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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"?

Committee Opinion[1]
Committee on Political Affairs and Democracy
Rapporteur: Ms Maryvonne BLONDIN, France, Socialists, Democrats and Greens Group

A. Conclusions of the committee

1. The Committee on Political Affairs and Democracy thanks Mr Antonio Gutiérrez, rapporteur of the Committee on Legal Affairs and Human Rights, for his report on a complex, topical issue which is essential for organising life in society in Europe. The committee by and large supports the proposed draft resolution.

2. The committee is not unaware that several provisions of the 1990 Cairo Declaration are extremely problematic as concerns human rights. As pointed out by the rapporteur of the Committee on Legal Affairs and Human Rights, however, the Cairo Declaration is a non-binding political document whereas the European Convention on Human Rights (ETS No. 5, "the Convention") is an international instrument which is binding on all Council of Europe member States.

3. What would be more worrying would be if Council of Europe member States, or States whose parliaments have partner for democracy status, formally recognised Sharia as a source of law in their Constitutions. This is not the case, however. Some allow recourse to Sharia through "Sharia courts" but only for matters relating to personal status. Even that is too much if, as is often the case, it leads to discrimination against women.

4. The committee fully agrees, therefore, with the report's conclusion that the Council of Europe member States which have endorsed implicitly or explicitly the Cairo Declaration, and the countries whose parliaments have partner for democracy status, should make use of 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 incompatible with the European Convention on Human Rights. They should also make every endeavour to revise the said Declaration along the lines of the Convention.

5. The committee proposes five amendments to the draft resolution in order to strengthen the report's message and to make the title easier to understand and more consistent with the Assembly's previous documents.

1. Reference to committee: Doc. 13965, Reference 4188 of 4 March 2016. Reporting committee: Committee on Legal Affairs and Human Rights. See Doc. 14787. Opinion approved by the committee on 21 January 2019.

B. Proposed amendments to the draft resolution

Amendment A (to the draft resolution)

Change the title of the report as follows: “Sharia, the Cairo Declaration and the European Convention on Human Rights”

Explanatory note: This title is shorter and more neutral.

Amendment B (to the draft resolution)

In paragraph 9, insert the following at the end: “on the principle that where human rights are concerned, there is no room for religious or cultural exceptions”

Explanatory note: This principle, which appears in the summary of the report, has a place in the resolution as well, having already been stated by the Parliamentary Assembly on several occasions. It also underpins the recent European Court of Human Rights judgment on the application of Sharia in Western Thrace.

Amendment C (to the draft resolution)

At the end of paragraph 11.2, insert the following words: “and a source of inspiration for those whose parliaments enjoy partner for democracy status”

Explanatory note: Although these States are not bound by the European Convention on Human Rights, when applying for partner for democracy status their parliaments made an explicit reference to their aspiration to embrace the values of the Council of Europe.

Amendment D (to the draft resolution)

In paragraph 12, delete the following words: “as well as Jordan, Kyrgyzstan, Morocco and the Palestinian National Council, all signatories to the 1990 Cairo Declaration,”

Explanatory note: The Assembly has already addressed the partners for democracy in paragraph 11. Here the focus should be on member States because partners for democracy are not bound by the European Convention on Human Rights.

Amendment E (to the draft resolution)

In paragraph 12.2, delete the words “as applicable”

Explanatory note: If paragraph 12 is directed solely at the member States, this phrase no longer serves any purpose.

C. Explanatory memorandum by Ms Maryvonne Blondin, rapporteur for opinion

1. Introduction

1. The report written by our colleague, Mr Antonio Gutiérrez, rapporteur of the Committee on Legal Affairs and Human Rights, is an integral part of the Assembly’s long-standing work to protect our standards and values.

2. On 26 September 2016, the Committee on Political Affairs and Democracy appointed Ms Anne Brasseur (Luxembourg, ALDE) rapporteur for opinion. On 22 May 2018, the committee held an exchange of views in Athens on the application of the Sharia in Western Thrace in Greece, with the participation of Ms Maria Giannakaki, Secretary General for Human Rights and Transparency, Ministry of Justice, and Mr Yannis Ktistakis, Assistant Professor, Faculty of Law, Democritus University of Thrace.

3. Following Ms Brasseur’s departure, the committee called for candidates during the June 2018 part-session and appointed me as rapporteur for opinion during the October 2018 part-session.

