does not allow for the reopening of proceedings in the domestic courts despite a finding by the Court of a violation of the Convention in a contentious case, and second, that the parties had failed to reach an agreement.[116]

In assessing the applicant's claims, the Court distinguished between the bequeathed properties located in Greece and those in Turkey. Regarding the property located in Greece, the Court first examined whether the nature of the breach allowed *restitutio in integrum* to be ordered, and while reserving the freedom to choose the means, it becomes the obligation of the respondent State then to effect it, because the Court neither have the power nor the practical possibility to enforce it.[117] Nevertheless, rectifying the ownership of the bequeathed property in the Land Registry to the sole benefit of the applicant was not possible. This was attributed to the judgment of the Thrace Court of Appeal (October 2019) upholding the co-ownership of the testator's sisters, which was bound by its former final judgment that had acquired the force of *res judicata* (post-remand from the Court of Cassation rendering *Sharī'a* the applicable law).[118] It follows that if the domestic law only allows for partial reparation, Art. 41 empowers the Court to afford the applicant such satisfaction, as appears to be appropriate,[119] whereby the Court enjoys a certain discretion,[120] and may have recourse to equitable considerations.[121] Consequently, the Court awarded the applicant compen-

114 *Molla Sali*, merits, (fn. 2), para. 166. Art. 41: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

115 *Molla Sali v. Greece*, just satisfaction, (fn. 1), para. 5. The applicant claimed 967,686.75 euros in respect of pecuniary damage resulting from the violation of her Convention right as per Art. 1 of Protocol No. 1, in addition to 30,000 euros in non-pecuniary damage for the violation of Arts. 6 and 14 of the Convention, as well as 8,500 euros in respect of costs and expenses.

116 *Molla Sali v. Greece*, just satisfaction, (fn. 1), paras. 6-7.

117 Ibid., para. 32.

118 Ibid., para. 37.

119 ECtHR, Application No. 28342/95, *Brumărescu v. Romania (just satisfaction) [GC],* para. 20; ECtHR, Application No. 58858/00, *Guiso-Gallisay v. Italy [GC]*, para. 90.

120 ECtHR, Application No. 35382/97, *Comingersoll S.A. v. Portugal [GC]*, para. 29.

121 ECtHR, Application No. 25701/94, *Former King of Greece and Others v. Greece [GC]* (just satisfaction), para. 79.



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sation corresponding to three-quarters of the value of the property located in Greece, from which she had been deprived as a result of the Court of Cassation's ruling.[122]

Conversely, several considerations underlay the Court's rationale in not taking a substantive position regarding the applicant's claims to the property located in Turkey. First, whereas there is nothing to hinder the Turkish courts from taking the merits decision of the ECtHR into account, the initial application giving rise to it was brought solely against Greece, thus rendering the Court's cautious decision to only award just satisfaction to the property located in Greece, with the exclusion to those in Turkey, consistent with Convention Art. 46, whereby the Court's judgment is binding only on the State(s) that are parties to the proceedings, which was not the case for Turkey.[123] Second, while anticipating the pending decision of the Istanbul Court of Appeal, the Court could not envisage in the meantime a scenario by which Greece could exercise its jurisdiction in Turkey.[124] What seemed legally feasible to the Court though is that the applicant could still bring an application against Turkey pursuant to Arts. 34 and 35 ECHR following the final decision to be delivered by Turkish courts on the effects of the testator's will regarding the property located in Turkey.[125] Third, the testator's will was drawn in general terms without specific distinction between the properties located in both countries, and more pertinently, the applicant's notarized deed accepting the will referred to and described the testator's property in Greece alone, and she had only registered the property transferred to her with the Komotini Land Registry.[126] Therefore, the combined effect of the foregoing considerations led the majority view in the Court to agree on lacking the jurisdiction to rule on the applicant's claims as to the testator's bequeathed property in Turkey.[127]

### D. Commentary

In this section, the attention shifts to entertaining some of the critical points that were voiced against the Court's approach in arriving at its conclusions in both stages. It builds on the analysis set forth in the General Principles subsection by engaging with each of the foregoing points (1-4) respectively and contrasts the Court's formulations with its former jurisprudence. It also addresses the plausible repercussions of the Court's decisions on the minority in Western Thrace, in light of the application of the recent Greek legislation amending the *mufti*-jurisdiction. The section concludes with an assessment of the main features of the joint partly dissenting opinion rendered with respect to the just satisfaction decision.

122 *Molla Sali v. Greece*, just satisfaction, (fn. 1), para. 45.
123 Ibid., paras. 47 and 51.
124 Ibid., para. 48.
125 Ibid., para. 52.
126 Ibid., paras. 49-50.
127 Ibid., para. 53.



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## I. Admissibility

While ceding to the sound arguments advanced in the Court's decision to reformulate the applicant's primary issue, i.e., a claim under Convention Art. 6§ 1, and instead examined the case solely through the prism of a discrimination claim as per Art. 1 of Protocol No. 1 in conjunction with Art. 14 ECHR, the undertaken approach however was less than orthodox to the extent that some observers perceived it as striking.[128] Such an impression was based on the Court's former jurisprudence, which reflected a general tendency to examine complaints under a Convention substantive right even where discrimination is central to the case,[129] rather than under the "parasitic" Art. 14 which has a narrower scope of application invoked only to complement other substantive provisions.[130] Interestingly though, despite the Court's view that *Sharī'a* law is discriminatory and does not level up to the Convention and international human rights standards,[131] sidestepping the applicant's primary claim under Art. 6 steered the Court's analysis away from precisely engaging its oversight with the procedural implications of the *muftī* jurisdiction, as practiced under the special status of Western Thrace. In other words, the Court avoided a priori any direct assessment of the potential procedural issues arising from the *modus operandi* of the *muftī* courts, such as the equality of arms, guarantees of fair trial and access to court,[132] despite the revealing nexus to the applicant's initial claim under Art. 6, due to the misapplication of *Sharī'a* rules by remitting the case to the *muftī* jurisdiction instead of applying the Greek Civil Code.[133] Thus, against the backdrop of the normalized deference of Greek courts to the decisions of this mode of religious adjudication,[134] the applicant was deprived of her right to a regular court determination.[135]

It remains worth contemplating however, had the Court examined the application under Art. 6 ECHR, whether an analogy could be drawn between the *Molla Sali* case and the Court's jurisprudence regarding the effectiveness of domestic judicial scrutiny to ecclesiastical decisions.[136] In *Pellegrini*[137] the Court found a violation of Art. 6§ 1 when Italian civil courts, acting under the terms of the Concordat with the Holy See, declared enforceable a decree of nullity obtained by the applicant's husband from a Vatican ecclesiastical court (Roman Rota). The equality of arms principle had been

128 *McGoldrick*, OJLR 2019/8, p. 543.
129 *O'Connell*, LS 2009, p. 212.
130 *Harris et al.*, p. 784.
131 *Molla Sali*, merits, (fn. 2), para.154.
132 *McGoldrick,* OJLR 2019/8, p. 543.
133 *Leigh,* OJLR 2019/8, p. 19.
134 *Molla Sali*, merits, (fn. 2), para. 48, citing *Georgia Sakaloglou*, Competence of the *mufti* in family, personal and inheritance cases among Greek Muslims in the area of Jurisdiction of the Thrace Court of Appeal, Nomiko Vima 63/2015, p. 1366; *Tsavousoglou*, OLR 2015/3, pp. 259-60; *Dayioğlu*, An Ongoing Debate in the Turkish-Greek Relations: Election of the Muftis in Greece, JBRI 2019, p.53; and *Hunault*.
135 *Leigh,* OJLR 2019/8, p. 19.
136 *Doe*, pp. 223-26 and 132-134, discussing the recognition of judicial and quasi-judicial autonomy of religious organizations.
137 ECtHR, Application No. 30882/96, *Pellegrini v. Italy*, paras. 26, 29 and 31.



