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**CAN SHARIA LAW OVERRIDE NATION'S CIVIL LAW,
PROBLEMS WITH COEXISTING TRIBUNALS WITHIN A
SOCIETY**

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ABSTRACT

Sharia law is not easy to define or apply, it has seen numerous iterations in different circumstances where the meaning and results vary a lot. Muslims in Europe have some options to practice sharia law most prominently in the field of family and succession law, how do these possibilities measure up with European legislation? Are they discriminative towards certain groups of people or fundamentally incompatible with western human rights? Can sharia law be applied to persons who are not part of the Muslim faith?

Answer to all these questions is yes and no, civil disputes can be settled out of court with mediation or arbitration in that sense Sharia can be applied in EU member states. Sharia law has major problems with gender equality and discriminating attitude towards certain minorities. From this perspective it's legitimate to say that sharia law is incompatible with European moral standards and the possibilities to use sharia law should be shut down. Sharia law should not be applied to cases where at least one of the parties is not an Islamite, recent case law has reached the same conclusion. Even when Muslim minorities are under strong protection, positive discrimination is never the answer to problems since it does not solve the situation why these problems occur.

Key words

Legal pluralism, Discrimination, Sharia law, Fundamental rights.

INTRODUCTION

Sharia law cannot be seen just as a set of binding and non-binding rules it is a larger entity which derives from religious precepts most prominently the Koran, therefore the nature of sharia law is more defined by the religion of Islam than any country which uses Sharia as their main legislative source. "Defining sharia law is one of the most vexing and difficult challenges pose by the sharia law bill debate. Perhaps this is why a number of bills that specifically identify sharia law make no attempt to provide a definition."¹

Western civilizations have always been skeptic towards sharia law, 21'st century has flipped this situation, for the first time in modern Europe Muslim minorities have grown to a size they want to bring their own legal system inside of European countries.

For example in UK roughly 100 Islamic sharia councils operate if they have the consents of all parties involved although several questions about the way consent should be confirmed in situations like these have been brought to light, critique towards enforcement of sharia law is in peculiar position since it is tied so closely to Islam as a religion, debate over sharia is often overshadowed by political correctness and all the complications which come with it. When an individual religion, person system etc. is put on to a pedestal where it is not allowed to be criticized, we should have a growing concern about the motifs behind this setup. Greece has been and still is a hot potato for human rights and discrimination of on minorities either in a positive or a negative manner, geopolitical occurrences has put the Balkans in a unique position near to numerous major religious sites.

Traditional legislation does not acknowledge Sharia law almost at all nor does it specifically limit its usage in EU. This precarious approach to competing legal norms is harmful in the long run.

In this paper it the authors aim to clarify jurisdiction between European law, civil law of a member state and sharia law, to answer my research questions: can sharia law be enforced without the consent of all parties and on what topics can sharia law overrule civil law? Is sharia law compatible with European legislation?

¹ Bradford, J. (2013). Bad moon rising: the sharia law Bans, *La. L. Rev.*, p.603.

Some judges see sharia law "incompatible with the fundamental principles of democracy."² It's clear that boundaries should be set to for clear and internationally normalized position. State where competing legislation exists is bound to have problems with applying those competing legislations.

After reading this thesis, the reader should not only know the current state of sharia laws enforceability in EU member states but understand the significance of the oldest still relevant legal system. How it has evolved in the time span of over 1000 years it has been applied trough history. How sharia law has been enforced trough different means than making traditional written western laws and most importantly recent judicial and not judicial events which have had a huge impact on the consensus about sharia law.

It is hard to underestimate the effect that mass immigration has and will have in the European member states, not only does the communities of non-Europeans get larger but they have demanded and will demand more legal autonomy within Muslim communities. If these large minorities will not adapt to western laws and customs should they be allowed to coexist with their own legal system which differs immensely from our own, on which we base our western values.

Pinpointing the state that we currently are in that development and what obstacles it will inevitably bring is important, since right now besides ethnic cleansing, very little in the field of removing Islam from Europe is realistically achievable.

The author conducted applied documentary research focusing on a single problem. Besides the rather abstract part focusing on Islam as a religion the author used secondary sources of law and the concepts revolving around human rights for his legal reasoning to achieve the end result. Data used by the author had a heavy emphasis on case law and legal texts on legal pluralism and conflicts of rights rather than statutes and treaties.

²*RefahPartisi (The Welfare Party) and Others v. Turkey*, Application No. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR, 2003-I, paragraph 123.

CHAPTER 1: ABOUT SHARIA LAW

1.1 History of sharia law

Defining sharia is a very difficult task hence it is often just left undone, the word sharia can roughly be translated "the right path" this refers to the traditional Islamic law deriving from the sacred book of Islam the Koran. Muslims interpret the Koran in a large spectrum ranging from nonbinding moral instructions to word by word since some fundamentalist sects of Islam consider the Koran as the actual word of god given to prophet Muhammad, who passed on god's will to the Koran.

