The Law of Lodging: The incompatibility of nation – state with fairness. A study on the ideological aspects of the Greek legal structure

The Minority question and the role of the Greek Church

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ABSTRACT

Is nation a constraint for Justice? Is Justice obtainable within modern nation – states? The establishment of nation states and the consequent quest of an alleged homogeneity and national security have fundamentally shaped the question of social Justice. The Hellenic Republic even from the earliest days of its constitution came up against this paradox; on the one hand social Justice and fairness had to be promoted while on the other, the basic axes of the domestic legal structure had to fall into the lines of an imaginary homogeneous Greek Orthodox nation state and serve the construction of a national consciousness and identity. This paradox became more evident after the emergence of the minority issue in Thrace, the recent transformation of Greece to a host – state for immigrants and the amplification of European integration; actualities that have eventually challenged well established Greek perceptions regarding the priorities of the domestic legal order.

This study examines the compatibility of nation with Justice within the Greek legal structure. The first chapter deals with the conceptualization of the aforementioned basic concepts as well as the construction of a theoretic model for detecting national ideologies throughout legal texts. Drawing principally on John Rawls' "theory of Justice" which provides the definition, the ideal model and the basic principles of Justice, chapter one sustains the theoretical context of the present thesis. The next two chapters focus on the impact of national ideologies (nationalism and communitarianism) upon certain legal territories concerning minorities (Muslims and Slav – Macedonians) and religious freedom (involving the constitutional role of the Greek Orthodox Church). Both chapters provide major observations for the conclusions contained in the fourth and final chapter of this study.

Outline

CHAPTER THREE
The role of the Church and religious freedom in Greece

CHAPTER FOUR
…and Justice for all

Abbreviations

CCPC	Civil Court Procedure Code
CERD	Committee on the Elimination of Racial Discrimination
CSCE	Conference on Security and Co-operation in Europe
EBLUL	European Bureau of Lesser – Used Languages
ECHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
FGM	Female Genital Mutilation
FYROM	Former Yugoslav Republic of Macedonia
GHM	Greek Helsinki Monitor
GNC	Greek Nationality Code
GPC	Greek Penal Code
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
KKE	Koumounistiko Komma Elladas
MP	Member of Parliament
NGO	Non Governmental Organization
PASOK	Panellinio Socialistiko Kinima
SIRIZA	Sinaspismos Rizospastikis Aristeras
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States
WHO	World Health Organization

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Aristides Tsekos

"I. Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.

II. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society."

(The two principles of Justice, John Rawls, A Theory of Justice, 1971)

INTRODUCTION

This study explores the compatibility of Justice with nation – state within the legal order of the Hellenic Republic focusing specifically on the legal terrains of minority law and religious freedom. The first major concept of the present study, Justice, corresponds to the Rawlsian model of "justice as fairness" while the second, nation – state, is designated by two of its basic notional aspects, i.e. the ideological patterns of nationalism and communitarianism. As discussed below, both these patterns and therefore the nation - state itself represent negative variables vis-à-vis the desirable end of a fair legal system embracing the notion of Justice as it has been shaped throughout the last quarter of 20thcentury by the Rawlsian thinking. Nevertheless, during the past two decades a new resultant has come to reshape the dipole "nation – state" and "Justice": European integration bearing the innovation of a process originated on the supranational level (and not on the national one) has challenged standard fixations of the Greek legal structure.

The hypothesis is synoptically imprinted on the following assertion: Even though European integration may have an ongoing impact upon the Greek legal structure, national ideologies still control the legislative function of the state. Yet, it is not merely a problem of Justice *lato sensu,* namely the normative level and lawmaking, but a problem of Justice *stricto sensu* as well*,* that is the actual application of the general law of Greece in the courtrooms by its ministers, the judges.

The present study considers two basic points as fact: First, Greece has constantly struggled to become a homogeneous state which, in order to accomplish its goals, has repeatedly played the legal cards of national security and reciprocity flirting though at the same time with abuse of Authority, of discretion and of majority rights. However, provided that the present query is based on a pure legal context, the historical references are limited as possible. Second, Greece is an EU member incorporating within its legal structure EU laws and directives. Thus, European integration is an actuality, even if its effects are somewhat questionable. Both procedures should be detected between the lines of legal texts.

The first important element in our methodology is the treatment of certain independent variables as indicative of the national ideological impact on Law. The objective criteria posed by Smith in his definition on nation (historic territory and principally the mass, public culture, including religion and language), although highly controversial, stand suitable for detecting national ideologies through the wording of legislations and court decisions. In short, whereas a statute or a verdict provides for discrimination on the grounds of those objective criteria, this statute should violate the fundamental principles of the Rawlsian Justice. Similarly, statutes and verdicts containing the legal clauses of national security and reciprocity, should also suggest a

legal malfunction and, to an important extent, injustice[1]. All laws, legal texts, circular letters and court decisions cited in the present study fell unexceptionally into one of the two aforementioned categories.

Second, a statute or a verdict opposing the principles of Rawls should be considered as conflicting to Justice even in cases where the statute or the verdict under study seems to protect the rule of majority or the right to culture. Neither majoritarianism nor cultural relativism should stand suitable pretences for injustice. In any case Justice should be blind – folded[2].

Third, the unit analysis is the Greek legal order, including the Constitution, formal laws, ministerial degrees and circular letters, as well as the relative jurisprudence. Hence, this is not a study upon official foreign policy, diplomatic manoeuvres, historical controversies or social phenomena. Moreover, taking into account the feasibility of the present study, two major legal sections have been opted for examination; the legal status of minorities in Greece and of the Greek Orthodox Church. Both fields have been selected since they comprise legal territories where ideological influence is more likely to be detected. Besides, in order to avoid overgeneralization it is essential to be explicitly declared here that the conclusions refer solely and exclusively to the aforementioned fields of inquiry and not of course to the entire legal structure of Greece.

Fourth, this study is longitudinal, namely it is designed to use legal texts in order to study changes over time. Hence, the unit of analysis will be examined in such

[1] In this regard, European statutes, even if they provide for some kind of discrimination, they should not be considered as *nationalistic*. For instance, the implementation of the *Schengen Agreement* in the Greek reality even if it is clearly an 'immigration anathema' getting close sometimes to racism, especially as regards Third World immigrants' and refugees' rights and life chances, should not be regarded as a *nationalistic* regulation because it refers to and has been legislated by a supranational entity and thus, does not correspond to none of the criteria that comprise the concept of nation nor it includes the legal clauses of national security and reciprocity.

[2] the aforementioned assertion is discussed below in relation with the application of Sharia in Greece along with the legal position of the Greek Church within the Greek constitutional order

a way that permits conclusions for the development of the Greek legal system though time. However, a more elaborate heed will be paid to laws in force.

Finally, the present study follows a deductive mode of inquiry which means that it moves from the pattern that theoretically is expected, (nation – states bears certain ideological aspects that prohibit the realization of Rawlsian Justice) to observations that test whether the expected pattern actually occurs (if the pattern is correct the legal structure of Greece should perform a certain degree of one-sidedness violating the basic principles of the Rawlsian Justice)[3].

CHAPTER ONE

Fairness Vs Nation

Hesiod, in his *Theogony* portrays *Themis* (Justice), the ancient Greek Goddess who embodied law, custom as well of divine order, and her daughter, *Dike (Trial)* who executed the law of judgments and sentencing and, together with her mother carried out the final decisions of *Moira (Fate). Themis* is depicted with a blindfold over her eyes holding scales and *Dike* is pictured with a sword in her right hand and seated among the divine judges. Since *Themis* is blindfolded she cannot be swayed by gender, race, wealth, or other influences or advantages that one party might hold. On her scales, disputing parties rest their case, the matter is weighed and the balance resolves the matter[4]. Likewise, the sword of *Dike* symbolizes the power that justice holds in preserving law and order.

2. *"Justice as Fairness"* and the *"Rule of Law"*

If John Rawls was to be asked he would had probably proposed a different reading of Themis and Dike. In Rawls' perspective, the blindfolded Themis incarnates the virtues of the legislative body (representatives) while the sword holder *Dike*

[3] E. Babbie, *The practice of Social Research*, Thomson Wadworth, 2007
[4] L. P. Love, *Images of Justice,* Pepperdine Dispute Resolution Law Journal Vol. 1, no. 29, 2000

substantiates the Executive. In his widely-read "Theory of Justice"[5], Rawls provides a theory of distributive justice, called "Justice as fairness"; actually, it is about a framework that explains the significance, in a society assumed to consist of free and equal persons, of political and personal liberties, of equal opportunity, and cooperative arrangements that benefit the more and the less advantaged members of society. Even so, "justice as fairness" does not seek to introduce an ecumenical truth or to deal with wholesale philosophical queries about the true essence of being. On the contrary, Rawls offers a political theory, not a metaphysical one[6]. Rawlsian justice is an associational conception regarding relationships between members of an association[7]. He focuses on the basic structure of the society's institutions and he primarily deals with the political association known as the modern nation-state[8].

Rawls conceives of *"society as a fair system of cooperation over time, from one generation to the next."* He says that *"the fundamental political relationship of citizenship […] is a relation of citizens within the basic structure of society, a structure we enter only by birth and exit only by death and […] a relation of free and equal citizens who exercise ultimate political power as a collective body"*[9].

Rawlsian political theory is based *inter allia* upon four basic notions: the *reasonable citizens, the original position*, the *Veil of Ignorance* and the *two principles of Justice*. Regarding the first, *"[c]itizens are reasonable when, viewing one another as free and equal in a system of cooperation over generations, they are prepared to offer one another fair terms of social cooperation […] and they agree to act on those*

[5] J. Rawls, *A Theory of Justice*, Harvard University Press, 1971

[6] A. Hatzis, *O ofelimistis piso apo to peplo* [Utilitarian Behind the Veil of Ignorance], work – in – progress, the essay was introduced in the seminar *Dikaio, Ithiki kai Politiki Philosofia* [Justice, Ethics and Political Philosophy], 20/5/2004, available in www.phs.uoa.gr/~ahatzis/working_papers.htm

[7] D. Moellendorf, *Cosmopolitan Justice,* Westview Press, 2002

[8] *"The "first subject of justice,"* Rawls says*, is principles that regulate the basic social institutions that constitute the basic structure of society. These basic institutions include the political constitution and framework for the legal system; the system of trials for adjudicating disputes; the norms of property, its transfer, contractual relations, etc. which are necessary for economic production, exchange, and consumption; and finally norms that define and regulate permissible forms of the family."* Samuel Freeman *Original Position,* Stanford Encyclopaedia of Philosophy, 2008

[9] J. Rawls, *Political Liberalism,* Columbia University Press, 1996

terms, even at the cost of their own interests in particular situations, provided that others also accept those terms. Rawls argues that *"[f]or those terms to be fair terms, citizens offering them must reasonably think that those citizens to whom they are offered might also reasonably accept them […] They must be able to do this as free and equal, and not as dominated or manipulated, or under the pressure of an inferior political or social position"*[10]. Rawls calls this the "*criterion of reciprocity"*.

The "original position" is designed to be a fair and impartial point of view that is to be adopted in our reasoning about fundamental principles of justice[11]. In taking up this point of view, we are to imagine ourselves as reasonable citizens and moral persons, being in the position of free and equal persons who jointly agree upon and commit themselves to principles of social and political justice. However the original position is not to be regarded as an event that must actually take place at some point in history[12]. It is rather a hypothetical situation designed to uncover the most reasonable principles of justice[13]. In short, the "original position" is the appropriate setting for a social contract where the most appropriate moral conception of justice for a democratic society is to be discovered by the "representatives"[14].

The representatives stand behind the "Veil of Ignorance", that is to say, like blindfolded Themis, they do not know the following about the persons they represent: their sex, race, physical handicaps, social class, social and historical circumstances. They rightly assume that the persons represented have these features but they do not know what it is. They do know however of certain fundamental interests they all have,

[10] *Ibid*
[11] S. Freeman, *Original Position,* Stanford Encyclopaedia of Philosophy, 2008
[12] Besides, Rawls maintains that the major advocates of social contract doctrine—Hobbes, Locke, Rousseau, and Kant—all regarded the social contract, as a hypothetical event. *Lectures on the History of Political Philosophy*, Samuel Freeman (ed.), Cambridge, MA: Harvard University Press, 2007
[13] *Supra* no. 11
[14] *Ibid*

plus general facts about psychology, economics, biology, and other social and natural sciences[15].

Rawls contends that the most rational choice for the representatives in the original position behind the Veil are "the two principles of justice"*:* I. "The Equal Liberty Principle" which stipulates that *"[e]ach person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all"* and the "Difference Principle" which provides that "*[s]ocial and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society"*[16].

As regards the Equal Liberty Principle, the clarification of what Rawls means by *"the fully adequate scheme of equal basic liberties"* stands critical. Rawls identifies the basic liberties as following: (a) the freedom of thought, (b) liberty of conscience, namely the liberty as applied to religious, philosophical and moral view of our relation to the world, (c) political liberties, i.e. liberties that would require representative democratic institutions, freedom of speech and the press and freedom of assembly, (d) freedom of association and finally, (e) freedoms specified by the liberty and integrity of the person, including freedom from slavery and serfdom and freedom of movement[17].

[15] Rawls says, *"Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance".* John Rawls, *A Theory of Justice*, Harvard University Press, 1971

[16] *Supra* no. 5

[17] *Supra* no. 9

All the liberties and freedoms must be covered by "the rule of Law"[18], according to which, decisions should be made by applying known principles or laws, without the intervention of discretion in their application[19]. Hence, the rule of Law by providing greater predictability and checks on arbitrary – even majoritarian - authorities stands as an additional keeper of social justice.

In order to comprehend representatives' reasoning Rawls asks from the reader to consider whether the representatives would choose a principal or legislation that makes economic discrimination on the base of race or religion. Given that they do not know anything about the individual persons they represent but they are committed to optimizing the interests of those persons, as reasonable and moral individuals, the representatives will rule out discriminations grounded on race and religion. In particular, Rawls claims that those in the original position would all adopt a "maximin" strategy which would maximise the position of the least well-off.

Nevertheless, the realization of Rawlsian justice is marred by the problem of proposing hypothetical ideal conditions without stating their conditions of possibility. Borrowing the words of Niklas Luhmann in his critique to another prominent Kantian political philosopher, Jurgen Habermas: *"This is a matter of a modal concept, which, in addition, is formulated in the conjunctive. Ever since Kant, one knows that in such*

[18] *Ibid*

[19] In his book *The Morality of Law*, the American legal scholar Lon Fuller identified eight elements of law which have been recognized as necessary for a society aspiring to institute the rule of law. Fuller stated the following: 1. Laws must exist and those laws should be obeyed by all, including government officials. 2. Laws must be published. 3. Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. For example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed. 4. Laws should be written with reasonable clarity to avoid unfair enforcement. 5. Law must avoid contradictions. 6. Law must not command the impossible. 7. Law must stay constant through time to allow the formalization of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed. 8. Official action should be consistent with the declared rule. Lon L. Fuller, *The Morality of Law*, Revised Edition, New Haven: Yale University Press, 1964

cases the statement must be specified by giving the conditions for (its) possibility. That however remains unsaid."[20]

Drawing from Luhman, the achievability of Rawls' political model in modern nation – states should be contingent on the independent variable of "nation – state" and the ideological aspects that it surely bears. In short, the relevant theoretical discourse should focus on the potentiality of a modern nation – state to obtain "justice as fairness", taking simultaneously into account certain features of such states, namely their inherent nationalistic and communitarian perspectives.

Very broadly, this study aims to highlight the difficulty of working out the relationship between the formal nation - state and the Rawlsian model of Justice by exploring the compatibility of the aforementioned concepts within the legal structure of a nation state that envisions itself as an exemplar homogeneous entity, such as the Hellenic Republic[21]. Thus, the theory of Rawls on Justice holds here a dual function: on the one hand it provides guidelines for detecting ideological footprints upon legal texts or verdicts, while on the other hand it operates as an ideal concept of Justice in terms of which critical comparisons with the legal order under study are to be made.

2. Nation and Justice

Standing at the core of the query on hand, the concept of nation operates as the central independent variable and entails thus an operational definition. Provided that neither objective[22] nor subjective[23] definitions of nation are satisfactory for the purposes of the present study, the latter applies the objective – cum – subjective

[20] N. Luhmann, *Quod Omnes Tangit: Remarks on Jurgen Habermas' Legal Theory,* in *Habermas on Law and Democracy: Critical Exchange,* (eds.) M. Rosenfeld and Andrew Arato Berkeley: University of California Press, 1998

[21] However, as discussed below national homogeneity in the sense of a complete congruence between national and political units is actually a fiction.

[22] Definitions based on objective markers such as ethnicity, language, religion, territory, common history, common descent or ancestry, common culture.

[23] Definitions based on self-awareness, solidarity, loyalty and collective will.

definition of Smith[24]. Smith defines nation as *"a named human population sharing a historic territory, common myths and historical memories, a mass, public culture, a common economy and common legal rights and duties for all members".* This definition, although greatly controversial, includes a list of criteria whose enumeration allows for its operationalization and therefore it appears more functional for detecting ideological footprints on legal texts. As discussed above, one may recognize as *nationalistic* norms - including laws presidential decrees, ministerial orders and circular letters - legislations that have for their legal premise one of the above criteria[25].

In spite of the objective criteria that Smith poses in his definition, he also premises a certain degree of consciousness of attachment to the community[26]. As Triantafillidou and Paraskevopoulou hold, *"[e]ven though Smith's definition is essentially of the objective kind, it includes a subjective element to the extend that a shared culture, a single economy and a common set of rights and duties entail a certain degree of awareness of membership to the group"* [27]. Similarly, for Weber, nation is a *"community of sentiment which would adequately manifest itself in a state of its own"*[28] while for Hechter it refers to *"relatively large group of genetically unrelated people of high solidarity"*[29]. Generally, very few scholars define nation solely on the base of objective markers; most of them prefer a subjective definition

[24] A. Triantafillidou, A. Paraskevopoulou, *When is the Greek Nation? The role of enemies and minorities,* Geopolitics, Vol. 7, no. 2, 2002

[25] For instance, the *restrictive measures* imposed on the Muslim minority in Greece by the military dictatorship of 1967 – 74 in order to force ethnic Turks to migrate to Turkey, to disrupt community life and weaken its cultural basis, had pointedly introduced discriminations on the base of religion, language and race. On the contrary, the implementation of the *Schengen Agreement* although it is an 'immigration anathema' to build a 'Fortress Europe', especially as regards Third World immigrants' and refugees' rights and life chances, it cannot be considered a nationalistic regulation so long as it was legislated on a supranational level, therefore it was not grounded on none of the aforementioned criteria posed by Smith.

[26] *Supra* no. 24

[27] *Ibid*

[28] M. Weber, *The Nation,* in *Nationalism,* (eds), J. Hutchinson and A.D. Smith, Oxford University Press, 1994. See also U. Ozkirimli *Contemporary debates on Nationalism, A critical engagement*, Palgrave Macmillan, 2005

[29] M. Hechter, *Containing Nationalism,* Oxford University Press, 2000, in *Contemporary debates on Nationalism, A critical engagement,* U. Ozkirimli, Palgrave Macmillan, 2005

based on the notions of self-awareness, solidarity and a shared feeling of common membership.

Nonetheless, "justice as fairness" by presuming the abruption of such notions and concepts virtually dictates that, unless this abruption becomes actuality, no legal order can be fair, since both subjective and objective criteria in lawmaking tear the "Veil of Ignorance" and generate bonds between legal structures and given national ideological patterns. In effect, true social justice assumes national representatives, including the judges, to overlook their thoughts of uniqueness vis-à-vis otherness as well as their feelings of solidarity or common membership; a difficult task especially within the given environment of nation – states where the history and the development of the state institution and law has systematically privileged the interest of national unity often at expense of individual rights and minorities. In this fashion the minority question triggered the theoretical discourse around the compatibility of nation – states and fairness.

Besides, the birth and development of nation states has been traditionally related to the emergence of certain national ideologies that, given their prejudiced essence, might have forced the states to act as carriers of one – sidedness, and thus unfairness, especially against minority groups and aliens. In practice, both the ideological constructs of communitarianism and nationalism comprise the leading generative figures for a multifaceted spectrum of political, legal and ideological resistance of the nation - state to accommodate minority otherness. The unwillingness of nation - states to do so is rooted in grounds that are resistant to accept fundamental premises that constitute a fair domestic legal order such as the rule of law and prohibition of discrimination.

In sum, although nation – states may not stand by definition reciprocal to Rawlsian justice, in order to attain the latter, their political and legislative elites must

belie given ideological structures that represent inherent elements of nation's existence. The problem becomes even greater within modern nation states where multiculturalism is present, evoking crucial ethical problems around ethnic identities and the legal equilibrium between majorities and minorities[30].

3. Communitarianism and the Kantian Universality of moral principles

Not surprisingly, the main reaction against the political theory of Rawls for justice came from the part of *communitarianism.* The latter conceives general principles culturally embedded and the terms of the debate, over which principles of justice we might like, culturally specific. Essentially, it is about a moral social philosophy which maintains that society should articulate what is good, that such articulations are both needed and legitimate. Communitarians are interested in communities, historically transmitted values and mores, and the societal units that transmit and enforce values such as family, schools, and voluntary associations (social clubs, churches, and so forth), which are all parts of communities[31].

In addition, communitarianists strongly support the collective character of morality[32]. They maintain that we are all moral persons so long as we join a community, namely we assume certain communal roles, contract communal relations and share harmonious expectations along with a common language, culture and collective memories[33]. To a large extent communitarianism perceives communal

[30] Several scholars, including Jurgen Habermas, started to seek the solution in cosmopolitanism and deliberation. In this direction, supranational structures, such as European Union may perform a positive role by providing common ground for social deliberation. Of course, this process should go through European integration and the EU norms.

[31] According to Amitai Etzioni community has two characteristics: first, a web of affect-laden relationships among a group of individuals, relationships that often crisscross and reinforce one another and second, a measure of commitment to a set of shared values, norms, and meanings, and a shared history and identity – in short, a particular culture. A. Etzioni, *Communitarianism,* Encyclopaedia of Community: From the Village to the Virtual World, Vol. 1, A-D, 2003

[32] P. Sourlas, *Ethnos kai Dikaiosini* [Nation and Justice], Etairia Spoudon Neoellinikou Politismou kai Genikis Paideias, Athens,1994

[33] As Alasdair Macintyre asserts: *"I'm someone's son or daughter, someone else's cousin or uncle; I am a citizen of this or that city, this nation…As such, I inherit from the past of my family, my city my tribe, my nation a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of my life, my moral standing point".* Alasdair Macintyre, *After virtue: A study in*

moral standing as the outmost boundary, over which, any discussion about ethics has no real meaning. In consequence, communitarianism recognizes community as the source of every common moral virtue and communal solidarity as the ultimate of these virtues[34].

Taking into account the Rawlsian political concept of justice the contradiction is evident. On the one hand, Rawls, drawing on a Kantian perspective, considers justice as a fundamental universal ideal for human moral society. On the other hand, communitarianists put forward collective values, such as solidarity. At large, the above opposition embraces one aspect of the wide-ranging debate regarding the universality of moral principles. Kantian theories sustain that a moral imperative is binding only if it is (or is able to be) recognized as valid by all human beings[35]. Hence Kantian theories postulate the overstepping of subjectivity and the adopting of a manhood perspective[36]. Respectively, the ideal of Justice for Rawls stands as a panhuman ideal which is attainable to the extent that human beings will get over their attitudinal notions and passions and become moral and reasonable. In keeping with Rawls, our ideals, notions and attributes shall be morally valid only if they fall in with the criterion of universality, i.e. being potentially embraced by all human beings[37].

