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On Aims, Means, and Unintended Consequences: The Case of *Molla Sali*

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Abstract: This contribution speaks to this Special Issue's guiding question of how the approach to freedom of religion and minority protection can be combined to foster the protection of religious communities and their members by examining a particular European Court of Human Rights (ECtHR) case that provokes a contrasting question: 'What happens when provisions for religious minority protection lead to the violation rather than protection of members' rights?' That case is *Molla Sali v. Greece* (2018), in which the ECtHR addressed the claim of a member of a Muslim minority community whose membership in that community subjected her—involuntarily—to the authority of sharia law over inheritance matters. The case serves as a foundation from which to explore the ECtHR's engagements with the Framework Convention for the Protection of National Minorities, an exploration which helps bring to the fore the problems around the concept of 'voluntary' opting into identification with a minority identity when the latter entails some form of disadvantage. Women, in particular, due to family and peer pressures, are vulnerable to such disadvantage in contexts such as that from which the case of *Molla Sali* arises. Thus, the case invites discussion of various ways in which individual and group rights may come into conflict and considers minority rights specifically in relation to other human rights.

Keywords: sharia law; European Court of Human Rights; gender equality; Muslims of Thrace; religious minority; ethnic minority

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Citation: Fokas, Effie. 2021. On Aims, Means, and Unintended Consequences: The Case of *Molla Sali*. *Religions* 12: 859. https://doi.org/10.3390/rel12100859

Academic Editors: Silvio Ferrari, Roberta Medda-Windischer and Kerstin Wonisch

Received: 3 August 2021
Accepted: 31 August 2021
Published: 12 October 2021

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1. Introduction

The guiding question for this Special Issue is, 'how can the approach to freedom of religion and minority protection be combined to foster the protection of religious communities and their members?' The present contribution turns that question on its head, in that it contends with a European Court of Human Rights case which asks, 'what happens when provisions for religious minority protection lead to the violation rather than protection of members' rights?'

The case in question concerns the claim of Ms. Molla Sali before the European Court of Human Rights (ECtHR, or 'the Court') regarding the contestation of her deceased husband's Greek civil will whereby she was to be the sole heir to his property. Molla Sali is a Greek national living in Komotini, a city situated in a region of Greece (Thrace), where the Muslim minority has a distinctive status based upon three international treaties: the Treaty of Athens (1913), the Treaty of Sevres (1920), and the Treaty of Lausanne (1923), all of which, in different ways, regulated the relations of the Ottoman Empire with Greece.[1] One dimension of this distinctive status is the practice of sharia law in matters of inheritance and family law. The sisters-in-law of Molla Sali contested the validity of their brother's civil will on the grounds that sharia law rather than Greek civil law ought to apply in matters of inheritance, given that Mr. Molla Sali was a member of the religious minority (Muslim) community of Thrace. According to sharia law, the sisters-in-law would inherit two-thirds of their brother's estate.

This case illustrates well some of the ambiguities and dangers that can arise when rights are conferred specifically in relation to one's religious identity. Ultimately, this case

serves as a reminder of a point already established at the ECtHR: that it does not always work to one's advantage to be treated by law as a minority, and that, therefore, one should have the right to choose whether or not to 'enjoy minority privileges'.

The *Molla Sali* case has been the subject of a budding body of legal scholarship, not least because, as noted by Koumoutzis and Papastylianos in the pages of this journal (Koumoutzis and Papastylianos 2019), it entails a first for the European Court of Human Rights: it is the first case in which the Court considered the compatibility of a religious community's separate legal status with the European Convention on Human Rights (ECHR). Scholars have examined the case from a broad range of perspectives (Iakovidis and McDonough 2019; Koumpli 2019; Leigh 2019; McGoldrick 2019; Richardson 2019; Tsavousoglou 2019; Topidi 2021; Fokas 2020), showing the various ways *Molla Sali* contributes to the Court's jurisprudence on minority group rights, and the ways the case does not give definitive answers regarding the Court's stance on sharia law—a matter to which I shall return below.

