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***Article 9
Application of Islamic law
in the domestic legal order***

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STUDY OF THE ECHR CASE-LAW
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SUMMARY

The case-law of the Court (and the former Commission) concerning Islamic law as such and its application in the domestic legal orders of the Contracting States is very scarce. The Court has ruled that Shari'a as a legal and political system is clearly incompatible with the fundamental values of the Convention; however, this is not necessarily true when it comes to particular provisions of Islamic law. In situations involving the real or possible application of Islamic law, both the Court and the former Commission have given priority to the European *ordre public* (and other autonomous considerations like the best interest of the child), while trying, to some extent, to accommodate other interests like cultural diversity.

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INTRODUCTION

1. The present research report deals with the question of how the Court sees the application of Islamic law in the domestic legal orders of the Contracting States from the point of view of the Convention.

2. Before analysing the specific issues related to Shari'a law and examined by our Court in its case-law, it is important to emphasise the difference between two issues:

- (a) the attitude towards Shari'a as a legal and political system, i.e., as a basis for an entire constitutional order, and
- (b) the attitude towards precise individual provisions of Islamic law applicable in different areas.

I. The attitude of the Court towards Shari'a as a legal and political system

3. Concerning the first issue, the Grand Chamber of the Court has given a clear answer in the key judgment in the case of [*Refah Partisi \(The Welfare Party\) and Others v. Turkey*](#) [GC] (nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II), concerning the dissolution, by the Turkish Constitutional Court, of a political party one of the basic goals of which was establishing a constitutional regime based on Shari'a. The Court ruled as follows:

“123. The Court concurs in the Chamber’s view that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention:

“72. Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. 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. ... In the Court’s view, 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.”

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124. The Court must not lose sight of the fact that in the past political movements based on religious fundamentalism have been able to seize political power in certain States and have had the opportunity to set up the model of society which they had in mind. It considers that, in accordance with the Convention's provisions, each Contracting State may oppose such political movements in the light of its historical experience.

125. The Court further observes that there was already an Islamic theocratic regime under Ottoman law. When the former theocratic regime was dismantled and the republican regime was being set up, Turkey opted for a form of secularism which confined Islam and other religions to the sphere of private religious practice. Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah's policy of establishing sharia was incompatible with democracy...

126. The Court will next examine the applicants' argument that the Chamber contradicted itself in holding that Refah supported introducing both a plurality of legal systems and sharia simultaneously.

It takes note of the Constitutional Court's considerations concerning the part played by a plurality of legal systems in the application of sharia in the history of Islamic law. These showed that sharia is a system of law applicable to relations between Muslims themselves and between Muslims and the adherents of other faiths. In order to enable the communities owing allegiance to other religions to live in a society dominated by sharia, a plurality of legal systems had also been introduced by the Islamic theocratic regime during the Ottoman Empire, before the Republic was founded.

127. The Court is not required to express an opinion in the abstract on the advantages and disadvantages of a plurality of legal systems. It notes, for the purposes of the present case, that – as the Constitutional Court observed – Refah's policy was to apply some of sharia's private-law rules to a large part of the population in Turkey (namely Muslims), within the framework of a plurality of legal systems. Such a policy goes beyond the freedom of individuals to observe the precepts of their religion, for example by organising religious wedding ceremonies before or after a civil marriage (a common practice in Turkey) and according religious marriage the effect of a civil marriage... This Refah policy falls outside the private sphere to which Turkish law confines religion and suffers from the same contradictions with the Convention system as the introduction of sharia...

128. Pursuing that line of reasoning, the Court rejects the applicants' argument that prohibiting a plurality of private-law systems in the name of the special role of secularism in Turkey amounted to establishing discrimination against Muslims who wished to live their private lives in accordance with the precepts of their religion.

It reiterates that freedom of religion, including the freedom to manifest one's religion by worship and observance, is primarily a matter of individual conscience, and stresses that the sphere of individual conscience is quite different from the field of private law, which concerns the organisation and functioning of society as a whole.

It has not been disputed before the Court that in Turkey everyone can observe in his private life the requirements of his religion. On the other hand, 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

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the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession). The freedom to enter into contracts cannot encroach upon the State's role as the neutral and impartial organiser of the exercise of religions, faiths and beliefs..."

