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Religious Adjudication and the European Convention on Human Rights

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I. Introduction

How should a human-rights compliant state respond to the phenomenon of religious adjudication? This is the question underlying two recent developments that have re-ignited the debate about recognition of Sharia Law in Europe. In the first, a long-awaited independent review into Sharia Councils in England and Wales recommended a combination of diversion, education and state promoted self-regulation.[1] In the second, the Grand Chamber judgment in *Molla Sali v. Greece*,[2] the European Court of Human Rights found the system in Western Thrace whereby Muslims were subject to the jurisdiction of muftis over questions of inheritance to be in violation of the Convention. More significantly perhaps, since that system has already been superseded in any event, the Grand Chamber gave clear indications of the standards that any form of recognition must meet to comply with the Convention. In this article it will be argued that taken together these developments help sharpen our understanding of what it means to recognize religious law and whether a state that does so can meet it human rights obligations.

The focus of this article is on 'religious adjudication'. This term requires brief preliminary explanation. Adjudication is a feature of what Maleiha Malik has termed 'minority legal orders'.[3] By this she is referring to cultures or religious groups whose social life is regulated by '[N]orms [that] determine how individuals should or should not act, as well as specifying the consequences of non-compliance' and 'institutions (for identification, interpretation and enforcement of norms)' which together amount to 'a social institution that is similar to a legal

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[1] *The independent review of the application of sharia law in England and Wales*, Cm. 9560 (Feb. 2018).

[2] *Molla Sali v. Greece* App no. 20452/14 (ECtHR, 9 December 2018).

[3] M.Malik, 'Minorities and the Law: Past and Present' (2014) 67 CLP 67 (hereafter, Malik, 'Minorities and the Law'). In their recent wide-ranging discussion of the perceived challenge to liberal constitutionalism from systemic aspects of religion, Ran Hischl and Ayelet.Shachar also point to the normative similarities between religions and constitutions: R. Hischl and A. Shachar, 'Competing Orders: The Challenge of Religion to Modern Constitutionalism', (2018) 85 U of Chicago LR 425 (hereafter, Hirschl and Shachar, 'Competing Orders') at 431-2.

For Review Only

order'.[4] Malik's discussion draws impliedly on a Hartian model, suggesting that minority legal orders combine primary (normative) and secondary (institutional) aspects.[5] From this point of view religious legal systems can vary in how closely they resemble positive law, depending on how developed their institutional mechanisms are. Some may provide for little more than mediation of disputes, whereas others have a sophisticated institutional framework for interpretation, enforcement and even change of norms. It is the institutional aspects of identification, interpretation and enforcement of religious norms that I term religious adjudication. The status of religious adjudication rather than of religious norms as such, I contend, is the central issue in contemporary debates ostensibly about religious 'law' in liberal states.

Like the recent review in the UK, in this article I approach religious adjudication non-judgmentally, as an existing social phenomenon. Religious adjudication takes place in a variety of contexts. Some- such as determinations by religious bodies, for example by the Beth Din, Roman Catholic Diocesan Tribunals or Sharia Councils over the availability of divorce or annulment of a religious marriage – involve the resolution of a dispute between two parties and have a clear analogue with adjudication by state courts. Others involve determinations by a religious community of whether its religious norms or standards have been broken leading to sanctions (such as the removal of a clerical licence or shunning) and are more analogous to professional disciplinary proceedings. In view of the persistence of such practices the question tackled here is not how to discourage or eradicate them, nor how to formalise them, but rather how a state that is faithful to its human rights commitments should respond. More specifically: is state recognition of religious adjudication compatible with the ECHR and, if so, under what circumstances?

The discussion proceeds in the following way. Part II explains the different ways in which the state may relate to religious adjudication. It identifies as especially significant for the current debates religious adjudication that is permitted or tolerated but is not endorsed by the state. The approach of the European Court of Human Rights towards religious norms and religious adjudication is introduced in Part III, in particular its approach to religious autonomy and to the right of fair trial. Part IV focuses specifically on how the Court has dealt with cases

[4]Malik, 'Minorities and the Law' 70-71.
[5] cf H.L.A. Hart *The Concept of Law* (Oxford 1961) ch.5.

For Review Only

involving parallel systems, especially in its recent *Molla Sali* decision. Building on that discussion, Parts V and VI tease out two tests of compatibility from the jurisprudence that religious adjudication of all kinds must satisfy in order to comply with the Convention. These are, respectively, adequate judicial scrutiny by the civil courts and voluntarism. The concluding section (Part VII) draws the arguments together.

II. 'Recognition' and Adjudication

It will clarify the subsequent discussion to first explain the different ways in which the state may relate to religious law. This is necessary in part because of the confusion surrounding the discussion of 'recognition' of religious law, much of which is caused by an overly simple binary approach to legal norms. I shall argue that confronting the phenomenon of religious law the state has a spectrum of different approaches available[6] and that to reduce these to the stark alternatives of prohibition of religious adjudication, on the one hand, or adoption or enforcement, on the other, is misleading.

Much of the debate over 'recognition' of religious law focuses on one specific question about the interaction of state and religious law- whether state law should permit religious legal obligations to be enforced in the sense of allowing them to be adopted as or translated into state obligations. Commentators sometimes refer, inaccurately, to parallel legal systems to describe schemes of this kind. Parallel systems do exist in some countries and these result in differential legal obligations fixed according to the religion of the parties, as is the case with the jurisdiction of religious courts in Israel[7] or Malaysia[8] over family matters. The attitude of the European Court of Human Rights to such parallel systems is discussed in Part IV below. Parallelism, however, is generally not what is under consideration in contemporary debates about accommodating religious adjudication in liberal states. More often the focus is on plural systems that result in 'supplementary' or 'overlapping' civil and religious jurisdictions.[9] From

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[6] cf M. Zee, 'Five Options for the Relationship between the State and Sharia Councils' (2014) 16 Journal of Religion and Society 7 and L. Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (OUP 2012) (hereafter, Zucca, *A Secular Europe*) ch. 6.

[7] Y. Sezgin, *Human Rights Under State-Enforced Religious Family Laws in Israel, Egypt and India*, (CUP 2013) ch. 4.

[8] P. Cumper, 'Multiculturalism, human rights and the accommodation of sharia law' (2014) Human Rights Law Review 14, 31-57; A.Harding, 'Malaysia: Religious Pluralism and the Constitution in a Contested Polity', Middle East Law and Governance 4 (2012) 356–385.

[9] See, for example, Bernard Jackson's discussion of religious law in the State of Israel: B. Jackson,

For Review Only

a theoretical perspective Lorenzo Zucca underlines the differing implications of parallel and plural systems for the relationship between positive law and religious law in a way that refers back to the difference between normative and institutional aspects of religious law (as briefly sketched in the introduction). Parallel systems, Zucca argues, involve the state in religious differentiation according to norms, whereas plural systems merely provide for religious adjudication.[10] This is a helpful approach that can be applied to the current debate.[11]

The focus on enforcement is, I contend, a distraction, because it narrowly reflects only some of the contexts in which religious adjudication is encountered.[12] It is meaningful to talk of the ecclesiastical law of the Church of England being 'enforced' by the state since it is part of the common law.[13] Equally, commercial contracts providing for religious arbitration can be 'enforced' under the Arbitration Act 1996.[14] In the absence of a contrary intention the law of England and Wales applies to arbitration agreements[15] but the parties may stipulate that the law of another jurisdiction[16] or that religious law should govern instead.[17] But even in these contexts the decision to be subject to religious law in the first place stems from a voluntary decision (to be ordained in the Anglican church, to enter into a contract with the clauses in question, and so on).

Moreover, to suggest that there is a dualism in which either religious law is either recognised or is not, creates the misleading impression that where it is not recognised religious

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[10] Zucca, *A Secular Europe* ch. 6.

[11] It would be misleading, however, to view minority legal orders solely from the point of view of their relationship with a given system of positive law. Such religious systems transcend national boundaries, even where the religious system has organised national, regional or local adjudicative bodies that correspond to the positive legal order. For example, pronouncement of a religious divorce by a rabbinical court or decree or annulment by a Catholic tribunal will be recognised universally. Depending on the status of the religious adjudication in different jurisdictions the effect in positive law will vary: in some European countries such decrees of annulment by Catholic tribunals take effect in positive law whereas in many others they operate only to determine religious obligations and have no civil effect (n. 56 below).

[12] See generally R. Sandberg, G. Douglas, N. Doe, S. Gilliat-Ray and A. Khan, 'Britain's religious tribunals: "joint governance" in practice' (2013) 33(2) OJLS 263; G Douglas et al, 'Marriage and Divorce in Religious Courts: A Case Study' (2011) 41 Fam Law 956.

[13] Zucca, *A Secular Europe* 123 and 128-30. Note, however, that Zucca's preference appears to be for state endorsement of limited forms of religious adjudication. He writes of the danger of the alternative as a 'black market' in Sharia Law (ibid 134), whereas my discussion (below) allows for greater nuance in distinguishing permission from prohibition and endorsement.

[14] R. Sandberg, *Law and Religion*, (Cambridge, 2011) 184-188.

[15] Arbitration Act 1996, s. 2(1).

[16] Including one that itself applies religious law.

[17] ibid s. 46(1), referring to considerations other than the rules of a national legal system.