The present article contributes to the existing literature from a socio-political, not legal, perspective and uses the *Molla Sali* case specifically to explore questions that arise at the nexus between freedom of religion and minority protection in the Greek context in which the case arose. Amongst the many ironies of the *Molla Sali* case is the fact that it is the ethnic, not the religious, identity of the minority in Thrace which—for political reasons to do with Greco-Turkish relations—underpins its continued 'distinctive' status, including the application of sharia law to it. In other words, the determinative factor in the Greek state's application of sharia law in this particular region of Greece, the *practical* reason for sharia's persistent application here, is because of the Turkish ethnicity of the Muslim population of Thrace rather than because of their (whether nominal or active) Muslim faith. Thus, again practically speaking, through an emphasis on minority *religious* rights, some members of a national (Turkish) minority are effectively disadvantaged because of their separate treatment, contrary to Art.3 of the Framework Convention for National Minorities (FCNM) assurance of a right to choose whether to be treated as a national minority and that no disadvantage should result from this choice (Art.3). It is also ironic that whilst the (ethnically Turkish in origin) minority in Thrace was to be protected in its religious identity by the application of sharia law, as foreseen by the Lausanne Treaty, in the newly established Turkish Republic in 1926, as part of Kemal Ataturk's secularist reforms and with reference to that very same treaty, sharia law was in fact abolished in Turkey (Koumpli 2019, p. 14).

Thus, we have the acutely paradoxical situation in which the Muslim minority of Thrace, historically comprised of Turks exempted from the population exchange between Greece and Turkey following the 1923 Treaty of Lausanne, would be subject to religious laws no longer applicable to the Muslim majority in Turkey. This anachronism may be considered an effective extension (or 'inverse', so to speak) of the *millet system*, whereby the Ottoman Empire allowed non-Muslim communities within the empire to be governed under each confessional community's own precepts. The irony deepens when one considers the fact that as a result, Greece—an EU member state since 1981—was until recently the only country in Europe where sharia law was compulsory (for a particular group), whilst Turkey—an applicant state to the EU since 1987—has, not without some basis, complained for many years that its Islamic identity is what prevents it from membership in what is, in fact, an exclusive 'Christian Club'. European institutional disdain for sharia law in particular has been widely discussed in relation to the highly controversial European Court of Human Rights case of *Refah Partisi v. Turkey* (2003), in which the Court determined that 'sharia is incompatible with the fundamental principles of democracy' (*Refah*, para. 123) (see, for example, Durham et al. 2012).

Of course, *Refah* and *Molla Sali* differ fundamentally in that the first refers to the realm of 'public' law and the latter to 'private' law; the point made here is that in *Refah*, the ECtHR communicated a clearly negative message regarding the compatibility of sharia with democracy in the context of this applicant state to the EU, whilst—as brought to its attention

in *Molla Sali*—sharia had been a compulsory practice for a community of European citizens in a long-standing EU member state.[2] A second interesting point of reference between *Refah* and *Molla Sali*, though, is the role played by political consideration in the judicial process. In *Refah*, the Court considered the decision of the Turkish Constitutional Court to close down the ruling political party Refah on the grounds that it was a 'centre of activities against the principle of secularism'. The ECtHR ruled unanimously that actions and speeches by Refah leaders showed the party had a long-term aim to set up a regime based on sharia law. In the Court's estimation, 'in the past, political movements based on religious fundamentalism have been able to seize political power in certain States' (para. 124, *emphasis mine*, as Refah *achieved*, did not seize, power through elections) and the establishment of a theocratic regime was not completely inconceivable in Turkey, account being taken of recent Turkish history and, secondly, of the fact that the great majority of its population are Muslims (*Refah* paras. 95 and 125). In *Refah* then, the Court held that the right of states to defend liberal democracy encompasses measures to protect the secularity of the state and the separation of religion and politics. In so doing, the Court was seen to be taking a decision heavily influenced by political considerations. One major relevant factor was Turkey's pending EU membership, which it was still pursuing actively at the time of those cases. Another is the fact that the timing of the case coincided broadly with that of France's introduction of its headscarf bans in schools.

Similarly, the decision of the Greek Court of Cassation to reject Molla Sali's plea to not be subject, by association through her husband's 'belonging' to the Muslim minority of Thrace, to sharia law may be considered heavily influenced by Greek political considerations. Against the backdrop of the ironies of the *Molla Sali* case in the Greek context, what can we learn from this case about the limits of a positive correlation between religious freedom and minority rights? In the pages that follow, I will briefly present the trajectory of the *Molla Sali* case through the Greek court system before considering the ECtHR's handling of the case. In a third sub-section, I will address specificities in the Greek approach to religious versus ethnic definitions of the Muslim minority of Thrace, and, in a fourth, I will consider ways in which the ECtHR decision in the *Molla Sali* case entails a missed opportunity, drawing comparisons with another Strasbourg judgement in a Greek case on religious education.

