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Compatibility of Sharia law with the European Convention on Human Rights: can States Parties to the Convention be signatories to the "Cairo Declaration"?

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Antonio GUTIÉRREZ, Spain, Socialists, Democrats and Greens Group

Summary

The Committee on Legal Affairs and Human Rights considers that the 1990 Cairo Declaration on Human Rights in Islam, whilst not legally binding, has symbolic value and political significance in terms of human rights policy under Islam. However, it fails to reconcile Islam with universal human rights, especially insofar as it considers Sharia law as its sole source of reference and does not recognise certain rights.

The committee considers that where human rights are concerned there is no room for religious or cultural exceptions. Member States and partners for democracy should bolster religious pluralism, tolerance and equal rights of all. The committee also stresses that the European Convention on Human Rights is an international instrument binding on all States Parties.

This report also addresses the actual application of Sharia principles in certain member States and makes country-specific recommendations.

1. Reference to committee: Doc. 13965, Reference 4188 of 4 March 2016.

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A. Draft resolution[2]

1. The Parliamentary Assembly recalls, *inter alia*, its Resolution 1846 (2011) and its Recommendation 1987 (2011) on combatting all forms of discrimination based on religion, as well as its Resolution 2076 (2015) on freedom of religion and living together in a democratic society and its Recommendation 1962 (2011) on the religious dimension of intercultural dialogue. On those occasions, the Assembly examined the co-existence of different religions in a democratic society. It recalls that pluralism, tolerance and a spirit of openness are the cornerstones of cultural and religious diversity.

2. The Assembly reiterates from the outset the obligation on member States to protect the right to freedom of thought, conscience and religion as enshrined in Article 9 of the European Convention on Human Rights (ETS No. 5, "the Convention"), which represents one of the foundations of a democratic society. The right to manifest one's religion, however, is a qualified right whose exercise may be limited in response to certain specified public interests and, under Article 17 of the Convention, may not aim at the destruction of other Convention rights or freedoms.

3. The Assembly also recalls that it has on several occasions underlined its support for the principle of the separation of State and religion, as one of the pillars of a democratic society, for instance in its Recommendation 1804 (2007) on State, religion, secularity and human rights. This principle should continue to be respected.

4. The Assembly considers that the various Islamic declarations on human rights adopted since the 1980s, while being more religious than legal, fail to reconcile Islam with universal human rights, especially insofar as they maintain the Sharia law as their unique source of reference. This includes the 1990 Cairo Declaration on Human Rights in Islam, which, whilst not legally binding, has symbolic value and political significance in terms of human rights policy under Islam. It is therefore of great concern that three Council of Europe member States - Albania, Azerbaijan and Turkey - are signatories to the 1990 Cairo Declaration, as are Jordan, Kyrgyzstan, Morocco and Palestine, whose parliaments enjoy partner for democracy status with the Assembly.

5. The Assembly is also greatly concerned about the fact that Sharia law – including provisions which are in clear contradiction with the Convention - is applied, either officially or unofficially, in several Council of Europe member States, or parts thereof.

6. The Assembly recalls that the European Court of Human Rights has already stated in *Refah Partisi (The Welfare Party) and others v. Turkey* that "the institution of Sharia law and a theocratic regime were incompatible with the requirements of a democratic society". Sharia law rules on, for example, divorce and inheritance proceedings are clearly incompatible with the Convention, in particular its Article 14, which prohibits discrimination on grounds such as sex or religion, and Article 5 of Protocol No. 7 to the Convention (ETS No. 117), which establishes equality between marital partners. Sharia law is also in contradiction with other provisions of the Convention and its additional protocols, including Article 2 (right to life), Article 3 (prohibition of torture or inhuman or degrading treatment), Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), Article 9 (freedom of religion), Article 1 of Protocol No. 1 (ETS No. 9) (protection of property) and Protocols Nos. 6 (ETS No. 114) and 13 (ETS No. 187) prohibiting the death penalty.

7. In this context, the Assembly regrets that despite the recommendation it made in its Resolution 1704 (2010) on freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (eastern Greece), asking the Greek authorities to abolish the application of Sharia law in Thrace, this is still not the case. Muftis continue to act in a judicial capacity without proper procedural safeguards. The Assembly denounces in particular the fact that in divorce and inheritance proceedings – two key areas over which muftis have jurisdiction – women are at a distinct disadvantage.

8. The Assembly is also concerned about the "judicial" activities of "Sharia councils" in the United Kingdom. Although they are not considered part of the British legal system, Sharia councils attempt to provide a form of alternative dispute resolution, whereby members of the Muslim community, sometimes voluntarily, often under considerable social pressure, accept their religious jurisdiction mainly in marital and Islamic divorce issues, but also in matters relating to inheritance and Islamic commercial contracts. The Assembly is concerned that the rulings of the Sharia councils clearly discriminate against women in divorce and inheritance cases. The Assembly is aware that informal Islamic Courts may exist in other Council of Europe member States too.

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2. Draft resolution adopted unanimously by the committee on 13 December 2018.

9. The Assembly calls on the member States of the Council of Europe to protect human rights regardless of religious or cultural practices or traditions.

10. The Assembly notes with approval the 2008 judgment of the United Kingdom's House of Lords addressing these principles.

11. The Assembly calls on Council of Europe member States and those whose parliaments enjoy partner for democracy status with the Assembly to:

11.1. bolster pluralism, tolerance and a spirit of openness by proactive measures, taken by governments, civil society and religious communities, whilst respecting common values as reflected in the European Convention on Human Rights;

11.2. accept that the Convention is an international instrument binding on all Council of Europe member States.

12. The Assembly calls on Albania, Azerbaijan and Turkey, as well as Jordan, Kyrgyzstan, Morocco and the Palestinian National Council, all signatories to the 1990 Cairo Declaration, to:

12.1. consider withdrawing from the Cairo declaration;

12.2. make use of all available means to make declarations, so as to ensure that the 1990 Cairo Declaration has no effect on their domestic legal orders that may be inconsistent with their obligations as Parties to the European Convention on Human Rights, as applicable; or

12.3. consider performing some formal act which clearly establishes the Convention as a superior source of obligatory binding norms.

13. The Assembly, while noting the legislative change in Greece which made the practice of Islamic sharia law in civil and inheritance matters optional for the Muslim minority, calls on the Greek authorities to:

13.1. monitor whether this legislative change will be sufficient to satisfy the requirements of the Convention;

13.2. allow the Muslim minority to choose freely its muftis as purely religious leaders (that is, without judicial powers), through election or appointment, thereby abolishing the application of Sharia law, as already recommended in Resolution 1704 (2010).

14. The Assembly, while welcoming the recommendations put forward in the conclusions of the Home Office Independent review into the application of sharia law in England and Wales, as a major step towards a solution, calls on the authorities of the United Kingdom to:

14.1. ensure that Sharia councils operate within the law, especially as it relates to the prohibition of discrimination against women, and respect all procedural rights;

14.2. review the Marriage Act to make it a legal requirement for Muslim couples to civilly register their marriage before or at the same time as their Islamic ceremony, as is already stipulated by law for Christian and Jewish marriages;

14.3. take appropriate enforcement measures to oblige the celebrant of any marriage, including Islamic marriages, to ensure that the marriage is also civilly registered before or at the same time as celebrating the religious marriage;

14.4. ensure that vulnerable women are provided with safeguards against exploitation and inform them about their rights to seek redress before the courts in the United Kingdom;

14.5. put in place awareness campaigns to encourage Muslim communities to acknowledge and respect women's rights in civil law, especially in the areas of marriage, divorce, custody and inheritance;

14.6. conduct further research on "judicial" practice of Sharia councils and on the extent to which such councils are used voluntarily, particularly by women, many of whom would be subject to intense community pressure in this respect.

