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, 12.30-14.30
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THE GREEK MUFTI SYSTEM IN A GLOBAL PERSPECTIVE: REFORM IN THE TRIANGLE OF THRACE, ATHENS AND STRASBOURG

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State enforcement of religious family laws, especially when individuals do not consent to their application, violate a number of fundamental human rights (e.g., freedom of religion, equality before the law, marital and familial rights, and procedural rights including due process and fair trial). In the pending *Molla Sali v. Greece* (no. 20452/14), the ECtHR will most likely rule in favor of the applicant and find that the Greek government has discriminated against the applicant on grounds of religion and gender and has violated her right to fair trial and to property, as alleged by the applicant.

If the ECtHR does find a violation, the Greek government's response to the judgment could take one of the following five possible forms:

1) **Business as usual**: The government could simply ignore the judgement and choose not to introduce any changes to the "shari'a" or "mufti system" in Western Thrace.

2) **Abolition of shari'a and mufti system**: It could opt for complete abolition of the mufti system, thereby bringing personal status matters of the Muslim population in the region under the purview of Greek Civil Code (as was done following the abolition of rabbinical law and courts by the Greek government in 1946, or the abolition of Christian law and courts—along with shari'a—by Turkish government in 1926).

3) **Spiritual Mufti and Separate Qadi Courts**: The government could also separate the spiritual and judicial functions of the office of the mufti. While allowing muftis to be elected by the community as religious leaders with no official titles or offices, it could establish in Western Thrace a hierarchical network of Islamic (shari'a) courts staffed with government-appointed *qadis* (as in the model of Israeli shari'a courts).

4) **Shari'a in Civil Courts**: It could abolish the office of the mufti and bring application of Muslim family law under the jurisdiction of civil courts in the region (as in the Indian model).

5) **Partial Overhaul of the Current System**: Lastly, the government could opt for partial reform of the current system in order to avoid further embarrassment vis-à-vis its European partners, by addressing the concerns that led to the current case before the ECtHR in the first place.

In the light of the recent legislative developments such as Law 4511/2018 (Jan 2018) and the draft presidential decree concerning procedural rules at mufti tribunals (Sep 2018), it looks like the Greek government has already opted for Option #5: partial overhaul. Moreover, the Greek government has also recently appointed three deputy muftis in Komotini, Xanthi, and Didymoteicho. But what do these appointments and legislative developments mean? How will they affect the current shari'a or mufti system in Western Thrace? Will the proposed "reforms" be sufficient to address the human rights and rule of law concerns that have led to the pending case before the Strasbourg Court? How unique is the Thracian mufti system in comparison to similar Muslim family law systems elsewhere? How will the new legislative and administrative changes affect the standing of the Greek mufti system vis-à-vis other countries applying Muslim family law (especially non-Muslim majority nations)? This presentation will briefly address these questions.

Recent Legislative Changes:

In December 2017, just few days before the Grand Chamber hearing of *Molla Sali v Greece*, the Greek government introduced a new bill that was passed by the parliament as Law No: 4511/2018 on January 15, 2018. The law simply added a new paragraph (4) to Art. 5 of Law 1920/1991, which regulates the jurisdiction of muftis. The amended article 5(4) now declares mufti jurisdiction to be exceptional. In order to invoke mufti jurisdiction over personal status matters, both parties have to agree to it in writing; otherwise jurisdiction belongs to civil courts. Inheritance matters are automatically subject to the Greek Civil Code unless the testator leaves a notarized civil will specifically instructing the distribution of his/her estate according to Islamic law. Law 4511/2018 states that the amended article 5 (4) will come into force upon publication of a presidential decree regulating procedural rules for mufti "tribunals."

On Sep 1, 2018, a draft presidential decree was issued. The decree, consisting of 28 articles, deals with subject-matter, territorial and personal jurisdiction of the mufti in Articles 2 and 3 (in the past Greek courts have issued conflicting rulings concerning the jurisdiction of the mufti. The decree aims to clarify this issue in these two articles).

