religions

MDPI

Article

Is There a Right to Choose a Religious Jurisdiction over the Civil Courts? The Application of Sharia Law in the Minority in Western Thrace, Greece

Eleni Kalampakou

Independent Author, 11633 Athens, Greece; ekalampa@gmail.com

Received: 1 April 2019; Accepted: 8 April 2019; Published: 10 April 2019

Abstract: The minority in Western Thrace, Greece, has long enjoyed a special status where family and inheritance matters were subject to Sharia law and religious jurisdiction (Mufti). After judicial controversy for many years over the compulsory character of this "minority privilege", the matter has been brought before the European Court of Human Rights (ECtHR). In view of the hearing of the case of Molla Sali v. Greece before the Grand Chamber, the Greek Parliament voted for the possibility for the members of this minority to choose either religious or civil law and jurisdiction—a right for them to exit the minority community. Although a step forward, this right raises a serious challenge to the rule of equality before the law and the right to a fair trial. Therefore, the paper seeks its possible legal foundations in the international obligations of the Greek state to protect religious freedom and the minority community and stresses the need to be accompanied by the "right to voice", meaning a true reform of the procedure before the Mufti and an effective constitutionality control of his decisions.

Keywords: legal pluralism; Sharia law; Western Thrace; religious exemptions; minority; religious equality; non-discrimination

1. Introduction

The Muslim community in Western Thrace (north-eastern Greece, at the borders with Turkey) is a minority protected by the Treaty of Lausanne[1]. Greek national law defines it as religious and provides for the implementation of Sharia law in family and inheritance matters. Thus, for the past century, the local Muftis have been deciding on marriage, divorce, maintenance, guardianship, custody, and succession cases; however, in order for their decisions to have legal standing, they should go through a civil court's validation, examined in terms of jurisdiction and constitutionality.[2] Although many of these decisions have been problematic with regard to gender equality, child protection, and the right to a fair trial, they have been almost all recognized by the competent courts as legally binding.[3]

The injustices caused in law and in practice drove members of the minority to present these cases before the civil courts and not the Mufti. Civil courts either ruled that they had exclusive jurisdiction to decide on all civil cases of members of the minority or decided that these citizens have a right to choose

[1] In the Treaty of Lausanne of 24 July 1923, Greece and Turkey agreed to a compulsory exchange of Greek and Turkish populations. The Treaty expressly excluded the "Moslem inhabitants of Western Thrace" and the "Greek inhabitants of Constantinople" from this population transfer. The Greek State recognises the existence of only one minority on Greek territory, namely, the "Muslim" minority of Western Thrace.

[2] Art. 5, 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. A Mufti 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.

[3] This is mentioned also in the case of Molla Sali v. Greece [GC], (no. 20452/14) 19/12/2018, para. 48.

between the civil courts and the Mufti—between the Civil code and Sharia.[4] For instance, in a case concerning the custody of minor children after a divorce of Muslim spouses, a first instance tribunal concluded that "*it is not possible for one to assert that the deprivation of rights or the unequal treatment of Greek Muslim women is a special provision that is justified by special circumstances or is imposed by reasons of general social or public interest, superior to their basic human rights, the equality before the law and the equality of sexes in a state of rule of law*".[5] In another case, the same tribunal ruled that the freedom of religion and the equality principle provide to all Greek citizens the right to choose their type of marriage, and since the spouses had chosen the civil and not the religious type of wedding, "*the state should safeguard to the Greek Muslim the law he/she wants to be subjected*"[6]. However, the Greek Court of Cassation has been continuously judging that the jurisdiction of the Mufti is compulsory and exclusive for these Muslim Greek citizens, as a protective privilege, and that the application of Sharia could not be a matter for them to choose.[7]

The issue was brought before the European Court of Human Rights (ECtHR) with the case of Molla Sali v. Greece[8]. In view of the hearing at the Grand Chamber, the Greek Parliament voted for an amendment of the existing law; from now on, all personal and inheritance cases of the members of the minority will be in principle regulated by the Civil code and adjudicated by the civil courts. Only if both parties agree can they subject their family disputes to the jurisdiction of the Mufti. Likewise, if he/she wishes, a Muslim can draw up before a notary a declaration to subject his/her succession under Sharia law. Lastly, the new law authorizes for the issuance of a presidential decree which will reform the procedure before the Mufti in accordance with the Code of Civil Procedure.[9]

Presenting this reform at the hearing before the ECtHR, the Greek government made clear that the Treaty of Athens[10] is not legally valid and the Treaty of Lausanne does not impose any legal obligation to Greece to apply Sharia law; instead, it enables and allows Greece to apply this religious law in a manner that the legislator deems most appropriate and consistent with the country's other international obligations and, of course, its obligations under the European Court of Human Rights (ECHR). Thus, in view of the change of customs in the minority, the government introduces the new law within its margin of appreciation to strengthen the rights of the members of the minority, especially those of women and children.[11]

In this new setting, the right to exit the minority equals a right to exit the civil law; thus, this paper discusses whether this challenge to legal equality could be based on the prohibition of religious discrimination or the protection of minority rights.

