The Last Sharīʿa Court in Europe: On *Molla Sali v. Greece* (ECHR 2018)

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Abstract

On its face, the ruling in Molla Sali v. Greece *(European Court of Human Rights 2018) was about choice of forum: in an inheritance dispute, could heirs choose to apply Islamic inheriance law or did a will drawn up in accordance with Greek inheritance law govern a Muslim decedent's estate? The case is significant not so much for its outcome, but because it involved features of two legal systems that are relatively unknown among European and American jurists: interpersonal law and Islamic law in the autonomous region of Greece. The Court's reasoning provides detailed insight into how features of these systems may clash with systems of European civil and common law, particularly in the framework of human rights.*

Introduction

The 2018 ruling of the European Court of Human Rights in the case of *Molla Sali v. Greece*[1] reminded me of a heated conversation I had in 1998 with an Arab lawyer. She had studied law in Europe but practiced in the Middle East. The discussion started pleasantly enough with talk about the intricacies of Islamic family law. Then she asked about the legal possibilities for Jews and Muslims in Europe, but when I answered that almost all European countries apply a single civil law to their citizens, she flew into a rage: "What, are they not entitled to their own religious family laws? But that is against freedom of religion!" Taken aback, I argued that all Europeans were perfectly free to fulfill religious legal requirements for their family life, but that the principle of equality before the law demanded that nationals were governed by the same law. It did not convince her: my call for equality before the law clashed with her demand for religious diversity as a matter of freedom of religion. This was a veritable clash of legal cultures. "If I were a European, I would take this matter to the European Court of Human Rights!" she ended our talk bellicosely. It took twenty years for this to happen.

The ruling of *Molla Sali v. Greece* is not so significant for its outcome, but for the fact that it involved choice of law questions in two legal systems that are relatively unknown among European and American jurists: interpersonal law and Islamic law. These are two systems of law with their own internal logic and coherence. The Court's reasoning provides close insight into how the features of these legal systems may clash with systems of European civil and common law, particularly in the framework of human rights.

I. The Case

Molla Sali and her husband belonged to the Muslim minority of a Greek province called Western Thrace, located at the

1 Molla Sali v. Greece, App. No. 20452/14, Eur. Ct. H.R. (2018), https://hudoc.echr.coe.int/eng?i=001-188985 [https://perma.cc/EFA7-7DL7].

most eastern tip of the European continent.[2] This minority was entitled to have its family and inheritance law regulated by Islamic law, as will be explained in more detail below. However, the husband decided to make his will according not to Islamic law but to Greek civil law, and he left his entire estate to his wife. When he died, his sole heirs were his wife and two sisters. These sisters contested the deceased's will because under civil law they were not considered heirs, whereas under Islamic inheritance law they were intestate heirs. The question therefore arose whether the husband had the freedom to choose Greek inheritance law or was bound by Islamic inheritance law.

While the legal question in this case seems quite straightforward—is choice of law allowed?—the typical situation in this part of Greece and the manner in which the case was legally put before the European Court of Human Rights raised several other legal questions of importance. But before we discuss these points, we first need an understanding of the Greek situation.

II. Interpersonal Law

Greece is perhaps the only country in Europe that inherited the Ottoman system of plurality in family law. According to this system, there is not one single (civil) family law for the entire population, but a number of religious family laws that coexist within a single state. In the case of the late Ottoman Empire, thirteen religious communities (*millets*) were recognized by the state, each with its own family law and courts.[3]

This system of plurality in family law is still maintained in many countries in the world, whereby these family laws can pertain to ethnic as well as religious communities. In the case of the

2 To name a region "Western" while it is located in the east is confusing, but the region of Thrace straddles Greece on its western part and Turkey on its eastern part.

3 These thirteen were: Greek Orthodox, Catholic, Syrian Catholic, Chaldean Catholic, Syrian Jacobites, Armenian Gregorians, Armenian Catholics, Protestants, Melkites, Jews, Bulgarian Catholics, Maronites, and Nestorians. Kamel S. Abu Jaber, *The Millet System in the Nineteenth-Century Ottoman Empire*, 57 Muslim World 214 (1967).

Middle East, for instance, Syria has one Islamic, one Druze, eleven Christian, and two Jewish family laws;[4] Egypt has one Islamic, six Christian, and two Jewish family laws;[5] and Israel has one Islamic, one Druze, four Christian, and two Jewish family laws.[6] Greece is not as excessive as this, and with its two family laws (civil and Islamic) is more comparable to Morocco (Jewish and Islamic law).