The conception of universality was also embraced and consolidated by several contemporary scholars, such as Jurgen Habermas[38] who sought the path to democracy and justice at the concept of the *deliberative citizen* who resembles to the Rawls'

Moral Theory, Duckworth, London, 1981 in *Ethnos kai Dikaiosini* [Nation and Justice], P. Sourlas, Etairia Spoudon Neoellinikou Politismou kai Genikis Paideias, Athens,1994

[34] *Supra* no. 32

[35] *Ibid*

[36] *Ibid*

[37] *Ibid*

[38] Similarly to Rawls, Habermas argues that *"the central element of the democratic process resides in the procedure of deliberative politics"* and he adds that *"just those action norms among which are those that «establish a procedure for legitimate lawmaking» are valid to which all possibly affected persons could agree as participants in rational discourses"*. J. Habermas, *Between Facts and Norms: Contributions to a discourse Theory of Democracy*, Cambridge, MA: The MIT Press, 1996 in *Democracy Law and Comparative Politics,* G. O'Donnell, Studies in comparative international development, spring 2001

notion of *reasonable citizen*[39]. Habermas argues that equal protection under the law is not enough to constitute a constitutional democracy. According to Habermas we must not only be equal under the law, we must also be able to understand ourselves as the authors of the laws that bind us. *"Once we take this internal connection between democracy and the constitutional state seriously"* Habermas writes *"it becomes clear that the system of rights is blind neither to unequal social conditions nor to cultural differences*'[40].

In contrast, communitarianism maintains that every single community has its unique moral conception of Justice; as a result, the perceived notions of justice and the actual communities are equal in number[41]. On this account, communitarians prefer to focus on specific attributes of each society and to demonstrate the supremacy of communal values vis-à-vis fairness. Nevertheless, communitarianism does not propose any alternative way for reaching social justice while it seem to misinterprets Rawls on the grounds that Rawls does not actually deny the existence of different conceptions of justice between the various cultures throughout history[42]. He argues however that this diversity is neither absolute to the extent that it impedes cross – cultural parallels nor it has moral implications towards the acts of modern persons[43]. Rawls' theory of Justice would have waved only if someone had thoroughly proved the actual existence of other concepts of justice not based on the values of generality

[39] According to Tali Mandelberg, deliberation is expected to lead to empathy with the other and a broadened sense of people's own interests through an egalitarian, open minded and reciprocal process of reasoned argumentation. Following from this result are other benefits: citizens are more enlightened about their own and others' needs and experiences, can better resolve deep conflict, are more engaged in politics, place their faith in the basic tenets of democracy, perceive their political system as legitimate, and lead a healthier civic life. T. Mandelberg, *Deliberative Citizen, Theory and Evidence,* Political Decision Making, Deliberation and Participation, Vol. 6, 2002

[40] C. Taylor, A. Gutman (eds.), *Multiculturalism examining the Politics of Recognition*, Princeton University Press, 1994

[41] A. Macintyre, *Whose Justice? Which Rationality?*, London, Duckworth, 1989

[42] *Supra* no. 32

[43] *Ibid*

and fairness[44]. Eventually, relating a concept of justice to a certain community is a historical task and has nothing to do with the moral quest of justice *per se*[45].

In order to stress the incompatibility between communitarianism and the Rawlsian justice, it is critical to introduce the role of two particular aspects of communitarianism as they appear in relation to the international and the domestic law, namely cultural relativism and majoritarianism.

The UDHR[46] represents an indicative case where universalism encounters communitarianism and cultural relativism. The UDHR proclaiming universalism enshrines universal rights that apply to all humans equally, whichever geographical location, state, race or culture they belong to[47]. In opposition, several proponents of cultural relativism have argued for acceptance of different cultures, which may have practices conflicting with human rights. For example, FGM occurs in different cultures in Africa, Asia and South America but it is considered a violation of women's and girl's rights by much of the international community, and therefore is outlawed[48].

Furthermore, universalism has been described by some as cultural, economic or political imperialism[49]. Several scholars and politicians have questioned the

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[44] *Ibid*

[45] As discussed below, the discourse about the various concepts of justice plays a critical role within the frame of multicultural societies because it raises crucial questions about which concept of Justice is better applicable for each multiethnic society.

[46] The International Bill of Human Rights consists of the UDHR, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. In 1966 the General Assembly adopted the two detailed Covenants, which complete the International Bill of Human Rights; and in 1976, after the Covenants had been ratified by a sufficient number of individual nations, the Bill took on the force of international law. P. Williams (ed.), *The International Bill of Human Rights,* Entwhistle, 1981.

[47] www.un.org/en/documents/udhr

[48] There have been many concentrated efforts by the WHO to end the practice of FGM. The UN has also declared February 6 as "International Day against Female Genital Mutilation". C. Feldman-Jacobs, *Commemorating International Day of Zero Tolerance to Female Genital Mutilation,* available in www.prb.org/Articles/2009/fgmc.aspx

[49] For instance, Melville Herskovits prepared a draft *"Statement on Human Rights"* which Executive Board of the American Anthropological Association revised, submitted to the Commission on Human Rights, and then published. The bulk of this statement emphasizes concern that the Declaration of Human Rights was being prepared primarily by people from Western societies, and would express values that, far from being universal, are really Western. Executive Board, American Anthropological Association "Statement on Human Rights" in *American Anthropologist,* Vol. 49, no. 4, 1947

philosophical foundations of international human rights law, charging that they are Eurocentric[50]. For instance, in 1981, the Iranian representative to the UN, Said Rajaie-Khorassani, articulated the position of his country regarding the UDHR by saying that the UDHR was *"a secular understanding of the Judeo-Christian tradition"*, which could not be implemented by Muslims without trespassing the Islamic law[51].

Relativistic arguments however tend to neglect the fact that modern human rights are new to all cultures, dating back no further than the UDHR in 1948. Besides they do not account for the fact that the UDHR was drafted on a supranational level by people from many different cultures and traditions and drew upon advice from thinkers such as Mahatma Gandhi. Moreover, Ignatieff asserts that cultural relativism is almost exclusively an argument used by those who wield power in cultures which commit human rights abuses[52]. This reflects the fact that the difficulty in judging universalism versus cultural relativism lies mainly on who is claiming to represent a particular culture. Anyway, the universality of human rights was reaffirmed by the 2005 World Summit which explicitly declared that *"the universal nature of human rights and freedoms is beyond question"*[53].

As far as the domestic legal order of states is concerned, in several law cases, especially in US, the tribunals have dealt with appeals having as main argument the failure of the trial court to consider the punishable act in its cultural context[54]. In Greece, similar issues were raised mainly with regard to the Muslim minority of Thrace. The Greek state, although maintaining an illiberal view towards the vast

[50] As Charles Taylor points *"[t]he supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of one hegemonic culture"* in *Multiculturalism and the Politics of Recognition* C. Taylor, Princeston University Press, 1992

[51] D. Littman, *Universal Human Rights and 'Human Rights in Islam,* Midstream Magazine Vol. 2, no.2, 1999

[52] M. Ignatieff, *Human Rights as Politics and Idolatry,* Princeton & Oxford: Princeton University Press, 2001

[53] www.un.org/summit2005/

[54] For instance, People vs. Singh (1987), Trujjilo-Garcia vs. Rowland (1992-1994), Jack and Charlie vs. the Queen (1985), United States vs. Tomono (1997). See also A. D. Renteln, *In defense of culture in the Courtroom,* in *Engaging Cultural Differences,* (ed.) R. Al Shwe, Russel Sage Foundation, New York, 2002

majority of minority issues, applies the canonical law of Sharia on certain legal issues pleading a supposed liberalism. However, as discussed in the relative section, the unique coexistence of Sharia with the general Greek law has resulted in numerous deprivations of human rights and discriminations against Greek Muslim women and children.

To conclude with, it has been argued that cultural relativism neglects the serious threat posed by the unconditional protection of cultural rights towards women and children and also often puts the tradition on trial rather than the individual[55]. Even Kymlicka, a prominent champion of cultural rights, does not defend cultural rights for immigrants but only for minorities who have long been residing in a nation – state. Besides, Kymlicka would only allow the protection of cultural rights for societies structured along liberal lines, i.e. societies that resemble the ideal democratic system[56]. However, as it is discussed below, homogeneous nation states do not necessarily fell into this category.

Apart from the cultural relativism, communitarianism sometimes may also encompass a common majoritarian rhetoric, especially within the context of the modern nation – states, where the predominant culture constantly argues for the constitutional primacy of the majority in the name of warped democratic values[57]. The theoretical discourse launched in Greece around the constitutional amendment of 2001 represents an excellent example of how certain majoritarian respects obstruct the further enforcement of the *rule of Law* and thus the consolidation of a fair legal order.

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[55] Susan Okin advances the argument that protecting cultural rights undermines women's right. S. Okin, *Is multiculturalism bad for women?* in *Is multiculturalism bad for women?* (ed.) S. Okin, Princeton University Press, 1999

[56] W. Kymlicka, *The rights of minority cultures,* Oxford University Press, 1995 in A. D. Renteln. *In defense of culture in the Courtroom,* in *Engaging Cultural Differences,* (ed.) R. A. Shwe, Russel Sage Foundation, New York, 2002

[57] As Kymlicka observes, minorities and majorities are at loggerheads with each other over chiefly legal issues as language rights, regional autonomy, political representation, land claims, immigration and naturalization policy. As he argues *"Finding morally defensible and politically viable answers to these issues is the greatest challenge facing democracies today.* W. Kymlicka, *Multicultural Citizenship: A liberal Theory of Minority Rights,* Oxford University Press, 1995

Although the Simitis government waving the flag of "modernization" displayed concern for reinforcing the substantive principles of legality and the rule of law as political ideals, the amendment was motivated by a pure majoritarian - communitarian legal philosophy seeking to strengthen political majorities. Particularly two controversial legal standpoints strived on the matter: the first was defending *"constitutional modernization"*, meaning strengthening the rule of law, and has been thoroughly summarized in the writings of Nikos Alivizatos of the University of Athens, who has steadfastly argued for the strengthening of *"checks and balances"*. As he has argued: *"both under its parliamentary and the presidential version, modern democracy means that the majority does not rule unchecked. On the contrary it introduces checks and balances to arrest the action of the rulers, whenever they take a wrong turn[…]We need checks; we need guardians of the Constitution. In post-war Constitutions, this role is played by judges and independent agencies."*[58]

The second view that finally prevailed steadily supported the legal majoritarian philosophy. One can go over the leading philosophy of the amendment primarily in the writings of its architect, the socialist politician Evangelos Venizelos, who overtly refused the theory of "checks and balances", by rejecting the suggestion that independent administrative agencies are institutional checks on the majority[59]. As he has argued: *"Independent agencies from this point of view function just like judicial power, which is not (should not be) an institutional, that is a political, check on the political institutions of the State, but a guarantor of the democratic rule of*

[58] N. Alivizatos, *O avevaios eksighronismos kai I tholi Sintagmatiki Anatheorisi,* [The uncertain modernization and the Opaque Constitutional Amendment], Athens, Polis, 2001 in *Constitutional Reform and the rule of Law in Greece",* P. Eleftheriadis, West European Politics, Vol. 28, no. 2, March 2005

[59] The 2001 constitutional amendment introduced constitutional independence for at least five of those agents: the Data Protection Authority (art. 9A), a Confidentiality of Communications Authority (art. 19), the National Council for Radio and Television (art. 15), a Civil Service Appointments Authority (art. 103) and the Office of the Citizen's Advocate (art. 103)

law."[60] It seems that, for Venizelos, independent agencies and judges are not barriers to power but additional guarantees for the 'democratic rule of law', i.e. the will of the majority as expressed through existing constitutional avenues[61]. Furthermore, the above legal stance may explain to some extent the reluctance of the 2001 parliamentarians to look for a substantial revision of the Greek Orthodox Church and state's constitutional model.

In short, communitarianism, embracing cultural relativism and pro – majority perspectives, stands theoretically at odds with Kantian perceptions of justice and foremost Rawlsian justice. Besides drawing on the aforementioned examples, it is arguable that the theoretical discourse has also practical effects on state legal structure. Thus, not merely nationalism standing at the extremes of communitarianism impedes the implementation of Rawls' model but communitarianism as well may, in certain cases, set back the route for Justice along with its basic prerequisite, the rule of Law.

4. Nationalism and Justice

Nationalism has sought its moral justification through communitarianism[62]. Provided that the communitarian moral philosophy argues for the supremacy of communal ideals, its theoretical stands has offered a convenient moral shelter for nationalistic notions together with a philosophical pillow towards the hypothetical justification of nation as the supreme universal ideal.

The discussion on nationalism assumes that humanity is divided into distinct nations, each with its own separate past, present and destiny. Alike

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[60] E. Venizelos, *To anatheoritiko Kektimeno: To sintagmatiko fainomeno ton 21ο aiona kai i eisfora tis Anatheorisis tou 2001,* [The Amendment's Achievement: The Constitutional Phenomenon in the 21st Century and the Contribution of the Amendment of 2001]. Athens: Ant. N. Sakkoulas, 2002, in *Constitutional Reform and the rule of Law in Greece,* Pavlos Eleftheriadis*,* West European Politics, Vol. 28, no. 2, March 2005

[61] P. Eleftheriadis, *Constitutional Reform and the rule of Law in Greece,* West European Politics, Vol. 28, no. 2, March 2005

[62] *Supra* no. 32

communitarianism, nationalism holds that human beings can only fulfil themselves if they belong to a national community, the membership to which remains superior to all other forms of belonging – familial, gender, class, religious regional and so on[63]. Moreover nationalism presupposes a system of nation – states in which each nation has a right to self – determination. All nationalisms, however varied their internal nature, draw on this common frame of reference to make their demands[64].

Nationalism is both a cultural and a political phenomenon. Several scholars addressed to nationalism as a political ideal, aiming at independent statehood or some form of political autonomy, while others attend nationalism as the right to national self – determination that stakes a cultural, rather than a political claim, that is the right to preserve the existence of a nation as a distinct cultural entity. Bringing together these two divergent positions, a third group of scholars including Eley, Suny[65] and Ozkirimli[66] argued that nationalism involves together both the *culturalization* of politics and the *politicization* of culture.

Notionally the given idea of Justice stands opposite to nationalism *per se*. As already mentioned, nationalism is about politics and culture; it is actually a way of seeing and interpreting political and cultural phenomena or, as Ozkirimli holds, it is *"a particular way of seeing and interpreting the world, a frame of reference that helps us make sense of and structure the reality that surrounds us"*[67]. The main

[63] R.G., Suny, *History,* in *Encyclopedia of Nationalism*, (ed.) A.J. Motyl, Vol. 1, Cal. Academic Press, San Diego, 2001 and R.J Suny, *Constucting Premordialism: Old Histories for new Nations,* Journal of Modern History, no. 73, 2001 in *Contemporary debates on Nationalism, A critical engagement,* U. Ozkirimli, Palgrave Macmillan, 2005

[64] C. Calhoun, *Nationalism and Ethnicity*, Annual review of Sociology, Vol. 19 and C**.** Calhoun, *Nationalism,* Buckingham: Open University Press, in *Contemporary debates on Nationalism, A critical engagement,* U. Ozkirimli, Palgrave Macmillan, 2005

[65] G, Eley, R.G. Suny, *Introduction: From a Moment of Social History to the Work of Cultural Representation,* in *Becoming Nationa,l* (eds.) G. Eley and R.G. Suny, Oxford and New York: Oxford University Press, 1996

[66] U. Ozkirimli, *Contemporary debates on Nationalism, A critical engagement*, Palgrave Macmillan, 2005

[67] *Ibid*

perception through which a nationalist conceives his political and cultural surrounding certainly is his nationality.

Far however from it, justice presupposes fairness, namely the equal treatment of equal cases and the unequal treatment of unequal cases, though, this very simple perspective of justice is not perceivable by a nationalist, since a nationalist expects a legal order that serves principally his nationalistic ideals. In accordance with Ozkirimli's definition, a nationalist sees and interprets justice through his nationalistic lens, and thus he stands in opposition to any meaning of social fairness and equality before the Law. Therefore, drawing on Rawls, a nationalist never and by no means should hold a representative seat in a constitutional state that pursues social welfare system and fairness for all citizens.

Moreover, we should not neglect the fact that nationalism actually aims at the ideal of a homogeneous nation – state. As Gellner argues, nationalism is *"a political doctrine which holds that the political and national unit should be congruent"*[68]. As regards the democratic modern nation states the ultimate goal of homogeneity very often crosses over their formal legislative function and political institutions, especially the Legislative. As a result nationalistic ideologies and perceptions have been unconditionally and directly transformed into legal norms which, in consequence, reflect not only an official state policy but also key national prejudices and fears. In short, the nation – states, contrary to Rawls' model of justice, have been accustomed in putting aside fairness and seeking homogeneity through laws providing for forced assimilation and security of the predominant culture.

Furthermore, government decisions on language, internal boundaries, public holidays and state symbols unavoidably involve recognizing, accommodating and

[68] *Ibid*

supporting the needs and identities of a particular national group[69]. No "Veil of Ignorance" exists nor legal prudence for "*the greatest benefit of the least advantaged members of society"*, as the second rule of "Justice and Fairness" provides for[70].

Another feature of nationalism principally performed in nation – states is the fixed rhetoric focusing on state's territorial integrity and national security. The presence of various ethnic minority groups and aliens within national territory is perceived as a serious threat for nation's survival and a substantial constraint towards homogeneity. Kymlicka makes at this point a distinction between the Western Democracies and the post-communist countries of Eastern and Central Europe[71]. According to him, most Western democracies bearing liberal standpoints address minority issues in terms of justice and fairness, namely they seem capable of accepting that justice requires some form of self – government for minorities. By contrast, in most of the post-communist countries of Eastern and Central Europe the claims of minorities are primarily assessed in relation to national security[72]. The main goal of these states has been to ensure that minorities are unable to threaten their existence or territorial integrity. As Kymlicka correctly asserts *"it makes all the difference in the world whether states view minority claims through the lens of fairness and justice or through the lens of national security loyalty"*[73].

Insofar as Kymlicka's perspective on the matter is valid, the relative minority enactments should stand indicative of the way that states view their minorities. In this fashion the examination on the normative level may provide safe conclusions whether a nation - state stands within the liberal or the illiberal camp. Moreover, the extent to which a state's legal order prefixes national security rationale rather than isonomy,

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[69] *Ibid*

[70] *Supra* no. 5

[71] W. Kymlicka, *Justice and security in the accommodation of minority nationalism,* in *Ethnicity, Nationalism and minority rights,* (ed.) St. May, T. Modood and J. Squires, Cambridge University Press, 2004

[72] *Ibid*

[73] *Ibid*

should be also considered indicative for the presence of nationalistic perceptions and fears. In retrospect, the claim of *"national security loyalty"*[74] is often an indication to nationalism and thus to injustice.

Notwithstanding, several legal and political philosophers tried to couple practically the two dissimilar concepts of nationalism and fairness. Robert Redslob, for instance, a striking example of legal modernism during the interwar period, speaks for a dynamic asymmetrical "*alliance*" between *"legal reason"* and *"nationalist passion"*[75]. For Redslob nationalist passion is "*elemental*"[76], it is the vital source of collective life; however, it must come to submit itself to the Law's regulative influence. Respectively, legal ideas, ineffective by themselves, provide a corrective supplement to the blindness of nationalist passion. As he argues *"it will no longer be the passion that directs events; it will be the conviction of a work of Justice. To be sure, passion will not cease to exist and act, but it will discipline itself in adapting to the conception of law from which it derives its legitimate title"*[77].

However, the above proposition does not provide a solution regarding the position of minorities and the least advantaged members of the society. On the contrary, the 20th century has plainly shown that entitling legislative power to nationalism has been a path towards discrimination. Of course Redslob, writing in 1931, about an "*alliance*" between "*nationalism*" and "*Law*" could not foresee the

[74] *Ibid*

[75] Robert Redslob was a professor of the history of treaties and public international Law at the University of Strasbourg. As Nathaniel Berman informs us his writings on nationalism include autobiographical accounts of the social and political dilemmas of the generation of Alsatians who came on age under German rule. Redslob's legal publications include his pre World War I German writings and his interwar French writings. Redslob's writings on nationalism reflect the experience of Alsace that land of "composite spirituality".

In short, Robert Redslob in characteristically modernist fashion speaks for the conflicting claims of state and nation and shows how elements that first appear to be the vital sources of authenticity, such as nationalist passion both displaced existing political forms and yet are in turned displaced by a newly revitalized rational discourse, such as the new international law. Moreover, Redslob argues that international law cannot simply substitute "nation" for "state" as its basic unit. He thereby clarifies the need for an autonomously grounded international law that would not require an external source of authority (either state or nation) for its legitimacy. N. Berman, *European Nationalism and the Modernist Renewal of International Law,* Harvard Law review, Vol. 106:1792, 1999

[76] *Ibid*

[77] *Ibid*

"Nuremberg Laws" of 1935 which excluded German Jews from Reich citizenship and prohibited them from marrying or having sexual relations with persons of "German or German-related blood"[78] nor the *restrictive measures* imposed on the Muslim minority of Thrace by the 1967 dictatorship in Greece that were placing formal obstacles to buying or selling land and houses, repairing dwellings and mosques, even obtaining licenses for tractors, trucks and cars, and opening shops[79].

In sum, nationalism seems to be a carrier of certain notions and ideals that manifestly contradict Rawls' perception of justice. In accordance with this trouble-free proposition, one could argue that a democratic nation – state committed at providing to all citizens social justice should stably strive against any form of nationalism.

As far as Greece is concerned, the Greek legal order, especially throughout the 20th century, has performed an efficient pattern of one-sidedness by providing numerous cases where nationalism played the role of the national Legislator. Given that the Law is a societal mirror, the exploration of legislations, ministerial and presidential decrees as well as of the basic jurisprudence reveals the nationalistic footprint on legal texts and therefore on society.

5. Is International Law the answer?

Several jurisprudents[80] have sought the answer for a fair legal system through the imperatives of the international law. The above aspiration is principally attached to the assumed role of the international law as the "predominant law"[81]. For instance, according to Hans Kelsen, it is not the legal order of states that occupies the highest

[78] www.ushmm.org/outreach/nlaw.htm

[79] U. Ozkirimli, S. Sofos, *Tormented by History,* Hurst Publishers Ltd, London, 2008

[80] For instance Redslob suggested that the solution rests on an autonomously grounded international law that will protect minority rights, namely an international law that would not require an external source of authority (either state or nation) for its legitimacy. Robert Redslob, *Le Principles de Nationalité,* 1931, in *European Nationalism and the Modernist Renewal of International Law,* N. Berman, Harvard Law review, Vol. 106:1792, 1999

[81] N. Berman, *European Nationalism and the Modernist Renewal of International Law*, Harvard Law review, Vol. 106:1792, 1999

stage in hierarchy; it is international law that tops the pyramid and delimits the sphere of within which the norm of single states are valid[82]. Similarly, it is international law that coordinates and delimits the legal order of the single states. Hence, as long as international law has not taken hold of a subject – matter, states may exercise their jurisdiction over that matter. In doing so, states still act as organs of the international legal community[83].

For instance, human rights, being a certain statutory territory of international law, comprise a proper field where international law has the opportunity to surrogate domestic legal structures and pursue fair rules. In fact, international law, including the legal protection of minorities and aliens, has the chance to play an effective role by imposing rules on nation – states that could constitute positive steps towards a more fair domestic legal structure.

In addition, from a widely held perspective, it was the international community through its institutions, such as the League of Nations and UN, and its legal standing that permitted, in most of the cases, the recognition, of nation – states[84] and compelled the latter to sign minority protection treaties or to make declarations guaranteeing various rights of their minority groups[85]. In this respect, international minority protection actually completed and perfected the creation of nation – states, giving a tangible example of how international law may serve at the same time justice and nation –states[86].

Nevertheless, various limitations restrain international law from functioning as Kelsen would have aspired for a virtual predominant *jus gentium*[87] within the legal

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[82] W.B. Stern, *Kelsen's theory of International Law,* The American Political Science Review, Vol. 30, no. 4, 1970

[83] *Ibid*

[84] Indicatively Poland, Czechoslovakia and Turkey, see also *Supra* no. 81

[85] *Supra* no. 81

[86] *Ibid*

[87] Latin: "law of nations", in legal theory, that law which natural reason establishes for all men, as distinguished from *jus civile*, or the civil law peculiar to one state or people. Roman lawyers and

order of the individual nation - states. The first and most important restriction lies mainly on the receptiveness of the states in ratifying and incorporating international norms.