2. The situation in Western Thrace

4. During the exchange of views in Athens on 22 May 2018, Ms Giannakaki spoke about Greek legislation which enables Greek citizens of the Muslim faith living in Western Thrace to opt for the use of Sharia. Under this provision, the family affairs (including inheritance issues) of many Muslims in Western Thrace are settled by the mufti. The Jewish community of Greece was also able to opt to use Jewish community law until 1936, when they decided that they no longer wished to be considered as a minority.

5. Ms Giannakaki pointed out that, in *Molla Sali v. Greece*, the European Court of Human Rights was called upon to consider whether the application of Sharia to the applicant's inheritance dispute, rather than the ordinary law applicable to all Greek citizens, even though the will of her husband, a Greek citizen who belonged to the Western Thrace Muslim minority, had been drawn up in accordance with the provisions of the Greek Civil Code (as a result of which she was deprived of three quarters of her inheritance), amounted to a difference in treatment on grounds of religion in violation of the European Convention on Human Rights. Ms Giannakaki then informed the Committee that in January 2018, following the European Court of Human Rights hearing in this case, a new law abolishing the special regulations imposing recourse to Sharia for the settlement of family-law cases within the Muslim minority had come into force. Recourse to a mufti in matters of marriage, divorce or inheritance was now only possible exceptionally, in the case of a joint request by all parties concerned.

6. Mr Ktistakis, for his part, pointed out five incompatibilities between the Cairo Declaration and the European Convention on Human Rights: the Declaration stated that all people were equal in terms of dignity, but not in law; there was no equality between women and men; there was no freedom of belief or freedom to manifest one's religion; freedom of movement and the right to asylum were restricted by Sharia; and Sharia was the sole source of reference for interpreting or clarifying the Declaration. It was very difficult to interpret Sharia in this context because there were four Sunni and several Shia schools of thought in this regard. In conclusion, he considered that the Cairo Declaration was incompatible with the Convention.

7. Commenting on the recent change in Greek legislation, Mr Ktistakis was of the opinion that rendering the application of Sharia optional for Western Thrace Muslims was not sufficient to ensure compatibility with the Convention. He cited, in particular, the European Court of Human Rights judgment of 22 March 2012 in *Konstantin Markin v. Russia* in which it was held that "in view of the fundamental importance of the prohibition of discrimination on grounds of sex, no waiver of the right not to be subjected to discrimination on such grounds can be accepted as it would be counter to an important public interest".

8. In its judgment in *Molla Sali v. Greece* of 19 December 2018,[2] the European Court of Human Rights confirmed that the difference of treatment suffered by the applicant, as a beneficiary of a will drawn up in accordance with the Civil Code by a Greek testator of Muslim faith, as compared to a beneficiary of a will drawn up in accordance with the Civil Code by a non-Muslim Greek testator, had no objective and reasonable justification. It accordingly concluded that there had been a violation of Article 14 of the Convention (prohibition of discrimination), read in conjunction with Article 1 of Protocol No. 1 to the Convention (ETS No. 9) (right to property). It should be emphasised that, in the view of the Court, refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts not only to discriminatory treatment but also to a breach of a right of cardinal importance in the field of the protection of minorities, that is to say the right to free self-identification.

9. In noting that Greece was the only country in Europe which, up until the time of the events, had applied Sharia to a section of its citizens "against their wishes" and in noting "with satisfaction" the recent legislative change, the Court seems to take the view that since the application of Sharia is now only possible exceptionally, at the request of all parties concerned, Greek legislation is compatible with the Convention. Whether this is in fact the case, however, remains to be ascertained when the judgment is executed or in future litigation before the Court.

10. Lastly, in stating that "a person's religious beliefs cannot validly be deemed to entail waiving certain rights if that would run counter to an important public interest", the Court is upholding the principle repeatedly stated by the Assembly that where human rights are concerned, there is no room for religious or cultural exceptions.

2. *Molla Sali c. Greece*, Application No. 20452/14: http://hudoc.echr.coe.int/eng?i=001-188747.

3. The situation in Mayotte

11. In its report, the Committee on Legal Affairs and Human Rights refers to the situation in the French territory of Mayotte, before it became a *département* in 2011, where "personal status", a customary law modelled on Islamic law and African and Madagascan customs, was in force.

12. The French Senate Information Report No. 675 of 18 July 2012 states that "several provisions of the personal status were also incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms". Despite the reservations made by France upon signing the Convention, certain rules applicable to Mayotte undermined some of its provisions: Article 6 (right to a fair trial), Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination, in particular on the grounds of sex or birth).