B. Explanatory memorandum by Mr Antonio Gutiérrez, rapporteur

1. Introduction

1.1. Procedure and fact-finding

1. The motion for a resolution entitled "Compatibility of Sharia law with the European Convention on Human Rights: can States Parties to the Convention be signatories of the "Cairo Declaration'?" was referred to the Committee on Legal Affairs and Human Rights on 27 January 2016 for report. I was appointed rapporteur by the committee at its meeting on 13 December 2016, to replace our colleague Ms Meritxell Mateu (Andorra, ALDE) who had left the Assembly.

2. At its meeting in October 2016, the committee took note and declassified an introductory memorandum prepared by Ms Mateu. I consider its findings to be an integral part of this report and refer the reader to this document to avoid repetition here.

3. At its meeting on 7 March 2017, the committee held a hearing with the participation of Professor Ruud Peters, University of Amsterdam (the Netherlands), and Professor Mathias Rohe, Erlangen University (Germany). On 5 September 2017, a second hearing was held with the participation of Mr Konstantinos Tsitselikis, Professor in Human Rights Law and International Organisations at the University of Macedonia (Thessaloniki, Greece), and Ms Machteld Zee, political scientist and legal scholar, author of the book "Choosing Sharia?: Multiculturalism, Islamic Fundamentalism and Sharia Councils". Finally, on 12 December 2017, the committee held an exchange of views with Professor Mona Siddiqui, chair of the independent review into the application of Sharia law in England and Wales (Independent Review), Professor of Islamic and inter-religious studies at the University of Edinburgh.

1.2. Issues at stake

4. Specifically citing the Cairo Declaration, the motion for a resolution focuses on the question of the compatibility of Sharia law with the values and principles enshrined in the European Convention on Human Rights (ETS No. 5, "the Convention"). In addition, the reference to the case law of the European Court of Human Rights ("the Court") and to the existence of informal Islamic courts in a number of member States has led me to study this matter in greater detail.

5. First of all, I believe it is important to underline the fact that it is difficult to compare an international legal document which is binding on States Parties, such as the Convention, with a "political" (i.e. non-binding) declaration such as the Cairo Declaration. Nonetheless, there are various relevant Islamic legal instruments in the field of human rights. The declassified introductory memorandum referred to above highlights the most prominent of those instruments and considers their respective degrees of legal force, indicating which Council of Europe member States are signatories to them. I shall here focus on certain aspects of the application of Sharia law in some Council of Europe member States through formal or informal Islamic courts, which constitute a parallel judicial system. Lastly, I shall address the compatibility, or incompatibility, of Sharia law with the principles and values of the Convention and the case law of the Court.

6. It should be pointed out that the Assembly and our committee have on several occasions looked at issues relating to the co-existence of different religions in a democratic society and at the compatibility of certain religious attitudes with the Convention. In particular, in November 2011 the Assembly adopted Resolution 1846 (2011) and Recommendation 1987 (2011) on combating all forms of discrimination based on religion, on the basis of the report by Mr Tudor Panţiru (Romania, SOC),[3] who had looked in detail at the concept of "reasonable accommodation", the principle of State neutrality vis-à-vis religions and the fight against discrimination. Moreover, in September 2015, the Assembly adopted Resolution 2076 (2015) on this subject – "Freedom of religion and living together in a democratic society".[4]

3. See also Doc. 12788
4. See also Doc. 13851

2. Analysis of the relevant instruments and their legal force

2.1. Sharia law

7. For the purposes of this study, it is essential to define Sharia law, its sources, its legal force and its problematic aspects in terms of the European Convention on Human Rights.

8. Sharia law is understood as being "the path to be followed", that is, the "law" to be obeyed by every Muslim (Surah 5). It divides all human action into five categories – what is obligatory, recommended, neutral, disapproved of and prohibited – and takes two forms: a legal ruling (*hukm*), designed to organise society and deal with everyday situations, and the *fatwa*, a legal opinion intended to cover a special situation. Sharia law is therefore meant in essence to be positive law enforceable on Muslims. Accordingly, it can be defined as "the sacred Law of Islam", that is, "an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects".[5]

2.1.1. Legal nature

9. While most States with Muslim majorities have inserted a provision referring to Islam or Islamic law in their Constitutions, the effect of these provisions is symbolic or confined to family law. Admittedly, these religious provisions may have a legal effect if raised in the courts and a political effect if they intrude into institutional attitudes and practices. However, the authority of Sharia law is derived directly from the Qur'an, and traditional Islamic law contains no effective provisions concerning its position in the pyramid of norms.[6]

2.1.2. Sharia law: problematic rules in relation to the European Convention on Human Rights

10. In this study I shall be looking at the general principles of Sharia law in relation to the European Convention on Human Rights and particularly Article 14, which prohibits discrimination on grounds such as sex or religion, and Article 5 of Protocol No. 7 to the Convention (ETS No. 117), which establishes equality between spouses in law. In this context, reference should also be made to other provisions of the Convention and its additional protocols – such as Article 2 (right to life), Article 3 (prohibition of torture or inhuman or degrading treatment), Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), Article 9 (freedom of religion), Article 1 of Protocol No. 1 (ETS No. 9) (protection of property) and Protocols Nos. 6 (ETS No. 114) and 13 (ETS No. 187) prohibiting the death penalty.

11. In Islamic family law, men have authority over women. Surah 4:34 states: "Men have authority over women because God has made the one superior to the other, and because they spend their wealth to maintain them. Good women are obedient. They guard their unseen parts because God has guarded them. As for those from whom you fear disobedience, admonish them and forsake them in beds apart, and beat them. Then if they obey you, take no further action against them. Surely God is high, supreme." In Sharia law, adultery is strictly prohibited. Legal doctrine holds that the evidence must take the form of corroborating testimony from four witnesses to prove an individual's guilt (Surah 4:15). These witnesses must be men of good repute and good Muslims. The punishment is severe and degrading, namely "a hundred lashes" (Surah 24:2). In the case of rape, which is seldom committed in public before four male witnesses who are good Muslims, punishing the rapist is difficult, if not impossible. In practice, this obliges women to be accompanied by men when they go out and is not conducive to their independence.

12. In respect of divorce, under Islamic law, a husband has a unilateral right to divorce (*talaq*), although this can be delegated to the wife, if included in the *nikah* (marriage contract), and a wife can therefore exercise her right to divorce (*talaq e tafwid*) without the husband's consent. Otherwise, a wife may initiate the divorce process, but only with the consent of the husband, by seeking a *khula.* In this case the wife forgoes her dowry (*mahr*).[7] In cases where the husband has deserted the wife, has failed to co-operate with the divorce process or is acting unreasonably, the marriage may be dissolved (*faskh*), but only by a *qadi* or a Sharia ruling. Hence, while divorce by mutual consent is enshrined in Islamic law (Surah 2:229 and Surah 4:128), the application must come from the wife, since the husband can repudiate his wife at any time. There is also the question of equal rights regarding divorce arrangements such as custody of children.

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5. Joseph Schacht, *An Introduction to Islamic Law*, Oxford University Press, 1983, p. 1.
6. Nathalie Bernard-Maugiron, "La place de la charia dans la hiérarchie des normes" in B. Dupret (ed.), La charia aujourd'hui. Usages de la référence au droit islamique, *La Découverte*, 2012, pp. 51-64.
7. Although in cases where the divorce is based on harm on the part of the husband, the wife does not forgo her *mahr.*

13. For division of an estate among the heirs, distinctions are made according to the sex of the heir. A male heir has a double share, whereas a female heir has a single share.[8] In addition, the rights of a surviving wife are half those of a surviving husband (Surah 4:12).

