ARTICLE TITLE: SHARIA COURTS IN GREECE

Konstantinos Tsitselikis
Professor, Uni. of Macedonia, Greece

2019

1. Introduction

The Balkans, a region where Christianity and Islam have come into close contact since the 14th century, is an interesting study in legal pluralism. The Ottoman millet system, under which distinct ethnic-religious communities - including Muslims - were granted partial institutional autonomy within the Empire, was, by the late 19th century, a convenient legal paradigm to accommodate (Muslim) minorities within the new nation (Christian) states. Greece retained a legal regime that to some extent grants legal autonomy to the Greek Muslim population that survived a population exchange with Turkey at the end of the Greek-Turkish war of 1919-1922. The Lausanne Treaty granted the Muslim population of (Western) Thrace in Greece a special minority protection regime that applies sharia law to Muslim Greek citizens residing in that region of Thrace. However, sharia law is only applied by the local Muftis who have special jurisdiction over these matters, in certain disputes relating to family and inheritance law.

Permitting the application of sharia law within a "Western" legal order, not to immigrants but to a specific group of citizens, certainly represents a peculiar situation in which legal pluralism has been partially maintained in Greece in relation to Muslim Greek citizens since 1881. The case of the Islamic courts in Thrace opens the field for discussion and concerns with regard to the compliance of sharia law with international human rights law[1] and the eventual reform of sharia law and courts. This issue will be discussed hereinafter. First, the sharia courts and the Muftis, their jurisdiction and selection process will be presented.

1. Such as the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

2. The genealogy of the Sharia courts

As mentioned above, the legal and social structures of Greece's Muslim communities have continuously had a strong communal profile. After the annexation of Thessalia (1881) and the Balkan Wars (1912-13), community organizational structures, community schools and foundations (waqfs), as well as religious hierarchies (Muftis) were integrated into a modern legal system.[2] In the Greek legal order, the Mufti became both judge and interpreter of sharia pertaining to Muslim disputes involving personal status, namely disputes of family and inheritance law.[3] At the end of the Greek-Turkish war of 1919-22, the fall of the Ottoman Empire and the establishment of the Turkish Republic, the Lausanne Conference adopted measures sanctioned by international law that effectively involved ethnic cleansing in a bid to achieve homogeneous nation-states in Greece and Turkey. The population exchange between the two countries was decided as a counter-weight to the Greek Orthodox population already expelled from Asia Minor. Over 400,000 Muslims of Greece were forced to migrate to Turkey. However, under the Convention of Lausanne (January 1923), the Muslims of Western Thrace were exempted from the population exchange, as were the Greek Orthodox of Istanbul (also the Greeks of the islands of Imvros and Tenedos). The subsequent Treaty of Lausanne (July 1923) guaranteed special minority rights to non-Muslim Turkish citizens in Turkey and to Muslim citizens in Greece who were exempted from the population exchange.

The jurisdiction of the Mufti to apply sharia law in Thrace was previously regulated by the Treaty of Sevres on minorities in Greece (1920), and its provisions were confirmed by the Treaty

2. The Treaty of Constantinople (1881), and then the Treaty of Athens (1913) established the special jurisdiction of the Muftis over the more than half a million Muslims who became Greek citizens. A series of Greek laws implemented the provisions of the Treaty of Athens (Article 11 of the Act 4734/1913, Article 4 of Act 147/1914). Later on, sharia courts chaired by a single judge, the Mufti, were organized by Act 2345/1920.

3. The Muftis in Greece have been granted jurisdiction over personal status issues of the Muslims with Greek citizenship since the treaties of Constantinople (1881), Athens (1913), and Lausanne (1923). Before the population exchange, there were about fifty Mufti Offices throughout Greece that also had a leading political role as representatives of the Muslim communities. Today there are three Muftis in the region of Thrace heading their respective Mufti Offices.

of Lausanne (1923). The latter, which, is the cornerstone of minority protection up to date, states in Article 42 Paragraph 1:

"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."

The legal content of Act 2345 (1920) on the authority and status of the Muftis did not change even when the law was replaced by Act 1920 (1991), which retained both the substantive law and the procedure of the 1920 act. Under this regime, the Mufti system has survived, albeit with some limitations. Within their areas of jurisdiction, the three current Muftis of Thrace (serving Komotini, Xanthi and Didymoteiho) have jurisdiction on family law and inheritance disputes between Muslim Greek citizens.

Act 1920/1991 on Muslim Religious Servants
Article 5.b. The Mufti has jurisdiction among Muslims Greek citizens of his region in matters of marriage, divorce, minors' emancipation, custody, Islamic testaments of *ab intestat* succession as far as these legal relations are governed by the Sacred Law of Islam.

At the same time, they are the highest-ranking administrative officials for the Muslim communities within their jurisdiction. They supervise the mosques and religious officials in each place of worship, as well as its cemeteries and religious foundations (waqfs). They also issue exhortations and legal advice to the faithful, direct charity work and perform marriages.

Act 1920/1991 on Muslim Religious Servants
Article 5. a. The Mufti exerts in his region duties provided by the present Act, as well the religious duties according to the Sacred Law of Islam. [The Mufti] appoints, supervises and fires the Muslim religious servants, celebrates or ratifies religious marriages between Muslims and issues legal opinions in matters related to the Sacred Law of Islam.