These events took place in the 7th century, in the time span of few hundred years Islam grew to a large religion where sharia was reinterpreted multiple times by different Islamic scholars. At this point in time sharia law was not yet codified in any real manner but it was already fractured into many different interpretations of "the will of god", that said Sharia law was in no way unified or codified or even regulated set of rules, they differ immensely on the basis of the one who applies them.³ "To what extent is sharia a fixed set of norms that apply to all Muslims? Many assume that sharia rules can simply be found either by reading the Koran, or by listening to the opinion of any Muslim priest. They also assume that all Muslims are bound by the same rules, and that sharia rules can thus be enforced across national borders to all Muslims equally, in the Middle East, Africa, Asia, and Europe. But is this correct? And if not, what then is the correct understanding of sharia?"⁴

In the dawn of the modern era sharia law has spread to majority of the continents and has seen different levels of use in several nation states mostly in Africa-Asia axis. In my opinion sharia should always defined when used much like the term liberalism, so many branches of different legitimate interpretations of sharia are and have been in use.

³Hallaq, W. (2005). *The origins and evolution of Islamic law*. Cambridge: Cambridge University Press.

⁴ Otto, J.M. (2008). *Sharia and national law in Muslim countries*. Leiden University Press, p 7.

1.2 Sharia law in modern era

In the 20th century Sharia law has mostly been used in areas which westerners would call developing countries.⁵ states which use sharia law can be categorized roughly in 3 categories: Mixed systems: Most Muslim countries have mixed systems in the sense that these systems postulate the hegemony of the national constitution and the Rule of Law, while at the same time allowing the rules of Islam to play a dominant role and influence certain areas of national law. These countries not only have constitutions but also large codifications of civil and criminal law, modeled after European or other regionally relevant codes. These systems acknowledge concepts like the separation of powers and democratic elections, even though they are at times overshadowed by authoritarian regimes. In these mixed systems, politicians and jurists play central roles in the law-making process rather than religious scholars. Many of these nations still uphold some sharia related relics in their legislation although they have seen large revision compared to literal sharia law or classical sharia law countries.

Classical sharia systems, a small minority of Muslim countries have classical sharia systems. National law in those countries is formally equated with classical sharia and in substance the national law is to a great extent based on sharia. Such systems often lack a constitution and a large-scale codification of laws. Muftis and Imams play a decisive role in the interpretation and application of sharia as national law. Therefore, change and modernization are difficult to achieve. The state has a ruler who promulgates laws, directs the executive, and functions as the highest judiciary. The ruler can make some legal changes and affect some aspects of modernization, but his space is limited by sharia as it is. Secular systems: in these systems, religious interference in state affairs, politics, and law is not permitted. State recognition and application of sharia within national law is considered to be irreconcilable with the democratic and secular constitutional state, although it is still relevant since application of sharia law within a legal system can be roughly categorized in mixed systems where sharia and national law coexist, classical sharia law systems where sharia law is the dominant legal norm and secular systems where sharia law exists but the state is not connected with spiritual matters.

To conclude this overview of sharia law in modern era it is of utmost importance to realize that when somebody refers to sharia law they are probably referring to certain type of sharia law which

⁵Al-Nowaihi, M. (1975). Problems of Modernization in Islam. - *Muslim World*, vol. 65, no. 3, 174-185, Warner, B. (2010) *Sharia law for non-Muslims*. USA: CSPI.

they have personally used or had experiences with. The scarcity of unified codified sharia law makes it borderline impossible for even scholars of the sharia law to reach the same conclusion in a large number of cases, the situation is made even more convoluted that muftis certain type of Islamic jurists can issue nonbinding opinions generally referred as *fatwa*, although judges often adhere to fatwa's. Giving them *de facto* much more substantial role than just nonbinding opinions of Islamic jurists.⁶"The mufti stated what the law was with regard to a particular factual situation. As he was – because of his erudition – considered to have supreme legal authority, his opinion, though non-binding, nonetheless settled many disputes in the courts of law. Thus, regarded as an authoritative statement of law, the fatwa was routinely upheld and applied in the courts. A disputant who failed to receive a fatwa in his or her favor was not likely to proceed to court, liable persons would instead abandon his or her claim altogether or opt for informal mediation."⁷

⁶Hallaq, W. (2001). *Authority, continuity and change in Islamic law*. Cambridge: Cambridge University Press.

⁷Hallaq, W. (2009). *An Introduction to Islamic Law*. Cambridge: Cambridge University Press.