Article 4 sets the minimum age of marriage at 18 but allows the mufti to authorize underage marriages with permission from the minors' legal guardians.

Article 5 requires each party appearing before the mufti to be represented by a lawyer. It states that those who cannot afford a lawyer may request free legal aid in accordance with Law 3226/2004.

Article 6 states that proceedings before the mufti must follow a written format, and that mufti decisions must be published.

Article 10 establishes that proceedings before the mufti must be conducted in the Greek language. If parties do not know Greek, a translator is recruited.

Article 11 requires that Mufti decisions are issued in the Greek and Ottoman languages.

Article 13 states that mufti decisions cannot be enforced without a decree issued by the local single-member court of first instance. The civil court must examine whether the mufti's judgment has been issued within his jurisdiction, and whether it contravenes the Greek Constitution or the European Convention on Human Rights (ECHR). An appeal against the decision of a single-member court can be brought before a multi-member court of first instance.

Articles 14-22 deal with the administrative structure and staffing of mufti tribunals. The most important development here is that each mufti tribunal will be appointed a legal adviser trained in secular law in order to assist the mufti.

The Mufti System in Comparative Perspective

There are 53 countries in the world that formally integrate Muslim Family Laws (MFLs) into their legal systems. Of these 53, 18[1] are non-Muslim-majority nations. Of these 18, 5 countries apply MFLs within civil courts (Tanzania, Myanmar, India, Ghana, and Uganda). The other 12 have specialized religious (shari'a) courts that are staffed with Muslim qadis and have specialized appeal mechanisms. In nearly all countries with shari'a courts, there are statutory laws that specify sources of applicable material and procedural laws. Only Greece has muftis who adjudicate disputes; in the other countries that apply MFLs within shari'a courts, qadis adjudicate.

In this respect, the Greek mufti system is exceptional. Muslim family law that Muftis ostensibly apply is not codified. Neither are there rules of procedure or evidence that are uniformly applied at mufti tribunals. There is also no direct appeal for mufti decisions, which are not published. The language (Ottoman) they use in their decisions cannot be read or understood by the overwhelming majority of their clients. Mufti decisions are only summarily translated into Greek without much detail about the case, evidence, or the rules applied. Civil courts, exclusively staffed with non-Muslim judges who generally have no knowledge of Islamic law or the language and culture of the community concerned rely upon these summary translations to review mufti decisions and declare them enforceable (in the process, they also supposedly "review" whether mufti decisions comply with the constitution or the ECHR—as expected, under these circumstances, they merely rubber-stamp mufti rulings without effective review).

In brief, the mufti system has long needed a comprehensive overhaul. The pending case before the Strasbourg Court has given the government an opportunity to undertake a comprehensive reform of the system, but thus far the government has failed to capitalize on it. Law 4511/2018 and the draft presidential decree of Sep 2018 are insufficient to remedy the problem (even though they do have a few positive provisions), as they by and large misdiagnose the issue at hand.

[1] Cameroon, Eritrea, Ethiopia, Ghana, Greece, India, Israel, Kenya, Mauritius, Myanmar, Philippines, Singapore, Sri Lanka, Suriname, Tanzania, Thailand, Trinidad and Tobago, Uganda.

Under a secular and democratic government, no one should be subjected to religion-based laws without his/her explicit consent to the application of these laws. Individuals should be provided with alternative exit mechanisms. In this respect, both Law 4511/2018 and the draft presidential decree of Sep 2018, despite their major shortcomings, can be considered a positive development, since they provide Muslim Thracians with a clearly defined exit option.

The draft presidential decree of Sep 2018 has several other important provisions. It eliminates the previous ambiguity concerning the territorial and subject-matter jurisdiction of the mufti. It requires that mufti proceedings be written and his decisions published. These are important rule-of-law measures that will increase transparency, accountability, and predictability of mufti tribunals. Parties appearing before mufti tribunals are required to have legal representation—another important step toward increased accountability. Additionally, each mufti tribunal will be given a legal adviser who has secular law training from a national university and legal experience to assist in the tribunals.