3. The Mufti as part of the Greek-Turkish antagonism

According to Article 7 of the act, the Mufti has to be a Greek citizen because "[t]he Mufti . . . is considered to be a civil servant" and a judge. The qualifications and competence of Muftis are not on a par with those required for other judges, causing the system to come under criticism. The three Muftis of Thrace are not trained in official judicial procedures before they are appointed by the government. Moreover, as they are also not necessarily well-educated in Islamic law, they adjudicate cases on the basis of a vague understanding of Islamic law: There are no textual sources that the Muftis can refer to; There is no guidance in the Greek legislation; There is no guidance from Greek courts or from foreign courts where sharia law of Hanafi tradition is applied.

Turkey has maintained a strong interest and involvement in Muslim minority issues in Greece, as has Greece in Orthodox Christian issues in Turkey. In the 1930s and 1950s, Turkey had suggested the abolition of the Mufti's jurisdiction; whereas after the late-1980s, Turkey politically supported the election of pro-Turkish Muftis.

The ongoing political dispute since the late 1980s over the control of the Mufti offices of Thrace makes the legal system of this Greek minority a field of contention within the broader Greek-Turkish antagonism. Before 1990, the Muftis were, in practice, appointed following an agreement between the minority's elders and the government.[4] In the period from 1985 to 1990, Greek governments became concerned about controlling the influence of the Turkish government on the Muftis, and passed Act 1920 (1991), which provided for Greek government appointment of the Muftis (Act 1920 (1991), art. 1). The appointment process for Muftis by the Greek government has renewed a Greek-Turkish confrontation.

The Mufti selection process has also triggered strong political reactions among pro-Turkish circles of the Greek Muslim minority, starting in the 1980s and existing even to this day. This led

4. Vemund Aarbakke, *The Muslim Minority of Greek Thrace* (unpublished Ph.D. dissertation, University of Bergen, 2000).

to an intense stand-off, with the minority rallying around the then-independent deputies elected in the Greek parliament (1989-1993), invoking their Turkish identity. Since then, along with the three officially recognized Muftis (in Xanthi, Komotini and Didymotyho), there are two parallel Muftis (in Xanthi and Komotini) elected by a limited electorate. These parallel Muftis control most of Thrace's mosques and act as political leaders.

The issue of the election of two "parallel" Muftis, not recognized by the government, ended up in the European Court of Human Rights (ECtHR) after lengthy processes before the penal and administrative Greek courts. A series of rulings in the Serif and Agga cases concluded that Greece had violated Articles 9 and 6 of the European Convention on Human Rights (ECHR) by "usurping the functions of a minister of a 'known religion.' through the criminal prosecution of the two elected Muftis."[5] The ECtHR, in upholding the applicants' rights to manifest their religion, recognized that social tensions may arise in situations where a religious or any other community becomes divided; it suggested that this was one of the unavoidable consequences of pluralism.[6]

The ambiguous and dual selection methods for Muftis reflect the tension in the dual nature of this position. On the one hand, the Muftis' appointment by the state may infringe on the moral obligation to respect the community's will to choose a religious leader. On the other, since he is a judge, election of the Mufti by the community contravenes the fundamental constitutional rules of Greece about the status of judges as founded in the European legal order.[7]

5. Serif v. Greece, 1999-IX Eur. Ct. H.R., http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58518; Agga v. Greece (No. 2), Eur. Ct. H.R. (2002), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60690; Agga v. Greece (No. 3), Eur. Ct. H.R. (2006), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76317; Agga v. Greece (No. 4), Eur. Ct. H.R. (2006), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76319.

6. Serif, 1999-IX 53. In a similar case concerning the *Mufti* of Bulgaria, the Court held that "In democratic societies the State does not need to take measures to ensure that religious communities are brought under a unified leadership," Hasan v. Bulgaria, 2000-XI Eur. Ct. H.R. 78, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58921.

7. In most European countries a judge cannot be elected; he must be appointed by the state and must enjoy

In 2018, the age of retirement of the muftis was set at 67 (*Law 4559/2018, FEK A 142*). As a result, the Muftis of Xanthi and Komotini had to retire and be replaced. Thus a long tradition according to which the Muftis served with no age limitations was broken. New ad interim Muftis have been appointed in all three Mouftiates. According to the Minister of Education and the Cults a new mode of selection would be set up, which is still pending. The discussion over a more liberal/communitarian selection mode was triggered this time by Resolution 2253 (2019) adopted by the Parliamentary Assembly of the Council of Europe that called Greece to "allow the Muslim minority to choose freely its muftis as purely religious leaders (that is, without judicial powers), through election, thereby abolishing the application of Sharia law […]"(par 13). The Greek government seems to have considered only how sharia court would comply with procedural norms aligned with human rights instead of abolishing them. The status of the Mufti-judge would be subject more and more to norms that govern civil servants, and the Mouftiates would becoming more and more state authorities.

In June 2019, according to Presidential Decree No 52 (FEK A 90), each Mouftiate acquires an administrative structure, the "Directorate of Cases under the Jurisdiction of the Mufti" and a series of public servants in order to staff the Directorates. The new arrangement creates new structures within the Mouftiates to the expenses of the state. The Secretariat of the sharia courts is being standardised and staffed for the assistance to the Mufti-judge. It could be arguable whether it surpasses the border line that guarantees the institutional autonomy to a minority religious community under both the ECHR and the Treaty of Lausanne. On the other hand, these courts are become closer to the state-court model than to the community institution based character. Last, it is quite ambivalent the fact that the sharia courts are put under the administration of the Ministry of Education and the Cults and not under the Ministry of Justice.

---

independence from community pressure. According to the Greek Constitution, article 88, judges are appointed for life term.