4. The Court reached the same conclusion in the case of [*Kasymakhunov and Saybatalov v. Russia*](#) (nos. 26261/05 and 26377/05, 14 March 2013). The applicants, an Uzbek and a Russian national, were convicted by the Russian courts for their membership of the radical Islamic organisation *Hizb ut-Tahrir al-Islami*, and sentenced to seven years and four months' and five years and six months' imprisonment respectively. Before the Court, the applicants alleged, *inter alia*, a violation of their rights under Articles 9, 10 and 11 of the Convention. After having found that *Hizb ut-Tahrir* had called for "holy war", advocated violence and hatred against Jews, the Court reasoned as follows:

“109. Nor are the changes in the legal and constitutional structures of the State proposed by *Hizb ut-Tahrir* compatible with the fundamental democratic principles underlying the Convention. The Court notes that the regime which *Hizb ut-Tahrir* plans to set up after gaining power is described in detail in its documents. An analysis of these documents reveals that *Hizb ut-Tahrir* proposes to establish a regime which rejects political freedoms, such as, in particular, freedoms of religion, expression and association, declaring that they are contrary to Islam. For example, *Hizb ut-Tahrir* intends to introduce capital punishment for apostasy from Islam and to ban all political parties which are not based on Islam ...

110. Furthermore, in its literature *Hizb ut-Tahrir* clearly states its intention to introduce a plurality of legal systems, that is, a distinction between individuals in all fields of private and public law, with different rights and freedoms afforded depending on religion. Thus, according to *Hizb ut-Tahrir's* Draft Constitution..., only Muslims will have the right to vote and to be elected, to become State officials or to acquire membership of political parties. Different tax rules and family laws will be applicable to Muslims and to adherents of other religions. The Court has already found that such a system cannot be considered to be compatible with the Convention system because it undeniably infringes the principle of non-discrimination on the ground of religion (see *Refah Partisi (the Welfare Party) and Others*, cited above ...). Similarly, some provisions of the Draft Constitution promote differences in treatment based on sex, for example providing that women cannot take up high-ranking official positions. These provisions are hard to reconcile with the principle of gender equality, which has been recognised by the Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe...

111. Lastly, the Court observes that the regime that *Hizb ut-Tahrir* intends to set up will be based on sharia. However, it has previously found a regime based on sharia to be incompatible with the fundamental principles of democracy, 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. An organisation whose actions seem to be aimed at introducing sharia in a State Party to the Convention can hardly be regarded as complying with the democratic ideal that underlies the whole of the Convention (see *Refah Partisi (the Welfare Party) and Others*, cited above...).

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112. It is significant that the activities of *Hizb ut-Tahrir* are not limited to promoting religious worship and observance in private life of the requirements of Islam. They extend outside the sphere of individual conscience and concern the organisation and functioning of society as a whole. *Hizb ut-Tahrir* clearly seeks to impose on everyone its religious symbols and conception of a society founded on religious precepts...

113. In view of the above considerations, the Court finds that the dissemination of the political ideas of *Hizb ut-Tahrir* by the applicants clearly constitutes an activity falling within the scope of Article 17 of the Convention. The applicants are essentially seeking to use Articles 9, 10 and 11 to provide a basis under the Convention for a right to engage in activities contrary to the text and spirit of the Convention. That right, if granted, would contribute to the destruction of the rights and freedoms set forth in the Convention and referred to above.

114. It follows that the applicants' complaints under Articles 9, 10 and 11 are incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4."

5. So, **Shari'a as a system is not compatible with the fundamental values of the Convention.** However, this doesn't mean that each and every particular provision of Islamic law is necessarily incompatible with these values. Domestic courts of the Contracting States can sometimes be obliged to apply Islamic provisions in the context of private international law, without being always at odds with the Convention rights and/or domestic or European public policy.

II. Particular issues of Islamic law

A. *The minimum age of marriage*

6. The Shari'a allows a girl to be married at the age of nine. It is clear that so low a threshold, considerably lower than the age of sexual consent in all the European countries, is contrary to European public policy (*ordre public*). The Convention institutions (the former Commission and the Court) had the opportunity to examine this question twice. In the case of [Khan v. the United Kingdom](#) (no. 11579/85, Commission decision of 7 July 1986, Decisions and Reports (DR) 48, p. 253), the Commission refused to extend the protection of Article 9 of the Convention to a man sentenced to prison for having had sexual intercourse with a girl under the age of sixteen (the legal age of consent) although he was married to her under Islamic law. The Commission also concluded that there had been no appearance of a violation of Article 12 of the Convention (right to marry).