Despite these positive steps, the draft decree also includes some misguided measures. For instance, it requires that proceedings be conducted solely in Greek language. Both muftis and members of the Muslim minority primarily speak Turkish as their native language, and many individuals in the community do not know Greek. The draft decree also requires mufti decisions to be written in Greek and Ottoman. The need for the judgement to be written in Greek can be perfectly justified, as the civil courts need to review it and issue an enforceability decree. But the need to have court decisions written in Ottoman is not easy to understand, apart from the need to maintain an archaic ritual of the mufti tribunals. Instead, decisions should be written in modern Turkish in addition to Greek, without plaintiffs' needing to incur additional translation costs. Turkish is the native language of the majority of the community in Western Thrace, while the Ottoman language can be read by only a small number of people who have attended madrasas in the region. In fact, I have witnessed on numerous occasions individuals who cannot read or understand mufti judgements. This is a major rule-of-law concern.

Apart from these procedural issues, the draft decree also attempts to regulate the age of marriage for Muslim couples. A procedural law is not the right place to address the issue of the minimum age of marriage. Instead, it should be regulated, along with polygyny, and *talaq* (extrajudicial, unilateral male divorce), in a comprehensive code dealing with substantive Muslim family law. A commission consisting of Muslim members of parliament as well as Islamic scholars and other stakeholders (women's rights activists etc.) should prepare a Muslim family code bill and submit it to parliament for approval. The evidence shows that procedural rules and penal laws that simply criminalize "undesired" practices such as underage marriages, polygyny, and *talaq* are usually insufficient to bring about a positive social or legal change in the community.

Although appointing legal advisers trained in secular law to mufti tribunals will be a step in the right direction, the authorities must make sure that some of these appointees are women. It is necessary to increase female representation in the mufti system. There are Islamic no laws prohibiting women from issuing fatwas or being muftis. Moreover, in the last few decades, Muslim

women have been appointed as Islamic judges to shari'a courts in several jurisdictions (i.e., Indonesia, Philippines, Malaysia, Israel, the Palestinian Authority in West Bank). Hence, the Greek government may consider amending legislation to open the door to the appointment of female muftis. Likewise, as criteria for appointment of mufti (the issue of mufti appointments in itself is a big problem, see ECtHR judgements in *Serif v Greece*, and *Agga v Greece*) are revised, the government should also require that muftis, who act as religious judges, have training in civil, constitutional law and are familiar with European and international conventions on human and women's rights. Criteria for selection and appointment of muftis should be on par with those for members of the civil judiciary.

In addition, a mechanism to directly appeal mufti decisions should be established. The appeal authority (court) should include experts on Islamic law and constitutional law who are selected from among the Muslim community in Thrace.

The current system of constitutional review is highly ineffective. Civil court judges serving in single-member circuits in the region should be trained in Islamic law and culture of the local community, or aided by experts from the community who possess legal, cultural and linguistic competency to conduct an effective review. Currently there is not a single Muslim judge in Greek judicial system. The government must make a sincere effort to recruit civil judges from among qualified members of the Muslim community and appoint some of them to the state courts in the region.

The Greek mufti system ranks low when compared to other MFL systems in the world (in both Muslim- and non-Muslim-majority countries) in terms of the legal guarantees and checks (procedural and substantive) placed on religious laws and courts to ensure their compliance with rule of law and basic human/women rights standards. For instance, on IRAMFAL (the Index of Right-based Accommodation of Muslim Family Laws), a composite indicator of rule of law and human rights friendliness of MFL systems, Greece scores 36%. Just to give you an idea, the lowest scoring country--Saudi Arabia-- has 6%, while the highest scoring country—Mali--has 78% on the index. The higher the score the more compliant the MFL system with the rule of law and basic human/women's rights standards. Among the MFL-applying countries that are considered democracies (e.g., Indonesia, India, Ghana etc.), Greece has the lowest IRAMFAL score.