In legal theory, such systems are considered a *sui generis* field of law, referred to as "interpersonal law" (or "interreligious law" when the laws in question are all religious). Most studies of this field in English, French, or German date from the first half of the twentieth century, mostly as a matter of colonial interest.[7] Both the lack of study and practice of interpersonal law in Europe since then may explain why this system of coexisting national family laws is exotic and little known to today's European jurist. We will see below that this had its effect on the Court's ruling.

To understand the relevance of all this to Greece, we need to go back to the nineteenth century, when Southeastern European peoples were fighting Ottoman rule and claiming independence, often resulting in the practice of ethnic and religious cleansing. While this was mostly done by means of armed conflict, Greece and Turkey decided to do so by mutual agreement with regard to the Muslim Turks residing in Greece and the Orthodox Greeks residing in Turkey. In 1923, Greece and Turkey agreed to swap these nationals: an estimated 1.5 million Greeks were forced

4 Maurits S. Berger, *The Legal System of Family Law in Syria*, 49 Bulletin d'études orientales 115 (1997).

5 Maurits S. Berger, *Public Policy and Islamic Law: The Modern* Dhimmi *in Contemporary Egyptian Family Law*, 8 Islamic L. & Soc'y 88 (2001).

6 Jayanth K. Krishnan & Marc Galanter, *Personal Law and Human Rights in India and Israel*, 34 Isr. L. Rev. 101 (2000).

7 There is no recent literature on this topic. In my own research I have made grateful use of authors like: Kessmat Elgeddawy, Relations entre systèmes confessionnels et laïque en droit international privé (1971); Klaus Wähler, Internationales Privatrecht und interreligiöses Kollisionsrecht (1981); G.W. Bartholomew, *Private Interpersonal Law*, 1 Int'l & Comp. L.Q. 325 (1952); Raoul Benattar, *Problème de droit international privé dans les pays de droit personnel*, Recueil des cours de l'Académie de droit international de La Haye 121 (1967); Pierre Gannagé, *La distinction des conflits internes et des conflits internationaux de lois*, *in* 1 Mélanges en l'honneur de Paul Roubier 228 (1961).

to move from Turkey to Greece, and an estimated half a million Turkish Muslims from Greece to Turkey.[8] Only a small community of Turks in the Greek province of Thrace and a small community of Greeks in Istanbul were not included in this population exchange. For them, Greece and Turkey concluded treaties in which they reciprocally guaranteed that these minorities could maintain their rights.[9] These rights were the typical religious minority rights of that time, which included the right to have religious family law applied.[10]

In the case of Greece, the jurisdiction of Islamic family, property, and inheritance law for the Muslim minority in Western Thrace was given to the *muftī*s, Islamic scholars who doubled as jurisconsults and judges, and whose rulings were recognized by the Greek state.[11] In Western Thrace, three Islamic courts (*muftiyet*) were established in the cities of Xanthi, Komotini, and Didymoteicho. In the century following these treaties, this arrangement in Western Thrace was a freeze frame of Ottoman times. The law and the judicial system in this region remained as it was, untouched by any changes. The most typical example of the fossilization of this arrangement is perhaps the fact that the rulings in the court of Komotini are still written in the old Ottoman language and script

8 Onur Yildirim, Diplomacy and Displacement: Reconsidering the Turco-Greek Exchange of Populations, 1922–1934, at 90, 106 (2006).

9 Treaty of Peace with Turkey Signed at Lausanne (Treaty of Lausanne), July 24, 1923, 18 L.N.T.S. 11 (1924), *reprinted in* 18 Am. J. Int'l L. 4 (Supp. 1924), *inter alia*, art. 45: "The rights conferred by the provisions of the present Section on the non-Moslem minorities of Turkey will be similarly conferred by Greece on the Moslem minority in her territory."

10 Treaty Concerning the Protection of Minorities in Greece (Treaty of Sèvres on Minorities), Aug. 10, 1920, 28 L.N.T.S. 243, *reprinted in* 15 Am. J. Intl'l L. 161 (Supp. 1921), *inter alia*, art. 14: "Greece agrees to take all necessary measures in relation to Moslems to enable questions of family law and personal status to be regulated in accordance with Moslem usage."