2. The Right to "Exit" the Minority's Legal Order

The status of this minority has been, and still is, a case of legal pluralism. The recognition of a sacred law and of a religious jurisdiction consists of a right to external protection of the minority, a special group right the minority enjoys, such as education in the minority language and special community property status. These rights protect the way of living of the minority from direct or

---

4 Judgment no 9/2008 First Instance Court of Rhodes, no 102/2012 & no 1263/2003 First Instance Court of Xanthi, no 405/2000 First Instance Court of Thebes, no 642/2009 Court of Appeals of Thrace.

5 First Instance Court of Xanthi, no 102/2012.

6 First Instance Court of Xanthi, no 1623/2003. See the case law in para. 48–55, Molla Sali v. Greece.

7 Supreme Court, Judgments no 1041/2000, 1097/2007, 2113/2009, 1497/2013, 1862/2013, 2138/2013.

8 ECtHR, Molla Sali v. Greece [GC], (no. 20452/14) 19/12/2018.

9 Law no 4511/2018, Official Gazette of the Hellenic Republic, 15 January 2018 Issue A', "*Amendment of Article 5 of Legislative Act of 24 December 1990 "On Muslim Clerics"* (A' 182) ratified by the sole Article of Law 1920/1991 (A' 11), available at https://www.minedu.gov.gr/publications/docs2018/Law_4511_2018_Reform_on_Mufti_jurisdiction_Sharia_law.pdf. If either party does not wish for the case to be subject to the jurisdiction of the Mufti, he or she may apply to civil courts, pursuant to ordinary substantive and procedural provisions, which in any case have the presumption of jurisdiction.

10 The Treaty of Athens was signed between the Ottoman Empire and the Kingdom of Greece on 14 November 1913. For the government's written arguments see Molla Sali v. Greece, para. 113.

11 Grand Chamber hearing—06/12/2017, available at: https://www.echr.coe.int/.

indirect state intervention in a context of a multicultural policy stemming back to the millet system of the Ottoman Empire (Tsitselikis 2012). However, if a multicultural policy wishes to respect the rights of the members of the minority, group rights should not be transformed into internal restrictions for those who wish to differentiate from the minority's rules and practices (Kymlicka 2002). Group rights can easily be used by the most powerful within the community to impose conservative interpretations of its rules and to suppress those who oppose. Every minority is a complex net of power relations with the majority and within the group itself (Christopoulos 2000), while any group minority identity will be primarily defined by these power relations (Narayan 1998). For these reasons, a liberal multicultural protection policy can only target the "external" protection of the minority autonomy and not allow the imposition of internal restrictions (Kymlicka 1995). Otherwise, every member of the minority has a duty to his/her community to be "protected", to preserve a certain way of life, even against his or her will (Barry 2001).

In the case of Molla Sali, the Government argued that the application of Sharia law was based on the Lausanne Treaty; thus, the treatment described was justified because Greece sought to protect the Muslim minority. The ECtHR ruled that this Treaty does not provide for any application of religious law nor refer to any certain Mufti jurisdiction and decided that the described difference in treatment was not justified. The Court reiterated that "*according to its case-law, freedom of religion does not require the Contracting States to create a particular legal framework in order to grant religious communities a special status entailing specific privileges. Nevertheless, a State which has created such a status must ensure that the criteria established for a group's entitlement to it are applied in a non-discriminatory manner"* (para. 155). Otherwise, the Court continued, "*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*" (para. 157).

According to the new Greek legislation, members of the minority are, in principle, subjected to the Civil code, and they exceptionally may choose religious law and jurisdiction. Hence, Muslim Greeks in W. Thrace are seen firstly as citizens and then as adherents of a religion, and only if they choose so. In this regard, during deliberations in the Greek parliament, the new law was presented as introducing a right to exit the minority—a first step to a multicultural society that combines respect for the identity of minorities and for universal human rights.