2. Through the Greek Courts

As other scholars have noted, the case law of the Greek courts differs as to whether the implementation of sharia law is mandatory or not for the Muslims of Thrace (Koumoutzis and Papastylianos 2019; Iakovidis and McDonough 2019; Koumpli 2019). Indeed, the claim of Molla Sali's sisters-in-law that sharia must be implemented in the case of the bequeathing of their brother's estate was rejected several times before being accepted by the Greek Court of Cassation. A closer consideration of the case's trajectory through the Greek court system is useful for understanding how very shaky the grounds for its ultimate rejection of Molla Sali's claim were.

Mr Molla Sali's civil will was approved by the local court of first instance (Komotini Court of First Instance) in June of 2008, and, in April of 2010, Molla Sali accepted her husband's estate by notarized deed and subsequently registered the property transferred to her with the Komotini Land Registry. In December of 2009, Mr Molla Sali's sisters contested the Komotini court's decision on the grounds that sharia law ought to have been implemented in the management of their brother's inheritance. Their claim, made before the Rodopi Court of First Instance, was rejected on the grounds that the application of Sharia law against the wishes of Greek citizens of the Muslim faith 'gave rise to an unacceptable discrimination on grounds of religious belief' (ECtHR 2018, Molla Sali v. Greece, para. 12).[3] Conceding the place of sharia law in international law (through Articles 42 and 45 of the Treaty of Lausanne), the Greek court indicated that the application of sharia law 'should not result in the Islamic law of succession being applied in a way as to curtail the civil rights of Greek Muslims because the aim of the treaty had not been to

deprive the members of that minority of such rights but to strengthen their protection' (para. 12). In other words, the court's decision focuses on the spirit of the law in this case.

After an appeal to this decision in June 2010 by the sisters-in-law of Molla Sali, the Thrace Court of Appeal also rejected their claims, indicating that the relevant legislation that foresaw the role of sharia law in Greece 'had been intended to protect Greek nationals of Muslim faith' (para. 15). That court also indicated that the testator (Molla Sali's husband) was free to choose the type of will he wished to draw up in the exercise of his rights. The mufti, the Greek Thrace Court of Appeal indicated, 'had no jurisdiction over the testator's wishes, which could not be circumscribed. Otherwise, there would be discrimination on the ground of religion' (para. 15). This court emphasized the rights of the deceased to dispose of his property in anticipation of his death under the same conditions as other Greek nationals. This right to choice has, in fact, been emphasized by the Greek state itself, as the ECtHR notes in the *Molla Sali* case in its presentation of the relevant findings of other international bodies. Specifically, the ECtHR's judgement indicates that the Greek state has indicated, in its response to the United Nations Human Rights Committee (UNHRC) report of January of 2014 concerning the rights of Muslims in the region of Thrace:

> The choice whether to use Sharia law or the Greek Civil Code . . . is made by members of the Muslim minority themselves. As shown, over the last years, by cases involving women from the minority, this option is in a fact of life in Thrace. Members of the Muslim minority in Thrace are absolutely free to address themselves either to the civil courts or the local Muftis. In case they choose the former, the general legislation is applied. (para 73)

Indeed, the voluntary recourse to civil courts on matters of family and inheritance law *has been* a 'fact of life' as, increasingly, Muslims of Thrace have chosen that route (Kalampakou 2019; Topidi 2021).

Yet a prevailing—and state-sponsored—sense in which recourse to sharia is a 'right' for the protected Muslim minority of Thrace buttressed yet another legal appeal by the sisters-in-law of Molla Sali before the Greek Court of Cassation (January 2012). That court, in line with many previous rulings in which it undermined the accepted practice of forum shopping amongst Muslims of Thrace,[4] ruled in favour of the sisters-in-law, indicating that the international treaty provisions whereby sharia law is implemented for the Muslim minorities of Thrace form an integral part of Greek domestic law (para. 18). Accordingly, the deceased's civil will had to be deemed invalid. The Court of Cassation then remitted the case to the Thrace Court of Appeal, which ruled in line with the Court of Cassation's judgement.

