

STUDENT NOTES

Abstract

Student Editor Marzieh Tofighi Darian (SJD Candidate, Harvard Law School) summarizes the landmark case Molla Sali v. Greece (ECHR 2018).

Student Editor Dixie Morrison (JD Candidate, Harvard Law School) examines how the Indian Supreme Court's reasoning in Shamim Ara v. State of U.P. & Anr. (Supreme Court of India 2012) influenced the legal status of triple ṭalāq and Islamic divorce in India.

**CASE BRIEF :: EUROPEAN COURT OF HUMAN RIGHTS RULES
AGAINST FORCING GREEK MUSLIM MINORITY TO FOLLOW ISLAMIC
LAW: *MOLLA SALI V. GREECE* (ECHR 2018)**

Marzieh Tofghi Darian (Harvard Law School)

FACTS

The applicant, Mrs. Chatitze Molla Sali, was named as the sole beneficiary in a notarized public will drawn by her Muslim husband in 2003 in accordance with the rules of the Greek Civil Code.

Despite the initial approval of the will by the Court of First Instance, the deceased's two sisters challenged the validity of the will. They invoked Greece's international obligations for the protection of Muslim minorities under the Treaty of Sèvres (1920) and Treaty of Lausanne (1923). They argued that, because the testator belonged to the Thrace Muslim minority, the issue of wills and inheritance fell within the jurisdiction of the *muftī* and should have been subject to the rules of succession in Islamic law wherein the will only complements the intestate succession.

The Court of First Instance dismissed the challenge noting that invalidating the will would deprive Greek Muslims of freely disposing of their property in a will, which amounts to unacceptable discrimination on the grounds of religious beliefs. The decision was upheld in the Appellate Court but was overturned by the Court of Cassation. The Court of Cassation, on two occasions before and after remitting the case, stated that the international obligations of Greece according to the above-mentioned treaties were an integral part of the Greek domestic law according to Article 28 § 1 of the Constitution. As a result, the Court of Cassation identified the Islamic rules of succession applicable in the instant case which would render the public will in question legally invalid. It also rejected the applicant's claim that her husband was not a practicing Muslim and therefore not subject to Islamic law. The Court stated that the applicant's claim would amount to evaluating the extent of the deceased's religious sentiment, which is not legally valid.

Having exhausted all domestic remedies, the applicant lodged a complaint in 2014 before the European Court of Human Rights (“ECHR”) against the government of Greece for the violation of her rights under Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) taken alone and in conjunction with Article 14 and Article 1 of Protocol No. 1.

ISSUE

The ECHR was set to determine whether the Court of Cassation’s decision to invalidate the public will resulted in treating the applicant differently compared to a beneficiary in a will drawn by a non-Muslim testator to the extent that subjects her to discrimination prohibited under Article 14 of the Convention¹ read in conjunction with Article 1 of Protocol No. 1.²

ECHR ANALYSIS AND JUDGMENT

The Court noted that, in order to find out whether there was a violation of a right protected under the Convention, it needed to proceed in three steps.

First, the Court had to determine whether Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 was applicable in this case: the Court found that the term “possession” in Article 1 of Protocol No. 1 was not limited to the ownership of material goods, and “property rights” may include certain other rights and interests constituting assets. In the instant case, the Court concluded that the public will did confer on the appli-

1 Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, 213 U.N.T.S. 222 (“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as...religion...or other status.”).

2 Protocol to the Convention of the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262 (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”).

cant title to a substantive interest as protected by Article 1 of Protocol No. 1.

In terms of non-discrimination as guaranteed under Article 14 of the Convention, the Court defined the test as “but for the alleged discrimination, the applicant would have had a right enforceable under domestic law.” As a result, the Court concluded that the applicant would have inherited the entire estate if her husband were non-Muslim.

Second, the Court proceeded to establish whether the applicant was in “an analogous or relevantly similar” situation to that of a beneficiary of a will drawn by a non-Muslim testator in accordance with the Civil Code and was treated differently because of the religion of her husband. The Court stated that the violation of Article 14 of the Convention occurs when the different treatment is based on “an identifiable characteristic or status.” However, the Court added that the Article also entails situations in which the person is treated differently on the basis of another person’s status or protected characteristics. The Court concluded that in this case, the applicant was, in fact, in a similar situation to beneficiaries of wills drawn by non-Muslim testators and was treated differently on the basis of her husband’s religion under the concept of “other status” as recognized in Article 14.

Third, the Court determined whether the violation of Article 14 of the Convention was justified on the basis of a governmental legitimate objective and a reasonable relationship of proportionality between the means employed and the legitimate objective.

The government argued that the obligation to protect Thrace’s Muslim minority was a legitimate objective requiring the application of Islamic law by Greek courts. The Court, however, found that the measures taken by the Greek government did not suit the alleged objective. The Court went on to say that even if the measures were suitable for achieving the objective, they were not proportionate to the aim pursued as they deprived the applicant of three-quarters of her husband’s estate.

The Court stated that neither the international treaties ratified by Greece to protect Muslim minorities nor freedom of religion under the Convention require Greece to apply Islamic law or to confer any jurisdiction to a special body with regard to religious practices. Rather, a state that has given special status to a religious group must ensure that the group's entitlement to the status is applied in a non-discriminatory manner.

Moreover, a state cannot deprive an individual of a right to voluntarily opt out of belonging to a specific group and not to practice its rules. In this case, the fact that the Muslim testator chose to draw the public will in accordance with the Greek Civil Code and not Islamic law was a manifestation of this right. Therefore, denying him such a right is contrary to the requirement of "self-identification" as a core concept in the protection of minorities.

In the end, the Court concluded that the discrimination was not overcome by "an objective and reasonable justification" and therefore there was a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 to the Convention.