| CHAPTER 3 |

Minimum International Standards of Protection Against Abuse and Harmful Religious Practices

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ABSTRACT

The impact of religion on society is obvious. Also, children, the weakest yet most valuable social links, ensuring the future persistence of social and national communities, are greatly culturally influenced by the religion of their parents or guardians. The right of parents to raise their children in the faith of their ancestors is the basis of modern civilization. On the other hand, some of the world's religions create certain risks to a child's psychological or physical well-being. Practices that are linked more or less formally to religion can directly threaten a child's proper biological development. They can also deprive a child of the proper experience of childhood. Such practices as genital mutilation of girls or forced child marriage characterize the main, though not exclusive, world based on the religion of Islam. The religious origins of these phenomena require deeper analysis. The norms of international law try to introduce a certain standard of child protection, to which this text is also devoted. One may doubt it is sufficient, in view of the scale of the entrenchment of violent tradition in some religious communities.

KEYWORDS

sharia, Quranic norms, political Islam, genital child mutilation, forced child marriage, parental abduction

1. Introduction

The religion in which a child is raised undoubtedly has an impact on his or her cultural well-being. Paradoxically, it can also create risks for their psychological and even physical development. The child's dependence on his or her parents, both spiritually and materially, usually means that he or she will grow up with the world view, including religion that the parents have established. This, naturally, fully determines the young person's attitude to life and way of thinking. The existing system of values is thus passed on to the next generation. In this process, religions create a universal value system. Although the concepts of good and evil appear to be universal (and,

Paweł CZUBIK (2025) 'Minimum International Standards of Protection Against Abuse and Harmful Religious Practices' in Katarzyna ZOMBORY – Márta BENYUSZ (eds.) *Religion and Children's Rights.* Miskolc–Budapest: Central European Academic Publishing. pp. 75–91. https://doi.org/10.71009/2025.kzmb.racr_3

consequently, religions generally recognise them in similar terms), the ritualistic influence of a religion can significantly distort these notions. Religious rules or peri-religious practices can pose risks for the child, including permanent physical damage. Interestingly, these practices are most often related to the sexual sphere, and the ritual influence of religion concerns the intimate spheres of the child's body.[1]

The existing major religions of the world, for all their complexity, are largely introspective. The purpose of religious norms is to shape the beliefs and attitudes of their followers in order to achieve a state desired from the perspective of the religious rules, which will provide him or her with a privileged situation in the next life (after death, in another incarnation, etc.). Religions are generally not interested in non-believers, whose behaviour is normatively indifferent to the religion in question. At most, they are proselytising in character. A fundamental exception in this respect is Islam, which at its core (in both Shia and Sunni versions) is extrospective. The religious norms making up the Mohammedan doctrine[2] are fundamentally concerned with the position of the non-believer and indicate the duties that such a person has towards the believers. Paradoxically, the written norms of Islam refer far more often to the legal position of the unbeliever (*kafir*[3]) than to the situation of the believer. This is because the task of this religion is to order the world by subordinating all people (Islam is Arabic for submission, subordination) to the only correct attitude, according to its principles.[4] In practice, this poses a number of problems in the case of clashes between Islam and Christian religions – clashes that do not occur in the case of conflicting values between other religions.

It is a politically correct myth to claim that the phenomenon identified above applies only to Islamic radicalism in its purest form. Sunni Islam (practised by up to 90% of those who identify with this religion) does not have a separate radical and non-radical version. In it, the relationship between law and religion is absolute.

1 These practices include, for example, religious circumcision in Judaism, which is performed on 8-day-old boys (which does not seem to have a negative impact on their health). In Islamic countries, older boys (between 2 and 14 years of age) are circumcised. Ritual circumcision of girls, however, practised in some of these countries, is a drastic procedure that destroys their future sexual life and results in a huge number of complications and post-operative deaths (Kłak, 2017, pp.140–143).

2 The written norms of the Islamic religion can be found in the Koran (which contains the message of Allah) and the sunna (i.e. the words and deeds of the prophet Muhammad). The sunna consists of two types of writings: the sīrah (biographies of Muhammad – the earliest, by Ibn Ishaq, was written more than 130 years after Muhammad's death, the most famous, by Ibn Hisham, titled *Sirat Rasul Allah* – translated as the life of God's messenger – more than 200 years after his death) and hadith (collections of saying or traditions about Muhammad). The most valued hadith collections are by Sahih al-Bukhari and Sahih Muslim. Cf. Warner, 2010, p. 5; Witkowski, 2009, p. 35; Sadowski, 2017, p. 31.

3 It is worth noting here that the term *kafir* has a strongly pejorative and contemptuous connotations in Islam. As the literature on the subject points out, 51% of the texts (including 64% of the text in the Koran, 37% of the text of hadith and as much as 81% of the sīrah) is devoted to *kafirs* (see footnote below). Cf. Warner, 2010a, p. 121.

4 In this context, Islam views man as a slave, a servant of Allah, obliged to obey. Cf. Gibb, 1965, p. 46.

In Islam, the religious norm is also the legal norm.[5] This is because Islam is a holistic religion – its task is to regulate every human activity,[6] which is a complete unification of the sphere of the sacred and the profane.[7] By all means, states whose citizens are mostly followers of Islam are often characterised by a secular legal order.[8] However, a follower of Islam is obliged to reject secular norms that are contrary to Islam. A version of Islam characterised by a departure from radicalism has essentially no religious basis – it merely implies a greater or lesser liberalism for secular law and a lack of fervent belief in, and acceptance of, Islamic principles. From the point of view of a strong believer, such conduct is regarded as apostasy or heresy.[9]