14. In criminal cases, cruel, inhuman and degrading punishments are ordered by Sharia law, including death by stoning, beheading and hanging, amputation of limbs and flogging. Apostasy results, firstly, in the apostate's "civil death", with the estate passing to the heirs, and, secondly, in the apostate's execution if he or she does not recant (Surah 2:217). Lastly, non-Muslims do not have the same rights as Muslims in civil and criminal law, for example in terms of the weight attached to their testimony in court, which is discrimination on the ground of religion within the meaning of Articles 9 and 14 of the Convention.

15. The declassified introductory memorandum referred to above describes various legal instruments as well as declarations adopted by Arab countries in response to the emergence of regional systems of human rights protection. In particular: the 1994 Arab Charter on Human Rights, its 2004 revised version, as well as the Universal Islamic Declaration of Human Rights (1981) and the Dhaka Declaration on Human Rights in Islam (1983). My mandate focuses primarily on the Cairo Declaration, which is why it is the only one I will examine in detail.

2.1.3. The Cairo Declaration on Human Rights in Islam

16. On 5 August 1990, the conference of Foreign Ministers of the Organisation of the Islamic Conference (OIC) adopted the Cairo Declaration on Human Rights in Islam (Resolution 49/19-P). The declaration in its preamble on the one hand acknowledges human rights by considering them sacred and divine and, on the other, recognises the need to protect them from "exploitation and persecution … in accordance with the Islamic Sharia". The Cairo Declaration acknowledges enhanced importance of collective rights, whether civil and political or economic, social and cultural, and also enshrines specific rights.

17. The Cairo Declaration has 16 articles on civil and political rights (Articles 1-8, 10-12 and 18-23, which lay down the right to life (Article 2), prohibition of enslavement, humiliation and exploitation of human beings, who are born free (Article 11), the right to respect for private and family life (Article 18), and freedom of expression and information (Article 22) and six articles on economic, social and cultural rights (Articles 9 and 13-16 enshrining the right to work and the right to own property and affirming the right to education and "seeking of knowledge"). The Cairo Declaration includes specific provisions such as prohibition of taking hostages (Article 21) and the right to live in a clean environment (Article 17).

18. However, the Cairo Declaration has given rise to much controversy,[9] for example concerning the concept of equality, the right to marry and the notable failure to recognise freedom of belief. Article 5(a) of the Cairo Declaration lays down the right to marry as follows: "Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right." According to experts, the reason why religion is not mentioned here is because Sharia law does not recognise a woman's right to marry a non-Muslim. The declaration further holds that "Islam is the religion of unspoiled nature" (Article 10). Article 1 of the 1990 Cairo Declaration recognises that "[a]ll men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations". This suggests that equality is to be understood in terms of dignity, obligations and responsibilities but not in terms of law. To put it plainly, Muslim women and non-Muslims have the same obligations and responsibilities as Muslim men but not the same rights (just the same "dignity). Last but not least, the Cairo Declaration is based solely on the rights and freedoms of Sharia law (Article 24: "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah"), which is considered "the only source of reference for the explanation or clarification of any of the articles of this Declaration" (Article 25).

8. Milliot and Blanc, *Introduction à l'étude du droit musulman*, Dalloz (ed.), 2001, p. 519.
9. See Sélim Jahel, "*La place de la Chari'a dans les systèmes juridiques des pays arabes",* Editions Panthéon Assas, 2012, pp. 35-55.

19. In 2011 the OIC set up the Independent Permanent Human Rights Commission (IPHRC) as an expert body with an advisory capacity and one of the principle human rights bodies of the OIC.[10] The OIC has adopted a number of declarations and conventions, including the Declaration on the Rights and Care of the Child in Islam (1994), the OIC Convention on Combating International Terrorism (1999), the Covenant on the Rights of the Child in Islam (2005) and the Statute of the OIC Women's Development Organisation (2009).

2.2. Legal force of the Cairo Declaration

20. Islamic declarations of human rights are an attempt to reconcile Islam with human rights in the universalist sense, under the auspices of the Organisation of Islamic Co-operation (OIC) and non-governmental organisations such as the Islamic Council of Europe.

21. In legal terms, these are political declarations, representing a position taken by a number of States with regard to human rights in Islam. However, in public international law, these declarations are not legally binding, since they are merely "declaratory". A declaration is a legal instrument which is not a treaty, constituting a position taken by a State on a situation, demand or action, which may contribute to the development of a peremptory norm.[11] Moreover, a State can enter reservations when acceding to an international organisation, as in the case of Turkey when it joined the OIC. In practice, this limits the effects of the 1990 Cairo Declaration to compliance with the Turkish Constitution.[12]

22. While the 1990 Cairo Declaration is not legally binding, it has symbolic value in terms of human rights policy in Islam.

3. Council of Europe member States that are signatories to one or more Islamic legal instruments

23. To date, no Council of Europe member State is a signatory to the 2004 Arab Charter on Human Rights and none has ratified the Statute of the Arab Court of Human Rights. However, Palestine and Jordan, whose National Council and Parliament respectively have "partner for democracy" status with our Assembly, have signed the Charter.

24. Three Council of Europe member States are also members of the OIC, namely Azerbaijan (since 1992), Albania (since 1992) and Turkey (since 1969). The following States have observer status with the OIC: Bosnia and Herzegovina (since 1994) and the Russian Federation (since 2005). Lastly, Jordan, Kyrgyzstan, Morocco and Palestine, whose parliaments have partner for democracy status with the Parliamentary Assembly, are also members of the OIC.

25. Among Council of Europe member States, Albania, Azerbaijan and Turkey are signatories to the 1990 Cairo Declaration. Jordan, Kyrgyzstan, Morocco and Palestine have also signed it.

4. Sharia law seen through the prism of the European Convention on Human Rights

26. The Islamic declarations on human rights adopted since the 1980s are imperfect attempts to reconcile Islam with human rights in the universal sense.[13] They are often more religious than legal texts. The preamble to the Cairo Declaration, for example, states that fundamental rights are an integral part of the "Islamic religion" and refers directly to Sharia law as a source of reference for interpreting them. We often find provisions which can prove to be disguised limitations on the rights being proclaimed, reflected in references to States' domestic legislation,[14] to Sharia law[15] or to rather vague definitions of the rights being guaranteed.

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10. Article 15 of the OIC Charter provides for the establishment of an Independent Permanent Commission on Human Rights (IPCHR) to promote "the civil, political, social and economic rights enshrined in the organisation's covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values". Establishment of the IPCHR was therefore laid down in the organisation's new charter, adopted at the 11th Islamic Summit held in Dakar (Senegal) on 13-14 March 2008. The IPCHR was officially inaugurated with the adoption of its Statute by the 38th session of the Council of Foreign Ministers held in Astana (Kazakhstan) on 28-30 June 2011.

11. See Article 36 of the Statute of the International Court of Justice, together with the article by Emmanuel Decaux in *Cahiers du Conseil constitutionnel*, No. 21 (French only), January 2007.

12. See replies from the Council to the European Parliament on 14 February 2006 (OJ C 327 of 30 December 2006) and 30 May 2005 (OJ C 299 of 8 December 2006). In its answers, the Council alluded to a general reservation entered by Turkey when it acceded to the Charter of the OIC, stating that it would implement the provisions of the Charter to the extent and within the framework of the Turkish Constitution. Article 2 of this Constitution States that the Republic of Turkey is a democratic, secular and social State governed by the rule of law.

13. Yannick Lécuyer, "L'Islam, la Turquie et la Cour européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme*, No. 67, 2006, p. 739.

[16] There are also serious omissions, particularly regarding freedom of religion, since Article 10 of the Cairo Declaration makes no reference to freedom of belief or freedom to manifest one's religion, stating only that "it is prohibited to exercise any form of compulsion on man … in order to convert him to another religion or to atheism". The 1981 Universal Islamic Declaration of Human Rights leaves in abeyance fundamental issues such as gender equality and freedom of religion and discriminates between Muslims and non-Muslims with regard to freedom of movement in the "Islamic world".