11 Treaty of Athens (1913), art. 11:

> The muftis, in addition to their authority over purely religious affairs and their supervision of the administration of vakouf [public] property, shall exercise jurisdiction between Muslims in matters of marriage, divorce, maintenance payments (néfaca), guardianship, trusteeship, emancipation of minors, Islamic wills, and succession to the position of Mutevelli. The judgments rendered by the muftis shall be executed by the proper Greek authorities.

that was officially abolished in Turkey in 1928 and has become a dead language ever since, except in this corner of Europe.[12]

This arrangement was exclusively for the Muslim minority in Western Thrace. No such status was created for Muslims in other parts of Greece, like the islands of Kos and Rhodes, hence the distinction in official terminology between "Muslim minority" (the name for the Muslims in Western Thrace) and "Muslim community" (the name for the Muslims on Kos and Rhodes).[13] The "Muslim community" has its own *imām*s, but no Islamic judges or schools as the "Muslim minority" in Western Thrace has. To complicate matters, these Muslims are together called "Old Muslims," as opposed to the "New Muslims" who have come to Greece as immigrants during the past decades. The New Muslims, with an estimated number of 200,000, are more numerous than the Old Muslims. Still, the special status under discussion here only applies to the estimated 130,000 "Muslim minority" in Thrace. And it is to this minority and their legal status that the *Molla Sali* case applies.

III. Dynamics of Greek Interpersonal Law

As of late, the position of the *muftī* and the application of Islamic family law in Western Thrace has become a matter of debate in Greek society. The *muftī* is questioned because of an alleged lack of procedural rule of law, and Islamic family law is criticized for its contravention of human rights standards, in particular the notion of gender equality.[14] However, the Greek Constitutional Court has consistently adhered to the notion of *pacta sunt servanda*, arguing that the state of Greece has committed itself by

12 Personal observation by the author in February 2018.

13 For a thorough study on this, see Konstantinos Tsitselikis, Old and New Islam in Greece: From Historical Minorities to Immigrant Newcomers (2012).

14 Yüksel Sezgin, *Muslim Family Laws in Israel and Greece: Can Non-Muslim Courts Bring About Legal Change in Shariʿa?*, 25 Islamic L. & Soc'y 235 (2018); Angeliki Ziaka, *Greece: Debates and Challenges*, *in* Applying Sharia in the West: Facts, Fears and the Future of Rules of Islam on Family Relations in the West (Maurits S. Berger ed., 2013).

treaty to this legal situation, and that this commitment cannot be altered unilaterally.[15]

Within the Muslim minority a more practical and pressing question had arisen, namely whether they are obliged to refer to the Islamic court for their family law matters, or if they are allowed to refer to the civil court. In other words, do they have a choice of *forum*? Since 1982, the Muslim minority members have had the option to choose between a religious (Islamic) or civil marriage.[16] But does this mean that all the legal consequences of that marriage are governed by that same law? Had a civil marriage been chosen, the answer would have been affirmative: according to the civil court in Xanthi (one of the three cities in Western Thrace), the spouses' choice for a civil marriage "implicitly indicates their desire not to be subject to the jurisdiction of the divine Muslim law, but to the civil law, like other Greek citizens."[17] A Muslim who had concluded his or her marriage in accordance with civil law was therefore assumed to have opted for civil law for all family law matters after that.

But did the same reasoning also apply to Muslims who had entered into a religious marriage? Had they in doing so "implicitly" opted for religious law? This was a controversial issue in the courts until the *Molla Sali* case. Here was a case of a couple who belonged to the Muslim minority of Western Thrace, who had married in accordance with Islamic law, but where the husband had bequeathed his entire estate to his wife in accordance with civil law.

The Thrace Court of Appeal ruled on September 28, 2011, that the husband was free to choose the type of will he wished to draw up, and therefore was not obliged to follow Islamic law. The Greek Court of Cassation, however, ruled on October 7, 2013, that the law applicable to the deceased's estate was the Islamic law of succession, based on the various international treaties that

15 Sezgin, *supra* note 14, at 262–63.

16 Law no. 1250 (1982).

17 Sezgin, *supra* note 14, at 259 (referring to Xanthi Court of First Instance, case no. 1623/2003).

stipulated thus. According to this court, Islamic law was, "pursuant to Article 28 § 1 of the Constitution, an integral part of Greek domestic law and prevailed over any other legal provision to the contrary."[18]

The case was then brought before the European Court of Human Rights in September 2017, but while still pending there, the Greek legislature moved quickly and introduced a law in January 2018 promulgating that:

> Inheritance matters relating to members of the Thrace Muslim minority shall be governed by the provisions of the Civil Code, unless the testator makes a notarised declaration of his or her last wishes...,explicitly stating his or her wish to make the succession subject to the rules of Islamic holy law.[19]

This settled the matter. A year later, the European Court of Human Rights came to the same conclusion based on the reasoning that denying such choice of forum, as the Greek Court of Cassation had done, would constitute a form of discrimination.