4. Adjudicating Personal Status: legal discrepancies and the content of sharia The coexistence of two legal systems in Thrace, applying both Islamic law and the Greek Civil Code, creates a number of discrepancies.[8] These discrepancies arise from the dual authority of the Muftis as legal and religious leaders, creating procedural problems, raising competence and authority issues, resulting in jurisdictional ambiguities related to mixed marriages, and problems of enforceability by foreign courts. This structure also creates concerns in relation to substantive law, e.g., about whether Muftis should apply the principle of non-discrimination or comply with Greek constitutional norms, and whether Greek courts have control over these decisions to ensure their constitutionality and conformity with European human rights expectations.[9] Sharia procedural and substantial law in many cases differs when compared to the norms of Greek civil law. The most ambiguous issue is that of gender equality and the child's best interest as guaranteed by the Greek Constitution and international law binding Greece (see hereinafter Sections 4.1, 4.2, and 4.3).

The equality of the litigants is not safeguarded when male litigants are given a stronger position in Mufti courts compared with female litigants (as regards rights in relation to divorce or inheritance). Nor are the rights to representation by a solicitor and due process through predictable and transparent application of the rule of law guaranteed. The Muftis are not required to issue a written decision with justification. In practice, there are also both substantive and procedural differences in the administration of justice between the three religious courts. Sharia law as applied by the Muftis' courts of Thrace is not standardized or codified and is left to the broad interpretation of the judge. These norms are embodied in the Qur'an and the Hadith according to the Mufti's own reading of the law, and thus sometimes the implementation of law differs from court to court.

8. Konstantinos Tsitselikis, *Applying Shari'a in Europe: Greece as an Ambivalent Legal Paradigm*, Yearbook of Muslims in Europe (2010): 673.

9. For a detailed case law of the Muftis' courts see Yannis Ktistakis, *Charia, Tribunaux religieux et droit grec* (Istanbul: Istos, 2013).

As explained, Act 1920/1991 acknowledges the Mufti as a judge whose jurisdiction should in theory be concurrent to mainstream civil courts, and the Mufti's decisions should not contravene the Constitution as far as the free will of the litigant is concerned. The Mufti's jurisdiction should not be mandatory or exclusive. The judicial competence of the Mufti should be preferential and supplementary in the sense that Muslims should be free, upon agreement, to choose between the Civil Court and the Islamic jurisdiction. In case of disagreement on jurisdiction, the Civil Court should be obligatory as it is for any citizen. Within the Greek legal system: a. All Muslims have the right to opt for civil law instead of sharia law, and b. Further to the applicability of sharia law, the implementation of Greek law does not depend on religious convictions of the citizens. Until 2018, the possibility of choosing between the two jurisdictions was not clear and at last resort in many cases the Court of Cassation said that sharia was mandatorily implemented to Muslims.

An amendment to the Mufti's law was submitted in December 2017 before the Parliament a few days before the hearing of the case Molla Sali v Greece (see hereinafter) took place before the Grand Chamber of the ECtHR. The new law of January 2018 (*Law 4511/ 2018, FEK A 2*)[10] made clear that the civil courts will have competence by default for all civil disputes, unless both of the litigants make an agreement to have their case adjudicated by the Mufti. According to the new law, shari'a courts have jurisdiction only when both litigants wish to submit to them their case. In all other cases, the jurisdiction belongs to civil courts. Therefore, civil courts are competent to adjudicate cases when Muslim litigants can not agree upon jurisdiction. Although the implementation of the law was dependent on the adoption of procedural norms as regards the process before the Mufti-judge, in October a new amendment (*Law 4569/2018, art. 48.3*) made immediate the implementation of the new law before the adoption of procedural rules. These

[10] Τροποποίηση του άρθρου 5 της από 24.12.1990 Πράξης Νομοθετικού Περιεχομένου «Περί Μουσουλμάνων Θρησκευτικών Λειτουργών» (Α΄182) που κυρώθηκε με το άρθρο μόνο του ν. 1920/1991 (Α΄ 11) (Amendment of article 5 of the Legal Content Act of December 24, 1990 On Muslim religious officials (A 182), certified through the article of law 1920/1991 (A 11), https://www.e-nomothesia.gr/kat-ekklesia-thriskeia/nomos-4511-2018-fek-2a-15-1-2018.html, accessed 28 December 2018.

amendments anticipated the ruling of the European Court on Human Rights that in December 2018 found a violation of the right to property in combination with discrimination in the case *Molla Sali v Greece*[11] on the ground that the Court of Cassation had imposed shari'a law without the explicit wish of the members of the Muslim minority of Thrace[12].

However, the question of incompatibility of the content of the applicable law

by the Mufti will be still remaining open.

Last, the Presidential Decree on the regularisation of the mufti's court procedure was adopted in June 2019 (Presidential Decree No 52, FEK A 90). For the first time the sharia courts of Thrace are subject to procedural norms set by the state. The main points of the reform regard:

- The presence of a lawyer who represents the litigants is obligatory.
- The enforceability of the mufti's judgment by the civil courts is depended on the compatibility of the judgment to the Constitution (art. 4.2 is mentioned: non-discrimination clause) and the ECHR.
- The procedure through which the litigants have to sign an agreement of choice for the sharia court is set in details.
- The judgment has to be properly justified. It has to be written in both Greek and Ottoman (*sic*) languages. Official translation can be deliver upon request in Arabic, Turkish or Engish.

There is large room for improvement as regards the rights of the litigants. Last, there is no second instance (appeal) which would guarantee the review of the Mufti judgment.