However, along with a right to exit from a closed religious order, the law provides for an exit from the general law of the Civil code, in other words, for a religious exemption. The ECtHR ruled that neither does the Lausanne Treaty provide for such an exemption nor does the freedom of religion require from the states to introduce a particular legal framework for religious communities. In other words, there is no obligation stemming from freedom of religion or the Lausanne Treaty for the application of Sharia and the existence of a special religious jurisdiction. Therefore, this important judgment recognizes the right of the members of a religious minority to opt out from the minority's legal order and voluntarily choose civil law; but, at the same time, the Court allows the national legislator to introduce a serious religious exemption—a right for the members of the minority to opt out from the provisions of the civil law and the jurisdiction of the civil courts.

The question, though, remains whether this exemption, as a choice of the individual, could be justified in terms of non-discrimination on religious grounds.

3. The Right to Choose Sharia Law to Ensure "Real Equality" for the Minority

A possible non-discrimination argument could be formulated like this: Muslims in W. Thrace are in a different situation compared to the rest of the Greek population because their religion adopts Sharia law, which provides differently from the Civil code in matters of marriage, divorce, maintenance, custody, guardianship, and succession. For example, according to the rules applied, the custody of

children after a certain age is with their father[12], while in succession, male heirs have double the share in the estate as compared with female heirs.[13] This difference between their religious rules and the civil law creates a burden in the exercise of their religious freedom when compared to the members of the majority religious community or other religious communities, whose rules do not oppose civil law. Thus, if the general civil law applies mandatorily to their family and inheritance cases, they will be indirectly discriminated because of their religion. In order to release them from this burden, to avoid indirect religious discrimination and ensure equality in fact (not only legal equality), the state should recognize their right to choose Sharia or civil law for these cases.

However, the state would be obliged to introduce a religious exemption only if there was not an objective and reasonable justification for the general application of the Civil code. As the ECtHR has declared in other cases "*...the right not to be discriminated against . . . is violated . . . also when States, without an objective and reasonable justification, fail to treat differently persons whose situations are different.*"[14] In the judgment of the Molla Sali case, the Court reiterated that differential treatment is justified when it demonstrates a "legitimate aim" or there is a "reasonable relationship of proportionality" between the means used and the aim pursued (para. 135).

Undoubtedly, in the case at hand, the objective and reasonable justification of not allowing such a religious exemption would be the respect of the principle of legal equality, a central pillar in any modern democracy, where the hierarchy between the identity of a citizen and any other cultural identity is undisputable. This is the reason the ECtHR has been completely negative in recognizing religious legal autonomy in the case of Refah Party v. Turkey: "*(...) a plurality of legal systems would (. . .) categorise everyone according to his religious beliefs and (. . .) allow him rights and freedoms not as an individual but according to his allegiance to a religious movement (. . . .) so, the prohibition of a political party that wishes to introduce such a system, does not violate the principle of non-discrimination on religious grounds*".[15] Hence, since a religious discrimination argument cannot be put forward, the next prominent legal basis for the possibility of the members of the minority to choose religious law and jurisdiction would be the international obligations of the Greek state to respect the rights of the Muslim community in W. Thrace as a recognized minority.

Indeed, the Treaty of Lausanne provides (art. 42) for government measures that will permit *the settlement of questions of family or personal status in accordance with the customs of the minority*. At the same time, the Treaty establishes that the members of the minority will *enjoy equality before the law and the same civil and political rights as the general population, without discrimination.* This approach of respect for the community's customs combined with equality before the law, prominent in legal documents from the League of Nations period of international law, was clarified in a decision by the Permanent Court of International Justice on the Greek minority schools in Albania, in 1935. The Court used the term "real equality" to describe the basic principles for the protection of minorities. According to its reasoning, real equality is a notion peculiar to the relations between the majority and minority, the characteristic feature of which is equality in fact. Equality in fact supplements equality in law and may involve the necessity of different treatment in order to attain a result which re-establishes an equilibrium between different situations. Real equality thus means (a) identical treatment in law and in fact between nationals belonging to the minority and other nationals and (b) suitable means available to the minority for the preservation of the racial peculiarities, traditions, and characteristics.[16]

The spirit of this judgement is still present today, even under the individual human rights system of the United Nations. Apart from the human right not to be discriminated against, in law and in fact, directly or indirectly, the International Covenant on Civil and Political Rights (ICCPR) (art. 27)