The trajectory of the case through the Greek court system suggests, at best, a lack of clarity within the Greek judicial system regarding the necessity or not of application of sharia law. The Greek government does not come across in this story as convinced of its stance on this matter, given three prior Greek court actions supporting Molla Sali and undermining her sisters-in-laws' claims (not to mention the government's earlier pronouncements in response to the UNHRC) that the application of sharia law in Greece is, in fact, optional. As Koumpli notes, 'It is clear that the full abolition of the Mufti jurisdiction and Sharia was considered a politically premature step at the moment' (Koumpli 2019, p. 23). Noting that family and succession (inheritance) law is still considered a strong reflection of the identity of a given society, she reminds us of how delicate and complex the matter is as, apart from its legal aspects, due to Greece's international relations and, specifically, its political considerations in the balancing of interests between Greece and Turkey in terms of Greece's responsibility, based especially in the Treaty of Lausanne, to maintain the identity of the Muslim minority of Thrace, regardless of whether individuals within that minority willfully chose that identity.

Molla Sali appealed the Greek Court of Cassation judgements, arguing, first, that the court 'had ignored the question whether her husband had been a "practicing Muslim"' (para. 22); second, that the judgement entailed the creation of a separate body of law for Greek nationals of Muslim faith to members of the Muslim community who did not

faithfully adhere to Islamic doctrine (para. 23); and third, that the drawing up of a public will, a possibility allowed to all Greek citizens regardless of religious identity, falls outside the mufti's jurisdiction. Unsuccessful in this appeal, she took her case to the ECtHR.

3. At the ECtHR

Molla Sali based her claim before the ECtHR on two separate articles of the European Convention on Human Rights (ECHR): Article 6, the right to a fair trial, and Article 14, the prohibition of discrimination. The Court limited its approach to Art. 14, which it considered in relation to Article 1, the right to property. There is, however, a fundamental dimension of this case to do with religious freedom: namely, the right to *not* belong to a particular faith. Ultimately, then, this is a case in which the claimant is *rejecting* her 'right' to the protection of minority religious identity (by association to her husband's same right) because, in fact, the latter entailed a limitation on a different right: the right to equal treatment and non-discrimination on the basis of religion. Thus, in her appeal to the ECtHR she also sought to defend herself against discrimination by association (to her husband, whose civil will was under contestation due to his belonging to the Muslim minority of Thrace).

As noted above, in the case of *Molla Sali*, the Court identified as the primary issue arising in the case 'whether there was a difference in treatment potentially amounting to discrimination, as compared with the application of the law of succession, as laid down in the Civil Code, to those seeking to benefit from a will, as drawn up by a testator who was not of Muslim faith' (para. 86). In explaining the methods followed, the Court indicates (para. 122) that it would seek to establish whether the applicant, as the beneficiary of a civil will drawn up by her husband, who belonged to the Muslim minority of Thrace, was in an analogous or relatively similar situation to that of a beneficiary of a civil will drawn up by a non-Muslim person and whether she was treated differently. Then, if the claimant was found to be in an analogous situation and to have experienced differential treatment, the Court would proceed to assess whether there was objective and reasonable justification for the difference in treatment.

The Court established that, indeed, Ms. Molla Sali had been treated in a discriminatory manner (para. 141). In addressing whether that discrimination was justifiable, the Court found—on examination of the texts of the Treaties of Sevres and Lausanne—that the treaties do not actually require Greece to apply sharia law. Most importantly, though, the Court judged that

> it cannot be assumed that a testator of Muslim faith, having drawn up a will in accordance with the Civil Code, has automatically waived his right, or that of his beneficiaries, not to be discriminated against on the basis of his religion. A person's religious beliefs cannot validly be deemed to entail waiving certain rights if that would run counter to an important public interest (see ECtHR 2012, Konstantin Markin v. Russia, § 150). Nor can the State take on the role of guarantor of the minority identity of a specific population group to the detriment of the right of that group's members to choose not to belong to it or not to follow its practices and rules.

Thus, the Court ruled that 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). Accordingly, in this case, there had been a violation of Art. 14, taken in conjunction with Art. 1.[5]

The Court arrived at this decision after careful consideration of relevant international law. In its judgement, it begins its engagement with international law by examining the scope of the international treaties to which Greece is a party and which regulate the 'protection of the religious distinctiveness of Greek Muslims' (para. 61). The Court found that the latter treaties were not fully clear on the necessary application of sharia law in the case of Molla Sali. As noted in the *Molla Sali* judgement, the Treaty of Athens (14 November

1913) indicates that 'as to matters of inheritance, the interested parties may, after agreeing thereto, resort to the mufti as an arbitrator' (para. 63), thus setting out a clear element of choice in the matter. But the Treaty of Sevres, signed in 1920, indicates that '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'; the latter clause does not sit comfortably with the former from the Treaty of Athens. The ECtHR then cited the Vienna Convention on the Law of Treaties to 'settle' the matter, which treaty indicates that 'the earlier treaty [in this case, that of Athens] applies only to the extent that its provisions are compatible with those of the later treaty' (para. 66).