27. The European Court of Human Rights had the opportunity to rule on the incompatibility of Sharia law with human rights in its 2001 and 2003 judgments in the *Refah Partisi v. Turkey* case, holding that: "Turkey, like any other Contracting Party, may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes (such as rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession)."[17]

28. In this particular case, the decision by the Turkish Constitutional Court to order the dissolution of the Welfare Party (Refah Partisi), which advocated the introduction of Sharia law, was held to be compatible with the Convention, and the Court clearly affirmed the following: "It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts." With respect to Sharia law itself, the Court expressly stated that "a political party whose actions seem to be aimed at introducing Sharia in a State Party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention" (paragraph 123). The Court reasserted these principles in the *Kasymakhunov and Saybatalov v. Russia* case.[18]

29. The Court has ruled that Sharia law is incompatible with the Convention, but obviously this does not mean that there is absolute incompatibility between the Convention and Islam, since the Court has recognised that religion is "one of the most vital elements that go to make up the identity of believers and their conception of life".[19] Accordingly, the Court's relatively firm position should not be taken as a rejection of all elements of Sharia or of Islam as a whole, whilst taking into account the existence of structural incompatibilities between Islam and the Convention which, as far as Sharia law is concerned, are sometimes absolute and sometimes relative.[20]

30. It is also probable that a large number of cases concerning the position of Muslim women under Islamic law never come before the ordinary courts or the European Court of Human Rights because women are under enormous pressure from their families and their communities to comply with the demands of the informal religious courts. In such cases there arises the question of whether to use the concept of public order to refuse to recognise (or enforce) discriminatory decisions even if they are not challenged by the women concerned.

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14. The retention of the death penalty for minors in the 2004 Charter (Article 7) can be inferred from the reference to States' domestic legislation, which may make provision for it. Nor is any mention made of prohibiting the death penalty in the 1990 Cairo Declaration (Article 20).
15. See Articles 24 and 25 of the Cairo Declaration, which refer to Sharia law as the only source of reference for clarification of the Declaration's articles.
16. See the cursory affirmation of protection of minorities in the 2004 Charter (Article 25).
17. *Refah Partisi and Others v. Turkey*, Application No. 41340/98, judgment of 13 February 2003 (Grand Chamber), paragraph 128.
18. *Kasymakhunov and Saybatalov v. Russia*, Applications Nos. 26261/05 and 26377/06, judgment of 13 March 2013, paragraphs 99, 100 and 111, reaffirming *Refah Partisi and Others v. Turkey*, No. 41340/98, judgments of 31 July 2001 and 13 February 2003 (Grand Chamber). See also the statement of facts in a similar case that is pending: *Vasilyev and Others v. Russia*, Application No. 38891/08.
19. *Otto Preminger Institut v. Austria*, judgment of 20 September 1994, paragraph 47.
20. Yannick Lécuyer, op. cit., p. 739.

5. Application of Sharia law on all or part of the territory of a Council of Europe member State – case studies

31. I have chosen to look more closely at the situation in two Council of Europe member States as they present two very different applications of the Sharia law: Greece and the United Kingdom. Experts invited to hearings before the committee have provided us with first-hand information on the situation on the ground. In this section, I also refer to the (in one case, former) situation in three other countries, though in a less detailed manner, namely the French territory of Mayotte, the Russian Federation and Turkey.

5.1. Western Thrace in Greece – legal application of the Sharia law through muftis

32. In the Treaty of Lausanne of 24 July 1923, Greece and Turkey agreed to a compulsory population exchange. The Convention Concerning the Exchange of Greek and Turkish Populations, signed in Lausanne on 30 January 1923, expressly excluded the "Moslem inhabitants of Western Thrace" and the "Greek inhabitants of Constantinople" from this population transfer.[21] The Greek State recognises the existence of only one minority on Greek territory, namely the "Muslim" minority of Western Thrace in north-eastern Greece. The Treaty of Lausanne applies only to Greek Muslims in Western Thrace, not to Muslims in other parts of Greece or to new Muslim immigrants. There is also a Greek Muslim community on the Dodecanese Islands. Greek civil law, not Sharia law, applies to this community. There are currently between 80 000 and 120 000 Muslims in Thrace. The Muslim minority comprises three ethnic groups including 50% Turkish, 35% Pomak and 15% Roma.[22]

33. The Treaty of Lausanne stipulates that Turkey allows its non-Muslim minority to decide questions of "family law or personal status" according to "the customs of those minorities" (Article 42) and confers reciprocal rights "on the Moslem minority" in Western Thrace (Article 45). The Treaty specifies only that the States adopt measures that allow their minority populations to resolve issues about personal status according to their religious beliefs; nowhere does it mention establishing religious courts. Greece, however, has interpreted the Treaty to mean that muftis act as judges in religious courts for private law issues.[23] The muftis' role was codified in two domestic Greek laws (Act 147/1914 and Act 1920/1991), which allow Greek Muslims in Western Thrace to choose Sharia law as a parallel legal system for specific areas of private law.

34. Since 1990, there have been five muftis in Thrace: three appointed by the Greek State and two elected by the minority population but not recognised by the Greek authorities.[24] The official muftis act in both religious and judicial capacities. They are in charge of the mosques, cemeteries and religious foundations, and are responsible for the imams in their districts. They also have jurisdiction over prescribed areas of private law, including cases of divorce, alimony, custody, pensions and the emancipation of minors. They do not have jurisdiction over issues related to adoption, children born out of wedlock, the division of property upon divorce or communication with children. Because muftis are civil servants and act as judges, the Greek State maintains it has the right to appoint them.[25] This has given rise to disputes (*muftis* elected by the minority but not recognised by the public authorities have been prosecuted for illegal use of religious symbols) and has led the European Court of Human Rights to find violations of Article 9 of the Convention.[26] It appears that the Greek authorities tolerate this dual mufti system.[27]

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21. See Article 2 of the Convention concerning the Exchange of Greek and Turkish Populations, Lausanne, 30 January 1923. Article 14 of the Treaty of Lausanne also excluded from the population exchange "the inhabitants of the islands of Imbros and Tenedos". See the report by Mr Andreas Gross (Switzerland, SOC), "Gökçeada (Imbros) and Bozcaada (Tenedos): preserving the bicultural character of the two Turkish islands as a model for co-operation between Turkey and Greece in the interest of the people concerned". Doc. 11629, 6 June 2008.

22. See report by Michel Hunault (France), "Freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (Eastern Greece)", Doc. 11860, 21 April 2009, p. 8, paragraph 17; report by Thomas Hammarberg, Commissioner for Human Rights, following his visit to Greece on 8-10 December 2008, CommDH(2009)9, p. 4, paragraph 7, citing Greece's Periodic Report on the implementation of the International Convention on the Elimination of all Forms of Racial Discrimination (2008), paragraph 24; Initial Report of Greece to the UN Human Rights Committee, 15 April 2004, paragraph 899.

23. The mufti's role has expanded in Greece; traditionally, the qadi, the judge, appointed the mufti as "interpreter' of law; in the Greek system the mufti is both interpreter and judge. See Konstantinos Tsitselikis, Applying Shari'a in Europe: Greece as an Ambivalent Legal Paradigm, in Jørgen Nielsen, et. al. (eds.), *Yearbook of Muslims in Europe*, Volume 2, 2010, p. 663-680.

24. Michel Hunault (France), op cit., particularly paragraphs 46 and 47, in which it is stated: "In 1990 … the system for appointing *muftis* was amended following a legislative reform. The Presidential Decree of 24 December 1990 repealing Law No. 2345/1990 provides that the *muftis* must be appointed by presidential decree on nominations from the ministry of education and religious affairs … Following these legislative changes, the Muslim community has elected its own *muftis*, even where *muftis* have been appointed by the President of the Republic in accordance with the 1990 legislation."