---

[12] See decision no 102/2012, First Instance Court of Xanthi.
[13] Molla Sali v. Greece, para. 36.
[14] Bayatyan v. Armenia (GC) (no. 23459/03), 7/7/2011, para. 126.
[15] ECtHR, Refah Partisi (The Welfare Party) and others v. Turkey (GC) (no 41340-41344/98) 13/2/2003, para. 70 & 119.
[16] Minority Schools in Albania, Advisory Opinion, 6/4/1935 P.C.I.J. (ser. A/B) No. 64, para. 48–52, 61–68.

establishes that "*persons belonging to minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*". According to the Human Rights Committee, this right is distinct from and additional to all the other rights which the members of minorities have as individuals in common with everyone else, while it is also different from the prohibition of discrimination. Thus, according to the Committee, positive measures "*may also be necessary to protect the identity of a minority and the rights of its members (. . .) These positive measures must respect the prohibition of discrimination between minority members and the rest of the population, but, as long as they aim at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria*".[17]

Further, the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes (art. 15) "*the right to participate in the cultural life*" and the *Committee of the Covenant* commented that *this right is recognized both to minorities as communities and their members and provides the obligation of states to recognise, respect and protect minority civilizations as an essential part of their identity as states*". The Committee also clarified that one component of this right (15a) "*covers in particular the right of everyone (...) to choose his or her own identity, to identify or not with one or several communities or to change that choice* (. . .)".[18]

Consequently, there is an obligation of the Greek state to take positive measures to protect the identity of the minority and the right of its members to practice their religion in community with others and to choose their identity. However, there is also an obligation to respect equality in law. In this respect, the possibility for members of the minority to choose Sharia law could be recognized by the state not because there is a corresponding obligation stemming from international human rights provisions but as a positive measure within the margin of appreciation of the state to protect the rights of the members of the minority and the minority itself as a community.

4. The Religious Jurisdiction under the Guarantee of the Right to a Fair Trial

Hence, the recognition of a religious law and a religious jurisdiction can be regarded as a form of "external protection" of the minority and its members from assimilation. However, the protection of the minority community cannot result in an infringement of other fundamental rights of its members. The UN General Assembly has clarified that (art. 3 para. 2) "*No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration*" and that (art. 8) " . . . *2. The exercise of these rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms*".[19] Thus, respect for minority autonomy and minority rights goes hand in hand with respect for universally recognized human rights and fundamental freedoms, which are, in the end, a safety net for the members of all cultural communities and minorities.

In the case of Western Thrace, the first right that may be in jeopardy is the right to a fair trial. The Human Rights Committee, in General Comment no. 32 for the interpretation of art. 14 of the Covenant on Civil and Political Rights—the respondent of art. 6 ECHR—explains that this right is also relevant where a State recognizes religious courts; however, certain guarantees should be safeguarded, such as by validation of the decisions by State courts and their challenge in a procedure that meets the requirements of the ICCPR[20].

---

[17] Office of the High Commissioner for Human Rights, General Comment No 23: The Rights of Minorities (Art. 27), CCPR/C/21/Rev.1/Add.5 (8/4/1994), para. 4, 5.1, 5.2, 6.1, 6.2, 9.

[18] Committee on Economic, Social and Cultural Rights, General Comment No 21, Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 21/12/2009, para. 11, 12, 23, 32.

[19] UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3 February 1992, A/RES/47/135.

[20] UN Human Rights Committee (HRC), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32.

The question is whether the Mufti and the quasi-judicial process before him meet the requirements of a tribunal or comply with the right to a fair trial. Regarding the present situation, the Commissioner for Human Rights of the Council of Europe has stated that he is "*favorably positioned towards the withdrawal of the judicial competence from Muftis, given the serious issues of incompatibility of this practice with international and European human rights standards*". In fact, he urged the Greek authorities to ensure an effective review and control by domestic civil courts of the judicial decisions which are rendered by Muftis.[21] The judgement of the ECtHR on the Molla Sali case referred to the above report as well as to other relevant reports by international human rights bodies (para. 70–77) but did not consider the case under the right to a fair trial, as it is enshrined in art. 6 ECHR. The Court noted that divergent case law in the national legal order regarding the application of sharia law and its compatibility with the equality principle and international human rights standards has created legal uncertainty that conflicted with the rule of law (para. 153). However, thee Court did not proceed further to examine this legal uncertainty under art. 6., as it had done in another case[22]. Hence, by choosing not to examine the case under the right to a fair trial, the ECtHR did not deal with the concrete problems the procedure before the Mufti entails, as well as the lack of any constitutionality control of his decisions (Tsitselikis 2012, pp. 405–6).