These amendments to the law on sharia tackle some of the major issues of concern that accumulated criticism in the past 25 years: a) the right to fair trial, under article 6 of the ECHR, when equality of the litigants is not safeguarded, and neither representation through a lawyer nor predictability and visibility of the applicable law is provided; b) lack of efficient control of the merits of the Mufti's decision, and lack of effective means to control the constitutionality of such

11 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-188985%22]}, accessed 27 December 2018.

12 The Court however was reluctant to examine the alleged violation of Art. 6 of the ECHR (see Kalampakou 2019), so the denial of justice by the Court of cassation, which would put straight forward the issue of non-adjudication of a case on the ground of religion.

decisions; c) lack of the possibility to resort to civil courts and conflicts resulting from parties making different choices of forums d) lack of the right to appeal against the Mufti's decision. Among these points a), b) and c) have been satisfactorily resolved by Pr. Decree No 52.

Sharia law can be directly applied only by the Mufti or taken into consideration by a civil court while testing the constitutionality of the sacred court's decision. The contact between sharia law and civil law can be seen at three different instances: a. When applied by the Mufti in the framework of his special jurisdiction according to art. 5 of Law 1920/1991; b. When the First Instance Court has to control constitutionality (Pr. D. 52/2019, Art. 12 par.3) and exerted jurisdiction by the Mufti; and c. When a Civil Court remands a case to the sacred court denying applying civil law. In all three cases, compatibility between sharia law and human rights standards are at stake.

One of the major issues that undermined the dual jurisdiction was for decades, until 2018, whether the Mufti's jurisdiction was obligatory or optional. In practice, the possibility for a Muslim to resolve a family law or inheritance law dispute before a Greek civil court has been very limited. In most of the cases brought before a civil court, the latter has referred the case to the Mufti court as the only and exclusive competent judicial authority (this practice has been ratified by the Cassation Court, see judgment 2138/2013, hereinafter). Therefore, for years restricted access for Muslim (female) plaintiffs to Civil Courts was a normality which undermined the equality of individual Muslim women. By 2018, after a case brought before the ECtHR the jurisdiction competence is clear. and Muslim Greek citizens of Thrace can opt for either civil or Islamic law, under certain conditions. .

The decisions of the Mufti can only be executed after being ratified by the Civil Court of First Instance (article 3.3, Act 1920/1991). Consequently, civil courts (should) monitor the

constitutionality of Muftis' decisions and the margin of divergence between the substantial legal norms of civil law and sharia law, as in cases of Islamic alimony (*nafaka*), children's custody or inheritance shares of the female heir. However, most of the Mufti decisions are ratified by the Greek Courts even if they infringe women's and children's rights as endorsed by the Constitution or the ECHR. The UN Human Rights Committee commented on this issue, urging Greece "to increase the awareness of Muslim women of their rights and the availability of remedies, and to ensure that they benefit from the provisions of Greek civil law".[13] These decisions are subject to appeal before the First Instance Court (*Polymeles Protodikeio*), concerning, solely, the extent of the Mufti's jurisdiction. There is no second instance within the Mufti's court. Since it is not submitted to any corrective control from a higher court, the Mufti's decision endangers not only the legal interests of citizens who come under his jurisdiction, but also the authority and importance of this Muslim institution.

The discussion of the status of the Mufti within the Greek and European legal order inevitably touches upon the issue of how to accommodate community based laws within a uniform legal context. To move forward, this discussion must maneuver between the demands for integration, preservation of minority identity, and the relationship between individual and collective identity as potential fields of normative action. The religious and political elite of the Turkish-Muslim minority of Thrace counters any criticism against the applicability of sharia law: The latter is perceived as belonging to minority protection regime which should remain "untouchable".

Stemming from an institutional Ottoman legacy, a relic of the segregated *millet* system, today's minority protection could serve as a strong case for legal pluralism. At the same time, inflexible societal segregation and problematic legal norms infringe on fundamental legal principles. Juridical procedures and law applied by the Muftis of Thrace need to take a generous leap forward. On the other hand, the case law as formed in the past 90 years by the civil courts failed to clarify the modalities of both the applicability of Sharia law by the Mufti's Courts and the

13. Human Rights Committee, 2005, (ICCPR) 'Greece', Concluding observations, 25/04/2005, CCPR/CO/83/GRC, (Geneva: United Nations) paragraph 8.

referral criteria from a civil court to the Mufti. Hereinafter, three fields (marriage and divorce, children and inheritance) where personal status is applicable through the Mufti's special jurisdiction for the Muslims of Thrace will be presented.

Case law

Case 1: The First Instance Civil Court of Rodopi while undertaking, constitutionally, supervision of the Mufti's decision (4/1991), according to Law 1920/1991, upheld that article 4 paragraph 2 of the Constitution was infringed on the ground of gender equality. The applicant was a Muslim, mother of a boy and a girl whose father had passed away. The Court of Rodopi confirmed the Mufti's decision only in part regarding the custody of the children and rejected the Mufti's application of the Islamic law on inheritance, which favored the male heir (a share of 14/21 of the estate) to the detriment of the female (a share of 7/21) (*First Instance Court of Rodopi*, judgment 152/1991).

Case 2: In a case on children's custody the Cassation Court quashed the Court of Appeal judgment according to which the Ottoman Civil Code should be applied by the First Instance Court (sic). The Cassation Court said that the implementation of the sharia law is mandatory for all Muslims of Thrace, and therefore it is mandatory (as the cornerstone of his jurisdiction) for the Mufti to apply and interpret it as an inherent part of the Islamic culture. Conversely, civil courts are not permitted to implement Sharia norms as they consist of religious rules and not a complete legal system which could be developed through time and applied by autonomous courts (Cassation Court, *AP*, judgment 2138/2013).