IV. The Ruling

The plaintiff, Molla Sali, had argued her case in terms of non-discrimination: because the Greek state requires the application of Islamic inheritance law, she was put in a more disadvantageous position than if she had been a widow to whom civil inheritance law is applied. She invoked the prohibition of discrimination as stipulated by Article 14 of the European Convention on Human Rights: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or

18 *Molla Sali*, *supra* note 1, ¶ 18.

19 Law no. 4511 (2018), art. 1, subsection 4(c), which came into force on Jan. 15, 2018.

other opinion, national or social origin, association with a national minority, property, birth or other status."

In order to ascertain whether discrimination had taken place, the European Court of Human Rights followed its standard methodology in such cases: a) is the person in question discriminated against, b) is that discrimination justified by a legitimate aim (keeping in mind a "margin of appreciation" for the defending state), and c) are the means pursued proportional to this aim?

To ascertain the discrimination, the Court made the comparison between the widow of a Muslim man (to whom Islamic family law applies) and the widow of a non-Muslim man (to whom civil law applies).[20] The difference was clear, the Court concluded, as according to Islamic inheritance law the Muslim wife would only inherit one-fourth of her husband's estate (the sisters of the deceased are entitled to the remaining three-fourths) while the non-Muslim woman according to Greek civil law would inherit all of it (as sisters of the deceased are not considered heirs). The application of "Sharia law," the Court explained, would deprive the Muslim widow of three-quarters of the inheritance,[21] and therefore "placed the applicant in a different position from that of a married female beneficiary of the will of a non-Muslim husband."[22]

The Court then continued with the question whether this difference was justified by a legitimate aim. The Court did not fully address this question as it curtly stated that "it is not necessary for the Court to adopt a firm view on this issue because in any event the impugned measure [i.e., the imposition of Islamic inheritance law] was in any event [*sic*] not proportionate to the aim."[23] In other words, the Court saw no need to define and evaluate the aim of the Greek state in imposing Islamic inheritance law as this subject of the Court's argument would be addressed in the last question on

20 The Court "needs to ascertain whether the applicant, a married woman who was a beneficiary of her Muslim husband's will, was in an analogous or relevantly similar situation to that of a married female beneficiary of a non-Muslim husband's will" (¶ 138 of the ruling).

21 *Molla Sali*, *supra* note 1, ¶ 145.

22 *Id.* ¶ 140.

23 *Id.* ¶ 143.

proportionality.

The Court was firm in its decision that the means used by the Greek state were not proportional to the aim, for two reasons. First, the application of Islamic law to the estate at issue "had serious consequences for the applicant, depriving her of three-quarters of the inheritance."[24] Second, Greece was wrong in assuming it was bound by the treaties: "The Court notes that there can be no doubt that in signing and ratifying the Treaties of Sèvres and Lausanne Greece undertook to respect the customs of the Muslim minority. However...those treaties do not require Greece to apply Sharia law."[25] Moreover, the Court argued that "the highest Greek courts disagree as to whether the Treaty of Athens is still in force."[26] The Court also concluded that "the Treaty of Lausanne does not explicitly mention the jurisdiction of the mufti...nor did the treaty confer any kind of jurisdiction on a special body in relation to such religious practices."[27]

From this, the Court concluded that the Muslim minority in Greece has the right of choice of family law:

> Refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts not only to discriminatory treatment but also to a breach of a right of cardinal importance in the field of protection of minorities, that is to say the right to free self-identification.[28]

The Court further argued that this freedom should allow the minority members the right to opt in to, as well as the right to opt out of, the family law that was in place specially for them.