Even if one were to assume (which is in principle a false assumption) that there are more or less radical versions of Islam, it should be emphasised that contemporary Europe is confronted with the most radical version – or rather, the most radical adherents. As a result of the influence of the 1951 Convention Relating to the Status of Refugees,[10] people from the Levant and the Maghreb (mainly Algeria) have been arriving in Europe, mainly in France, since the 1950s and have been granted refugee status due to religious persecution in their home country. Paradoxically, these people were actually persecuted on religious grounds (which gave them protection under the Convention) because their fundamentalist attitudes were not accepted by the secular authorities in their countries. In this way, Europe "imported" the most radical believers expelled by the Arab states.[11] In addition, in recent years there has been mass economic migration[12] from the most civilisationally backward regions of Islamic countries (such as Afghanistan, the countries of sub-Saharan West Africa,

5 Sadowski, 2017, p.163 et seq.

6 Hence, Sharia as Islamic law is a condensation and extrapolation of the norms contained in the Koran and the sunna. The written source of "everyday Sharia" for the average believer is the book *Reliance of the Traveller*, written in the 14th century and held in high regard by the major religious centres of Islam. Cf. Ibn al Naqib and Keller, 1997, cited in Warner, 2010b, p. 14.

7 Cf. Krawczyk, 2013, p. 95.

8 Although it should be noted that this legal order may be largely based on Sharia norms. Numerous norms of civil law make reference to Islam and the constitutional norm of the superiority of Sharia over secular law is the rule.

9 This explains why most Islamic fundamentalists' attacks are attacks in Islamic countries (which is not usually mentioned in the media) – directed at the secular authorities and the secularising (according to the attacker) community of followers.

10 Under Art. 1(A)(2) of the Convention Relating to the Status of Refugees, adopted in Geneva on 28 July 1951, as modified by the Protocol Relating to the Status of Refugees, adopted in New York on 31 January 1967, persecution for reasons of religion constitutes grounds for according the refugee status under the Convention.

11 Cf. Allam, 2008, *passim*.

12 Contrary to the expectations of Marxist leftist circles, this is not an influx of refugees. These persons are not refugees within the meaning of the instruments of international refugee law. In most cases, they are not fleeing persecution but are heading for Europe to improve their economic situation. The fundamental reason for their mass influx is therefore economic. It should be borne in mind, however, that for Muslims it is also of a religious nature. The financial support paid to them (for nothing, for doing no work) is seen as a *dhimmi* tax, which, according to the Koran, the infidel, recognising his subordination, is obliged to pay to Muslims. Cf. The Koran 9:29.

Somalia, Djibouti). All this brings to Europe people who are socially dysfunctional from the point of view of the principles of European civilisation. They create their own enclaves, which leads to the emergence of phenomena that had previously been completely unknown in the European reality, including pathological threats to the well-being of children growing up in such environments. At the same time, these practices are contrary to the norms of both family and criminal law in European countries. These are, in particular, forced marriages (including child marriages that involve the acceptance of paedophilic acts) and the circumcision of children (girls). It is surprising in the modern world that such cases, previously associated with remote areas of the world steeped in Islamic tradition, have become real threats in Europe today. The law and practice of European countries are compelled to counter such threats to children.

Naturally, the means of combating such phenomena are different in the international sphere and in the sphere of domestic law. The ability of the international community to influence the practice of Islamic states in this regard must be considered meagre, despite some successes.[13] Possible educational efforts aimed at raising awareness of the extent of the harm done to children are rational. The fact is, however, that given the existence of a centuries-old, religiously motivated tradition, it is difficult to imagine the possibility of effectively preventing this type of pathology.[14] However, in the case of European countries with Muslim communities, it seems that national criminal and civil law provisions, which include a public policy clause, make it possible to prevent this type of pathological practice.

This chapter highlights the basic risks for children that arise in practice in the context of customs associated with Islam (characteristic of immigrant Muslim communities that do not integrate into the states in which they reside). At the same time, it outlines the basic international legal instruments, as well as those specific to the domestic law of states, which can be seen as remedies – protective measures against criminal or discriminatory treatment of children based on religious traditions. While article 30 of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989,[15] grants children belonging

13 For example, Egypt's banning of ritual circumcision in 2007 was a purely theoretical success; in practice, the practice is still widespread.

14 Although it is doctrinally disputed that the circumcision of girls is prescribed by Islam, this confuses the genesis of the phenomenon with its religious basis. The fact is that ritual circumcision of both boys and girls has been practiced by the peoples of the Middle East and North Africa since the time of the Pharaohs of ancient Egypt, and the original basis for this was probably the polytheistic beliefs of that period. It is therefore a widespread phenomenon not only among the peoples of the Middle East who profess Islam, but also among the local Christians (e.g. Copts), but while it persists among Christian Copts only as a result of tradition, the norms of Islamic law explicitly recommend circumcision (cf. Sahih al-Bukhari vol. 7, book 72, no. 779). Circumcision as compulsory for both males and females is indicated in the Sharia law manual *Reliance of the Traveller*, chapter "e" para. 4.3 – cf. Warner, 2016, p. 45.

15 Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, UNTS vol. 1577, no. 27531.

to religious and cultural minorities the right to have and enjoy their own culture and to profess and practise their religion, it is clear that the right to the protection of cultural identity, including religion, traditions and customs,[16] cannot lead to the recognition and maintenance of cultural and religious practices that are contrary to universally recognised principles of human rights. There is a full consensus on this point in both the doctrine[17] and practice of international law.[18] It is also clear that not all cultural and religious practices are compatible with the system of human rights protection and, in particular, with norms for the protection of children. In particular, cultural and religious practices that are harmful to the dignity, health and development of the child are unacceptable. There can be no doubt that both forced child marriage and female circumcision are contrary to the best interests of the child and can in no way be justified by traditional rules rooted in religious beliefs.