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breached in this case, because the applicant had not been informed in detail that her ex-husband had instituted annulment proceedings until she was summoned to appear before the ecclesiastical court, without legal representation or access to the case file, and without being informed that the nullity would imperil her entitlement to maintenance.[138] To that effect, the Court emphasized that its role was not reviewing compliance of the proceedings before the ecclesiastical courts with Convention Art. 6, but rather whether Italian courts had duly satisfied themselves that the relevant proceedings complied with the guarantees of Art. 6 before authorizing the enforcement of the marriage annulment decision.[139] The Court stressed that a scrutinized review was all the more relevant in light of an enforcement decision emanating from the courts of a foreign country, the Vatican, which is non-signatory to the Convention, as well as the capital importance it held for the parties.[140]

*Pellegrini* is thus arguably analogous to *Molla Sali*. One observes a framework of religious adjudication governing family law matters based on an international agreement (Lausanne – Concordat), scope of religious autonomy limiting state courts' judicial review, and invoking just about the same Convention compliance concerns as those emerging in the vicinity of the *mufti* jurisdiction. More significantly, if the Court took such a scrutinizing position towards the religious judgment of a non-state party to the Convention, it would not be inordinate to expect the same Court to hold Greece, a Convention Member State, to the same, if not even a higher, level of responsibility regarding compliance with Art. 6 ECHR.[141]

By the same token, in *Lombardi Vallauri*[142] the Court found a breach of Art. 6 ECHR in light of the applicable doctrine rendering the issue of appointing teachers by a Catholic university, pending the approval of the Holy See, non-justiciable before Italian courts.[143] The Court highlighted that the applicant's right to effective access to court was impaired by failure of the administrative courts to scrutinize the contested decision, which emanated from a non-state party to the Convention.[144] The judicial review of the administrative courts was inadequate, because they refused to examine the lack of justification on the university board's side that impeded the applicant from grasping the precise reasons for the rejection of his re-employment, which hindered the principle of adversarial debate, and therefore violated the applicant's right to effective access to court as per Art. 6 § 1 ECHR.[145] The gist of the matter was that while religious autonomy could justify the university's decision not to re-employ whoever is not in conformity with its religious ethos, religious institutions nonetheless may have a responsibility to justify their decisions, and more importantly, that state au-

138 *Leigh,* OJLR 2019/8, p. 14. Citing *Pellegrini v. Italy,* (fn. 136), paras. 42-47.
139 *Pellegrini v. Italy,* (fn. 137) , para. 40.
140 Ibid., paras. 42-47.
141 *McGoldrick*, OJLR 2019/8, p. 561.
142 ECtHR, Application No. 39128/05, *Lombardi Vallauri v. Italy*.
143 Ibid., para. 18. The *Consiglio di Stato*: "no authority in the Republic may rule on the findings of the ecclesiastical authority".
144 Ibid., paras. 67-69.
145 Ibid., para. 71. Also, *Leigh*, OJLR 2012/1(1), p. 120.



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thorities should not accept their determinations without scrutiny.[146] This is comparable to the case of endorsing the unjustified determinations of the *muftī* courts by the Greek civil courts in a formalistic manner without applying the necessary scrutiny in compliance with the Convention and Greek legal order, rendering the examination of the *Molla Sali* case under Art. 6 ECHR more relevant. Another aspect that could have brought the case under Art. 6 ECHR, is that a right to property has a pecuniary dimension and would constitute a civil right for the purposes of Art. 6 ECHR, provided that this right had a basis in domestic law.[147] Further analysis on assessing claims to the right to property under Art. 6 ECHR follows in the next subsection.

## II. Discrimination

Following the same critical line of thoughts, in assessing the issue of discrimination one finds two points deserving contemplation, given the Court's reticence in their regard, namely satisfying the element of possession as basis to the applicant's claim under Art. 1 of Protocol No. 1 and establishing discrimination by association. With respect to the first point, notwithstanding the foregoing discussion on admitting the applicant's claim under Art. 6 ECHR, the Court favored to examine the case solely under Art. 14 read in conjunction with Art. 1 of Protocol No. 1,[148] whereby the applicant had claimed the ownership of the remaining three-quarters of the estate that had been acquired by her sisters in law after the invalidation of the testator's will by the Court of Cassation and imposing the *Sharī'a* rules of inheritance instead. In order for such a claim to fall within the ambit of Art. 1 of Protocol No. 1, the applicant had to first establish *prima facie* evidence of the existence and validity of her claim to the possession in dispute.[149] The Court's jurisprudence indicates that for the purposes of Art. 1 of Protocol No. 1 "possession" can either be "existing possessions" or assets including claims, in respect of which an applicant can argue that he/she has at least a

146 *Leigh,* OJLR 2019/8, p. 20.

147 *McGoldrick,* OJLR 2019/8, p. 558. Comparing *Molla Sali* with ECtHR, Application No. 56665/09, *Károly Nagy v. Hungary [GC]*. The Grand Chamber ruled, by a majority of 10:7, that there had been no violation of Art. 6, when the applicant had failed to bring his claim for unpaid allowances during his suspension before the state courts, on the account that his employment was governed by ecclesiastical and not civil law. The Grand Chamber stated: "Given the overall legal and jurisprudential framework existing in Hungary at the material time when the applicant lodged his civil claim, the domestic courts' conclusion that the applicant's pastoral service had been governed by ecclesiastical law and their decision to discontinue the proceedings cannot be deemed arbitrary or manifestly unreasonable.", para. 76.

148 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 preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

149 *Van Drooghenbroeck*, ELF 2000, p. 439.



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"legitimate expectation" that will be realized.[150] In other words, the ambit of Art. 1 of Protocol No. 1[151] primarily applies to the effective enjoyment of a person's existing possessions that have been acquired beforehand,[152] and does not include a guarantee of a right to acquire possessions.[153] Accordingly, in reviewing the applicant's position, there is some force in the argument that she was unable to materialize the element of possession in the first place, because the three-quarters of the estate were never really transferred to her and instead were seized by her sisters in law. The government argued before the Court that the applicant had never presented any deed forming the basis of the claim to ownership besides the testator's will, as approved by the court of first instance,[154] therefore an assertion of possession in the form of an existing right for the purposes of Art. 1 of Protocol No. 1 was not resting on firm grounds.[155]

Turning to the remaining possibility, to establish possession via a legitimate expectation, the Court had formerly set its test in *Kopecký*,[156] whereby if a proprietary interest takes the form of a claim, it may be regarded as an asset only where such claim has sufficient basis in national law including settled case-law of domestic courts confirming it.[157] Hence, it was not intelligible to suggest that the applicant could not foresee that her sisters in law would not contest her sole ownership of the estate. Whereas she had asserted her legitimate expectation pursuant to the decisions rendered from the courts of first instance and appeal respectively,[158] they were subsequently quashed by a higher court without acquiring the necessary legal force to invest the applicant with an enforceable right or generate a proprietary interest amounting to an asset.[159] Moreover, the established case law of the civil bench of the Greek Court of Cassation has had a steady stream of decisions since 1960 upholding the application of *Sharī'a* to Greek Muslims in the sphere of intestate succession.[160] Therefore, it was unforeseeable to anticipate that the Court of Cassation would suddenly reverse its settled approach to this category of inheritance cases.[161] Yet, the Court refrained from delving into this point, in spite of its assertion that the circumstances of the case were to be "considered as a whole" in order to verify the element of possession for the

150 ECtHR, Application No. 39794/98, *Gratzinger and Gratzinger v. Czech Republic [GC]*, para. 69.
151 *Harris et al.*, p. 862. The Article was a result of arduous negotiations among the Member States. The United Kingdom and Sweden in particular had a staunch position not to allow any substantial constraints on the power of the State to implement any nationalization programs, thus the provision did not guarantee any express right to compensation in case of State interference, save the applicable general principles of international law in this regard.
152 *Sermet*, HRF 1998, p. 11.
153 *Fabris v. France,* (fn. 76), para. 50.
154 *Molla Sali*, merits, (fn. 2), para. 106.
155 *Koumoutzis/Papastylianos*, MDPI 2019/10(5), p. 307.
156 ECtHR, Application No. 44912/98, *Kopecký v. Slovakia [GC]*.
157 Ibid., para. 52.
158 *Molla Sali*, merits, (fn. 2), para. 97.
159 *Kopecký v. Slovakia,* (fn. 156), para. 59.
160 *Molla Sali*, merits, (fn. 2), para. 55.
161 Ibid., paras. 107-8.