V. Comments on the Ruling

24 *Id.* ¶ 145.
25 *Id.* ¶ 151.
26 *Id.* ¶ 44.
27 *Id.* ¶ 151.
28 *Id.* ¶ 157.

a. Prohibition of Discrimination

Molla Sali argued that an obligatory application of Islamic inheritance law constituted a form of discrimination, as it would put her in a legal position that would be less advantageous than under civil law. The Court, in following her in this argument, however, made a skewed comparison. Ascertaining the act of discrimination requires that it is done within the same environment: a woman gets paid less than the man for doing the same job; a homosexual is not allowed for the same function that a heterosexual is admitted for; a woman with a headscarf is not admitted in a restaurant that allows other women. In the case of *Molla Sali*, that same environment is inheritance law. However, in this particular case there are two entirely different systems at work within this environment: civil and Islamic inheritance law.

In civil inheritance law, there is an equal distribution of inheritance shares among all the heirs. Islamic inheritance law, on the other hand, has a complex two-tier system.[29] On the one hand, there is the equal distribution of inheritance shares among all the male heirs. This was the existing, pre-Islamic system. Islam introduced a second tier by allotting shares to those persons excluded from this system. They were mostly women, like the wife, daughter, or sister of the deceased. These heirs did not share with the other male heirs, however, but were given fixed fractions of the inheritance. These fractions differed per person (daughters had a higher fraction than the widow, for instance), but could also differ depending on the composition of the family (when there are many daughters, they need to divide their fraction among themselves and may individually have less than the widow). Moreover, these fixed fractions are specifically mentioned in the Qur'ān and consequently enjoy an untouchable status in Islamic law.

In the case of *Molla Sali* we are therefore confronted with the rather unique situation of an inheritance case involving only

29 Islamic inheritance law is very structured and mathematical, but extremely complex. See the seminal work by N.J. Coulson, Succession in the Muslim Family (1971).

female heirs who, consequently, are each entitled to a so-called "Qurʾānic fraction" (*farīd qurʾanīya*). In this case, Islamic law is specific in the legal fractions allotted to these women: one-fourth for the widow, and three-fourths for the sisters (to be divided among them).[30] It is this particular case that the Court used for its comparison with civil law. The Court held that the widow would be deprived of three-fourths of the inheritance if Islamic inheritance law were applied. She is therefore better off under civil law. That is true in this particular case. But would the Court have decided differently if the widow would have been better off under Islamic law? One can imagine a situation where the widow inherits *less* under civil law than under Islamic inheritance law.[31] One can also imagine a situation where the presence of other family members had left the widow with a *higher* share under Islamic law than she would have received under civil law.[32] In these cases, the logic of the Court would dictate that, as a matter of non-discrimination, Islamic law should be upheld, because that would be more beneficial to the widow than civil law. This brings an element of arbitrariness in the Court's reasoning, as the measuring stick for comparison applied here by the Court is—albeit unwittingly—not fair and equal treatment, but the best interests of the party in question, in this case the widow.

The Court's assessment of non-discrimination also overlooks another consequence: it denies the legal rights of other parties, in this case the sisters-in-law. The Court correctly states that by applying Islamic inheritance law the widow only receives one-fourth and is deprived of the remaining three-fourths of the inheritance

30 There are no English-language tables for these calculations. A website that is helpful (but should not be considered conclusive) is Islamic Inheritance Calculator, http://www.inheritancecalculator.net [https://perma.cc/TFY5-F3AQ].

31 For instance, in the situation that the husband, in accordance with civil law, had bequeathed most (or all, if permissible by law) of his estate to his children or a foundation, and the wife were left with a legal share that would be less than the legal one-fourth to which she would have been entitled if Islamic law were applied.

32 For instance, in the case of male heirs like sons and a father-in-law, the Qurʾānic share of the widow would then be reduced to one-eighth, but if she had more than six sons (or four sons and four daughters), this share would then be higher than what she would receive under civil law.

that she would otherwise receive under civil law. But the same argument applies *vice versa* to the sisters-in-law: if Islamic inheritance law is *not* applied, the two sisters are equally deprived of *their* intestate share under Islamic inheritance law, which is three-fourths of their brother's estate. Either way, one of the parties is deprived of part of the inheritance, and hence put in a position that may be considered discriminatory. One may, of course, argue that the wife and the sisters of the deceased do not enjoy the same status as heirs. But this is the position that most modern European inheritance laws might take. In Islamic family law, we have seen, both the wife and the sisters of the deceased are equally entitled to legally fixed fractions of the inheritance.