2. The Position of the Woman and the Child Under Sharia Regulations

The fundamental problem of the legal status of the child under the norms of Islamic law, which create a range of risks, arises indirectly from the legal status of the woman under these norms. In principle, the legal position of a woman under Islamic law is much worse than that of a man, both in civil law[19] and in family law. The social, legal and economic superiority of men is a direct consequence of the message of the Koran.[20] In essence, the traditional rules of Islam lead to the reification of women.[21]

This also implies parental authority over children, which is usually vested primarily in the man. In Islam, a young child generally remains in the care of its mother until the age of 30 months, when it should be weaned, according to the Koran.[22] The child

16 Guaranteed to minorities (to the same extent as in Art. 30 of the Convention on the Rights of the Child) also in Art. 27 of the 1966 International Covenant on Civil and Political Rights, adopted 16 December 1966 by General Assembly resolution 2200A (XXI) UNTS vol. 999, no. 14668.

17 Zombory, 2023a, pp. 294–295.

18 Committee on the Rights of the Child, General Comment No. 11 (2009): Indigenous children and their rights under the Convention; CRC/C/GC/11), para. 22.

19 For example, the value of a woman's testimony in court is worth half that of a man (The Koran 2:282, Sahih al-Bukhari volume 3, book 48, no. 826); the compensation due to a woman is equal to half the compensation that would be due to a man in the same situation (*Reliance of the Traveller*, chapter 'o', thesis 22.1).

20 The Koran 4:35. Cf. Truskolaska, 2007, p. 98.

21 Ibn Ishaq and Guillaume, 1955, p. 651: 'Lay injunctions on women kindly, for they are prisoners with you having no control of their persons.' A man may forbid a woman to leave the house (*Reliance of the Traveller*, chapter "m", thesis 10.4). *Sunan Abi Dawud* (book 5, hadith 2155) formally equates a woman's nuptials with the purchase of a camel. Women who disobey their husbands can be beaten – The Koran 4:43 explicitly encourages the beating of disobedient wives (numerous hadiths and norms of Sharia law regulate the beating of wives).

22 The Koran 46:15.

then becomes fully dependent on the father, who can theoretically remove his wife from the parenting process and take over all responsibility. The father's decisions also determine the choice of his daughter's spouse – the will of the woman in the traditional value system need not be taken into account.[23]

Undoubtedly, a fundamental problem connected with the position of women and children under Islamic norms is that forced marriage and child marriage is *de facto* legalised paedophilia. In this case, the Muslim religion provides a basis for accepting acts that are clearly qualified as paedophilia by the legal system of civilised countries. This is linked to the biography of the Prophet of Islam himself. Muhammad, at the age of 53, took a six-year-old child as his wife and had sexual intercourse with her when she was nine years old.[24] By all means, it can be argued that this deviation should not be shocking given the medieval historical context, but it must be remembered that the figure of the Prophet and his behaviour remain a literal model for many Muslims today.[25] European states must pay particular attention to the possibility of such phenomena occurring among followers of the Prophet who take their religion too literally. While it is difficult to imagine such situations among Muslims from the Maghreb and the Levant who have been living in Europe for many decades and are the third or fourth generation born here, it is not unthinkable in the case of the mass migration from Afghanistan or sub-Saharan Africa that has been ongoing for the past decade. These are often people who had no chance of finding employment in their place of origin, mostly uneducated, but quite radical, with a host of negative life experiences, whose religiosity was shaped in the spirit of a medieval understanding of Islamic doctrine.

23 Under the Sharia legal system, a woman's consent to marriage is expressed by her silence. As a result, in contemporary Afghanistan or Bangladesh, more than half of all girls are married before they reach the age of majority. In practice, religious leaders can directly persuade people to enter into marriage with minors. Khomeini, the Shiite leader of Iran, explicitly urged fathers to make every effort to have their daughters already living in their husband's home before they enter menstrual age. Cf. Spencer, 2014, p. 106.

24 Sahih al-Bukhari, vol. 5, book 58, no. 236 and vol. 7, book 62, no. 88. By all means, it can be argued that there were (political) marriages of minors in medieval Europe, but these involved both sexes, and the consummation of the marriage took place when the minors reached the age of adulthood (the determination of adulthood was based on both biology and age – lower than today). While this is essentially a thing of the past in the Christian world (except, for example, when a minor becomes pregnant, which in many jurisdictions involves consent to marriage and "accelerated adulthood"), such situations are not uncommon in the Islamic world today. In Saudi Arabia, the legal age of marriage is 12, but girls aged 6 or 9 are often married off, and a 10 year old mother is not uncommon. Cf. Gopal, 2006, p. 146 et seq.

25 Moreover, the life of Muhammad (sīrah) is one of the three main sources of Islamic law, determining rules of conduct alongside the Koran and hadith. Given that the first written references to Muhammad did not appear until 130 years after his death, there is no serious historian today who could risk his authority by claiming that we are definitely dealing with a real figure (by contrast, the figure of Jesus was already followed by the Romans during his earthly life and is mentioned in numerous documents). Thus, it cannot be ruled out that the Prophet is a fully fictional figure (a kind of Ali Baba), or a compilation of several local leaders (highwaymen, slave traders). Cf. Alcader, 2010, p. 61.