For Review Only

adjudication is therefore irregular, problematic or even unlawful. Much of the public discussion of Sharia Councils has in the UK has carried this implication.[18]

Limiting discussion to recognition or enforcement also assumes an unduly naïve account of the operation of legal norms, since an important dimension is omitted, namely the position of religious law when it is merely permitted to operate (i.e. not prohibited) by state law. In the UK non-binding religious adjudication is permitted (as with Sharia Councils) but this does not constitute state endorsement or enforcement. The toleration of non-binding religious adjudication is not an argument (legal or otherwise) for or against extending binding adjudication and still less so in favour of parallel legal rules. Such toleration, nevertheless, allows for expression of religious choices and, to that extent, acknowledges pluralism. Although for some religionists this is second-class recognition (hence demands for more positive recognition), for others it goes far enough.[19]

On the other hand, it is also misleading to suggest that the choice is between toleration - with the connotation that this amounts to state endorsement - and prohibition.[20] Toleration does not preclude the state from education or persuasion aimed at discouraging religious adjudication. Positing a false alternative in this way evades an important question: why less burdensome or restrictive measures than prohibition would not adequately address concerns over discriminatory or other aspects of religious adjudication that are potentially harmful to vulnerable groups within religious minorities, for example women seeking religious divorces. It is arguable that, even if it is established that some forms of religious adjudication are, on the whole, harmful prohibition should be a last resort. Indeed, from some perspectives prohibition itself can be seen as a form of impermissible state entanglement with religion. [21]

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[18] R. Grillo, *Muslim Families, Politics and Law: A Legal Industry in Multicultural Britain* (Ashgate 2016) (hereafter, Grillo, *Muslim Families, Politics and Law*) ch. 2

[19] Abdullah An-Naim has argued that even in predominantly Muslim societies for the state to enforce Shari'a is contradictory and un-Islamic: A. An-Naim, *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard University Press 2008).

[20] cf Malik, Minorities and the Law, 101: 'Future debates will need to move beyond the current false binary between prohibition or permission to a more sophisticated analysis that develops strategies for cultural voluntarism and mainstreaming minority legal orders in liberal societies.'

[21] There have been attempts to introduce legislation prohibiting the use of Sharia in a number of US states, although most of these adopt religiously neutral language (referring to 'foreign law' rather than religious law).

A number of these distinctions are highly pertinent to the debate in the United Kingdom in recent years over Sharia Councils.[22] The apparent growth in popularity of these bodies in settling disputes in the Islamic community, coupled with concerns over whether they deal fairly with women who resort to them, have provoked a variety of reactions, from calls for prohibition, through to proposals for their recognition, with variations on regulation or toleration in between. In 2017 the then Home Secretary Theresa May, established an independent review chaired by Professor Mona Siddiqui, to examine the compatibility of the application sharia law with the law in England and Wales and '. … the ways in which [it] may be being misused, or exploited, in a way that may discriminate against certain groups, undermine shared values and cause social harms'.[23]

Reporting in 2018, the independent review found some 90% of referrals to Sharia Councils were by women seeking an Islamic divorce.[24] In many such cases civil divorce was not available because the marriage was unregistered. While the review found some evidence of good practice by the councils it also found clear evidence of discriminatory and unfair treatment of women. In its view, however, the answer was not to ban Sharia Councils (which it judged would be likely to be ineffective) but rather to effectively tackle the issue of the high proportion of Muslim marriages that were unregistered, so making recourse to Sharia Councils unnecessary. It therefore proposed amendments to the Marriage Act 1949 to make it an offence for the celebrant of a Muslim marriage to fail to register it. This, it argued, should be coupled with a concerted education campaign in the Muslim community to promote civil marriage. At the same time, it proposed that a system of self-regulation of Sharia Councils should be established to promote good practice. Responding in a Green paper in March 2018, the government undertook to further explore the reform of the law on marriage and religious

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http://gaveltogavel.us/2014/01/22/bans-on-court-use-of-shariainternational-law-south-carolina-bill-bans-sharia-law-by-name-bills-not-reintroduced-in-at-least-three-states/ (last accessed 31 January 2019).

A similar amendment to the Oklahoma Constitution was prevented by an interim injunction on the grounds that it would violate the First Amendment: *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012). Subsequently the District Court (Western District of Oklahoma) granted a permanent injunction: *Awad v. Ziriax* Case No. CIV-10-1186-M, August 15, 2013.

[22] n 18 above.

[23] 'Independent Review into sharia law launched' (Home Office press statement, 26 May 2016). https://www.gov.uk/government/news/independent-review-into-sharia-law-launched? (last accessed 31 January 2019). A parallel investigation by the Home Affairs Select Committee was discontinued due to the dissolution of Parliament for the 2017 General Election.

[24] *The independent review of the application of sharia law in England and Wales*, Cm. 9560 (Feb. 2018).

For Review Only

weddings and supported the proposals for an education campaign.[25] It rejected, however, the review's recommendation to encourage self-regulation by creating a body to design such a system comprising specialist family lawyers and Sharia Council panel members. The Green Paper argued that to do so would confer legitimacy upon Sharia Councils as a form of alternative dispute resolution and that the state should have no role in facilitating or endorsing this.[26]

The recommendations of the review contrast with the mixture of prohibition and regulation proposed in a series of unsuccessful private Bills moved by since 2011 by Baroness Cox in the Arbitration and Mediation Services (Equality) Bill.[27] That Bill aimed to prohibit sex discrimination in the provision of arbitration (both under the Arbitration Act 1996 and in 'arbitration services') in treating the evidence of a man as worth more than that of a woman, or vice versa. It would also have excluded from arbitration proceedings matters falling within the jurisdiction of the criminal or family courts and given power to set aside negotiated agreements in family law if consent was not genuine; and criminalised false claims of jurisdiction. The overall approach was to add procedural safeguards to religious arbitration.[28] Similar reasoning underlay the (rejected) Boyd proposals in the Canadian province of Ontario.[29] The debate resulting from the report's proposals ended, however, in the prohibition of faith- based family arbitration, following the introduction of regulations limiting recognized family arbitration agreements to those conducted in accordance with civil law.[30]

For Review Only

[25] HM Government, *Integrated Communities Strategy Green Paper: Building stronger more united communities* (March 2018).
[26] ibid 58. See also: *The independent review of the application of sharia law in England and Wales*, 20 (Dissenting view on regulation).
[27] Grillo, *Muslim Families, Politics and Law* ch.7.
[28] Although critics doubted what it would have added to the common law or the Arbitration Act 1996: J. Eekelaar, 'The Arbitration and Mediation Services (Equality) Bill' [2011] *Family Law* 1209.
[29] M. Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Attorney-General of Ontario 2004).Available at: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf (last accessed 31 January 2019).
[30] Ontario Reg 134/07, s. 4(1). See also: M. Boyd, 'Ontario's 'shari'a court': Law and Politics Intertwined' in Griffith-Jones *Islam and English Law*; N. Bakht, 'Were Muslim barbarians really knocking on the gates of Ontario? The religious arbitration controversy - another perspective', (2005) 40 *Ottawa Law Review* 67-82; L. Weinrib, 'Ontario's Sharia Law Debate: Law and Politics under the Charter' in R Moon (ed), *Law and Religious Pluralism in Canada* (UCB Press 2008) 250; A. Schachar , 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law', (2008) 9 *Theoretical Inquiries in Law* 573-607.

Critics of the recognition of religious law often allege that recognition poses a threat to the unity or sovereignty of state law.[31] In a strict sense, arguments of this kind rest on a misunderstanding. Recognition of plural religious systems is, fundamentally contractual in nature- the norms enforced are the parties' religious norms, rather than norms promulgated by the state. Even in jurisdictions where parallel systems operate the 'one law for all' criticism is arguably incorrect since invariably there are complex ground rules for establishing the primacy of constitutional or procedural norms.[32] Following a Hartian approach, such arrangements can be understood as a ranking of sources of law, rather than a partition of the legal system.[33] But to suggest that recognition of *plural* systems in western states involves anything as fundamental as change to the rule of recognition is simply mistaken. For the same reason it would be equally misconceived for advocates of religious law to argue from the existence of permitted forms of plural law that the refusal to adopt a parallel system is inconsistent or somehow discriminatory. Allowing to operate adjudicative mechanisms for moral and religious norms that are binding in conscience does not commit the state to enact or otherwise endorse these norms as positive law.

It is common ground among many commentators that whatever form of recognition may be given to religious adjudication, human rights (especially those of women within religious communities) must be protected.[34] This concession is made in order to overcome what one influential author, Ayelet Shachar, calls the 'either/or' 'your culture or your rights' dilemma that accommodation of religious difference within liberal societies otherwise appears to present.[35] Notwithstanding such consensus detailed exploration of the human rights compatibility of religious adjudication remains a largely unexplored dimension to the debate about recognition of religious law. Without knowing whether or how the human rights proviso

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[31] e.g. D. Green (ed.) *Sharia Law or 'One Law For All?'*(Civitas, London 2009) 1-7.

[32] R. Hirshl, *Constitutional Theocracy* (Harvard University Press 2010) ch. 4. Hischl and Shachar comment: 'In countries that . … grant religious or customary communities some degree of jurisdictional autonomy . … clashes over the scope of authority and the "chain of command" between constitutional courts and religious tribunals seem inevitable.' Hischl and Shachar, 'Competing Orders', 437.

[33] See H..L.A. Hart *The Concept of Law* (Oxford 1961) ch.6 for discussion of the rule of recognition.

[34] T. Modood, 'Multicultural Citizenship and the Shari'a Controversy in Britain' in R Ahdar and N Aroney (eds) *Shari'a in the West*, (Oxford University Press, 2010) (hereafter, Ahdar and Aroney *Shari'a in the West*) 38; J. Waldron, 'Questions about the Reasonable Accommodation of Minorities' in Ahdar and Aroney *Shari'a in the West* 133.