7. In the second case, [Z.H. and R.H. v. Switzerland](#) (no. 60119/12, 8 December 2015), concerned an asylum application filed with the Swiss

authorities by a couple of Afghan nationals married in Iran according to Islamic law as recognised by the Iranian legal system. At the moment of this religious marriage, the wife was only fourteen. Their asylum application was rejected for the reason that, according to the European Union law applicable in this case, this application had to be made in Italy, the first country where they came. The applicants tried to appeal to the Swiss courts which rejected their appeal, considering that their religious marriage could not be recognized in Switzerland: firstly, in Afghanistan, the minimum marriage age for women was fifteen; secondly, sexual intercourse with a person under sixteen years of age was a crime in Switzerland. Therefore, the marriage of this couple was legally null and void because it was contrary to Swiss *ordre public*; consequently, the woman could not be considered as a “*family member*” with her partner. The man was subsequently expelled from Switzerland to Italy. Before the Court, the couple alleged a violation of Article 8 of the Convention (family life).

8. In its judgment, the Court ruled that Article 8 could not be construed as obliging a Member State to recognize a marriage (religious or other) of a child of fourteen. In this respect, it reiterated that Article 12 (right to marry) made an express reference to the domestic civil law of each Contracting State. Given the sensitive nature of the moral choices on which the Swiss judges had to rule, as well as the importance of children’s rights, the Court considered that the domestic courts were in a better position to take an appropriate decision. In these circumstances, the ruling of the Swiss courts according to which the applicants were not legally married, was not unreasonable. As a result, the Court found *no violation* of Article 8 of the Convention.

B. The recognition of Islamic religious marriages in the domestic legal system

9. The question of recognition of an Islamic religious marriage in the domestic (secular) legal system was addressed by the Court in the case of [*Şerife Yiğit v. Turkey*](#) [GC] (no. 3976/05, 2 November 2010). The applicant was a Turkish national who entered into a religious marriage (“*imam nikahı*” in Turkish) with an man with whom she subsequently had six children. After her husband died, she filed an application on her own behalf and on behalf of her younger daughter to obtain recognition of her marriage and the registration of the girl in the civil status register as the daughter of the deceased. The Turkish court accepted this request, but rejected the marriage application. The applicant also made a request to the pension fund for her and her daughter to benefit from the deceased’s pension and health insurance. These rights were granted to the daughter, but not to the applicant, on the grounds that her marriage was not legally recognised.

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10. The Grand Chamber decided to examine the application not only under Article 8 (right to respect for private and family life) but also under Article 14 (prohibition of discrimination) combined with Article 1 of Protocol No. 1 (protection of property). The applicant, who was married under the religious regime, claimed that she had been treated differently than a woman married in accordance with the Civil Code who would have asked to benefit from the social rights of her late husband. The Court reiterated that Article 14 prohibits, in the ambit of rights and freedoms guaranteed by the Convention, any discrimination based on a personal characteristic by which persons or groups of persons are distinguished from each other. The nature of a marriage between two persons, whether civil or religious, is certainly such a characteristic. Therefore, a “*different treatment*” such as the one to which Mrs Yiğit was subjected could in principle be prohibited by Article 14. Examining whether this difference had an objective and reasonable justification, the Court noted, first of all, that the decision taken by the Turkish authorities pursued legitimate aims, namely the preservation of *ordre public* (the civil marriage having the special aim of protecting women’s rights and interests), and the protection of the rights and freedoms of others. The Court then examined whether there was a reasonable relationship of proportionality between the refusal of the Turkish authorities to allow the applicant to benefit from the social rights of her deceased partner and the aims pursued by the authorities. On this essential point, the Court found it decisive that, in view of the relevant rules of Turkish law, Mrs Yiğit could have no legitimate expectation of enjoying the social rights of her cohabiting partner. The Turkish Civil Code is clear on the prominent role and status of civil marriage and the applicant should have known that she had to regularise her union in accordance with the Civil. Finally, the Court noted that the rules and procedures relating to the celebration of a civil marriage were clear and simple and did not impose any excessive burden on the persons concerned. Since the difference of treatment of the applicant was objectively and reasonably justified, the Court held that there had been no violation of Article 14 of the Convention combined with Article 1 of Protocol No. 1.