Sometimes the problems are insoluble. In Polish practice (where the number of immigrants from Muslim countries is rather small, as Poland has not yet been affected by mass migration), there have been situations in which a refugee centre received people who declared themselves to be married[26] – an adult man with a girl of a few years. If the girl spoke only a dialect of one of the Middle Eastern languages that only her "husband" knew, a dilemma had to be resolved: whether to leave the child in the company of her "husband", in fact the only guardian in Poland known to the child (running the risk of paedophilic incidents), or to separate the 'spouses', exposing the girl to additional trauma by placing her in the company of unknown women with the same communication problems. In Western European countries, this type of situation is practically commonplace.[27]

3. International Instruments for the Protection of Minors

Unfortunately, the interest of the international community in the above-mentioned threats to the well-being of minors has not resulted in the adoption of universally applicable sources of international law that would explicitly regulate the issue in the context of religion. Among the international legal instruments that consider the problem of forced marriage (including child marriage) and female circumcision is the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, adopted on 11 May 2001 in Istanbul (hereinafter: the Istanbul Convention). However, its scope is very limited and it should be noted that it creates legal obligations for State Parties to take measures to criminalise forced marriage (including child marriage)[28] and female circumcision.[29] In practice, the implementation of these obligations varies, with some State Parties still not having

26 Naturally, such a union cannot be recognised as marriage. It is a rule of private international law to apply the public policy clause in such situations – this will be discussed further, in point 4 of this text.

27 Among the marriages of Syrian migrants, half were to women under the age of 18. In Norway, 60 married minors applied for asylum in 2015, with the youngest married girls being 11 years old. The situation is similar in Denmark, where cases like the one described in the text above and the problem of separating a child from her husband who is also her guardian have been recorded. Cf. Półtorak, 2017, p. 115.

28 According to Art. 37 of the Istanbul Convention: 'Forced marriage: 1. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised. 2. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised.'.

29 Art. 38 of the Istanbul Convention provides: 'Female genital mutilation: Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: a excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris; b coercing or procuring a woman to undergo any of the acts listed in point a; c inciting, coercing or procuring a girl to undergo any of the acts listed in point a.'.

introduced changes in this area[30] – the fundamental problem of the Convention being that it criminalises these offences in the laws of State Parties, while they are predominantly committed in the territory of states not bound by its provisions.[31]

Despite the above-mentioned advantages of the Istanbul Convention, it is noteworthy that it is part of the fight against modern civilisation, which is based on the division of social roles by redefining traditional gender roles. The letter of the Convention refers to the need to 'uproot traditions and customs' and thus comes into conflict with the nature of the state as the guarantor of the continuity of a nation, its history and traditions. It thus creates a clear conflict with the existing law and practice of states. A state that "uproots" traditions and customs, instead of gradually changing or modifying them when they are, for whatever reason, without value, is committing cultural suicide – with, in most cases, deplorable consequences – because action begets reaction.[32] A state concerned with its development should therefore avoid adopting an instrument which directly and openly damages tradition and custom, even if, as in the case of the Istanbul Convention, it does not conceal such aims. Moreover, hasty adoption of the Convention may be directly counterproductive.[33]

Returning to treaty solutions concerning the prohibition of child marriage, it should be noted that the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly on 18 December 1979,[34] and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, opened for signature in New York on 10 December 1962,[35]

30 For example, in Polish law, the introduction of the crime of ritual circumcision (defined as 'excision, infibulation or other permanent and substantial mutilation of the female genital organ') into Art. 156 of the Criminal Code did not occur until 2023 (although Poland has been a party to the Istanbul Convention since 2015). The crime is punishable by imprisonment from 3 to 20 years.

31 Unfortunately, these crimes are also carried out today in Muslim communities in Europe, and a common case is that girls are taken to their ancestral country for ritual circumcision.

32 This was the case, for example, in Iran in 1979. The Shah's fight against tradition led to the flourishing of religious fundamentalism in society, which was many times more radical than the Shia traditions cultivated in the period before the liberal policy of eradicating religion.

33 This is best illustrated by the case of Turkey, which finally denounced the Convention in 2021. (Turkish practice in applying the Convention also shows that the Convention will not be accepted in conservative Islamic societies). Poland adopted the Convention in 2015, and efforts to denounce it began in 2020. The Prime Minister's request to the Constitutional Tribunal in 2020 to examine the compatibility of the Istanbul Convention with the provisions of the Polish Constitution was withdrawn in January 2024. However, a number of countries in the Central European region are not parties to the Istanbul Convention: Hungary, Slovakia, the Czech Republic, Lithuania, Latvia, Bulgaria and Ukraine.

34 According to Art. 16(2) of this Convention: 'The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory'.

35 Art. 2 of this Convention reads: 'States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.'

also contain provisions on the invalidity of child marriage. However, these only deal with the civil law aspects of marriage (lack of legal effects, minimum age) and, unlike the Istanbul Convention, do not introduce an obligation to criminalise these phenomena.

However, it is possible that forced marriages of minors, if they involve the sexual exploitation of a child, could be considered subject to mandatory criminalisation at the level of national law, if only on the basis of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, signed in Lanzarote on 25 October 2007. As mentioned above, Sharia law allows child marriage (following the example of Mohammed), but does not allow sexual intercourse until the girl has reached sexual maturity – such intercourse will therefore in most cases constitute paedophilia according to the legal systems of civilised countries.

The issue of ritual circumcision has been of interest to European Union bodies[36] and concern for the victims of circumcision is reflected in at least several EU directives.[37] The Council of Europe[38] and the United Nations[39] have also shown a growing interest in the need to combat this drastic practice. Certainly, increasing knowledge about this phenomenon, the risk of death, the lifelong suffering and trauma caused by it can have an impact on reducing the number of such cases. However, the scale of the phenomenon in the world is so huge that the impact of these initiatives is likely to be minimal. Despite the efforts of the international community, many more generations of girls from Africa and Asia will meet this painful fate for religious reasons. The United Nations' assumptions that the practices of forced marriage and female circumcision will be eradicated by 2030 appears to be a form of wishful thinking.[40]

36 Cf. European Parliament resolution of 7 February 2018 on Zero Tolerance for Female Genital Mutilation (FGM) (2017/2936(RSP)).