35. A number of experts and international bodies have noted an extension of the muftis' authority and application of Sharia law to Greek Muslims living outside Western Thrace[28] and even outside Greece (in Australia, under Ruling No. 12/2001 of the Komotini Religious Court; in the United Kingdom, under Ruling No. 146/2002 of the Xanthi Religious Court).[29] It has also been noted that muftis have expanded their jurisdiction to cover some marriages between Greek Muslims and partners who are not members of the Muslim community in Thrace.[30]

36. Although muftis act in a judicial capacity, these proceedings often lack procedural safeguards. Muftis are not trained as judges, yet have the power to make decisions that greatly impact individuals' lives.[31]

37. Because representation by attorneys is not required in proceedings before muftis, parties often lack legal representation.[32] This lack of representation puts women at a distinct disadvantage. Females in the Muslim community in Western Thrace are often not well educated – some are illiterate – and do not always know their legal rights in either the religious or civil sphere.[33] Furthermore, male litigants have legally stronger positions than female litigants in the proceedings.[34]

38. There is also a lack of further judicial review of muftis' decisions. Such decisions are final and cannot be appealed. Muftis' written decisions are often perfunctory, with just a short description of the facts and a judgment; the reasoning or legal basis for the decision is generally absent.[35]Although muftis' decisions only become legally binding once ratified by a Greek Court of First Instance, in actual practice Greek courts provide a mere façade of review, ratifying 99% of the decisions they receive.[36] This occurs even though Greek courts must review whether the decision falls within the mufti's jurisdiction, and under Law No. 1920/1991 domestic courts shall not enforce decisions contrary to the Greek Constitution.[37] However, courts rarely judge if decisions comply with the Constitution, even those that infringe on women and children's rights and violate the Convention.[38]

39. There have also been reports of underage marriage and marriage by proxy. According to Hanafi law, a person must have reached puberty – generally the age of 15 – before marrying. However, girls under the age of 15 may marry with parental consent. In 2005, the mufti presided over the marriage of an 11-year-old Muslim girl.[39] Because the Greek Civil Code has no prescribed minimum age for marriage and instead allows the judge or mufti to decide if minors may marry, such marriages are legal under Greek civil law.[40] Muftis have also officiated at a number of Muslim weddings by proxy without the express consent of the brides, who are sometimes underage.[41] Until at least 2003 such marriages were even recorded in the State public records.[42] The local muftis state that they have not conducted any marriages by proxy since 2006.[43]

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25. The Greek Government also maintains it should appoint the muftis because community elections would not meet constitutional and international standards, as women are not allowed to vote. See Gay McDougall, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, report of the independent expert on minority issues, Addendum, Mission to Greece, 8-16 September 2008, p. 8, paragraph 19.
26. See in particular *Serif v. Greece*, Application No. 38178/97, judgment of 14 December 1999, and *Agga v. Greece (No. 2)*, Application No. 50776/99, judgment of 17 October 2002.
27. Michel Hunault, op cit., p. 12, paragraph 49.
28. Muftis have declared themselves "legitimate judges' of Greek citizens of the Muslim faith wherever they live, not only in Western Thrace but also in Santorini (Komotini Religious Court, Ruling No. 24/2003) and Euboea (Komotini Religious Court, Ruling No. 22/2003). See Alexis Varende, "La charia appliquée en Grèce", 19 August 2014.
29. A. Varende, op. cit.
30. K. Tsitselikis, op. cit., p p. 666-67.
31. K. Tsitselikis, "Seeking to Accommodate Shari'a within a Human Rights Framework", p. 347.
32. I. Tsavousoglou, "The Legal Treatment of Muslim Minority Women under the Rule of Islamic Law in Greek Thrace", *Oslo Law Review,* 2015, Issue 3 (Special Issue: Legal Pluralism) pp. 241-62, p. 248.
33. I. Tsavousoglou, op. cit., p. 249.
34. K. Tsitselikis, "Seeking to Accommodate Shari'a within a Human Rights Framework", p. 348.
35. I. Tsavousoglou, op. cit., p. 248.
36. M. Hunault, op. cit., p. 13, paragraph 55.
37. T. Hammarberg, op. cit., p. 10, paragraph 34; I. Tsavousoglou, op. cit., p. 247.
38. M. Hunault, op. cit., p. 13, paragraph 55.
39. Although under Sharia law the minimum age for marriage is 12, a mufti officiated at the wedding of an 11-year-old girl "in order to protect the girl's interests". See the resolution of 31 March 2005 by the Greek National Commission for Human Rights on the marriage of minors by the muftis in Greece; See also, T. Hammarberg, op. cit., p. 9, paragraph 3.
40. Tsaoussi and Zervogianni, "Multiculturalism and Family Law: The Case of Greek Muslims", p. 218.
41. Nineteen such weddings were celebrated in 2002 and ten in 2003. See the decision of 7 May 2003 by the Greek National Commission for Human Rights regarding Muslim weddings by proxy in Greece; See also, T. Hammarberg, op. cit., p. 9.
42. T. Hammarberg, op. cit., p. 9, paragraph 31.

40. Women are at a distinct disadvantage in divorce and inheritance proceedings, two key areas over which muftis have jurisdiction. Under Sharia law as practised in Thrace, there are a number of ways to obtain a divorce. The most common form is by mutual consent. In such cases, the woman essentially "buys" herself out of the marriage, either by returning her dowry, waiving her right to alimony, or giving up custody of her children.[44] Alternatively, men may unilaterally state that they would like a divorce. In Thrace, such statements must be made to the mufti and the husband must compensate his wife.[45] In contrast, without the consent of her husband, a woman may only initiate a divorce if the husband is at fault. However, in such cases the mufti can reject the application, as has happened in numerous instances.[46]

41. In theory, every Muslim citizen in Thrace can choose freely between Sharia and civil law for decisions concerning family and inheritance law. However, the Greek Supreme Court has a narrow interpretation of this right to choose. In its Judgment No. 1097/2007 of 16 May 2007, the Greek Supreme Court held that for Greek Muslims, inheritance of unencumbered property was strictly governed by "Islamic holy law", not by the Greek Civil Code. Under "Islamic holy law" it is not possible to inherit through a will. The coexistence of this parallel legal system has been much criticised.[47]

42. Thomas Hammarberg, former Commissioner for Human Rights, clearly stated that he was "favourably positioned towards the withdrawal of the judicial competence from *muftis*, given the serious, aforementioned issues of compatibility of this practice with international and European human rights standards".[48] At the same time, he emphasised that it is important to ensure the direct participation of the minority group in this process, as it touches directly on minority rights.

43. In March 2014, Chatitze Molla Sali, a Muslim woman from Western Thrace, filed an application against Greece with the European Court of Human Rights.[49] Molla Sali challenged the Greek Supreme Court's ruling of 7 October 2013 that the will of a deceased Muslim citizen in favour of his wife was invalid on the grounds that it was against Sharia law. According to this ruling, matters of inheritance involving members of the Muslim minority had to be settled by the *mufti*, as required by Sharia law. Prior to his death, Molla Sali's husband had written a notarised will leaving her his estate. After her husband's death, her sisters-in-law brought suit, claiming that because the deceased belonged to the Thrace Muslim community, Sharia law – in which wills are invalid – applies. The Greek courts initially dismissed the case, both at first instance and on appeal. However, the Court of Cassation quashed the judgment, holding that questions of inheritance fall under the muftis' jurisdiction. The case was remitted to a new Court of Appeals bench, which found that because Sharia law applied, the will was not valid.[50] On 7 June 2017, the case was relinquished to the Court's Grand Chamber; a hearing was held in December 2017.[51]

44. Anticipating the ruling of the Strasbourg Court in the Molla Sali case, in January 2018 the Greek Parliament passed a law (No. 4511/2018) which rendered the practice of Islamic sharia law in civil and inheritance matters optional for the Muslim minority.