Despite its meager score, however, the Greek mufti system enjoys a considerable advantage over other MFL systems. Greece is the only country in the world that requires *ex ante* constitutional review of religious court rulings. In other countries where there is constitutional review, the review is conducted *ex post*, which places the burden of reporting alleged human rights violations and breaches of law on the parties. In theory, all mufti decisions in Greece are subject to review by civil courts, which could overturn them if they are found to contravene the constitution. However, as noted earlier, the *ex ante* constitutional review system is nonexistent in practice due to political and structural constraints.

The draft presidential decree also introduces another *ex ante* oversight mechanism that is mandatory legal representation for individuals appearing before mufti tribunals. When this

provision fully comes into force, Greece will be the first country in the world with mandatory representation in shari'a courts.

Besides these two unique features, thanks to Law 4511/2018, the Greek mufti system now also provides individuals with a flexible exit option. When compared to other nations, the Greek system seems to offer a greater freedom to Muslim citizens to choose between Islamic and civil systems—at least in theory (we still need to see in practice if necessary conditions for individuals to effectively utilize concurrent jurisdictions exist). For instance, the Israeli system allows concurrent jurisdiction only for such matters as maintenance, custody, inheritance etc., but not for marriage or divorce. The Indian system allows Muslims to marry civilly under the Special Marriage Act of 1954, but those who opt for religious marriage cannot later utilize the civil law for divorce. On the other hand, the new Greek law and the draft decree seem to allow people to resort to civil courts even if they married religiously.

Prospects for Reform in the Mufti System

In brief,

* If *ex ante* constitutional review can be conducted properly and effectively;

(for this to happen, the following must occur: the Court of Cassation, *Areios Pagos*, 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;

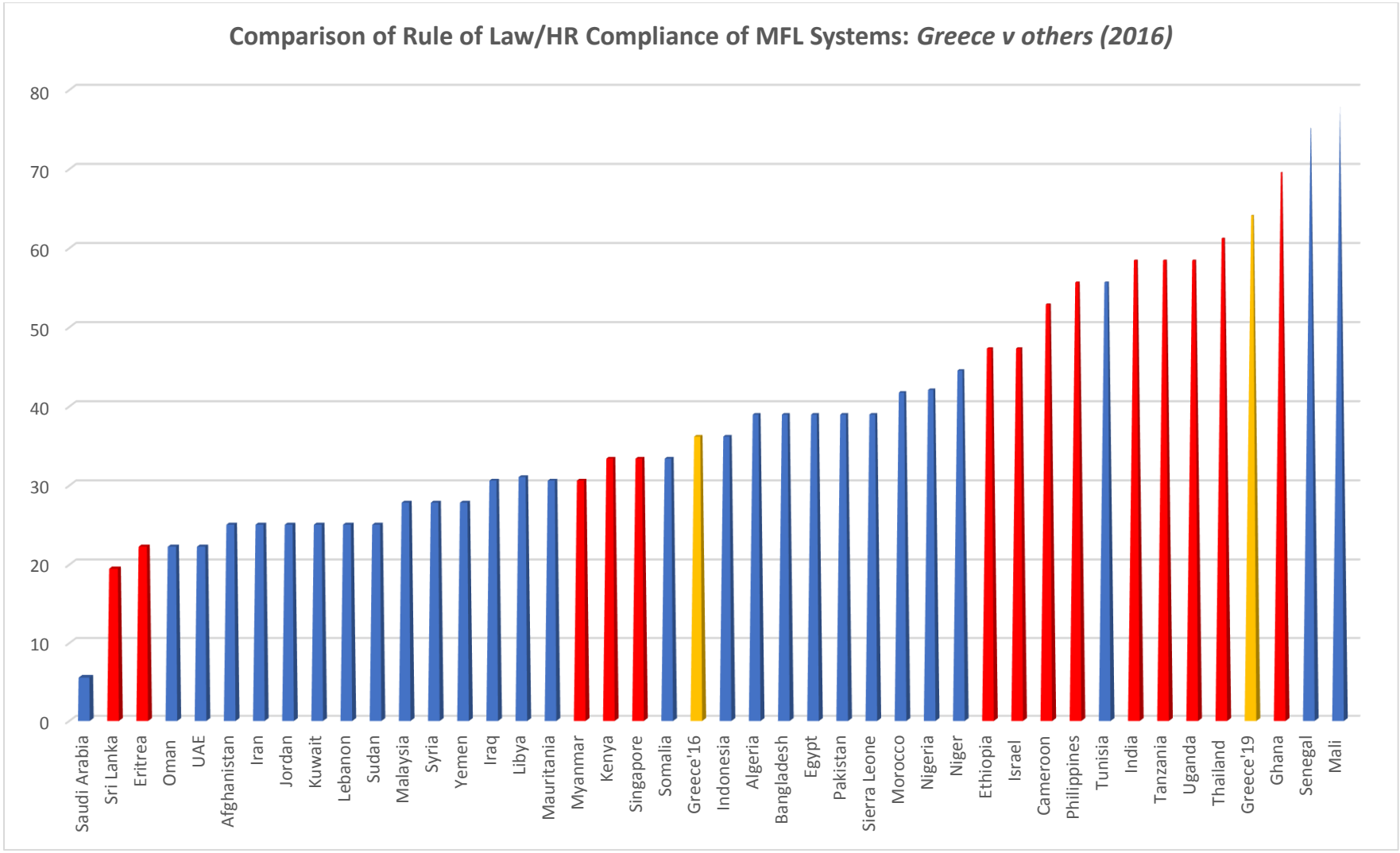
(for this to happen, the following conditions must be satisfied: the government must recruit judges from the minority to civil courts; work with civil society to set up legal aid clinics that will help women and other underserved groups lodge cases in civil courts; increase awareness of civil option among communities in the region; and provide *pro bono* translation services, etc.)