37 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (*OJ L 315, 14.11.2012, p. 57–73);* Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (*OJ L 180, 29.6.2013, p. 96–116);* Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) *(OJ L 337, 20.12.2011, p. 9–26).*

38 Declaration (13/09/2017) of the Committee of Ministers on the need to intensify the efforts to prevent and combat female genital mutilation and forced marriage in Europe, adopted by the Committee of Ministers on 13 September 2017 at the 1293rd meeting of the Ministers' Deputies.

39 UN General Assembly resolution of 20 December 2012 on 'Intensifying global efforts for the elimination of female genital mutilations' (A/RES/67/146).

40 Let the example of Sheikh Tantawi (d. 2010), Grand Mufti of Egypt, Grand Imam of Al-Azhar University in Egypt, an unquestioned authority for a billion Sunnis, indicate how unrealistic this is. He claimed that circumcision was 'a laudable practice that did honor to women' (Abdo, 2002, p. 59). Cf. Spencer, 2014. p. 116. Although it is commendable that Tantawi, probably influenced by Egypt's criminalisation policy (since 2007), considered circumcision to be a religiously indifferent issue and did not allow his own daughter to be circumcised.

4. The Public Policy Clause in International Instruments and National Law as a Means of Protecting Minors

Possible discriminatory violations of children's rights may also occur in civil law. Civil law norms may have a religious basis. In the case of Islam, this is the rule – many verses of the Koran (and a number of hadith) contain norms that have an impact on civil law (mainly inheritance law, family law and contract law). By definition, the essence of Islam is the subordination of man to God, but also the ordering of different categories of persons through the subordination of one to the other. The aforementioned fundamental subordination of women to men results in different rights in the area of civil law. This also applies to the rights of female children. From the perspective of the law of European states, the impact of those norms of Sharia law that introduce a gender differentiation of children is relevant. This is particularly so in the case of inheritance law.

According to the rules of the Koran, a woman should receive half the value of the inheritance received by the male heir.[41] Such norms actually limit women's (including girls') legal capacity to inherit.[42] In addition, in legal orders based on Islam, the performance of legal acts by women is limited (limitation of legal capacity) if they act without a male guardian.[43] Given that in the legal orders of most countries the restriction or (until a certain age) absence of legal capacity is a common mechanism of protecting children from making dispositions that are disadvantageous to them, the application of Sharia solutions that are discriminatory towards women to children is not justified.

The jurisprudence of the EU states seems to be drifting towards a greater acceptance of foreign law, or even the functioning of parallel legal spaces within one state[44] – and, interestingly, not only where this entails a more liberal view of reality. A sense of colonial guilt (more or less justified in Western European societies) contributes to the acceptance of solutions based on Islamic law that are far removed from any sense of justice.[45] For the time being, however, such discriminatory (and therefore illegal) effects of possible foreign laws in the legal order of a state are eliminated through the application of

41 The Koran 4:11.

42 Regardless of this, it is worth emphasising that the rules of inheritance based on Sharia are quite complicated (they differ in the case of Sunnis and Shiites) and most of them can actually be covered by the public order policy in the case of effecting on the territory of a culturally different state. Cf. Witkowski, 2009, pp. 184–196.

43 Cf. Kamarad, 2017, p. 97. The guardian is necessary for the conclusion of marriage. If a woman marries on her own and without the permission of her guardian, her marriage is invalid ("ashes and nothing" – Masabih, book 27 hadith 40) and she commits adultery punishable by death (Sahih Muslim, book 17, hadith 4206).

44 For an exemplary overview of theoretical concepts in the pluralist approach to law, cf. Olson, 2017, pp. 233–254.

45 Cf. Liska, 2017, pp. 126–128.

so-called public policy clauses.[46] Instead of applying the law that would be applicable to the case if it were not contrary to public policy, the court applies its own law.

It should also be noted that, in today's European legal area, the applicability of foreign succession law is most often the result of the European conflict-of-law rules contained in articles 20-22 of the European Succession Regulation No. 650/2012.[47] The applicability of foreign succession law to the succession of a European citizen in proceedings before the European courts may result from his habitual residence in a foreign state at the time of death (Article 21 of Regulation 650/2012) or from his choice of foreign law (Article 22 – if he possesses the nationality of the foreign state in question). If the application or choice of a foreign law results in a legal order that violates the public policy standards of the country where the court is carrying out succession proceedings, it is natural to invoke the public policy clause and for that court to apply its own law and not a foreign law.[48] In this regard, it should be noted that Regulation 650/2012 has its own provision containing a public policy clause[49] (thus, formally, the above-mentioned public policy provisions of the laws of the member states do not apply to succession proceedings conducted in European Union countries bound by the Regulation).[50] The public policy clause of Regulation 650/2012 may eliminate the application of the succession rules of Islamic law.

46 For example, in Polish law, the public policy clause is contained in Art. 7 of the Private International Law Act (Act of 4 February 2011 – Private International Law, consolidated text Journal of Laws of 2023, item 503): 'Foreign law shall not apply, should the effects of its application be contrary to the fundamental principles of the legal system of the Republic of Poland.' (There is also a similar provision in civil procedural law). Many European and Latin American countries provide for very similar solutions. Sometimes the scope of conflict with foreign law is more clearly defined in these provisions – e.g. in Latvian law: 'The law of a foreign state is not applicable in Latvia if it is in conflict with the social or moral ideals of Latvia, or mandatory or prohibitory norms of Latvian law' (Art. 24 of the Civil Code of Latvia, Valdības Vēstnesis vol. 41 of 20.02.1937, as amended).