5.2. Sharia councils in the United Kingdom

45. There is currently no single accepted definition of the term "Sharia council". In the United Kingdom, these bodies generally provide advice and attempt to resolve disputes relating to family or personal issues, according to the principles of Sharia law. However, little is known about their work, which is conducted in private, and decisions are not published, leading to a lack of transparency and accountability. The actual number of Sharia Councils operating in the United Kingdom is also uncertain.[52] However, a study by the

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43. 2010 International Religious Freedom Report, Chapter on Greece, U.S. Department of State, 13 September 2011.
44. I. Tsavousoglou, op. cit., pp. 253-54. In a divorce, children remain with their mother until sons are seven and daughters are nine, after which fathers gain custody. See also Turner and Arslan, "Legal pluralism and the Shari'a", p. 448.
45. I. Tsavousoglou, op. cit., pp. 252-53.
46. Tsaoussi and Zervogianni, op. cit., p. 217; I. Tsavousoglou, op. cit., pp. 254-55.
47. The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) expressed "concern about the non-application of the general law of Greece to the Muslim minority on matters of marriage and inheritance", CEDAW, Concluding comments on Greece, 2 February 2007, paragraph 33. In fact, women receive only one third of an inheritance, while men get two thirds.
48. T. Hammarberg, op. cit., p. 14.
49. *Molla Sali v. Greece*, Application No. 20452/14, lodged on 5 March 2014.
50. European Court of Human Rights, Relinquishment in favour of the Grand Chamber in a case concerning the application of Islamic religious (Sharia) law to an inheritance dispute between Greek citizens who are Muslims, Press Release, 8 June 2017.
51. European Court of Human Rights, webpage on Cases pending before the Grand Chamber.

University of Reading[53] identified 30 groups involved in this type of activity (although later concluded that some smaller councils closely associated with mosques had not been included), whilst a report by the think tank Civitas[54] estimated that at least 85 groups are operating, although this figure also includes informal tribunals run out of mosques or online forums.

46. Sharia councils provide a form of alternative dispute resolution, whereby members of the Muslim community voluntarily consent to accept their religious jurisdiction. Whilst marital issues and granting Islamic marriage divorces accounts for around 90% of the work undertaken by Sharia councils,[55] they also advise in matters of law including issues of inheritance, probate and wills and Islamic commercial law contracts,[56] and provide mediation, counselling and *fatwa* (religious ruling) services.

47. Sharia councils are not considered part of the British legal system. They are not courts and their decisions are not legally binding.[57] As pointed out in the recently published independent review into the application of sharia law in England and Wales (Independent Review), "It is important to note that sharia councils are not courts and they should not refer to their members as judges". Studies have found that councils seek to avoid conflict with civil law.[58] However, despite having no judicial authority, some councils see themselves as authoritative on religious issues, and "the power of Sharia councils lies in how they are perceived by their communities".[59]

48. A significant number of Muslims do not have a marriage recognised under British law. Those who do not register their marriage under civil law, and some who have been married abroad, have little redress available to them, as, under British law, their position is similar to that of unmarried cohabitants, who have very few financial remedies upon the breakdown of their relationship.

49. The above-mentioned Independent Review describes as one of its key findings the fact that "a significant number of Muslim couples fail to civilly register their religious marriages and therefore some Muslim women have no option of obtaining a civil divorce". Some women may have no other option but to obtain a religious divorce by way of a *faskh*, for which the judgment of a Sharia council is required. Furthermore, even in cases where women have a civil law marriage, some may seek the decision of a Sharia council, for reasons of self-identity or community standing, to provide reassurance that they have the religious freedom to remarry within their faith. "Those who obtain a civil divorce but not a religious divorce may find it difficult to remarry. This position is sometimes referred to as a 'limping marriage'".[60] One of the experts invited before the committee, Ms Zee, denounced what she described as "marital captivity".

50. There are numerous reports citing examples of how Muslim women have been discriminated against by Sharia councils. Examples of such discrimination include women being pressured into mediation, including for victims of domestic abuse; greater weight being given to the husband's accounts of reasons for divorce; women not being questioned by council members, who are almost all men, in an impartial manner and feeling blamed for the breakdown of the marriage; marital rape not being recognised as rape; and unjustified requirements to repay the *mahr* (dowry).[61] There have also been allegations made that Sharia councils have issued discriminatory rulings with regard to child custody; the Casey Review cited claims that "some Sharia councils have been supporting the values of extremists, condoning wife-beating, ignoring marital rape and allowing forced marriage"; and researchers were told that "some women were unaware of their legal rights to leave violent husbands and were being pressurised to return to abusive partners or attend reconciliation sessions with their husbands despite legal injunctions in place to protect them from violence."[62] However, the

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52. D. MacEoin, "Sharia Law or One Law for All?", Civitas, London, June 2009, p.69.
53. Samia Bano, "An explanatory study of Shariah councils in England with respect to family law", University of Reading School of Law, 2 October 2012, p.5.
54. D. MacEoin, op. cit.
55. Based on the findings of a 2010-11 research project; see N. Doe et al., "Written Evidence to Home Affairs Committee on Sharia Councils", Cardiff University School of Law and Politics, 6 September 2016, paragraph 6.
56. N.S. Shah-Kazemi, "Untying the Knot: Muslim Women, Divorce and the Shariah", Oxford: The Nuffield Foundation, 2001.
57. *Al Midani v. Al Midani,* [1999] 1 Lloyd's Rep 923.
58. The Sharia councils studied required parties who had civil law marriages to have obtained a civil divorce prior to obtaining a Muslim divorce; see S. Bano, op. cit., p. 7; N. Doe *et al.*, op. cit.
59. House of Lords Parliamentary Debates, 19 October 2012, Volume 739, col 1716, by Baroness Cox.
60. S. Bano, op. cit., p. 11.
61. S. Gohir, "Information and Guidance on Muslim Marriage and Divorce in Britain", Muslim Women's Network UK, 2016; M. Zee, "Choosing Sharia? Multiculturalism, Islamic Fundamentalism and British Sharia Councils", Eleven International, January 2016; M. Namazie, "Sharia Law in Britain: A Threat to One Law for All and Equal Rights", One Law for All, June 2010; C.R. Proudman, "Equal and Free? Evidence in Support of Baroness Cox's Arbitration and Mediation Services (Equality) Bill", May 2012.

majority of the evidence is anecdotal, as very little empirical evidence has been gathered in relation to users of Sharia councils; further research in this area is therefore necessary. Mechanisms are required to provide safeguards and ensure that vulnerable women are not exploited or put at risk. Many of these women are also not aware of their rights to seek redress before the British courts.

51. Sharia councils should not be confused with arbitration tribunals. The Muslim Arbitration Tribunal (MAT) was established in 2007 under the Arbitration Act 1996. The MAT operates within the framework of British law and its decisions can be enforced by civil courts, provided that decisions have been reached in accordance with the legal principles of the British system. The legal authority of the MAT comes from the agreement of both parties to give the tribunal power to rule on their case. In cases where decisions do not conform to the principles of British law, they may be quashed. Moreover, the 1996 Act cannot be used to exclude the jurisdiction of the family law courts.[63] The MAT can therefore conduct arbitration according to Islamic personal law on issues such as commercial and inheritance disputes.

52. Two official inquiries are currently considering the issues surrounding the application of Sharia law in the United Kingdom. The Commons Home Affairs Select Committee Inquiry into Sharia Councils, launched in June 2016, heard evidence from numerous parties concerned, but was terminated due to the general election in June 2017.[64] As mentioned above, in May 2016, the Home Office launched an Independent Review into the Application of Sharia Law in England and Wales.

