

Light on Article 14 between
Discrimination by Association & Self-
Identification Right.
The Individual within the Group & the
Group before the State in ECtHR's
Molla Sali v. Greece:
a Successful Balance?

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1. Preliminary Remarks

In the very much awaited judgement *Molla Sali v. Greece*¹, the Grand Chamber of the European Court of Human Rights held that the applicant's inability to inherit under a public will made in her favor by her death husband, a member of the Muslim community of Western Thrace, was in violation of Article 14, read in conjunction with Article 1, Protocol No. 1, of the European Convention.

Greece's condemnation touches to the core the dilemma surrounding the conflicting relationships among members of a minority community and the community itself and that arising between the State, and its legitimacy to intervene on the dissident member's behalf, *vis-à-vis* to the group.

By refusing to fully endorse Greece's system of protection towards the Muslim community of Western Thrace, the European Court of Human Rights has for the very first time confronted itself with the compliance with the European Convention of a minority rights regime² centered on a legal pluralistic

* Peer reviewed.

¹ Grand Chamber Judgement, 18 December 2017. For a comment, see Í. TSAVOUSOGLU, *The Curious Case of Molla Sali v. Greece: Legal Pluralism Through the Lens of the ECtHR*, in *strasbourgobserver.com*, 2019; H. SURREL, *Interdiction de discrimination – Les droits de l'homme l'emportent sur les droit collectifs (Court EDH, Gde Ch., 19 déc. 2018, Molla Sali c/ Grèce, n. 20452/14)*, in , 2019; C. M. CERNA, *Molla Sali v. Greece (Eur. Ct. H.R.)*, in *International Legal Material*, Volume 58, Issue 2, 280 ss.

² It is also worth recalling that, following *Refah Partisi & Others v. Turkey*, *Molla Sali v. Greece* is the second case where the ECtHR is asked to confront with the compatibility of Sharia Law with the European Convention.

model, that exempts its members from the application of State laws in favour of a system of religious personal law³.

Moving far and beyond the specificities of *Molla Sali v. Greece*, the article seeks to examine the European Court's approach towards minority rights, including the right to choose not to exercise a minority right, in the light of Article 14 ECHR.

Within this perspective, the approach is twofold.

First and foremost, the article will focus on the European Court's finding of a discrimination by association on religious ground, without conversely ascertaining the alleged violation of Article 14 suffered by the applicant as qualified member of the minority.

Second, taking into consideration the minority rights context, the article seeks to look at the European Court's attempt to balance collective and individual rights through the lens of the Framework Convention's right to free self-identification.

The article aims at questioning whether the European Court of Human Rights is embracing a minority rights awareness throughout its case-law and whether is paving the way to new balancing strategies between dissident members and the minority community as a whole.

The article argues that, despite the outcome of the judgement, the Grand Chamber has not yet taken side, neither has offered hints as to the proper convention approach to solve intra-communitarian conflicts, opting instead for a redesign of the legal question behind the case, by making use of the *iura novit curia* principle, centered not so much on the applicant, but rather on her husband.

At the outset, the Judgement seems emblematic of the Grand Chamber's attempt to save the best of both worlds. On the one hand, Greece is condemned on the basis of the unequal treatment reserved to those belonging to the Muslim community of Western Thrace with respect to Greek non-members on the ground that the Respondent State does not allow minority members to not identify themselves with the community.

³ On the specifics of Greece, see K. TSITSELIKIS, *Aspects of Legal Communitarianism in Greece: Between Millet and Citizenship*, *Ofiati Socio-legal Series*, 2012, 106 ss. and *Seeking to Accommodate Shari'a within a Human Rights Framework: The Future of the Greek Sharia Courts*, *Journal of Law and Religion*, 2012, ss.. For a comparative analysis of countries that ensure the application of Sharia through a system of religious Courts, see Y. SEZGIN, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt, and India*, Cambridge University Press, 2013. On the specifics of issues related to the challenges of religion when coupled with personal law system, see J. L. COHEN, C. LABORDE (eds.), *Religion, Secularism, and Constitutional Democracy*, Columbia University Press, 2015 with a reference Y. ERGAS, *Regulating Religion Beyond Borders: The Case of FGM/C*.

On the other, Greece is condoned for granting the Muslim community to quasi self-govern itself in violation of the principle of gender equality⁴.

2. The Case and the European Court's Judgement

The case of *Molla Sali* lies in the dissolution of the Ottoman Empire, known as *millets* system, and in the 1923 Treaty of Lausanne⁵ that amended the previous 1920 Treaty of Sevres, favoring the peaceful resolution of the conflict opposing Greece to Turkey at the outset of World War I⁶.

Following the Treaty of Lausanne, the Muslim minority of Western Thrace benefited of a system of protection, that features elements of territorial and non-territorial autonomy⁷, resulting in the applicability of Sharia Law to family law matters (MFLs, *Muslim Family Laws*) in the light of a personal law system based on the functioning of a partial religious jurisdiction, so-called Muftis system.

The Mufti system was though introduced before the Lausanne Treaty according to Law no. 147 of 1914, that defined areas where Sharia Law would have been applied, and Law no. 2395 of 1920 that recognized the religious jurisdiction of the Muftis in controversies among Muslims belonging to the minority community.

Following Law no. 147 of 1914, Sharia Law has been further recognized applicable to succession rules and Mufti judgements enforceable, once ratified by a civil Court of first instance.

At the time of the application, members of the Muslim community of Western Thrace were also denied the right to opt for the civil adjudication of a case, that was compulsory remitted to the Mufti, whose procedure was hardly believed in compliance with the convention guarantees set forth under Article 6 of the European Convention.

International Treaties and State laws therefore concurred in shaping Greece's system of minority protection, that results in the combination of personal and territorial principles.

⁴ On the condition of minority women in Western Thrace, see S. KOFINIS, *The Status of Muslim Minority Women in Greece: Second Class European Citizens?*, in D. SCHIEK, A. LAWSON (eds), *European Union Non-Discrimination Law and Intersectionality*, Ashgate, 2010, 125 ss.

⁵ Reference is to Article 45, but, more generally to Articles 37-45 dedicated to the protection of minorities. For a more detailed investigation, see K. TSITSELIKIS, *A surviving Treaty: The Lausanne Minority protection in Greece and Turkey*, in K. HENRARD (ed.), *The Interrelation between the Right to Identity of Minorities and their Socio-economic Participation*, Martinus Nijhoff, 2013, 287 e ss.

⁶ On this, see K. TSITSELIKIS, *Old and New Islam in Greece - From Historical Minorities to Immigrant Newcomers*, Martinus Nijhoff, 2012.

⁷ For an insight into the ways in which States might safeguard minority rights through forms of autonomy, see, among others, T.H. MALLOY, F. PALERMO (eds.), *Minority Accommodation through Territorial and Non-Territorial Autonomy*, Oxford University Press, 2015.