In short, by comparing the position of the widow in civil and Islamic inheritance law, the Court compared apples to oranges. Moreover, in doing so, the Court did not make an absolute assessment, but a relative one based on an incidental and particular situation. As a result, the Court had made a consideration not based on non-discrimination, but on the litigant's best interests.

b. Interpersonal Law

The Court's inconsistencies in comparing the two legal systems can possibly be explained by its unfamiliarity with the system of interpersonal law. In Greece, both civil family law and Islamic family law are considered Greek domestic law. We have seen that such a system is called interpersonal law, which allows for the coexistence of more laws that all deal with the same subject matter, but apply to different communities. In some countries with this legal system, one is bound by the law of one's ethnicity or religion; in other countries, one can also opt out of this community law by choosing the alternative of civil law. Regardless of which framework is chosen, the system of interpersonal law presumes equal status of all coexisting laws, however different they may be, and however one law may be considered discriminatory or otherwise wrong in the eyes of another law.

Greece has inherited the system of interpersonal law that prevailed in the Ottoman Empire, and which was based on the Islam-

ic perspective on freedom of religion: religious communities have the freedom to live in accordance to the rules of their religion, and these include the rules of family life.[33] This explains the indignation of the Syrian lawyer when she learned that most European countries do not allow for such legal plurality. She failed to understand the radically different perspective of the European legal systems where the notion of equality prevails. This equality demands a mono-legal approach: that is, a single law that applies to all. Comparing these two systems is therefore like looking in the mirror: where one system focuses on equality and hence tends to eradicate differences, the other system embraces the differences and hence avoids making comparisons. By using the principle of non-discrimination, the Court has applied a mono-legal approach to a plural-legal system.

The Court is aware of the existence of an interpersonal law system in the Greek case. In the words of the Court, a state "may feel required as a matter of freedom of religion to create a particular legal framework in order to grant religious communities a special status entailing specific privileges."[34] However, the Court continues, in such a case the state must ensure "that the criteria established for a group's entitlement to it are applied in a non-discriminatory manner."[35] Here, the Court is not entirely clear what it means by "criteria." Are they the criteria under which *the system operates*? If so, then non-discrimination would mean that individuals have the freedom to make use of such laws or not. The Court is quite adamant that such choice of law should exist.[36] However, as we have seen above, the Court also seems to base the non-discriminatory criteria on the *comparative outcome* of various laws within that system.

Regardless of what non-discrimination principle or criteria the Court refers to, it is of little use in the context of an inter-

33 Maurits S. Berger, *Secularizing Interreligious Law in Egypt*, 12 Islamic L. & Soc'y 394 (2005) (with reference to primary Islamic law sources). *See generally* Antoine Fattal, Le statut légal des non-musulmans en pays d'Islam (1958); Wähler, *supra* note 7.

34 *Molla Sali*, *supra* note 1, ¶ 155.

35 *Id.*

36 *Id.* ¶ 157.

personal system, because the *raison d'être* of such a system is the coexistence of various family laws that are by definition different from each other and hence mutually discriminatory. Assessing any possible discrimination within the Greek legal system of interpersonal law, as the Court does, will therefore by default lead to ascertaining such discrimination.

c. Human Rights and Islamic Law

In its ruling, the Court has in several instances indicated that "Sharia law" is discriminatory *within the community* to which it applies.[37] In the case of family law, that is a correct observation: Islamic family and inheritance law discriminates on the basis of gender and religion. To name just a few examples: men and women have different marital rights and duties; women have fewer, if any, rights to divorce; non-Muslim men are not allowed to marry Muslim women; Muslims and non-Muslims cannot inherit from each other. But this being true, it has no relevance for the case at hand. The discrimination to which the widow referred was not based on gender or religion (both parties involved are female and Muslim).

Nonetheless, even though this discussion is not pertinent to the case at hand, it plays an important role in the background of it, because the discriminatory nature of several rules of Islamic family and inheritance law poses a problem for Greece because it considers these rules domestic law. Greece is a signatory to the 1950 European Convention on Human Rights, and the cohabitation of opposing legal systems poses a challenge to Greece's obligations under the Convention, to put it mildly.

Among the signatories to the European Convention on Human Rights, it would be inconceivable to apply laws with a discriminatory character. But that is exactly the case with the application of Islamic family law in the Greek province of Western Thrace. For that reason, it is confusing that the Court discusses the

37 *See, e.g.*, *id.* ¶¶ 145, 153, 154, and 158.