Further, the Court made reference to the Council of Europe Framework Convention for the Protection of National Minorities (which has been signed but not ratified by Greece), whereby 'Every person belonging to a national minority shall have the right to freely choose to be treated or not to be treated as such, and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice' (para. 67). The right to free self-identification, the ECtHR contends, 'is not a right specific to the Framework Convention . . . it is the "cornerstone" of international law on the protection of minorities in general', and this also applies to the negative aspect of the right: 'no bilateral or multilateral treaty or other instrument requires anyone to submit against his or her wishes to a special regime in terms of protection of minorities' (para. 157).

Had that provision been about religious minorities or had it been ratified by Greece, it would have been the most useful resource for the Court and for Molla Sali in this case. As it stands, this provision is wholly irrelevant to Molla Sali's case in its Greek trajectory. Its irrelevance is key to understanding the practice of sharia law in Greece. The non-ratification of the Council of Europe Framework Convention for the Protection of National Minorities is not surprising and, thus, forms the prism through which the case will herein be examined from the perspective of the protection of national versus religious minorities.

4. National v. Religious Minorities

The reason for the Greek non-ratification of the Council of Europe Framework Convention for the Protection of National Minorities is surely the same as the reason for which it would not apply to the *Molla Sali* case even if it had been ratified: the Greek state has historically, emphatically, insisted on a religious rather than national definition of the main minority population of Thrace.[6] The presence of this minority group is the result of the terms of the population exchange between Greece and Turkey in the early 1920s, a group quite conspicuously self-defined as Turkish, but to which the label of 'Muslim' is applied by the Greek state. The latter fact is a manifestation of the historic—and, importantly, current-day—tensions between these two countries. The story behind these tensions is long and complex and lies beyond the scope of the present contribution but suffice it to say that the story is compelling enough for the Greek state to preclude it from admission or recognition of a minority in Thrace defined by its Turkish nationality. In fact, going well beyond the issue of formal labelling of the minority in general, the Greek state has also not allowed the registration of associations whose titles include 'Turk' or 'Turkish' (Tsitselikis 2004, p. 411). Thus, in fact, the Greek state has repeatedly emphasized the *Greek* nationality of the Muslim minority of Thrace: they are, the Greek state has often noted, Greek citizens and, thus, Greek nationals. The reader may begin to recognize the contradiction, then, in the fact that in the case of Molla Sali's claim, the Greek state ultimately denied Molla Sali's right to be ruled by Greek civil law as any other Greek citizen.

Why provide for sharia law specifically in Greece? This practice is—as noted above—a left-over of the millet system of the Ottoman Empire.[7] Under the Ottoman millet system, non-Muslim communities were divided into religious groups and given 'protected' status: in exchange for the payment of a special tax, they were allowed to live within the Muslim state without converting but as second-class subjects. The millets enjoyed a measure of autonomy and were represented by their religious leaders in their dealings with the high porte (Zürcher 2001, p. 12).

The embeddedness of Greek Orthodoxy in conceptions of Greek national identity is to a large extent a by-product of this millet system under which Greeks lived during the four centuries of Ottoman rule: by Sultan's decree, the Patriarch of Constantinople was recognized as the highest religious and political leader of all Orthodox peoples—regardless of ethnicity—living within the empire. The entailed privileges and responsibilities were immense: the Patriarch and higher clergy were exempted from taxes, but they were responsible for collecting them from the Orthodox populations and for guaranteeing the latters' full obedience to the Sultan. The millet system also granted the Patriarchate full juridical authority over the Orthodox (on matters of marriage, dowry, property, inheritance, education, and social welfare) (Kokosalakis 1995, pp. 239–40). Thus, with this vast expanse of functions, the Church was legitimised by the Ottoman State as a religio-political institution (see Makrides 1991, p. 284; see also Dimitropoulos 2001, p. 52).