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purpose of Art. 1 of Protocol No. 1.[162] Therefore, and while taking into account the earlier discussion on the *sui generis* status of Western Thrace and jurisprudential framework in Greece, the applicant's legitimate expectation to be the sole heir was, at least arguably, unfounded.

Turning to the second point of review, it is first important to highlight the significance of the Court's decision from an international human rights law perspective for bringing the notion of discrimination by association to the fore.[163] The Court drew on the decisions of other international adjudicatory bodies,[164] interpreting the notion of discrimination as encompassing other forms, to include discrimination against those individuals who are associated with a person with a disability.[165] The Court of Justice of the European Union had as well weighed in on the matter: Despite avoiding the exact term "discrimination by association", it nevertheless recognized the effective implementation of the notion[166] on grounds of disability[167] and ethnic or racial affiliation.[168]

Although this was the first time in which the Grand Chamber examined and found discrimination by association,[169] the concept had been formerly established in a number of Chamber decisions addressing discrimination by association on grounds of disability,[170] race[171] and nationality[172] but not religion.[173] As has been previously discussed, the Court reformulated the issue, whereby the applicant had been discriminated against on the basis of the "other status", namely the religion of her husband, when compared to a beneficiary of a will made in accordance with the Civil Code by a non-Muslim testator.[174] It is interesting to note that whereas in the other cases of discrimination by association the victim alleging discrimination did not belong to the disadvantaged group (disability, ethnic origin or race), the applicant being a Muslim herself shared the same discriminatory trait.[175] Hence, there remained some ambiguity in the manner the Court expressed the issue because it did not explicitly use the term discrimination by association.[176]

The Court interpreted the testator's choice to draw up a will in accordance with Civil Code as invalidating any argument supporting the application of *Sharī'a* rules

162 Ibid., para. 125.
163 *Iakovidis/McDonough*, OJLR 2019/8, p. 440.
164 *Molla Sali*, merits, (fn. 2), para. 69.
165 UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6 on Equality and Non-Discrimination*, of 26/4/2018, CRPD/C/GC/6, para. 20.
166 *Iakovidis/McDonough*, OJLR 2019/8, p. 441.
167 CJEU, case C-303/06, *Coleman*, ECLI:EU:C-2008:415, paras. 38, 42, 50 and 56.
168 CJEU, case C- 83/14, *Chez Razpredelenie Bulgaria Ad [GC]*, ECLI:EU:C:2015:480, para. 56. See: *Malone,* ILJ 2017, pp. 144 ff.
169 *Molla Sali*, merits, (fn. 2), Separate Opinion Mits, para. 7.
170 ECtHR, Application No. 23682/13, *Guberina v. Croatia*, para. 78.
171 ECtHR, Application No. 25536/14, *Škorjanec v. Croatia*, para. 55.
172 ECtHR, Application No. 44399/05, *Weller v. Hungary*, para. 37.
173 *McGoldrick,* OJLR 2019/8, p. 544.
174 *Molla Sali*, merits, (fn. 2), para. 141.
175 *McGoldrick,* OJLR 2019/8, p. 545.
176 Ibid., only Judge Mits made an explicit reference to this term. *Molla Sali*, merits, (fn. 2), Separate Opinion Mits, para. 7.



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of inheritance to him.[177] Nevertheless, it would be still difficult to maintain that applying *Sharī'a* would have been discriminatory to him and that this would have been permissible only had he waived his right (and that of his beneficiaries) not to be discriminated against on the basis of his religion.[178] In other words, if the testator had not made a will under the Civil Code or made a will instructing the division of his property according to *Sharī'a*, would the argument that he was being discriminated against on the account of his religion still stand?[179] More pertinently, could the applicant in this case have complained that as a beneficiary she was being discriminated against because she would receive a lesser share under *Sharī'a* than under the Civil Law?[180]

Even if being subjected to *Sharī'a* rules of inheritance was discriminatory against an individual, it must have been weighed against an argument of considerable import, that such legal order reflected the pursuit of a legitimate aim vested in an important public interest, namely, the protection of a religious minority based on an international treaty.[181] It is remarkable how the Court expeditiously processed the question of whether a legitimate aim existed,[182] contrary to what Judge Mits opined that the invoked aim by the Government was per se a legitimate one, however he concurred with the Court as to disproportionality of the employed measures.[183] He asserted that the Court's sole focus on the testator's faith neglected a substantial aspect, namely the religion of the applicant as well as the historical and legal minority rights context.[184] Accordingly, the proper comparator that should have been adopted by the Court in light of the special status of Western Thrace, was whether a married Muslim woman as a beneficiary of her Muslim husband's will was in analogous or relevantly similar situation to that of a married non-Muslim female beneficiary of a non-Muslim husband's will.[185] This led him to conclude that the discrimination occurred not only by association to her husband's religion, but also on the grounds of the applicant's own religion.[186]

## III. Religious Adjudication and Minority Rights

After reflecting upon the process through which the Court developed its rationale in establishing discrimination by association, this juncture sheds light on the Court's approach to the issue of religious adjudication. It is important to reiterate here that

177 *Molla Sali*, merits, (fn. 2), paras. 86 and 156.
178 *McGoldrick,* OJLR 2019/8, p. 545. Following the lines of; ECtHR, Application No. 30078/06, *Konstantin Markin v. Russia [GC]*, para. 150.
179 Ibid., p. 546.
180 Ibid.
181 Ibid.
182 *Molla Sali*, merits, (fn. 2), para. 143.
183 Ibid., Separate Opinion Mits, para. 10.
184 Ibid., para. 1.
185 Ibid., para. 8.
186 *Iakovidis/McDonough*, OJLR 2019/8, p. 442. Citing *Molla Sali*, merits, (fn. 2), Separate Opinion Mits, paras. 12-13.



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the contention in the *Molla Sali* case did not originate from a substantive decision rendered by a religious tribunal. In fact, the case never reached the *muftī* in the first place, but instead, the conflict was triggered by the secular State courts' interpretation as to the appropriate applicable law to the testator's will. Nevertheless, the Court's engagement with this dimension accrued to the case an additional layer of importance. For the first time, a functioning religious regime attesting to the vivid legal pluralism in Europe, vested in the *muftī* jurisdiction operating under the auspices of the special status in Western Thrace, was put under the Grand Chamber's thorough review to rule on the extent of its compliance with the Convention.[187]

The discussion on religious adjudication as conveyed by the facts of the case involved an entanglement of the scope of minority protection with the overlapping mandates of international instruments on the one hand, and the primacy of the right to self-identification as perceived by the Court on the other. Accordingly, a well-rounded assessment would require, first, to address the Court's interpretation of Greece's international obligations that had established the legal basis of the *muftī* jurisdiction, taken in light of the Court's distinction between parallel and plural systems; and second, analyzing how the Court articulated the significance of the right to self-identification as a delimitation to collective minority rights. The discussion on religious adjudication is concluded with a review of the new legislation enacted in 2018 and how its novel features aimed to buttress Greece's efforts in bringing the minority legal order of Western Thrace more in line with the Convention.

### 1. Interpretation of International Obligations

As has been discussed in Section B, the *sui generis* status in Western Thrace found its legal basis in a series of international treaties, most important of which is the Treaty of Lausanne that had been concluded and enforced before the Convention was adopted by Greece.[188] *Molla Sali* brought the question of the compliance of pre-existing international legal obligations with the Convention to the forefront while awaiting the Court's review with much anticipation.[189] Seeking guidance in former jurisprudence, it is noticeable from the landmark *Soering*[190] decision that precedence was given to the provisions of the Convention (Art. 3) over the enforcement of an extradition treaty[191] because the obligations stemming from a specialized treaty as such were found inconsistent with the "fundamental values of democratic societies" and the

187 *Tsavousoglou,* The Curious Case of Molla Sali v. Greece.