4.1. Marriage and Divorce

Marriage, family and childhood receive specific protection from Article 21 of the Greek Constitution. Private law on marriage and inheritance matters is governed by the Civil Code, which is applicable to anyone who is under the jurisdiction of Greek Civil Courts. Religious marriage celebrated by any of the 'known religions' is valid, having legal effects upon registration. Therefore, civil and religious marriages are both equal and optional (Articles 1367, 1368, 1371, 1416 of the Civil Code) and any relevant dispute is adjudicated according to the

Civil Code by the Civil Courts. Consequently, anyone is subject to the ruling of a judge and no one can be deprived of jurisdictional control as this is guaranteed by the Constitution (Article 8). Within this general legal framework, special jurisdiction is granted to Muslims of Thrace and Mufti Courts of Thrace, in Xanthi, Komotini and Didymotyho, which apply Islamic law (certain provisions of) according to Law 1920/1990 (article 5.b, see above).

As defined in Law 1920/1990 on the Muftis, their special authority and jurisdiction apply to all marriages of Muslim residents of Thrace belonging to the minority of Thrace. As stated, the issue whether the Mufti has exclusive competence, is a thorny question and one that Greek jurisprudence has not resolved to date.

The Greek civil code regulating the relationship between spouses in marriage and divorce is applied regardless of the spouses' religion, unless otherwise foreseen, as in the case of Muslim Greek citizens who want to 'activate' their religious law.[14] However, in practice it is likely that a case brought by the wife before the civil court against the husband (for divorce or children's custody) will be remanded to the Mufti. Last, disputes related to couples married before the municipal authorities under civil code provisions, cannot be adjudicated by the Mufti.

Case law

Case 1: The husband asked for divorce before the Mufti as his wife had left their house. The wife had signed a declaration at the Police confirming that she had left the house. The Mufti Court, referring to the pertinent Sharia provisions declared the divorce and said that the wife was deprived thereof from all rights she would have according to the marriage contract related to the three-month alimony and the divorce indemnity (*mihir*) (*Ierodikeio Komotinis*, decision 32/2001).

Case 2: The marriage of a 14-year old Muslim girl was challenged before the Civil Court which concluded that the marriage of a minor by the Mufti is valid, and there is no reason to annul it

14. Athina Kotzabasi, *The family legal relations of the Greek Muslims* [in Greek] (Thessaloniki: Paratiritis 2003): 14.

because it was accepted by the local society, the parents of the wife were not opposed to it, the husband was good, working and honorable and therefore the future of the marriage was sustainable (*Monomeles Protodikeio Rodopis*, judgment 51/2006).

As mentioned above, the Mufti has competence to adjudicate in relation to divorce and alimony (*nafaka*). Therefore, cases related to the separation of the property of a divorced couple, would not be subject to the Mufti's jurisdiction (Court of Appeals of Thrace, 119/2006). Other questions, such as whether the regulation of the marriage contract (*nikah*) and the clause of indemnity due to the wife in case of divorce (*mihir/mahr*, and the obligation of the husband to maintain the wife during the wedlock or after, for three months, (*nafaka*) by the Islamic law would abolish Muslim women's right to alimony as set by the Greek civil code, are rarely encountered by the Greek courts[15].

The main issues of divergence between Greek law and the Mufti rules on marriage are with regard to the equality of sexes, the age of the spouses, marriage through authorization, and bigamy. According to Islamic law, the male and the female spouse have differentiated access to divorce. Only the husband can initiate a divorce without the consent of the spouse; the wife can have the marriage terminated only if her husband has done something egregiously bad. Unilateral divorce through the practice of *talaq* is applicable only through the Mufti's decision. Without the Mufti's decision, a divorce cannot have legal effects within the Greek legal order. In the case of divorce by consent (*khul*), the wife must compensate her husband. Moreover, according to Islamic law, minors can get married with the consent of their parents, while, according to the code of civil law, minors can only marry under special circumstances (article 1350, par.2). Pregnancy of a minor could constitute such a special circumstance in practice, though the extent to which this circumstance is used is rather disturbing. In many cases of poor Roma Muslims, for instance, young girls are married as young as 13 or 14. Marriage by proxy as permitted by the Islamic Law (in the Hanafi school of jurisprudence) has long been seen as complying with Greek

15 As mentioned, most of the civil disputes are referred from civil courts to the Mufti courts. In general, women are quite reluctant to break through a male dominant Muslim society.

public policy. With the introduction of article 1350 of the Civil Code in 1983 the practice was disputed since it was clearly stated that both spouses have to be present at the wedding. Although the Legal Council of the State (Legal Opinion 686/1993) has said that marriage by proxy does not contradict the Greek law, a circular of the Ministry of the Interior (Circular 31/20.9.2002) made clear that marriage by proxy – through power of attorney – and polygamy were deemed contradictory to public policy; as such, legal acts in this vein conducted by the Muftis are considered null and void and not subject to registration. On the same line, the National Committee for Human Rights has said that marriage by proxy should be illegal in the future, and that the age limit for a marriage without parental authorization should be 18 instead of the 12, which is acknowledge by the Mufti Courts (Decision of 7.5.2003).

According to another Ministerial decision, the solemnization of a marriage before the Mufti for Muslims residing outside Thrace, between a Muslim and a non-Muslim, or between alien Muslims, would not be recognized by the state as legal.[16] This restrictive measure was endorsed by courts which also often refuse to ratify the Mufti's decision on divorce, when the divorced spouses are not both Greek citizens or do not live in the same province.