[35] A Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press 2001) (hereafter, Shachar, *Multicultural Jurisdictions)* 113-4.

For Review Only

would work in the case of *specific* human rights in *specific* legal systems it will never be clear if it offers a real solution to the 'either/ or' dilemma or merely a false hope that religious minorities can keep their culture and have their rights. As Jean-Francois Gauderault-DesBiens has argued, claims for the recognition of religious courts in liberal states must be considered 'in concreto' against 'country-specific expressions of legal traditions'.[36] In that spirit discussion now turns to the compatibility of different forms of religious adjudication with the European Convention on Human Rights. As we shall see in the next section the European Court of Human Rights has considered several specific forms of state relations to religious law and from this jurisprudence further deductions can be made about its probable approach to other models that it has not so far encountered.

III. Recognition under the European Convention

In this section two specific questions are addressed. Firstly, whether there are human rights-based reasons to recognize religious adjudication as a manifestation of the right of freedom of belief and religion (either individually or collectively). Secondly, whether any such recognition must be subject to compliance with procedural human rights standards (in particular, the right to a fair trial before an independent and impartial tribunal under Article 6 ECHR).

Religious Autonomy and Religious Law

The self-governance of religious communities is an important aspect of collective freedom of religion and belief. This entails freedom to associate with other like-minded religionists, and self-governance according to religious norms free from state interference follows from this. These norms typically involve such important aspects of communal and family life, including membership, admission, discipline and expulsion from religious communities, recognition of family events such as marriage, divorce, maturity into adulthood and the acceptance of children into full membership, inheritance as well as questions such as dietary observance.

International human rights law clearly recognises the collective dimension to religious liberty including, as a consequence, the autonomy of religious communities. It is far from clear,

[36] J-F Gauderault-DesBiens, 'Religious Courts, Personal Federalism and Legal Transplants' in Ahdar and Aroney, *Shari'a in the West* at 177.

For Review Only

however, that recognition of religious adjudication is regarded as an essential aspect of religious autonomy. There is no mention of the recognition of religious adjudication as such in several of the key international texts dealing with religious autonomy; it does not feature, for example, in the UN Human Rights Committee's General Comment 22,[37] in the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief[38] or in the main relevant Council of Europe resolution.[39] Nevertheless some writers argue that the protected manifestation of belief at the collective level entails a right to observe and apply religious law in community and to establish religious tribunals.[40]

Although there has been a growing recognition of the importance of religious autonomy as contributing to pluralism in its jurisprudence[41] the European Court of Human Rights has not to date endorsed an autonomous sphere for religious *law*. The Article 9 jurisprudence on religious autonomy has led to a limited recognition of a sphere of religious decision-making in which the state must not interfere: in choice of religious leadership,[42] resolution of doctrinal disputes[43] and the exercise of religious discipline.[44] In these fields, two lines of argument - based on separation from state institutions and on consent- have come together in favour of recognition of an autonomous sphere. Where religious autonomy comes into conflict with other Convention rights, however, the state has a duty to balance autonomy

For Review Only

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[37] General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30/07/1993. CCPR/C/21/Rev.1/Add.4, General Comment No. 22. (General Comments).

[38] UN Doc. A/36/51 (1981). The Declaration was adopted by General Assembly Res. 36/55, 36 UN GAOR, Supp. (No. 51), 171.

[39] Council of Europe, Parliamentary Assembly, Recommendation 1086, adopted 6 October 1988. http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta88/erec1086.htm

[40] See citations in A. Scolnicov, *The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights* (London 2011) 130.

[41] In its leading decision *Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46. the Court avowed:

' [T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. . … Certainly States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions'.

[42] *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy and Ors v Bulgaria* Apps no 412/03 & 35677/ 04 (ECtHR, 22 January 2009); *Hasan and Chaush v Bulgaria* (2000) 34 EHRR 55; *Metropolitan Church of Bessarabia v Moldova* App no 45701/99 (ECtHR, 13 December 2001); and *Mirolubovs v Latvia*,App no 798/05 (ECtHR, 15 September 2009).

[43] Freedom of religion 'excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate': *Manoussakis v. Greece*, (1996) 23 EHRR. 387, 400-01.

[44] See further, text at n. 82 below.

with other rights.[45]

The Court's treatment of arguments for the recognition of religious law under human rights law has been lukewarm at best. For example, in 2011 the Grand Chamber found no violation of Articles 8 or 14 from the failure in Turkey to give legal recognition to a purely religious marriage or from the treatment of it as different to a civil marriage.[46] Similarly, in *Chbihi Loudoudi and Others v. Belgium*[47] the failure of the Belgian authorities to allow the applicants to legally adopt their Moroccan niece, for whom they were caring under *kafala (*a voluntary undertaking in Islamic law to provide for a child's welfare, education and protection), was found not to violate Article 8. Nor has the Court been especially sympathetic to claims that individuals have a right to manifest their beliefs grounded on adherence to religious law. When faced with a claim by ultra-orthodox Jews that the restricted system of licensing in France interfered with their ability to obtain meat slaughtered in accordance with their religious dietary laws (*glatt* meat) the Court was anything but accommodating. The majority found that there was no violation of Article 9 since the applicants could obtain *glatt* meat by importing it.[48] The outcome would suggest that there is no general Convention duty to facilitate observance of religious law, [49] and this has been explicitly confirmed by the Grand Chamber in the recent *Molla Sali* decision, considered below.[50]

Overall the Convention approach allows for recognition of religious autonomy within a liberal framework based on universal legal and human rights values. This recognition is thus largely

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[45] *Fernández Martínez v. Spain* App no 6030/07 (ECtHR, 12 June 2014), Grand Chamber. See further Part V below.

[46] *Serife Yigit v. Turkey* (2011) 53 EHRR 25. The Court has also found an application to challenge Malta's refusal to recognise a religious annulment of marriage following conversion to Islam and subsequent remarriage according to Libyan law to be inadmissible, since it did not violate Articles 8 or 14 and was within the state's margin of appreciation: *Green & Farhat v Malta* App no 38797/07 (ECtHR, 6 July 2010).

[47] *Chbihi Loudoudi and Others v. Belgium* App no 52265/10 (ECtHR, 16 Dec. 2014); see also *Harroudj v. France* App no 43631/09 (ECtHR, 4 Oct. 2012).

[48] *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v. France* App no 27417/95 (ECtHR, 27 June 2000), Grand Chamber, paras.80–83. This 'absolved' the Court from determining the Art. 9(2) question, but the majority went on to find that that provision would have been satisfied, having regard to the state's margin of appreciation (ibid para.84). A minority found the possibility of obtaining *glatt* meat by other means 'to be irrelevant for the purpose of assessing the scope of an act or omission on the part of the State aimed, as in the present case, at restricting exercise of the right to freedom of religion': Joint Dissenting Opinion of Judges Sir Nicolas Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Pantiru, Levits and Traja, ibid para. 1.

[49] In the strictly regulated context of a prison, however, the Court has recognised that a failure by the authorities to accommodate a prisoner's Mahayana Buddhist dietary rules violated his rights under Article 9: *Jakobski v. Poland* App no 18429/06 (ECtHR, 7 December 2010).

[50] Part IV below.

For Review Only

confined to a distinct religious sphere and is hostile to a stronger version of pluralism. More detailed consideration of the human-rights compatibility of religious adjudication can be found in in a small group of decisions applying Article 6 (the right to fair trial before an independent and impartial tribunal) to religious adjudication.

Procedural Standards, Human Rights and Religious Adjudication

The underlying rationale for the imposition of procedural standards on religious adjudication is that legal recognition is a privilege: the price of enjoyment is following recognised procedural rules. Conversely the state should not endorse procedural impropriety by permitting legally recognised bodies to behave arbitrarily in determining disputes or delegate its authority to those that do so.[51] In terms of the discussion of different degrees of recognition in Part II, these arguments are at the their strongest in the cases of parallel systems and state enforced arbitration. Consequently, the UN Human Rights Committee has argued that the right to a fair trial applies to religious courts recognized by or entrusted with judicial tasks by the state and that recognition can only be compatible with Article 14 of International Covenant on Civil and Political Rights if:

> '. …proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14…'[52]

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[51] There is some support for this position from the Strasbourg jurisprudence concerning the reach of the ECHR to decisions of ecclesiastical bodies that are adopted by state courts: see the *Pellegrini* and *Lombardi Vallauri* decisions of the ECtHR, discussed below.

[52] UN Human Rights Committee General Comment 32 Article 14: Right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32, 23 August 2007; Human Rights Committee, Ninetieth session, Geneva, 9 to 27 July 2007), para. 24.
In relation to a complaint against Sudan under the African Charter of Rights concerning the operation of Shari'a Courts the African Commission of Human Rights has determined:

> 'When Sudanese tribunals apply *Shari'a*, they must do so in accordance with the other obligations undertaken by the State of Sudan. Trials must always accord with international fair-trial standards. Also, it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only *Shari'a* are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they so wish.'