188 Greece ratified the Convention on 28/11/1974. Available at: https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/country/GRE?p_auth=pwOuuwEB (01/07/2020).

189 *McGoldrick,* OJLR 2019/8, p. 547.

190 ECtHR, Application No. 14038/88, *Soering v. The United Kingdom*. The case involved an extradition case from the UK to the USA, where the applicant awaits undergoing the death row phenomenon amounting to torture or inhuman treatment. For a detailed analysis see; *Anderson/Walker,* pp. 71-77.

191 *Harris et al.*, p. 247.



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"general spirit of the Convention".[192] Thus, it could be deduced from *Soering* that the adopted approach was characterized by a reserved stance wary of interpreting other instruments while eschewing an explicit confrontation with other international law norms. Some observers underlined that the Court's narrow interpretive stance aiming to avoid conflict with other norms was ubiquitous, especially where comparable standards of human rights protection are maintained in the corresponding system,[193] whereas in less comparable instances, even when the Court had taken into account other treaties it did so without proceeding to resolve the conflict of norms.[194]

Projecting the preceding thought on *Molla Sali*, it follows that the Court's approach was expected to engage with this dynamic in a more than nuanced manner and clearly demarcate the relationship between the Convention and the package of international treaties enabling the exercise of the *muftī* jurisdiction in Western Thrace. In so doing, the Court first referenced the Vienna Convention on the Law of Treaties in asserting that the earlier treaty obligation applies only to the extent that its provisions are compatible with those of the later treaty.[195] Second, while not contesting the undertakings of Greece pursuant to the Treaty of Lausanne, the Court construed the wording of the relevant provisions as not requiring Greece to apply *Sharī'a*. More specifically, the Court stressed that the Treaty of Lausanne did not explicitly mention or confer any kind of jurisdiction on the *muftī* in relation to religious practices, but only guaranteed the religious distinctiveness of the Greek Muslim community, while maintaining the Government's position that the treaties of Athens and Sèvres were no longer in force.[196] Third, the Court fortified its reasoning by referring to the voiced concerns against the application of *Sharī'a* in Western Thrace by international bodies, more pertinently the Council of Europe Commissioner for Human Rights and his recommendations to Greece to interpret its former obligations in light of European and international human rights instruments.[197]

Notwithstanding the foregoing, the Court's interpretation was not free from criticism. In relation to the obligations arising from the treaties of Athens, Sèvres and Lausanne, the Court's reasoning was characterized as being formalistic and evasive, sidestepping the normative conflict by forwarding unconvincing literal interpretation

192 *Soering,* (fn. 189), paras. 87-8.

193 *Milanovic,* DJCIL 2009, p. 123. Commenting the presumptive absence of norm conflict with EU Community law by relying on the principle of *pacta sunt servanda*: ECtHR, Application No. 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, paras. 150 and 156.

194 *Rachovista,* ICLQ 2017 pp. 574-6. Comparing the approaches of the ECtHR and the IACtHR on how external treaties would inform the interpretation process of their respective conventions.

195 *Molla Sali*, merits, (fn. 2), para. 66. Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, UNTS Vol. 1155, p. 331. Art. 30 § 3 stipulates: "When all parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

196 Ibid., para. 151.

197 Ibid., para. 154. *Hammarberg*, para. 41.



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of Greece's treaty obligations regarding the Muslim minority in Western Thrace.[198] While ceding to the fact that none of the treaties had explicitly mandated the application of *Sharī'a*, the Court's interpretation rendered their provisions regarding the special status in Western Thrace and the competences of the *muftī* arguably devoid of any substantive effect. The Court's interpretation did not give much weight to the fact that the treaties had been understood and applied for over a century in this manner, and during that time, Greece had consistently maintained its obligations under Lausanne in accordance with prior and subsequent practice regarding the interpretation of treaties under general international law.[199]

## 2. Plural or Parallel?

After reviewing the Court's interpretation of the Treaty of Lausanne in relation to the *muftī* jurisdiction in Western Thrace, the analysis turns now to the Court's characterization of this mode of religious adjudication. On the face of it, one could argue that the particular status of the minority in Western Thrace is intriguing. It bears a combination of attributes resembling those of a recognized national ethnic minority and an established religious entity at the same time, except for the fact that unlike the more familiar patterns, the population there is neither ethnically nor linguistically monolithic,[200] and the religious establishment was initially founded on an international agreement. However, this does not mean that religious adjudication as such stands as an exclusive phenomenon to Greece. In various contexts within the European sphere, the determinations of religious bodies on the divorce and annulment of a religious marriage involve a dispute resolution process that is comparable to adjudication by State courts, such as those issued from the Jewish *Beth Din*,[201] Sharia Councils (in the UK)[202], Roma traditional courts (Kris-Romani)[203] and the Roman Catholic Diocesan Tribunals.[204]

These processes of religious adjudication represent one facet of *Maleiha Malik*'s notion of a minority legal order, which she defines as a non-state normative regulation, as practiced by religious (and cultural) groups, that shares some of the characteristics of State law by comprising two specific elements that should be simultaneously met.[205] The first is the corpus of substantive group norms, which are sufficiently con-

198 *McGoldrick,* OJLR 2019/8, p. 548.
199 Ibid., citing Draft Conclusions of the International Law Commission on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, ILC Report, 70th Session/2018, UN Doc. A/73/10.
200 With Islam being the common factor, the region of Western Thrace represents a melting pot of different groups including Pomaks, Roma/Gypsies and Turkophones (ethnic Turks and minority Turks). For an overview of the various components of the population in Western Thrace, see: *Borou,* JMMA 2009/29(1), pp. 6-9.
201 On scope and enforcement of the awards see; *Feit*, JBDA 2012, pp. 30 ff.
202 For an overview see; *Bano,* LSJ&GD 2007, pp. 1 ff.
203 *Weyrauch,* AJCL 1997/45(2), p. 225.
204 *Leigh,* OJLR 2019/8, p. 2.
205 *Malik*, CLP 2014, pp. 69-70.



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crete and salient that they are distinguishable from the other state norms applicable to the general social relationships; and second, an institutional order operating with considerable coherence and consistency, in charge of identification, interpretation, modification and enforcement of these norms.[206] The reach of the institutional aspect varies depending on the degree of its structural sophistication, and, more importantly, the extent of its recognition within a given legal order to enjoy the necessary power to enforce its determinations.[207] In other words, while an underappreciated resemblance between a religious legal order (be it that of a minority) and the State legal order exists in various ways,[208] what remains a point of contention however is the legal characterization of religious adjudication, which hinges on the State's adopted stance, ranging from full accommodation to dense intervention.[209]

By this point, it is rather vital to make a distinction between plural and parallel systems, which are often conflated in describing how the State relates to religious law in general and religious adjudication in particular.[210] Theoretically, under parallelism, there are two – almost separate – legal spheres, whereby the State is involved in regulating the split, or rather the differentiation according to religious norms, between citizenship and religious affiliation, rendering the choice of law options subordinated to stringent conditions of belonging to a certain group.[211] Whereas a plural system simply refers to enabling the existence of alternative methods of adjudication while the integrity of the State legal system remains intact and enjoys the exclusive authority to empower a variety of adjudicators (including the religious) in selected areas of law provided that their functioning does not raise issues of public order.[212] The significance of this distinction carries over to *Molla Sali*, when considering the Court's assessment of parallel systems and the status of *Sharī'a* under the Convention.