47 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (*OJ L 201, 27.7.2012, p. 107–134).*

48 Theoretically, the application of foreign norms may lead to discrimination on the grounds of age (exclusion from inheritance or limitation of inheritance in the case of children who do not inherit if the male spouse is still alive), gender (limitations on women's inheritance), religion (exclusion of apostates who have abandoned Islam for another religion or atheists), or children born out of wedlock. There may also be a gross imbalance in the shares received by the spouse and descendants in the succession process. Limitation or exclusion of testamentary succession, which is contrary to Roman law, can also be seen. Some of these problems are reflected in the inheritance rules of Islamic law, which, as mentioned above, are quite complicated (for example, according to the inheritance rules of Islamic law, only one third of an estate can be disposed of by will, and it is impossible to appoint an heir by will who is entitled to inherit by operation of law) – cf. Witkowski, 2009, p. 194.

49 Art. 35 of Regulation 650/2012 states: 'Public policy (*ordre public*): The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.'

50 Regulation 650/2012 is not binding on Denmark and Ireland.

5. Problems of Parental Abduction in Interreligious Marriages

Children are particularly at risk in intercultural and interfaith marriages where there are significant differences in the values and religious traditions of the parents. The mutual infatuation, which is partly due to the different customs and beliefs of the partner, fades over time and is often replaced by the radicalisation of one's religious views – essentially a desire to exert exclusive influence on the children of the couple. This is particularly the case in mixed marriages where one of the spouses (usually the man) is an adherent of Islam.[51] Although divorce is not forbidden in Islam (it is in fact easy to obtain,[52] which can be connected with the refusal to recognise divorce judgements from countries where Islam permeates the legal space of family law[53]), the need to share property or custody of children with a woman, as a result of a secular court ruling, is often seen by the Muslim spouse as contrary to Islam and an affront to his dignity as a believer. This often triggers "honourable" reactions, including attempts to remove the ex-wife from the process of bringing up the children, e.g. through their abduction and deportation to the Muslim husband's country of origin.

When a marital relationship breaks down, the spouses may undertake illegal actions leading to parental abduction of children. In addition to the above-mentioned behaviour of Muslim fathers, it sometimes happens that the non-Islamic wife, feeling threatened or anticipating the abduction of the child to a Muslim country, takes the child abroad herself (usually to another EU country) in order to interrupt or impede contact with the child's father. This type of parental abduction is covered by the Convention on the Civil Aspects of International Child Abduction, signed in The Hague on 25 October 1980.[54] Although the mechanisms of the Hague Convention, as

51 In principle, this is only the case if the Muslim is a man. This is because Islam approves of such marriages, provided that the children are brought up in the Muslim faith. A woman brought up in the Muslim religion cannot marry a non-Muslim. Such a situation is also impossible under the secular legal systems of the many countries where Islam is the dominant religion. The influence of Sharia on secular law is clearly visible in this case.

52 The acceptance of divorce in Koranic law is also due to the attitude of Muhammad himself (who, incidentally, was the only follower of Islam to have special permission from Allah to have more than four wives – he had eleven wives, excluding slave concubines – cf. Bielawski, 1973, p. 25). Muhammad increased the number of his wives by taking over the wives of murdered enemies (cf. Sahih Bukhari, vol. 3, book 46, no. 717), as well as by "gifts" from co-religionists (when the Prophet took a liking to a co-religionist's wife, that man would get a divorce and the Prophet would marry a formally free woman – cf. The Koran 33:36–40.

53 There is a particular problem with *talaq* divorces (the divorce becomes effective when the husband has uttered the word *talaq* to his wife three times; it can also be sent by SMS). Thus, divorce is possible on the declaration of one of the parties (of a particular gender) without considering the will of the other, and the permanence of the marriage is compromised. A public policy clause should eliminate such a solution, which is similar to rulings from Islamic countries where child custody is determined by the courts only in favour of the father.

54 UN Treaty Series, vol. 1343, No. 22514.

set out in its Article 12, provide for an order for the immediate return of the child[55] (who has not reached the age of 16) to the State Party from which he or she has been wrongfully removed, the court should also take into account factors related to the personal situation of the child. Under Article 13, however, a judicial or administrative authority of the requested State is not obliged to order the return of the child if the person, institution or organisation opposing the child's return demonstrates that there is a grave risk that the return of the child would expose him or her to physical or psychological harm or would otherwise place the child in an intolerable situation. It also follows from the same provision that a judicial or administrative authority may refuse to order the return of the child if it finds that the child is opposed to being returned and has reached an age and degree of maturity at which it is appropriate to take his or her views into account. It should be noted in this regard that, for the countries of the European Union, the provisions of the Hague Convention should be interpreted in accordance with the modifications resulting from the European regulations.[56] The relevant provisions of the regulations refer to the need (and not merely the possibility) to hear the child when he or she is mature enough to express such an opinion.[57] In addition, under Article 20 of the Hague Convention, the return of the child may be refused in accordance with the provisions of Article 12 if the return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. These provisions may be particularly relevant in the case of a child from a culturally mixed family where the child's mother is threatened with violence by the father seeking the child's return. It should be noted that in modern Hague Convention jurisprudence, the application of the above-mentioned rules – preventing the return of the child – is increasingly common.[58] This evolution is undoubtedly taking place in the context of social changes

55 The Hague Convention's solutions uphold a policy of zero tolerance of parental abduction and, as such, can sometimes be difficult to reconcile with the standards of other international legal instruments that emphasise the need to be guided by the best interests of the child. Cf. Zombory, 2023b, pp. 226–227.