The Mufti jurisdiction operates solely with respect to those who are Muslims (subjective requirement) and who, at the same time, reside in the territory of Western Thrace (territorial or objective requirement). *Molla Sali*, the applicant, is a woman belonging to the Muslim community of Western Thrace who tried to challenge the application of Sharia Law to an inheritance dispute arisen following the death of her husband who made a public will in accordance with the Greek civil code provisions.

The applicant's resort to the Greek civil code was therefore on the basis of the judicial proceeding undertaken by the two sisters of the applicant's husband, who claimed the applicability of Sharia Law to the dispute, asking for the annulment of the public will.

At the domestic level, the Rodopi Court of First Instance rejected the two sisters' claim, arguing the violation of the constitutional right to equality, non-discrimination and self-determination in that Sharia Law would have caused an illegitimate difference in treatment on the ground of religion.

Within the same line of reasoning stands the Thrace Court of Appeal, that likewise contested the jurisdiction of the Mufti with respect to public wills, emphasizing the deceased's right to opt for the civil law regime over Sharia Law.

On the contrary, the Court of Cassation reversed the previous judgments arguing in favour of the compulsory application of Sharia Law on the basis of its conformity with the Greek Constitution and concluding for the invalidity of the public will.

Following the negative outcome of domestic proceedings and relying on the system of minority accommodation, the applicant invoked before the European Court of Human Rights⁸ the violation of the civil limb of Article 6 ECHR, alone and in conjunction with Article 14, because of the Court of Cassation's refusal to scrutinize the merit of the case on the sole ground of the applicant's religious affiliation⁹, and of Article 1, Protocol no. 1, due to the applicant's inability to inherit her husband's properties following the compulsory application of Sharia Law.

Despite the applicant's allegations and accordingly to the *iura novit curia* principle, the Grand Chamber conversely chose to examine the case from the sole standpoint of the violation of Article 1, Protocol no. 1, in conjunction with Article 14, holding that "since the main focus of the present case is the Court of Cassation's refusal to apply the law of succession as laid down in the Civil Code for reasons linked to the

⁸ On the exceptional features of the application within a more general trend of the Muslim minority of Western Thrace to refrain from bringing cases before Courts, see M. MARKOVITI, *The ECtHR as a Venue for Greco-Turkish Relations: The Treaty of Lausanne and the Muslim Minority in Western Thrace*, Working Paper no. 3, Mobilise GrassRoots, 2017.

⁹ For an in-depth analysis and critique of the denied investigation as to the alleged violation of the applicant's right to access to justice, see E. KALAMPAKOU, *Is there a right to choose a religious jurisdiction over civil courts? The application of Sharia law in the minority Western Thrace, Greece*, in *Religions*, 2019.

Muslim faith of the testator, the applicant's husband, the primary issue arising is 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"¹⁰.

Once framed the analysis in the light of Article 14 ECHR, the Grand Chamber moves on verifying whether the applicant "was in an analogous or relevantly similar situation to that of a married female beneficiary of a non-Muslim husband's will".

The positive outcome of the comparison, given the successful evaluation of the ambit test underneath the applicability of Article 14, justifies the in-depth evaluation on the proportionality of the difference in treatment originated from the mandatory application of Sharia Law to the estate at issue.

Leaving, though arguably, aside the question as to whether the aim of protecting the Muslim minority of Western Thrace through the compulsory application of Sharia Law was legitimate, the Grand Chamber focuses instead on the "question of the proportionality of the difference in treatment complained to that aim"¹¹.

The Grand Chamber mentions at least four reasons supporting the argument of the violation of Article 14, read in conjunction with Article 1, Protocol No. 1, of the European Convention.

First, the Court notes that, although the system of protection afforded to the Muslim community of Western Thrace derives from international obligations, nor the Treaty of Sevres nor that of Lausanne ever required Greece to implement systems of parallel jurisdiction such as that of the Muftis¹², neither to compulsory apply Sharia Law.

Secondly, and according to Greek Law no. 1920/1991 which "refers solely to Islamic wills and intestate succession"¹³, no jurisdiction of the Mufti over other types of inheritance is to be found in the Law.

As a third argument, the Grand Chamber recalls the legal uncertainty that emerges from the case-law at the national level, that does not show a clear-cut interpretation as to the compatibility of Sharia Law with

¹⁰ See § 86.

¹¹ See § 144.

¹² See, § 151, "[t]he Court notes that there can be no doubt that in signing and ratifying the Treaties of Sèvres and Lausanne Greece undertook to respect the customs of the Muslim minority. However, in view of the wording of the provisions in question [...], those treaties do not require Greece to apply Sharia law. Indeed, the Government and the applicant agreed on that point. More specifically, the Treaty of Lausanne does not explicitly mention the jurisdiction of the mufti, but guarantees the religious distinctiveness of the Greek Muslim community, which was excluded from the population exchange provided for in that treaty and was expected to remain in Greece, where the large majority of the population was Christian. Nor did the treaty confer any kind of jurisdiction on a special body in relation to such religious practice".

¹³ See, § 152.

the principle of equal treatment and with human rights law¹⁴. A legal uncertainty “which is incompatible with the requirements of the rule of law”¹⁵ and which contradicts the Government’s argument that the compulsory application of Sharia Law derives from a “duty to honor [Greece’s] international obligations and the specific situation of the Thrace Muslim minority”¹⁶.

Not so much clarifying whom to side with, the Grand Chamber moves on to the fourth and main argument that lies in the criticisms and concerns that the mandatory application of Sharia Law gives rise internationally as to the unequal *status* of women and children compared to men within Muslim communities and towards the majority.

Here, the question appears swinging between the controversial compatibility of Sharia Law to international human rights law standards, left aside, to that of the safeguard of individual rights within closed communities, especially when it comes down to women¹⁷ and children.

With this regard, the Grand Chamber holds that: “several international bodies have expressed their concern about the application of Sharia law to Greek Muslims in Western Thrace and the discrimination thus created, in particular against women and children, not only within that minority as compared with men, but also in relation to non-Muslim Greeks. Thus, the Council of Europe Commissioner for Human Rights, in his report on the rights of minorities in Greece, noted that the application of Sharia law to matters concerning family law and inheritance was incompatible with the international undertakings entered into by Greece, particularly after its ratification of the post-1948 international and European human rights treaties, including those relating to the rights of the child and women’s rights”¹⁸.

The unique reference to gender is further abandoned, as the Grand Chamber chooses to focus on freedom of religion, neglecting that it “require[s] the Contracting States to create a particular legal framework in order to grant religious communities a special status entailing specific privileges”¹⁹ and, be as it may, it nonetheless requires the State to safeguard parity of rights within and outside the minority.

¹⁴ See, § 153.

¹⁵ *Ibid.*

¹⁶ See, § 146.

