

Protecting a Child's Religious Identity in Adoption, Kafala, and Other Forms of Alternative Care: Analysis From International, EU, and Polish Law Perspectives

Lucjan ŚWITO

ABSTRACT

The right to religious identity, as well as freedom of conscience and belief (religion), are among the fundamental human rights protected in many national legal orders and in supra-state norms. These rights are universally applicable regardless of age; extending to adults and children alike. Undoubtedly, universal law guarantee parents a primary role as educators, including the right to raise and educate a child in accordance with their own religious and philosophical beliefs. However, religiously inclusive upbringing is not the domain of parental upbringing alone, and the right to maintain religious identity is not only enjoyed by children growing up in their natural family environments but is also enjoyed by children in foster parental care in the broadest sense. The right of a child to be raised in the 'religion of the fathers' is a right in itself and is protected not only because of the educational rights of the parents; the preservation of religious identity is protected primarily as a personal right of the child himself or herself. Further, a child under alternative care has the right, with the development of maturity, to make his or her own choices and decisions on worldview issues. However, until they reach this state, they have the right to have their religious identity, brought from their generational family, protected in this alternative care. The article presents (in outline) various forms of alternative care in the broadest sense, such as adoption, foster care, and Islamic *kafala*, indicating how the protection of the religious identity of the child covered by these forms of alternative care is presented from the perspectives of international law, EU law, and national legal orders (essentially, taking the example of Polish law).

KEYWORDS

adoption, foster care, *kafala*, religious identity, religious upbringing, freedom of religion and conscience, worldview

Lucjan ŚWITO (2025) 'Protecting a Child's Religious Identity in Adoption, Kafala, and Other Forms of Alternative Care: Analysis From International, EU, and Polish Law Perspectives' in Katarzyna ZOMBORY – Márta BENYUSZ (eds.) *Religion and Children's Rights*. Miskolc–Budapest: Central European Academic Publishing. pp. 111–136. https://doi.org/10.71009/2025.kzmb.racr_5



1. Introduction

The concept of religious identity was introduced in the sociological and psychological sciences in the early 20th century, becoming the subject of multiple approaches and concepts. For example, according to A. Harbatski, religious identity is a form of group and personal consciousness, built on the awareness of one's belonging to a particular religion and forming an idea of oneself and the world through relevant religious dogmas.¹ Conversely, J. Gunn, writing about religion in the dimension of identity, emphasises the special role of a person's belonging to a religious group, pointing out that this identity is less about sharing theological doctrines, but rather about a certain dimension of history, culture, ethnicity, and tradition.²

The right to religious identity, as well as freedom of conscience and belief (religion), are among the fundamental human rights protected in many national legal orders and in supra-state norms. The aforementioned rights apply regardless of age; thus, they apply not only to adults but also to children.

Acts of universal law guarantee parents a primary role in their function as child educators, including the right to raise and teach children in accordance with their religious and philosophical beliefs. Article 26(3) of the Universal Declaration of Human Rights of 10 December 1948³ explicitly states that parents have the right to choose the kind of education for their children. Further, Article 18(4) of the International Covenant on Civil and Political Rights of 19 December 1966⁴ and Article 13(3) of the International Covenant on Economic and Cultural Rights of 19 December 1966⁵ unequivocally obligate state parties to ensure parents' right to the religious and moral education of their children in conformity with their convictions, as does Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950,⁶ which explicitly recognises the right of parents to ensure their child's education and teaching in conformity with their own religious and philosophical convictions.

Setting aside the differences that exist between Article 14(3) of the Charter of Fundamental Rights of the European Union⁷ and Article 14(2) of the Convention on

1 Harbatski, 2015, p. 136.

2 Gunn, 2003, p. 201.

3 Universal Declaration of Human Rights, adopted in Paris on 10 December 1948, UN General Assembly resolution 217 A, pp. 71–79.

4 International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, UN General Assembly resolution 2200A (XXI).

5 International Covenant on Economic, Social and Cultural Rights, adopted in New York on 16 December 1966, UN General Assembly resolution 2200A (XXI).

6 Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950 under the auspices of the Council of Europe, ETS No. 5.