In the case of Greece, the Constitution thoroughly and explicitly consolidates international law as an integral part of the domestic Greek legal order that shall prevail over any contrary provision ruled by the domestic enactments. Art. 2 of the Greek Constitution rules that *"[...] adhering to the generally recognised rules of international law, pursues the strengthening of peace and of justice, and the fostering of friendly relations between peoples and States"*[88]. Besides, art. 28 formally integrates international laws and international conventions into the Greek Law[89]. The same article also constitutes the foundation for the participation of the country in the European integration process. Thus, the Greek legal system seems to be well equipped for integrating international law. Yet, whether the latter managed to urge Greece taking effective measures towards the direction of fairness regarding minorities and immigrants still remains to be answered.

Another restrain refers to the priority of national security; regarding the international scheme on human rights, let alone the exception of the non- derogable

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magistrates originally devised *jus gentium* as a system of equity applying to cases between foreigners and Roman citizens. Encyclopaedia Britannica, www.britannica.com/EBchecked/topic/308654/jus-gentium

[88] Art. 2: *1. Respect and protection of the value of the human being constitute the primary obligations of the State. 2. Greece, adhering to the generally recognised rules of international law, pursues the strengthening of peace and of justice, and the fostering of friendly relations between peoples and States.*

[89] Art. 28:*1. The generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.*

2. Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement.

3. Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.

human rights[90], the UN recognizes that human rights can be limited or even pushed aside during times of national emergency, however, *"the emergency must be actual, affect the whole population and the threat must be to the very existence of the nation. The declaration of emergency must also be a last resort and a temporary measure"*[91]. Accordingly, the Greek Constitution in art. 48 provides for the suspension of several constitutional articles related to particular liberties and rights[92]. Not unexpectedly, in several cases discussed below the Greek law has unduly brought into play the pretension of national interests and of national security in order to suppress minority rights[93].

A final obstacle towards the implementation of human rights is the abusive exercise of *reciprocity* argument. Largely, the principle of reciprocity involves permitting application of the legal effects of specific relationships in law when these same effects are expected equally by foreign countries. In international law, reciprocity means the right to equality and mutual respect between states[94]. Nonetheless, Greece and Turkey deliberately has distorted the Lausanne Treaty and abused in numerous cases the principle of reciprocity in order to depress their minorities respectively. Nonetheless, as far as the Turkish - Greek case is concerned, the argument of reciprocity lacks validity for two critical reasons: Firstly the Lausanne Treaty does not recognize any legal reciprocity between the legal

[90] International conventions class the right to life, the right to be free from slavery, the right to be free from torture and the right to be free from retroactive application of penal laws as non-derogable.

[91] *The Resource Part II: Human Rights in Times of Emergencies,* available in www.un.org/esa/socdev/enable/comp210.htm#10.2

[92] Art. 48: *In case of a state of war or mobilization due to external dangers or of manifest threat to the national security, or in case of armed revolt against the Democratic regime, the Parliament may, after proposition of the Cabinet, suspend throughout the country or in part thereof the operation of Articles 5 (4), 6, 8, 9, 11, 12 (1)-(4), 14, 19, 22, 23, 96 (4), and 97 or some of these Articles and put into effect the law on "state of siege" as this law may apply on each occasion, and establish extraordinary tribunals.*

[93] Indicatively, law 1366/1938 on property rights and art. 19 GNC

[94] S. Akgönül, *Reciprocity and its Application in International Law,* in *Reciprocity: Greek and Turkish Minorities, Law, Religion and Politics,* (ed.) S. Akgönül, Bilgi University Press, Istanbul, 2008

obligations of the two countries[95]. Secondly, according to the international law of the treaties, human rights - and consequently minority rights - are not subject to reciprocity[96].

This study treats international law and particularly European integration as a key factor and investigates its impact on the Greek legal order while at the same time it examines the constraints posed by Greek institutions in the enforcement of international and European norms. As discussed below, these constraints should be perceived as the direct effect of the given ideological patterns of nationalism and communitarianism.

CHAPTER TWO

The Minority Question

1. Minorities in Greece

Consideration of issues involving minorities has been stamped by a conceptual and terminological confusion in the social sciences, humanities and law. The Dictionary of World Politics does not even have entries for "minority", "peoples" or "indigenous" while its entry "nation" begins: *"Although probably the most pervasive concept of the contemporary world, this is a vague notion…"*[97]. This conceptual and terminological confusion has hampered the elaboration and implementation of mutual understanding, sustainable policy and effective law. It has been argued however that it is necessary to define "minorities" in general and as a

[95] Art. 45 of the Treaty convenes Turkey's obligations to Greece just "similarly".

[96] According to K. Tsitselikis reciprocity could be implemented on technicalities regarding the implementation of the rights of a minority, such a exchange of experts, curriculum of the minority schools, technical cooperation etc in *The Legal Status of Islam in Greece* K. Tsitselikis, Die Welts de Islams, Vol. 44, no. 3, 2004

[97] G. Evans, J. Newnham, *The Dictionary of World Politics; a Reference guide to Concept, Ideas and Institutions*, London: Harvester Wheatsheaf, 1992

matter of law in order to establish an effective system of protection for minorities through the reference to general rules applicable in specific cases[98].

The hazy legal environment on minority concepts has resulted in a hazy argumentation around the qualitative and quantitative characteristics of minority groups in Greece. The Hellenic Republic has officially recognized only the religious minority of Muslims in Western Thrace which is comprised by three distinct ethnic groups, the Pomaks, the Roma and the Turkish-origin Muslims. The Greek government considers that the 1923 Treaty of Lausanne provides the exclusive definition of minorities in the country and defines the rights they have as a group. The Greek state does not officially confer status on any indigenous ethnic groups nor does it recognize “ethnic minority" or "linguistic minority" as legal terms.

A slight exception can be detected in the cases of the Armenians and the Jews who obtain a peculiar quasi – recognized minority given that their languages are formally instructed in some private schools, situated most of them in Athens[99]. Legally the state recognizes also the Catholics. Nevertheless, it is noteworthy that the EBLUL enumerates along with the Turks and Pomaks three other native linguistic groups, i.e. the Arvanites, the Aromanians (Vlachs) and the Slav-Macedonians[100].

Since the present study focuses merely on the legal aspects of the minority question, it investigates minorities displaying a separate legal concern. In practice, only the Slav – Macedonian minority in Florina along with the Muslims of Thrace as

[98] J. Packer, *On the Definition of Minorirties.* in *The Protection of Ethnic and Linguistic Minorities in Europe,* (ed.) J. Packer and K. Myntti, Institute for Human Rights, Åbo Akademi University, Turku, 1993

[99] In particular, there is one Jewish school in Athens and one in Thessaloniki where the Hebraic language is instructed to the approximately 200 students. Moreover, three Armenian elementary schools and one high school in Athens that hold around 250 Armenian students. See also K. Tsitselikis *“Mionotikes Glosses stin Ellada”* [Minority languages in Greece] in www.greek-language.gr/greekLang/studies/guide/thema_c6/index.html

[100] Actually EBLUL speaks for “*Macedonian*” and “*Albanian*” linguistic groups, in www.eblul.org/

a group have legally pursued certain rights claiming an ethnic identity as well[101]. For instance, on July 23, 1999, a public appeal signed to the Speaker of the Greek Parliament by Muslim and Slav – Macedonian minority deputies, called on the government to recognize the existence of "*Turkish*" and "*Macedonian*" minorities[102]. The event provoked near unanimously hostile reactions from politicians and the media[103].

In the case of Slav – speakers of Florina, the legal issue was attached to the right of freedom of assembly and association (art. 11 European Convention of Hunan Rights). As far as the Muslim minority is concerned, the legal record involves a wider spectrum of cases mainly attached to the application of the Lausanne Treaty.

2. The Muslim Minority in Thrace

2.1. The legal status

A relic of the country's Ottoman past, Thrace's Muslims community was exempt with the Greeks of Istanbul, from the mandatory population exchange between Greece and Turkey agreed with the Treaty of Lausanne in 1923. Signed in the aftermath of Greece's military debacle in Anatolia, the international Treaty of Lausanne includes a section on the "Protection of minorities", a bilateral agreement between Greece and Turkey containing a series of provisions to guarantee the rights of the exempted minority population.

The Treaty of Lausanne comprises the main legal document which regulates the status of the Muslims with Greek citizenship and undoubtedly constituted the cornerstone of Muslim minority protection. Nowadays the Treaty of Lausanne is still in force as minority protection provisions have survived the general trend to abolish

[101] Other claims made by various religious groups, such as the Jehovah Witnesses, will be examined in the relative chapter in relation with the role of the Greek Orthodox Church.

[102] Human Rights Watch Report, 2000

[103] On the heels of the appeal, public comments by Foreign Minister George Papandreou duelled the debate when Papandreou stated that Greece has nothing to fear from nation al minorities and that international treaties in which Greece is a party permit self identification. Human Rights Watch Report, 2000

interwar minority treaties[104]. According to articles 37 - 45 of the Treaty of Lausanne, Muslims of Greece and non- Muslims of Turkey have been granted special legal protection which is constituted on the base of equality without discrimination (art. 38 par.1), freedom of worship (art. 38 par.2), freedom to exercise civil and political rights (art. 39 par 3), as well on the right to use their own language in the court's oral proceedings (art. 39 par. 5) and the right to found private educational, pious and religious institutions with free use of their language (art. 41). Besides, the Greek State shall not impose restrictions to the religion, the media and private use or public meetings (art. 39 par. 4) while it is obliged to grant public minority schools, pious or religious institutions (art 41), not to perform acts contrary to Muslim's religious beliefs or customs (art 43 par.1) and finally to provide support to any religious foundation (art. 42 par.3)[105].

2.2. The implementation of the Lausanne Treaty in Greece

The implementation of the Treaty was interpreted by the Greek side through the principle of reciprocity. Thereby, very often Greece invoked Turkey's violations of the Treaty to cover its own non – implementation or even violations of the Treaty[106]. Operating in this fashion, Greek minority legislations were often enforced in order to "punish" Muslims with Greek citizenship for Turkey' s violations of the Treaty against the Greek Orthodox community of Istanbul[107].

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[104] P. Thornberry, *International Law and the Rights of Minorities*, Clarendon Press, Oxford, 1991 in *Study on the validity of the undertakings concerning minorities*, UN Doc. E/CN.4/367.1950, see also K. Tsitselikis, *The Legal Status of Islam in Greece,* Die Welt des Islams Vol. 44, no. 3, 2004

[105] It is worth noting the relevant text derived from the official web site of Ministry of Foreign Affairs: "*The Lausanne treaty provides for Muslim minority in Greece, Its members are free to declare their ethnic origins (Turkish, Pomak or Roma), speak their language, exercise their religion and observe their particular customs and traditions. What is not acceptable to the Greek State is the attempts to establish a single ethnic identity for the entire Muslim minority in Thrace to subsume Pomak and Roma persons under a Turkish identity"*

[106] K. Tsitselikis, *The Legal Status of Islam in Greece*, Die Welts de Islams, Vol. 44, no. 3, 2004

[107] Indicatively, the 1932 Parliamentary Law prohibiting Greek citizens living in Turkey from a series of 30 trades and professions from tailor and carpenter to medicine, law and real estate , the "Varlik Vergisi", the "Halki" issue and the deportation of 1964.

Furthermore, the application of the Treaty was also attached to the wider spectrum of the Greek - Turkish relations trailing the disputes over Cyprus and the Aegean. As a result, the Greek governments have "securitized" the minority issue treating the Muslims of Thrace as a prominent threat against the state's integrity and national security.

Very broadly, the diplomatic cards of reciprocity and national security loyalty have hampered the enforcement of the international law and the European integration, and they have signified the illiberal stance of the Greek state on the matter and therefore injustice. Following a loose chronological line we will attempt to pinpoint the most egregious examples of this official policy.

2.3. The restrictive measures

The *restrictive measures* represent a set of mainly informal as well as formal widespread administrative measures instituted by Greek administrations to the need to balance out the demographic decline of the Greek population of Istanbul[108]. Although the majority of the restrictive measures was drafted by Metaxas' dictatorship during the interwar period, it was the military dictatorship of 1967 which "perfected" their implementation and enforcement on the Muslim minority in order to force ethnic Turks to migrate to Turkey or to disrupt community life and weaken its cultural basis. Until the 1990's the restrictive measures provided for rejection of planning permission, placing obstacles to obtaining tractor and heavy licences for a predominantly rural population living off agriculture, the appropriation of land owned by minority members and institution for public works, even making difficulties in routine matters such as receiving bank loans or finding employment[109].

[108] D. Anagnostou, *Deepening Democracy or Defending the Nation? The Europeanization of minority Rights and the Greek citizenship,* West European Politics, Vol. 28, no 2, 2005

[109] *Supra* no. 79

The scrutiny and supervision regarding the application of the measures was attached for a long period, starting from 1967, to the euphemistically called "Offices of Cultural Affairs" (*Grafeio Ekpolitistikon Ypotheseon)* instituted in the prefectures of Xanthi, Rhodope and Kavala that handled all affairs related to Turkish Muslims with absolute discretion, in violation of laws and rights applying to Greek citizens in general[110]. Run by high-rank state officials ironically referred to as the "minority governors," who had been appointed by the junta between 1967 and 1974, these offices monitored and circumscribed all economic transactions involving Muslims, with the support of Greek local authorities, employers, banks, enterprises and interest groups[111]. Yet, the key task is not to comprehend the motives of nationalistic dictatorships that imposed discriminatory measures; rather, it is to conceive why the following democratic – even socialistic - governments preserved the aforementioned measures until the early 1990's, when the right wing New Democracy government finally proceeded to their abrogation.

The absurdity of the measures can be abstracted in the case of the blockade of Greek authorities, conducted mainly by the army, near the city of Xanthi that was cutting off the road to the villages of Pomaks in the north. Up until 1996, the northern mountainous areas entirely populated by the minority were designated as *"restricted zones"*, where travel by outsiders required special clearance and a permit from the police.

2.4. Following the tracks of law 1366/1938

As a result of the application of the obligatory law numbered 1366/1938[112], members of the Muslim minority in Greece, i.e. non Greek – origin citizens, could not

[110] It is worth noting that the competent Ministry on minority issues was until recently the Ministry of Foreign Affairs (now it is the Interior Ministry). However, the Ministry of Foreign Affairs still holds an office that deals with the minority.

[111] D. Anagnostou, A. Triantafillidou, *Regions, Minorities and European Integration, a case study on Muslims in Western Thrace, Greece,* Romanian Journal of Political Science, Vol. 1, 2007

[112] Law 1366/ 2-7-1938 regarding "the prohibition of legal acts in borderlands"

acquire immovable property in Western Thrace[113]. In 1948 (law 823/1948, art. 20) and 1951 (law 1832/1951 art. 18 par 4) the Greek state validates the sale contracts only if the seller was a non - "exchangeable" Muslim. In other words, the Muslims had the right to sell only and not buy land, but also, in order to get the money they additionally had to prove that they were living in Thrace before 1930. In 1951, the subsequent law 2258/1951 (art. 14) provided for a partial retroactive withdrawal of interdictions imposed by the previous law 1366/1938 (art.14 par.1). Even so, the withdrawal should be resolved by the Minister of Agriculture after the explicit affirmation of the Army or the Police confirming that no threat for national security had been existed (art.2). Besides, art. 14 par. 3 was making an exception for the Greeks of North Epirus who had the right to buy immovable property in borderline areas of the country[114]. In May 1989, law 1366/1938 was condemned by the European Court of Human Rights (ECHR), case no.309/87, because it violated arts. 48, 52 and 59 of European Convention on Human Rights, under which economically active nationals of member state were granted the right to reside in another host member state[115]. Finally the law in hand was abolished by law 1892/1990 (art. 31 par.1).

In 1990, law 1892/90 abolished the obligatory law of 1938, although it actually retained the prohibition of legal acts concerning liens related to landed property in borderline areas of the state[116] (art. 25, par. 1), with the only difference

[113] As Baskin Oran points out, a surprisingly low number of Greeks, except those living in Western Thrace, were aware of this situation. See also B. Oran, *Religious and national identity among the Balkan Muslims: a comparative study on Greece, Bulgaria, Macedonia and Kosovo,* Cahier d'études sur la Méditerranée orientale et le monde turco-iranien, no.18, 1994

[114] It should be also mentioned that the Greek dictatorship of 1967 on the one hand coercively applied the Law 1366/1938 and on the other hand it supported the Orthodox population with purposive loans from the Agricultural Bank of Greece in order to buy minority immovable property.

[115] *The Report from the Commission on the Citizenship of the Union,* Brussels 21/12/1993, COM(93)702 final

[116] According to art. 24 par. 1 the prefectures of Xanthi, Rodopi and Evros have been characterized as borderline areas.

that the new law does not provide for any discrimination on the base of nationality or religion[117].

However, a more careful observation of the new law reveals a certain ideological impact on its spirit. In particular, art. 26 of the new law provides for a partial abrogation of the prohibitions imposed by art. 25 in two ways. First, art. 26 stipulates that natural persons and legal entities of Greek citizenship, fellow countrymen *("omogenis",* that is, "of the same Greek descent"*) "including Cypriot citizens"*[118] as well as European citizens of member states hold the right to request the abrogation of the prohibition. Nevertheless, the relative request should be submitted at a six-member committee constituted in each borderline prefecture (such as Evros, Komotini and Xanthi), including a representative from the Ministry of National Defence, whose positive vote is mandatory for the acceptance of the relative request. Second, par. 2 of art. 26 provides for the concrete right of the Minister of National Defence to raise the abrogation even for persons and legal entities not included in art 26, i.e. citizens of third states. In fact, art. 26 and especially par. 2 have led to several unreasonable rejections on requests by the Ministry of National Defence on the grounds of national security (most of them were annulled by the Council of State)[119].

In plain words, if a Muslim of Komotini wants to perform legal acts involving certain rights on immovable property she/he must first obtain the relevant permission granted by a committee in which the Greek army's representative holds the leading vote. Similarly, whereas an American legal entity wants to buy a share of a company

[117] Yet, the same article contains an exception for the Greek state, Greek municipalities and bodies corporate under public, which hold the right to fulfil legal acts in borderlines areas

[118] Cyprus was not then a EU member

[119] Council of State, decisions 720/1999 and 1701/1997

Greece has actually two Supreme Courts, the *Areios Pagos* (Court of Cassation) and the *Simvouleio of Epikrateias* (Council of State, i.e. the Supreme Administrative Court) modelled in the French Conceil d' Etat. The former judges on criminal cases while the Council of State rules in cases that involve the administration and the government.

that holds landed property in Xanthi for example, it must first obtain, the consent of the Minister of National Defence.

To summarize, the previous law 1366/1938, functioning within the framework of the restrictive measures, was a clear discriminatory measure which was finally abrogated. Even so, its successor law 1892/1990, still involving the Ministry of National Defence is another example of the securitization policy towards the minority question in Greece and thus a clue for an illiberal official view on the matter.

2.5. Art. 19 of the GNC

Three decades before the enactment of article 19 GNC, the presidential decree of 12.08.1927 contained the following provision: *"Greek citizens of non-Greek descent (allogenis) who leave the Greek territory with no intent to return shall lose their Greek nationality".* According to the aforementioned degree many Slav Macedonians, Vlachs as well as Jews and Armenians were deprived of their Greek citizenship[120]. Hence, ex article 19 GNC was not produced in a socio – legal vacuum[121]. Rather, it was another brick on the wall of homogenization that the Greek state has purposefully struggled to attain for itself.

Ex art. 19 GNC, (law 3370/1955) was a provision applied from 1955 until 1998. It provided for the denationalisation of *"citizens of different (non-Greek) descent"* ("*allogenis*", as opposed to "*omogenis*") who left Greece *'with no intent to return'*. The article was included in law 2270/1938 but mainly entered into force in 1955, together with the emergence of Cyprus issue, operating as retaliation against the active Turkish policy against the Greek minority of Istanbul at that time. It was finally abolished in 1998, after strong international pressure, together with the initiation of a

[120] N. Sitaropoulos, *Freedom of Movement and the right to nationality vs. Ethnic Minorities: The case of ex article 19 of the Greek Nationality Code,* European Journal of Migration and Law, Vol. 6, 2004

[121] *Ibid*

new "détente" era in Turkish – Greek relations and the emergence of European integration as an essential element of Simitis' "modernization" plan.

In particular, art. 19 GNC stipulated that *"a citizen of non-Greek descent ('allogenis') who leaves the Greek territory with no intent to return may be declared a person having lost the Greek nationality"*. The GNC relates the notion of "*allogenis*" to either aliens of non – Greek descent or Greek nationals of non – Greek descent. In effect, it was the second group that was insistently targeted by the administration which had correlated the article in issue with the blurred notion of Greek national consciousness.

The development of the GNC has primarily taken place along *jus sanguinis* lines with the criterion of national consciousness acquisition playing a subsidiary role[122]. Accordingly, art. 19 views citizens of non-Greek descent *("allogenis")* as individuals with Greek nationality who did not *"originate from Greeks, had no Greek consciousness and did not behave as a Greek (and consequently) it may be concluded that their bond with the Greek nation is completely loose and fragile"*[123].

According to Sitaropoulos, the lack of intent to return to Greece could be concluded by presumptions such as a person's emigration taking along the whole family, the liquidation of property or business in Greece or the 'non-active practice of Greek citizenship'[124]. In many cases the Council of State accepted the liquidation of property as the major evidence showing lack of intent to return or, conversely, the

[122] D. Christopoulos. *Peripeteies ti ellinikis ithageneias, Poios den ehei ta prosonta na einai Ellinas* [Upheavals of Greek Citizenship – who does not have the qualities to be Greek], Theseis, Vol. 87, 2004

[123] The Council of State gave a similar definition of an 'allogenis' in the context of art. 19 GNC: *"a person whose descent is of a different [non-Greek] ethnicity and who through their actions has demonstrated feelings showing lack of Greek national consciousness, in a manner that they may not be considered as integrated into the ethnic Greek body that consists of persons connected by common historical traditions desires and ideals"* (decision 57/1981) Z. Papassiopi-Passia, *Nationality Law,* Sakkoulas, Athens - Thessaloniki, 2003

[124] *Supra* no. 120

continuation of property ownership in Greece as evidence showing no intent to remain out of the country.

Consulting the relative court decisions on the matter, one could draw useful conclusions about administrative practises and the legal reasoning of the Greek tribunals. For instance, in 1960, decision 2169/1960 of the Council of State points that the "new" provision of art. 19 GNC *"is more clement that the previous aforementioned Presidential Degree of 13/8/1927"*[125]. In another case, in June 1985, a member of the Muslim minority went to Turkey for a visit. Six months later, in December 1985, the Minister of Interior, reliant on police reports, removed her Greek nationality according to art. 19 GNC. As was proven during the trial, the "stateless" woman was robbed in Istanbul three days after her arrival there, an incident that she had reported in time to the Greek Consulate in Istanbul. Finally, the Council of State annulled the ministerial decision for defective reasoning[126]. In another case, an *allogenis* born in 1964 lost her Greek citizenship in 1970. In 1986, she applied for the reclamation of the latter. Not surprisingly, her application was rejected because according to the Xanthi Police Department, in 1970 (when she was six years old) illegally entered the country where she remained since then illegally. The police had also stated that *"according to the relative evidences, she hasn't yet been acclimatized in the Greek reality regarding its mores, customs, national and religious traditions and she hasn't converted to the official orthodox religion but she adheres to the Muslim dogma, similarly to her husband"* [127]. In the Housein case, the Greek Interior Ministry had denationalised the applicants in 1991, even though the latter, at the time of the above decision, were residing in Greece, had valid Greek passports and valid Greek state insurance cards as farmers. In two other cases the Minister of Interior

[125] The translation of the court decisions cited here is mine

[126] Council of State, decision 1137/1987

[127] The administrative act was annulled by the Council of State decision no 160/1990 on the base of defective reasoning.

deprived two persons of their Greek nationality because they went to Turkey in order to study. The Council of State abrogated the relative administrative acts[128].

As regards numbers, the Interior Ministry estimates[129] of 60.004 individuals to have been deprived of their citizenship between 1955 and 1998, creating a significant number of stateless persons[130]. The overwhelming majority of these persons, about 50.000 individuals, were Greek Muslims of Turkish - origin who used to live or are still living in Western Thrace as stateless persons.