CHAPTER 2: SHARIA LAW IN EUROPE

2.1 Overview of sharia in Europe

Europe in historic sense has always rejected Islam and sharia law, in the 21'st century the situation has started to change due to the large growth of Islamic population coming mainly from the middle-east and Africa.

Mass immigration is not just an influx of people coming into Europe, besides humans, new values, new perceptions on law, morality and other ideals which are not derived from the same sources as our western standards. These people form up their own communities excluded sometimes involuntary and sometimes by their own volition, in these smaller communities the need for values which are not European arise since the members of the communities are not of European decent. Some solutions to these problems have been tried in the 20'th and 21'th century with Muslim receiving some autonomy in legal aspects within EU member states. These decisions are often done with the premise that cultural assimilation to the larger population would happen with time without any active enforcement. This might not be the case some communities which have received special powers within legal systems to use other legal systems with religious aspects have always become even more secluded from the general population for example Jehovah witnesses were *de facto* denied of blood transfer if they did not express their consent to it since in Finland they had a habit of demanding legal actions for involuntary transfusion. The slippery slope argument has seen its application on matters like these, when small amount of power is taken away from the national legal system and given to some religious tribunal instead of the national courts there is an argument to be made that beforementioned tribunal would only want more power in the long run. This has negative effects since it is hard to sustain 2 parallel courts, religious or not.

In the 2010's pressure for larger adoption of sharia law has emerged, extremists and political parties demanding for sharia have been founded. This change in perspective is mostly traceable to the influx of Muslims in Europe so called sharia patrols have seen action in UK, Germany, Finland etc.

These radicalistic parties are often condemned by larger Muslim communities at least in public, often these patrols demand people to act properly, sexual orientation or the lack of head dress are enough for actions for the fundamentalist vigilantes.⁸

More democratic way towards enforcement of sharia law is by forming political parties which try the parliamentary route. One of the most prominent Islam parties in Europe is the Islamic party of Belgium which boasted candidates in every municipality on the 2018 elections. It's safe to say that pressure for sharia law is almost only a western European phenomenon, countries such as Poland, Hungary, Romania and Bulgaria which all have very strict policies on immigration and asylum coupled with the low amount of social welfare have been deterring for largescale immigration.

2.1.1 Sharia in UK

Great Britain was one of the first countries to let Muslim communities in Europe to have their own tribunals. Islamic sharia councils or ISC's were founded in 1982 in UK marking the beginning of a new era. ISC's provide legal rulings and advice to Muslims, basing their decision on sharia law more precisely the four Sunni schools of thought, Hanafi, Maliki, Shafii and Hanabali.⁹ All the aforementioned schools of Sunni thought are based on interpretations of the Koran which are close to 1000 years old. ISC is concerned with Muslim Family issues, which cover marriages divorces and inheritance issues. Large criticism has been pointed towards the conduct of ISC's most prominently on issues involving custody rarely does the biological mother keep custody of her child if the subject is dealt within Islamic sharia councils. Besides Islamic sharia councils UK created so called Muslim Arbitration Tribunals a method of alternative dispute resolution based on Islamic law. Modern take on alternative dispute resolution and mediation is very positive since civil actors who solve disputes before they reach the court are very cost efficient benefactors for the judicial system.

⁸Khaliq, U. (2005). *Freedom of Religion, Apostasy and Islam*. Surrey: Ashgate Publishing Ltd.

⁹Machtheld, C. (August 17, 2013). *What happens at sharia councils?, part three :The Muslim Arbitration Tribunal*. Leiden law blog. Accessible: <https://leidenlawblog.nl/articles/what-happens-at-sharia-councils-part-three-the-muslim-arbitration-tribunal>, 11 May 2019.

Muslim Arbitration Tribunals or MAT: operate under the British Arbitration Act of 1996,¹⁰ more specifically section 1 (b) " *the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.*" Rarely does civil disputes reach a point where the decision must be nullified in the name of "public interest" For many the general direction of giving autonomy to MAT's has been overall the opposite of what was desired to achieve. Giving some leeway with separate rules regarding family law and inheritance issues was seen as a way to fasten integration towards the general population of UK, instead they seem to have an effect which encourages demanding of certain aspects of sharia law to be imported besides the legal questions where ISC and MAT have jurisdiction.

Arbitration and actions which lead to a conclusion of the matter are considered useful since whole organizations are founded for such purpose, benefits gained from alternative dispute resolution are obvious every case solved out of court is a case which does not strain the system with its existence.