7 Charter of Fundamental Rights of the European Union, adopted in Lisbon on 12 December 2007, Official Journal of the European Communities, 2012/C 326/02.

the Rights of the Child⁸ (the first act emphasises the right of parents to raise their children in conformity with their religious and philosophical convictions and the second concerns the exercise of freedom of thought, conscience, and religion by the child himself), religiously sensitive upbringing is undoubtedly not the domain of parental upbringing alone, and the right to maintain religious identity is not only granted to children growing up in their natural family environment but also to children in foster parental care.

The right of a child to be raised in the “religion of the fathers” is a right in itself and is protected not only because of the educational rights of the parents. The preservation of religious identity is protected primarily as a personal right of the children themselves, although it is clear that this identity does not determine the worldview once and for all.

The right to change one's religion or deviate from existing beliefs and convictions is one of the attributes of freedom of conscience and religion, provided that such decisions are accompanied by the capacity for informed discernment. A child placed in foster parental care possesses the right to make independent choices and decisions regarding worldview issues as they achieve sufficient maturity. However, until such maturity is attained, the child retains the right to have their religious identity, as inherited from their generational family, preserved and respected within foster care.

2. Forms of Alternative Care – Outline of Issues

In many jurisdictions worldwide, alternative care is mainly implemented based on two main formulas: adoption and foster care. Among followers of Islam, a different welfare institution in the form of *kafala* is also practised.

2.1. Adoption and Foster Care in General

Adoption is a family law institution that, in modern times, occurs – with greater or lesser differences – in the legal orders of many countries of Europe and the world.⁹ It consists in the creation, by means of a procedure prescribed by law, of family ties intended to perform the same or at least similar function as the “natural” knots of blood and descent.

Without going into a detailed analysis, it is worth mentioning, for illustrative purposes only, that in Western European countries, the principle of the welfare of the child is the basic principle of adoption, which means that it must be applied at all stages of the adoption procedure and that the primary purpose of the institution is to ensure the welfare of the child deprived of his or her family. For example, a court in Greece will rule on an adoption if the personality, health, family relations, and

8 Convention on the Rights of the Child, adopted in New York on 20 November 1989, UN Treaty Series No. 27531.

9 Compare considerations of systemic similarities and differences: Khazova, 2007, pp. 97–103.

financial situation of the adopter and adoptee, as well as their ability to match each other, serve the welfare of the adopted child. Under the provisions of the German law, while a threat to the welfare of the child is an obstacle to the termination of the adoption, the adoption may be terminated if the prevailing interests of the adopter require such a termination.

In most countries, adoption is decided by the court, but there are other options. In Switzerland, it occurs by court decision in some cantons, but by administrative decision in others. In Denmark, it is decided by the local administrative body of the Regional Government Department (Statsamt) and can also be dissolved by an administrative decision of the Minister of Family and Consumer Affairs. In Norway, too, (full) adoption occurs through an administrative decision issued by the Ministry of Justice in the interests of the child.

The primary type of adoption is a full adoption, although this is not necessarily the only type of adoption regulated by law – as evidenced by French, Belgian, and Italian laws.

Domestic adoptions take precedence over international ones – hence, one can speak of the application of the principle of subsidiarity of international adoption in these countries. In addition, in most countries, there are no laws regulating them separately, apart from the requirements in some countries for adopters (citizenship, domicile, habitual residence or other connection to the forum), the fulfilment of which determines the admissibility of adoption. In Portugal, for example, priority in adoption is given to Portuguese nationals and, to adopt a child there, one must have an established legal residence in that country; in Spain, the adopter can be a person with an established legal residence there; and in Denmark, the adopter can be a person with a habitual residence in another country, as long as the applicant or his or her spouse is a Danish citizen and adoption in the country of his or her residence is not possible, provided, however, that the adoption decision issued in Denmark is valid in the country of his or her residence. Further, in Greece, international adoption is conditional on the Greek citizenship or Greek origin of the adopter and his or her residence in the territory of that country.¹⁰

Common to all legal systems are the adoption prerequisites: the minimum age of the adopter (sometimes also the maximum), the age difference between the parties, and the consent of statutorily defined persons to the adoption. Adults with full legal capacity – alone or jointly with their spouses, as long as they are married (sometimes also in unions that are not traditionally understood as marriages) – can, as a rule, adopt.