¹⁷ For a fruitful discussion on the challenges faced by group rights when coupled with the gender discourse, see, for example, S.M. OKIN, *Is Multiculturalism Bad for Women*, J. Cohen, M. Howard, M. Nussbaum eds., *Is Multiculturalism Bad for Women*, Princeton University Press, 1999 and *Mistress of their own destiny: group rights, gender and realistic rights of exit, Ethics*, 2002, 205 ss.; S. BENHABIB, *The claims of culture: equality and diversity in the global era*, Princeton University Press, 2002; A. SACHAR, *Multiculturalism Jurisdictions: cultural differences and human rights*, Cambridge University Press, 2001.

¹⁸ See, § 154.

¹⁹ See, § 155.

States' obligation to ensure equal rights within and outside the minority community is further linked to the crucial right to free self-identification²⁰, derived from the Framework Convention for the Protection of National Minorities, interpreted as a “cornerstone of international law on the protection of minorities in general”²¹.

The Grand Chamber hinges on it its main argumentation, maintaining that, on the one hand, the State must not: “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” – and, on the other, that – “[r]efusing 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”²².

The Grand Chamber lingers in particular on the negative aspect of the right to free self-identification, asking the State and the members of the minority to respect the free and informed choice of the member to not to be treated as such²³.

Despite the coming into force of the new law, which grants members of the Muslim minority of Western Thrace the right to opt for civil settlements of family-law cases, the Grand Chamber states the inefficacy of those provisions with regard to the applicant, whose situation needs to be framed in the time lapse of the previous legal system.

In the light of the above and benefiting from an interlaced analysis of the European Convention with the Framework Convention on the Protection of National Minorities²⁴, the Grand Chamber concludes for the violation of Article 14, read in conjunction with Article 1, Protocol No 1, in that by neglecting the

²⁰ On it, see H.J. HEINTZE, *Article 3*, M. WELLER ed., *Oxford Commentaries on International Law. The Rights of Minorities. A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford University Press, 2005, who, specifically, notices that “[i]n modern societies, [...] persons have multiple identities that coincide, coexist, or form layers, reflecting their various associations. However, identities are not based solely on ethnicity, nor they have uniform within the same community. Identity can be held by different members to varying degrees and can be more or less salient. This means that the same person might identify herself or himself in different and arrangement for her or him in a particular situation or context”.

²¹ See, § 157. For an investigation into the international mechanisms of protection towards minorities, see P. THORNBERRY, M.A. MARTÍN ESTEBANEZ, *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe*, Council of Europe Publishing, 2004 and *International Law and the Rights of Minorities*, Clarendon Press, 1991; G. PENTASSUGLIA, *Minorities in International Law: An Introductory Study*, Council of Europe Publishing, 2002.

²² See, § 157.

²³ See, § 157.

²⁴ M. WELLER ed., *Oxford Commentaries on International Law. The Rights of Minorities. A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford University Press, 2005.

applicant the right to inherit her husband's estate she has been discriminated against by association on the ground of religion.

3. Is there a Discrimination on Religious Ground? Yes, but (Only) by Association

The idea that Article 14 might possess a collective dimension, therefore affording an embryonic protection to ethnic minorities²⁵, was smoothly put forward in the ECtHR's case-law on travelers²⁶, hate crimes against roma²⁷ and, to some extent, it was even behind the finding of an indirect discrimination based on race in the landmark *D.H. & Others v. Czech Republic* case²⁸.

It was thus disappointing, in the instant case, that not only did the Grand Chamber refuse to embrace the applicant's approach, in that she alleged to be a victim of a direct discrimination based on religion and gender, but also that it chose to frame the analysis within the strict fences of the so-called discrimination by association.

The history of the notion of discrimination by association goes back to European Union Law.

²⁵ For an insight into the convention approach towards minorities, see S.M. POULTER, *The rights of ethnic, religious and linguistic minorities*, *European Human Rights Law Review*, 1997, 254 ss., who emphasizes that “many of the human rights enumerated in the Convention do directly assist members of minority groups and communities in asserting and maintaining their distinctive cultural identities in a collective manner. For example, the rights to freedom of association and assembly (Art. 11) clearly guarantee the establishment and running of cultural organisations. The right to freedom of expression (Art. 10) authorises the publication of newspapers, journals and magazines in minority languages. The right to freedom of religion (Art. 9) expressly includes a person's freedom, in community with others, to manifest his or her religion in public worship and in teaching. Moreover, the state has to respect, in the exercise of any functions that it assumes in relation to education and teaching, the right of parents to ensure that such education and teaching is in conformity with their own religious and philosophical convictions (Protocol 1, Art. 2)”. As for religion in particular and its collective resonance, see, among others, M.D. EVANS, *Manual on the Wearing of Religious Symbols in Public Areas*, Council of Europe Publishing, 2009, 34 and in the case-law, special references go to ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, § 118; *Izzetin Dogan and others v. Turkey*; *Moscow Branch of the Salvation Army v. Russia*. For a more extensive analysis of the approach of the ECtHR towards minorities within a comparative perspective focused on Italy, see, for example, C. NARDOCCI, *Razza e etnia. La discriminazione tra individuo e gruppo nella dimensione costituzionale e sovranazionale – Race and Ethnicity. Discrimination between the individual and the group in the constitutional and supranational perspective*, Edizioni scientifiche italiane, Napoli, 2016, [in Italian].

²⁶ Reference is to ECtHR, *Buckley v. United Kingdom*, *Chapman v. United Kingdom* (for a comment, see J. RINGELHEIM, *Chapman redux: the European Court of Human Rights and Roma traditional lifestyle*, E. BREMS ed., *Diversity and European Human Rights. Rewriting Judgments of the ECHR*, Cambridge University Press, 2013, 426 ss. 426 ss.) *Connors v. United Kingdom* (for a note on the case, see C. CAHN, *Towards Realising a Right to Positive Action for Roma in Europe: Connors v. UK*, *Roma Rights Quarterly*, 2005, 13 ss.) and, more recently, For a comment, see R. SANDLAND, *Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights*, in *Human Rights Law Review*, 2008, 475 ss.

²⁷ See ECtHR, *Nachova & Others v. Bulgaria*,

²⁸ For an analysis of the Judgement, see S. SPILIOPOULOU AKERMARK, *Images of children in education: a critical reading of D.H. & others v. Czech Republic*, in E. BREMS (ed.), *Diversity and European Human Rights. Rewriting Judgments of the ECHR*, Cambridge University Press, Cambridge, 2013, 40 ss.

The concept was firstly suggested by the European Court of Justice in *S. Coleman v. Attridge Law and Steve Law* in the context of a discrimination case on the ground of disability²⁹, where the ECJ was asked whether “the principle of equal treatment and the prohibition of direct discrimination apply equally to an employee who is not himself disabled but who, as in the instant case, is treated less favourably by reason of the disability of his child for whom he is the primary provider of the care required by virtue of the child’s condition”³⁰.