It is worth mentioning that, although the provision of art. 19 GNC was formally abolished in 1998 its abrogation did not have any retroactive effect. As a consequence many stateless members of the minority are still striving to regain their Greek nationality[131]. The Hammarberg Report[132] (2009) mentions 200 stateless persons[133] who have remained in Greece and wish to recover their Greek nationality but they have had to go through the normal naturalization process applicable to aliens, which is a long, expensive and uncertain as regard the outcome, procedure[134].

Provided that the article 19 GNC allowed the state to revoke the citizenship of non-ethnic Greeks unilaterally and arbitrarily, was in contravention of, *inter allia*, art 12 par. 4, of the International Covenant on Civil and Political Rights[135] which provides that *"no one shall be arbitrarily deprived of the right to enter his own*

[128] Council of State, decisions 4263/1995 and 209/1993

[129] Greek Interior Ministry information note dated 11/2/2004

[130] *Supra* no. 120

[131] According to official data between 1998 and 2003 111 applications had been submitted seeking the annulment of administrative decisions concerning the depravation from Greek nationality. Greek Interior Ministry information note dated 11/2/2004

[132] Commissioner for Human Rights of the Council of Europe, Report by Thomas Hammarberg, Strasburg 19/2/2009.

[133] In their comments on the draft Report the Greek government noted that 'less than 30' stateless persons of the Muslim minority have now remained in Greece.

[134] The applicants whose applications are rejected by the Committee have the right to apply for naturalization "*politografisi*" based on arts. 5,6,7,8 and 9 of the new Citizenship Law (law 3284/2004).

[135] Ratified by law 2462/1997, Government Gazette 25, A' / 26-2-1997

country" [136]. Correspondingly, the application of art. 19 GNC violated two major provisions of the 1961 UN Convention on the Reduction of Statelessness (art. 9, which rules out the deprivation of nationality on racial, ethnic, religious or political grounds and art. 8 par.1 which also categorically proscribes denationalisation if this renders the denationalised person stateless)[137] as well as art. 3, par. 2, of the Fourth Protocol to the European Convention on Human Rights[138] which provides that *"no one shall be deprived of the right to enter the territory of the State of which he is a national"*[139]. Finally, it has been widely accepted that the provisions of ex art. 19 flagrantly contravened art. 4 par. 3 sub par. 2 of the Greek Constitution which stipulates that *"Withdrawal of Greek citizenship shall be permitted only in case of voluntary acquisition of another citizenship or of undertaking service contrary to national interests in a foreign country"*.

Nevertheless, almost ten years after the abolition of art. 19 GNC the situation seems to come close to regularization. The Hammarberg Report for instance *"welcomes the efforts made by the Greek authorities and urges them to restore immediately the nationality of those minority members who were denationalised under the above provision and have remained in the country"*[140]. However, ex art. 19 GNC will always stand as an exemplar racially/ethnically discriminatory provision which remind us that the relevant state practice has violated the peremptory rule of international law regarding ethnic/racial equality, thus entailing Greece's international responsibility.

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[136] *Greece: The Turks of Western Thrace* available in www.hrw.org/reports/1999/greece. See also *Appeal to the Greek government for the abolition of art. 19 of the Citizenship Code and other discriminations* available in www.greekhelsinki.gr/

[137] The 1961 UN Convention has not been ratified probably due to the legacy of the ex art. 19 GNC

[138] The ECHR was ratified by legislative decree 53/1974. Greece has also ratified the first (legislative decree 53/1974), sixth (law 2610/1998) and seventh (law 1705/1987) protocols to ECHR.

Greece is also bound by the following major treaties: the *ICERD* (1966), ratified by legislative decree 494/1970, the *ICESCR* (1966), ratified by law 1532/1985, and the *ESC* (1961), ratified by law 1426/1984.

[139] *Supra* no. 132

[140] *Ibid*

2.6. The Mufti case

The Mufti is one of the most respectable persons having an important authority within the religious Muslim society so long as his religious leadership is vested with jurisdictional competences. The legally recognized Muftis, exercising limited jurisdiction, exist nowadays in Komotini, Xanthi and Didimotiho. The powers of Muftis derived from law 2345/1920. This legislation provided that the Muftis have, apart from their religious functions, *"competence to adjudicate on family and inheritance disputes between Muslims to the extent that Islamic Law governs these disputes"*. Moreover, law 2345/1920 legitimized the election of Mufti directly by his community who had *"the right to vote in the national elections and who resided within the prefectures in which the Muftis would serve"*.

The legal status however was changed after the enforcement of law 1920/1991 which brought a very crucial amendment on the Mufti's selection procedure. In particular, the new law provided for *"the appointment of the Mufti's by presidential decree following a proposal by the Minister of Education who, in his turn must consult a committee comprising of the local Prefect and a number of Muslim dignitaries by the State"*. As a counteraction to the 1991 law, members of the minority with the encouragement of the independent Muslims MP's organized and conducted elections in Xanthi and Komotini in order to select their Mufti in accordance with the previous law 2345/1920. As a result there have been two Muftis since then: one appointed by the state and one elected by the Muslim followers. Of course, solely the acts (marriage, divorce etc) issued by the appointed Muftis have legal effects. Rather, the non – recognized elected Muftis were persecuted. The issue of the prosecutions of the two elected Muftis, one in Komotini and one in Xanthi,

finally ended up before the ECHR in Strasbourg and in two cases the Court found violation by Greece of article 9 of the European Convention on Human Rights. The Mufti Agga case is probably the better known one and it is extensively discussed below as the most indicative of the legal issues under question.

Mehmet Emin Agga is the son of the former Mufti of Xanthi. He presented himself as an independent candidate in the Greek parliamentary elections of 1985 and 1989. On the death of his father in 1990, Mehmet Emin Aga was first appointed "*naip*" (temporary mufti) on 16 February 1990. On 28th December 1990 he was elected Mufti of Xanthi along with Ibrahim Serif who was elected Mufti of Komotini by show of hands in the mosques of the two towns respectively under the high supervision of the Turkish consulate of Komotini[141], four days after an emergency degree granted the state the right to appoint Muftis. The degree of 24 December 1990 was in fact the precursor of the law 1920/1991 which was retroactive.

Although a new Mufti was appointed by the authorities in Xanthi, Mehmet Emin Aga continued his activities. Since 1993, however, criminal charges have repeatedly been brought against him for *"Usurping the function of a religious minister"*, an offence under arts. 175 and 176 of the Greek Penal Code (pretence of authority), which provides a maximum sentence of one year's imprisonment[142]. Emin Aga was convicted in particular for signing religious messages as a minister of a "known" religion and having publicly worn the uniform of such a minister between 1993 and 1996. Nonetheless, there was no indication that the defendant attempted at any time to exercise the judicial and administrative for which the legislation on Muftis makes provision. Yet, he was sentenced to an overall total of 132 months'

[141] K. Tsitselikis, *The Shariatic Courts of Western Thrace and the Principle of Reciprocity,* Istanbul, 2006 available in www.kemo.gr.

[142] Art. 175 par. 2 of the GPC forbids anyone to practise law or exercise the functions of a minister of the Greek Orthodox Church or that of another religion known in Greece without justification. Art. 175 par. 1 provides a sentence of up to one year's imprisonment or the payment of a fine.

imprisonment in the first instance, which after appeal has been reduced to a total of 94 months' imprisonment. Finally, with one exception, the Court of Cassation in 1999 had rejected Emin Aga's appeals and upheld a total of 38 months sentences. Eight of his convictions – in trials held far away from Xanthi in order *"to avoid disturbances"* according to the state – were the subject of two applications lodged before the ECHR (cases 50776/99 and 52912/99) and were considered by it as a violation of art. 9 of the European Convention on Human Rights (freedom of religion)[143].

The Court concluded that "*punishing a person for merely presenting himself as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society"*[144]. The supervision of execution of this case was concluded (along with the similar earlier case of Mufti Serif) by the Council of Europe Committee of Ministers in 2005 following the adoption on behalf of the Hellenic Republic of measures in order to prevent a similar violation of the European Convention on Human Rights[145]. However, two very similar judgments against Greece were again rendered by the ECHR on 13 July 2006 finding anew, unanimously, violations of art. 9 of the aforementioned Convention due to other prosecutions against the same applicant for the same reasons.

The official Greek stance on the matter was - and still remains - grounded on the legal argument that the judicial power is not elective but appointive. Accordingly, the Muftis performing certain judicial and administrative functions on matters of family and inheritance law should be appointed by the administration[146]. The election

[143] See also GHM – Minority Rights Group, Press Release 17/10/2002, available in www.greekhelsinki.gr/bhr/english/organizations

[144] ECHR, *Agga vs. Greece*, Judgment of 17/10/2002, final 17/1/2003

[145] *Supra* no. 132

[146] According to the official site of the Greek Ministry of Foreign Affairs *"[i]n Greece, Muftis are appointed by the Administration through a procedure in which prominent members of the Minority are consulted. A further reason for the appointment of Muftis by the administration is that they perform, in accordance with Islamic practice, certain judicial and administrative functions in matters of family and*

of the Mufti by the community would contradict the fundamental constitutional rules about the status of the judges. Nonetheless, the Greek governments seem to neglect the fact that the Muftis were being elected for decades by their community. Moreover the appointment of Muftis by the state can contradict the moral obligation to respect the community's will to have a religious leader of their choice; a reasoning accepted also by the ECHR in Strasbourg[147].

In reality, the Greek interfering policy on the matter, exercised also on the similar issues of the Muslim religious foundations and associations, is comprehended within the wider framework of Greek – Turkish antagonism over the minority. The political game played in Thrace "commits" the Greek state in seeking the greater extent of control over the minority by raising legalistic pretences such as reciprocity or in this case the jurisdictional competences of the Muftis. However this official intrusive policy on minority matters indicates a clear securitization of the minority issue revealing the illiberal standpoint of the Greek administrations.

Besides, the designed manoeuvres on the issue still have a significant adjoining effect; the Greek state in order to justify the appointment of Muftis on his judicial powers has purposefully kept in force the application of the Muslim canonical law (Sharia) on family and inheritance matters, leading in consequence to severe deprivations of human rights. This unacceptable official reasoning has met the strong criticism and opposition by many law experts and scholars such as Ktistakis, Tsitselikis and Alivizatos who steadfastly demanded the immediate expulsion of

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inheritance Law. There is no judicial harassment whatsoever of the so-called elected Muftis in Xanthi and Komotini. Recently (31 December 2006), a new so-called election took place in Xanthi, in which only a limited number of Muslim men chose to participate, while women were excluded from the electoral process." available in http://www.mfa.gr/

[147] *Supra* no 144

Sharia from the Greek legal order and the reinstatement of the previous status of the elected Mufti[148].

2.7. Sharia or rule of law?

The special jurisdiction of the Mufti has been established in 1914. Nevertheless, the shariatic courts were in detailed organized by the law 2345/1920 according to which private disputes in inheritance and family matters are examined by the local Mufti. Particularly, the Mufti exercises his jurisdiction principally on family matters such as divorce, pensions, alimony, emancipation of minors and custody while his jurisdictional competence on inheritance matters stops short at the cases on Islamic inheritance in which the latter could not exceed one third of the overall property of the defunct[149].

Under the new legal framework provided by law 1920/1991 on the legal status of Mufti functions and qualifications of the Muftis remained largely the same. As noted before, the only critical amendment was related to the fashion of Mufti's selection.

In principle, the Muslims of Thrace have the right to chose between the Sharia and the Greek Civil Code. However, until recently the Greek courts have denied the right of the Muslims to bring their cases in front of the civil courts in opposition to law 1920/1991 which provides that the domestic court, in cases of dispute, shall not enforce decisions of the Mufti that contradict the Greek Constitution[150]. Hence, in practise, the Mufti's jurisdiction has become to a large

[148] Y. Ktistakis, *O Muftis, I Sharia, kai ta dikaiomata tou Anthropou* [the Mufti, Sharia and Human Rights] Xanthi, 2006, available in www.kemo.gr, K. Tsitselikis, *The Shariatic Courts of Western Thrace and the Principle of Reciprocity,* Istanbul, 2006, available in www.kemo.gr and N. Alivizatos, *Dikaiomata horis ekptoseis* [Human Rights without deductions], Ta Nea, 23 September 2006

[149] *Supra* no. 141

[150] *Supra* no. 132

extent obligatory. Finally, it is worth noting that virtually the alien Muslims can appeal to the Mufti's jurisdiction too[151].

Greece is the only European state that applies the Sharia contrary to other Balkan states such as Bulgaria and Turkey. The enactment of Sharia is a chiefly political decision that resulted in a vague legal order where the canonical law coexists with the general law of the state. This irregular legal practise has raised serious concerns by various competent national and international organizations and heavy criticism by Greek scholars. The main criticism focuses on the incompatibility of Sharia with the European and International human rights standards as well as the Greek Constitution so long as the former contains numerous orders that violate fundamental rights of women and children. Some of them are listed below:

- The Sharia allows weddings by proxy, including minors, without the clear and express consent of the woman in most cases.
- Following the relative jurisprudence of the shariatic courts of Western Thrace, the assenting divorce presupposes the wife's explicit renunciation of her right on alimony. In plain words, the wife buys her freedom.
- The dissolution of marriage can be decided following a unilateral statement of the husband (*talaq*) even if the wife raises objections.
- Sharia provides for different hereditary portions regarding the gender of the heir in favour of males[152].

Ktistakis refers to 2769 decisions of the shariatic courts between 1991 and 2006 that more or less violated given human rights of Greek Muslim citizens[153]. The

[151] *Supra* no. 141

[152] According to Sharia when the husband dies the wife inherits the 1/8 whereas the male child is entitled to double hereditary portion than the female child. In addition, when the devisor has only female children, his brothers, uncles and other male relatives are also entitled to the legacy.

[153] Y. Ktistakis, *O Muftis, I Sharia, kai ta dikaiomata tou Anthropou* [the Mufti, Sharia and Human Rights], Xanthi, 2006, available in www.kemo.gr.

application of Sharia contravenes, *inter allia*, the following fundamental provisions on human rights:

- Art. 16 of the Convention on the Elimination of All Forms of Discrimination against Women,
- Art. 23, paragraph 3, of the International Covenant on Civil and Political Rights that proscribes marriages without the *'free and full consent of the intending spouses'*,
- Art. 6 of the European Convention on Human Rights on the right to a fair trial,
- Art. 5 of the Greek Constitution on the protection of the free development of one's personality along with all the relative provisions regarding the equality between women and men.

Apart from the clear incompatibility of Sharia with the modern scheme of human rights, numerous other protestations underscore the contravention of Mufti's jurisdiction towards the rule of law. First, only the Mufti has the competency in interpreting the Sharia while no court of appeal is provided for. Second, no written shariatic rule determines the procedure before the court of competent jurisdiction. For instance, in shariatic courts there are no assigned days of hearing and therefore the applicant has the right to come before the Mufti whenever he or she wants. As a result the default, i.e. the failure to appear in court, is a usual phenomenon in shariatic courts. Third, the publication of a decision means actually the registration of Mufti's judgment in ottoman language, which very few Muslims are aware of, in a notebook that functions as official archive. The litigants are commissioned to translate the decision to Greek by paying a civilian translator and to present this unofficial and loose translation before the civil Court of first instance in order to get ratified and come into force. The above procedures contradict fundamental legal principles such as the right of access to justice and the right to a fair trial. Finally, provided that a

Greek judge according to the Constitution (arts. 87-91) should hold a law degree by a recognized law school and should have succeeded in the relative contest for the judicature, the Mufti technically is not a judge[154].

Nonetheless, the obvious deficits of the Sharia vis-à-vis human rights and the Greek Constitution are consistently neglected by the Greek courts which still persist acknowledging the jurisdiction of Mufti. In a recent judgment, the Court of Cassation reaffirmed the exclusive jurisdiction of Sharia in inheritance law with the reasoning that Sharia comprises *"special domestic enactment"*[155]. Eminent scholars however have challenged the court's legal reasoning demanding from the civil courts to respect the Constitution and the international treaties ratified by the Greek parliament. Prof. Nikos Alivizatos, points out that as long as the Greek governments hesitate to abolish the legal fossil of Sharia, it is time for the Greek judges to safeguard the rights of Greek Muslims[156]. In this direction the recent decision of the Court of First Instance of Komotini[157] ruled that *"the Mufti's decision […]should not lead to the direction of Muslims' individual rights violation"*[158] giving an encouraging first dispatch towards the shift of the Greek jurisprudence on the matter.

The Sharia issue bears a meaningful didactical value in terms of both theoretical and practical politics. First, Sharia shows that the communitarian theories embracing cultural relativism are incompatible with the essence of justice and with the practical enforcement of the rule of law. However, we should not overlook the possibility lying on the argument that, let alone law, cultural relativism might have a positive influence towards a desirable societal reorganization of the Muslim community that would constitute the minority functional part of the Greek society. As

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[154] *Ibid*
[155] Court of Cassation, decision 1097/2007
[156] N. Alivizatos, *Dikaiomata horis ekptoseis* [Rights without deductions], Ta Nea, 23 September 2006
[157] Court of First Instance of Komotini, decision 9/2008
[158] *Ibid*

Tsitselikis asserts, *"[e]galitarians would subscribe to the abolition of the Mufti jurisdiction whereas the communitarians would insist in keeping in force the present status. In effect, what determines the point of balance between the two opposite position is the grade of real freedom for the members of minority"*[159].

However, one could logically assert that the greatest degree of real freedom is possible with the abrogation of Sharia together with the re-establishment of the elected Mufti. Even so, the claim for an alleged protection of cultural rights should not function as an impediment for the consolidation of fairness and the rule of law.

Second, the Sharia case reveals the two-faced official Greek policy on the minority matter. The same administration displays liberal views regarding the granted judicial jurisdiction of Mufti, at the same time it struggles to manipulate the minority by applying illiberal policies, as the aforementioned Mufti case has shown. What the Greek policymakers, however, seem to disregard is that the enforcement of Sharia, is not a liberal "gift" for the Muslims; on the contrary, the coexistence of Sharia with the general legal frame is probably the most straight – out confession that this legal frame is unjust.

2.8. Law 3647/2008 on the status of the Muslim religious foundations (Vakfs)

Correspondingly to the Mufti case, the religious foundation issue was used as another diplomatic battlefield by Greece and Turkey on their antagonism for a greater degree of mastery over the minority[160]. The intervening Greek endeavour was formally imprinted on law 1091/1980 along with the several sequential presidential degrees providing for the status of vakfs[161]. Nevertheless, the new law 3647/2008 has

[159] *Supra* no. 141

[160] Law 1091/1980 defined vakf as *"[…]the real or tangible property or any income in favour of non – profit, charitable or pious purpose or religious or charitable institutions which has been offered as a gift.*"

[161] Presidential Degrees no 9/1988, 430/1989, 91/1996, 2/2007 etc

introduced a new era on the matter signifying a promising shift towards the eradication of otiose policies of the past.

The previous law (no 1091/1980) provided for the direct election of five member Management Committee reinforcing the involvement of the local Prefect in the competence and autonomy of the Vakf administration Committee[162]. According to the previous law, the local Prefects have been granted the right to propose candidates for the Committees *"according to their judgment"* (art. 5) and to lodge applications before the civil courts requesting the disposition of a committeeman (art. 8). In compliance, a more recent legislation stipulated that the Secretary General of the Region of Eastern Macedonia and Thrace has competence to appoint in certain cases the five - member Management Committee following the consultation of the local appointive Mufti[163]. As a result, the management of Muslim religious foundation had been largely controlled by the local governmental offices.

The new law 3647/2008 has brought changes regarding the management of vakf property. First, it has introduced the institution of the local Vakf Committees operating in each settlement situated out of the municipal limits of Xanthi, Komotini and Didimotiho (art. 6 – 9). The Muslim religious foundations' property located within the aforementioned municipalities is now administered by an elected five member Management Committee instituted in each municipality. The Secretary General of the Region retains only the exceptional right to request the constitution of special elected Committees that will administer a specific Muslim foundation or group of foundations but strictly inside the administrative limits of Komotini, Xanthi and Didimotiho, following however the wishes of the donor (art. 10 – 13). Thus, the Secretary General according to the new enactment obtains a very restricted local competence and a limited discretion. Second, the same bill has abolished all the rights

[162] *Supra* no. 106
[163] According to art. 3 of the Presidential Decree 91/1996

granted to the Prefect by previous provisions. Third, the elections for the Management Committees (but not for the Vakf Committees) are governed by the general regime regarding the municipal elections in Greece (art. 11). Fourth, the Muslim religious foundations constituted after the enforcement of the law will be governed by the general provisions of the Civil Code (art. 5). Last but most important, the new legal regime on Muslim religious foundations is now governed solely by the Treaty of Lausanne along with the law 3647/2008 abrogating the saving clause of reciprocity (art.1): a small phrasal deletion which may introduce an official pioneering view on the minority question.

2.9. The minority education

The official legal status of the minority education is defined in the Treaty of Lausanne, as well as in a series of educational agreements which have been signed by both Greece and Turkey. Nevertheless, Muslim minority education has been influenced for many years by a complicated web of circulars and decisions, hanging in the delicate balance of Greek – Turkish political antagonism.

To a large extent, there has only been limited interaction between the Muslim community and the mainstream Greek educational establishment, due to the fact that, the majority of Muslims following official directives attend solely special schools, called *minority schools* located exclusively in the region of Thrace[164]. According to the official records, 215 minority primary schools operate in Thrace, that teach in both Greek and Turkish, with more than 400 Muslim teachers. There are also two minority Junior and Senior High Schools and two Theological Schools[165]. Furthermore, in

[164] K. Magos, *Examples of best practice: "All together we are the city" : a workshop developed by the Muslims Minority Education Project in Greece,* International Education, Vol. 18, no. 2, 2007

[165] The full text derived from the official website of the Greek Ministry of Foreign Affairs is the following: *"In Thrace, 215 minority primary schools teach in both Greek and Turkish, with more than 400 Muslim teachers. There are also two minority Junior and Senior High Schools and two Theological Schools. Further efforts are being made to help Muslims to improve their Greek language skills through the adoption of educational programmes, such as the supplementary teaching programme and the educational programme for Muslim children, worth 6.5 million in total. Moreover,*

accordance with the Lausanne Treaty the curriculum in the minority schools is bilingual. Teachers from the majority population instruct in Greek while teachers from the minority teach the other subjects of the curriculum in Turkish. Finally, the teaching hours in Greek and Turkish are equally divided.

An inherent problem of the Muslim minority in Thrace emanates from the divergent ethnic background of the minority. The Rom and Pomak ethnic groups possess neither a written language nor historical and legendary literature nor traditions invented or otherwise praised by Pomak or Roma philologists. Instead, both groups tent to identify with the same demand raised by the Turkish origin elites. This identification is reinforced by the minority educational system where the Turkish language is taught to all Muslim students regardless of their ethnic origin[166].

Generally, the aim of minority schools is *"to ensure the physical, intellectual and moral development and progress of the students according to the purposes of the general education in Greece and the determined principles of the curriculum of the respective public schools of the Country"* (art. 2, law 694/77). However, if we regard the above provision within the framework of art. 16 of the Constitution which provides for "*the development of the national and religious consciousness of the pupil*"[167] as the main purpose of the Greek educational system, it can be legitimately

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it is of particular importance that, as of the 2006-2007 school year, optional Turkish Language courses have been made available in public schools. Affirmative action measures have also been taken with a view to facilitating the admission of children of the minority into universities and technical colleges, such as a 0.5% quota on the total number of admissions. This last measure is also coupled with an exemption from the mandatory base grade of 50% in each subject of the university entrance exams." available in http://www.mfa.gr/

[166] *Supra* no. 24

[167] Art. 16**:** *1. Art and science, research and teaching shall be free and their development and promotion shall be an obligation of the State. Academic freedom and freedom of teaching shall not exempt anyone from his duty of allegiance to the Constitution.*
2. Education constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious consciousness and at their formation as free and responsible citizens.
3. The number of years of compulsory education shall be no less than nine.
4. All Greeks are entitled to free education on all levels at State educational institutions. The State shall provide financial assistance to those who distinguish themselves, as well as to students in need of assistance or special protection, in accordance with their abilities.

argued that educational system promotes the Greek national consciousness to all students, and therefore minority education has to wipe out any ethnic differences[168]. On the other hand, the provisions of the 1969 Bilateral Greco – Turkish Cultural Protocol have established the principle of non – offence of the ethnic identity and religion of Muslim students. In effect, the 1969 provisions actually imply the manifestation of a different ethic identity by Muslim students, which the Greek state should respect.