In *Refah Partisi*,[213] the Grand Chamber unanimously found no violation in the dissolution of an Islamist political party that was in power for zealously advocating a State endorsement of *Sharī'a* in Turkey.[214] The human rights compatibility of the proposed religious law in toto was considered "indirectly" by the Court.[215] In so doing, the Court's opinion rested on addressing two main issues of concern. First, a systemic problem arising from proposing a legal system as such, which could undermine the State's role as the impartial guarantor of individual rights and freedoms in a democratic society, besides the potential of the proposed system to infringe the principle of non-discrimination between individuals with respect to their enjoyment of public freedoms on the account of religious affiliation contrary to the fundamental

206 Ibid.
207 *Leigh,* OJLR 2019/8, p. 3.
208 *Hirschl/Shachar (eds.),* UCLR 2018/85, p. 432.
209 *Zee,* JRS 2014, p. 9.
210 *Leigh,* OJLR 2019/8, p. 3.
211 *Zucca,* p. 131.
212 Ibid., pp. 127-8.
213 ECtHR, Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (The Welfare Party) And Others v. Turkey [GC].*
214 *Cerna,* ASIL 2019, p. 282.
215 *Leigh,* OJLR 2019/8, p. 15.



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principles of democracy.[216] The second issue was content based, since the *Refah* party had intended to organize both public law and private law spheres according to invariable dogmatic religious precepts.[217] While being assertive in refraining from expressing an abstract opinion on the merits of a plurality of legal systems,[218] the Court's ruling was unequivocal in declaring that *Sharī'a* diverged from the underpinning values of the Convention,[219] and that any general adoption of *Sharī'a* as part of the constitutional system of a State Party to the Convention would raise the same concerns,[220] rendering *Sharī'a* incompatible with the fundamental principles of democracy as set forth in the Convention.[221] The Court maintained the same general stance towards *Sharī'a* as a parallel system in *Kasymakhunov*.[222]

To summarize, the foregoing cases have demonstrated the Court's disapproval of proposed parallel systems by applicants aiming to govern and enforce wide spectrum changes in the constitutional order that were never implemented. They were neither pleading for expansive religious autonomy nor for recognizing religious adjudication. Whereas in *Molla Sali* the Court encountered a discrimination claim emanating from the operation of an existing practice, limited in substantive and territorial scope albeit within the realm of private law.[223] In a comparable case reviewing the application of substantive *Sharī'a* norms, the Court found no violation of Art. 14 taken in conjunction with Art. 1 of Protocol No. 1,[224] in a discrimination claim brought by a Muslim woman who had been denied the benefits of her husband (pension and health insurance cover), for being religiously not civilly married, thereby accepting the legitimate aim pursued by the Turkish Civil Code in putting an end to a marriage tradition "that placed women at a clear disadvantage, and in situation of dependence and inferiority

216 *McGoldrick,* HRLR 2009, p. 610.
217 Ibid., p. 611.
218 *Refah Partisi,* (fn. 212), para. 127.
219 *Cumper*, in: European Yearbook of Minority Issues 2003-2004, pp. 169-175. Premised on the common ground (or lack thereof) and whether Islamic values could be reconciled with the Judeo-Christian tradition.
220 *McGoldrick,* HRLR 2009, p. 612.
221 *Refah Partisi,* (fn. 212), para. 123. The Court stated: "It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. ... In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.".
222 ECtHR, Application Nos. 26261/05 and 26377/06, *Kasymakhunov and Saybatalov v. Russia,* para. 111.
223 *Leigh,* OJLR 2019/8, p. 16.
224 ECtHR, Application No. 3976/05, *Şerife Yiğit v. Turkey[GC].*



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compared to men".[225] It could be argued that the decision according to Art. 14 ECHR in this case was encouraged by the broad-brush criticisms against *Sharī'a* in *Refah*.[226]

Some commentators criticized the Court's adversarial and generic observations regarding *Sharī'a*,[227] its negative stereotyping of Muslims and Islamic values,[228] the disregard of the diverse interpretations made by Muslims themselves on key concepts reviewed by the Court,[229] and the wholesale rejection of *Sharī'a* without leaving margin for future examination of the possible compatibility with the Convention values.[230] To some extent, the Court's approach in *Molla Sali* is subjected to the same criticism, given the emphasis on the discriminatory impacts of *Sharī'a* on women and children rather than focusing on the difference in treatment under Art. 14 that the Court had established.[231]

Notwithstanding the Court's general stance towards *Sharī'a* as a legal system, it could be discerned for the purpose of religious adjudication discussion that it is natural to invoke the Court's rejection when religious adjudication is presented as part of a

225 Ibid., para. 81. Noteworthy is the Concurring Opinion of Judge Kovler: "[W]hat I cannot agree with in the text of the judgment are the Court's pronouncements on marriage under Islamic law. I think it would have been wiser to refrain from making any assessment of the complexity of the rules of Islamic marriage, rather than portraying it in a reductive and highly subjective manner in the short section entitled "History" (see paragraphs 36-37), where what is left unsaid speaks louder than what is actually said. Hence, to state that "Islamic law ... recognises repudiation (talâk) as the sole means of dissolving a marriage", such repudiation being "a unilateral act on the part of the husband", and not to mention that the woman can also seek a divorce, for instance if her husband is unable to maintain the family, is to present only half the picture. … The language of politicians and NGOs is not always appropriate to the texts adopted by an international judicial body. … the Court had already, in my view, committed a serious error by passing judgment on the Islamic system of values, when it could easily have refrained from such a demonstration of ideological activism. … had the Court taken them into account, would have prevented it from reaching hasty conclusions which I regret being obliged to adopt together with the rest of the text of the judgment".

226 *Leigh,* OJLR 2019/8, p. 18. Noteworthy is the Concurring Opinion of Judge Kovler: "What bothers me about some of the Court's findings is that in places they are unmodulated, especially as regards the extremely sensitive issues raised by religion and its values. I would prefer an international court to avoid terms borrowed from politico-ideological discourse, such as "Islamic fundamentalism" (paragraph 94 of the judgment), "totalitarian movements" (paragraph 99 of the judgment), "threat to the democratic regime" (paragraph 107 of the judgment), etc., whose connotations, in the context of the present case, might be too forceful. … This general remark also applies to the assessment to be made of sharia, the legal expression of a religion whose traditions go back more than a thousand years, and which has its fixed points of reference and its excesses, like any other complex system. In any case legal analysis should not caricature polygamy (a form of family organisation which exists in societies other than Islamised peoples) by reducing it to ... "discrimination based on the gender of the parties concerned" (paragraph 128 of the judgment)".

227 *Baderin,* in: Griffith-Jones, Robin (eds.), p. 77. See the essays of *Bratza* and *McGoldrick* in the same source for further analysis, pp. 38-41 and 42-72.

228 *Peroni,* IJLC 2014/10(2), pp. 205-6.

229 *Moe,* in: Durham et al. (eds.), p. 236.

230 *Macklem,* IJCL 2006, pp. 512-3.

231 *Molla Sali*, merits, (fn. 2), para. 154. See the reference to international bodies, (fn. 196).



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parallel constitutional order aiming to overthrow the very order the Court has been entrusted to defend. Yet, it is important not to lose sight of the fact that the objections to enforcing religious law due to its discriminatory effect fall on the substantive content of these norms rather than the adjudicatory process *per se*, especially cases under Art. 14 ECHR, where it is more challenging to justify a difference in treatment based on a religious law, and thus they emerge in regard of parallel systems rather than plural systems.[232] Although the special status of Western Thrace is comparable to the examples of parallel systems set earlier (*Refah* and *Kasymakhunov*) neither in aim nor in scope of operation, the Court nevertheless treated it as a *de facto* parallel order,[233] instead of perceiving it essentially as a supplementary mode of adjudication, albeit deficient and requiring reform. Hence, it shall be discussed in the following juncture how the Court evaluated the element of the individual's consent within the religious minority and the weight of voluntariness in demarcating the scope of minority rights as a precondition to afford an accommodation for religious adjudication.