4.2. Children

As mentioned earlier, the Mufti has competence to adjudicate tutelage (child's custody, *epimeleia teknou*), and emancipation of minors. As explained, the field of the Mufti's jurisdiction cannot be extended through the interpretation of the law. Therefore, cases related to adoption, children out of wedlock, and communication with children are not subject to the Mufti's jurisdiction. By 2008, a series of court decisions also ruled that children's custody was exempted from the jurisdiction of the Mufti based on a narrow interpretation of the term tutelage (First Instance Court of Rodopi 130/2008, 140/2008 and 183/2008). In 2010, the Mufti of Komotini protested

16. Decision of deputy Minister of the Interior F.97920/20138/31.10.2003 adopting the Legal Opinion 347/7.10.2003 of the Legal Council of the State (3d Section). This decision remained in force only temporarily. See also Yannis Ktistakis, *Charia, Tribunaux religieux et droit grec* (Istanbul: Istos, 2013): 38.

against this practice of the courts of Thrace, which he described as having overturned 'the established legal norms'. In many more areas the Mufti's jurisdiction remains disputed, such as the nature of parental relations, and the rights of children out of wedlock. According to Islamic law, the period of pregnancy could be extended in legal terms up to two years with a view to facilitate the recognition of a child by the father (Opinion 1/1990 by the Prosecutor by the First Instance Court of Alexandroupolis).

Case law

Case 1: The plaintiff was a divorced Muslim mother who opened a case on the children's custody before the First Instance Court of Rodopi. The Court denied jurisdiction and remitted the case to the Mufti. The Mufti Court adopted a loose interpretation of Sharia law in order to deliver a ruling in accordance with the civil code. The Mufti in fact did not take into consideration the Sharia rules on the age of the child and ordered the mother to undertake the custody instead of the father (*Mufti Court of Komotini*, Decision 21/2002).

Case 2: The Mufti of Xanthi revoked his decision to issue divorce for a couple who were Muslims living in Thrace because the religious marriage was not registered at the Registry of the Mufti Office. Then the wife opened a children's custody and alimony case before the First Instance Court of Xanthi. The husband appealed before the Court of Appeals, which upheld that according to international norms regarding Muslims in Greece, the Ottoman Civil Code (*sic*)[17] should be applied in relation to children's tutelage and that alimony is not a rightful claim. Finally, the High Court, which adjudicated the case in cassation, upheld that, as the Mufti had revoked his jurisdiction, civil courts have jurisdiction over the case in all matters, alimony included (*Areios Pagos,* judgment 2138/2013).

The main issue remains the divergence between norms and practices in the Civil Code and the implementation of Sharia failing to take into account the notion of the *child's best interest*. According to the International Convention on Children's Rights (Article 3 par 1) and the Convention on the Elimination of All Forms of Discrimination Against Women (Article 16 par

17 The Ottoman Civil Code is by no means a source of the Greek law.

1.d), among other international instruments, the best interest of the child should prevail. According to Islamic law, after the dissolution of marriage, the mother obtains the custody of the children only until a certain age. The ex-husband has to maintain the ex-wife during a period of three months after the dissolution of wedlock and provide alimony up to the age of 7 and 9 for sons and daughters, respectively. After this age, children are placed under the direct protection of the father.

4.3. Inheritance

The Civil Code regulates issues of inheritance and wills for all those who are subject to civil courts. The Mufti has jurisdiction in cases relating to Islamic wills, (in which the inheritance allocated does not exceed one-third of the overall property the deceased has bequeathed to people other than his/her relatives) and intestate succession. The major issue at stake in inheritance cases is that the male heir gets twice the share of the female heir thus breaking the principle of equality of sexes endorsed by both the Greek and European legal order.[18]

In practice, after 1985, such cases became rare, as Muslim heirs, members of the minority of Thrace, are using the Mufti's *fetva* on the inheritance before the notary and the taxation office in order to register and apply for the necessary transactions. However, certain cases of dispute reach the courts. In some cases, the Civil Courts said that the Mufti had exclusive jurisdiction, in some other cases they ruled that there is a concurrent jurisdiction between civil courts and the Mufti courts. In some cases the civil courts have contested the right of Muslims to leave a will before a notary (*dimosia diathiki*) (Court of Appeals of Thrace, judgment 642/2009 and Case 2). Finally, in a striking case, the civil court said in 2015 that a will drafted by a Muslim Greek has no legal effects vis-à-vis any Muslim heir (Case 3).

18. Aspasia Tsaoussi and Eleni Zervogianni, "Multiculturalism and Family Law: The Case of Greek Muslims", in ed. Katharina Boele-Woelki & Tone Sverdrup *European Challenges in contemporary family law* (Antwerp: Intersentia 2008): 209, 219.

Case law

Case 1: The Court of Appeals of Thrace adjudicated a dispute between the widow and two sisters of the deceased husband over the validity of the public will (according to the Civil Code) and the property left by the latter - all were Muslims of Thrace. The Court ruled in favor of the freedom of Muslims to opt for one or the other legal system, namely the Sharia applied by the Mufti Court or the civil law applied by the Civil Court. Thus the widow could have the inheritance according to the public wills (*Efeteio Thrakis*, judgment 392/2011).

Case 2: The two sisters of the previous case, appealed in cassation against the Appeal Court's ruling claiming that the will drafted before a notary by their father could not be valid as it is not in harmony with Sharia law and that only the Mufti Court would have jurisdiction over the case. The Court upheld the appeal and said that the Mufti Court has exclusive jurisdiction over property left by a deceased member of the Muslim minority of Thrace and that a Muslim could not have the right to draft a will before a notary according to the civil law, as *lex specialis*, namely article 5 of law 1920/1991 is the only applicable law (Cassation Court, *AP*, judgment 1862/2013).