* If every individual appearing before mufti is represented by a lawyer (and those who cannot afford it are appointed *pro bono* legal counsel);

Then we can expect the Greek mufti system to become more rule of law and human rights compliant. In fact, we can project that with the implementation of the new legislation, despite the aforementioned shortcomings, the Greek mufti system's IRAMFAL score will rise from 36% to

69%. This would be a considerable improvement, but there would still be much to be done to make the system fully compliant with human/women's rights and expand basic procedural guarantees.

In conclusion, I am cautiously optimistic about the prospects for reform in the Greek mufti system. Non-Muslim governments cannot easily introduce direct changes into shari'a law or courts. The change usually takes place when it is initiated from within, especially by the courts and qadis themselves. If Greek courts (or the Strasbourg Court) can effectively pressure muftis to abide by the constitution and the ECHR from above (top-down pressure), and if Muslim litigants can effectively utilize concurrent jurisdiction, thereby exerting lateral pressure on muftis (horizontal pressure), and if civil society groups can lobby muftis and religious elites and mobilize local groups (bottom-up pressure), there would be enough pressure on muftis to undertake self-reform. If they want to protect their jurisdiction and keep their clients, muftis must spearhead the process of self-reform and renewal; otherwise they will soon become irrelevant.


Comparison of Rule of Law/HR Compliance of MFL Systems: *Greece v others (2016)*
80
70
60
50
40
30
20
10
0
Saudi Arabia
Sri Lanka
Eritrea
Oman
UAE
Afghanistan
Iran
Jordan
Kuwait
Lebanon
Sudan
Malaysia
Syria
Yemen
Iraq
Libya
Mauritania
Myanmar
Kenya
Singapore
Somalia
Greece'16
Indonesia
Algeria
Bangladesh
Egypt
Pakistan
Sierra Leone
Morocco
Nigeria
Niger
Ethiopia
Israel
Cameroon
Philippines
Tunisia
India
Tanzania
Uganda
Thailand
Greece'19
Ghana
Senegal
Mali