In that case, the European Court of Justice, following the Advocate General (AG) Poiares Maduro’s opinion, offered for the very first time an extensive interpretation of the concept of protected ground, within the meaning of the Council Directive 2000/78/EC, stating that “the prohibition of direct discrimination [...] is not limited only to people who are themselves disabled”, but it also covers those who are, have been or would be reserved a less favorable treatment even when they do not themselves possess the protected characteristic.

As acknowledged in literature, in endorsing the concept of discrimination by association, the ECJ has greatly contributed to broaden EU antidiscrimination law in its ability to intercept discriminatory behavior, though leaving aside and unanswered three separate issues.

The first, as outlined, concerns “the nature of the association between the victim of discrimination and the person with the protected attribute for the protection to be extended”³¹; the second whether indirect discrimination could also be protected; third whether the concept of discrimination by association might similarly spread beyond disability to include other factors such as gender, race or ethnic origin³², where no relationship of care exists between the victim and the bearer of the protected ground.

On the last two points, the European Court of Justice offered a preliminary response in *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, where the concept of discrimination by association has been applied beyond disability to ethnic origin and race, allowing protection even to indirect discrimination by association.

In that case, the ECJ argued that: “[t]he concept of ‘discrimination on the grounds of ethnic origin’ [...] must be interpreted as being intended to apply [...] irrespective of whether that collective measure affects

²⁹ On this, see A. STEWART, S. NICCOLAI, C. HOSKYN, *Disability Discrimination by Association: A Case of the Double Yes?*, in *Social & Legal Studies*, 20(2), 2011, 173 ss.; G.N. TOGGENBURG, *Discrimination by association: A notion covered by EU equality law?*, in *Eur. L. Reporter*, 2008, 87 ss.; L. WADDINGTON, *Protection for Family and Friends: Addressing Discrimination by Association*, in *Eur. Anti-Discrim.L.Rev.*, 2007, 15 ss.

³⁰ § 33.

³¹ A. ERIKSSON, *European Court of Justice: Broadening the scope of European nondiscrimination law*, in *International Journal of Constitutional Law*, 2009, 731 ss.

³² *Ibid.*

persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure”³³. The concept of discrimination by association has then gained attention by the European Court of Human Rights, in the case of *Guberina v. Croatia*, where the ECtHR, in a case involving the applicant’s request for a tax exemption due to the disability of his son, held that: “the words ‘other status’ have generally been given a wide meaning in its case-law [...] and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent. [...]. It thus follows, in the light of its objective and nature of the rights which it seeks to safeguard, that Article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person’s status or protected characteristics”³⁴.

Same interpretation of the corollaries of the non-discrimination principle was also endorsed in a case of racist hate crime by association, *Škorjanec v. Croatia*, where the European Court similarly held that: “the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence, [...] concerns not only acts of violence based on a victim’s actual or perceived personal status or characteristics but also acts of violence based on a victim’s actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic”³⁵.

On this last note, *Molla Sali v. Greece* was the very first case the Grand Chamber assessed the recurrence of a religious discrimination by association, in that the applicant was thought as been the victim of a discrimination not for being herself member of the minority, but for being the wife of a member of the Muslim community of Western Thrace.

With this regard, the Grand Chamber states that: “since the main focus of the [...] case is the Court of Cassation’s refusal to apply the law of succession [...] for reasons linked to the Muslim faith of the *testator*, the applicant’s husband, the primary issue arising is whether there was a difference in treatment potentially amounting to discrimination as compared with the application of the law of succession [...] to those seeking to benefit from a will as drawn up by a testator who was not of Muslim faith”³⁶.

What was thus crucial in structuring the judgment was the choice of the comparator – a married female beneficiary of a non-Muslim husband’s will – that results from the overlap of the direct victim of the

³³ ECJ, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, § 1.

³⁴ ECtHR, *Guberina v. Croatia*, § 78.

³⁵ ECtHR, *Škorjanec v. Croatia*, § 56.

³⁶ ECtHR, *Molla Sali v. Greece*, § 86.

discriminatory conduct with the testator (the applicant's husband) rather than with the beneficiary (the applicant).

This way of reasoning allowed the Court to shift the focus of its scrutiny from the applicant's *status* to that of her husband.

In other words, one thing is judging a case by looking at the applicant's *status* as inherently bonded to his or hers personal traits, another is questioning the consequences that another person's *status* and traits, somehow related to the applicant's, might entail on the latter. The resort to such a *de relato* analysis, in that the Grand Chamber looked at the applicant solely on the ground of her affiliation with her husband, opened the doors to the concept of discrimination by association.

However, two intertwined issues arise from this choice.

First, and in line with the concurring opinion of Judge Mits, the fact that the applicant, *Molla Salı*, was treated less favourably because she was married with a member of the Muslim minority was not "the only constitutive element of the case"³⁷.

As rightly pointed out, "[i]f one follows the [...] logic concerning the special legal regulation applicable in Thrace geared to protecting the Muslim minority, then the proper comparator which the Grand Chamber should have used is whether 'a married Muslim woman who was a beneficiary of her Muslim husband's will, was in an analogous or relevantly similar situation to that of a married non-Muslim female beneficiary of a non-Muslim husband's will'"³⁸.

That is to say that the applicant was herself a victim within the meaning of Article 35 ECHR and that the Grand Chamber would have better ascertained that "there has been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1 on the grounds of the applicant's husband's and her religion"³⁹ instead of confining its examination on the discrimination by association limb.

Second, to be more accurate, if one bears in mind the above mentioned definition of discrimination by association emerged in EU antidiscrimination law, it is self-evident that the specifics of this type of discrimination rests on the absence of *any* objective affiliation between the victim of discrimination and the suspect or protected ground.

³⁷ See the Concurring Opinion of Judge MITS, § 7.

³⁸ *Ibid.*, § 8. This is in fact the right comparator. The fact that a non-Muslim woman married to a Muslim man would have suffered from the same consequences as the applicant, it is not relevant here since the issue was whether the applicant suffered from a difference in treatment as a result of being member of the minority group.

³⁹ *Ibid.*, § 13.

The wording “by association” therefore implies that prejudices suffered by the victim go well beyond those who possess that human trait for including, conversely, those who are merely affiliated to the former.

In the instant case, though, the applicant did possess the said characteristic, being herself a Muslim together and even before being the wife of a Muslim man.

In other words, as to the concept of discrimination by association, “[a]n interesting peculiarity featuring in *Molla Sali* is that the testator’s religion, which lies at the root of the applicant’s discrimination by association, is also her own religion, as she, too, is a Muslim of the minority population of Western Thrace. This is most uncommon [...since] in the typical scheme [...] the person suffering discrimination by association does not bear the protected characteristic and does not belong to the disadvantaged group him or herself”⁴⁰.