53. The results of the Independent Review, chaired by Islamic and inter-religious studies expert Professor Mona Siddiqui who addressed our committee in December 2017, was made public on 1 February 2018. It has been conducted by a panel of experts, including a family law barrister, a retired high court judge, a specialist family lawyer, and advised by two religious and theological experts. The review comes up with three main recommendations: 1) the need for legislative change of the Marriage Act to "ensure that civil marriages are conducted before or at the same time as the Islamic marriage ceremony, bringing Islamic marriage in line with Christian and Jewish marriage in the eyes of the law". It proposes that "the celebrant of any marriage, including Islamic marriages, would face penalties should they fail to ensure the marriage is also civilly registered", thus making it "a legal requirement for Muslim couples to civilly register their marriage before or at the same time as their Islamic ceremony"; 2) the necessity to put in place awareness campaigns as "cultural change is required within Muslim communities so that communities acknowledge women's rights in civil law, especially in areas of marriage and divorce" but also "to ensure that sharia councils operate within the law and comply with best practice, non-discriminatory processes and existing regulatory structures"; and 3) the creation of a body that would set up the process for councils to regulate themselves, including by designing a code of practice for sharia councils to accept and implement.

54. Baroness Cox's Arbitration and Mediation Services (Equality) Bill [HL] 2016-2017, first introduced to the House of Lords as a Private Members' Bill in 2011, received a second reading in the House of Lords on 27 January 2017. The Bill aims to protect women from religiously sanctioned gender discrimination and address a "rapidly developing alternative quasi-legal system which undermines the fundamental principle of one law for all".[65] At its second reading, the government contended that there are aspects of the Bill which are legislatively unnecessary because of existing legislation, as well as issues which should be considered in light of the above-mentioned Independent Review.

5.3. The French territory of Mayotte (until 2011)

55. The French experience concerning the transformation of Mayotte into an overseas *département* is relevant with respect to the handling of a local civil status based on Islamic law and *qadi* justice (justice dispensed by Muslim judges (*qadis*)). Mayotte is a French territory in the Indian Ocean off Madagascar, and one of its distinctive features is the central role of Islam in its society. 95% of the population is Muslim. This has had a considerable influence on the law applied in Mayotte and on the existence of *qadi* justice in civil and commercial cases.

56. Until Mayotte was made a *département* in 2011, the inhabitants had two types of status: personal status (local civil law) and ordinary civil status. Personal status was governed by customary law modelled on Islamic law and African and Madagascan customs. This special system of civil law applied automatically to Muslim citizens of Mayotte,[66] who nevertheless had the option of waiving it in favour of ordinary civil status.[67]

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62. L. Casey, "The Casey Review, A review into opportunity and integration", December 2016, paragraphs 8.40 and 8.41.
63. *Radmacher v. Granatino,* [2010] UKSC 42, per Lord Phillips PSC, paragraph 2.
64. Although written submissions and oral evidence given have been published.
65. House of Lords Parliamentary Debates, 27 January 2017, Volume 778, col 891, by Baroness Cox.

57. However, this personal status was incompatible with the principles of the French Republic[68] and possibly in contradiction with the European Convention on Human Rights. Polygamy was permitted, a woman could be repudiated by her husband, and discrimination against women in matters of inheritance remained. From 2000 onwards, an acceleration of the process of making Mayotte a *département* led the French Parliament to undertake a radical transformation of local civil status to bring it into line with the principles of the French Republic and closer to ordinary civil status.[69]

58. The transformation of Mayotte into a *département* also marked the end of *qadi* justice, with the introduction of a judicial system based on ordinary law and a reorganisation of the courts.[70] It should be noted that *qadi* justice had been heavily criticised by the population of Mayotte, who rejected the application of some principles of customary law (including repudiation, polygamy and men's double share of inheritances) and the random nature of *qadi* justice, which failed to respect the principle of a fair hearing.[71] Mayotte society's strong attachment to France, combined with the lengthy process of turning Mayotte into a *département*, allowed an overhaul of local civil status and an end to *qadi* justice in favour of a judicial system based on ordinary law.

5.4. Russian Federation

59. The Russian Federation, which has been a member of the Council of Europe since 1996and an observer at the Organisation of Islamic Cooperation since 2005, is a patchwork of ethnic and religious groups. Islam is considered to be the country's second religion, covering, in 2010, some 14.3 million Muslims[72] belonging to over 40 different ethnic groups, the largest of which are the Tatars, Bashkirs and Chechens. Most Russian Muslims live in the Northern Caucasus, particularly in Chechnya, Ingushetia, Dagestan and Tatarstan. Russia's Muslims also have their own organisations.[73]

60. In the Northern Caucasus, and particularly Chechnya, family and property matters are usually judged under Sharia law, while disputes arising out of violence, abduction, insults and adultery come under orally transmitted customary law (*"adat"*).[74] Here, under the guise of "tradition", women and girls are victims of violence and discriminatory practices such as early marriage, abduction for forced marriage,[75] "honour" killings,[76] female genital mutilation and polygamy,[77] despite the provisions of Russian federal law.[78] Moreover, family relations are governed by the idea that children are the "property" of the father, so that women lose all custody and access rights for their children after a divorce.[79] The recent report by our former committee colleague Michael McNamara (Ireland, SOC) notes that "[t]he deterioration of the situation of

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66. Vote No. 64-12 bis of 3 June 1964 of the Chamber of Deputies of the Comoros on reorganisation of Muslim legal proceedings. "Muslim citizens of Mayotte" is taken to mean French citizens considered to be natives of Mayotte, even if they were born in the Comoros, so long as they have not renounced this connection.
67. See Article 75 of the French Constitution of 4 October 1958. Renunciation of personal status is irreversible.
68. See French Senate Information Report No. 675 (in French), tabled on 18 July 2012, p. 26, which states that "certain rights conferred by personal status appeared incompatible with the constitutional principles of equality for all citizens and the secular nature of the French Republic".
69. See Overseas Programme Law No. 2003-660 of 21 July 2003 (in French) and Order No. 2010-590 of 3 June 2010 (in French) laying down provisions with regard to the local civil status applicable in Mayotte and in the courts competent to rule on it. See also French Senate Information Report, op. cit. pp. 27-29.
70. French Senate Information Report, op. cit., pp. 29-33.
71. *Qadi* justice did not accept representation by a lawyer or the rule that both parties must be heard and had virtually no procedural rules.
72. Pew Research Centre, "The Global Religious Landscape"; based on data from the United Nations Economic Commission for Europe (UNECE) "Generation and Genders Surveys".
73. Among the Muslim organisations claiming federal status are the Russian Council of Muftis (based in Moscow), the Central Spiritual Directorate of Russian Muslims (based in Ufa) and spiritual directorates in each independent republic, and the North Caucasus Muslim Co-ordination Centre; see Sylvie Gangloff, *"*Islam au Caucase – Introduction" (in French), *CEMOTI* reviews, No. 38, 2006.
74. International Crisis Group, The North Caucasus: The Challenges of Integration (I), Ethnicity and Conflict, Europe Report No. 220, 19 October 2012.
75. Caucasian Knot, "Grozny residents report disappearance of young woman", 27 November 2013.
76. Ibid. See also Memorial Human Rights Centre, "Young Woman Abducted in Grozny", 30 July 2013 and the OFPRA (French Office for the Protection of Refugees and Stateless Persons) issue paper, Tchétchénie: le régime de Ramzan Kadyrov, March 2015.
77. Human Rights Watch, "Dispatches: Will Russia Protect A Child Bride?", 13 May 2015.
78. International Crisis Group, "Women in the North Caucasus Conflicts: An Under-reported Plight", Commentary, 9 June 2016; Russian Justice Initiative, *"*RJI submits shadow report to UN Women's Committee on Women's Rights in the North Caucasus*"*, 13 October 2015.
79. CEDAW, Concluding observations on the eighth periodic report of the Russian Federation, CEDAW/C/RUS/CO/8, 20 November 2015, pp. 6-14.

women in the Chechen Republic through the rigid enforcement of religious norms has continued".[80] I trust that our colleague Frank Schwabe will also look further into this aspect in preparing his report on "The continuing need to restore human rights and the rule of law in the North Caucasus region".