Though the Orthodox millet was ecumenical and multinational in nature, in reality, it was largely Greek-dominated: the succession of Patriarchs was (and continues to be) Greek, and the social administration was almost exclusively in the hands of Greeks. This latter fact was due to the simple reality that the Greek population living in Constantinople, the *Phanariots*, were already the leaders of business there and had become directly involved in the administration of the Ottoman Empire itself (Kokosalakis 1995, p. 240). With a Greek Patriarch carrying out secular and ecclesiastical functions, and a largely Greek hierarchy in control of the Orthodox millet, 'Greek interests came to dominate a Church that became increasingly involved in the preservation and perpetuation of Hellenism, and it became more and more difficult to separate Hellenism from Orthodoxy' (Rexine 1972, p. 201). Accordingly, beyond the institutional role of the Church—in its economic, legal, and political dimensions—it also has an important psychological function for the Greeks under Ottoman rule: the Church was seen as provider and protector of the people and preserver of their national identity. Thus, as Koumpli (2019) suggests, the implementation of a millet-style approach to the Muslim-faith minority in Greece from the early 20th century was second nature, so to speak.

5. Missed Opportunities? *Molla Sali* in (Greek) Context

There are interesting parallels between the case of *Molla Sali v. Greece* and the Court's judgement in the case of *Papageorgiou v. Greece* the following year, in 2019. In both cases, the Greek government introduced legal change in the respective fields of law before the Court's judgements were issued and in anticipation of the results in each case: the practice of sharia in Thrace was made optional and contingent on the agreement of all parties involved, and the regime for exemption from religious education no longer requires the revelation of one's faith or lack thereof. And in both cases, many commentators considered that the Court had missed an opportunity to say something more definitive on the issue in question, resulting in open problems in each respective field.

In the case of *Papageorgiou*, the Court was asked to consider the content of religious education courses in Greece as well as the exemption procedure in place in order to yield a judgement as to whether the course could be mandatory—following the standards set out in the case of *Folgero v. Norway* (2006), calling for mandatory religious education to be critical, pluralistic and objective and, if not, whether the Greek state could demand that those seeking exemption give justification for the latter based on their non-Christian Orthodox status. Instead, in *Papageorgiou*, the Court essentially 'skipped' the question of the content of the course, indicating that '[i]n the circumstances of the case, the content of religious education lessons as such is not directly connected to that of exemption from the course and the Court will not consider it separately'.

As noted elsewhere (Fokas 2019), the Court's decision to focus exclusively on the exemption regime is striking in the extent to which it seems to represent a departure from the Court's jurisprudence on mandatory religious education. The right to exemption has tended to be linked to an examination of the content of the course in order to determine whether a right to exemption must be offered. In the case of *Folgero v. Norway*, the Court

meticulously inspected both the content of the 'Christianity, Religion and Philosophy' (KRL) course provided and the other religion-related activities in which students participated in schools (and even the *travaux preperatoires* for the reform in religious education that led to the introduction of the KRL) before determining that 'it does not appear that the respondent State took sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner for the purposes of Article 2 of Protocol No. 1'. Also in the case of *Hasan and Eylem Zengin v. Turkey*, the Court first examined rather thoroughly whether the classes in religious culture and ethics were conducted in an objective, critical and pluralist manner, and, secondly, whether the right enshrined in Article 2 of Protocol 1 was respected.

Thus, in its religious education jurisprudence, the Court has tended to examine religious education programs in detail and find them insufficient in protecting Article 2 of Protocol 1, whilst, at the same time, maintaining that mandatory religious education is, in principle, acceptable. But the Court has failed to articulate clear guidelines as to how religious education could be carried out in a manner acceptable to Article 2 of Protocol 1, thus leading to 'the prospect of a series of cases challenging syllabuses in different European countries, entailing fact-sensitive analysis of the context, the legal provisions and the specific syllabus by the Court' (Leigh 2012; see also Relano 2019).

From this perspective, *Papageorgiou* entails a missed opportunity for the Court to finally close the open questions left by these preceding cases and to deliver a more definitive statement on what exactly a mandatory (without exemption possibility) course in religious education that is sufficiently critical, objective and pluralistic might look like. Such guidance is sorely needed in the Greek context where, following a series of legal challenges to religious education from both secularist actors (finding the course in religious education 'too Orthodox' to be critical, pluralistic and objective and, thus, legitimately mandatory) and conservative religious actors (finding the course 'not Orthodox enough', in line with their expectations that the state should instill the Orthodox faith in Orthodox-faith pupils).