It is thus questionable why the Grand Chamber chose to overlook the applicant’s religious affiliation (and gender⁴¹), bypassing the fact that she herself has been the victim of a direct discrimination based on religion.

Should the Grand Chamber ever wanted to hinge on the relationship between the applicant and her husband and on the legal consequences deriving from it, it would have done to do so by recognizing *prima facie* the direct discrimination suffered by the applicant and only after that by association.

By contrast, reading the case through the lens of the associative dimension of the discriminatory behavior undermined the finding of the direct discrimination based on religion and a truthful investigation into the collective dimension of the claim⁴².

The Grand Chamber therefore endorses a very peculiar type of discrimination by association, that highly diverges from the concept suggested by the ECJ.

Moreover, religion was not the only feature the applicant and her husband had in common as both belonged to the same minority suggesting a shared ethnic background that likewise contribute to distance the relationship between *Molla Sali* and her husband to that existing in a traditional discrimination by association scheme.

⁴⁰ N. KOUMOUTZIS, C. PAPASTYLIANOS, *Human Rights Issues Arising from the Implementation of Sharia Law on the Minority of Western Thrace—ECtHR Molla Sali v. Greece, Application No. 20452/14, 19 December 2018*, in *Religions*, 2019, 9.

⁴¹ For a study on the condition of Muslim women in Western Thrace, see, among others, I. TSAVOUSOGLU, *The Legal Treatment of Muslim Minority Women under the Rule of Islamic Law in Greek Thrace*, in *Oslo Law Review*, 2015, 241 ss.; A. TSAOUSSI, E. ZERVOGIANNI, *Multiculturalism and Family Law: The Case of Greek Muslims* (May 25, 2011). European Challenges in Contemporary Family Law, 209 ss., K. BOELE-WOELKI, T. SVERDRUP, eds., Intersentia, 2008; *Islamic Law and Law of the Muslim World* No. 08-17.

⁴² On this, see Paragraph No 4.

The preferred reasoning (and comparator) has thus led to two main consequences: first and foremost, the absence of any investigation on the compliance of Sharia Law with the European Convention; second, the scarce attention paid to dissident members and to intra-communitarian dynamics, that resulted in a missing “elaboration on the role of the state in a contemporary European democracy characterized by religious diversity”⁴³.

With respect to the former, the argument is that by interpreting the case as featuring a discrimination by association, in which the applicant suffered a discrimination only because she was affiliated to her husband, the Grand Chamber avoided to take a stand as to the contested compliance of Sharia Law with the principle of gender equality safeguarded by the European Convention.

Notwithstanding the Grand Chamber seems to acknowledge and share the concerns of international bodies as to the unequal treatment suffered by Muslim women and children due to the compulsory application of Sharia Law within small communities, it nevertheless limits its examination by looking at the testator’s faith without dealing with the overall regime applicable to all members of the community where major criticisms are likely to arise.

In doing so, the Grand Chamber refrained from condemning Sharia Law and its discriminatory content to the detriment of minority women.

On this, the Court agrees that: “[r]effusing 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”.

Still, the applicant is depicted as a victim “by association” and not as the member who has been neglected the right to exit and to not identify with the minority.

Hence, the Strasbourg Court, deliberately or not, sketched a clear-cut distinction between Sharia, and its theoretical non-compliance with human rights law standards, that is even acknowledged in the judgement, and the way in which it is specifically implemented in Western Thrace, that is conversely reserved no accurate examination. A logic, which sheds a dark light on the Grand Chamber’s willingness to fully unveil the problematic application of Sharia Law towards the applicant.

This way of reasoning had far-reaching implications in that it contributed to silence the recurrence of the discrimination based on gender alleged by the applicant, who claimed that she would have not been

⁴³R. URTZ, *The Vices of Leaving this Undecided*, in *Int’l J. Const. L. Blog*, 2019, at: <http://www.iconnectblog.com/2019/01/the-vices-of-leaving-this-undecided/>.

reserved same treatment were she not a woman. And, indeed, according to Sharia Law, the applicant's inheritance rights would not be compromised to the extent they were, had she not been a woman.

Accordingly and notwithstanding the circumstances of the case were crystal-clear in portraying the unequal and hierarchical structure of family relations in Western Thrace, gender, as ground of discrimination, is never evoked in the judgement and similarly the Grand Chamber refrained from linking its concerns towards Sharia Law with the specificities of *Molla Sali*.

Whether this option was linked to reasons other than the willingness to "save" the admissibility of the application and to reject exceptions on the applicant's lack of victim *status* is hard to say and open to debate.

What can be argue is that the outcome is a judgement where, the procedural and substantial implications underneath this "new" type of discrimination by association are combined in a way that granted the Grand Chamber to avoid a full disclosure of the human rights violations invoked.

In a nutshell, the approach is misleading. It is based on a new and heterogeneous type of discrimination by association which has little in common with the concept proposed by the ECJ and its *ratio*, that is to say enlarging the scope of anti-discrimination laws. On it, in fact, as the applicant was also a victim of a discrimination on the basis of religion and gender, there was no need for the ECtHR to make use of the discrimination by association scheme in the first place.

The result is the neglect of a fruitful confrontation with the Muslim world and with Muslim women, who deserve at the same time to be Muslims and to have their rights fully protected under State laws.

4. A Glance to Internal Minorities (or Maybe not): between Individual Self-Identification and Collective Rights

Alongside implications surrounding the upheld finding of a discrimination by association, *Molla Sali v. Greece* is also the very first case the ECtHR was solicited to deal with intra-communitarian conflicts and with an invoked right to not exercise a minority right.

The Strasbourg Court was actually asked to verify whether the compulsory application of Sharia Law, introduced by Greece as a form of minority protection under international agreements, was in compliance with liberal human rights law standards centered on individuals *status*.

First and foremost, it is noteworthy that the European Court bonds its reasoning to the so-called right to self-identification, allowing the Council of Europe's Framework Convention for the Protection of National Minorities to have a say in the judgment.

Despite Greece's lacking ratification of the Framework Convention, this is undoubtedly a welcome and remarkable move, in that the Strasbourg Court rarely gives access and links its reasonings to other international treaties⁴⁴.

What's more, this choice greatly contributes to show an embryonic willingness to embrace an holistic path aimed at balancing individuals and group rights without automatically siding with the former, neglecting legal substance to the latter⁴⁵.

From this viewpoint, the Grand Chamber endorses the option of those who suggest that, in a context of minority protection where groups are given forms of autonomy, the State might enforce and safeguard collective rights⁴⁶ as long as they do not entail internal restrictions on members of the minority⁴⁷.