### 3. Right to Self-Identification

It follows from the discussion in Section C in relation to the scope of religious autonomy, that the exceptional divergence from general State laws that may arise from the operation of religious adjudication hinges on whether the element of voluntariness to freely join and exit the religious community is satisfied. This aspect was highly emphasized in the *Molla Sali* decision. Before delving into this aspect, it is important to note first that a minority legal order remains significant when considering the important functions it performs for its adherents that cannot be replaced by the State legal system, such as connecting the contesting parties to their shared ritualistic and communal normative values.[234] It also provides for non-adversarial solutions by minority arbiters, who have deeper knowledge of the community traditions and cultural norms, and are thus better suited to resolve issues and reconcile the parties back into the community.[235]

This begs by its turn the question of whether the element of voluntariness in such settings remains intact or is subjected to external factors vitiating a genuine consent regarding the choice to opt in and out. For the vulnerable members within a religious minority, especially religious women, a common concern that may play a role is community pressure, where the availability of religious adjudication may increase the perceived sense of disloyalty if the individual opted for State courts instead.[236] This is most evident in situations where religious women seek to secure a religious di-

232 *Leigh,* OJLR 2019/8, p. 18.
233 Ibid.
234 *Malik,* pp. 79-80.
235 Ibid.
236 *Ahmed and Luk,* IJAMDM 2011, p. 301.



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vorce,[237] which emphasizes their need for religious adjudication without prejudice to the necessity of improving the substantive and procedural quality of the presented services.[238] In these situations, fearing community ostracism for practicing the right to opt out forces this individual into a "cruel zero-sum choice", whereby the individual is forced to either accept all the group practices including those violating her constitutional rights or simply leave completely.[239] By way of contrast, the crux of the matter would be that opting for religious adjudication should be interpreted neither as a relinquishment of civil and political rights nor opting for State court adjudication as a declaration of exit from the fully-fledged membership of the religious community.[240] In the same vein, some argued that there is no guarantee of a genuine voluntary engagement with minority legal orders and that encouraging the recognition of such modes of adjudication in principle threatens shared citizenship.[241]

The concerns of voluntariness and group membership were vividly echoed in the *Molla Sali* case. The applicant contested denying Greek Muslims access to civil courts, which was based on a series of rulings by the Court of Cassation that had rendered the jurisdiction of the *muftī* compulsory, and that having imposed *Sharī'a* law against her wishes under the pretext of protecting the religious minority to which she belonged entailed discrimination on grounds of religion that did not pursue a legitimate aim.[242] She argued further that making access to civil courts by the Muslim minority contingent upon renouncing their status as members of that minority was tantamount to creating a segregationist system of *Sharī'a* law.[243] The Court expressed support to the applicant's claims by confirming that such refusal to benefit from ordinary laws not only amounted to discrimination but also violated a right of cardinal importance in the field of minority protection, namely, the right to free self-identification, rendering the application of *Sharī'a* valid only where recourse to it remained voluntary.[244] Evidently, the absence of consent was thus critical to the Court's finding that the discrimination arising from the imposed application of *Sharī'a* to the testator's will had no objective and reasonable justification.[245]

Considering the foregoing analysis, it appears that one of the significant features of the Court's decision is the introduction of a jurisprudential innovation, namely highlighting the significance of the right to self-identification.[246] The Court emphasized the negative aspect of that right by asserting that the right to choose not to be treated

237 *Doe et al.,* Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts, RCU 2011, p. 44, available at: http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf (15/07/2020).
238 *Bano,* JCL 2007, pp. 48-51 and 57. A detailed discussion on the different types of difficulties encountered by Jewish and Muslim women in the UK in acquiring a religious divorce.
239 *Shachar,* WRLSI 1998, p. 107.
240 *Malik,* p. 83.
241 *McCrea,* PL 2016, p. 222.
242 *Molla Sali*, merits, (fn. 2), para. 101.
243 Ibid., para. 104.
244 Ibid., paras. 157-9.
245 Ibid., para. 160.
246 *McGoldrick,* OJLR 2019/8, p. 551.



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as a member of a minority is to be unhindered and that it must be respected by both the other members of the minority and the State.[247] There is an undeniable force in the integrity of this principle. Interestingly though, as it appears from the facts of the case the situation was less than clear-cut. For instance, there was no explicit evidence that either the applicant or the testator had chosen not to be treated as members of this minority, whereas the facts indicated to the contrary when considering that they had undergone marriage pursuant to *Sharī'a* law.[248] It could be argued that the fact that the testator had chosen, or rather cherry picked, different legal options for various aspects of his life was not in itself an evidence of his choice to exit his minority but rather a case of forum shopping based on convenience.[249] Nevertheless, this aspect did not weigh much in the Court's assessment. While disregarding that both Greece and Turkey had not ratified the Framework Convention, the Court considered the right to free self-identification (especially in its negative aspect) not just as a right specific to the Framework Convention, but rather as the cornerstone of international law on the protection of minorities in general.[250] Perhaps it would have been helpful had the Court expounded on the converging aspects in the international law on minorities' protection attesting to being a "cornerstone".[251] The Court eventually sided with the applicant's claim regarding the negative aspect of self-identification in not wanting to be subjected to *Sharī'a* law against her will. It remains worth contemplating though, that if one is worse off due to the application of the relevant applicable law, would that make it of itself discriminatory, especially if the reason of applying that particular law is that the person is both objectively and subjectively a member of that group?[252] Reading the Court's decision in this particular case, the answer seems to be yes.

## 4. The New Greek Legislation

Before the Court's merits decision was rendered, Greece, anticipating that the Court would find a Convention violation, had enacted new legislation amending the *muftī* jurisdiction as practiced in Western Thrace.[253] Pursuant to the new legislation, members of the Muslim minority in Western Thrace shall be primarily governed by the Civil Code, then as an exceptional venue may opt for the *muftī* jurisdiction. Such a choice takes effect only when all the involved parties explicitly request the settlement of their dispute in accordance with *Sharī'a* law, and if one of the parties does not wish to submit to *muftī*'s jurisdiction, that party may apply to civil courts that are deemed

247 *Molla Sali*, merits, (fn. 2), para. 157.
248 Ibid., Separate Opinion Mits, para. 2.
249 *McGoldrick,* OJLR 2019/8, p. 551.
250 *Molla Sali*, merits, (fn. 2), para. 157.
251 Ibid.
252 *McGoldrick,* OJLR 2019/8, p. 552.
253 *Molla Sali*, merits, (fn. 2), para. 57. Law no. 4511/2018 amending section 5 of Law no. 1920/1991 ratifying the Legislative Act of 24 December 1990 on Muslim ministers of religion.



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to have general jurisdiction.[254] Inheritance matters are also covered in the new amendment, which shall be governed by the Civil Code unless the testator makes a notarized declaration explicitly stating his or her wish to make the succession subject to the rules of *Sharī'a* law.[255]

The new features introduced by the new legislation were noted with satisfaction by the Court.[256] It echoed the Court's view that freedom of religion as set forth in the Convention did not obligate the State to tailor a particular framework granting religious communities a special status entailing special privileges, however if such status had been established, then the State must ensure that the criteria for the group's entitlement was applied in a non-discriminatory manner.[257] It follows, that in the absence of any negative reference to plurality of legal systems (along the lines of *Refah Partisi*),[258] the Court seemed to have impliedly endorsed the position that States do not have a positive obligation to prohibit voluntary religious adjudication, and more pertinently, that a formal recognition of religious adjudication would be permissible so long it was non-discriminatory.[259] Necessitating the agreement of all parties concerned as a precondition to engage the *muftī* jurisdiction aligns the Greek law with the Court's jurisprudence,[260] whereby it accepted unequivocally that limitations arising from religious adjudication that was freely accepted were permissible under the Convention.[261]

The amendments also reflected a new hierarchy of norms, whereby the members of the Muslim minority in Western Thrace are to be addressed first as Greek citizens subject to the Civil Code and then as adherents of a religion.[262] They sought to ensure factual, not just formal, equality for the minority in Western Thrace,[263] formulated in a manner that avoids potential claims of indirect discrimination on grounds of religion, by not imposing the Civil Code mandatorily on family law and inheritance matters and enabling the voluntary option to choose religious law.[264] By virtue of the new