56 There are two sets of rules that come into play in contemporary cases (as a result of the application of the Hague Convention to the abduction of children under the age of 16): the new Brussels II Regulation (No. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ L 338, 23.12.2003, pp. 1–29*), which applies to judgments rendered in proceedings commenced before 1 August 2022, while the Brussels II ter Regulation (Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), *OJ L 178, 2.7.2019, p. 1–115)* applies to proceedings after that date, pursuant *to Art. 100 of the latter Regulation.*

57 In accordance with Art. 11(2) of the new Brussels II Regulation and Art. 21 of the Brussels II ter Regulation.

58 Cf. Order of the Supreme Court of the Republic of Poland of 15 December 2021, I NSNc 277/21. Cf. also Order of the Supreme Court of the Republic of Poland of 8 September 2022, II CSKP 1298/22.

in Europe,[59] including those connected with the different religion of immigrants. Judicial assessment in such cases is very difficult, since fundamental religious and cultural differences between the parents lead to great difficulty in establishing the child's own religious identity,[60] and a court decision blocking or ordering the return of the child in practice often determines the establishment of such a basis (although it should be noted that court decisions under the Hague Convention, according to its Article 19, do not prejudge custodial rights).

6. Conclusions

One issue not covered in this chapter is forced labour (including child labour). Although it is the subject of numerous conventions adopted under the auspices of the International Labour Organisation,[61] in practice it remains one of the problems of modern civilisation, affecting in particular Buddhist and Hindu areas of South-East Asia as well as Islamic areas of Africa and Asia. However, it would appear that the harm caused to children by these practices has less to do with religion and more to do with poverty.[62] It is worth noting that, in the case of this phenomenon, developed countries reward the fact of adopting relevant conventions and eliminating child labour at the level of national legislation with commercial measures, such as preferential tariffs (under, for example, the Generalised System of Preferences,[63] whose

59 Cf. Beaumont et al., 2015, pp. 43–45; cf. also the ECtHR judgment of 21 May 2019, *O.C.I. and Others v. Romania*, para. 35; cf. also the ECtHR Grand Chamber judgments of 6 July 2010, *Neulinger and Shuruk v. Switzerland*, para. 139; 26 November 2013, *X. v. Latvia,* paras. 106–108.

60 Kuźnicka, 2016, p. 181.

61 Cf., for example, the 1930 International Labour Organisation Convention (No. 29) concerning Forced or Compulsory Labour and the 1957 Convention (No. 105) concerning the Abolition of Forced Labour.

62 It is worth mentioning that one of the most dangerous occupations is the participation of underage boys as jockeys in camel races, which is one of the favourite pastimes in the wealthy Arab countries of the Persian Gulf (although the use of minors as jockeys is theoretically forbidden in many of these countries). The treatment of workers (including children), mainly from poor foreign countries (Philippines, India), as slaves is unfortunately in accordance with the letter of hadith and Islamic tradition. It should be pointed out that Islam, which traditionally celebrates human inequality (the superiority of Muslims), was for centuries based on slavery (cf. Mez, 1981, pp. 168–178), which, for example, was officially abolished in Saudi Arabia only in 1962 (cf. Pagés, 2020, p. 293).

63 See European resolutions – Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (*OJ L 303, 31.10.2012, pp. 1–82*). The European Union's GSP mechanism provides in Art. 9 of the above-mentioned regulation for the so-called incentive arrangements, which can be used by developing countries if they have ratified certain UN and ILO conventions on respect for fundamental human and labour rights and on the environment and principles of good governance. The treaties include those addressing child labour: the ILO Convention (No. 138) Concerning Minimum Age for Admission to Employment of 1973 and the ILO Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999. Cf. also the solutions of The U.S. Generalized System of Preferences (Title V of the Trade Act of 1974, 19 U.S.C. §§ 2461 – 2467).

use is allowed under the rules of the legal system of the World Trade Organisation or under the preferences provided for in free[64] or preferential trade).[65]

It may be worthwhile to learn from the experiences with child labour to promote the protection of children from the above-mentioned forms of religiously motivated violence in an economically analogous way (leaving aside the effectiveness of the above-mentioned trade mechanisms in the case of the rich Islamic states of the Gulf region, which base their economic prosperity on oil extraction). Compliance with possible minimum standards of national law could be encouraged. The Istanbul Convention, on the other hand, is definitely not suitable for this purpose, as it is an ideological instrument, created on the basis of a left-wing ideology that aims to redefine the social position of the sexes, and also creates a non-transparent expert body (GREVIO) with a significant influence on the actions of the State Parties. Neither this objective nor the structure of the Istanbul Convention will meet with the approval of Islamic states whose legislation is traditional or directly based on the Sharia. Therefore, if the international community decides to promote changes in domestic criminal law, it should define these standards in the content of an international treaty that is open to adoption – based on conservative values (and thus acceptable to states in the Middle East region). *De lege ferenda*, it is worth considering the adoption of such a treaty.[66]

64 The basis for the creation of free trade areas as an exception to the MFN clause is Art. XXIV of the General Agreement on Tariffs and Trade (GATT).

65 Preferential trade arrangements with developing countries (constituting, e.g., a unilateral free trade area) are the result of the modification of GATT Art. XXIV, mentioned in the footnote above, by the provisions of the so-called Enabling Clause (*Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries. Decision of 28 November 1979*, GATT/L/4903, GATT/BISD 1980, vol. 26, pp. 203–205).