In line with these approach, three conditions have to be met: reciprocity of rights between minority members and the majority in compliance with a general principle of formal equality; voluntary self-ascription to the minority, which encompasses individuals' self-identification; freedom to choose to be member or conversely to exit the group⁴⁸.

Molla Sali v. Greece raises a question of self-ascription and exit as the applicant asked to be exempted from the compulsory application of Sharia Law. The denial to choose civil Courts over religious jurisdiction, which lies at the core of the application, is rightly interpreted by the Grand Chamber as a violation of the

⁴⁴ On the relationship and mutual interactions between the ECtHR and the FCNM, see S.E. BERRY, *A tale of two instruments: religious minorities and the Council of Europe's rights regime*, *Neth. Q. Hum. Rts.*, 2012, 10 ss.

⁴⁵ Extensive literature exists on the dichotomy between collective rights and individual rights which relies on the discussion that juxtaposes liberals versus communitarians. For an analysis of the debate see, among many others, see M. WALZER, *The Communitarian Critique of Liberalism*, *Political Theory*, 1990, 6 ss.; B. PAREKH, *Retinking Multiculturalism*, Palgrave MacMillan, 2006 and *Dilemmas of a Multicultural Theory of Citizenship*, *Constellations*, 1997, 54 ss.; W. KYMLICKA, *Liberalism, Community, and Culture*, Oxford University Press, Oxford, 1989 and *Multicultural Citizenship. A liberal theory of minority rights*, Oxford University Press, 2003; C. TAYLOR, *Multiculturalism. Examining the politics of recognition*, A. GUTMAN, ed., Princeton University Press, 1994; J. RAZ, *The Morality of Freedom*, Oxford University Press, Oxford, 1986. On the concept of collective rights in its contentious relationship with that of individual right, see Y. DISTEIN, *Collective human rights of people and minorities*, *International and Comparative Law Quarterly*, 1976, 102 ss.; M. GALENKAMP, *Individualism Versus Collectivism: The Concept of Collective Rights*, Erasmus Univ., Fac. der Wijsbegeerte, Rotterdam, 1993; L. GREEN, *Two Views of Collective Rights*, in *Canadian Journal of Law and Jurisprudence*, 1991, 315 ss.; L. MCDONALD, *Can Collective and Individual Rights Coexist?*, *Melbourne University Law Review*, 1998, 310 ss.; J. NARVESON, *Collective Rights?*, in *Canadian Journal of Law & Jurisprudence*, 1991, 329 ss.; M. SANDERS, *Collective rights*, *Human Rights Quarterly*, 1991, 368 ss.; V. VAN DYKE, *Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought*, *The Journal of Politics*, 1982, 21 ss.

⁴⁶ For an overview of international human rights law approach towards collective rights, see, for example, A. XANTHAKI, *Collective rights: the case of indigenous people*, *Amicus Curiae*, 2000, 7 ss., who, prior to the coming into force of the 2007 UN Declaration on the Rights of Indigenous People, discussed on the existing mechanisms safeguarding group rights: Article 27 ICCPR; Articles 1 & 2 of the UN Convention on the Prevention and Punishment of the Crime of Genocide; Article 1(4) of the UN Convention on the Elimination of All Forms of Racial Discrimination.

⁴⁷ See L. GREEN, *Rights of Exit*, *Legal Theory*, 1998, 165 ss.

⁴⁸ For an in-depth analysis of the right to exit, see A. PHILLIPS, *Multiculturalism without culture*, Princeton University Press, Oxford, 2007.

right to exit the group in that the State did not grant protection to the individual right to not identify with the minority of belonging.

But the question that might arise following the reasoning of the Court is: the right of who? The applicant as victim by association? Her husband as the “real” victim of a direct discrimination based on religion? As it will be further discussed, the main criticism the judgement gives rise concerns the option to identify the applicant’s husband with the bearer of the right to not identify with the minority, rather than the applicant.

In other words, it can be argued here that the right to not identify with the minority and its corollaries (i.e. the right to opt for civil jurisdiction) were given a wrong interpretation that led to a lacking safeguard of the applicant’s conflicting relationship with the minority.

In *Molla Sali v. Greece*, the Strasbourg Court derives, as said, its main argumentation from Article 3 § 1 of the Framework Convention for the Protection of National Minorities that, according to its Explanatory Report: “guarantees to every person belonging to a national minority the freedom to choose to be treated or not to be treated as such [, ...leaving] it to every such person to decide whether or not he or she wishes to come under the protection flowing from the principles of the framework Convention”⁴⁹.

Despite “individual’s subjective choice is inseparably linked to objective criteria relevant to the person’s identity”, the Report goes on highlighting that: “no disadvantage shall arise from the free choice it guarantees, or from the exercise of the rights which are connected to that choice [and that t]his ... provision aims to secure that the enjoyment of the freedom to choose shall also not be impaired indirectly”⁵⁰.

Departing from the right to self-identification, which also compromises the right to not identify with the community of belonging, the Strasbourg Court grappled with an attempted theoretical balance between individuals *versus* collective rights, that nevertheless left unclear whether the Strasbourg Court addresses the issue from the applicant’s perspective rather than her husband’s.

A first element that buttresses the argument of a non-truthful or at least of a lenient investigation into the existing tensions within the minority community emerges from § 143 of the judgement, where the Strasbourg Court, arguing on the pursuit of a legitimate aim, held that: “[a]lthough the Court understands that Greece is bound by its international obligations concerning the protection of the Thrace Muslim minority in the particular circumstances of the case, it doubts whether the impugned measure regarding

⁴⁹ Explanatory report on the Framework Convention for the Protection of National Minorities, § 34.

⁵⁰ *Ibid.*, § 36.

the applicant's inheritance rights was suited to achieve that aim. Be that as it may, it is not necessary for the Court to adopt a firm view on this issue because in any event the impugned measure was in any event not proportionate to the aim pursued"⁵¹.

Though justified by its case-by-case evaluation, such a statement somehow endorses an hands-off approach, in that the Court refuses to interfere within the minority rights regime existing in Western Thrace.

Quite interestingly, though, the following paragraphs seems more fitting for this effort.

Moving on to the proportionality test, the Court argues in fact that: “[r]efusing 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 – which also encompasses, goes on the Court – “the right to choose not to be treated as a member of a minority”⁵².

The Court also claims that: “according to its case-law, freedom of religion does not require the Contracting States to create a particular legal framework in order to grant religious communities a special status entailing specific privileges. Nevertheless, a State which has created such a status must ensure that the criteria established for a group's entitlement to it are applied in a non-discriminatory manner”, and, lastly, that the State cannot “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”⁵³.

Significant statements, in that the Court endorses and asks for a minority regime not entailing such severe limitations – Kymlicka's internal restrictions – of the individuals rights of those belonging to the minority⁵⁴, and, yet, it decides to do so by looking solo at the testator.