For Review Only

Nonetheless, there are a number of practical questions that may arise in other forms of religious adjudication, especially those operating in close-knit religious communities. It is noteworthy therefore that in 2016 the Equality and Human Rights Commission highlighted the importance of Article 6 ECHR in its submission to the independent review of Sharia Councils in England and Wales.[53] The Commission emphasised the need for individuals to have 'a good understanding of what their legal rights and responsibilities are, to know how to access an independent tribunal, and the financial and practical means to do so' and drew attention to the language barriers that may affect women using Sharia Councils. [54]

Under the ECHR the question of procedural standards for religious decision-making has arisen exclusively to date concerning the applicability of the Convention to ecclesiastical authorities in Christian denominations. Systems of canon law remain in many European states as a relic of what historically was a much broader jurisdiction, extending not only to clergy but also to the laity. In some countries legislative and constitutional provisions recognise these systems; mostly these refer to internal religious affairs but there are also some states that recognise a broader ecclesiastical jurisdiction, specifically when it comes to the annulment of religious marriages.[55] Annulments of these marriages by Catholic tribunals are recognised in civil law in Portugal, Malta, Italy and Spain under the terms of agreements with the Holy See.[56] By contrast, in the UK ecclesiastical courts are now are only concerned with internal church affairs.[57] The approach taken at Strasbourg to these long-established features of the European legal order can help to shed light on how the newer questions raised by religious arbitration,

For Review Only

African Commission on Human and People's Rights, Communications 48/90-50/91-52/91-89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan,* Thirteenth Activity Report 1999-2000, Annex V, para.73.

[53] See further Part II above.

[54] *Response of the Equality and Human Rights Commission to the Consultation: Review into the application of sharia law in England and Wales* (2016), paras. 8 and 9.

[55] N. Doe, *Law and Religion in Europe* (Oxford 2011) 223-26 and 132-34 discussing recognition of legislative and judicial autonomy for religious organizations; and see M. Rynkowski, 'Could the ecclesiastical courts submit the demand for a "preliminary ruling" to the European Court of Justice?' (2009) IV *Derecho Y Religión* 59.

[56] Doe, *Law and Religion in Europe*, 224. In the case of Italy, a further summary application is necessary to a State court of appeal, which is required to determine that the ecclesiastical tribunal had jurisdiction and that requirements of Italian law have been fulfilled; and see *Pellegrini v. Italy* (2002) 35 EHRR 2, discussed below.

[57] For the law of the Church of England: M. Hill, *Ecclesiastical Law* (4th ed., Oxford, 2018); N. Doe, *The Legal Framework of the Church of England* (Oxford, 1996).

for example among Jewish and Muslim communities, might be tackled within the Convention framework.

The main Convention requirement of relevance is Article 6(1):

> 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ….'.

A straightforward example demonstrates the application of Article 6 to adjudication by religious tribunals. In *Launikari v Finland*[58] a minister of the Evangelical Lutheran Church of Finland successfully challenged the excessive length of the domestic proceedings in which he sought to challenge his dismissal for having acted in breach of his official duties. Finnish law gave a right to appeal to the Supreme Administrative Court from the National Church Board but because of complex jurisdictional issues proceedings in the applicant's case took more than six years, resulting in a denial of the right of fair trial, the European Court of Human Rights found. Similarly, the total exclusion of access to civil courts in favour of a state-imposed system of religious arbitration to deal with property disputes between Greek Orthodox and Roman Catholic churches following the dissolution of Greek Catholic Church in Romania has been found to violate Article 6.[59]

There is, however, a significant constraint of the usefulness of Article 6 in relation to religious adjudication, arising from the parasitical approach that the Strasbourg court takes towards the definition of a civil right. It is a settled feature of the Article 6 jurisprudence that it does not permit the secretion of new rights into the national legal order under the guise of procedural protection. Consequently, if there is an existing recognised right under domestic law (or an arguable case for one) Article 6 will apply, but if there is none it will not.

The application of these principles was contested in *Károly Nagy v. Hungary*[60] where the Grand Chamber found by a majority of 10:7 that there had been no violation of Article 6 when the

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[58] App no 34120/96 (ECtHR, 5 October 2000).
[59] *Sâmbata Bihor Greek Catholic Parish v Romania* App no 48107/99 (ECtHR, 12 January 2010).
[60] *Károly Nagy v. Hungary*, App 56665/09 (ECtHR, 14 September 2017) (Grand Chamber).

applicant (a former priest in the Reformed (Calvinist) Church of Hungary) had been unable to bring a claim in the secular courts for unpaid allowances during a period when he was suspended. His claims both in the employment courts and in contract had been dismissed since these were matters under the exclusive jurisdiction of the ecclesiastical courts (where he had chosen not to bring a claim). The Hungarian courts had applied the statutory limitations under the Church Act 1990 and the relevant jurisprudence of the Constitutional Court, according to which there was no civil cause of action. The majority of the Grand Chamber held therefore that was no relevant civil right for the purpose of Article 6.[61] The dissenting judges emphasised, however, the danger that a too restrictive approach to Article 6 risked conferring immunity on the religious authorities.[62] Judges Sajó, Lopez Guerra, Tsotsoria and Laffranque criticized what they regarded as an over generous approach towards religious autonomy, which effectively deprived the applicant of due judicial protection under the Convention.[63] Similarly, Judge Pinto de Albuquerque concluded that the Hungarian position was disproportionate, based on a comparative survey of 39 Council of Europe states which showed that only 7 completely excluded any jurisdiction of State courts to examine pecuniary claims by the clergy.[64]

It follows also from the Strasbourg approach that even where it is clear that a civil right exists the depth of human rights scrutiny under Article 6 will be constrained by the standard of review applied under domestic law. Thus, in *Müller v. Germany* [65] the Court found that Article 6 was applicable to the dismissal of the applicants by the Salvation Army because since 2000 German Federal Court of Justice had established a new line of caselaw allowing for limited review of whether such decisions arbitrary or contrary to public policy or morals. However, since it

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[61] ibid paras. 60-61. The same approach has been followed in several other decisions: *Dudová and Duda v. the Czech Republic*, App no. 40224/98 (ECtHR, 30 January 2001) (no right in Czech law for member of the Hussite church to challenge lawfulness of dismissal); *Ahtinen v. Finland*, (2009) 49 EHRR. 47 (no right in Finnish law for a priest in the Evangelical Lutheran Church to challenge his transfer); *Baudler v. Germany* App, no. 38254/04 (ECtHR, 6 December 2011) (no right under German law engaging Art 6 ECHR in the Protestant Church placing the applicant on enforced leave of absence: decision governed solely by ecclesiastical law and not subject to review by state administrative courts); *Reuter v. Germany* App no. 39775/04 (ECtHR, 6 December 2011) (finding by German administrative courts that financial consequences of church's decision to oblige the applicant to take early retirement was not within their jurisdiction did not violate Art 6).

[62] Judge Sicilianos argued that the majority had applied an over-stringent view of an 'arguable case' in their finding that Art. 6 did not apply: *Károly Nagy v. Hungary*, Dissenting Opinion of Judge Sicilianos; Judge Pinto de Albuquerque argued that Article 6 was applicable since the Hungarian Supreme Court had, in his view, failed to assess the applicant's legal claim and had granted de facto legal immunity to the Church: ibid Dissenting Opinion of Judge Pinto de Albuquerque.

[63] Ibid Joint Dissenting Opinion of Judges Sajo, Lopez Guerra, Tsotsoria and Laffranque.

[64] Ibid Dissenting Opinion of Judge Pinto de Albuquerque.

[65] *Müller v. Germany* App, no. 12986/04 (ECtHR, 6 December 2011).

For Review Only

concluded that this standard had been applied, the Court found there was no violation of Article 6.

In cases where it is found that that Article 6 applies, there is also some scope to adapt its requirements,[66] taking account of the religious institutional setting in which dispute resolution occurs. When it comes to challenging the impartiality of state-recognised clergy disciplinary processes a flexible interpretation of Article 6 has been adopted at Strasbourg. In *Tyler v UK*[67] the Commission found that the composition of the courts (appointed by church authorities) to hear proceedings against an Anglican clergyman for 'conduct unbecoming' did not breach the requirement for 'an independent and impartial tribunal'. In the Commission's view it was appropriate for disciplinary matters to be dealt with by a tribunal containing representation from the body concerned.[68] The European Court of Human Rights has cited the risk of interfering with religious autonomy as a reason for finding that Article 6 (1) did not apply to proceedings in which priests of the Czechoslovak Hussite Church challenged termination by the church authorities of their clerical service.[69] The question of waiver of rights or consent by a party to a procedure that might otherwise be taken to violate Article 6 is also significant. Nevertheless, if an applicant can negotiate these hurdles there are principles under the Article 6 jurisprudence which are of potential importance in religious adjudication, in particular as regards the composition of the tribunal, under the 'equality of arms' principle[70] and the need for reasoned decision-making.[71]

Not surprisingly the European Court of Human Rights has been less willing to allow deviations from procedural standards on grounds of religious autonomy in situations where a religious body in effect stands in the place of a state body to make a determination affecting a lay

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[66] D. Harris, M.O'Boyle, E.Bates and C.Buckley, *Law of the European Convention on Human Rights* (2nd ed., Oxford, 2009) ch. 6.
[67] App no 000212183/83 (ECtHR, 5 April 1994).
[68] The Commission also noted that there were other relevant guarantees of judicial independence. In dismissing the applicant's attack on the composition of the consistory court, it stressed that the chancellor's appointment was permanent and was subject only to removal in exceptional circumstances and there was a requirement that he or she be a qualified lawyer and swear a judicial oath. There was no reason to assume that the 4 assessors (two clergy and two lay) were not independent. The Commission similarly rejected challenges to the Dean and other members of the Court of Arches.
[69] *Dudová and Duda v Czech Republic* App no 40224/98 (ECtHR, Jan 30, 2001).
[70] 'This. …requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent.' D. Harris, M.O'Boyle, E.Bates and C.Buckley, *Law of the European Convention on Human Rights,* 251.
[71] ibid 269.

person's general legal rights.[72] It has therefore applied Article 6 to decisions of a religious body *recognised* by other state institutions as affecting the applicant's rights, since it is the state's duty to ensure that such bodies observe the requirements of the right to fair trial.[73] Thus, in *Pellegrini v Italy*[74] the Court held that the Article 6 had been breached when the Italian civil courts, acting under the terms of the Concordat with the Holy See, endorsed a decree of nullity obtained by the applicant's husband in a Vatican ecclesiastical court.[75] It found that the Italian courts had failed to adequately verify compliance with Article 6 by the ecclesiastical courts prior to executing the decree. Scrutiny was required because the Vatican was not a signatory to the Convention and because of the importance of the matter for the parties. The equality of arms principle had been breached because the conditions under which the initial hearing had taken place: the applicant was not aware of the nullity proceedings instituted by her husband until she responded to a summons to be questioned in the ecclesiastical court, had no legal representation and had not been informed that a declaration of nullity would seriously affect her entitlement to maintenance.[76]

For Review Only

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[72] For instance, where annulments of marriage pronounced by Catholic authorities have civil law status, as in Portugal, Malta, Spain and Italy: N. Doe, *Law and Religion in Europe* (Oxford, 2011) 224.