61. In the Chechen Republic, the authorities continue to interfere in citizens' private and social lives with their imposition of Islamic values.[81] For example, the leaders of the Chechen Republic require women to dress according to Islamic rules and tolerate violent attacks on women whose dress is considered indecent.[82] Such actions are clearly in breach of the rights enshrined in the Constitution of the Russian Federation and Article 11 of the Constitution of the Chechen Republic.[83] A number of cases are currently pending before the European Court of Human Rights.[84]

5.5. Turkey

62. Turkey is a founding member of the Organisation of Islamic Cooperation and a signatory to the Cairo Declaration and, since 2011, has had observer status at the League of Arab States. The Turkish Constitution puts the principle of secularism above the fundamental right to freedom of religion. The principle of secularism is enshrined in the preamble and Article 2 of the 1982 Constitution (revised in 2001). Under Article 4, the provisions of the first three articles of the Constitution "shall not be amended". Article 14 also provides that none of the fundamental rights and freedoms enshrined in the Constitution (freedom of conscience, religious belief and conviction being guaranteed in Article 24) "shall be exercised with the aim of … endangering the existence of the democratic and secular order of the Turkish Republic".

63. Sharia law does not apply in Turkey, even though most of the population obeys the precepts and rituals of Islam. It would appear that action by the AKP government has had the effect of weakening the principle of secularism rather than abolishing it.[85] However, the ban on the Islamic headscarf was lifted first in State universities,[86] then in the civil service[87] and subsequently in secondary schools.[88] Furthermore, religious education is now compulsory in schools,[89] which is problematic for religious minorities, whether Muslim or non-Muslim.[90]

6. Conclusions

64. As described in the report, several provisions of the Cairo Declaration are highly problematic with regard to human rights, not least its Article 25, which states that: "The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration". These problems arise because there are clear incompatibilities between Sharia law and the European Convention on Human Rights.

65. It is therefore of concern that three Council of Europe member States – Albania, Azerbaijan and Turkey – are signatories to the 1990 Cairo Declaration, as are Jordan, Kyrgyzstan, Morocco and Palestine, whose parliaments have "partner for democracy" status with the Parliamentary Assembly. We should

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80. See report for our committee by Michael McNamara (Ireland) on Human rights in the North Caucasus: what follow-up to Resolution 1738 (2010)?, Doc 14083, 8 June 2016.
81. See second information report of our committee by Dick Marty (Switzerland, ALDE), Situation in the North Caucasus Region: security and human rights, 29 September 2009, pp. 4-5.
82. Human Rights Watch report, You Dress According to Their Rules: Enforcement of an Islamic Dress Code for Women in Chechnya, March 2011. The attacks described in the report were perpetrated between June and September 2010 by unidentified men said to be police officers, in the centre of Grozny, the Chechen capital.
83. Constitution of the Chechen Republic, Chapter 1: Fundamentals of the Constitutional Structure, Article 11: "1. The Chechen Republic is a secular state. No religion is allowed to determine matters of government or its obligations. 2. Religious organisations are separate from government and equal under the law."
84. M. McNamara, op. cit., paragraph 38.
85. Ariane Bozon, "La Turquie est-elle toujours laïque?", Slate, 26 July 2016.
86. Laure Marchand, "En Turquie, le voile islamique fait sa rentrée universitaire", *Le Figaro*, 18 October 2010.
87. Wearing of the headscarf has been allowed in the civil service since 2013, Franceinfo, "Turquie: le port du voile autorisé dans l'administration", 8 October 2013.
88. Since 2014, girls in secondary schools have been authorised to wear the headscarf. See *Al-Jazeera*, "Turkey lifts decades-old ban on headscarves", 8 October 2013; France 24, "Turkey lifts headscarf ban in secondary schools", October 2013; France 24, "Les lycéennes et collégiennes turques autorisées à porter le voile islamique", 23 September 2014.
89. Article 24 of the 1982 Turkish Constitution states: "Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives."
90. See, for example, *Mansur Yalçin and others v. Turkey*, Application No. 21163/11, judgment of 16 September 2014 (inclusion of material on the Alevi faith in the national curriculum).

therefore strive to reconcile the various positions and create bridges of understanding between Sharia law and the Convention, on the prior condition of acceptance that the Convention is an international instrument binding on all Council of Europe member States, whereas the Cairo Declaration is a political, non-binding document.

66. In my view, the aforementioned States should make use of available means to make declarations, so as limit the effects of the 1990 Cairo Declaration on their respective Constitutions and vis à vis their obligations as Parties to the Convention as applicable. They should consider performing some formal act which clearly establishes that the Convention is a superior source of obligatory binding norms.

67. This report also addresses the actual application of the Sharia in Council of Europe member States. It will be highly interesting to see the conclusions of the European Court of Human Rights in the case *Molla Sali v. Greece*, and whether the legislative change in Greece which rendered the practice of Islamic sharia law in civil and inheritance matters optional for the Muslim minority will prove to be sufficient to satisfy the requirements of the Convention. As far as the United Kingdom is concerned, I welcome the recommendations put forward in the conclusions of the Home Office Independent review into the application of sharia law in England and Wales (see paragraph 53 above).

Appendix – Dissenting Opinion[91] by Mr Pieter Omtzigt (the Netherlands, EPP/CD) member of the Committee on Legal Affairs and Human Rights

I thank the rapporteur for his report, based on my motion for a resolution.[92]

The rapporteur clearly notes the total incompatibility of shari'ah Law with the European Convention on Human Rights. He finds Sharia law incompatible with the Convention on the following points and I concur with him:

– Article 2 (right to life)

– Article 3 (prohibition of torture or inhuman or degrading treatment)

– Article 6 (right to a fair trial)

– Article 8 (right to respect for private and family life)

– Article 9 (freedom of religion)

– Article 14 (prohibition of discrimination on grounds such as sex or religion)

– And furthermore:

– Article 1 of Protocol No. 1 (protection of property)

– Article 5 of Protocol No. 7 (equality between marital partners.)

– Protocols Nos. 6 and 13 (prohibition of the death penalty)

I do not consider this list to be exhaustive. For instance, blasphemy laws based on sharia, like the ones in Pakistan, are clearly not compatible with article 10 (freedom of expression).

In Articles 24 and 25 the Cairo Declaration states that:

> *"All the rights and freedoms stipulated in this Declaration are subject to the Islamic shari'ah.*
>
> The Islamic shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration."

The European Court of Human Rights in the *Refah Partisi v. Turkey* case ruled:

> *"It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts."*

The Cairo Declaration is just a declaration and is clearly not compatible with the legally binding Convention. Therefore you cannot sign and ratify the Convention and be a signatory to the Cairo Declaration. The States that are in this situation should be asked to withdraw from the Cairo Declaration in order to fulfil their obligations under the Convention.

Sharia councils in the United Kingdom perpetuate the problem of marital captivity. Whereas under civil laws men and women enjoy equal rights to divorce, Sharia councils maintain a system where women have limited rights as compared to men.

Other family law issues are also highly problematic in Sharia. Men and women do not get equal shares from a heritage. And the husband gets the custody of older children in case of a divorce. This is clearly totally incompatible with the Convention and States should refrain from granting legitimacy to Sharia councils. Instead member States should enforce their own civil laws, which exist to protect the weaker party. Particularly women who feel great social pressure should be helped through civil courts to enforce their rights.

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91. Rule 50.4 of the Assembly's Rules of Procedure: "The report of a committee shall also contain an explanatory memorandum by the rapporteur. The committee shall take note of it. Any dissenting opinions expressed in the committee shall be included therein at the request of their authors, preferably in the body of the explanatory memorandum, but otherwise in an appendix or footnote."

92. Doc. 13965