The solutions adopted in other countries of the so-called Eastern Bloc are not uniform. By way of example, in Bulgaria, *adoptio plena* and *adoptio minus plena* are used – both ruled by the court in the interest of the child. In Croatia, Serbia, and Slovenia, adoption is full. In Croatia, it is adjudicated by the court in the interests of the child and lasts until the adopted child reaches the age of 18 years. Serbian and

10 Bagan-Kurluta, 2009, pp. 11–12.

Slovenian adoption is not dissolvable, decided by an administrative body (Center for Social Work). The rule is that a Slovenian child can be adopted by a Slovenian citizen. However, in the absence of such potential adopters – international adoption is permissible. Czech adoption is also full and, in some cases, not dissolvable. In Hungary, a full adoption decided by an administrative body can also be terminated by an administrative decision, which is preceded by an agreement between the adopter and the adopted.¹¹

Adoption, it should be emphasised, is not a form of foster care. It does not aim to temporarily replace inefficient parents, but, by its very design, replaces them permanently.

Instead, the purpose of foster care is primarily to work with the family to reunite the child with his or her family or, if this is not possible, to seek adoption of the child and, if adoption is not possible, to provide care and education in a foster care setting. The purpose of foster care is to meet the emotional needs of the child, with particular attention to the needs of living, health, and education as well as cultural and recreational needs, to ensure that the child is prepared for a dignified, independent, and responsible life, overcoming the difficulties of life in accordance with the principles of ethics, to establish and maintain close, personal, and socially acceptable contacts with family and peers.

A child placed in foster care is legally the child of his or her parents, while an adopted child is legally the child of those who adopted him or her.

The history of foster care dates back to the 14th century and has Christian origins (foster care became more widely known in the late 16th century, when the French pastor St Vincent à Paulo, concerned about the high infant mortality rate in orphanages for the poor, began placing them with women in the countryside). Modern systemic solutions for the custody of children deprived of the care of biological parents are being developed by international organisations such as FICE (Fédération Internationale des Communautés Éducatives) and IFCO (International Foster Care Organisation), among others. The solutions in each country vary in detail, but in fundamental respects, they are similar, showing many parallels with the foster care system in place in English legislation. By way of example only, it should be pointed out that the main principle of organising “child care” in the UK is to return the child to his or her biological family as soon as possible, or to provide him or her with another family environment. At the same time, institutional forms are being systematically reduced in favour of family forms. In addition, institutional forms are taking the form of small therapeutic facilities, and public facilities are being replaced by private ones. Children are placed either in family care (foster families) or in institutional care (children's homes, local authority homes, homes run by NGOs, private registered nursing homes, and preschool hostels).

In the UK, the following types of foster care are distinguished: emergency – emergency care usually lasting a few days; short-term – a child may be in short-term care

11 Ibid., pp. 11–13.

for up to a few months; long-term – may last several years or until the child reaches adulthood; special – when a special commitment is required, such as for children with disabilities.

Other forms of care include temporary care (short breaks) to support biological parents, often in the case of sick, handicapped children, which lasts from a few hours to a week or a month; care for juvenile offenders (remand); pre-adoption care (fostering for adoption); so-called Family and Friends or Kinship Care, where the child is cared for by a local council, the child lives with someone he or she knows, usually a family member; the institution of a therapeutic specialist (specialist therapeutic) for children with complex needs or difficult behaviour; and care for young mothers.

It should be noted that foster families are treated in the UK ultimately as the most appropriate form of care for children placed outside the natural family. Within foster families, a distinction can be made between foster parents who are employees of local community institutions, foster parents who are relatives, and foster parents where the parent is a person with whom the child has lived for at least 3 years. Inspection and qualification of foster families is handled by local authorities through their respective institutions.¹²

2.2. Alternative Care Based on the Example of Polish Law

In Polish family law, there is a whole range of solutions that regulate the issue of providing a child deprived of a family environment (or having such an environment, but of an incomplete or dysfunctional nature) with a widely understood alternative care.