66 It is worth noting that a draft of such a treaty – the Convention on the Rights of the Family – was drawn up in 2018 by the Warsaw-based Ordo Iuris Institute for Legal Culture. It is based on constitutional values also contained in the constitutional rules of Islamic states (cf. https://ordoiuris.pl/sites/default/files/inline-files/Konwencja_o_Prawach_Rodziny_z_komentarzami_PL_1.pdf). This Convention is a reasonable alternative to the Istanbul Convention – without reproducing its mistakes and leftist ideological message. The Convention on the Rights of the Family also addresses the issue of forced marriage and ritual circumcision. Art. 12 of the draft states: '1. No one can be forced to marry. 2. Forced marriages are invalid.' On the other hand, according to Art. 37 of the draft: '1. The States Parties shall ensure that perpetrators of violence are subject to criminal liability applying effective, proportionate and dissuasive sanctions for the following intentional conduct: 1) seriously impairing a person's psychological integrity through coercion or threats, 2) repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, 3) committing acts of physical violence against another person, 4) engaging in non-consensual acts of a sexual nature with another person, 5) causing another person to engage in non-consensual acts of a sexual nature with a third person, 6) approving sexual violence, 7) forcing an adult or a child to enter into a marriage, 8) luring an adult or a child to the territory of a State Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage, 9) coercing or procuring a woman to undergo circumcision, infibulation or performance any other mutilation to the whole or any part of her labia majora, labia minora or clitoris as well as inciting, coercing or procuring a girl to undergo any of the said acts, 10) performing a forced abortion on a woman as well as performing an illegal abortion with her consent and 11) performing surgery on a woman which has the purpose of terminating her capacity to naturally reproduce without her prior and informed consent or understanding of the procedure'.

Bibliography

Abdo, G. (2002) *No God but God: Egypt and the Triumph of Islam*. New York: Oxford University Press.

Alcader, J. (2010) *Prawdziwe oblicze Islamu*. Komorów: Wydawnictwo Antyk Marcin Dybowski.

Allam, M. (2008) *Kamikadze made in Europe. Czy Zachodowi uda się pokonać islamskich terrorystów?* Warszawa: Universitas.

Beaumont, P., Trimmings, K., Walker, L., Holliday, J. (2015) 'Child Abduction: Recent Jurisprudence of the European Court of Human Rights', *International and Comparative Law Quarterly*, 64(1).

Bielawski, J. (1973) *Islam, religia państwa i prawa.* Warszawa: Wiedza Powszechna.

Gibb, H.A.R. (1965) *Mahometanizm*. Warszawa: Państwowe Wydawnictwo Naukowe.

Gopal, J. (2006) *Podszepty Gabriela. Islam. Bilans krytyczno-historyczny*. Zgorzelec: Ahriman-International.

Ibn al-Naqib, Keller, N. (trans.) (1997) *Reliance of the Traveller.* Maryland: Armana Publications.

Ibn Ishaq, Guillame, A. (trans.) (1955) *The Life of Muhammad*. Lahore: Oxford University Press.

Kamarad, E. (2017) 'Klauzula porządku publicznego w odniesieniu do stosowania prawa krajów islamskich jako prawa obcego' in Czubik, P., Magoń, K. (eds.) *Islam w międzynarodowej i krajowej przestrzeni prawnej*. Cracow: Stowarzyszenie Ryza, pp. 95–104.

Kłak, Cz.P. (2017) 'Penalizacja obrzezania rytualnego kobiet. Propozycja zmian w polskim prawie karnym' in Czubik, P., Magoń, K. (eds.) *Islam w międzynarodowej i krajowej przestrzeni prawnej*. Cracow: Stowarzyszenie Ryza, pp. 140–154.

Krawczyk, R. (2013) *Islam jako system społeczno-gospodarczy*. Warszawa: Oficyna Wydawnicza Uczelni Łazarskiego.

Kuźnicka, D. (2016) 'Prawo do tożsamości jako prawo dziecka – wybrane zagadnienia', *Folia Iuridica Universitatis Wratislaviensis*, 5(2), pp. 181-198.

Liska, I. (2017) 'Conflict of Values in a Global Space, in the Background of Different View of Natural Law', *Baku State University Law Review*, 2017/3.

Mez, A. (1981) *Renesans islamu*. Warszawa: Państwowy Instytut Wydawniczy.

Olson, G. (2017) 'Arguments for Cultural Approaches to Law',*German Law Journal*, 2017/18.

Pagés, A. G. (2020) *Prawdziwe oblicze islamu*. Cracow: Wydawnictwo AA.

Półtorak, M. (2017) 'Ochrona przed wczesnymi i wymuszonymi małżeństwami w prawie międzynarodowym i unijnym a prawo szariatu' in Czubik, P., Magoń, K. (eds.) *Islam w międzynarodowej i krajowej przestrzeni prawnej*. Cracow: Stowarzyszenie Ryza, pp. 453–464.

Sadowski, M. (2017) *Islam. Religia i prawo*. Warszawa: Wolters Kluwer.

Spencer, R. (2014) *Niepoprawny politycznie przewodnik po islamie i krucjatach*. Warszawa: Fronda.

Truskolaska, J. (2007) 'Rodzina w islamie', *Roczniki Nauk Społecznych*, 35(2).

Warner, B. (2009) *The Hadith: The Sunna of Mohammed,* [no place of publication indicated]: Center for the Study of Political Islam.

Warner, B. (2010a) *A Two-Hour Koran*, [no place of publication indicated]: Center for the Study of Political Islam.

Warner, B. (2010b) *Sharia Law for Non-Muslims*, [no place of publication indicated]: Center for the Study of Political Islam.

Warner, B. (2016) *The Islamic Doctrine on Women,* [no place of publication indicated]:Center for the Study of Political Islam.

Witkowski, S.W. (2009) *Wprowadzenie do prawa muzułmańskiego.* Warszawa: Wydawnictwo Naukowe Scholar.

Zombory, K. (2023a) *Prawnomiędzynarodowa ochrona praw kulturalnych mniejszości narodowych – wybrane zagadnienia*. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości.

Zombory, K. (2023b) 'Protecting the child's best interest in international parental abduction of children: mediation in the 1980 Hague Convention cases', *Prawo w działaniu*, 2023/54. Available at: https://doi.org/10.32041/pwd.5408.