11. Concerning Article 8 of the Convention, the Court noted that the applicant, her partner and their children constituted a genuine “*family*” protected by this provision. However, it found that the applicant and her partner were able to live together without any interference on the part of the national authorities. The fact that they had opted for a religious marriage and did not marry civilly did not result in any sanctions that would prevent Mrs Yiğit from effectively leading her family life within the meaning of article 8. The Court reiterated that Article 8 could not be interpreted as imposing on the State the obligation to recognize religious marriage or as requiring the State to introduce a special regime for a particular category of

unmarried couples. Consequently, there had been no violation of Article 8 either.

C. Relations between parents and children of different faiths

12. In the case of [Karakuzey v. Germany](#) (no. 26568/95, Commission decision of 16 October 1996, unpublished), a divorced Muslim man was sentenced to prison for refusing to pay maintenance for his under-age daughter on the ground that she had changed religion, as her mother had had her baptised in the Roman Catholic Church. According to the applicant, a child who had left the Muslim faith (even under its mother's influence) had to be considered "*non-existent*"; consequently, to require its Muslim father to pay maintenance would be contrary to freedom of religion. The former Commission found that there had been no interference in the applicant's freedom of religion, as the obligation to pay maintenance for a child, custody of whom had been granted to the other parent, was generally applicable and had no direct implications *per se* for the sphere of religion or conscience.

D. The kafāla

13. In two judgments, the Court examined the particular problem of *kafāla* (legal care which is the substitute for adoption in Islamic law).

14. In the case of [Harroudj v. France](#) (no. 43631/09, 4 October 2012), the applicant, a French national living in France, obtained a ruling from an Algerian court granting her the right to take into *kafāla* a child born in Algeria of unknown parents and abandoned at birth. The applicant was granted legal authorisation by the Algerian authorities to change the child's last name to her own. Soon thereafter, the applicant brought the child to France. There, the applicant applied to adopt the child, but her application was rejected by the French court. The court noted that the *kafāla* gave the applicant parental authority, enabling her to take all decisions in the child's interest, and gave the child the protection to which all children are entitled under the international treaties. The court also pointed out that under the French Civil Code a child could not be adopted if the law of his or her country - Islamic law in this case - prohibited adoption, which was the case here, since her Algerian family law did not authorise adoption.

15. In French law, *kafāla* is considered as a form of guardianship if the child is an orphan or has been abandoned and the parents are unknown, or as a delegation of parental authority. The French Civil Code, however, authorises the adoption of a minor whose personal status is governed by Islamic law "*if the minor was born and habitually resides in France*". In

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addition, a child who cannot be adopted because of his or her personal status under Islamic law has the right, before coming of age, to apply for French citizenship if they have lived in France for at least five years, in the care of a French national.

16. The applicant argued in her subsequent appeal that it was in the child's interest for a filial bond to be established between them, and that denying her the right to adopt established a difference of treatment based on the child's country of origin, as children born in countries which did not prohibit adoption could be adopted in France. That appeal was rejected by the Court of Cassation which noted that cooperation agreements on international adoption applied only to adoptable children, and that *kafāla* was explicitly acknowledged by the New York Convention of 20 November 1989 on the Rights of the Child as protecting the child's best interests in the same way as adoption.

17. The Government did not dispute the existence of a family life between the applicant and the child, but they did deny that the refusal to let the applicant adopt amounted to an "*interference*" with the applicant's family life. The Court shared that view, noting that the applicant was not complaining about a major obstacle to her family life, but simply wanting to establish a filial bond which the Civil Code denied her because adoption was prohibited in the child's country of origin. The Court went on to examine whether France was under any positive obligation regarding respect for the applicant's family life. The Court considered, first of all, that the margin of appreciation open to the French State here was wide, in so far as there was no consensus on this question among the Council of Europe's member States. Although none of the States considered *kafāla* equal to adoption, approaches to whether or not the law of the child's country of origin constituted an obstacle to adoption varied to different degrees.