Case 3: The widow filed an application before the ECtHR on the grounds of right to a fair trial (Art. 6), right to property (Art. 1, Pr. 1) and discrimination (Art. 14). The case was adjudicated by the Grand Chamber of the Court (*Molla Sali v Greece***,** Application no 20152/14, judgment of 19.12.2018)[19]. The Court upheld that there was violation of the right to property of the applicant in conjunction to the prohibition of discrimination "by association" on the basis of religion of the deceased husband. The Court said that the right to self-identification of the member of a minority

19 On different approaches to case, see: Kalambakou, Eleni, *Is There a Right to Choose a religious Jurisdiction over the Civil Courts? The Application of Sharia in the Muslim Minority of Western Thrace, Greece*, Religions (2019); Tsavousoglou, İlker *The Curious Case of Molla Sali v. Greece: Legal Pluralism Through the Lens of the ECtHR*, (2019); Iakovidis, Iakovos & Paul McDonough, "The Molla Sali Case: How the European Court of Human Rights Escaped a Legal Labyrinth While Holding the Thread of Human Rights", Oxford Journal of Law and Religion (2019): 1–20.

means also the right to opting out from the minority protection framework. According to the Court, "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 *Law 4511/2018* all wills drafted by a Muslim can be subject to civil law, clarifying an ambiguity that lasted long.

5. Time to reform?

The discrepancies between sharia as applied by the Muftis' courts and fundamental principles of human rights (both substantial and procedural) could be remedied in two different ways: either by abolishing the Mufti's jurisdiction, or by channelling the development of sharia in a direction that will not contradict public policy (*ordre public*).[20] That would require the development of this legal system in consonance with the Greek constitution and the European Convention of Human Rights.

Not surprisingly, a series of international and national bodies have expressed their concern about the noncompliance of the Mufti courts with human rights standards. For instance, the Commissioner for Human Rights in the Council of Europe has made recommendations that Greece should consider withdrawing the judicial competence of the Muftis, given the courts' incompatibility with international human rights standards; strengthening the substantial review of

20. The *ordre public* (public policy) consists of a series of fundamental norms and principles that supersede and reflect the legal, social, economic, religious, ethical, and other beliefs that govern legal relations. The concept is related to norms that are so fundamental for the legal order that they have to be respected, regardless of procedural obstacles. Overriding of the *ordre public* occurs when these beliefs are offended and legal relations are disrupted.

the Mufti's judicial decisions by domestic courts; and/or formalizing an open and continuous dialogue with representatives of the Muslim minority in order to start the process of achieving compliance.[21] Also, the plenary of the Presidents of the Bar Associations in Greece proposed the abrogation of the Mufti's jurisdiction.[22]

As said, the *Molla Sali* case triggered a series of amendments to the law on the sharia courts. The new rules adopted in 2018-19 quashed a series of procedural deficiencies in a positive direction. However, attempts at reform must consider the political situation first and foremost, if an overall harmonization with international human rights norms is to be achieved. The survival over decades of the Mufti's jurisdiction constitutes a supreme example of instrumentalized resistance to attempts at liberal reform. The reasons for this resistance stem from the competitive political and ideological embrace of the Muslim minority by both the Greek and the Turkish governments going back to 1923, i.e., from the historical beginning of this minority in Thrace and the implementation of the Lausanne Treaty, still considered an immutable legal foundation of minority protection today.

The coexistence of two different legal systems in Western Thrace could be seen as a case of legal pluralism, provided it ensures a system of option for the one or the other judicial system and does not lead to any direct violation of fundamental rights. If one religious juridical system were imposed on the individual on the basis of his religious affiliation, it would contradict the general principles and values of the European system and democratic society.[23] At the same time, the alignment of sharia law with European standards should not mean the total elimination of sharia

21. Thomas Hammarberg, *Report by the Commissioner for Human Rights Following his Visit to Greece on 8-10 December 2008*, CommDH(2009)9 (Strasbourg: Council of Europe, 2009): 59-61. See also Resolution 1704 (2010) adopted by the Parliamentary Assembly of the Council of Europe, and Michel Hunault, *Report on the 'Lausanne minorities' in Turkey and Greece*, Doc 11860 (Strasbourg: Council of Europe, 2009): 48.

22 Bar Associations in Greece, Press Release, 2 May 2009.

23. Refah Partisi v. Turkey, 2003-II Eur. Ct. H.R. at 126-28, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60936.

law and its absorption into European law. That would simply reflect the hegemony of a dominant legal system over a minority legal system.

In considering proposals for the abolition or the maintenance of Islamic law, one has to very carefully evaluate the social and political factors that together make up the "minority problem" of Thrace, without fear and passion and free of any preconceptions of the past. One promising development in resolving the tension between religious minority rights and Western democratic standards may be the call by Islamic scholars for internal reform of Islamic law and policies. The written sources of sharia could be interpreted through *ijtihad*, namely the critical hermeneutic endeavor of jurists to analyze and comprehend the written sources of *sharia* with 'justice and equity'.[24] Sharia law could develop new approaches encompassing legal principles which establish the foundations of the European legal order. If that were to happen in Greece, sharia law implemented by the Mufti courts and reformed from within, could comply with fundamental human rights principles; and Greek law could accommodate Islamic law. At last, implementation of Sharia law became optional, and thus legal discrepancies were limited to cases in which both litigants willingly take their case before the sharia courts.