Here the obscurity appears evident: On the one hand, the Greek State should provide a Muslim education to the minority according to the Lausanne Treaty and partially to the Greco – Turkish Cultural Protocol, respecting their religious beliefs, while on the other hand and in accordance with the Constitution, this very same education should also aim to promote an ethnic identity. But which ethnic identity? The Turkish or the Greek? Cultivating a Turkish identity within the borders of the Greek State contradicts the whole understanding of the term "Greekness" and "Greek". Even so, imposing a Greek identity to a Muslim minority is an unachievable and somewhat against the international law and the relevant treaties task.

Moreover, the legal regime of the minority education is still governed by the principle of reciprocity. According to the relevant law in force (law 694/1977) the education of the Muslim minority in Thrace is governed by the Lausanne Treaty, the present law *"on the organisation and administration of the General Education"* and the *" law which is subjected to the principle of judicial reciprocity applied in any case"* (art. 1). Besides, the article concludes with the remark that *"the terms*

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5. Education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons. These institutions shall operate under the supervision of the State and are entitled to financial assistance from it; they shall operate on the basis of statutorily enacted by-laws. Merging or splitting of university level institutions may take place notwithstanding any contrary provisions, as a law shall provide. A special law shall define all matters pertaining to student associations and the participation of students therein […].

[168] D. Christopoulos, K. Tsitselikis, *Treatment of minorities and homogeneis in Greece: relics and challenges,* History and Culture of South Eastern Europe – An Annual Journal (Jahrbuecher fuer Geschichte und Kultur Suedosteuropas), Vol. 5, 2003

"minority", "minority school" and "minority population" mentioned herein refer exclusively to the Muslim minority in W. Thrace".

Indeed, the complexity of the issue along with the unwillingness of the state to deal sincerely with it has resulted for decades in disgraceful educational conditions for the Greek Muslims. However, the situation started to change from 1997 onwards, when a broad 9-year project on education entitled *"The Muslim Minority Education Project"* was put in place[169]. This programme was co – financed by European as well as state resources and presents a real impact of EU policies in Greece and how European integration affects the lives of Muslims towards a positive hopeful direction[170]. To conclude with, it is worth mentioning that Ktistakis, a specialist on Muslim minority issues and a critical judge of the Greek official practices, labels the minority education as liberal and somewhat proper[171].

2.10. The war of terminology

Since the Turkish invasion/intervention in Cyprus, a war of terminology has broken out between Greece and Turkey. The latter insists calling the minority "Turkish national minority", while the former exclusively refers to a "Muslim religious minority"[172]. The fact is that twenty years before 1974, during a short period of rapprochement, it was the Greek government that ordered the use of "Turk" and

[169] *Supra* no. 164

[170] K. Tsitselikis, *How far have the EU policies affected the minorities in Greece and Turkey*, paper presented at the conference *EU and Greek – Turkish relations, from conflict to cooperation?*, Workshop Bogazici University, Albert Long Hall, October 2004, available in www.euborderconf.bham.ac.uk

[171] Y. Ktistakis, contribution in the meeting with the topic *Prosfiges kai Meionotites, dishereies ensomatosis* [Refugees and Minorities, integration difficulties] Athens, 14/2/2008, available in www.kemo.gr

[172] Baskin Oran supports that both countries are legally right on the matter: Greece is right because art. 45 of the *Lausanne Treaty* identifies the minority as "Muslim Minority" while on the other hand Turkey is right because *the Convention and Protocol on the Exchange of Greek and Turkish populations* of 1923 that regulated the compulsory exchange of said minorities in these two countries makes mention of "Turks" and not of "Muslims" . B. Oran, *Religious and national identity among Balkan Muslims: A comparative study on Greece, Bulgaria, Macedonia and Kosovo,* Cahier d' etudes sur la Mediterranee orientale et le monde turco – iranien, no. 18, 1994

"Turkish" for defining the minority[173] (largely however due to the communist threat from Bulgaria)[174]. Yet, in 1984 the Court of Cassation banned the use of the word "Turkish" in the signs of Muslim organizations and associations[175]. The shift in Greek policy on the matter became more evident after the communiqué of the Speaker of the Greek Parliament, dated 10 March 1985, in which he stated that the term "Greek Muslim" must henceforth be used[176]. It culminated with the prohibition of the use of the terms "Turkish/Turk", the removal of signs containing these words and the imprisonment of the two Muslim candidates (Sadik and Serif) who run in the election of 1989 for the Greek Parliament and by name referred to a Turkish minority having the backing of the motherland Turkey[177]. Finally, the dispute was brought before the ECHR regarding the registration of associations whose title includes the nouns "Turk/Turkish"[178]; a legal struggle that reflects an ideological clash vested by legalistic arguments, ignoring social and ethno – linguistic realities[179].

In legal terms, the dispute can be summarized in the cases of *Bekir – Ousta and others, Emin and others v. Greece*[180] and the case concerning the naming of *the Turkish Union of Xanthi.* The first case concerns the competent courts' refusal to allow the registration of the Muslim minority applicants' association that they decided

[173] There were brief times when the Turkish identity was recognized. Two orders, dated 1954 and 1955 and signed by the (Greek) Chief Administrator of Thrace, pursuant to the instructions of the Prime Minister, asked all concerned to use the terms of 'Turk' or Turkish', instead of 'Muslim'. For some time, protocols for educational programs referred to *Turkish* schools', old photographs showed inscriptions on the buildings as *Turkish* elementary school', diplomas identified the holder as *'Turk',* and some textbooks were described as *'Turkish* books'. T. Attaov, *The ethnic Turkish Minority in Western Thrace, Greece,* The Turkish Yearbook, Vol XXH, 1992, and in *Greece: The Turks of Western Thrace,* available in www.hrw.org/reports/1999/greece

[174] S. Kavaz, *The panel on the problems of the Turkish minority of Western Thrace in Greece within the framework of promotion and protection of all human rights*, UN Human Rights Council , 7th session, Geneva, March 2008

[175] *Supra* no. 168

[176] T. Attaov, *The ethnic Turkish Minority in Western Thrace, Greece,* The Turkish Yearbook, Vol. XXH, 1992

[177] *Supra* no. 168

[178] The last judgment of the Supreme Court (decision 4/2005) has confirmed the decision of the Appeal's Court of Xanthi that banned the Turkish Union of Thrace.

[179] *Supra* no. 106

[180] Another identical case was *Sidiropoulos and others vs. Greece* concerning the Slav-Macedonian minority in Florina

to form in Evros in 1995, under the name *"Evros Prefecture Minority Youth Association"*, on the ground that the applicants intended in fact, through this association, to promote the idea that an ethnic, as contrasted to a religious, minority existed in Thrace. Eventually the ECHR found unanimously against Greece for violating art. 11 of the European Convention on Human Rights regarding the right to freedom of association [181].

The cases of the *"Turkish Union of Xanthi"* and the *"Cultural Association of Turkish Women of the Prefecture of Rodopi"* have been strictly interrelated following, from 2001 onwards, a simultaneous course. Yet, the naming of the "Turkish Union of Xanthi" has taken a symbolic character epitomizing the minority claim of recognition of its ethnic rather than religious character. The "Turkish Union of Xanthi" was founded in 1927 under the name "House of the Turkish Youth of Xanthi". In 1936 the applicant association successfully sought to change its name to "Turkish Association of Xanthi" and since then has been legally operated and recognized by all forms of social, political and cultural life until 1983, when the Greek authorities decided to close down the union and ban the name.

The union lodged the first petition before the Court of First Instance on 30/1/1984. After an unjustifiable long period of legal struggle[182], the Plenary Session of the Court of Cassation in its final decision on 7th February 2005 has reaffirmed the decision 31/2002 of the Xanthi Court of Appeal that dissolved the union because of the term "Turkish" in its title. It did so because its name was, according to the court's decision, confusing to the union's membership as it referred to another national entity pursuing thus, by its mere naming, the interests of another state into Greece. It was

[181] ECHR, *Bekir – Ousta and others v. Greece*, Judgment of 11 October 2007

[182] Court of First Instance of Xanthi, decision 36/1986, Court of Appeal of Thrace, decision 117/1999, Court of Cassation, decision 1530/2000 which remanded the case before the Court of Appeal of Thrace, Court of Appeal of Thrace 31/2002, Fourth Chamber of the Court of Cassation decision 1549/2003 which remanded the case before the Plenary Session of the Court of Cassation which finally after 20 years released the final decision on the matter.

thus damaging the peaceful coexistence between the Muslim and Christian population of Thrace and was raising, following the wording of the decision, a *"non existent issue of a Turkish minority problem"* there. Furthermore this registration would be against the public order on the grounds that the title of the association would create the impression that in Greece exists a Turkish national minority as contrasted to the religious one provided for by the 1923 Lausanne Peace Treaty. The Court of Cassation followed the same reasoning on the decision 586/2005 concerning the *"Cultural Association of Turkish Women of the Prefecture of Rodopi"*.

In 27/3/2008 the ECHR found unanimously[183] against Greece for violating art. 11 of the European Convention on Human Rights regarding the right to freedom of assembly and association[184]. The Court, having noted that the applicant association had never in fact appealed to violence, underlined that no matter how shocking and unacceptable may seem to be for the authorities certain points of view or terms used by the association or its members, these should not automatically be viewed as a threat to the public order or the country's territorial integrity, since the essence of democracy consists in fact in its capacity to solve problems through an open debate[185]. In fact, the ECHR displayed a liberal view on minority issue in contrast to the illiberal one of the Greek government.

Besides, the Greek point on the matter is weak for two other reasons: a) the attribution of rights based on religion does not prohibit members of the religious minority from opting for and declaring certain national ideology b) as Tsitselikis observes, one could reverse the Greek argument and assert that in Turkey there are

[183] Even the Greek Judge of the ECHR President Petros Pararas found against Greece; a stance that evoked reactions in Greece, especially from the Greek nationalists who used to stress the role of Mr. Pararas as consultant of the Prime Minister K. Karamanlis.

[184] ECHR, *Turkish Union of Xanthi v. Greece*, judgment of 27/3/2008, final 29/9/2008

[185] It is worth noting that the ECHR decision was, *inter allia*, based on the aforementioned case of *Bekir – Ousta and others* as well as on *United Macedonian Organization Ilinden and others v. Bulgaria*, *Stankov and United Macedonian Organization Ilinden and others v. Bulgaria, Ouranio Toxo and others v. Greece* και *Sidiropoulos and others v. Greece,* available in www.greekhelsinki.gr

only *non – Muslims* and not Rums, for instance, according to the Lausanne Treaty that speaks explicitly for *non – Muslims*[186].

Nonetheless, Greece has not yet complied with the ECHR decisions. As a result the Turkish Union of Xanthi has lodged anew appeal to the Xanthi Court of Appeal requesting the compliance of the administration with the decision. The hearing took place on 10 April 2009 and the decision is still pending.

The war of terminology is an ideological war rather than a legal debate. However, it is conducted almost exclusively within the courtrooms and thus it is principally related to the judicial function of the state. In practise, the administration and the Legislative have played a limited role in this dispute. Drawing from this observation, the case of the Turkish Union in Xanthi is indicative for the interpretation of Law by the Greek Courts which seem however to hold an illiberal view, based largely on the widespread fixation regarding minorities as a potential threat to the territorial integrity of the country.

3. The Slav – Macedonian minority in Greece

3.1. The minority

Defining the Slav – Macedonian minority in Greece is an extremely complex task in the wake of the complexity in conceptualizing minorities *per se*. Nevertheless, taking into account the objective criteria provided by the majority of the proposed definitions on minorities[187], one could argue that the Slav – Macedonian minority in Greece consists of Slav – speaking Greek nationals.

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[186] K. Tsitselikis "*I thriskeutkopoiisi tou ethnikou ellinotourkikou antagonismou sto pedio ton dio meionotiton"* [the spiritualization of the Greek – Turkish national antagonism within the minority frame], 18/5/2005, available in www.kemo.gr

[187] 1949 UN Convention: *The concept of minority refers to groups who have constant ethnic, linguistic and religious traditions or other important properties within a community, who are clearly different from the rest of the community by virtue of these properties, who desire to maintain these properties and who are not in a dominant position.* UN-Doc E/CN. 4/Sub. 2/119, par. 32, UN –Doc E/CN. 4 /Sub. 2/149, par. 26

Capotorti: *A group numerically inferior to the rest of the population of a State, in a non – dominant position, whose members- being nationals of the State – posses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show if only implicitly a sense of*

As far as the subjective criteria of "awareness of minority" and "solidarity" are concerned, the matter is even more complex, as the majority of the Greek citizens who grew up in what are usually called *Slavophone* (Slav – speakers) or *bilingual* families, have today a Greek national identity. Yet, a small group, located in Northern Greece, in the Prefecture of Florina, has claimed a clear "Macedonian" national identity, consider themselves as part of the same nation with the dominant one in the neighboring F.Y.R.O.M./Macedonia.

Regarding numbers, in 1998 the linguist Anhava suggested that there are 200,000 Slav – speakers in Greece, where this group is likely to have more or less fully assimilated by the early twenty-first century[188]. In 1999 the GHM estimated those of a *"Macedonian"* national identity between 10.000 and 30.000 persons. However, given the votes received by the minority political party *Ouranio Toxo* throughout several national elections[189], one could estimate the minority hard core between 7.000 – 10.000 individuals[190]. Notwithstanding, as seen before, the basic problem of various statistical analysis referring to Macedonia is mainly a problem not of numbers but of terminology[191].

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solidarity, directed towards preserving their culture, traditions, religion or language. F. Capotorti, *Study on the rights of persons belonging to ethnic, religious, and linguistic minorities* in N. N. Huibhne, *Ascertaining a Minority Language Group: Ireland a case study,* in *Minority and Groups rights in the New Millennium,* (ed.) Deirdre Fottrell, Bill Bowring, Brill, 1999

Oran: The five points provided by Baskin Oran on defining minorities are *"Being different from the majority, numerical proportion, not to be dominant, citizenship and the "awareness of minority"***,** Baskin Oran, *Türk Yunan ilişkilerinde Batı Trakya Sorunu*, 2nd edition, Bilgi Yayinevi, Ankara, 1991, in *Islamic Community Brotherhood Administrations in Greece "Cemaat ı Islamıye" 1913 – 1998,* A. N. Adıyeke, Araştırma Projeleri Dizisi, Ankara, 2002

Deschenes: *A group of citizens of a State constituting a numerical minority and in a non dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population having a sense of solidarity with one another motivated if only implicitly by a collective will to survive and whose aim is to achieve equality with the majority in fact and law(1985)*

[188] P. Ahonen, *Ethno nationalism in European East –West Borderlands: Weltanschauungen in the European Union and Central and Eastern Europe,* Religion, State & Society, Vol. 35, no. 1, 2007

[189] 7.300 votes in 1994, 5000 in 1999, 6.176 in 2004, GHM, press release 18/9/1999 available in www.greekhelsinki.gr and the Hammarberg Report, 2009

[190] GHM, press release 18/9/1999, available in www.greekhelsinki.gr

[191] I. Michailidis, *The War of Statistics: Traditional recipes for the preparation of the Macedonian Salad*, East European Quarterly, Vol. XXXII, no. 1, 1998

3.2. The official Greek view on the minority

The Greek State considers the minority as a *"Slav – oriented group of Greek citizens"*[192] and denies the granting of the minority status on the grounds of the fact that a Slavonic dialect does not necessarily entail any Slav - Macedonian national consciousness. Practically, the Greek argumentation seems to count exactly on the absence of a clear and universal definition on national minorities. The Greek administration points out in its comments to the Hammarberg Report that *"as the Grand Chamber of the European Court of Human Rights stated in the Gorzelik vs. Poland case, a definition of "national minority" would be very difficult to formulate. In particular, the notion is not defined in any international treaty"*[193]. In plain words, the Greek State declares that it is not obliged to recognize officially any national minority as long as no common acceptable definition on minorities exists.

In addition, the Greek administration challenges the existence of the subjective preconditions of minorities and does not consider the relevant claim on behalf of few persons as indicative for all the *slavophone* community in Greece. The statement of the Greek delegation during the March 2001 session of the U.N. CERD was characteristic: *"[n]obody has asked these people if they are willing to self-identify themselves as belonging to a different nation. They never have expressed themselves in favour of not being Greeks. They never expressed themselves as having a distinct ethnic identity"*.

[192] Comments of the Greek Authorities on the draft report of the commissioner for human rights of the Council of Europe following his visit to Greece on 8 – 10 December 2008, The Hammarberg Report, 2009

[193] *Ibid*

3.3. The linguistic aspect of the Slav – Macedonian minority

As Tsitselikis asserts, the existence or absence of a minority language is an objective observation which does not prove the existence of an ethnic minority group[194]. Accordingly, none of the subjective criteria attached to collective intentions of preserving the language or constituting an ethnic minority group should be taken into consideration when identifying a linguistic minority.

Drawing from the above assertion, the Slav – Macedonian community does constitute, *inter allia*, a linguistic minority irrespective of the definition adopted[195]. *Slavophones* are numerically inferior to the rest of the population and they are Greek nationals possessing linguistic characteristics differing from those of the rest of the population. Besides, the Greek state has publicly acknowledged their distinct linguistic quality[196]. In the Sidiropoulos case the decision of the Thessaloniki Court of Appeal imprints the official ideology of the Greek State by pointing that *"[t]he fact that a small part of this region's (Macedonia) population also speaks a language which is basically a form of Bulgarian with admixtures of Slavic, Greek, Vlach and Albanian words, does not prove that this minority is of Slavic or Bulgarian origin"*[197]. Similarly, the Greek authorities have acknowledged that *"in northern Greece there exist 'a small number of persons who […] use, without restrictions, in addition to the Greek language, Slavic oral idioms, confined to family or colloquial use"*[198].

However, in this fashion, the Greek Court along with the Greek administration have actually recognized the existence of a linguistic minority in Macedonia. Besides it is worth noting that in the early 1990's Greek diplomats and experts of the Ministry of Foreign Affairs, having countered the urging reaction of the

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[194] K. Tsitselikis, *Meionotikes Glosses stin Ellada* [Minority languages in Greece], available in www.greek-language.gr

[195] *Supra* no. 187

[196] *Supra* no. 132

[197] ECHR, *Sidiropoulos vs. Greece*, Judgment of 10 July 1998

[198] *Supra* no. 132

international community regarding the treatment of minorities in Greece, proposed the recognition of a Slavic – speaking minority in Northern Greece[199]. Furthermore, in 1998, in his visit to Skopje, the Foreign Minister, Mr. Theodoros Pangalos, stated that there is no Slavic minority in Greece, but those individuals wishing to practise their culture and learn their language are free to do so, and can take their complaints to the Council of Europe if they feel that Greece denies their rights as such[200].

Hence, regardless of the denial to recognize a national minority, the Greek authorities should adopt all necessary measures in order to make possible the effective enjoyment by the minority members of their right protected under art. 27 of the International Covenant on Civil and Political Rights to use freely their language, including certain rights on education and religious practise. One could possibly argue that the omission, on behalf of the Greek state, to recognize the linguistic minority does not correspond to the given unit of analysis of the present study so long as it is neither a law nor a court decision. However, in law, omission is act, and the recognition of the linguistic minority of the Slav – Macedonian minority is an omission so long as the non – recognition status violates human rights emanated from an observed and confessed reality.

In summary, it can be stated that Slav – speakers, regardless of the theoretical framework used, do constitute a linguistic minority group for the purposes of international law, despite their own reluctance to pursue legally their linguistic rights before the domestic and international courts. Besides, in law linguistic rights exist *ipso fato* and *ab initio*.

In practice, the applications lodged by the members of the minority before the ECHR refer solely to the protection of their right to constitute and preserve

[199] Supra no. 109

[200] T. Kostopoulos, *I apagoreumeni Glossa* [The Forbidden Language], Mavri Lista, Athens, 2000

associations (art. 11 of the European Convention on Human Rights) and not to the protection of their language[201]. Given this, and provided that the Greek State has not enforced any legislation concerning the minority - due to the non recognized status of the latter - our units of analysis are narrowed at two major legal cases: the *Sidiropoulos and other vs. Greece* and the *Ouranio Toxo vs. Greece* case. Both cases similarly to the trials of Turkish Union of Xanthi had a discrete ideological burden strictly related to the existence of an ethnic Slav – Macedonian minority in Greece.

3.4. Sidiropoulos and others vs. Greece

In April 1990, the six applicants, all Greek nationals living in Florina and claiming to be of "Macedonian" ethnic origin and having a "Macedonian" national consciousness, decided together with forty-nine other people to form a non-profit association called *"Home of Macedonian Civilisation"*. The association's headquarters were to be at Florina, near the border with FYROM/Macedonia.

In June 1990, the applicants applied to the Court of First Instance of Florina for registration of their association under art. 79 of the Civil Code however in August 1990, the Court of First Instance of Florina refused the application on the grounds that the association's real aim was to promote the idea of an Macedonian minority in Greece. The reasoning of the decision stands indicative of how national perceptions may affect the application of the Law and therefore is cited below:

> *[s]ome of the founding members of the association who are on the provisional management committee […] have engaged in promoting the idea that there is a Macedonian minority in Greece (see, for example, the newspapers Makhitis, Ellinikos Voras, Nea and Stohos of 28 June 1990, 24*

[201] Members of the Slav-Macedonia, heirs of "betrayers" during the German occupation, have lodged before the European Court of Human Rights petition concerning the acquisition of properties confiscated by the Greek State on 1946. Nevertheless the ECHR judged that the Court is incompetent *ratione temporis* to adjudicate on the case. Y. Ktistakis, *Oi diekdikiseis sto Strasvourgo* [the claims before Strasbourg], Kathimerini 26/7/2008, available in www.kemo.gr.

June 1990, 18 June 1990 and 28 June 1990 respectively); these newspapers all the more reinforce the Court's previous opinion as none of the applicants has so far cast any doubt on the matters set out in these newspapers […], namely that they travelled to Copenhagen on 9 June 1990 and took part in the CSCE, where they maintained that there was a Macedonian minority in Greece and even congratulated Professor Ataov, a Turk, who read out a text containing provocative and unacceptable allegations against Greece. One of the members of the provisional management committee, Mr Constantinos Gotsis, refused, in the course of proceedings in the Florina Court of First Instance against the publisher of the newspaper Stokhos, to accept that he was Greek […] On the basis of the foregoing circumstances, which have been proved, the Court considers that the true object of the aforementioned association is not the one indicated in clause 2 of the memorandum of association but the promotion of the idea that there is a Macedonian minority in Greece, which is contrary to the country's national interest and consequently contrary to law[202].

In effect, the Court examined the application under judgment by taking into consideration information taken to be true on the grounds that it is a matter of *"common knowledge"*. The court also relied on articles which had appeared in the – nationalistic - newspapers *Ellinikos Voras, Makhitis and Stohos* and considered that the facts reported in the aforementioned newspapers, combined with the association's name and the content of its memorandum and articles of association cast doubt on its objectives.

[202] *Supra* no. 197

In May 1991, the Thessaloniki Court of Appeal reaffirmed the decision in the first instance and dismissed the appeal. The Court held that, when examining an application for the registration of an association, it was not required to apply the ordinary rules on the burden of proof. When examining such applications, it did not have to – and could not – confine itself to considering evidence produced by the parties. Hence, the Court of First accepted rightly the truth of information grounded on *"common knowledge"*[203]. The information that the Court of Appeal judged as *"a matter of common knowledge"* represents another memorandum on nationalism:

> *[t]he area, part of the Greek administrative region of Macedonia had always been Greek. The fact that part of its population spoke a second language, which was essentially Bulgarian mixed with Slav, Greek, Vlach and Albanian, in no way proved that they were of Slav or Bulgarian origin. The Socialist Republic of Macedonia had sought to create a Slav Macedonian State in order to have access to the Aegean. To that end, it had tried to win over to its cause the Greek inhabitants of the Greek administrative region of Macedonia who spoke the second language previously mentioned. In accordance with instructions from Slav organizations abroad, the applicants had set up the "Home of Macedonian Civilization" in order to achieve that objective*[204].