18. The Court then observed that the refusal to let the applicant adopt was based on the French Civil Code, but also, to a large extent, on compliance with international treaties, particularly the New York Convention of 20 November 1989 on the Rights of the Child, which explicitly referred to the *kafāla* as "*alternative care*", on a par with adoption. The Court considered that the fact that *kafāla* was acknowledged in international law was a decisive factor when assessing how the States accommodated it in their domestic law and dealt with any conflicts that arose. The Court also noted that *kafāla* was fully accepted in French law, and in the instant case had produced effects comparable to guardianship, so that the applicant was able to take all decisions in the child's interest. It was also possible for her to include the child in her will and choose a legal guardian to look after her in the event of her demise. Lastly, under the French Civil Code, the child had the possibility, after a short time, to acquire French nationality and thereby become adoptable, as she had been taken into the care of a French national in France.

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19. The Court concluded that, by providing for an exception for children born and residing in France, and giving children taken into care in France by a French national rapid access to French nationality, the authorities had made an effort to encourage the integration of such children without immediately severing the ties with the laws of their country of origin, thereby respecting cultural pluralism. A fair balance had therefore been struck between the public interest and that of the applicant, without interfering with her right to respect for her private and family life. The Court accordingly held that there had been no violation of Article 8 of the Convention.

20. In the second case - [*Chbihi Loudoudi and Others v. Belgium*](#) (no. 52265/10, 16 December 2014) - the applicants were a married couple of Belgian nationals and their niece of Moroccan nationality. The niece's birth parents gave their approval for a *kafāla* arrangement. The child was thus entrusted to their care, by her parents, for the applicants to “*look after all her interests ... and provide for the general needs of her life; to travel with her, whether inside or outside Morocco, and to accommodate her with them when abroad*”. The *kafāla* agreement was certified and approved by the competent Moroccan judge. However, after the child arrived in Belgium, the Belgian courts refused to approve the deed, declaring that the statutory conditions were not met for an adoption, as the *kafāla* agreement entered into in Morocco did not concern a case where a child had been entrusted by the competent authorities of the child's State of origin to the adoptive parents; in this case the child had been entrusted by her parents. The court took the view that the requested adoption would create a legal parent-child relationship which was not constituted by the *kafāla* arrangement and therefore a new legal status.

21. The Court began by finding that in the present case Article 8 was applicable in its “*family life*” aspect. It did not call into question the interpretation of the Belgian law by the domestic courts, which had taken the view that the legal conditions for an adoption had not been met, on the grounds that the child had not been entrusted to the would-be adoptive parents by the competent “*authority*” of the child's State of origin. The Court verified, however, whether the child's “*best interests*” had been taken into account. It observed in this connection that the refusal to grant the adoption had had a legal basis seeking to prevent any improper use of adoption and to respect private and family life, those being among the aims pursued by the relevant Hague Convention. In addition, the courts, taking into account the existence of a legal parent-child relationship with the child's birth parents in Morocco, had identified the risk of her not having the same personal status in Belgium as in Morocco. The Belgian authorities had thus been entitled to consider that their refusal to grant adoption was in the child's best interests, by ensuring the maintaining of a single parent-child relationship in both countries. Moreover, that refusal had not

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deprived the applicants of all recognition of the relationship between them, because the procedure of unofficial guardianship was still open to them - an arrangement resembling *kafāla* - even though its outcome was uncertain. Lastly, the applicants had not referred to any practical obstacle that they would have to overcome, as a result of the situation, in order to pursue their family life. Consequently the Court found that there had been no violation of Article 8 of the Convention.

22. So, in these two cases the Court has made a considerable effort to find an equilibrium between two values currently considered as important in the Western society: the best interests of the child and cultural diversity.

CONCLUSION

23. The conclusions that can be drawn from the very scarce case-law concerning the application of Islamic law in the domestic legal orders of the Contracting States are the following. **Firstly**, Shari'a as a legal and political system is clearly incompatible with the fundamental values of the Convention, but this is not necessarily true when it comes to particular provisions of Islamic law. **Secondly**, in situations involving the real or possible application of Islamic law in the Contracting States, both the Court and the former Commission have given priority to the European *ordre public* (and other autonomous considerations like the best interests of the child), while trying, to some extent, to accommodate other interests such as cultural diversity.