The most complete formula, as a result of which a legal and family relationship similar to that existing between parents and child is established, is adoption. The principal effect of adoption is the creation of an artificial kinship relationship between the adopter and the adopted. Accordingly, all legal effects normally associated with kinship will also exist between the adopter and adoptee. This fundamental effect of adoption cannot be changed by the will of the parties. Consequently, neither the reciprocal relationship between the adopters nor the agreement of the adoptive spouses to relieve one of them of the obligations arising from a joint adoption affects the legal effect of the rights and obligations arising from the adoption, both for the adoptee and for each adopter.¹³

The institution of adoption in the Polish Family and Guardianship Code¹⁴ is based on eight basic principles: the principle of the welfare of the child, the non-material nature of adoption, the equal treatment of adopted children and children of the natural parental relationship (*adoptio naturam imitatur*), the non-contractual form of the establishment of adoption (the establishment of the adoption relationship occurs

12 Cf. Foster carers. Types of Foster care. Available at: <https://www.gov.uk/foster-carers/types-of-foster-care>, (Accessed: 5 August 2023).

13 Cf. Judgment of the Supreme Court of 4 December 1968, II CR 375/68, LexPolonica nr 300813, OSNCP 1969, nr 10, poz. 174.

14 Act of 25 February 1964, Family and Guardianship Code, Journal of Laws 2023, Item 2809, hereinafter referred to as the “Family and Guardianship Code”.

by court decision, not by legal action), the limited terminability of adoption, the secrecy of adoption, and state supervision of adoption.

The Polish Family and Guardianship Code distinguishes three types of adoption: a) full adoption (*adoptio plena* – Articles 121-123 of the Family and Guardianship Code); b) full non-separable adoption, also known as complete adoption (*adoptio plenissima* – Article 125¹(1) of the Family and Guardianship Code); c) incomplete adoption (*adoptio minus plena* – Article 124(1) of the Family and Guardianship Code).

The distinctive feature of full adoption is that it extends not only to the adopter and adoptee themselves, but to the adopter's entire family as if the adoptee had been born as the adopter's natural child. As a result of full adoption, the rights and obligations of the adoptee arising from kinship to his or her relatives cease, as well as the rights and obligations of these relatives to him or her. The effects of the adoption extend to the adopted person's descendants (Article 121(3) of the Family and Guardianship Code).

A full adoption that is not dissolvable is one that the parents have agreed to without naming an adopter. It is a peculiar variant of full adoption and is characterised primarily by non-dissolvability. In a total adoption, the adopters become, in the eyes of the law, the natural parents of the child, and the fact of adoption cannot be proven.

Partial adoption, unlike full adoption, essentially creates only a relationship between the adopter and the adopted; the adopted person is not fully integrated into the adopter's family and does not become a brother or sister of the adopter's children, a grandchild of the adopter's ascendants, or a relative of the adopter's distant relatives. Nonetheless, the adoptee's offspring who comes into the world will be included in the adoption relationship, which means that the adopter will be the grandparent of the adoptee's children. However, there is no kinship between these descendants and other relatives of the adopter. The adoptee retains all ties of kinship with the natural family and will remain a member of it, with the proviso that under the provisions treating the so-called small family, the adoptee is part of the adopter's family, not his or her natural parents.¹⁵

Another form to regulate the situation of a minor is the establishment of foster care. The issue of foster care in the *strict sense* is regulated in Section 2a of the Family and Guardianship Code and Part III of the Act of 9 June 2011 on Family Support and the System of Foster Care.¹⁶ According to Article 32(1) of the same law, foster care is provided when parents are unable to provide care and upbringing for a child.

The Polish legislature distinguishes two forms of foster care: family foster care and institutional foster care (Article 34 of the above-mentioned law). Family foster care is carried out by kinship foster families, non-professional foster families, or professional foster families, while professional foster families can act as emergency foster families or specialised professional families. Foster family care can also take the form of a family orphanage.

¹⁵ Ignatowicz, 2023, p. 573.

¹⁶ Act of 9 June 2011 on Family Support and the System of Foster Care, Journal of Laws 2024, Item 177, hereinafter referred to as the "Foster Care Act".