In a judgment delivered on 16 May 1994, the Court of Cassation dismissed the appeal. It considered most of the grounds of appeal to be unfounded and held that the lower court had been entitled to take into consideration evidence (such as the articles

[203] "Common knowledge" is a legal term introduced in art. 336 CCP which rules that incontestable well – known facts shall be taken to be true by the Court without proof.

[204] Council of Europe, Human Rights Education for Legal Professionals available in www.coehelp.org

in newspapers as well as "well – known facts") which had not been submitted by the parties. Eventually the case was brought before the ECHR that found against Greece for violation of art. 11[205] of the European Convention on Human Rights[206]. However, the above association's legal personality is still not recognized, despite the Greek official report to the Committee of Ministers of the Council of Europe (2000) indicating that courts had been instructed to execute the judgment, since for many years no lawyer in Florina wanted to undertake the case.

3.5. The "Ouranio Toxo" trial

The *Ouranio Toxo* is a political party founded in 1994 in Florina, whose declared aims include the defence of the "Macedonian minority" living in Greece. It has been regularly taking part in elections since 1994. In 1995 the party established its headquarters in Florina, affixing a sign with the party's name in Greek and Slav-Macedonian, an act that provoked the strong reaction of the local community. Protests were organized by the local authorities while the public prosecuting attorney ordered the removal of the sign on the grounds that the inclusion of the party's name in Macedonian was liable to sow discord among the local population. The protestation resulted to the destruction of the party's offices. Then its leaders pressed charges against suspected perpetrators, accomplices and instigators (which included the local mayor and bishop).

The Council of Misdemeanour Judges of Florina saw no reason to even set a trial date. Explaining their reasoning, the judges argued, *inter alia*, that the reactions of individuals and groups in Florina were justified by the fact that the sign was

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[205] Art. 11 guarantees the freedom of peaceful assembly and freedom of association with others. Its protection does not therefore extend to demonstrations or associations whose organisers or founders and members have violent intentions.

As the court did not find the indication that the founders of "Home of Macedonian Civilisation" had other aims than set out in memorandum (exclusively to preserve and develop traditions and folk culture of Florina region) this association is an "association" within the meaning of art. 11 of the European Convention on Human Rights and article 11 is therefore applicable in its case.

[206] *Supra* no. 197

provoking concern to them. The inflammatory reactions of the protesting crowd were considered in this case *"objectively necessary to express their disapproval of the raising of the so-called minority issue"*[207]. On the contrary, criminal proceedings were brought under art. 192 of the GPC against the leaders of *"Ouranio Toxo"* and others for inciting discord. The applicants were acquitted in September 1998[208].

In 2003 the Court of Cassation dismissed the appeal and eventually the ECHR held unanimously that there had been a violation of art. 6, section 1 of the European Convention on Human Rights (right to a fair hearing) on account of the length of proceedings as well as a violation of art. 11 (freedom of assembly and association). It is worthy mentioning that the ECHR judgment explicitly referred to a "*Macedonian*" minority in Greece.

In retrospect, the Sidiropoulos and Ouranio Toxo cases has revealed main weaknesses of justice *stricto sensu* n Greece. In fact, regarding the vast majority of the cases concerning fragile national issues, the Greek judges have often habilitated the role of Foreign Policy and National Defence Ministries proclaiming a more national rhetoric rather than a pure legal reasoning. Thus, it is not solely a problem of administration but also a problem of enforcing law in courtrooms.

3.6. Articles. 19 and 20 GNC in the case of Slav - Macedonians

During the Second World War, following a long period of repression and forced assimilation, some local Slavs were attracted by the force of Bulgarian nationalism while many joined the Communist – led Greek Popular Liberation Army (ELAS). The defeat of ELAS by the monarchist forces in the civil war that followed the German occupation brought a new wave of persecutions since the victors were determined to cleanse the region from anti – national elements. As a result many Slav

[207] GHM, press release dated 30 December 2001
[208] Human Right Case Digest, Vol. 15, no. 1-2, September – October 2005, (pbs.) Martinus Nijhoff

– Macedonian along with their Greek communist comrades left the country as political refugees[209].

The vast majority of these political refugees were deprived of their Greek nationality in accordance with arts. 19 and 20 GNC. The latter gave the authorities the discretion to rescind Greek citizenship from ethnic Greeks who engaged in anti – national acts. Several cases were brought before the Greek Courts involving the reclamation of the Greek citizenship by Slav – Macedonians. For instance, in 1982 the Greek Interior Ministry rejected demand for the recovery of the Greek nationality because the applicant living in Australia was developing *"anti – national activities"* by participating in the organization called *"Skopian Movement"* which had *"autonomistic purposes"*[210].

3.7. Nicholas Stoidis wants to change his name

In 1996 Nicholas Stoidis tried to change his name back to Stojanov, his grandfather's name which was Hellenized in 1913. He claimed, *inter allia*, that the name *Stoidis* and especially its ending *(– idis)* are indicative of a Pontic origin which is not desired given his Bulgaromacedonian origin[211]. Unfortunately for Mr. Stoidis the local Prefect snubbed his demand getting him to resort before the Council of State. Yet, the latter rejected his application stating that "*the issue of the indigenous Bulgaromacedonians has definitely closed with the Treaty of Neuilly in 1919"*[212].

4. European integration on minority issues

Since the beginning of 1990's the determination of the Greek political elites across the major political parties towards the intensification of Europeanization process marked an evident shift regarding the official minority policies. Several specialists on minorities in Greece, such as Anagnostou and Tsitselikis, have stressed

[209] *Supra* no. 79
[210] Council of State, decision 4345/1983
[211] Council of State, Judgment of 3/2/1998. During the trial Stoidis was supported by reporters of Eleftherotipia, Ios tis Kiriakis, www.e-grammes.gr/2001/08/stoidis.htm
[212] *Ibid*

and explored the political modification regarding the transposition of EU norms in variable ways and degrees in domestic minority policies. Nevertheless, one could easily detect their reluctance in identifying a real impact of EU policies on the domestic normative level.

In principle, there is no clear legal obligation for member states of the EU on minority protection. In Greece, except of a package of two educational programmes concerning the Muslim minority in Thrace and the Roma population all around the country there is no other direct impact of the so – called Europeanization process.

Even so, several positive steps should be regarded as the outcome of the broader changes brought by the alignment of Greece general policies, economy and law, with the EU standards. Besides, international criticism and in particular the clear disapproval of EU institutions concerning certain biased minority practises have played a catalytic role in the lifting of discriminatory administrative measures and legislations, such as the art. 19 GNC, the restriction zone in the northern borderline of Thrace and all the restrictive measures imposed on the Muslim minority until the early 90's. Likewise, the gradual disengagement from the principle of reciprocity, as the case of Muslim religious foundations has shown, is also coherent within the same frame. In this direction the contribution of a growing activism of European level institutions and NGO's was critical, as well as the elaboration of human rights principles in relation to minority protection and citizenship.

More than the EU policies and law itself the application of the ECHR, has a more direct relevance to minority issue in Greece. As Tsitelikis asserts the decisions of the Court have quite often a symbolic importance, with no real impact on the minorities themselves, but with real implications for Greece on the international level[213]. In effect, the ECHR brought an important impact on safeguarding minority

[213] *Supra* no. 170

rights and in consequence it has attracted the interest of individuals belonging to minority groups in Greece[214].

The ECHR disposes a supra national jurisdictional authority that creates an obligation for the states to comply with the supremacy of international and European law within their legal order. This impact on the national legal order in view to align the latter with the ECHR could have important consequences for the minority but only through the specific circumstances connected to the allegations brought before the Court. In fact, although the ECHR may display some power regarding the abolition of legislations contradicting the European norms, it has no power in dictating broader legal reforms or imposing policies to the states. Rather, it offers two possibilities, the internationalization of a complaint and the legal satisfaction for the violation of a right[215].Thus, the ECHR is incompetent to oblige Greece to recognize a national Slav – Macedonian minority. Nevertheless, the Court is competent following the relevant application to put Greece on trial for violating the particular right to the free use of minority language.

Regardless of the weakness of EU to impose minority policies within the realm of member states, EU norms and institutions, try largely to safeguard individual rights and prevent discriminative practises on the ground of ethnic or religious characteristics[216]. In doing so they arguably challenge traditional notions of nationhood and citizenship premised upon cultural belonging to a community and promote a more inclusive conception of national membership[217]. Reactively nationalistic reflexes are actuated in order to impede the proliferation of such

[214] The cases concerning minorities and being adjudicated by the Court can be classified in two distinct categories, those pertaining to religious freedom (legal position of Muslims, Jews and Catholics) and national minorities (implying lateral aspects to the recognition of the existence of a Turkish and a Slav – Macedonian minority).

[215] K. Tsitselikis, *Minority Mobilization in Greece and Litigation in Strasbourg,* International Journal on Minority and Group Rights, Vol. 15, 2008

[216] *Supra* no. 108

[217] Y. N. Soysal, *Limits of Citizenship - Migrants and Postnational Membership in Europe,* Chicago: The University of Chicago Press, 1994

"universal" or "European" norms, especially in nation states where the history and development of state institutions and laws has systematically privileged the national unity at expense of individual rights and minorities[218].

Exploring the history of art. 19 GNC, Dia Anagnostou has illustrated that Greece is such a case too. The abrogation of art. 19 GNC obtains a dual translation. The first, as discussed above, is related to the supranational level of European institutions and NGO's. This reading connects the abolition of the article to the international pressure put on the government and more specifically to averting the opening of a monitoring procedure against Greece by the Council of Europe. The second communitarian reading suggests that the Greek Parliament abolished the article in issue due to specific national reasons attached to the Greek diplomacy towards Turkey at that time, namely to deprive Turkey, the minority and other European states of another reason to criticise Greece for discriminatory treatment of minorities.

Anagnostou cites some indicative statements made by MP's during the discussion in the Parliament. For instance, Mr. Prokopis Pavlopoulos[219] from the right – wing party New Democracy, emphatically stated that the abrogation must not be seen as an act of regret for a mistaken policy of the past. Instead, he argued art. 19 GNC *"was a right decision of the Greek state, which for the same reasons that it once instituted it, today believes that it should abolish it"*[220] implying that it was national interests vis-à-vis Turkey that render the latter imperative. It is noteworthy that only the left parties advanced a strong argument in favour of abolishing art. 19 GNC on grounds of principle.

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[218] T. Risse, M. G. Cowles and J. Caporaso, *Europeanization and Domestic Change: Introduction* in *Transforming Europe* (eds.) M. G. Cowles, J. Caporaso and T. Risse Ithaca: Cornell University Press, 2001

[219] Prokopis Pavlopoulos was the Interior Minister of Greece between 2004 - 2009

[220] *Supra* no. 108

In retrospect, European integration although it moves towards a positive direction has not yet performed an effective impact on the Greek legal order. In fact, even political decisions that could be regarded as the direct product of international law imperatives bear also strong communitarian reasoning attached to diplomatic manoeuvres and the protection of national interests.

5. Conclusions

The Greek state and the national elites confronted with the existence of ethnic and linguistic minorities within what was perceived as a homogeneous homeland and national culture, have opted for securitizing the minority question. The minorities are perceived to be the voice of the external "other" which justifies and reinforces a vigorous Greek reaction easily detected through laws and jurisprudence. Especially minorities that were actively supported by apparent kin – states were put in sight of the national legislator and the judiciary. In this regard, nationalism plays a kea role in lawmaking and law – enforcing level and drastically effects the perception that the state has of itself.

As regards the legal position of the Muslim in particular, the recognized status of the former, and therefore the obligatory protection of its fundamental minority rights, has shaped the formal Greek policy on the normative level. However, the state has managed to default its international obligations by imposing discriminatory laws and measures grounded on the legal claims of reciprocity and of national security.

As regards the issue of the Slav – Macedonian minority, it has required a slight different official confrontation. The non – recognized status of the minority has practically removed the legal metacentre from the Parliament and the Ministries to the courtrooms. Whereas for the Muslim minority the judiciary applies certain laws legislated and provided for a recognized minority, in the case of Slav – Macedonians, the judges are obliged to correlate the formal national rhetoric with the existing

general laws of the state. As a result, the formal position of Greece, save for the official foreign policy, has been mainly imprinted on court decisions rather than formal legislation.

In terms of European integration, the competitive character of international politics on the one hand and the closer integration with other European countries within the context of the EU on the other, has led to a new classification of the domestic legal order regarding minority issues. However, in spite of the fact that European integration directly or indirectly has actually influenced in some instances the minority issues (Muslim education, abolition of art. 19 GNC and of restrictive measures, religious foundation issue) it has not managed to shape a sincere liberal Greek view on the matter based on the universal notion of Justice and human rights.

In this respect, the different formal treatment of the two minorities under study is indicative for the absence of a sincere liberal and democratic view on the minority question. In fact, the positive steps taken on the normative level vis-à-vis the "vitrine" of minorities in Greece, the Muslim minority of Thrace, remains utopia for the other minority groups and especially the Slav – Macedonian community, which has thereby left with lodging applications before Strasbourg as the only effective means of legal protection.

Besides, one could locate the same lack of a true liberal view by the Greek government on the schizophrenic official treatment of the same Muslim minority. As seen before, on education matters and the new Muslim religious foundation regime the state exercises a somewhat liberal policy, on minority mores and tradition obtains an alleged, as proved, communitarian view while on muftis and associations retains a plain interfering strategy. Rightly someone should wonder which of these very different perspectives on the same matter is actually the honest.

CHAPTER THREE

The role of the Church and religious freedom in Greece

1. State and Orthodoxy in Greece

The position of the Greek Church within the modern legal structure of Greece is the offspring of concrete historical resultants lying upon the predominant role of Orthodoxy during the Ottoman occupation, the Greek revolution and the establishment of the newborn Hellenic Republic. As Tsatsos holds the Greek Orthodox Church has performed the fundamental ideological abutment for the development of a Greek civil regime[221].

However, the most sophisticated analysis comes from Manoledakis who regards the church – state relation as the deliberate outcome of a conscious official policy. According to Manoledakis, the "societal authority", including the hierarchically streamlined Orthodox Church, enforces upon society its social morality using means of ideological, psychological or even corporeal violence; using the same means upon the same subject, i.e. society, the state imposes its Law. In consequence, the latter (state) has managed to exploit the former (Church) by utilizing it as a rigorous ideological mechanism of social compulsion in order to accommodate its totalitarian mastery upon society[222]. Similarly to Manoledakis, Orfanoudakis asserts that the Greek Church reliant on its political and social dynamic supplicates the state requesting economic, legal and administrative benefits. In return, the state enjoys the right to intervene in Church's administration by providing for its basic legal characteristics[223]. Drawing from the other two, Mavrogordatos has illustrated that

[221] D. Tsatsos, *Sintagmatiko Dikaio* [Constitutional Law], Vol. 2, Ant. Sakkoulas, Athens – Komotini, 1993

[222] I. Manoledakis, *Oi sheseis Eklissias kai Politias apo ti skopia tis filosofias tou Dikaiou* [Church – State relations from the aspect of Philosophy of Law], Dikaio kai Politeia vol. 15, 1988

[223] S. K. Orfanoudakis, *O Horismos Kratous – Ekklisias* [the State – Church separation], in *Sheseis Kratous Ekklisias en opsei tis Anatheorisis tou Simtagmatos,* Etairia Nomikon Voreiou Elladas, Sakkoulas, Athens – Thessaloniki, 2008

over the centuries there is not a single issue on which the Church has absolutely refused to compromise with the state, except one: their separation. Only in such an eventuality, when the Church would have nothing to lose, would it risk a total break with the state. Otherwise, the religious hierarchy has been apparently willing to compromise on practically everything[224].

In point of fact, church–state relations have been secure, as Church and state mutually support each other. The Church has expected from the state protection, through the Constitution and other legal and financial means, just as the state has depended on the church as a homogenising and unifying force which provides a greater degree of social control, especially in moments of crisis[225]. As a result, the Church has become a national institution safeguarding national identity and sovereignty in the social sphere while the state has always sought to protect the state Church as a matter of self – preservation. Thus, the legal position of the Autocephalous Orthodox Church should be actually perceived more as a state requital for its influence upon the Greek electorate and society rather than an end of ideological imperatives.

Numerous examples justify this point of view starting from the establishment of the Greek Orthodox Church in 1833 until the recent re – emergence of the "Macedonian" question. The secession from the Ecumenical Patriarchate[226], the

[224] G. Maurogordatos, *Orthodoxy and Nationalism in the Greek Case* in *Church and State in Contemporary Europe: The Chimera of Neutrality,* (eds.) J. T.S. Madeley, Z. Enyedi, Routledge, 2003

[225] N. Kokosalakis, *Orthodoxie grecque, modernite´ et politique* in *Identite´s religieuses en Europe,* (eds.) G. Davie & D. Hervieu-Leger, Paris: La De´couverte, 1996, in *Identity Crisis: Greece, Orthodoxy, and the European Union,* L. Molokotos – Liederman, Journal of Contemporary Religion, Vol. 18, no. 3, 2003

[226] Severing ties with the Patriarchate was considered necessary in order to preclude the possibility of the Ottoman Government might influence Greek Politics through the Orthodox Patriarchy. The independence was eventually accepted by the Patriarchate in 1850.

Although the Greek Church became independent from the Patriarchate, it turned into a department of State under the Ministry of Education and Religious Affairs and the Holy Synod (a non-elected body of government appointees to the Greek Church) with King Otto as the head of the Church; he had complete authority to intervene in religious affairs and approve the election of bishops. The subordination of the new autocephalous church to a Bavarian Catholic did not represent an anomaly with respect to the Ottoman past, since it perpetuated church subordination to the secular ruler. See also

mutual fight against the communists during the Greek Civil War, the active role of ecclesiastical agents on the "Macedonian" debate in early 1990's and their current actual "disarmament", following concrete governmental advices, are few examples that have portrayed the leading role of the state in its peculiar waltz with the Church.

Besides, Orthodoxy stands as one of the major agents for the Greek diplomacy. The majority of Orthodox institutions around the world such as the Orthodox Archdiocese in US and the Patriarchate in Jerusalem are still ruled by Greek – descent hierarchs while the Greek Ministry of Foreign Affairs sustains an entire diplomatic department for safeguarding this favourable status quo and promoting the Greek interests through religious channels. Under this perspective the presence of President Obama next to the Orthodox Archbishop of America, Demetrius, during the Greek celebrations for the Greek Independence on March 2009 was perceived back in "motherland" as a meaningful diplomatic success.

The direct product of the State – Church affiliation is the exclusive benefits and strong visibility of Orthodoxy in many aspects of Greek public life, rites of passage, national celebrations, and government[227]. Furthermore, as a powerful agent of socialization, Orthodoxy has come to play an essential role in national education. To a large extent the advantageous position of the Church is grounded on the Greek Constitution and especially on the article 3 that proclaims Orthodoxy as the "prevailing" religion in Greece and sets the basic features for its legal status.

In contrast, the identification of the Orthodox Church with the state stands inevitably at expense of religious freedom and the other denominations in Greece. The key deficits of the legal regime on religions lie upon the interpretation of the

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C. Papastathis, *La Republique hellenique,* in *Les Origines Historiques du Statut des Confessions Religieuses dans les Pays de l'Union Europeenne,* (eds.) B. Basdevant-Gaudemet, & F. Messner, Paris: Presses Universitaires de France, 1999, see also G. Maurogordatos, *Orthodoxy and Nationalisn in the Greek Case* in *Church and State in Contemporary Europe: The Chimera of Neutrality* (ed.) J. T.S. Madeley, Z. Enyedi, Routledge, 2003

[227] L. Molokotos – Liederman, *Identity Crisis: Greece, Orthodoxy, and the European Union* Journal of Contemporary Religion, Vol. 18, no. 3, 2003

constitutional art. 3 and art. 13 and their particularization through state laws. Indicatively the bureaucratic procedures for building a religious edifice or the offence of "proselytism" which has resulted in repeated convictions of Greece before the ECHR are examples being in need of further examination. In addition, this study derives useful connotations from the legal discourse initiated in view of the 2001 constitutional amendments concerning the major issue of the state – church separation. Prominent legal scholars, such as Alivizatos, Nikolopoulos, Orfanoudakis, Poulis, Kosmidis and Eleftheriadis have adduced their thoughts on the matter, pinpointing the shortfalls of the legal environment in force.

2. The constitutional order and its implications

Theoretically the Greek Orthodox Church, as an organized community based on specific faith, should not necessarily constitute a separate subject – matter for the Constitution. The constitutional Legislator could simply locate the function of the Autocephalous Orthodox Church within the provisions of art. 13 (freedom of religious conscience and practise) as well as within art. 12 (right to form not profit associations and unions)[228]. However, the concrete reference of Church's legal position through the provisions of the art. 3 of the Constitution has been dictated by actual historical and political reasons noted before. Together with the art. 3 the very same reasons seem to have set the preamble of the Constitution as well.

2.1. The state - church model in Greece

The regime that governs the state – church relation is the rule of law *(Nomo Kratousis Politeias),* which in this case bears two basic characteristics: 1) the exhaustive legislative adjustment of the state – church relations through lawmaking in the sense that the relation under study is chiefly a legal association constitutionally standardized. Therefore, it is nothing but the state that sets the principal rules through

[228] *Supra* no. 221

the Parliament and preserves the discretional power to delegate partial competence to the Church in certain matters[229] and, 2) the state preserves the right to intervene in the organization and running of the Church[230]. In practice, the Greek Orthodox Church is a self – administered legal entity regulated by state law regardless of the relative provisions located in canonical statutes. Given the aforementioned two features, one could logically assert that in terms of the various models of church – state relations, Greece is a clear cut case of *formal establishment*[231].

Furthermore, the state - church relations fall into the acceptation of the "typical" Constitution which, in contradiction to the "substantial" Constitution, includes provisions not related to the effectual establishment and the exercise of the system of the government[232]. Consequently, art. 3 of the Constitution regulating the status of the Church does not constitute a fundamental principle for the democratic polity and therefore it is subject to revision[233].

Finally, the interpretation of the constitutional provisions regarding the legal status of the Autocephalous Orthodox Church of Greece, namely art. 3, takes place under the wider spectrum of the constitutional arts. 13, 16, 33 and 59 par. 1. Very broadly, art. 13 provides for the freedom of religious conscience and practise, the prohibition of proselytism (without however a preferential treatment for the

[229] E. Venizelos, *Simeia Ermineutikis Trivis sti Sintagmatiki Diarrithminsi ton Sheseon Kratous – Ekklisias* [Points of Interpretive Frictions in the Constitutional Arrangement of State – Church Relations], Dikaio kai Politiki, 1988

[230] *Supra* no. 221

[231] The formal establishment involves two other religious minorities as well: the Muslims of Thrace, whose muftis are appointed by the Greek state alike civil servants, and Jews whose communities and central council are established and regulated by state law. All other faiths are treated as private associations except for the Catholic Church the status of which as a legal person has been disputed until recently in *Orthodoxy and Nationalism in the Greek Case* G. Maurogordatos in *Church and State in Contemporary Europe The Chimera of Neutrality* (ed.) J. T.S. Madeley, Z. Enyedi, Routledge, 2003

[232] This is not the case however for art. 105 regarding the administration of Mount Athos. A. Manitakis, *Elliniko Sintagmatiko Dikaio* [Greek Constitutional Law], Sakkoulas, Athens – Thessaloniki, 2004

[233] In the wake of the debate around the state – church separation a theoretical dispute took place whether the suppositional separation could be enforced by a typical parliamentarian bill or only through the procedure of constitutional amendment, see also A. Manitakis, *Elliniko Sintagmatiko Dikaio* [Greek Constitutional Law], Athens – Thessaloniki, 2004

"prevailing" religion in Greece) and the equal treatment of the ministers of all known religions in Greece. In fact, art. 13 guarantees the full and complete enjoyment of religious freedom. Art. 16 provides for "the development of national and religious consciousness" through education while arts. 33 par 2 and 59 par. 1 regulate the oath of the President of the Republic and of the Members of the Parliament "in the name of the Holy and consubstantial and Indivisible Trinity"[234].