[73] Where an ecclesiastical body has jurisdiction over matters affecting a person's civil rights its own procedure must either conform to Art. 6 or it must be subject to subsequent control by a judicial body having full jurisdiction and providing Article 6 safeguards. See *Helle v Finland* App no 20772/92 (ECtHR, 19 April 1997), in which the Court noted that because a Cathedral Chapter's decisions were subject to the control of the Finnish Supreme Administrative Court, which was an independent and impartial tribunal with full appellate jurisdiction to review its decisions, this satisfied Article 6 (ibid paras. 45 and 46). cf *Károly Nagy v. Hungary*, App 56665/09 (ECtHR, 14 September 2017) (Grand Chamber), Dissenting Opinion of Judge Pinto de Albuquerque, para. 41.

[74] *Pellegrini v Italy* (2002) 35 EHRR 2.

[75] As second cousins the couple were within the prohibited degrees of kindred and the officiating priest had failed to obtain the necessary dispensation before their canon law ceremony of marriage.

[76] Contrast *Eskinazi v Turkey* App no 14600/05 (ECtHR, 6 December 2005) an admissibility decision in which the Court found there was no violation of Art. 6 arising from an order by the Turkish courts for the return of the applicant and her daughter to Israel, following a request made under the Hague Abduction Convention 1980 by a rabbinical court in Tel Aviv in religious divorce proceedings brought by her husband. Under Israeli law the decision to contract a religious marriage resulted in the rabbinical court having exclusive jurisdiction over the divorce proceedings (including custody), subject to the supervision of the Israeli Supreme Court. The applicant claimed that she would not receive a fair trial because of the religious nature of the rabbinical court, which did not provide the same fundamental guarantees relating to public policy as a secular court. In particular, she pointed to its tendency to interpret the best interests of the child in the light of religious principles. Distinguishing *Pellegrini*, the ECtHR found, that the responsibility of the Turkish courts (Israel is not party to the ECHR) under Art. 6 at such a preliminary stage of the proceedings was limited. It also rejected the claim that the religious nature of the rabbinical court was incompatible per se with Article 6 (ibid 26). While noting some misgivings, the Court emphasised assurances given by the Israeli government about the conformity of the rabbinical courts' practice with international law and the power of review of the Supreme Court to correct any flagrant denial of justice (ibid 27-28). Moreover, that the applicant fell under the jurisdiction of the rabbinical

From this initial discussion of the recognition of religious adjudication under the Convention we move now to a closer analysis of how different forms of adjudication are treated, beginning with the European Court of Human Rights' approach to parallel systems.

V. The European Convention and Parallel Systems[77]

The human rights' compatibility of a proposed parallel form of religious law was considered indirectly by the Grand Chamber in the controversial *Refah Partisi* decision when it ruled that steps taken by Turkey against a political party with such an agenda did not violate Articles 9 or 11. The Court found that to implement state endorsement of Shari'a law in Turkey (according to which Muslims would be bound in private law matters) would violate the Convention.[78] A system in which an individual's rights and obligations differed according to their religion would abrogate the state's responsibility to guarantee religious liberty and would be discriminatory, contrary to Article 14. Moreover:

> '[S]uch a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs. …..'[79]

Consequently, there was no violation of Article 9 in the prohibition of Refah Partisi for unconstitutional activities. The Grand Chamber characterised the party's policy as applying precepts of Shari'a law to the majority population (Muslims) within the framework of a plurality of legal systems. This programme was beyond the protection of freedom of religion under Article 9 of as a matter of individual conscience since it assigned private law obligations according to membership of a religious group.[80] Despite the Grand Chamber's reference to plurality its approach suggests that this better understood as a decision about parallel legal systems. Certainly, although not fully developed in the judgment, lack of consent appears to be

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court was a consequence of her own decision to contract a religious marriage in Tel Aviv (in addition to her civil marriage under French law): ibid 27.

[77] In this section I treat the *Refah Partisi* and *Molla Sali* decisions as examples of parallelism because, despite some references to plural systems in the judgments, it is clear that the Court itself regards them involving non-consensual, state imposed, religious norms.

[78] *Refah Partisi v. Turkey* (2003) 37 EHRR 1, 33.

[79] ibid para.119.

[80] Esp., paras. 127 and 128.

For Review Only

central to this aspect of the ruling, suggesting that the position of genuinely *supplementary* religious legal systems remains open.[81]

Refah Partisi concerned a proposed parallel system that was never implemented but in *Molla Sali v. Greece*[82] the Grand Chamber of the European Court of Human Rights confronted the operation in practice of the few systems of plural religious law within the Council of Europe - the inheritance law of the province of Western Thrace. This provided for succession disputes involving members of the Muslim community to fall under the jurisdiction of the local mufti.[83] The system was a continuation of the arrangements for religious minorities in their respective countries made between Greece and Turkey by the Treaty of Lausanne of 1923. In this instance the complaint to the European Court of Human Rights arose from the decision of the Greek courts to disregard the disposition to the petitioner by her late husband's will of his entire estate, in favour of a distribution of property according to intestacy under Sharia law. The result was that close relatives (her husband's surviving sisters) were entitled to three-quarters and that the widow received one quarter of the estate. Her complaint alleged violations of her rights under Article 1 of the First Protocol (the right of property), Article 6 (the right to fair trial) and Article 14 (non-discrimination, inter alia, on grounds of religion). However, the Grand Chamber chose to in effect disregard her Article 6 arguments and to focus on what it considered to be the central question: '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.'[84] It concluded that there had been a violation of Article 14 in conjunction with Article 1 Protocol 1.

For Review Only

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[81] The Grand Chamber demurred from expressing an opinion in the abstract about the plurality of legal systems: ibid para. 127.In his concurring opinion Judge Kolver regretted that the Grand Chamber had not taken up this opportunity: ibid *Concurring Opinion of Judge Kolver*.

[82] *Molla Sali v. Greece* App no 20452/14 (ECtHR, 19 December 2018), Grand Chamber.

[83] A mufti is a Greek civil servant holding the rank of Director-General of Administration who is appointed by presidential decree on a proposal by the Minister of Education and Religious Affairs (para. 39). Human rights questions concerning the appointment of the mufti had previously featured in *Serif v. Greece* (2000) 31 EHRR 20 in which European Court of Human Rights held that the applicant's conviction, despite being elected by the local Muslim population, for the offence of usurping the functions of a mufti was an infringement of Art. 9. The Greek government's claim that it was necessary to have a single mufti appointed by it to prevent religious tension was rejected. See also *Agga v. Greece* Apps. no 50776/99 and 52912/99 (ECtHR, 17 October 2002); *Agga v. Greece* (no. 3) App no 32186/02 (ECtHR, 13 July 2006).

[84] *Molla Sali v Greece*, para. 86. With regard to Art. 6 the applicant had argued that by disregarding the terms of a will made under the Civil Code that the Greek courts had denied her the benefit of the application of the ordinary law and had applied instead Sharia Law.

In its analysis under Article 14 the Grand Chamber compared the position of the applicant, as a married woman who was a beneficiary of her Muslim husband's will, to the position of a married female beneficiary of a non-Muslim husband's will.[85] A wife in this position would naturally expect that on her husband's death his estate would be settled in accordance with his will. Although the lower Greek courts had upheld the will as a valid under the provisions of the Civil Code, the Court of Cassation had overturned these judgments and found that the relevant law was the Islamic law applicable in Greece. Applying Islamic law, the estate fell into the category of mulkia the and the will was consequently void. The outcome was that the applicant had been treated differently to a married female beneficiary of the will of a non-Muslim husband. Article 14 was therefore engaged.

From this starting point, in accordance with the Article 14 jurisprudence, the Grand Chamber went on to consider whether the discrimination pursued a legitimate aim and was proportionate. The Grand Chamber doubted the Greek government's assertion that the case-law of the Court of Cassation as applied in this instance was suited to the avowed aim of the protection of the Thrace Muslim minority.[86] However, the Grand Chamber preferred not to resolve that question in the light of its finding that the difference in treatment was not proportionate to this aim, bearing in mind the serious consequences for the applicant.