254 Ibid., Section I, Art. 2a.
255 Ibid., Section I, Art. 2c.
256 *Molla Sali*, merits, (fn. 2), para. 160.
257 Ibid., para. 155.
258 *McGoldrick,* OJLR 2019/8, p. 549.
259 *Leigh,* OJLR 2019/8, p. 25.
260 Ibid., p. 23.
261 ECtHR, Application No. 75581/13, *Travaš v. Croatia*, para. 92. The case involved the dismissal of a professor of Catholic religious education from his teaching position, due to his civil divorce thus breaching Canon Law. The Court took the view that: "by signing his successive employment contracts, the applicant had knowingly and voluntarily accepted a heightened duty of loyalty towards the Catholic Church, which had limited the scope of his right to respect for his private and family life to a certain degree. The Court stressed that such contractual limitations were permissible under the Convention if they were freely accepted".
262 *Kalampakou*, MDPI 2019/10(4), p. 263.
263 *Henard,* NJHR 2016, p. 166. Discussing in detail the rule in *Thlimmenos* judgment in establishing the duty of States of differential treatment under the prohibition of discrimination (duty to accommodate - not to fail to treat differently persons whose situations are significantly different).
264 Ibid., p. 264.



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amendments, the permeating impression formerly alluded to in Section B that the Greek government had granted an ambiguous privilege to the Muslim minority in Western Thrace has thus been discredited. The new law sets the minimum age of marriage at 18 while enabling the *muftī* to authorize underage marriage pending the minor's legal guardians permission (Art. 3); asserts that each party must be represented by a lawyer when appearing before the *muftī* (Art. 4); that the proceedings before the *muftī* must follow a written format and that his decisions must be published (Art. 6); that the proceedings are to be conducted in Greek language (Art. 10); that the *muftī*'s decisions are unenforceable unless a decree from the court of first instance is issued to that effect after vetting the local jurisdiction of the *muftī* and the compliance with Greek Constitution and the Convention with possibility of further appeal (Art. 13); and that the *muftī* court is to be supported by administrative staff, most importantly a legal advisor trained in State secular law (Arts. 14 22).[265]

The new law will thus put an end to the diverging interpretations and dithering decisions regarding the application of *Sharī'a* law to family law matters in Western Thrace across the different branches of the Greek Judiciary, which was responsible for creating legal uncertainty and bringing the *Molla Sali* case before the Court in the first place.[266] Notwithstanding the positive features of the new law, there remain a few issues of concern as to the impact of these changes from the perspective of the minority in Western Thrace. For religious communities, personal status laws play a significant role in shaping the group's identity and in organizing membership boundaries.[267] They constitute among other factors the core matters that represent the collective identity of this community and its desire to perpetuate itself.[268] For over a century, this mode of religious adjudication had been an essential social and religious component of the Muslim minority in Western Thrace that encompassed the practices and cultural identity of the minority within its rubric.[269] Against the backdrop of the new legislation alongside the Court's decision, there is a concern that even for the devout members, the impetus of financial need will be critical in driving the choice of law and any broader allegiance to their religious community.[270] The Muslim minority in Western Thrace may after all not see these changes as a part of a wider human rights discourse. Instead, they may be perceived as a creeping assimilation by the State, unsheathing the thin edge of the wedge that will lead to a complete abolishment of *Sharī'a*, and subsuming their minority rights as they see it by significantly diminishing this aspect of their group identity.[271] Although, on the face of it, the new law does not seem to violate Greece's obligations under the Treaty of Lausanne since the settlement of family law issues according to the *muftī* jurisdiction is not abolished, it remains to be seen in the near future whether Turkey would consider it a threat to the viability of the Treaty.

265 *Sezgin,* p. 2.
266 *Molla Sali*, merits, (fn. 2), para. 153.
267 *Shachar,* in: Adhar/Aroney (eds.), p. 117.
268 *Gaudreault-DesBiens*, in: Adhar/Aroney (eds.), pp. 160-61.
269 *Boussiakou,* p. 26.
270 *McGoldrick,* OJLR 2019/8, p. 555.
271 Ibid.



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## IV. Just Satisfaction

After having thoroughly discussed the critique that arose from the merits stage, notwithstanding the Court's considerations discussed earlier in Section C, this subsection sheds light on the criticism that was forwarded by the joint partly dissenting opinion in relation to the just satisfaction decision. The dissenting Judges did not shy away from asserting that the majority avoided grappling with some of the more difficult issues arising from the assessment of pecuniary damages as per Art. 41, and thus failed to seize an opportunity to provide guidance and clarity in an underdeveloped area of case-law, which could have been helpful both to future Court formations and the parties involved.[272]

The position of the dissenting Judges regarding the applicant's head of claim for just satisfaction concerning the properties located in Turkey rested on two main pillars.[273] First, they objected to the majority's adoption of an unjustifiably narrow interpretation of the merits decision; and second, they contested the applicable methodology once a Convention violation had been established.[274] With respect to the first point, they overtly disagreed with the majority's finding that the violation of Article 1 of Protocol No. 1 only applied to the properties in Greece since the applicant had only registered the properties in the relevant Greek Land Registry, however they contended that this fact on its own could not be an argument for excluding the Turkish properties from the applicant's claims, because the authorities in Greece could only register properties existing in Greece.[275] In the same vein, they stressed that it would have been necessary to elaborate in the clearest possible language to the applicant in the merits decision, that the properties comprising the inheritance located in Turkey could not form the basis of just satisfaction, hence denying the applicant any argument for obtaining compensation for the more valuable part of the estate.[276] They emphasized that if the focus, as the majority suggested, fell only upon the Greek properties, then significant issues of admissibility and merits were left unaddressed.[277] The "possession" aspect in the merits decision constituted the totality of the estate including the properties in Turkey, after the Court had identified the just satisfaction claim (merits para. 164) that included the head of claim relating to the Turkish estate, and unless the majority had overlooked it, no aspect of the applicant's claim was either declared inadmissible or dismissed.[278] Thus, it could be argued that the Court's unwillingness to explicate its choice regarding the exclusion of the Turkish properties may be justified by lack of precedent in this field where Art. 41 jurisprudence remains underdeveloped.[279]

272 *Molla Sali v. Greece*, just satisfaction, (fn. 1), Joint Partly Dissenting Opinion, paras. 4-5.
273 *Firmansyah*.
274 *Molla Sali v. Greece*, just satisfaction, (fn. 1), Joint Partly Dissenting Opinion, para. 3.
275 Ibid., para. 14.
276 Ibid., para. 17.
277 Ibid., para. 21.
278 Ibid., para. 22.
279 *Firmansyah*.