Argument that arbitration which is made under sharia law influence is automatically incompatible with the normal arbitration even though the arbitration act specifies that the conflicting parties have a basic freedom to agree their disputes under a legislation of their own choosing, has been made by some parties which agree to the concept that sharia law is in fact fundamentally in conflict with western values of democracy and equality.¹¹

2.1.2 Sharia in Benelux countries

A democratic option has risen on 2010's to replace forceful adoption of sharia law by a parliamentary route, a prime example of this is the Belgian sharia party formed in 2012 which openly wanted several things including adoption of sharia law and the segregation of women and men in public spaces.¹² Right now it's unlikely to any political party to co-operate with sharia party especially after some very controversial statements from leading figures in the party. This

¹⁰Arbitration Act 1996, Accessible: <https://www.legislation.gov.uk/ukpga/1996/23/contents>. 11 May 2019.

¹¹Rehman, J. (2007). Islam, "War on Terror" and the Future of Muslim Minorities in the United Kingdom: Dilemmas of Multiculturalism in the Aftermath of the London Bombings- *Human rights quarterly*, vol 29, No 4, pp 831-878.

¹²Embling, D & Boukanoun, A. (2018). *Islam Party stirs controversy ahead of Belgian elections*. Accessible: <https://www.euronews.com/2018/04/26/islam-party-stirs-controversy-ahead-of-belgian-elections>. 2 May 2019.

might not be the case for all eternity since Muslims in Europe tend to stack up to certain places it's not unbelievable to think that some cities might even have an Islamite majority in the future it would lead to a majority in places of city councils. This is made with the assumption that Members of the Muslim faith would all vote for sharia party.

2.1.3 Sharia in Balkans

Balkans have been the hotspot for conflict in 20'th century Europe spanning from the start of world war 1 in Serbia to the collapse on Yugoslavia and the civil wars following it. Balkans had historically the strongest Muslim population due to the predecessor of turkey the ottoman empire. Having such a large country which advocates Islam has its effects, the collapse of the ottoman empire and the rise of modern turkey which has been under several intensities of Islamite control still holding on to some traditions like the star and the crescent in the flag. Greece has a unique position in Europe since it has agreements from the 1910's and 1920's still giving some validation for implementation of sharia law in Greece, we will go to more detail about these further in this text with case *Molla Sali v. Greece*.¹³

The destruction of Serbia, Hungary and Romania by the central powers lead to lots of immigration towards Greece after the first world war later the nonexistent religious right of Yugoslavia and ethnic cleansings committed in modern Kosovo lead to a situation where the stable Muslim population has formed onto Greek soil. Greece is maybe the one European union member state with most history with Muslims and stable Muslim population. Greece has been a subject for negative feedback on its way of handling of family and inheritance law in Muslim communities, human rights commissioners have been outspoken about this issue like in 2009, when the commissioner for human rights gave a long report about the status of human rights for minorities. 'The Commissioner takes note of the very serious concerns that have been expressed by competent national and international organizations about the application to Muslim Greek citizens in Thrace of the Sharia Law in family and inheritance law matters by Muftis who are appointed by the Greek state. Given the issues of incompatibility of this practice with European and international human rights standards, the Commissioner recommends its review

¹³Molla Sali v. Greece, Application No. 20452/12 ECHR Available:

<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-188985%22%5D%7D>, 13 May 2019.

by the authorities, institutionalizing at the same time an open and continuous dialogue with representatives of the Muslim minority on all matters affecting their everyday life and human rights, in accordance with the Council of Europe standards.’¹⁴This is not the only instance where Greece authorities have gotten a slap on the hand for the conduct in which sharia law has been applied discriminately towards non-Muslim population in the name of protecting minorities. The position of women in Islamic law has been the point of most problems.¹⁵

2.2 Sharia law as a part of practicing one’s religion

To what extent does freedom of religion give permission to practice religion without interference since European Convention on Human Rights states ‘ Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’¹⁶ Sharia law is often seen as an integral part of Islam and such categorized as manifestation of Sayed religion, therefore the argument that Islamic tribunals which decide on matters not under criminal law not only should be handled by local religious tribunals but they are protected under the freedom of religion.¹⁷ No actual bans on sharia law have been noted on European Union member states own law.¹⁸

From the western perspective freedom of religion is to guarantee religious actions without the fear of oppression from a larger or state religion. Concept of the church and state being separate entities was prominent¹⁹ before the European Convention on Human Rights. The real question about sharia

¹⁴Hammarberg, T. (2009). Report by commissioner for human rights of the council of Europe, CommDH.

¹⁵Boussiakou, I. (2008). Religious Freedom and Minority Rights in Greece: the case of the Muslim minority in western Thrace. Hellenic Observatory Papers on Greece and Southeast Europe.

¹⁶European Convention on Human Rights, article 9, 2. Accessible:
https://www.echr.coe.int/Documents/Convention_ENG.pdf, 15 May 2019.

¹⁷Donnelly, J. (1989). *Universal Human Rights: In Theory & Practice*. London: Cornell University Press.