Similarly, *Molla Sali* leaves critical questions open regarding the practice of sharia law and its compatibility with democracy. As noted above, in *Molla Sali*, the Court deemed that refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts to both discriminatory treatment and a violation of the right to free self-identification (para. 157). By thus refraining from setting a limitation on the right to opt-into sharia law, the Court's decision in *Molla Sali* sits particularly uneasily with its statement made in *Refah* that

> Turkey, like any other Contracting Party, may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes … The freedom to enter into contracts cannot encroach upon the State's role as the neutral and impartial organiser of the exercise of religions, faiths and beliefs (para. 128).

In other words, neither is the voluntary opting-in to sharia law found to be acceptable in the case of Turkey.

As noted by Koumoutzis and Papastylianos, in *Molla Sali*, the Court had the opportunity to judge for the first time 'whether individuals have the right to remain voluntarily "trapped" in a minority identity recognized by an international treaty, which deprives them of certain rights, in the name of protection of that identity' (Koumoutzis and Papastylianos 2019, p. 304). The Court indicates in *Molla Sali* that the right to choose not to be treated as a member of a minority 'is completely free, provide it is informed. It must be respected both by the other members of the minority and by the State itself' (para. 157). Thus, in *Molla Sali*, the Court leaves open the possibility that sharia law is compatible with democracy, as long as it is chosen by the parties involved.[8]

As explained by Kalampakou (2019), in allowing the right to opt-out from the minority legal order, the Court is also allowing an opting-out from the provisions of civil law and the jurisdiction of civil courts, and this raises further serious legal questions regarding

whether the latter exemption could be justified in terms of non-discrimination on religious grounds. Ultimately, she argues, the *Molla Sali* ruling 'raises a serious challenge to the rule of equality before the law and the right to a fair trial' (Kalampakou 2019, p. 260).[9] Given the nature of sharia law and the way it is practiced in the region of Thrace (with many drawbacks in the procedure before the muftis and the low quality of their decisions), the choice to opt-out of civil law inevitably entails a waiving of one's right to equality before the law and to a fair trial. Thus, Kalampakou explains, in *Molla Sali*

> the European judges miss the unique chance to set concrete standards for the exercise of a rise to choose a religious legal order in matters of civil law. Although they rightly avoid repeating the judgement 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 (Kalampakou 2019, p. 266).

Quite apart from these deficiencies—from a legal perspective—in the move from *Refah* to *Molla Sali*, from a socio-political perspective, the Court reveals itself in *Molla Sali* to be careless at best, if not naïve, given that the respect of an individual's 'choice'—specifically, a woman's choice not to submit herself to the limitations imposed by sharia law—by 'the other members of the minority' (para. 157) is not easily guaranteed in the context of Thrace, in which the case arose. It is no coincidence that the legal representation of Molla Sali struggled for years to take the case of sharia in Thrace to the ECtHR; this was because of the pressures on Muslim women in Thrace to conform to sharia law.[10] There is a legitimate concern that the parties to a case may be subjected to intense social pressure to choose recourse to Islamic courts in the name of preserving religious tradition (World Politics Review 2018). And surely Thrace is not exceptional in this regard. As Kyriaki Topidi (2021) explains, determining what constitutes 'consent' is, in general, not a clear-cut matter: 'Consent in conditions of peer pressure is not conducive to free choice'. The failure of the ECtHR here to engage with the extent to which the 'voluntary' recourse to sharia may in fact not be fully voluntary in certain contexts of pressures from within one's minority community entails, at best, a superficial respecting of the FCNM's Art. 3 promise of 'no disadvantage' resulting from one's 'choice' to be treated as a minority. As such, *Molla Sali* also entails a missed opportunity for the Court to elaborate on the FCNM's implicit assumption that 'opting-in' necessarily entails a voluntary choice.

6. Conclusions

In an article entitled 'Are Religious Minorities Really Minorities?', Nazila Ghanea (2012) explains how, although historically, religious minorities were the primary trigger for the institutionalization of the international framework of minority rights, religious minorities have been sidelined from its protections. Calling for a 'return' of religious minorities into dominant conceptions of minority protection, she admits that one challenge that could result from such an inclusion is the problem of those within a religious community who may be compelled to apply religious laws or may be sanctioned for not doing so (Ghanea 2012, p. 78). The change in Greek legislation, introduced in anticipation of and ultimately sanctioned by the ECtHR judgement in the case of *Molla Sali*, entails an example of such a problem. As expressed by one third-party intervener in the *Molla Sali* case, the Greek Helsinki Monitor, sharia, as implemented in Greece, discriminates against Muslim women on three grounds: first, on the grounds of religion; second on the grounds of sex; third, on the grounds of location/residence. Regarding the third, it is important to note that the Muslims of Thrace are, in general, not only discriminated against compared with non-Muslims in their—until recently—compulsory submission to sharia law but they are discriminated against compared with other Muslims in Greece, both Greek Muslims or Muslims residing in Greece; the latter two categories are subjected exclusively to Greek law (Koumpli 2019). All these counts of discrimination will continue where Muslim men and women in Thrace lack the agency to enforce their choice to opt out of sharia law. Realistically speaking, though, it is women who are disproportionately