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Nevertheless, the merits decision established that the applicant had been deprived of the entire estate due to discrimination on grounds of religion, rendering the Court's rationale the more ambiguous for not including the Turkish properties, and more pertinently, for not allowing the applicant to claim damages to that part of the estate.[280] The second point of criticism entailed by its turn two issues of concern when approaching the Court's methodology.[281] In the first, they argued that for the purposes of Art. 41 ECHR the principles that were to be applied to the properties located in Greece are the same as those applicable to the estate in Turkey including any remedial order, however the outcome indicated otherwise.[282] The Court seemed to avoid any assessment of the existence of a sufficient causal link between the invalidation of the testator's will by the Greek Court of Cassation and the Turkish courts' refusal to give effect to the will, thus rendering this aspect of the applicant's lost inheritance compensable and falling within the ambit of Art. 41.[283]

As for the second point, the dissenting Judges suggested that in light of an underdeveloped Art. 41 jurisprudence, the starting point of the analysis should have been the principles of reparation applicable under general international law.[284] In so doing, they sought guidance in the test set by the judgment of the International Court of Justice in *Costa Rica v. Nicaragua*, which emphasized that in order to award compensation the court had to ascertain whether there was a sufficiently direct and certain causal nexus between the wrongful act and the injury suffered by the applicant.[285] They were of the view that this test may be satisfied in this case, since Turkish courts did not apply any separate rule of Turkish public order to refuse the enforcement of the will (so as potentially to break the chain of causation), and instead were bound by the decision of the Greek Court of Cassation.[286] They fortified their view as well by referring to the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[287] Whereas Art. 31 states that the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act, encompassing any damage whether material or moral, Art. 47 states that if several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.[288]

The ambiguity that surrounded the Court's pronouncements on just satisfaction especially with respect to ignoring the element of causation before dismissing the applicant's head of claim regarding the estate in Turkey therefore left the dissenting

280 Ibid.
281 *Molla Sali v. Greece*, just satisfaction, (fn. 1), Joint Partly Dissenting Opinion, para. 25.
282 Ibid., para. 26.
283 Ibid., para. 42.
284 Ibid., para. 27.
285 Ibid., para. 44. ICJ, *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua),* Compensation, Judgment [2018], ICJ Rep, p. 15.
286 Ibid., para. 45.
287 Ibid., para. 30. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, fifty-third session 2001, A/56/10.
288 Ibid., para. 47.



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Judges with the impression that the applicant's success in the merits decision was rather a Pyrrhic victory.[289] In their bid to rectify the situation, they made it clear that if it were up to them, they would have made an award of pecuniary damages against Greece (to the amount established by the evidence) for the consequential losses that might have been suffered by the applicant in respect of the Turkish estate, pending any final judgment by Turkish courts confirming the status quo.[290] They maintained that even if ordering such an award would be considered unusual, still, as a matter of principle, there was no reason why it could not be made.[291]

## E: Concluding Remarks

This contribution aimed at objectively addressing an aspect of a factual phenomenon existing in contemporary Europe, namely religious adjudication in light of the Court's jurisprudence. It provided a condensed analysis of the main issues that have been invoked by the *Molla Sali* case in both the merits and just satisfaction stages, the case which was described by the Court's President as being one of the leading decisions of its year. The analysis approached the *Molla Sali* saga by distinguishing three interrelated issues worthy of reiteration; whether the merits decision paved the way for an expansive application of *Sharī'a* law; whether the Court imposed a ban on religious adjudication; and whether the decision bore any particular ramifications regarding Muslim Europeans. In addressing these issues, Section B explained the historical legal background that had laid ground for the *sui generis* legal order in Western Thrace, which enabled the implementation of *Sharī'a* substantive norms between the members of the Muslim minority. Section C assessed the contours of the Court's approach, analyzing the general principles that were applied in relation to the criteria of admissibility, establishing discrimination and the jurisprudential norms defining the scope of religious autonomy as set forth by the Convention. Section D engaged with critical analysis in pursuit of addressing the initial issues raised in the Introduction.

It has been demonstrated that in accommodating religious adjudication the Court had usually applied a dual test of oversight to ensure Convention compliance, comprised of judicial scrutiny undertaken by the relevant Member State courts and examining the fulfilment of the element of voluntariness. The Court refrained from considering the *Molla Sali* case under Art. 6 ECHR, and thus did not engage in direct oversight as to whether the Greek courts had scrutinized the *muftī* jurisdiction, notwithstanding the diverging interpretations across the various divisions of Greek courts, in contradistinction with its former jurisprudence involving comparable ecclesiastical law cases. As revealed by the facts, there was nothing intrinsically unfair about applying the rules of *Sharī'a* that produced that result, i.e., the case was neither gendered nor directed to an unfair rule concerning to the distribution of assets, but

289 Ibid., para. 56.
290 Ibid., para. 60.
291 Ibid.



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rather, it was the determination of the applicable law by the Greek courts that resulted in the applicant's grievance.[292]

The Court paid due regard to the element of voluntariness vested in confirming the right of the individual within a minority to self-identification and rendered it the cornerstone of international law on the protection of minorities. The Court drew analogies with comparable settings such as the likes of Shariah Councils in the UK, except for a major difference. Whereas the latter are a product of a consensual arbitration process that is still awaiting full recognition from the State, religious adjudication in Western Thrace had already been recognized and integrated in the Greek legal order for over a century, albeit with its imperfections. Following the Court's jurisprudence, religious adjudication that is introduced as part of a wider parallel constitutional order capable of overriding the fundamental values of democracy underlying the Convention will not be accommodated. In that vein, the Court's former stance set in the *Refah Partisi* decision places Muslim Europeans under a sense of alienation when considering the wholesale rejection of *Sharī'a*.

Perhaps this case was a missed opportunity to narrow the gap and demonstrate that the Convention offers substantial protection for a wide spectrum of Muslims, which might encourage Muslim Europeans to support the Convention as an accommodation strategy.[293] As Europe becomes ever more cosmopolitan, there is arguably room for a broader discussion of a relationship between *Sharī'a* and European human rights law, especially when considering the possibility of a case with slightly different facts, in which a future Court might have to begin to engage in a reconciliation.[294] Nevertheless, in *Molla Sali* the Court impliedly did not close the door on recognizing religious adjudication provided it survived the dual test and that it was non-discriminatory.

Considering the new legislation amending the *muftī* jurisdiction enacted in anticipation of the Court's decision, one concludes that the decision unequivocally did not expand the application of *Sharī'a* law. In fact, it relegated the once State-sanctioned *muftī* jurisdiction that had been applied mandatorily, as interpreted by the Greek Court of Cassation, into an optional arbitral tribunal. With respect to the just satisfaction decision, one cannot go beyond what has already been submitted by the dissenting Judges in relation to the ambiguity of the Court's approach towards the head of claim, and for missing a ripe opportunity to galvanize what seems to be the underdeveloped Art. 41 jurisprudence.

At the end of this conclusion, a final remark remains to be considered regarding the *muftī* jurisdiction. It could be argued that the *mufti*'s office, a distinctive remnant of the bygone Ottoman legacy in Greece, as it has been practiced with its procedural and substantive limits, was prone to waning and being taken over by other systems inasmuch as in the case of any other antiquated institution. This is primarily attributed to a failure to induce reform from within.[295] For the Muslim minority in Western Thrace,

292 *McGoldrick,* OJLR 2019/8, p. 558.
293 *McGoldrick,* HRLR 2009, p. 639.
294 *Iakovidis/McDonough*, OJLR 2019/8, p. 438.
295 *Tsitselikis*, Sharīʿa in Greece: Part 4.



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the *muftī* courts continued to apply substantive Islamic law that was mainly confined to the Ottoman manuals of jurisprudence without seeking further legal solutions despite the colossal breadth of Islamic tradition.[296] Perhaps that could have provided a higher standard of due process, and even substantively, more satisfactory resolutions without compromising the religious sensitivities. Instead, it seemed to extend an Ottoman practice, functioning in isolation from its historical roots within the rubric of the Ottoman theocratic governance.[297] In the lengthy Greco-Turkish affair, religion has always been instrumental to ignite "distracting" political skirmishes even up to date.[298] This resulted, among other factors, in undermining the inherent ability of the *muftī* jurisdiction to evolve within the European sphere as a distinct, yet not antithetical, legal tradition, capable of addressing the religious interests of the Western Thracians in a manner that reconciles their particular minority traits without forsaking the observance of minimum standards of the rule of law and fundamental human rights.

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296 Even within the official *H*anafi School as endorsed by the Ottoman Empire, under contract and property law, the wife can negotiate a higher value dower, payable either promptly, or deferred, thus turning into a postmortem debt to be cut out of the estate regardless of the mandatory prescribed share. Also under the *Imami* School of jurisprudence, up to 1/3 of the estate can be assigned to a member entitled to a mandatory share irrespective of the approval of the stakeholders. If that were to be applied to *Molla Sali* she would have received one-quarter (mandatory wife share) in addition to one-third in will from the whole estate.

297 *Tsitselikis,* Sharīʿa in Greece: Part 3.

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