6. Conclusions

The discussion of the status of the Mufti within the Greek and European legal order inevitably touches upon the issue of how to accommodate the non-liberal laws of a minority in a liberal legal context. To move forward, this discussion must maneuver between the demands for integration, and the preservation of minority, collective and individual identity, as potential fields of normative action.

There is increasing criticism—not unjustified—that sharia law as the Mufti courts apply it does

24. "After carefully digesting what these new giants of *Sharia* law [of the university of Cairo] wrote, I am fully convinced that the *corpus-juris* elaborated by the jurists of the past is not a closed book, but an open one which can be brought to life and rejuvenated in order to cope with the requirements of the modern world." Ahmed Sadek El Kosheri, "Islamic Schools of Law", in ed. Christian v. Bar *Islamic Law and its reception by the courts in the West* (Koln/Munich: Karl Heymanns Verlag KG, 1999): 43.

not comply with human rights norms, such as equality of the sexes and the right to fair trial. The religious and political elite of the Thracian minority counters this criticism by pointing to the central importance of the adjudication by the Mufti for the enjoyment of minority rights. What could serve as a strong case for legal pluralism and minority protection infringes upon fundamental legal principles. Stemming from the Ottoman millet system, this model results in the imposition of social and legal segregation on the basis of religion. The *Molla Sali* case before the ECtHR triggered already a series of changes in procedural law, in compliance with human rights. As the Court said, no disadvantage shall result from the choice to belong or not to belong from the exercise of the rights which are connected to that choice (par 67-68).

The law applied by the Muftis of Thrace needs to submit to comprehensive reforms. The questions they raise are multifaceted: through which process could a reform on the content of the applicable sharia norms reconcile both sharia and human rights for the members of the Muslim minority? What would be the nature of a reform that tackeles the substance of sharia law? Would the abolition of Islamic law be the only path sufficient to satisfy the European and Greek legal orders? Changes to the law should be initiated and supported from within the community by leaders, civil society and government. An alternative, culturally accommodating, structure of adjudication could thus be put forward as a democratic paradigm[25].

25. Tsitselikis, Konstantinos, Muslims of Greece: A Legal Paradox *and* a Political Failure, Oberauer, Nobert, Yvonne Prief & Ulrike Qubaja (eds.), *Legal pluralism in Muslim Context*, Leiden/Boston: Brill 2019, 80.

Bibliography

Aarbakke, Vemund, *The Muslim Minority of Greek Thrace* (Bergen: University of Bergen, 2000) [unpublished Ph.D. dissertation].

Alivizatos, Nikos, "The constitutional treatment of religious minorities in Greece", in ed. R.-J. Dupuy *Mélanges en l'honneur de Nicolas Valtikos* (Paris: Pedone, 1998): 629-643.

Hammarberg, Thomas*, Report by the Commissioner for Human Rights of Following his Visit to Greece on 8-10 December 2008*, CommDH(2009)9 (Strasbourg: Council of Europe, 2009).

El Kosheri, Ahmed Sadek, "Islamic Schools of Law", in ed. Christian v. Bar *Islamic Law and its reception by the courts in the West* (Koln/Munich: Karl Heymanns Verlag KG, 1999): 35-45.

Hunault, Michel, *Freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (Eastern Greece)*, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report, Doc 11860/21.4.2009 (Strasbourg: Council of Europe 2009).

Kalambakou, Eleni, *Is There a Right to Choose a religious Jurisdiction over the Civil Courts? The Application of Sharia in the Muslim Minority of Western Thrace, Greece*, Religions (2019)

Huseyinoglu?

Tsavousoglou, İlker *The Curious Case of Molla Sali v. Greece: Legal Pluralism Through the Lens of the ECtHR*, (2019), January 11, 2019 Guest Blogger Article 1 of Protocol No. 1, Molla Sali v. Greece, Pluralism,Sharia law

Iakovidis, Iakovos & Paul McDonough, "The Molla Sali Case: How the European Court of Human Rights Escaped a Legal Labyrinth While Holding the Thread of Human Rights", Oxford Journal of Law and Religion (2019): 1–20, <doi: 10.1093/ojlr/rwz017>

Kotzabasi, Athina, *The family legal relations of the Greek Muslims* [in Greek] (Thessaloniki: Paratiritis, 2003).

Ktistakis, Yannis, *Charia, Tribunaux religieux et droit grec* (Istanbul: Istos, 2013).

Tsitselikis, Konstantinos, *Applying Shari'a in Europe: Greece as an Ambivalent Legal Paradigm*, Yearbook of Muslims in Europe (2010): 673-690.

Tsitselikis, Konstantinos, *Old and New Islam in Greece. From historical minorities to immigrant newcomers* (Leiden/Boston: Martinus Nijhoff, 2012).

Tsitselikis, Konstantinos, «Muslims of Greece: A Legal Paradox *and* a Political Failure», Oberauer, Nobert, Yvonne Prief & Ulrike Qubaja (eds.), *Legal pluralism in Muslim Context*, Leiden/Boston: Brill, 2019, 63-82.

Tsitselikis, Konstantinos, *Islam in Greece. Annotated legal documents* (Leiden: Brill, 2016).

Tsaoussi, Aspasia and Eleni Zervogianni, "Multiculturalism and Family Law: The Case of Greek Muslims", in ed. Katharina Boele-Woelki and Tone Sverdrup *European Challenges in contemporary family law* (Antwerp: Intersentia 2008): 200-225.

United Nations, Human Rights Committee, ICCPR, 'Greece', Concluding observations, 25/04/2005, CCPR/CO/83/GRC (Geneva: United Nations, 2005).