The “non-discriminatory manner” seems, in fact, more suitable for a Muslim *versus* non-Muslim testators context rather than for a Muslim *versus* non-Muslim women comparison. An approach which seems problematic with respect to the gender-specificities of the case.

⁵¹ ECtHR, *Molla Sali v. Greece*, § 143.

⁵² ECtHR, *Molla Sali v. Greece*, § 157.

⁵³ *Ibid.*, § 155.

⁵⁴ See, on this, also § 158: “Greece is the only country in Europe which, up until the material time, applied Sharia law to a section of its citizens against their wishes. This is particularly problematic in the present case because the application of Sharia law caused a situation that was detrimental to the individual rights of a widow who had inherited her husband's estate in accordance with the rules of civil law but who then found herself in a legal situation which neither she nor her husband had intended”.

On it, it seems the Grand Chamber missed the opportunity to raise criticisms as to the treatment of minority women within small communities, who often found themselves victims of multiple or intersectional discriminations.

Be as it may, the judgement remains quite ambiguous on this note.

On the one hand, as highlighted above, the Grand Chamber embraces an individualistic approach taking on the challenge to balance individuals *versus* group rights⁵⁵, favoring a redesign of the relationship between the State and the minority group, that suggests that the State might interfere to the extent it is capable to remove violations of individual rights affecting members of the community.

The central point of the reasoning lies in fact in the refusal of a minority rights regime, that neglects the free exit of its members⁵⁶ and denies the positive and negative aspects of group membership, meaning that a member can belong to a minority or not, can exercise the rights of a minority or not.

The Grand Chamber criticises Greece for being “too open” in its communitarian-based commitment towards the Muslim community of Western Thrace, moving forward the debate on minority rights and State sovereignty.

On the other, though, it is regrettable that the recognition of the right to accept or conversely refuse minority *status* did not really take the applicant and, as a consequence, internal minorities and dissident members into proper consideration.

From this viewpoint, it could be argued that it might have been the reluctance to see the case through the eyes of the applicant, that have impeded the Grand Chamber from taking an additional step, applying the right to self-identification on her as well.

In other words, a *per relationem* analysis as such suggested by the Grand Chamber in building the case moving from the notion of discrimination by association, tackled just half of the problem, that is that pertaining the relationship between the State and the dissident but majority member of the group (i.e. the applicant’s husband), while the other half, that governing the State *versus* the minority in terms of its legitimacy to interfere on behalf of internal minorities and/or minority members (i.e. the applicant), remains unsolved.

Should the Grand Chamber had engaged in the analysis of the direct discrimination suffered by the applicant on gender and religious grounds, this additional facet of the claim would have more easily emerged and eventually assessed in the judgement.

⁵⁵ See § 156.

⁵⁶ See § 157.

However, as long as the Grand Chamber chooses not to challenge internal rules governing the life of the minority, gender and religious discriminations affecting minority women are not really under examination.

We all agree that the right to self-identification is a cornerstone of international human rights law on the protection of minorities and it is noteworthy that the Grand Chamber insisted on it condemning Greece's policies towards the Muslim community of Western Thrace in that they in practice do not allow members to resort to civil law and jurisdiction.

As the right to not identify with the group is dominant here, we would all agree more were it equally applied to minority members and to the applicant as well.

5. Conclusions: a New Path for Minority Rights Regime?

Several questions were underneath the judgment.

First and foremost, one revolved around the role of the margin appreciation doctrine and of the Grand Chamber in condemning or, *viceversa*, condoning Greece's policies towards the Muslim minority of Western Thrace.

Will therefore the Grand Chamber uphold the historical and geopolitical reasons behind the current regulation of the relationships between Greece and the Muslim minority or will it give up its scrutiny over a preferred resort to the margin of appreciation⁵⁷?

From this perspective, Greece's reform with Law No. 411 of 2018 – providing members of the Muslim community of Western Thrace with the right to opt for State laws and requiring a prior agreement between the parties to establish the Mufti's jurisdiction – seems to have had little impact on the judgement, at least explicitly.

On the one hand, the Grand Chamber followed its tendency to confine its judgement at the time of the application without conversely hinging on the changing legal framework coming slowly into force prior to the judgment.

⁵⁷ On the nature and implications surrounding the use and misuse of this doctrine, see, among many, S. GREER, *The Margin Of Appreciation: Interpretation And Discretion Under The European Convention On Human Rights*, Council of Europe Publishing, Strasbourg, 2000; G. LETSAS, *A theory of interpretation of the European Convention of Human rights*, Oxford University Press, Oxford, 2007 and *Two Concepts of the Margin of Appreciation*, *Oxford Journal of Legal Studies*, 2006, 705 ss.; H.C. YOUROW, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Martinus Nijhoff Publishers, 1996; A. YUTAKA, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerp, 2002; M. SAUL, *The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments*, *Human Rights Law Review*, 2015, 745 ss.; O.M. ARNARDÓTTIR, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, *Human Rights Law Review*, 2014, 647 ss.

On the other, Greece's decision to amend by law some of the main criticisms surrounding the *status* of the Muslim Minority of Western Thrace right after the public hearing of December 2017 must have helped the Grand Chamber to set aside fears of overstepping its supervisory role⁵⁸.

That being said, it is unclear whether the margin of appreciation would have possibly gained more weight if the Grand Chamber had chosen to engage in a balance between the applicant and the minority without rewriting the case as depicting a discrimination by association.

Put differently, even though the Grand Chamber refrained from recalling explicitly the margin of appreciation in its judgement, it is noteworthy that the resort to the notion of discrimination by association must have highly contributed to hide a willingness to evade questions as to the compatibility of Greece's system of personal law with the European Convention.

Not surprisingly, but following the Government's exceptions⁵⁹, the Grand Chamber never even engaged in a distinction between *Molla Sali* and *Refah Partisi v. Turkey*, which similarly brought about concerns as to the role of the State in accommodating or limiting religious diversity in a context of religious