The Grand Chamber rejected the Greek government's contention that it was necessary for the courts to treat the will as devoid of effect in order to give effect to the international obligations to protect the Muslim community. It noted that, while under the Treaties of Sèvres and Lausanne Greece undertook to respect the customs of the Muslim minority, it was not obliged under these provisions to apply Sharia law. The Treaty of Sèvres was no longer in force. The Treaty of Lausanne guaranteed the religious distinctiveness of the Greek Muslim community but did not specifically mention the mufti or any other special body with jurisdiction over religious practices.[87]

In a key passage the Grand Chamber stated that:

[85] ibid paras. 138-141.
[86] ibid para. 143.
[87] ibid para. 151.

> . … 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. …[88]

It was noteworthy therefore that there were differences of opinion among the Greek courts over whether the application of Sharia law was compatible with the principle of equal treatment and with international human rights standards.[89] Moreover, a number of international bodies had expressed concerns about whether the application of Sharia law to matters concerning family law and inheritance was compatible with Greece's human rights obligations, including those relating to the rights of the child and women's rights.[90]

Molla Sali v Greece was not the first decision in which the European Court of Human Rights has chosen to apply Article 14 in this way in preference to an applicant's formulation of their claim. In its 2010 decision in *Serife Yigit v Turkey* the Grand Chamber took a similar path under Art 14 rather than primarily under Art 8 (as had the Chamber). It held that the non-recognition of the applicant's religious marriage (no civil marriage had been conducted) was justified by the Turkish policy of giving primacy to civil marriage for the protection of women (e.g. to prevent polygamy) and to uphold the secular nature of the Turkish republic. In a case like *Serife Yigit* raising a claim for infringement of a qualified right like Article 8 there may be little practical difference to analysis of the facts under Article 14 since questions of legitimacy of

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[88] ibid para. 155.
[89] ibid paras. 48-53.
[90] UN Committee on the Elimination of Discrimination against Women, *Concluding observations on the seventh periodic report by Greece, adopted at its fifty-fourth session (11 February – 1 March 2013)*, paras. 36 and 37; UN Human Rights Committee, *Consideration of reports submitted by States Parties under Article 40 of the Covenant, 25 April 2005,* para. 8; *Report by Thomas Hammerberg Commissioner for Human Rights of the Council of Europe following his visit to Greece from 8 to 10 December 2008, Issued Reviewed: Human Rights of Minorities*, paras. 33-36 and 41; Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, *Freedom of religion and other human rights of non-Muslim minorities in Turkey and of the Muslim minority in Thrace (eastern Greece)*, (21 April 2009), para. 55; Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *Compatibility of Sharia law with the European Convention on Human Rights: Can States Parties to the Convention be signatories of the 'Cairo Convention'?,, Introductory Memorandum (Rapp. Ms. Merixtell Mateu)*, AS/JUR (2016) 28 (7 October 2016), para. 43.

For Review Only

aim and proportionality are relevant to both in any event. There is, however, potentially a greater difference in approach compared to Article 6, where these structured tests do not apply. Analysis under Article 6 has allowed the Court to address alleged procedural problems in the application of religious law, as noted in Part IV. However, plainly substantive human rights infringements cannot be addressed in this fashion.

The use of Article 14 is undoubtedly encouraged by the broad-brush criticisms levelled at Sharia in the *Refah Partisi* case. These comments have themselves been criticised as unhelpful by commentators. **[91]** To an extent the Grand Chamber's decision in *Molla Sali* is open to the same criticism. For example, in places it ranges over the broader discriminatory effect of Sharia (referring to women generally and to children), rather than focusing solely on the relevant comparison in treatment under Article 14 that the court itself had identified.[92] The Court's preference for Art. 14 makes it difficult to envisage circumstances under which a state be able to satisfy the reasonable and objective criterion for a difference in treatment under religious law.[93]

Referring back to the discussion in Part II above, the objection to enforcing religious law because of its discriminatory impact primarily relates to the content of the norms rather than to adjudication as such. Not surprisingly therefore they have arisen in relation to parallel systems – the Grand Chamber treated Western Thrace as one in effect- rather than plural systems, as defined above.

The Court's preference for using Article 14 perhaps implies that plural systems would encounter fewer difficulties from the point of view of Article 6. It should be borne in mind, however, that there also some procedural norms affecting religious adjudication that might

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[91] D McGoldrick, 'Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws' (2009) 9 HRL Rev 603; D McGoldrick, 'The compatibility of an Islamic/*shari'a* law system or *shari'a* rules with the European Convention on Human Rights', in R Griffith-Jones (ed), *Islam and English Law: rights, responsibilities and the place of shari'a* (Cambridge 2013) 42-71.

[92] e.g. *Molla Sali v Greece*, para. 154.

[93] In *Refah Partisi* the Grand Chamber stated:'. … 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 (such as rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession). 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 . …' (*Refah Partisi v. Turkey* (2003) 37 EHRR 1, para. 128).

For Review Only

trigger Article 14 in conjunction with Article 6. For example, under Islamic law different weight may be given to the testimony of men and women[94] while under Jewish law women are not regarded as fully qualified to give evidence in court and cannot be appointed as rabbis or judges.[95] In the case of truly voluntary religious adjudication this would not be a question of the state creating a discriminatory system. Nonetheless a civil court that recognised a religious determination would have a responsibility under Article 6 ECHR to ensure that the right to fair trial was not infringed by such practices.[96]

The *Molla Sali* decision raises two further questions that merit further discussion, namely, the extent to which national courts should defer to religious adjudicators and the relevance of consent within religious communities to human rights protection. These are examined in the Parts V and VI below.

For Review Only

V. Judicial Scrutiny and Deference

Although the Grand Chamber in *Molla Sali v Greece* choose to approach the case through the prism of discrimination under Article 14 it is nonetheless revealing to consider why the applicant had claimed that her right to a fair trial under Article 6 had been violated. In essence her argument was that the Greek courts had declined to apply the ordinary law under the Civil Code (under which her husband's will was valid) and instead had misapplied a Sharia law concept ('property in full ownership') to remit the case to the jurisdiction of the mufti.

The underlying question was that of who had competence to determine the legal questions and the degree of deference owed to a religious decision-making body. The effect of the line of cases from the Greek courts that the Court of Cassation applied to the applicant's dispute was to defer to muftis as to whether property was mulkia- even to the extent of treating a notarised

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[94] 'Believers, when you contract a debt for a fixed period, put it in writing. … Call to witness two witnesses of your men, if the two are not men, then a man and two women from the witnesses whom you approve; so that if one of the two errs, one of them will remind the other. …' (Qu'ran 2:282).
For discussion of the relevance of this verse to the law of evidence and the debate about whether it contains.a general proposition about the superiority of the testimony of men in Islam: J. Hussain *Islam: Its Law and Society,* (Federation Press, 2011), 194. See also: M. Fadel 'Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought', (1997) 29 International Journal of Middle East Studies 185.
[95] Deuteronomy 17:6.
[96] See *Pellegrini v Italy* (2002) 35 EHRR 2, text at n. 74 above.

non-Islamic will as invalid. Seen in this light the applicant's claim that she had been deprived of a right to a regular determination[97] of her dispute according to the law seems credible. The Grand Chamber, however, tackled the question of deference from a different angle, holding that to accord this degree of deference (in so far as it resulted in discriminatory treatment under Art 14) did not have a legitimate aim and was disproportionate.

The question of the responsibility of state courts to scrutinise religious adjudication is a theme running through the Strasbourg jurisprudence, as can be seen from several examples. As noted in Part IV above a certain degree of non-interference in the affairs of religious communities is required in order to respect their religious autonomy. However, if carried to the extent that religious matters are non-justiciable before domestic courts there is a risk that that religious groups effectively enjoy legal immunity. The Strasbourg approach to excessive use of the non-justiciability principle by domestic courts in religious law/ autonomy cases is illustrated in *Lombardi Vallauri v. Italy*.[98] There the Court found a violation of Articles 10 and 6 arising from the refusal to re-employ a lecturer in legal philosophy at a Catholic university in Milan (who had served more than 30 years under a series of temporary contracts) following an objection by the Congregation for Catholic Education to his views.[99] Vallauri's attempts to challenge the university's decision in the Italian courts failed. Ultimately the *Consiglio di Stato* applied existing doctrine under which the inability to challenge the Holy See's decision in the civil courts was compatible with constitutional guarantees of freedom of instruction and freedom of religion.[100] The European Court of Human Rights found that there was an interference with the applicant's right to freedom of expression, which although prescribed by Italian law and with the legitimate aim of protecting the "rights of others" (namely, the University's interest in basing its teaching on Catholic doctrine), had not been 'necessary in a democratic society'. Although it was not for the domestic authorities to examine questions of religious doctrine, in the Strasbourg Court's view the administrative courts should have addressed the lack of reasons for the Faculty Board decision, in the interests of 'the principle of adversarial debate'. For similar reasons by a majority of 6 to 1 the Court also found a breach

[97] The Grand Chamber itself noted at para. 153 of its judgment that the mufti's jurisdiction applied only to Islamic wills and intestate succession and not to other types of inheritance.
[98] App no 39128/05 (ECtHR,20 October 2009).
[99] Approval from the Congregation for Catholic Education was a requirement of the post.
[100] Judgment of 18 June 2005.

For Review Only

of Article 6 because the lack of reasons impaired the applicant's effective access to a court.[101] While recognition of religious autonomy could justify the university's refusal to employ someone who in its view did not conform to its religious ethos, this could not extend to a point blank refusal to explain the basis for that conclusion. Put positively: religious authorities may have a responsibility to explain their decisions and state bodies should not accept their conclusions without question.