2.2. The preamble

All the Greek constitutions except from the one of 1927 have been declared in the name of the Holy Trinity. As Adamantios Korais has pointed, the above invocation has been actually emanated from the manner of European sovereigns to add this phrase in preambles of international treaties[235]. Following a similar reasoning, Tsatsos asserts that the preamble should be considered as a monarchic remnant given the faint legitimization of the palatine institution in Greece along with the efforts of the king to exhibit a supernatural emanation for his, whatsoever unjustified, powers. Nonetheless, the preservation of the preamble in the current Constitution seems to have more visible motives. The conservative leading right – wing political elites at the time had no reason to seek an aimless tension with the Greek Church, especially in moments of national crisis when the state was in a desperate need of an Orthodox – nationalistic rhetoric against the emerging Turkish threat.

As regards the implications of the preamble, it has widely accepted by legal theory that the declaration of the Constitution in the name of the Holy Trinity forfeits any legal effect both in applicative and interpretive level. It is also noted that the preamble does not constitute part of the Constitution nor operates as a normative

[234] However, art. 59 par. 2 postulates that MP's who are of a different religion or creed shall take the same oath according to the form of their own religion or creed.

[235] *Supra* no. 221

preamble like the functional preambles introduced in other western Constitutions. Finally, it is noteworthy that the Greek Constitution establishes an ideologically neutral legal order according to arts. 1 par. 3 (democratic principle), art. 2 par. 1 (respect and protection of the value of the human being), art. 4 par. 1 (principle of equality) and art. 13 par. 1 (freedom of religion)[236]. Hence, the existence of the preamble is perceivable only through its historical resultants and not through its legal functionality.

2.3. The "prevailing religion" and the legal personality of the Church

In compliance with the 1975 Constitution and following a shady period on state - church relation between 1967 and 1974, during the military dictatorship, the Church has become more independent under a revised administrative system that has limited the restrictive way in which the state could regulate Church affairs[237]. In general the Autocephalous Church of Greece is now administered jointly by the Holy Synod, consisting of functioning bishops, and the Resident or Permanent Holy Synod, which conducts the executive affairs[238]. To this day, the Ministry of Education and Religious Affairs pays the salaries of priests and approves the enthronement of bishops and the licensing of all church buildings for all religious denominations[239], that is, exemptions based on the highly controversial concept of the "prevailing religion" introduced in the provisions of the third article of the Constitution[240].

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[236] *Ibid*

[237] C. Papastathis, *La Republique hellenique* in *Les Origines Historiques du Statut des Confessions Religieuses dans les Pays de l'Union Europe´enne,* (eds.) B. Basdevant-Gaudemet, & F. Messner, Paris: Presses Universitaires de France, 1999

[238] Council of State, decision no 545/1978 and 546/1978

[239] C. Papastathis, *State and Church in Greece* in *State and Church in the European Union, (*ed.) G. Robbers, Baden-Baden, Germany: Nomos, Verlagsgesellschaft, 1996, and T. Stavrou, *The Orthodox Church and Political Culture in Modern Greece*, Baltimore, MD: Johns Hopkins U. P., 1995

[240] The concept of the "prevailing religion" constituted the opening provision (art. 1) of all previous Constitutions between 1844 and 1952. K. Chrysogonos, *Atomika kai Koinonika Dikaiomata* [Individual and Social Rights], 2nd edition, Sakkoulas, Athens – Komotini, 2002

To start with the analysis of art. 3[241], it should be mentioned that there are more than one Orthodox churches in Greece and all are governed by a different legal regime. Specifically the Constitution provides for the status of the Autocephalous Orthodox Church of Greece (art. 3 par. 1), the Orthodox Church of Crete (art. 3, par. 2), the canonical regime of the Patriarchal Boroughs of Dodecanese (art. 3, par 2) and the legal status of Athos Peninsula extending beyond Megali Vigla and constituting the region of Aghion Oros (art. 105)[242].

As regards the legal status of the Autocephalous Orthodox Church, it has been grounded on a pure majoritarian – communitarian reasoning. The notion of the "prevailing religion" is an ascertainment of the fact that the denomination of Orthodoxy is followed by the majority of the Greek population. The fact that almost 97% of Greek citizens are Orthodox Christians is the material underpinning of every argument justifying the special position of Orthodox Church as the prevailing religion in the land according to the wording of the Constitution. The general advocate of the parliamentarian majority during the constitutional revisory proceedings of 1975 explicitly argued that the term "prevailing" signifies that the Orthodox faith was followed by the vast majority of the Greek citizens, according to which national celebrations and holidays are defined. *"Therefore"* as he asserted *"a special*

[241] Art. 3: *1. The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928.*

2. The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph.

3. The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited.

[242] The Dodecanese annexed by Greece in 1947, remains under the jurisdiction of the Patriarchate together with the autonomous Church of Greece. A lingering dispute involves the other "New Lands" annexed by Greece after the Balkan Wars over which the Patriarchate claims to retain purely "spiritual" authority. Nevertheless in all cases the Minister of Religious Affairs preserves a partial authority in the selection of the bishops.

solicitude for Orthodoxy on behalf of the state is lawful and permissible"[243]. Similar, but not identical, is the stance of Venizelos, the architect of the last constitutional amendment (2001), who pointed that the term "prevailing" is just a *"required honour"* to Orthodoxy due to her historical bonds with the Greek polity and its confluence in the formation of the modern Greek culture[244].

Nevertheless, several specialists on the constitutional law, among them Tsatsos and Alivizatos, have proposed the term "official" instead of "prevailing" which, according to them, describes in a more efficient way the current legal framework of the state – church relations. Drawing from their argumentation, the term "prevailing" bears the danger to be falsified as the constitutional will of the state for backing, along with the institution of the Orthodox Church itself, the flock of this particular faith at the expense of the followers of other denominations.

The lack of an explicit clarification over the term "prevailing" has resulted in several legal paradoxes. For example, the Court of First Instance of Athens, interpreting arbitrarily the constitutional provisions, prohibited the screening of Martin Scorsese' movie "The Last Temptation" on the grounds of the controversial assertion that Orthodoxy constitutes foundation of the Greek Republic[245]. In 2006, in order to avoid this kind of arbitrary interpretations over art. 3 of the Constitution, the socialist party (PASOK) in view of a new constitutional amendment (2010) proposed the introduction of a declaratory statement concerning the term "prevailing" that would have clarified the church and state's discrete roles. More radically the Communist Party (KKE) followed by the other parliamentarian leftish party (SIRIZA) suggested the total abolition of art. 3. Yet, the governmental right – wing party, New Democracy, rejected the propositions of the opposition evoking two basic arguments:

[243] K. Chrysogonos, *Atomika kai Koinonika Dikaiomata,* [Individual and Social Rights], 2nd edition, Sakkoulas, Athens – Komotini, 2002

[244] E. Venizelos, *Oi Sheseis Kratous – Ekklisias* [The State – Church relations], Paratiritis, 2000

[245] Court of First Instance of Athens, decision 17115/1988

a) the longstanding constitutional tradition and b) the assertion that the term "prevailing" depicts a declared majoritarian adherence to a particular religion[246].

Theoretically, the constitution of the Autocephalous Orthodox Churh as the "prevailing" religion according to art. 3 of the Constitution, does not imply any limitation on religious freedom for the followers of the other denominations in the country[247]. As noted before, and has been widely recognized, the Greek Constitution establishes an ideologically and thus religiously neutral polity while several privileges granted to the Church refer to the Church as an institution and in no way to its adherents[248]. Besides, the Council of State has considered art. 3 as not suggestive of the prevalence of the Orthodox faith over the other denominations and their adherents (judgment 2281/2001)[249].

Even so, as regards the body of the Autocephalous Orthodox Church of Greece, the designation as "prevailing" has produced several normative implications, principally as the direct product of Church's definition as a body corporate under public law (law no 590/1977, art. 1 par. 4). The effects of this regulation move towards two diverse directions: First, the institution of the Church as a body corporate under public law is *par excellance* establishment of its subordination to the state[250]. Indicatively, the enthronement of archbishops and bishops requires government ratification with presidential degrees (law 590/1977 art. 15 par. 6 and par. 26). In

[246] *Supra* no. 223

[247] V. Karakostas, *To Sintagma, ermineutika sholia nomologia* [The Constitution, declaratory remarks and jurisprudence], Sakkoulas, Athens - Komotini, 2006

[248] C. Papastathis, *Sheseis Ekklisias kai Politeias kata to Sintagma tou 1975* [Church – State relations according to the 1975 Constitution], Dikaio kai Politiki, vol. 15, 1988 and D. Tsatsos, *Dio Gnomdotika Simeiomata gia ti shesi Ekklisias – Kratous kai gia ti Thriskeutiki Eleutheria* [Two Consultatory Responses for the Church – State relations and Religious Freedom], Dikaio kai Politiki, Vol. 15, 1988

[249] N. Saripopoulos, *Sistima Sintagmatikou Dikaiou* [Constitutional Law Regime],1923, in *Atomika kai Koinonika Dikaiomata* [Individual and Social Rights], K. Chrysogonos, 2nd edition, Sakkoulas, Athens – Komotini, 2002 and D. Tsatsos *Sintagmatiko Dikaio* [Constitutional Law], Vol. 2, Ant. Sakkoulas, Athens – Komotini, 1993

[250] P. Nikolopoulos, *Horismos Kratous Eklissias* [State – Church separation], Sakkoulas, Athens – Komotini, 2006

addition, establishing new orthodox parishes requires consultative response issued by the local town council and the local bishop (law 590/1977 art. 36 par. 1 and par. 2).

Second, the legal personality of the Orthodox Church permits the payment of wages of the clergy from the revenues of the state budget[251] along with the compensation of a "productivity" bonus instituted for civil servants[252]. Furthermore, the establishment of the Church as a body corporate under public law authorizes the supreme administrative capitulary, i.e. the Holy Synod, with obiter legislative competence. In particular, the Holy Synod is vested the power to issue formally promulgated normative acts regarding offences committed by the clergy[253]. Hence, provided that these acts have the statutory effect of state law (law 590/1977 art. 1 par. 2), the public courts are obliged to apply along with the general law of Greece, the canonical acts regulated by the Church. For instance, the Council of State rejected a petition that was turned against administrative act denying the renewal of licence for carrying a weapon to a cleric, on the grounds that the canonical penal code prohibits the exercise of violence by a cleric even when the cleric stands in self - defence[254].

Similar enactments have privileged the Church with partial tax exemptions that permitted the assessment of local exceptional levies for the construction of an orthodox church collected through electricity bills and imposed on all consumers of a municipality regardless of their religious beliefs[255]. However, both enactments have

[251] The issue of the payroll of the clergy has been also perceived as a matter of financial dealing between the state and the church in the sense that the latter had yielded once immovable property to the former obtaining in return the abovementioned privilege. P. Nikolopoulos, *Horismos Kratous Eklissias* [State – Church separation], Sakkoulas, Athens – Komotini, 2006

[252] *Supra* no. 224

[253] G. Poulis, *Ta sintagmatika plaisia ton Sheseon Kratous kai Ekklisias* [The Constitutional frame of State – Church relations], Armenopoulos, Vol. 36, 1982, in *Skepseis gia tis sheseis Kratous kai Ekklisias stin Ellada,* C. Kosmidis, Etairia Nomikon Voreiou Elladas, Sakkoulas, Athens – Thessaloniki, 2008

[254] State of Council, decision 2569/1991

[255] *Supra* no. 243

been found unconstitutional by the Greek courts on the grounds that both violate the religious equality established in art. 13 of the Constitution[256].

Eventually, at a more symbolic level, religious symbols (icons) are permitted and often displayed in government buildings and courtrooms, just as clergy are invited to give their blessings in the military, in prisons, and during national civil celebrations and parades, as well as during presidential and government inaugurations when state officials take a religious oath. However, as regards the latter, a positive step has been taken by Stathopoulos during his incumbency in the Ministry of Justice, who passed law 2915/2001 (art. 14 par. 7) legislating the civil oath as an alternative of the religious one [257] during the civil procedure before the Greek courts.

2.4. Constructing a religious building in Greece

Apart from its obiter normative authority the Church has also been vested with administrative powers related to the constructing of religious edifices. According to Mavrogordatos the construction of any religious building "*requires"* the permission of the local Orthodox bishop[258]. The legal verity is however slightly different. In particular, the relevant regulation (art. 1 of the obligatory law 1672/1939), dated back to Metaxas' dictatorship, provides for the erection of religious buildings which, regardless of the denomination, requires permission by the local town – planning authorities, the competent ecclesiastical authority, i.e. the bishop, and the Minister of Education and Religious Affairs.

Besides in accordance with the parliamentary degree dated in 2/6/1939 whether the construction concerns religious building of a heterodox, i.e. non – orthodox, denomination, the relative permission requires the gathering of signatures

[256] As regards the tax exemption, Court of First Instance of Thessaloniki, decision 1064/1998 which declared that the tax exemptions should refer to all known denomination in Greece in accordance with art. 13 of the Constitution, as regards the exceptional levies, Council of State decision 4045/1983

[257] *Supra* no. 250

[258] *Supra* no. 224

and an application lodged before the local ecclesiastical authority by, at least, fifty families[259]. Yet, the Minister of Religious Affairs preserves the right not to grant the permission if he decides that there is no concrete reason necessitating the construction of the heterodox edifice.

The legal regime regarding the construction of religious buildings is unconstitutional beyond any doubt[260]. First, the intercession of ecclesiastical authorities in constructing heterodox religious buildings violates art. 3 par. 1 of the Constitution as well as the fundamental principle of religious equality. Second, the prerequisite of collecting signatures in order to lodge the relevant application violates art. 13 par. 1, since it enjoins individuals to reveal their religious beliefs. Third, the permission granted by the Minister of Religious Affair *per se* is unconstitutional so long as it relates the free practice of religion to the will of a statesman. The excuse that the regime in issue was put in force in order to prevent proselytism is debunked by the fact that the offence of proselytism does not turn solely against the "prevailing religion" but it refers to all denominations without exception. Hence, the treatment of heterodox denomination of other religion is legally unacceptable.

Moreover, the Greek courts, have failed to guarantee the freedom of religious practice in the relevant jurisprudence. In an attempt to compromise religious isonomy with the enforcement of obligatory law 1672/1939, the Council of State has degraded the permission of the ecclesiastical authority to the status of a non binding preparatory act which does not confine the final decision of the Minister of Religious Affairs[261]. Thus, the consent of the local Bishop is not *required,* as Mavrogordatos asserts, but it constitutes an element regarding the admissibility of the application. However, even if the Bishop's judgment is non binding, heterodox flocks they are still obliged to lodge

[259] In reality the application should be signed by at least fifty "leaders" of families, i.e. the husbands

[260] P. Dagtoglou, *Atomika Dikaiomata* [Individual Right], Vol. 1, Athens – Komotini, Sakkoulas, 1991

[261] Council of State, decision 1444/1991

application before the Orthodox authorities. Besides, the Council of State has ruled that even the Minister's permission is nothing but an assertive act affirming that the applicant heterodox denomination is a "known religion"[262], does not derogate the public morals and public order nor engages proselytism[263]. Even so, as discussed above, both the Bishop's non - binding preparatory act and the ministerial permission should be considered unconstitutional and thus illegal.

In reality the aforementioned legal regime has produced discriminatory effects against non – orthodox religions. Despite pressures from Arab countries and the presence of many Muslims (both immigrants and internal migrants), there is no official mosque operating in Attica, nor anywhere else in Greece, except Thrace, where the native Muslim population enjoys minority status through the Lausanne Treaty. Besides, even the internal migrants from Thrace are living in Attica, are deprived of religious services since the appointed Muftis of Thrace do not have jurisdiction outside their area. Moreover, Muslim cemeteries operate only in Thrace. On the contrary, it should be mentioned that the Church reserves for its part the right to issue building permits for its own churches and chapels without factual interference by the civil authorities. Abuses have involved even the construction of villas beside chapels, in gross violation of general regulations[264].

In addition, the legal regime of the construction of religious building is related to law 2200/1940 (art. 6) according to which, whereas a private chapel serving personal religious needs is disposed for public worship, shall be shut down by the police following concrete orders by the local Bishop or shall be expropriated in favour of the local orthodox parish. Furthermore, the Council of State ruled that the

[262] The Council of State has judged that the "known" religion shall bear two basic notional features: a) its religious teaching shall be instructed in public, thus not to be apocryphal and b) its religious practise shall be manifest and evident and not mystique (decisions 995/1970 and 2105-2105/1976)

[263] Council of State, decision 4636/1977

[264] *Supra* no. 224

expropriation of private chapels is legitimate even in cases where the owner of the chapel is an Orthodox Christian but conveys his chapel to another non – orthodox person. The reasoning of the Court was grounded on the will of the state "*to retain the chapel under the Orthodox denomination"*[265]. Hence, law 2200/1940 not only upgrades the Church to *predominant* religion conducting administrative acts (in contradiction to art. 3 and art. 13 of the Constitution), but also put the police authorities under the bishop's competence[266].

To sum up, one may perceive the beneficial position of the Orthodox Church on the matter as an ideological footprint proving the impact of nationalism in lawmaking. This might have been the case back in 1939 and 1940 when the aforementioned laws were passed. However, now it should be considered as a clear state effort to renounce its responsibilities on the matter. In fact it is not a matter of nationalism but a matter of a purposeful utilization of nationalism by the state, or, more plainly, it is just politics; politics animated by a strong illiberal communitarian view that eventually stand at expense of fairness.

2.5. The disposal of the dead

The regulation of matters concerning civil burials and cremations falls into the exclusive competence of the state which theoretically has to respect the will of individuals and provide them the freedom to choose on their disposal. Even so, the Church still obtains a virtual monopoly of the disposal of the dead, as most burials are religious, although civil burials are permitted by law.

Specifically, with reference to cremations, the latter were still against the law in Greece until 2006, when art. 35 of law 3448/2006 decreed the possibility of cremation as an option but only for non – orthodox persons. In fact, the 2006 enactment permits the cremation of the person whose religious beliefs allows

[265] Council of State, decision 904/1997
[266] *Supra* no. 243

cremation. Moreover it determines the procedure and assigns the government to establish crematoriums in the country. Yet, the context of the article does not include the vast majority of the Greek population by confining its application only upon the adherents of a small number of religions and thus it still preserves practically the monopoly of the Church.

2.6. The criminal offence of proselytism

The prohibition of proselytism is ruled in the last section of par. 2 art. 13 of the Constitution[267] that establishes the freedom of worship of all "known" religions[268] providing however some limitations to this freedom[269]. Here it is worth noting the changes occurred in the wording of art. 13 in relation to the previous constitutional articles on the matter: All the constitutions since 1844, except the 1927 Constitution, prohibited proselytism only against the prevailing religion[270], while the current art. 13 does not provide for any preferential treatment of the Orthodox Church.

The Constitution does not define proselytism leaving a reasonable doubt about the intents of the Law. Besides the constitutional Legislator does not establish the

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[267] Art. 13: *1. Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs.*
2. All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited.
3. The ministers of all known religions shall be subject to the same supervision by the State and to the same obligations toward it as those of the prevailing religion.
4. No person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions.
5. No oath shall be imposed or administered except as specified by law and in the form determined by law.

[268] The Council of State has judged that the "known" religion shall bear two basic notional features: a) its religious teaching shall be instructed in public, thus not to be apocryphal and b) its religious practise shall be manifest and evident and not mystique. Council of State, decisions 995/1970 and 2105-2105/1976

[269] Proselytism should not considered consistent with other constraints imposed by virtue of the same article on religious liberties such as the prerequisite of *known religion* or the compliance of religious practise with *public order* or *good usages* (par. 2), in the sense that the latter introduce features regarding the impersonal general frame of religious organization and practise whereas proselytism refers to a specific punishable behaviour of a particular person. G. Poulis, *I Ishis ton Kanonon tis Ekklisias kai o prosilitismos en opsei tis Sintagmatikis Anatheorisis* [The validity of Canon Law and Proselytism in view of the Constitutional Amendment], in *Sheseis Kratous Ekklisias en opsei tis Anatheorisis tou Simtagmatos,* Etairia Nomikon Voreiou Elladas, Sakkoulas, Athens – Thessaloniki, 2008

[270] K. Kiriazopoulos, *Proselytization in Greece: Criminal Offence vs. Religious Persuasion and Equality,* Journal of Law and Religion, Vol. XX, 2005

criminal offence of proselytism nor does it commit the Parliament to decree such an offence[271]. Nevertheless, during the dictatorship of Metaxas, proselytism was made a criminal offence for the first time according to section 4 of obligatory law 1363/1938 that has been described by the legal theory as the worst token of legislative bungling throughout the entire Greek legal system[272].

According to the aforementioned obligatory law as amended by law 1672/1939:

> *By proselytism is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of the other person's inexperience, trust, need, low intellect or naivete. The commission of such an offence in a school or other educational establishment or philanthropic institution shall constitute a particularly aggravating circumstance*[273].

Apart from specialized legal comments on the nature of the above provision – involving for instance the designation of the offence as "attempt" and thus the combinational application of the relevant articles of the GPC (art. 42 par. 1) – even a freshman of law can spot and analyze the obvious vagueness of this article. The direct or indirect attempt of intrusion on the religious conscience of an heterodox in order to change its content is tantamount to the exercise of the freedom to promulgate a

[271] *Supra* no. 243

[272] G. Poulis, *I Ishis ton Kanonon tis Ekklisias kai o prosilitismos en opsei tis Sintagmatikis Anatheorisis,* [The validity of Canon Law and Proselytism in view of the Constitutional Amendment], in *Sheseis Kratous Ekklisias en opsei tis Anatheorisis tou Simtagmatos,* Etairia Nomikon Voreiou Elladas, Sakkoulas, Athens – Thessaloniki, 2008

[273] The translation was derived from K. Kiriazopoulos, *Proselytization in Greece: Criminal Offence vs. Religious Persuasion and Equality,* Journal of Law and Religion, Vol. XX, 2005

religion or belief. The problem, therefore, lies in the evaluative concepts by which the means for the commission of proselytism are conveyed. Unspecialized references on the acts that constitute the objective hypostasis of the crime such as "*any kind of inducement or promise of an inducement"* and *"fraudulent means"* have led to arbitrary interpretations and to an extreme broadening of the punishable acts[274]. Besides until now no law has particularized the concepts of the provision under study.

The unclear framework of the law has led to several tragicomic unconstitutional court decisions. For instance, the Thrace Court of Appeal judged in 1991 that the presence of a mother with their children inside a religious (not orthodox) resort fells into the provisions of proselytism[275]. In the same respect, civil courts have held that persons who sent to Orthodox priests booklets with the recommendation that they should study them and apply their content or offered scholarship for studying abroad were guilty of proselytism[276]. In other cases a) preaching that *"these are all those who do not embrace my faith"* while displaying a painting showing a crowd of wretched people in rags[277], b) distributing *"so-called religious"* books and booklets free to *"illiterate peasants"* or to *"young schoolchildren"*[278] or c) promising a young seamstress an improved position if she left the Orthodox Church, whose priests were alleged to be *"exploiters of society"*[279] were considered by the courts as acts of proselytism. Not surprisingly, the common characteristic of all verdicts on the matter refer to proselytism solely against Christian orthodox believers, in spite of the fact

[274] In the case *Larissis vs. Greece case*, the Permanent Air Force Tribunal rejected an assertion raised by the defence a to the unconstitutionality of the law of proselytism. The court found that no issues could arise under the principle *nullum crimen sine lege certa* as a result of the non – exhaustive enumeration in the criminal statute of the means by which the intrusion on someone's else's religious beliefs my be brought about. ECHR, Report of the Commission adopted on 12 September 1996

[275] Thrace Court of Appeal, decision 533/1991

[276] Court of Cassation, decision 2276/1953

[277] Court of Cassation, decision 271/1932

[278] Court of Cassation, decision 201/1961

[279] Court of Cassation, decision 498/1961

that the act (or better attempt) of proselytization is punishable regardless of the religion that is turned upon.