Meanwhile, institutional foster care is provided in the form of a foster care centre, a regional foster care centre, and an interventional pre-adoption centre. The court places the child in institutional foster care if it is not possible to place the child in family foster care or it is not reasonable for other important reasons. This regulation expresses the principle of preference for family forms of foster care.

The norm of Article 35(1) of the Foster Care Act takes, as a rule, that the basis for placing a child in foster care is a court decision. Exceptions to this rule are provided only in cases of urgent necessity, at the request or with the consent of the child's parents and on the basis of an agreement concluded by the district governor with the foster family or the operator of the family child's home, of which the court is immediately notified. The agreement is intervening in nature and expires at the conclusion of court-ordered foster care proceedings (Article 35(2) of the Foster Care Act). Placing a child in foster care without a court decision is also allowed in cases where the child has been brought by the Police or Border Guard to a professional family acting as a family emergency shelter or to an intervention-type care facility (Art. 58(1)(2) and 103(2)(2) of the Foster Care Act), as well as when there is an imminent threat to the life or health of the child due to family violence (Art. 58(3) and 103(2)(3) of the Foster Care Act in conjunction with Art. 12a of the Act on Prevention of Domestic Violence of 29 July 2005).¹⁷ The exceptions indicated in Article 35(1) of the Foster Care Act thus relate to emergency situations requiring the immediate provision of temporary care, and are, in each case, linked to the obligation to immediately (within 24 hours) notify the court of the placement of the child in foster care (Articles 58(3) and 103(8) of the Foster Care Act and Article 12a(4) of the Domestic Violence Act). The notice triggers *ex officio* guardianship proceedings.

According to Article 112¹ of the Family and Guardianship Code, the duties and powers of foster parents (institutional foster care institutions) include the following: exercising day-to-day custody over the person of the minor, raising them, and representing them in claiming benefits intended for their upkeep, while other rights and duties belong to the child's parents, as long as they have parental authority. In a situation where parents have been deprived of this authority or where their authority has been suspended, leading to the establishment of custody entrusted to a foster family (Article 149(4) of the Family and Guardianship Code), all the powers comprising custody of the child's person and property belong to the foster parents as guardians.

It should be noted that the creation of a foster family does not create a family and legal bond between the foster parents and the child, as it happens with adoption. A child admitted to a foster family does not acquire the status of a child of foster parents. No maintenance obligations or entitlements arise between the child and foster parents, and no inheritance under the law occurs between them.

17 Act of 29 July 2005 on Prevention of Domestic Violence, Journal of Laws 2024, Item 424, hereinafter referred to as "Domestic Violence Act".

2.3. *Kafala*

Nor does Muslim law deny children deprived of parental care the opportunity to grow up in a family. As an aside, it is worth noting that in Islam, children are considered orphans (*yatim*) if they have no father, regardless of whether their mother is alive. After the death of the father, even if the mother is alive, the obligation to provide for the child rests with the closest male relative.¹⁸

In the Muslim world, surrogate parental care is understood in a significantly different way than in the tradition of European law (EU law). The term “adoption” itself does occur in Arabic (*tabannin*); however, Islam prohibits adoption, which would involve the establishment of a legal and family relationship identical to that between the biological parents and the child. The ban derives from a Quranic parable about the Prophet Muhammad’s marriage to the ex-wife of his adopted son Zaid. Recognising that accepting a child for upbringing does not create a family bond enabled Muhammad to enter into the aforementioned marriage, which was thus no longer an impure union.

The Quran forbids adoption *strictly* speaking; however, it allows for the existence of a foster care institution in the form of a *kafala*. The adoption of a child into the family under this formula does not mean the termination of the legal bond between the child and his or her biological parents. *Kafala* does not result in a relationship of kinship between the child and the adopters. The child retains the name of their biological father and does not inherit from their adoptive ‘parents’ (although these may donate or bequeath 1/3 of their assets to the child in their will). Under the *kafala*, the guardian is responsible for the child and is obliged to provide for the child’s needs, ensure their maintenance, and educate them in the spirit of Islam. As a general principle, rules apply to a child covered by a *kafala* as they apply to those outside the family: “mother” and “sisters” are required to cover their hair (and, in more traditional communities, other parts of the body), as is the foster “daughter” in the company of the “father” and “brothers”.¹⁹ There are also no legal obstacles that would prevent a marriage between a foster “father” and a “daughter”.