¹⁸Taylor, P. (2005). *freedom of religion: UN and European human rights law and practice*. Cambridge: Cambridge University Press.

¹⁹Katz, W. (1952). Freedom of religion and state neutrality-*U. Chicago law review*, volume 20, issue 3, 426-440.

law and freedom of religion is does sharia law count as practicing one's religion?²⁰ Sharia law is an integral part of the ideal Muslim caliphate (Islamic state under the leadership of an Islamic steward with the title of caliph) and the everyday life of an fundamentalist Muslim,²¹ on the other hand Muslims all over the world live without sharia law just fine so is it such an integral part of Islam in the end. Islam is in a unique position with its own legal system based on the holy text of the Koran, no other major religion has anything but moral guidelines or some short statutes like the ten commandments. Sharia is fully fledged legal system with its own interpretation of civil and public law though still leaving a lot to be desired especially in the 21'st century. The position of Sharia as a law of the religion gives it instant enforceability on the subjects of Islam according to some scholars of sharia law. Sharia being promoted by top Islamite scholars is the key point here, that ties Sharia to Islam as a religious codex, by itself sharia law is from a western viewpoint unequal and discriminating legal system which deprives certain groups and communities of their basic rights, such groups are for example sexual minorities, women and infidels or *takbir* people of non-Muslim faith.²²

Freedom of religion as it is interpreted in EU is a double-edged sword since it guarantees unlimited freedom to express one's religion but is limited by the other fundamental freedoms especially the prohibition of discrimination. In the battle of rights, the negative obligation to forbid some conduct is almost always going to step over the positive right to do something.²³ Human rights are equal should be equal for everyone all over the globe and in the ideal position the rights would never be in conflict but in reality conflicting rights are very common not just in the aspect of religious freedoms but for example in the with free speech and the growing demand to criminalize so called 'hate speech'.

²⁰Mayer, A. (1994). Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct? - *Michigan Journal of International Law*. volume 15, issue 2, 307-429.

²¹Buskens, L. (2000). *An Islamic triangle changing relationships between sharia, state law, and local customs*. Leiden university press.

²²Tibi, B. (1994). Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations. - *Human rights quarterly*, Vol, 16, No, 2, 277-299.

²³ Evans, C. (2001). *Freedom of religion under the European Convention on Human Rights*. Oxford: Oxford University Press, Zucca, L. (2012). *A secular Europe: Law and religion in the European constitutional landscape*. Oxford: Oxford university press, Büchler, A. (2016). *Islamic law in Europe?: Legal pluralism and its limits in European family laws*. Routledge.

When human rights have a conflict, in an European context the ‘winner’ in the situations is the right which would be infringed, since human rights are absolute but they cannot infringe other human rights,²⁴ for example freedom of religion grants the possibility to have some legal problems handled by tribunals which do not follow the national law in every sense, groups like these are for example: Jehovah’s witnesses, Laestadian’s and Islamite’s. The tribunals what these groups hold should not breach the right for free trial or discriminate people,²⁵ since these tribunals are frequently hold with closed doors it is rather hard to precisely determinate if there really are breaches of human rights going on. Rights and actions derived from one right cannot breach other rights.

CHAPTER 3: RELEVANCE OF SECONDARY SOURCES OF LAW AND CASE LAW ON APPLYING SHARIA LAW IN EUROPE

3.1 Sharia in European legislation and sources of law

As the author has previously stated in this text European countries have not acknowledged sharia law in their domestic legal texts, still sharia law is being applied in a sense. When legislation does not give a straight answer to a legal question is the proper procedure to find the answer from secondary sources of law.²⁶ In EU the naming scheme is a bit different and EU standard is the categorization and definition we will be using, the two main sources of EU law primary and secondary sources as e-justice. Europe describes them: ‘ Primary law is constituted by treaties laying down the legal framework of the European Union. Secondary law is composed of legal

²⁴Brems, E. (2005). *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms.* - *Human Rights Quarterly* Vol. 27, No. 1, 294-326.

²⁵ Thornberry, P. (1993). *International Law and the Rights of Minorities*, Oxford: Oxford University Press.