Nonetheless, a "right" to choose Sharia law and religious courts will be compatible with the right to a fair trial only if the procedures before the religious judge are reformulated in a context of legal certainty—indeed, in accordance with the Civil code procedure, such as if the religious judge is a person of high knowledge of Sharia law as well as the civil law and if his decisions will indeed be controlled effectively by the competent courts in terms of their compatibility with the Greek Constitution and human rights Treaties.

These procedural—still awaited—changes will guarantee to the members of the minority, and especially the most vulnerable among them, that they will be heard. It will give them the right "to a voice" (Phillips 2009) before the religious court, to present their legal arguments, their interests, and to claim the compatibility of any decision with the Greek Constitution and the ECHR. This right is equally significant with the "right to exit", as it permits the members of the minority themselves to doubt existing traditions, moeurs, and religious authorities; to open a discussion on the current interpretation of religious rules; and eventually to claim changes significant for the protection of the minority itself as a community open to evolution.

5. Conclusions

The case of Molla Sali v. Greece has brought a significant change in the lives of many Greek citizens—members of the minority in W. Thrace—ending a state of discrimination and legal uncertainty that international mechanisms for the protection of human rights, lower national courts, and many academics and non-governmental organizations had condemned as unacceptable for the European legal order. Reflecting the theories of liberal multiculturalism that promote cultural plurality but forbid internal restrictions to the exercise of universal human rights, the ECtHR recognized the right to exit a minority legal order and opt for general law as a right linked to free self-identification and "completely free provided it is informed" (para. 157).

The positive aspect of this right, though—the right to choose a minority legal order instead of the general law—is limited according to the Court, in the sense that "no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice" (para. 67–68,

---

[21] Report by Mr Thomas Hammaberg, Commissioner for Human Rights of the Council of Europe, following his visit to Greece on 8–10 December 2008 (CommDH(2009)9, 19/2/2009, Issue reviewed: human rights of minorities, p. 14, Council of Europe: Parliamentary Assembly, Freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (Eastern Greece), 21 April 2009, Doc. 11860, para. 55 "99% of the muftis' decisions are ratified by the Greek courts, even where they infringe women's and children's rights as laid down in the Constitution or the ECHR".

[22] ECtHR, Okyay and others v. Turkey, (no. 36220/97), 12 July 2005, § 73.

referring to art. 3 of the Framework Convention for the Protection of National Minorities). However, by not examining the case under art. 6 ECHR, the Court avoids seeing the existing disadvantages of the exercise of the right to choose Sharia law, meaning the many drawbacks in the procedure before the Muftis and the low quality of their decisions. In this way, the European judges miss the unique chance to set concrete standards for the exercise of a right to choose a religious legal order in matters of civil law. Although they rightly avoid repeating the judgment in the Refah Party case, where they condemned religious legal pluralism in an absolute manner, they now fail to take the opportunity and set the necessary fair trial guarantees. However, individual choice, especially when it concerns the application of a minority's religious law and jurisdiction, cannot excuse or "legitimize" discrepancies and drawbacks. Instead, it is the state who has the responsibility to protect all its citizens irrespective of any aspect of their minority or religious identity and ensure that they indeed enjoy their fundamental human rights, such as the right to a fair trial. This is the reason why the awaited presidential decree which sets such procedural rules is absolutely necessary for the implementation of the new national law that recognizes the right to choose Sharia.

Funding: This research received no external funding.

Acknowledgments: The author wishes to thank Stergios Mitas and Costas Stratilatis, professors at Law School, Nicosia University, Cyprus, for their support and fruitful discussions.

Conflicts of Interest: The author declares no conflict of interest.

References

Barry, Brian. 2001. *Culture and Equality, an Egalitarian Critique of Multiculturalism*. Cambridge: Polity Press, pp. 112–13.

Christopoulos, Dimitris. 2000. *Droit, Europe et Minorités. Critique de la science juridique européenne*. Athens: Sakkoulas Ant, pp. 241–74.

Kymlicka, Will. 1995. *Multicultural Citizenship*. Oxford: Oxford University Press, pp. 37, 152.

Kymlicka, Will. 2002. *Contemporary Political Philosophy: An Introduction*. Oxford: Oxford University Press.

Narayan, Uma. 1998. Essence of culture and a sense of history: A feminist critique of cultural essentialism. *Hypatia* 13: 86–106. [CrossRef]

Phillips, Anne. 2009. *Multiculturalism without Culture*. Princeton: Princeton University Press, pp. 154–57.

Tsitselikis, Konstantinos. 2012. *Old and New Islam in Greece, From Historical Minorities to Immigrant Newcomers*. Leiden and Boston: Martinus Nijhoff.