In two cases, respectively from Spain and Croatia, involving the dismissal of Catholic religious education teachers for breaching requirements of canon law the Court has addressed the duties of state authorities with regard to such religious determinations.[102] Both arose against the backcloth of the arrangements under concordats that the Holy See has with a number of states covering, inter alia, religious education in state schools. Under these arrangements religious education teachers require in effect a licence from the local diocesan authorities, which can be withdrawn for breaches of canon law, resulting in the teachers' dismissal. The European Court of Human Rights found the dismissals did not violate Article 8 (the right to respect for private life) because their purpose was to protect the rights and freedom of others, namely the religious autonomy of the Catholic church. This approach is undoubtedly controversial because of the teachers' employment status as public employees but that is not the concern here. Rather, it is the approach to judicial scrutiny of determinations of Canon Law which is of interest in the present discussion.

In *Fernández Martínez v Spain*[103] the Grand Chamber found that the withdrawal of a priest's licence under Canon Law (leading to his dismissal from his post in a state school) had not infringed his right to respect for private or family life because in the view of the majority (the Grand Chamber divided 9:8) the Spanish courts had satisfactorily weighed this against the right of the Church authorities to religious autonomy under Article 9. The bishop withdrew of the applicant's licence because of 'scandal' (the absence of 'scandal' was a pre-requisite under the

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[101] The Court considered that there was no need to examine separately the applicant's complaints under Articles 9, 13 and 14.

[102] *Travaŝ v. Croatia* App no 75581/13 (ECtHR, 4 October 2016); *Fernandez-Martinez v Spain* App no 6030/07 (ECtHR, 12 June 2014), Grand Chamber.

[103] *Fernández Martínez v. Spain* App no 6030/07 (ECtHR, 12 June 2014), Grand Chamber. For contrasting analyses see: J. Martinez-Torron, '*Fernández Martínez v. Spain*: An unclear intersection of rights' and I. Leigh, 'Reversibility, Proportionality and Conflicting Rights**:** Fernández Martínez v. Spain' in S. Smet and E. Brems (eds.) *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press 2017).

Papal rescript allowing the bishop to authorise him to continue as a teacher although he had lost his 'clerical state' due his marriage).[104] 'Scandal' was a Canon Law term,[105] although it was not strictly defined, and an underlying issue therefore was whether the church authorities had exclusive jurisdiction to determine whether it applied or, if not, to what extent the courts could review their decision. There were grounds for scepticism about the behaviour of the church authorities since the withdrawal of his licence took place not when they became aware that the applicant was married and had five children, but only years later when his position was publicised as a result of following a meeting of an advocacy group, the Movement for Optional Celibacy, to which he belonged. Moreover, the Spanish Constitutional Court had decided that the state's duty of neutrality prevented it from ruling on the bishop's use of 'scandal'. Nonetheless the majority of the Grand Chamber found that the relevant Spanish jurisprudence allowed the courts to form an independent assessment taking account of all relevant factors related to the proportionality exercise. Although the Spanish Constitutional Court had deferred to the ecclesiastical authorities on various matters, its jurisprudence did not require it to do so where the Bishop had acted other than for strictly religious reasons and it had verified that this was not the case here.[106]

In *Travaŝ v. Croatia*.[107] the applicant, who was a layman, had his canonical mandate to teach religious education withdrawn when he remarried after obtaining a civil divorce, but without seeking or obtaining an annulment of his first marriage by the religious authorities. The Court found that there had been an interference with the is right to private life but that this had been prescribed by law, for the protection of rights and freedoms of others and necessary in a democratic society. The task of the domestic courts was to:

> to scrutinise whether a proper balance was achieved between the competing rights of the Church to respect for its autonomy and the applicant's rights under the Convention . …. It was therefore for the courts to ensure that the Church's autonomy is exercised in a

[104] A Papal dispensation from celibacy had been granted at his own request but only after a delay of some 13 years from when he had applied.
[105] Code of Canon Law, Canon 1394.
[106] *Fernández Martínez v. Spain,* paras. 150 and 151. The dissenting minority judgment treated the relationship between the Ministry of Education and the bishop as constituting a form of 'delegation' by the Spanish State of the powers to appoint teachers to the Church, for which it nonetheless remained responsible. For the minority it was the Ministry of Education's action in giving effect to the bishop's decision (not the Courts in reviewing it) which was therefore critical. Since the Ministry had simply endorsed the decision the dissenting judges found no evidence that it had taken into account the applicant's right to respect for private life or the effects of the decision on that right: ibid *Joint Dissenting Opinion*, para. 26.
[107] *Travaŝ v. Croatia* App no 75581/13 (ECtHR, 4 October 2016); and see further in Part VI below concerning the relevance of consent.

> manner which is not arbitrary or taken for a purpose that is unrelated to the exercise of its autonomy and that it did not produce effects disproportionately interfering with the applicant's Convention rights . …[108]

The European Court of Human Rights noted that the domestic courts (in particular the Constitutional Court) had reviewed the applicant's case in detail taking into account all the relevant factors, notably his understanding of special allegiance owed towards the teachings and doctrine of the Church that followed from his status as a teacher of Catholic religious education, his position within the State education system, the attempts of the authorities to find him alternative work and the other employment opportunities open to him. The domestic judicial process had been thorough and, in view of this level of scrutiny, it could not be said that the canonical decision was improper.[109]

It will be apparent that the Strasbourg Court does not regard its position as re-opening the review conducted by the domestic authorities of adjudication by religious bodies, but rather reviewing their thoroughness and plausibility within the framework of proportional balancing. We will now consider the second test of compatibility to emerge from Court's jurisprudence- the criterion of voluntariness.

VI. Voluntariness, Consent and Waiver

The question of whether the application of Sharia principles of succession to the Muslim community in Trace was consensual or compulsory was central to the dispute in *Molla Sali v Greece.* The applicant submitted that the practice of the Greek courts, arising from a series of Court of Cassation judgments, de facto treated jurisdiction of the muftis as compulsory, even where members of the Muslim community did not consent, and thus constituted discrimination on grounds of religion which did not pursue a legitimate aim.[110] Furthermore, she argued that a system which forced to individuals to renounce membership of a religious community in order to be able to access the civil courts in Greece would amount to creating a segregationist system of Sharia law.[111] It is clear that the Grand Chamber agreed about the importance of voluntariness: the absence of consent was critical to its finding that the discrimination inherent

[108] ibid para. 109.
[109] ibid para. 113.
[110] *Molla Sali v Greece*, para. 101.
[111] ibid para. 104.

For Review Only

in application of Sharia inheritance law in Thrace to the Muslim community served no reasonable and objective justification.[112] Proof of waiver of important public interests had to be more explicit than simple derivation from membership of religious minority group in order to justify discriminatory treatment.[113] It buttressed its argument with reference to Article 3.1 of the Council of Europe Framework Convention for the Protection of National Minorities, which provides:

> Every person belonging to a national minority shall have the right freely to 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.[114]

It is notable in this respect that the court contrasted this with the position of Sharia councils in the United Kingdom and with the reforms that Greece itself adopted while the case was pending (and which came into force in January 2018).[115] Under the amended Greek legislation the agreement of all parties is a precondition to a mufti exercising jurisdiction in matters of marriage, divorce or inheritance.[116] As the Grand Chamber noted, prior to these reforms Greece was in the position of being 'the only country in Europe which, up until the material time, applied Sharia law to a section of its citizens against their wishes.'[117]

On the other hand, where the European Court of Human Rights is persuaded that that religious adjudication results from an applicant's voluntary choices the jurisprudence shows that it is less likely to find an infringement of the Convention. In *Travas v Croatia* the Court emphasised that the applicant's predicament was the result of choices that he had made, in particular, as a teacher of religious education:

> the applicant had knowingly and voluntarily accepted a heightened duty of loyalty towards the Catholic Church, which had limited the scope of his right to respect for his

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[112] ibid paras. 158-161.
[113] ibid para. 156.
[114] ibid para. 67; Greece has signed but not ratified this Convention.
[115] ibid paras 159 and 160.
[116] Law no. 4511/2018, s. 1.
[117] *Molla Sali v. Greece*, para. 158. Up until 2011 France applied Sharia in the territory of Mayotte: Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *Compatibility of Sharia law with the European Convention on Human Rights* (n. 90 above), paras.46-49.

For Review Only

> private and family life to a certain degree. …[and] stressed that such contractual limitations were permissible under the Convention if they were freely accepted[118]

This buttressed the conclusion that there was no infringement of his Article 8 rights. Moreover, while aware of the Church's position that his first marriage subsisted under Canon Law, he had not sought to have it annulled and had chosen not to effectively participate in annulment proceedings brought by his first wife. Accordingly, for the purpose of assessing the proportionality of the interference with his right to private and family life, the Court characterised his position:

> the applicant decided to disregard the requirements of special allegiance towards the teachings and doctrine of the Church, concomitant with his status of a teacher of Catholic religious education. He thus brought himself in a situation in which he lost his canonical mandate to perform that function. Even so, he still expected to retain the right to a teaching job in the State education system.[119]

Of course, the extent to which participation in religious adjudication is voluntary is a key point in contention between proponents and objectors to accommodation. Unlike parallel systems, most existing forms of religious adjudication in liberal states are (in principle anyway) voluntary and the question is whether these should be extended. Critics dispute, however, when it comes to religious adjudication over family matters in particular whether participation of women from religious minorities is truly voluntary. The social penalty for not using these procedures may be for the woman to be cut off from her ethnic and religious community. Shachar describes the 'cruel zero-sum choice'[120] facing those can enforce their rights under civil law but only at the cost of 'exiting' or cutting themselves off from their religious community. Ronan McCrea has recently argued that it may not be feasible to ensure genuine voluntary engagement with minority legal orders and that enhancing their recognition undermines shared citizenship.[121] There are references in Christian, Islamic and Judaic

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[118] *Travaŝ v. Croatia*, para. 92.
[119] ibid para. 96.
[120] A. Shachar, 'Reshaping the Multicultural Model: Group Accommodation and Individual Rights' (1998) 8 *Windsor Rev. Legal & Social Issues* 83, 107.
[121] R McCrea ,'Why the Role of Religious Tribunals in the Legal System Should Not Be Expanded' *Public Law* [2016] 214-222.