⁵⁸ In a nutshell, Law No 4511 of 2018 introduced a new paragraph to Article 5, Law No 1920 of 1991, providing members of the Muslim community of Western Thrace with the right to opt for civil jurisdiction. The Mufti jurisdiction becomes therefore exceptional and based on a previous agreement between the parties. For a comment, see Y. SEZGIN, *The Greek Mufti System in a Global Perspective: Reform in the Triangle of Thrace, Athens and Strasbourg*, Remarks prepared for the event entitled "Sharia in Europe? — In Anticipation of the ECtHR Ruling on the Molla Sali v Greece Case" Aga Khan Centre, London, 8 Oct 2018. Some consider the optional jurisdiction not sufficient as to overcome issues related to the compatibility of Sharia Law with the Greek Constitution and human rights standards. See A. TSAOUSSI, E. ZERVOGIANNI, *Multiculturalism and Family Law: The Case of Greek Muslims*, cit., 221 ss. Another interesting aspect of the new law concerns the *ex ante* constitutional review prior to the enactment of the Muftis rulings. On it, see Y. SEZGIN, *op. cit.*, who observes that: "[i]f *ex ante* constitutional review can be conducted properly and effectively, for this to happen, [...] the Court of Cassation [...] must change its essentialist and discriminatory attitude towards Thracian Muslims and the mufti system; judges from the minority should be represented in the civil judiciary; civil judges in Thrace should be trained in Islamic law; procedural and substantive Islamic laws should be codified (or "ascertained"); and mufti decisions should be fully translated into Greek, including case details, evidence, rules, etc. Alternatively, as mentioned earlier, a special court of appeal can be set up to review mufti decisions, rather than asking civil judges and courts to do that.). If Muslim Thracians can effectively utilize the concurrent system [...] the following conditions must be satisfied: the government must recruit judges from the minority to civil courts; work with civil society to set up legal aid clinics that will help women and other underserved groups lodge cases in civil courts; increase awareness of civil option among communities in the region; and provide pro bono translation services; If every individual appearing before mufti is represented by a lawyer and those who cannot afford it are appointed pro bono legal counsel".

⁵⁹ See § 111 of the Judgement: "The Government invited the Court to draw a distinction between the present case and the case of *Refah Partisi* [...]. They submitted that in the instant case the Court was not called upon to consider in abstracto the application of a plurality of legal systems based on Sharia law, or its compatibility with fundamental rights. The present case had to be examined in concreto, having regard to such criteria as respect for multiculturalism in today's Europe and the difficulty of formulating policies applicable to religious communities. In view of the complexity of the "modern identity" of the inhabitants of Europe, the Court should conduct a case-by-case examination of each rule of Sharia law applying to actual cases concerning Muslims residing in non-Muslim States. The complexity criterion should be especially decisive in a case such as the present one, since the domestic courts had referred to international treaties as being the basis of Sharia law".

pluralism⁶⁰. Nevertheless, in that case, the Grand Chamber, hinging on the Chamber's conclusions, took a clear stand against religious pluralism in case of gross violations of human rights.

It was held in fact that: “plurality of legal systems [...] cannot be considered to be compatible with the Convention system [...] for two reasons. Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention [...]. Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy”⁶¹.

As stated already, the major criticism in *Molla Sali* arises from the lacking protection granted to the applicant as victim herself of an intersectional discrimination based on religion and gender.

With regard to the merit, as discussed above, the case raised the issue of the discriminatory dimension of the claim and of its intersectional nature⁶², having the applicant invoked the violation of Article 14 ECHR on both grounds of religion and gender.

Here's where the judgement is way too disappointing.

If the question of the compatibility of Sharia Law with the European Convention could have expected to be somehow avoided or circumvented, nor that concerning the direct discriminatory effects on religious ground suffered by the applicant, whose *status* has instead been neglected in the judgement.

Be it for the unsaid willingness to go too far in sanctioning Greece's system of minority protection or for the inherent weaknesses of the European Convention's architecture towards disparity of treatment⁶³, references to the right to self-identification did not in itself resulted in a successful balance between the competing interests at stake.

⁶⁰ In a comparative perspective and on the interplay between religion and pluralism, see M. D'AMICO, *Constitutional Secularism and Religious Fundamentalism in Italy And Europe: Considerations Stemming From Judicial Decisions*, *Italian Review of Legal History*, 2017, 1 ss. and, more generally, *Contended Rights. Contemporary issues of Constitutionalism*, FrancoAngeli, Milano, 2016 [in Italian].

⁶¹ See § 119.

⁶² For a pioneer study of the notion and implications of the concepts of intersectional discrimination, see K. CRENSHAW, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, *Stanford Law Review*, 1991, 1241 ss.; and *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, *University of Chicago Legal Form*, 1989, 57 ss.

⁶³ The reference here is to Greece's lacking ratification of Protocol No. 12 of the ECHR which could have enforced the discriminatory claims brought by the applicant.

The applicant evoked a conflict within the minority and blamed State's inability to act on her behalf. The Grand Chamber, on its part, replied by siding her claim apart, arguing in favor of a general principle of equal treatment between members and non-members of the minority community and not, as it was behind the application, between members, men and women, belonging to the said minority community. The fact that, in a context where a minority is entitled with territorial or non-territorial autonomy, the constitutional principle of equality must be safeguarded on both sides – for those in and for those outside the minority in their mutual interactions – is no question, at least for theorists who advocate for a liberal conception of multiculturalism⁶⁴.

Molla Sali did not merely (not only) build her case by comparing herself to non-Muslim women having no linkages with the minority, but she did it (also) by looking at the other members of the community giving voice to intra-communitarian conflicts and raising criticism as to treatment reserved to minority women.

On this, however, the Grand Chamber quite simply ignored her claim.

What then? What remains after *Molla Sali v. Greece* as to the place of minority and dissident members' rights within the European Convention?

As outlined above, the reference to the Framework Convention for the Protection of National Minorities widened the reasoning of the Court, giving entrance to the right to self-identification as a key argument to sustain the alleged violations.

Nonetheless seemed to be on the right track, the Court though failed to adequately address intra-communitarian dynamics, giving up a chance for suggesting new ways of minority protection aimed at integrating existing mechanisms, operating on the vertical line between the State *vis-à-vis* the minority, with the needs of dissident members and internal minorities, too often forgotten or wrongly compared to those whose aspiration is to exit permanently the group⁶⁵.

Good news we had a strategic case in Strasbourg, unveiling tensions within minority communities. Bad news the European Court of Human Rights wasn't ready or willing to go beyond theoretical statements and to tackle the entire issue served before it.

⁶⁴ On the problematic *status* of internal minorities and dissident members, see L. GREEN, *Internal Minorities and their Rights*, in *Group Rights*, University of Toronto Press, 1994, 257 ss. For a liberal approach to multiculturalism, which argue for a temperament of communitarian features, see, among others, W. KYMLICKA, *Multicultural Citizenship. A liberal theory of minority rights*, Oxford University Press, 1996.

⁶⁵ On this, see H. H. WEI, *A Dialogical Concept of Minority Rights*, Studies in International Minority and Group Rights, Brill, 2016, 161 ss., who elaborates on the so-called right to remain and on the right to internal dialogue as a way to safeguard dissident members from the negative consequences arising out from their exit from the cultural group of belonging.



Hopefully, more *Molla Salz*'s are yet to come and, eventually, the European Court of Human Rights will be forced to truthfully say where it wants to stand: with the State and the minority who acts against its members or with the latter. In other words, the European Court of Human Rights will likely be asked to consider the alternative between a non-interference approach in the relationship between the nation State and the minority or a more pervasive intervention which could impact eventually on the group's internal affairs.

It would have been enough, as for now, to at least portray the case as it were without looking for procedural escapes. Better luck next time.