13. The transformation of Mayotte into a *département* marked the end of qadi justice, with the introduction of a judicial system based on ordinary law and a reorganisation of the courts. The qadis lost their judicial powers and became mediators in family and social matters.

4. The partners for democracy

14. As stated by the rapporteur of the Committee on Legal Affairs and Human Rights, Jordan, Kyrgyzstan, Morocco and Palestine, whose parliaments have partner for democracy status with our Assembly, have endorsed the 1990 Cairo Declaration through their membership of the Organisation of Islamic Co-operation (OIC). Unlike member States, countries whose parliaments have partner for democracy status are not bound by the European Convention on Human Rights. However, those parliaments have stated that they share the same values as the Council of Europe, namely pluralist and parity-based democracy, the rule of law and respect for human rights and fundamental freedoms. It should be reiterated that none of these States recognises Sharia as a source of law in its Constitution (as does the Egyptian Constitution, for example).

15. In its reports on requests for partner for democracy status, and in its reviews of this status, the Assembly has made no direct reference to Sharia. It has, however, made some comments in which Sharia is mentioned indirectly: firstly, as regards abolition of the death penalty and the introduction of a moratorium on executions; and secondly, on gender equality, including as regards interreligious marriages and inheritance law, fighting all forms of gender-based violence, and promoting equal opportunities for women and men.

16. The Assembly has also concerned itself with the right to freedom of thought, conscience and religion, including the freedom to change one's religion or belief, and the freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief in worship, teaching, practice and observance, in accordance with Article 18 of the Universal Declaration of Human Rights.

17. It has criticised the use of torture, inhuman or degrading treatment, poor conditions of detention and violations of freedom of expression, assembly and association. In the case of Morocco, it has encouraged public debate about abolishing polygamy. In the case of Jordan, it has expressed regret that Article 6.1 of the Constitution, which is discriminatory towards women, has not been amended.

5. Protecting Council of Europe standards and values

18. This is not the first time that the Assembly has addressed the issue of the relationship between religions and human rights. In its Resolution 1510 (2006) on freedom of expression and respect for religious beliefs, the Assembly stated that "freedom of expression as protected under Article 10 of the European Convention on Human Rights should not be further restricted to meet increasing sensitivities of certain religious groups".

19. I would also like to mention Mr Tiny Kox's report on "Combating international terrorism while protecting Council of Europe standards and values" (Doc. 13958 of 26 January 2016), in particular paragraphs 48 to 53 of the explanatory memorandum where it is stated that:

> *"48. Respect of everyone's right to freedom of thought, conscience and religion, as enshrined in Article 9 of the Convention, is often confused with an "obligation" to accept anything which is put forward as a component of someone's religion".*
>
> *49. More than two hundred years ago, a movement started in Europe towards the separation of church and State. As a consequence, secularism, that is the principle of the separation of State and religion, is today accepted as one of the pillars of a democratic society. The Assembly has stated that we must continue to protect this principle.*

50. A similar process has not yet taken place in many Muslim countries, where Islam is seen both as a person's religion and as a way of organising life in society. While any person's right to his/her religious beliefs must be protected in a democratic society as far as these beliefs do not violate the rights of others, any rules which do not respect human rights must not be tolerated.

51. It is clear that parts of what is considered by some Muslims as a component of Islam, including most of the Sharia law, fall into this category and cannot therefore be accepted as civil law in societies that consider themselves democratic. It would be wrong, in the name of political correctness, to pretend that this is not so. The European Court of Human Rights determined on 31 July 2001 that "the institution of Sharia law and a theocratic regime were incompatible with the requirements of a democratic society". [3]

52. That is certainly not a process that should be imposed from the outside. Europe should, however, stand ready to support, in every possible way, Muslim democratic leaders and intellectuals, whom, together with relevant representatives of civil society, would embark on this long but inevitable process.

53. To begin with, Europe should ban in its territory all practices, religious or not, which do not respect human rights: where human rights are concerned there is no room for "cultural exceptions". Education and the media should play important roles too."

6. Conclusion

20. I fully share the opinion of the rapporteur of the Committee on Legal Affairs and Human Rights on the importance of clearly stating the values advocated by the Council of Europe. We must make it clear that we will not accept such values being subordinate to cultural or religious subjective considerations.

3. *Refah Partisi (the Welfare Party) and Others v. Turkey*, Applications Nos. 41340/98, 41342/98, 41343/98 and 41344/98.