The arbitrary application of art. 4 of obligatory law 1363/1948 along with the excessive zeal displayed by the Greek courts towards its application has caused the repeated condemnation of Greece before the ECHR for violating art. 9 of the European Convention of Human Rights regarding the religious freedom[280]. The *Kokkinakis* judgment was the first case that the ECHR dealt with religious freedom and refers more particularly to the freedom of teaching religion[281]. His case became a *cause celebre* when, in May 1993, the ECHR ruled his right to religious freedom had been violated and awarded him damages of three and a half million drachmas. In particular, the Court judged that the visit of Mr. Kokkinakis and his wife, both Jehovah's Witnesses, at the house of an orthodox Christian woman as well as the obtrusive offering, reading and analyzing of religious booklets with demonstrable intent to convert her, does not constitute *abusive* proselytism. Thus, the conviction of Kokkinakis by the Greek Courts could not be grounded on an urgent social occasion nor was it proportional to its aspired purposes.

Furthermore, in Kokkinakis case the ECHR judged that religious freedom is a matter that primarily concerns an individual's conscience. The freedom to manifest religion or belief derives from religious freedom and the freedom to teach religion or

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[280] Art. 9: *1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*

2. 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 the protection of the rights and freedoms of others.

[281] Minos Kokkinakis was born into an Orthodox family in Siteia of Crete in 1909, and in 1936 became a Jehovah's Witness. He was arrested for proselytization over sixty times and was subjected to many displacements and repeated incarcerations. On March 2, 1986, Kokkinakis and his wife visited Ms. Kyriakaki in her home in Siteia and started talking to her. Informed by Ms. Kyriakaki's husband, who was a cantor in the local Orthodox Church, the police arrested Mr. and Mrs. Kokkinakis. The District Attorney of Lasithi pressed criminal charges against them for proselytization on the basis of article 4 of Obligatory Law 1363/1938. ECHR, *Kokkinakis v Greece*, available in www.ius-software.si/EUII/EUCHR/dokumenti/1993/05/CASE_OF_KOKKINAKIS_v._GREECE_25_05_1993.html also available in www.minorityrights.org/download.php?id=383

belief derives from the freedom to manifest it. The same court held that the freedom of teaching is not exercised only in community with others, "in public" and within the circle of those whose faith one shares, but can also be exercised "alone" and "in private" and outside this circle[282].

In a similar case, even more remarkable as regards its legal reasoning, *Larissis and others vs. Greece*, involving repeated attempts of proselytism committed by three Pentecostal Air Force officers against other members of the air force and a number of civilians (all of them Orthodox Christians) the ECHR concluded that there had been a violation of art. 9 of the European Convention on Human Rights only as regards the conviction of the applicants for the proselytism of civilians[283]. On the contrary, the court held that for the cases of the applicant's airmen subordinates there had just been abuse of authority and not abusive proselytism vindicating partially the Greek side[284].

Nonetheless, after repeated convictions the Greek public prosecution authorities have started to display a greater prudence regarding the exercise of prosecution for the offence of proselytism. Yet, as Evaggelos Venizelos has correctly asserted, the only clear – cut solution would be the abolition of Metaxas' obligatory law and its replacement with a modern provision which will respect the principle of proportionality and will explicitly define the means for the commission of proselytism as an abusive act.

2.7. Religious education

[282] Nevertheless it has been stated that by introducing the concept of abusive proselytization and allowing its criminalization, this decision establishes state protectionism in the European market for religion. K. Kiriazopoulos, *Proselytization in Greece: Criminal Offence vs. Religious Persuasion and Equality,* Journal of Law and Religion, Vol. XX, 2005

[283] ECHR, Report of the Commission adopted on 12 September 1996

[284] E. N. Mprami, *Thriskeutiki Eleutheria kai Europaiko Dikastirio Dikaiomaton tou Anthropou: Ipothesi Larissis kai loipoi kata Ellados* [Religious Freedom and the ECHR: Case Larrisis and others vs. Greece], Phd, Athens, 2007

According to art. 16 par. 2 of the Constitution, one of the basic missions of the state regarding education is the development of religious consciousness of Greeks[285]. The provision has raised a critical debate around the interpretation of the term "religious consciousness" where two basic standpoints have been supported.

The first point of view relates the concept of religious consciousness with art. 3 of the Constitution and thus to the establishment of Orthodoxy as the "prevailing" religion. In accordance with this point of view, the Greek state is obliged to instruct in the grades of education the class of religion in compliance with the Orthodox dogma, since this is the dogma followed by the majority of Greeks who, therefore, have the inviolable constitutional right to demand an orthodox religious teaching[286]. Besides art. 2 of the presidential degree 583/1982 explicitly rules that the weekly religious instruction aims to familiarize the young Greeks with the truths of Orthodoxy. Accordingly, the 6th Chamber of the Council of State has accepted the obligatory character of the religious instruction of the Orthodox teaching along with other religious activities in schools, such as the morning prayer and the periodical church – going of the students[287]. Furthermore, in compliance with the aforementioned judgment, the Council of State also ruled that the reduction of the teaching hours concerning the lesson on religion from two to one hour per weak in high schools violates art. 16 of the Constitution[288].

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[285] Art. 16, par. 2: *education constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious consciousness and at their formation as free and responsible citizens […]*

[286] A. Marinos, *To Sintagma, I Dimokratia kai to mathima ton thriskeutikon* [The Constitution, Democracy and religious education], Sakkoulas, 1981, in *Atomika kai Koinonika Dikaiomata,* [Individual and Social Rights], K. Chrysogonos, 2nd edition, Sakkoulas, Athens – Komotini, 2002, and P. Nikolopoulos, *Horismos Kratous Eklissias* [State – Church separation], Sakkoulas, Athens – Komotini, 2006

However, Nikolopoulos wrongly correlates the obligatory teaching of the Orthodox dogma in schools with the preamble of the Constitution. As we have thoroughly noted before the preamble does not bear any legal effect even in the interpretive level.

[287] Council of State, decision 3356/1995

[288] Council of State, decision 2176/1998

As a result, in addition to frequent blessings and liturgies on school grounds by members of the Orthodox clergy, weekly religious instruction (two hours per week, according to law 1566/85), regular religious assemblies (prayer), and church attendance are mandatory in the grades of education both public and private[289].

The counter standpoint conceives the matter through the spectrum of art. 13 and art. 5 par. 1[290] of the Constitution along with art. 9 of the European Convention of Human Rights, that provide for the absolute protection of religious freedom and equality. The advocates of this stance have proposed a more flexible interpretation of art. 16 according to which the Constitution provides for a basic religious instruction about all the major denominations and faiths or alternatively for the optional character of religious education[291]. In line with this viewpoint, a recent court decision comes to question the prior jurisprudence on the matter by accepting that the Parliament has the discretional power to give the instruction of religion a more scientific direction towards the analysis of all denominations[292].

The debate concerning the religious education in high schools re-emerged in the wake of the 2008 ministerial decision which has simplified the release of students from the relative class. The previous legislation, i.e. the ministerial circular letter Γ2/8904/29-11-1995[293], provided that the non – orthodox students (either heterodoxes[294] or atheists) had the right not to attend the class after submitting along with their parents relevant request before the headmaster of the school. The same right

[289] N. Alivizatos, *A New Role for the Greek Church?,* Journal of Modern Greek Studies, Vol. 17, 1999 and Y. Sotirelis, *Thriskia kai Ekpaidefsi: apo ton Katichitismo stin Polyfonia*, Sakkoulas, Komotini, 1998

[290] Art. 5: *1.All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages.*

2. All persons living within the Greek territory shall enjoy full protection of their life, honour and liberty irrespective of nationality, race or language and of religious or political beliefs.

[291] Indicatively Sotirelis, Tsatsos, Chrysogonos and Dagtoylou

[292] Council of State, decision 34/2002

[293] Ministry of Education and Religious Affairs

[294] In Greek, *eterothriskoi I eterodoxoi*

however was not granted then to the Orthodox students[295]. The 1995 ministerial circular was heavily criticized by the legal theory, including the independent Data Protection Authority, for violating the freedom of religious since the compulsory declaration of a person's religious beliefs goes against the provision of art. 13 of the Constitution and art. 9 of the European Convention of Human Rights[296].

In an attempt to comply with the Data Protection Authority as well as the European scheme of Human Rights as provided by the aforementioned Convention, in August 2008, the Ministry of Education released a new circular letter determining that from the new session (2008 – 2009), the students who wish to be released from the class for religion, have the right to do so just by submitting a simple statement without any specific motive or justification. As expected the circular provoked the severe reaction from the part of the Church.

It is noteworthy that the controversial circular letter is actually the outcome of one of the most prominent judgments during the last decade, namely decision 2283/2001 of the Plenary Session of the Council of State concerning the debate around the identity cards in early 00's, in compliance with which no state authority shall demand the self-expression of religious beliefs[297].

As regards the Greek universities, the absolute freedom on religious education determines that all individuals regardless of their faith, shall have indiscriminate access to all departments and schools. Hence, the Council of State ruled as illegal and unconstitutional a student's suspension from the Theological Department because he declared atheist[298]. Accordingly, the Council of State decided that the election of a

[295] S.Troianos, *Sholio*, [Comment], Nomiko Vima, Vol. 43

[296] One could easily identify the legal argumentation behind the critique on this case with the severe controversy concerning the identity cards.

[297] Similarly, Council of State, decisions 2284/2001 and 2285/2001

[298] Council of State, decision 194/1987

professor to the Theological School does not require from the candidate to declare his Orthodox beliefs[299].

3. European Integration on religious issues

The EU has assumed a very limited role towards the establishment of legal associations between the member states and religious institutions. The member states still hold the absolute power to regulate and interpret the environment within which these domestic religious establishments shall operate. Besides drawing from the ECHR judgment on Kokkinakis case, domestic courts have the exclusive jurisdiction on ruling for the unconstitutionality of domestic statutes and legislations regarding state – church relations.

Nevertheless, European integration has been a catalyst in the state - church relations in Greece by initiating several controversial issues concerning human rights protection. In fact, the EU institutions have questioned the church and state model in Greece. Besides the globalisation of western political culture has provoked the reaction of the Orthodox hierarchy who is concerned about the loss of Orthodox identity to a homogeneous western culture. In short, European integration was perceived by the clergy as a threat towards the accomplishment of Church's mission as a homogenising factor and a threat for Church's well established privileges.

Three basic issues have arisen in Greek society which have demonstrated the clash between European integration and the Orthodox understandings of human rights: the identification card controversy, the question of religious freedom, and the debate on homosexuality.

As far as the first is concerned, in summer of 2000 the Simitis administration implemented law 2472/1997 that removed religious affiliation from national identity cards. Two years later, the Minister of Justice announced plans to proceed with the

[299] Council of State, decision 1798/1989

issue of new identity cards without the inclusion of religion. The then Archbishop Christodoulos organised a national mobilisation campaign calling for an informal referendum to collect signatures requesting the voluntary declaration of religion on identity cards and hoping to force the government to hold a national referendum. Eventually, in 2001, the Council of State declared that the inclusion of religion on identity cards was unconstitutional, while Archbishop Christodoulos suggested that the Greek Prime Minister was subject to strong international pressure[300]. In fact, there has been clearly a tension between national and international rule, particularly the concern of ceding control to Europe at the expense of national self-rule. Advocates of religion on identity cards issue have seen the question of identity cards as a strictly domestic issue and have accused the government of compromising and undermining its authority while yielding to European influence.

In legal terms, the case of identity cards does not display a special interest, since the legal framework is considered to a large extent unambiguous. The issue however has evoked the concern of numerous social and political scientists who started to investigate the role of the Church in Greek society. One could summarize the relative bibliography in the assertion that the Greek Church has strived to safeguard an alleged national identity against a more cosmopolitan understanding of identities and eventually to fulfil its ends as a homogenising factor. However, we should not neglect the fact that it was the state itself through lawmaking that granted this role to the Church in past decades. Besides, what the identity card crisis has eventually shown is that the state still holds the baguette in state – church relations.

The second major human rights issue that has developed recently in Greece is the understanding of religious freedom in light of art. 3 of the Constitution and the

[300] Pressure from the World Jewish Council, the European Union, and American Jewish lobbying Organization, *Vima*, 15th March, 2001; *Vima*, 20th March, 2001; *Herald Tribune*, 16th March, 2001;*Athens News*, 16th March, 2001 in *Identity Crisis: Greece, Orthodoxy, and the European Union* L. Molokotos – Liederman, Journal of Contemporary Religion, Vol. 18, no. 3, 2003

conceptualization of the term "prevailing". According to Kiriazopoulos the interpretation of this term in Greek legal theory has produced a legal environment where freedom of religion is violated according to western understandings of the concept[301]. As discussed above, the mandarin procedures for constructing religious buildings, the discriminatory enforcement of the penal statute on proselytism, the one – sided religious instruction in schools and the monopoly of Church on the disposal of the dead are controversial issues that have also met the critique by European institutions and NGO's, while in some cases they have resulted to the condemnation of Greece before the ECHR[302].

Finally, with regard to homosexuality, the new European Charter on Fundamental Human Rights, which was proposed for ratification in December 2000, provides for the protection of the rights of gays and lesbians. From the time of the European Parliament non-binding resolution to promote the equal rights of same sex couples in the spring of 2000, the Church, playing the part of society's moral guardian, came out against homosexuality and the EU[303].

4. Conclusions

Generally two different but interrelated groups of legal issues has been examined so far. The first concerns the legal entity of the Autocephalous Orthodox Church as it has been regulated by the Constitution through the provisions of the controversial art. 3. The second is related to the more general concept of religious freedom as it has been established on the constitutional art. 13.

The legal determination of the Church's personality through the Constitution has been grounded on communitarian rather than on nationalistic reasoning. One

[301] K. Kyriazopoulos, *Prevailing religion in Greece: its meaning and implications',* Journal of Church and State, Vol. 43, no. 3, 2001, in *The Clash of Civilisations: The Church of Greece, the European Union and the Question of Human Rights,* D. P. Payne, Religion, State & Society, Vol. 31, no. 3, 2003

[302] Indicatively *Kokkinakis and others vs. Greece, Larissis and others vs. Greece.*

[303] D. P. Payne, *The Clash of Civilisations: The Church of Greece, the European Union and the Question of Human Rights,* Religion, State & Society, Vol. 31, no. 3, 2003

could raise the objection whether the limits between these two ideological concepts are vague or not well defined as regards their impact on lawmaking. However, the theoretical groundwork cited in the first chapter along with the legal issues examined in the present chapter accommodates the clarification of the argument. For instance, the majoritarian argument that stands as the major legal claim of the conservative elites regarding the state – church relations fell into a more communitarian reasoning rather than a nationalistic one.

None of the prominent law experts in Greece nor even the Parliament or the Greek courts defend the superiority of Orthodox faith upon the other faiths, as well as the privileged position of the Orthodox followers upon the followers of other religions. The religiously neutral character of the Constitution is undeniably and steadfastly accepted by the totality of the Greek legal thought.

The beneficial position of Church's institution has been traditionally based on majoritarian arguments that - as expected by the theoretical framework of this study at first place - have resulted in discriminatory enactments violating the two principles of Rawls for Justice as fairness. Starting from 1975 proceedings until now, all the advocates of Church constantly raise the majoritarian argument. Nevertheless, bringing forward this communitarian rhetoric should be considered even more precarious than a clear – cut nationalistic stance, in the sense that alleged "democratic" external views are more difficult to be countered. Indeed, as the 2001 constitutional amendment example has shown, claims based on the power of majority in democratic societies are far more difficult to be legally opposed than nationalistic regulations that clearly contradict fundamental principles of Justice.

Moreover, the state has exhibited so far a devious behaviour vis-à-vis the Church: in some matters the latter has been benefited while in other cases the state has not feared to look for a disputation. On the one hand the state grants administrative

competence (construction of religious buildings) while on the other denies any involvement even in matters that may bear a given concern on behalf of the Church (for instance, in religious education). Hence, the state protectionism through the state - church relations seems to fall more into the framework of politics rather than of nationalistic patterns and its ideological resultants.

As far as religious freedom is concerned, similarly to the minority question, the Greek legal system has revealed shortfalls that have attracted the European criticism. In the normative level, the violations of human rights have principally occurred due to the alleged effort of the state to protect its church. Nebulous provisions (proselytism) or explicit discriminatory enactments (disposal of the dead) have underlined state protectionism.

Nonetheless, following the developments performed at the supranational level, Greek Governments has started slowly but steadily to introduce issues unfavourable to the Orthodox understanding. The cremation issues, the identity card debate, the rights of homosexuals and the religious education are some of the matters noted here that have already created a rift between the state and the church and preludes more radical changes in the near future.

As regards justice *stricto sensu*, the Greek Courts seem to hold a controversial stance on religious matters. In some cases they have succeeded to maintain a hopeful position[304] while in other cases they reproduced a conservative pro – Orthodox national rhetoric. However, taking into account the relevant jurisprudence discussed here through the course of time it seems that during the last years a positive shift has been taken place[305].

[304] Indicatively Court of First Instance of Thessaloniki, decision 1064/1998 regarding the tax exemption and Council of State, decision 4045/1983 regarding the exceptional levies.

[305] Indicatively, the latest decisions cited here on religious education, proselytism and the judgment of the Council of State regarding the legitimacy of Bishop's consent for the construction of religious buildings.

CHAPTER FOUR

… and justice for all

1. Is There Justice in Greece (or what Rawls would have said for the Greek case)?

Taking into account the reservation of overgeneralization posed in hypothesis, the answer is no. In homogeneous nation – states such as Greece, national laws and practices allocating minority rights and religious freedom reflect deeply ingrained cultural-historical conceptions of nationhood that have a lasting and formative quality. Consequently, national affiliation prevails over fairness while nationalism and communitarianism have become regulatory components of the Greek legal order. Besides, the given ideological resultants of the nation – state impede the consolidation of justice at two different levels: the lawmaking and the law - enforcing level. Thus, it is not merely a question for the Legislative and the administration but a structure problem of Justice *stricto sensu* too, as the several judgments cited here have proven.

Drawing from Rawls the problem lies upon the fact that the ministers of the dual function of Justice have failed to comply with the prerequisite of *"reasonable citizen"*. For Rawls *"citizens are reasonable when…they are prepared to offer one another fair terms of social cooperation… They must be able to do this as free and equal, and not as dominated or manipulated, or under the pressure of an inferior political or social position"*. Nonetheless, when the matter comes to sensitive national issues, the competent state institutions, namely the courts and the administration, have largely acted as manipulated and dominated adopting ideological practises and displaying often discriminatory behaviour. Strangely enough, the above pattern seems to work even in cases where the outcome would have arguably urged an objective observer to extrapolate the impartiality of the aforementioned national institutions (for instance, the abolition of art. 19 GNC).

The failure to comply with the prerequisites of the "reasonable citizen" has resulted to the absence of the "veil of ignorance" in lawmaking and therefore to the repeated violation of the two principles of Justice. As far as the veil of ignorance is concerned, it is noteworthy that the majority of laws passed on minorities and religion along with the prominent court decisions, one way or another, have been based on the given criteria posed by Smith in defining "nation", i.e., religion[306], culture[307] or nationality[308]. Moreover several enactments were additionally grounded on the claims of national security[309] and reciprocity[310].

In addition, insofar the Greek representatives have never stood behind the *"Veil of Ignorance"* in most of the cases they have been swayed by ideological constructs occurred in nation – states. In effect, the representatives have securitized the minority question, thus having displayed certain nationalistic attributes, while as regards religion they have tried to control the Greek society by claiming pure communitarian arguments.

In relation to the two principles of Justice, the *"fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all"* is not the case for many Greek citizens that had the "misfortune" to display characteristics different from the majority. The freedom of assembly and association has been violated in several cases - some of them brought also before the ECHR[311] - due to motives of national security, while the liberty of conscience as applied to religious, philosophical and moral view of our relation to the world has been often foiled in

[306] Indicatively, religious practise, construction of religious buildings, disposal of the dead, proselytism, religion education and the relevant judgments

[307] Indicatively, Sharia

[308] Indicatively, art. 19 GNC, Turkish Union of Xanthi vs. Greece, Sidiropoulos and others vs. Greece and Ouranio Toxo vs. Greece

[309] Indicatively, the restrictive measures, the right of property in borderline areas

[310] Indicatively, minority education, the previous legislation on Muslim religious foundation, art. 19 GNC, the restrictive measures

[311] Indicatively, Sidiropoulos and others vs. Greece, Ouranio Toxo vs. Greece, Turkish Union of Xanthi cases vs. Greece etc

favour of a state protectionism regarding Orthodoxy (freedom of religious practise, proselytism). Even liberties concerning the integrity of the person or the freedom of movement have been put aside, especially in the past (restrictive measures, art. 19 GNC).

Finally, in reference to the "*Difference Principle",* the social and economic inequalities have been to the greatest benefit of the most advantaged members of society (Autocephalous Orthodox Church) and at the expense of the least advantaged ones (Muslim minority, religious minorities, not to mention the not even "existent" Slav – Macedonian minority).

2. Is there hope?

Yes. Following the course of the Greek legal order throughout the 20th century until now, one could easily detect several positive developments towards the desired end of fairness. Discriminatory enactments regarding the restrictive measures, art. 19 GNC and the Muslim religious foundation regime have been abolished, the reciprocity argument seems receding, while hopeful developments on educational level, both minority and religious, indicate an ongoing rift with policies of the past.

Critical changes have been also detected in terms of law – enforcing as the recent judgments of the Court of First Instance of Komotini regarding the application of Sharia as well as of the Council of State[312] have shown. However, the gap between the jurisprudence of the two Supreme Courts in Greece, the Council of State and the Court of Cassation remains remarkable. The former seems to surpass past discriminatory practises[313] while the latter seems to remain attached to a more nation – oriented enforcement of the Law. It is worth noting that almost all the

[312] Indicatively, decisions regarding the constructing of religious buildings, the card identity crisis and the religious education

[313] Indicatively, decisions on art. 19 and religious education

condemnations of Greece before the ECHR have been related to decisions ruled by the Court of Cassation.

3. Recommendations

In spite of the abovementioned encouraging developments, critical steps are still to be taken: summarizing the issues examined here, a basic list of recommendations would be the following:

- Full retraction of reciprocity as regards the implementation of the Lausanne Treaty (on both sides).
- The immediate reinstatement for the minority members who have lost their Greek nationality from the enforcement of art. 19 GNC.
- The abolition of Sharia and the reinstatement of the elected muftis.
- The recognition of the linguistic minority of Slav – Macedonians in Florina.
- The alignment of the Greece with the judgments of the ECHR regarding the right of freedom of assembly and association as well as religious freedom.
- The clarification of the term "prevailing religion" ruled in art. 3 of Constitution and the initiation of an effective discourse concerning the actual church – state separation.
- The abolition of the legal regime regarding the constructing of religious buildings and the enforcement of enactments regarding burials that would respect the right of free choice and religious freedom.

4. Is European integration the solution?

The conclusions on the causes that have resulted in the deficits of the present legal order lead safely to the assertion that European integration would have been an effective solution. In fact, most of the positive developments were dictated more or

less by imperatives introduced at the supranational level[314] giving at the same time clear indications for the positive impact that European integration may have towards a fair domestic legal system.

However, in practice, the alignment of Greece with the European standards has not been always sincere, as the example of the abolition of art. 19 GNC has shown, nor seems to indicate all the times a true liberal view on minority and religious issues. Besides, the extent to which European integration has had a direct effect in the domestic legal order is still debatable leading to the legitimate conclusion that important steps still remain to be taken.

The key answer lies upon the concept of cosmopolitanism. Provided that notions emanated from the very concept of nation – state have blocked the establishment of fairness in Greece, seeking a supranational or cosmopolitan identity may hold the key for justice. The slow but steady adoption of European ideals along with the densification of European integration in state's legal order may result to the predomination of a true European identity and Rawlsian justice.

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[314] Here, minority and religious education, abolition of art. 19 and of the restrictive measures, respect of the Personal Data Protection authority and constitutional independence granted to several non – governmental authorities.

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