For Review Only

teachings emphasising that differences between believers should be settled without going to outsiders, although the application of these to modern legal conditions is not straightforward.[122] Viewed benevolently such teachings put an emphasis on mediation and reconciliation. Applied more stringently, however, they can be used to punish and deter co-religionists from accessing secular courts.[123] Even for those emphasizing that participation is voluntary the implications are not clear-cut. Arguably a system in which religious adjudication is not recognised (as with Sharia Councils in the UK) enables women to pick and choose which religious body to approach.[124] Others point out, however, that women using these councils may not always be fully aware of (or may be misled about) their status under UK law, or may be coerced into using them, particularly if they are non-English speakers.[125] Such concerns do not necessarily lead in the direction of non-recognition: they could be met by strengthening of safeguards to ensure genuine voluntariness.[126] This was the approach endorsed by the Independent Review of Sharia Councils, described in Part II above.

Impliedly, the Grand Chamber in *Molla Sali* appears to have endorsed the position that states do not have a positive obligation to prohibit non-binding religious adjudication, provided if satisfies the criterion of voluntariness. And, presumably, it follows from the Grand Chamber's

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[122] Respectively, Matthew 5:25-26 and Luke 12:13-15; An-Nisaa' 4: 59; Y. Feit, 'The Prohibition Against Going to Secular Courts', 1 (2012) Journal of the Beth Din of America 30-46; J. Burnside, *God, Justice and Society: Aspects of Law and Legality in the Bible* (Oxford 2011) 110-111.

[123] On perceived pressure to use religious law in preference to civil law: F.Ahmed and S. Luk, 'Religious arbitration: a study of legal safeguards' (2011) 77(3) Arbitration 290, 293 and 302; J. Brechin, 'A study of the use of Sharia law in religious arbitration in the United Kingdom and the concerns that this raises for human rights' (2013) 15(3) Ecc. LJ 293, 300; Jackson, 'Transformative accommodation' and religious law' 150.

cf The comment of the former Archbishop of Canterbury, Rowan Williams 'if any kind of plural jurisdiction is recognised, it would presumably have to be under the rubric that no 'supplementary' jurisdiction could have the power to deny access to the rights granted to other citizens or to punish its members for claiming those rights': R. Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 Ecc LJ 262-282.

[124] S. Bano, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law* (Palgrave Macmillan 2012) 207.

[125] This risk has also been raised by the Equality and Human Rights Commission (n. 54 above).

[126]Likewise Russell Sandberg has recently argued that: 'We need to look more broadly at religious adjudication, how law can deal with adjudications that are enforced religiously and socially in contexts where legal enforcement has not been sought or is irrelevant, how the law can determine whether or not an agreement is voluntary or not . … 'Russell Sandberg, "The Council of Europe and *sharia*: an unsatisfactory Resolution" in *Law & Religion UK*, 29 January 2019 , http://www.lawandreligionuk.com/2019/01/29/the-council-of-europe-and-sharia-an-unsatisfactory-resolution/ (accessed 31 January 2019).

Article 14 analysis that even formal recognition of religious law would be permissible provided (unlike the position under Sharia law in Western Thrace) it was non-discriminatory.

The Court's Article 6 jurisprudence has not addressed religious arbitration per se. Were it to do so the questions would inevitably arise of how far it is possible to contract out of protection and of the extent of the state's responsibilities. On several occasions it has been found that a contracting state is not liable for the actions of an arbitrator in a private dispute. In *Deweer v Belgium* the Court noted that waiver of right of access to court in an arbitration agreement 'does not in principle offend against the Convention.'[127] In *Nordstrom-Janzon v Netherlands*[128] the Commission found there was no obligation to ensure that voluntary arbitration proceedings were in conformity with Article 6. A contracting state could determine the grounds for quashing an arbitral award and the lack of redress before the domestic courts for a challenge to the arbitrator's impartiality did not engage Article 6. The Commission noted the voluntary nature of waiver of the right to legal proceedings but suggested that duress (which was not alleged) could vitiate any such waiver. That reservation leaves open the possibility that a party to religious dispute settlement might in future be able to argue that Article 6 should nevertheless apply because consent was not freely given, for example because of community pressure to submit to religious adjudication,[129] although it is unclear what evidence would be needed to establish duress.[130] In the absence of such an argument, however, the voluntary nature of religious arbitration will constitute an insurmountable hurdle to finding a violation of the Convention in most cases.

VII. Conclusion

Ran Hischl and Ayelet Shachar have noted that:

> From Canada to India and Britain to South Africa, the specter of litigants turning to religious or customary sources of law as authoritative guides for regulating their

[127] *Deweer v. Belgium* (1980) Series A no. 35, para. 49.
[128] App no. 28101/95 (Commission Decision, 27 November 1996). See also *Jakob Boss Sohne KG v Germany* App no. 18479/91 (Commission Decision, 2 December 1991). The jurisprudence distinguishes between voluntary and compulsory arbitration, treating the latter as subject to Art. 6: *Tabbane v. Switzerland* App no. 46109/ 12 (ECtHR, 1 March 2012), paras. 26 and 27.
[129] Text at n. 120 above.
[130] In relation to the potentially analogous position of participation in professional sporting events, the Court has held that if participation is conditional on submitting to arbitration then Article 6 will apply: *Mutu and Pechstein v. Switzerland* Apps no 40575/10 and67474 (ECtHR, 4 February 2019), paras. 113-5 and 121-3.

For Review Only

> behavior, alongside or in lieu of other norms, has risen to the forefront of public debate and constitutional battle. At stake is not merely the question whether a particular individual or group may seek exemption from a general rule, but rather *which type of institution*—a public court enforcing democratically enacted laws and regulations, or a faith-based tribunal applying religious based norms and practices—will have the authority to make a final, binding decision.[131]

This article's distinctive contribution to that debate is to specifically address the application of the European Convention on Human Rights to different forms of religious adjudication. It has done so by, firstly, clarifying the conceptual confusion surrounding discussion of recognition of religious law, drawing a fundamental distinction between parallel systems. In parallel systems the state itself recognises religious norms, and plural systems in which space is given by the state for religious adjudication applying religious norms. As explained in Part II, these plural arrangements can take a variety of forms, from those where the determinations of religious institutions are formally adopted or applied at one end of the scale through to those where they are merely tolerated at the other. Different human rights considerations apply to these various permutations.

From an analysis of the Strasbourg jurisprudence it is clearly unlikely that a parallel system would be able to comply with the Convention. Any scheme of this kind would certainly involve a substantive difference in treatment of individuals according to primary norms, contrary to Article 14. The non-consensual state imposition of religious norms on religious groups would fail the criterion of non-discrimination that emerges from the Court's *Refah Partisi* and *Molla Sali* decisions

Plural systems, on the other hand, are more complex and varied in their human rights implications. They range, on the one hand, from adjudication which the state recognises in qualified form, such as religious arbitration under commercial agreements and family determinations of ecclesiastical tribunals to, on the other hand, those that have no civil law analogue and which are not intended to be legally binding. Where the outcome of voluntary religious adjudication is adopted by state institutions substantive and procedural protection under the European Convention, for example under Articles 8 and 6, will be engaged. State courts are required to exercise a supervisory role and Strasbourg will review how thoroughly

[131] Hischl and Shachar, 'Competing Orders', 433-434,

For Review Only

they have done so. Nonetheless the jurisprudence grants some flexibility, for example to take account of religious autonomy, especially in clergy discipline and doctrinal dispute cases, and, when determining if any interference with private life is disproportionate, to acknowledge the importance of an individual's autonomy in placing himself under an obligation of religious allegiance.

Different considerations apply where those resorting to religious adjudication have no intention to create legal relations or legal effects, as with non-binding adjudication. It is clear from the recent decision in *Molla Sali v Greece* that the state has no duty under the ECHR to facilitate religious adjudication of this kind.

The European Court of Human Rights has not so far encountered legislation of the kind applicable in some US states forbidding religious adjudication.[132] In a hypothetical situation of this kind, individual autonomy arguments would be at their strongest and the case for intervention, if tenable at all, would rest on the dangers that weaker members of religious communities may not be fully or accurately informed, or indeed may be positively misinformed, about the legal status of the religious adjudication that they have entered into.

Nor has the Court had occasion to consider the general compatibility of a voluntary non-binding system of religious adjudication. While a state is under no Convention obligation to facilitate religious minorities in this way, it cannot be said that would be impossible to do so compatibly with the ECHR. I have argued that, in line with the Strasbourg jurisprudence, the questions of the adequacy of judicial scrutiny and of voluntariness would be determinative in such a case. While national courts can properly defer to religious autonomy, this must not amount to de facto immunity and, where conflicting rights are at stake, they have a responsibility to scrutinise how the religious body has struck the balance. The jurisprudence on voluntariness is less developed but nonetheless suggests that the presence of duress would render religious adjudication unfair. This leaves a question that has not been tackled here: whether proponents of religious adjudication are willing to pay the price for legal recognition or continued toleration.

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[132] n 21 above.

For Review Only