Greek case together with "the application of Sharia law in England and Wales."[38] Confusing, because there Islamic law is not applied as a matter of state law, as is the case in Greece. In England and Wales, as in many other European countries, rules of Islamic family law are applied on a voluntary basis among Muslims, just as Catholics, Protestants, and Jews are doing with their own religious family laws.[39] Such application has no standing in the court of law of the relevant country. All citizens enjoy the same protection of the national law, which is governed by human rights values. However, under that rule of law they are free to apply any religious rule of their choosing, even in instances where such a rule would contravene human rights. The gender differences in marital duties and divorce rights, for instance, are typical of most religious family laws. People are allowed to live in accordance with these discriminatory regulations, and many orthodox communities do so, although in several Western European countries there is increasing political and judicial pressure to contain the excesses thereof in Muslim communities.[40]

The Greek situation is different, however, as Islamic family law there is not a community practice but domestic law, which makes the case of Greece unique in Europe. It is understandable, therefore, that much discussion is going on with respect to this particular situation regarding how to reconcile the existence of a law that is discriminatory among its believers with the existence of human rights that apply to all citizens. Two solutions seem to present themselves. The first is to modify the religious law in such a way that it conforms to the basic tenets of human rights. In the

38 *Id.* ¶ 83.

39 Compared to the literature on Islamic law in Europe, the practice and legal status of other religious courts and laws in Europe are little studied. For a general overview, see Norman Doe, Law and Religion in Europe: A Comparative Introduction (2011), especially ch. 4, *The Legal Position of Religious Organizations*.

40 The most consistent and persistent in this regard is the British government. Mona Siddiqui et al., *The Independent Review into the Application of Sharia Law in England and Wales*, UK Parliament (Feb. 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPFG_Report_into_Sharia_Law_in_the_UK_WEB.pdf [https://perma.cc/UL2U-4T6S].

Muslim world, this is a well-known discussion with proponents suggesting that such conciliation is possible while others argue the contrary.[41] Such discussions are hardly taking place in Greece at the moment.[42]

The second solution is to make this religious law optional, which seems to be the road taken by the Greek legislature and the Court. But even then, the case in the Canadian province of Ontario in 2004 and the ongoing discussions in England show that the freedom to choose does not always mean that this option is freely enjoyed: peer pressure and social coercion within the communities often prove stronger than the individual strength to choose for one's own good.[43]

d. The Term "Sharia Law"

A comment is needed about the Court's use of the term "Sharia law" when it discusses the Greek case. Elsewhere I have discussed the disadvantages of this term.[44] First, because for many it alludes to violent and oppressive practices by the likes of Boko Haram, ISIS, or the Taliban while *sharīʿa* also refers to less controversial legal rules like contract, ownership, use of land and water,

41 There is ample literature on this. Examples are Jasser Auda, Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach (2007); Abdullahi Ahmed An-Na'im, Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law (1990); Amina Wadud, Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective (1999); Khaled Abou El Fadl, *The Human Rights Commitment in Modern Islam*, *in* Human Rights and Responsibilities in the World Religions (Joseph Runzo, Nancy M. Martin & Arvind Sharma eds., 2003); *CEDAW and Muslim Family Laws: In Search of Common Ground*, Musawah 26 (2011), http://www.musawah.org/wp-content/uploads/2018/11/CEDAW-MuslimFamilyLaws_En.pdf [https://perma.cc/7UAT-4JVM].

42 Although I know from personal conversations with Greek jurists and government officials that such thinking is taking place on an informal level.

43 For Ontario, see the report by the Attorney General and the Minister Responsible for Women's Issues, Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, Ministry of the Attorney General (Dec. 2004), https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html [https://perma.cc/89XF-33T8]. For England and Wales, see Siddiqui et al., *supra* note 40, at 3, 12, 21.

44 Maurits S. Berger, *Understanding Sharia in the West*, 6 J.L. Religion & St. 236 (2018).

and religious rituals. Second, it is an umbrella term that refers to both practices in the current era as well as classical legal scholarship from centuries ago. Third, the term is often used by opposing factions: both the Muslim democrats and the anti-democrats base their arguments on *sharīʿa*, just like those with conservative and oppressive visions of the role of women and those who are staunch feminists. Finally, the term encompasses many domains of rules, ranging from civil law to penal law, from finance to social conduct, from religious rituals to the conduct of the state. In other words, the term "Sharia law" has little meaning if it is not qualified. And that is precisely what the Court neglects to do.