²⁶Norman, D. (2011). *Law and religion in Europe: A comparative introduction.* Oxford: Oxford University Press.

instruments based on these treaties, such as regulations, directives, decisions and agreements. In addition, there are general principles of EU law, the case law developed by the European Court of Justice and international law.²⁷

Since TFEU, TEU older treaties do not define or even mention sharia law we must define where does the legislative power reside, since surely there must be a party which job is to restrict aggressively expansive systems like sharia law, it would not make sense to enforce EU norms in such a consistent manner and not defend the sovereignty of that legal system. Primary EU law does not take any part in sharia law so the answer should be found from secondary sources, there are now regulations or directives about sharia law so the answer should be found from agreements such as the Treaty of Sèvres and Treaty of Lausanne which we will look with greater intensity later. The last remaining source of law is case law, in Europe case law is a prominent part of legislation and has a high relative position compared to Nordic and Germanic legal families but not as strong position as case law has in common law countries where law is derived from judicial precedent instead of statutes as is the case in EU besides UK.²⁸ When the scope is EU case law can have a big and lasting impact on law, like in case 6/64 *Costa v. ENEL*²⁹ where primacy of European union law was established and case 53/81 *Levin v. Netherlands*³⁰ in which ECJ defined workers, a definition still used but not defined in any statutes.

Case law has maybe the largest impact on applying a law and many courts exist for the sole reason to give precedents, important decision which establish principles or rules.³¹ All precedents are not unique or hold similar value in the perspective of applying law, some lay down foundations for future decisions and some remain as an oddity or a relic of an unforeseen legal question which is unlikely to be repeated.

Different courts exist for different reasons, local courts often go through cases with an assembly line like focus trying to plow through as many as they can in a certain timespan, in EU citizen have

²⁷EU Law. Available at: https://e-justice.europa.eu/content_eu_law-3-en.do, 11 May 2019.

²⁸Kaczorowska, A. (2010). *European union law*. Routledge.

²⁹6/64, ECJ. *Flaminio Costa v E.N.E.L.* Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006>, 14 May 2019.

³⁰53/81 ECJ. *Levin v Netherlands*. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0053>, 14 May 2019.

³¹Alter, K. (1998). Who Are the “Masters of the Treaty?: European Governments and the European Court of Justice. - *International Organization*, 52(1), 121-147.

the biggest problems with the time it takes for a case being processed through the litigation. Actual case law is formed on higher instances of court, national supreme courts and European courts are the ones giving out precedents, landmark cases which may or may not hold some formally non-binding value but *de facto* are in a position where they can be considered as rules. National supreme courts often were not originally made for the sole purpose of creating precedents but have evolved to a state where the full time job of a supreme court is to make precedents for applying laws. Modern lawmaking is hard in many aspects since politicians and lawmakers are rarely experts on the topic, off course experts on the topic are used basically every time in the process of lawmaking but they are not the ones making decision about the final version of the law itself.

Laws are meant to be simple so even people without background of legal knowledge could understand the meaning and objectives of the law. This leads to a minor paradox of creating law since at the same time it should be so broad that it can be applied where it's supposed, so simple and easy to read that everybody can understand it and yet so sophisticated and in detail that it leaves no blind spots. Balancing these aspects has been and will be hard in the future, globalization and the growth of rights and ownership has created more complex legal problems, lawmakers replied with more and more complicated laws. In this point of time if we would want laws to be such extensive that we would not need precedents as a helpful tool to apply law to situations which are not covered specifically in law the actual text would be very long and tedious to read or to grasp the basic idea.

Supreme courts have taken this duty to create a layer of case law which lives in a symbiotic relationship to the law applied since if the law is overruled the relevant case law also loses its importance. Supreme Courts can be considered like spiders laying down the reinforcing structure of web (case law) to the central part of the web (actual law), when a certain individual web collapses a new one is made from scratch which again needs some case law around it so it can function the way it was meant.

This argument of the function and objectives of the highest instances of courts is backed the procedures these courts often abide to. Taking the facts of a case as facts and mostly only taking cases where the legal arguments collide and sending cases which have no precedential value back for another round of litigation to lower courts. The practice of judicial review by European courts on the matter at hand, often national courts will ask for a non-binding review of the case helping to find the decision which would happen on the highest possible court in Europe, though these

reviews are not binding they have a heavy base weight since if the review is not taken into consideration on the outcome of the case it is likely that the losing party will try to appeal to the court which gave out the review in the first place hoping for a similar conclusion in the appeal. Some see this change of objectives of supreme courts breaking the separation of powers since the judiciary branch can by itself change the way laws are applied without any check or power to veto by the legislative branch. This is a shortsighted argument because the judiciary branch does not have *competence competence* about applying the law since it is not making the law, courts do not decide on which topics they can make case law but instead are left with the task of filling up these holes in legal texts with rationalized and consistent norms and rules which have more or less binding position.

Case law can always be overruled but this mostly needs a change of legislation or general consensus of some aspect of the law. *Legi posterior derogate legi priori* principle applies to case law as well, old and overruled case law strips itself from relevance *eo ipso*, case law has no formal role as statute so it can be deprived of its status without any formal process. The obsolescence of case law happens all the time more so in common law systems than in civil law, for example American or British courts are inclined not to consider century old cases as relevant if they are not landmark cases which do not happen so often.