The *kafala* care system, although the details may vary across countries, as a general rule, imposes an obligation on *kafala* caregivers to raise their child in the spirit of Islam, while Islam excludes the possibility of changing one’s religion. The European model of human rights, including the right to religious freedom, is not practised in Islam.

In Islamic doctrine, the rights of the individual come from God and His revelation – *the Quran* – and are not inherent in humans by the law of nature. The human person is treated not as a subject of rights, but as an individual obligated to appropriate behaviours, attitudes, and actions towards their municipality, and above all,

18 See: Piwko, 2010, pp. 157–173; Tomkiewicz, 2017, pp. 149–164.

19 These restrictions do not apply if the child was less than 2 years old at the time of admission to the family and was breastfed by the foster mother.

towards God.²⁰ Therefore – according to this doctrine – Muslim society should govern itself according to God's law as it is defined by the *Quran* and the *Sharia*, the system of Muslim law developed by Muslims over the centuries.²¹

Muslim countries differ in the application of religious law; however, as far as religion is concerned, they unequivocally refer to *Sharia* as their basis in the joint declarations of human rights promulgated. Without going into the entire depth of the issues concerning the concept of human rights in Islam,²² by way of example only, it should be pointed out that Islamic states not only did not adopt the 1948 Universal Declaration of Human Rights, but on 5 August 1990, developed the so-called Cairo Declaration of Human Rights in Islam,²³ from which it follows that all mankind by its very nature is Muslim, and therefore, freedom of religion cannot be accepted. Already in its preamble, the Cairo Declaration of Human Rights states that Islam is above other religions:

‘Affirming the civilizational and historical function of the Muslim community, which is the best community that God ever created, which, by combining temporal life and eternal life, and knowledge and faith, has given mankind a universal and harmonious civilization; affirming the desirable role of this community today, as a guide for mankind in chaos due to different and contradictory beliefs and ideologies, because it is capable of offering a solution to the chronic problems plaguing this materialistic civilization [...]. ‘

The same preamble also stresses the prohibition against opposing what is required by *Sharia* law: ‘In the belief that fundamental rights and universal freedoms in Islam are part of the Islamic religion, no one has the right to oppose them’. Article 10 of the Cairo Declaration of Human Rights, in turn, states that, ‘Islam is man's natural religion’. It is unlawful to exert any form of pressure on a person or to take advantage of his ignorance or poverty to convert him to another religion or to atheism; according to Article 19, ‘No punishment is inflicted except in accordance with Islamic law’. This means accepting corporal punishment under *Sharia* law, including the death penalty for apostasy. While *the Quran* does not contain an explicit provision prescribing the death penalty for apostates, the death penalty for deviants is recommended by many hadis, including several recognised by all schools of Islam. A defector should be punished by death according to the teachings of the three schools of *Sunni* (*Hanbali*, *Maliki*, and *Shafi'i*), while the *Sunni Hanafi school* and *Shia Jafari school* prescribe imprisonment until ‘return to the bosom of Islam’, although even in this case, the death penalty is not excluded.

20 Baecker, 2005, p. 89.

21 Cf. Armour, 2004, pp. 35–36.

22 Cf. more: Bisztyga, 2013; Mrozek-Dumanowska, 1999; Jabłoński, 2005.

23 The declaration was signed by 45 foreign ministers at the 19th Islamic Conference of Foreign Ministers: Cairo Declaration on Human Rights in Islam, adopted in Cairo on 5 August 1990, University of Minnesota, Human Rights Library, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation].