This is not the first time that the Court omits juridical precision in Islamic law cases when it is needed. In the case law of the Court, the term "Sharia law" even obtained a more pejorative meaning when in 2003 the Court ruled that "sharia clearly diverges from [the European] Convention [on Human Rights] values."[45] Given the fact that *sharīʿa* has so many meanings and interpretations, this seems quite careless of the Court. Indeed, if we realize that *sharīʿa* also includes rules pertaining to prayer, fasting, marriage, and burial, it seems unlikely that the Court considered these contrary to European human rights values.[46]

It would have done the Court credit if it had been more precise in its choice of words. In the case of *Molla Sali*, wording like "Islamic family law" or "the Islamic inheritance law applicable in Western Thrace" would have been much more specific than the generic term "Sharia law."

e. Choice of Law

45 Refah v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98, and 41344/98, Eur. Ct. H.R. (2003), http://hudoc.echr.coe.int/eng?i=001-60936 [https://perma.cc/AYW7-82JP].

46 I argued this in my article (in Dutch), *Tien jaar later: kritische beschouwingen bij de visie van het Europees Hof op de sharia*, 3 Tijdschrift voor Religie, Recht en Beleid 69 (2013); I summarized it in English in Berger, *supra* note 44, at 237.

The legal detours, terminology, and arguments of the Court, as discussed above, are puzzling when we come to the end of the ruling where the Court in a very clear and lucid manner makes its case for a choice of law in an interpersonal legal system. The Court argues that the treaties, to which the Greek Court of Cassation holds itself bound, are misinterpreted as there is no requirement by the Greek state to apply "Sharia law." The Court rejects the Greek Court of Cassation's argument that it is treaty-bound to have this law applied to the Muslim minority in Western Thrace.

I am not in a position to assess these arguments as they pertain to the field of international law, in which I hold no expertise. However, assuming this argument is correct, then its logical consequence is that Greek citizens should have the freedom to opt for one of the applicable laws. This is also the Court's conclusion. The Court further argues that this freedom should allow the minority members the right to opt in as well as the right to opt out. In other words, they must have the freedom to equally choose for the application of Islamic family or inheritance law, as they may choose for non-applicability.[47]

This statement is legally clear and precise, and actually makes all the Court's earlier deliberations redundant.

Conclusion

In this case, the European Court of Human Rights overturned the standard case law of the Greek Court of Cassation that Islamic family and inheritance law was obligatory for Muslims in Western Thrace who had opted for an Islamic marriage: such an obligation does not exist, the European Court held, because as long as a domestic law recognizes more than one family law, people should have the right of choice. The Court based this right of choice on the principle of non-discrimination.

47 *Id.* For a similar argument, see Dominic McGoldrick, *Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws*, 9 Hum. Rts. L. Rev. 603 (2009).

This ruling is not so significant, as Greek case law was already moving in this direction, and the Greek legislature had put it into law shortly before the ruling was issued. What may be considered significant, however, is that the case involved two legal features that are relatively unknown among European jurists: interpersonal law and Islamic law. These are two systems of law with their own internal logic and coherence. Within the systems of European civil and common law, particularly in the framework of human rights, the ruling gave a glimpse of the resulting clash of legal cultures.

Two points can be highlighted in this respect. The first is that the Court's application of the non-discrimination principle was not as consequential as it could have been. This had to do with the unique nature of the legal system of interpersonal law at hand, in which the coexisting family laws are by default mutually discriminatory. Ascertaining the possible discrimination of the applicant by comparing her position as a Muslim widow with that of a non-Muslim widow was therefore not a neutral comparison because the outcome would by definition be different, and hence discriminatory.

Another significant feature of this ruling is that it has to do with Islamic law, specifically Islamic family and inheritance law, which is considered domestic law in Greece. This law contains discriminatory rules on the basis of gender and religion, and as such is controversial in the context of human rights. However, in this particular case, these discriminatory rules were *not* relevant as both opposing parties were female and Muslim, and the main legal question at hand was that of choice of law. By still referring now and again to the discriminatory nature of Islamic family law (and thereby consistently using the ominous term "Sharia law"), the Court showed its lack of insight into and comprehension of this particular law.