The main point of this is that statutes form only a part of the applicable law which cannot function properly without supporting legal instruments of which case law is the most prominent in European context.

3.2 Significance of Molla Sali v. Greece

Case 20452/2014 Molla Sali v. Greece³² is an important case not only by the outcome of the decision or by the fact that European court of human rights categorized it as a *key case* but the pivotal point of European court of justice overruling a decision by a national court to which would have given benefit to a Muslim instead of a Non-Muslim citizen in the place of plaintiff. Let me elaborate a bit the basic principle of applying sharia law to EU-citizens is dependent on the matter

³²20452/2014 Molla Sali v. Greece. Available: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-188985%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-188985%22]}), 13 May 2019.

that all the parties involved are of Muslim faith and consent to the use of Sharia law instead of the dominant regional legal norm in this case Greek law.

Any case in which sharia law would be applied instead of national law of a member state is basically discrimination against the party involved which is not a Muslim, particularly harmful is the road that this would lead. Basically, if Sharia law can be applied to situations where all parties are not Muslims or consented to the use of Sharia law, there is not really anything stopping from applying sharia law to situations where not a single party has wanted the use of sharia law.

National courts and European courts work mostly under the same jurisdiction but with different types of decisions based on the way that courts work. European courts mostly take appeals to already handled cases where the litigation could have been ongoing for years, in these situations the facts of the case remain unaltered but the process of reasoning to find the rightful decision is often turned around. Particularly difficult are cases where European courts change the outcome of a national supreme court, our case is a prime example of that. A case where highest national authorities disagree with European Court of Justice.

Case 20452/2014 is not only significant because of the conclusion which European court of human rights ended but other factors too most prominently 2 treaties which give Muslims and Muslim communities a very strong position to practice their own law in Greece. Among these treaties certain rights are established like in the Treaty of Sèvres article 14§ 1 ‘‘Greece agrees to take all necessary measures in relation to Moslems to enable questions of family law and personal status to be regulated in accordance with Moslem usage’’³³ and the Treaty of Lausanne articles 42 § 1 ‘‘The Turkish Government undertakes to take, as regards the non-Moslem minorities, in so far as concerns their family law or personal status, measures permitting the settlement of these questions in accordance with the customs of those minorities’’³⁴ in conjunction with article 43 of the same Treaty ‘‘Turkish nationals belonging to non-Moslem minorities shall not be compelled to perform any act which constitutes a violation of their faith or religious observance, and shall not be placed under any disability by reason of their refusal to attend Courts of Law or to perform any legal business on their weekly day of rest. This provision, however, shall not exempt such Turkish nationals from such obligations as shall be imposed upon all other Turkish nationals for the

³³Treaty of Sèvres. Available: http://sam.baskent.edu.tr/belge/Sevres_ENG.pdf, 13 May 2019.

³⁴Treaty of Lausanne. Available: http://sam.baskent.edu.tr/belge/Lausanne_ENG.pdf, 13 May 2019.

preservation of public order.’’³⁵ All this will make more sense to the situation at hand when we read article 45 of the before mentioned treaty which establishes that Greece will confer these rights similarly to Muslim minorities as Turkey confers beforementioned rights to non-Muslim communities in Turkey. Given that this particular case had maybe the highest possible validation for use of sharia law in Europe the outcome is set for a landmark case in European legislation.

The case in itself revolves around legal pluralism on succession in western Thrace, the applicant a Greek citizen is not a member of the Muslim communities in western Thrace, his husband on the other hand was. On 2003 applicants’ husband had drawn up a will and notarized it with the relevant provision of the civil code, in his will he had bequeathed his whole estate to his wife. Applicants husband died on 2008, on 2010 the applicant accepted her husband’s estate by a notarized deed, the treasury was notified, and the applicant registered the property transferred to her in the Komotini land registry paying the corresponding registration fees. It’s notable that it does not appear from the case files that the applicant had to pay any inheritance tax on the property she acquired, still there is more than enough actions to ensure proper succession and ownership of the property.

This case would go through several court proceedings chronologically in this order: Ropodi court of first instance where the decision was to uphold the will of the deceased, Thrace court of appeal which did not change the outcome, Greek court of cassation which remitted the case to the Thrace court of appeal, it was proceeded again in Thrace court of appeal set aside the judgement delivered by Ropongi court of first instance in favor with the sisters of the deceased who demanded three quarters of the inheritance, as a result of the whole proceedings the applicant was deprived $\frac{3}{4}$ of the property she had acquired. The applicant appealed to European court of human rights stating that there has been a violation of article 14 in conjunction with article 1 of the European Convention on Human Rights. Article 1 being ‘‘obligation to respect human rights: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’’³⁶ And article 14 of the convention ‘‘prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion,