disadvantaged, not least because they are disproportionately vulnerable to the limitation on self-determination as a Muslim minority and the pressures from their families and peers to accept the authority of sharia law over matters of family and inheritance law.

As discussed above, the aim of early 20th century treaties, which served as the basis for sharia law in Thrace, was not to establish the separate treatment of the Muslim minorities in that region but rather to protect their rights as Muslims and to maintain their identity through their religious practices (sharia included). But does the question of aims and means matter? Regardless of original aims, the continued practice of sharia in Thrace is certainly not a reflection of privilege or right. In using the *Molla Sali* case for this exploration of the intersections between the protection of minority rights grounded on religious identity, on the one hand, and the protection of religious freedom, on the other, we emerge none the wiser regarding how sharia may be practiced in ways fully compatible with democracy, gender equality, and non-discrimination. But we do get a hint, at least, of the fact that there is no universally ideal formula for a combined approach to freedom of religion and minority protection.

Funding: Research for this article was conducted under the auspices of the Grassrootsmobilise Research Programme (2014–2019, European Research Council (ERC), Grant Agreement No. 338463).

Acknowledgments: This article also reflects research conducted in the context of the Orthodox Christian Center's Henry Luce/Leadership 100 project on Orthodoxy and Human Rights, Fordham University. The author would like to thank the anonymous reviewers for their helpful comments on its first draft.

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

Notes

1 These treaties are presented briefly in paragraph 62 of the *Molla Sali* judgement and more thoroughly by Tsitselikis (2004).

2 Of course, the ECtHR is not an EU institution, but accession to the EU does require membership to the Council of Europe, which, in turn, is contingent on ratification of the European Convention on Human Rights, which the ECtHR defends.

3 All such citations indicating a paragraph number, unless otherwise indicated, are direct citations from the ECtHR Case of *Molla Sali v. Greece* (2018).

4 As noted in Kalampakou (2019, p. 261), in Supreme Court Judgments no. 1041/2000, 1097/2007, 2113/2009, 1497/2013, 1862/2013, and 2138/2013.

5 The Court also considered that the question of the application of Article 41 (just satisfaction) of the Convention was not ready for decision and reserved it. The Court finally ruled on Art. 41 in this case on 18 June 2020 and held, unanimously, that the Greek State had to take measures to ensure that Ms Molla Sali retained her ownership of the property, which had been bequeathed to her by her husband in Greece, or that her ownership rights be restored; in the event that such measures had not been adopted within one year, Greece had to pay Ms Molla Sali a sum of 41,103.36 euros (EUR) in respect of pecuniary damage. Furthermore, the Greek State was to pay Ms Molla Sali EUR10,000 in respect of non-pecuniary damage and EUR5828.33 in respect of costs and expenses. Judgement available online: https://hudoc.echr.coe.int/eng#\{%22fulltext%22:[%22molla%20sali%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-188985%22 (accessed on 2 August 2021).

6 It should be noted that the Turkish minority is not the only national minority that the Greek state has, historically, not wished to recognize. See, for example, the grievances of the ethnic Macedonian minority in Greece (Human Rights Watch 1994).

7 Presentation here of the Ottoman millet system is largely drawn from Fokas (2020).

8 From a different perspective, *Molla Sali* is seen as too aggressive: in deciding the case based on Article 14, the Court 'makes it difficult to envisage circumstances under which a state [may] be able to satisfy the reasonable and objective criterion for a difference in treatment under religious law' (Leigh 2019, p. 18).

9 In fact, at this point in the text, Kalampakou is discussing the legal change introduced by the Greek government in Law no. 4511/2018, whereby all personal and inheritance cases would, in principle, be regulated by the civil code and adjudicated by the civil courts unless both parties to a case agree to the application of sharia law instead. But the argument applies equally to the ECtHR *Molla Sali* judgement insofar as it approves the voluntary recourse to sharia law.

10 Personal communication with Yannis Ktistakis, 16 June 2020.

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