³⁵*Ibid.*

³⁶European Convention on Human Rights. Accessible: https://www.echr.coe.int/Documents/Convention_ENG.pdf, 13 May 2019.

political or other opinion, national or social origin, association with a national minority, property, birth or other status.’’³⁷

Article 14 of the convention does not by itself give reason enough for this conduct to be a violation since there needs to be a right or freedom to be enjoyed, in this case applicant’s right was of a fiscal nature being the ownership of property or property rights. From the perspective of the applicant Greek officials were practicing positive discrimination towards the Muslim communities of Thrace, this conduct lead to a conclusion which deprived her legally attained property. The key point is here that actual succession had happened, the applicant had gotten the possession of the property of her deceased husband and registered it, the will which lead to she receiving the inheritance was made in a formally adequate sense and it was approved by the Ropodi court of first instance.

The sisters of the deceased had some arguments on how Muslim law did not recognize the transfer of ownership towards the applicant, we will not go to any detail about these arguments since it is not the point of this thesis, still to say that beforementioned arguments were rather sound logical at least if sharia law is considered sound and logical. The court came to a verdict that there has been a discrimination fitting to article 14 with conjunction to article 1 of the European Convention on Human Rights.

³⁷*Ibid.*

CONCLUSION

The author would describe sharia law as the most unsecular legal system in the world, defining sharia law is a more difficult task since there is no one and only sharia law much like a communist will argue that real communism has not been yet tried, specific application of sharia law is often based very much on muftis which gives sharia more flexibility towards morals of different communities where sharia law is the dominant norm. Muftis hold a huge amount of power in sharia law-based systems since they act as lawyers and judges at the same time. To put it bluntly sharia law is a religious law of Islam although it's substantially more complex than any other religious law with very high emphasis on adaptability. If we strip the values out of sharia I can see a lot of innovative solutions perfect for rapidly expanding nations like the Muslim caliphates of previous centuries, this is not fitting to the modern era since globalism has eradicated warlords, the last real examples being in 1930's China, therefore I would claim that Sharia law has no place in modern Europe. How sharia law treats women, people with disabilities, sexual minorities, political opposition and people of not Muslim faith (Kafir) is undeniable against western values of equality and non-discrimination.

Statutes in effect under European union do not validate or disapprove sharia law, I find this disturbing since sharia law has found it's userbase in Europe on the aftermath of mass immigration from middle-east and Africa, founding of tribunals where Muslims can apply sharia law to civil disputes is a slippery slope going towards full implementation of sharia law in European countries, the effects of this can be seen in so called "sharia patrols" and on the founding of political parties which claim to want replacement of current legal norms with sharia law.

The whole concept of replacing dominant legal norms with imported values of immigrants is the total opposite of the goal of successful immigration, immigrants should become functioning members of the society which they blend in and not to replace the values with their own imported one's.

Biggest possible negative consequence of this development is that sharia law could be applied to people who are not of Muslim faith, since there is not a single rule stating that sharia could not be applied to representatives of other religions this is a very real possibility. The very fresh case of *Molla Sali v. Greece* was a real life example of how Sharia law could deprive individuals from their legal rights/properties just because some of the parties involved were of Muslim faith and demanded the appliance of sharia law instead of the nation's civil law. Recently the attitude

towards optional appliance of sharia law has been progressing towards negative attitude and for a reason, UK is a cautioning example how even small jurisdiction can bring large backlash from the native population towards the way Muslim minorities handle their internal disputes which are clearly not on par with local values.

European courts of human rights decision in *Molla Sali v. Greece* will undoubtedly weaken the enforceability of sharia law in Europe since now it would seem that almost any case could be appealed to ECHR with a positive result, making the assumption that the person appealing is not an Islamite.

Answering the original questions that this thesis asked is rather straightforward, the author claims that sharia law is inferior compared to a any European Union member state's civil law, sharia law could be enforced without the consent of all parties if they are members of the Islam faith. A person who is not an Islamite could argue for discrimination in a case like this but if the appeal would come from a member of the Muslim community I doubt that it would be seen anything else than forum shopping. The main point here is that sharia law based verdicts can only be deemed null and void for discriminative reasons if one of the participants is not a Muslim, maybe this will change in the future but right now the author believes this is the case.

Right now sharia law can mainly be applied in matters of family- and inheritance – law, how sharia handles these situations is not similar to European legislation neither are the verdicts, therefore the author can argue that sharia law is not compatible with European legislation and should not be applied, since practicing sharia law differs immensely in procedure and in the conclusion from members states civil law. Sharia law cannot be enforced on situations where all the parties involved did not consent on the use of sharia law since the right to use sharia law derives from religious freedoms which the forceful enforcement of sharia law would violate.

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