The institution of *kafala* is “recognised” by the provisions of acts of international law. *Kafala* is mentioned in Article 3(e) of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the Hague Convention) of 19 October 1996.²⁴ This provision stipulates that measures referred to in Article 1 of the Convention may deal in particular with ‘the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution’. *Kafala* is also mentioned explicitly in the Convention on the Rights of the Child adopted by the United Nations (UN) General Assembly on 20 November 1989.²⁵

3. Protection of the Child's Religious Identity In Alternative Care in Light of Supra-State Regulations

The issue of protecting the religious identity of a child, including a child in alternative care, is an issue that, as a rule, does not escape the attention of national legislators and supra-state bodies. However, in acts of international and EU law, this matter is regulated relatively modestly and mainly in the context of norms concerning parental authority, the prohibition of discrimination or, in general, the realisation of rights related to freedom of conscience and religion. The regulations of international and EU law on the subject are quite succinct and, in essence, have a slogan-like character. At the outset, however, it should be noted that the term “international law” and “EU law” here is a kind of shorthand, covering different areas of law.

“International law” is a set of norms recognised by states or nations as binding based on their mutual relations, including relations with international organisations. It is usually contained in or derived from the content of agreements between sovereign states. The term usually refers to two legal disciplines: public international law, which governs relations between states and international organisations and deals with areas such as human rights, the law of treaties, the law of the sea, international criminal law, and international humanitarian law; and private international law (conflict-of-law rules), which is a set of rules of procedural law that determines which legal system governs a given legal dispute and which jurisdiction that dispute falls under. These standards are applied in legal disputes with a cross-border element, such as those related to contracts between parties from different countries or when there is a cross-border element in a multi-jurisdictional country.

EU law, however, is – to put it somewhat simplistically – the collection of acts that make up the legal system of the EU. The entire *acquis communautaire*, including, for example, the rulings of the Court of Justice of the EU, is called the *acquis*. The basic

24 Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, HCCH, concluded on 19 October 1996, Official Journal L 048.

25 Convention on the Rights of the Child, adopted in New York on 20 November 1989, UN Treaty Series No. 27531.

division of EU law is the division into primary law – established by member states as part of international law, and secondary law – established by the institutions of the Union (regulations, directives, decisions, opinions, recommendations). If there is a conflict of legal norms between primary and secondary law, primary law takes precedence. However, this is not an exhaustive division – as it also includes international agreements to which the EU is a party, general principles of law, and common law. The literature also sometimes uses terms such as “European family law”. Most often, this term is used to designate EU administrative regulations. The term is also sometimes used to refer to conflict-of-law rules on certain family matters, as well as rules on jurisdiction and the effectiveness of foreign judgments, which are of EU origin and contribute to the private international law and civil procedural systems of the Member States. It is not uncommon under this term to present comparative remarks on different family law systems.

3.1. An International Law Perspective

Concerning acts of international law, it is first necessary to point to the Declaration of the Rights of the Child, adopted by the UN General Assembly on 20 November 1959. The Preamble to this act emphasises that the UN, in the Universal Declaration of Human Rights, proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. It was pointed out that the child, because of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth, and that mankind owes the child the best it has to give. It emphasised:

‘[...] the General Assembly proclaims this *Declaration of the Rights of the Child* to the end that he may have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth, and calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures [...].’

Principles 2, 6, 7, and 10 are relevant to the issues addressed in this paper. Principle No. 2 stipulates that the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop (physically, mentally, morally, spiritually, and socially) in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration. Principle No. 6 emphasises that a child, for the full and harmonious development of his personality, needs love and understanding, and should, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security. Meanwhile, children without a family or sufficient means of support should be given special care by society and state

authorities. Principle No. 7 also states that a child shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility. It also declared that the best interests of the child shall be the guiding principle of those responsible for his education and guidance, and at the same time, stressed that the responsibility for raising the child lies in the first place with his parents. Principle No. 9 mandates the protection of the child against all forms of neglect, cruelty, and exploitation. The last principle, No. 10, mandates the protection of the child from 'practices which may foster racial, religious and any other form of discrimination', educating the child in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

The International Covenant on Civil and Political Rights,²⁶ opened for signature in New York on 19 December 1966, states in Article 24 that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property, or birth, the right to measures of protection on the part of his family, society, and the State.

Much more detailed than the above international agreements, standards concerning the legal position of the child are provided for – created on the initiative of Poland and widely accepted globally – by the Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989. By setting out minimum standards of law, including substantive private law, the Convention has the effect of harmonising the law in the contracting states.²⁷

As an aside, it should be noted that the Vienna Convention on the Law of Treaties of 23 May 1969,²⁸ in Article 19, does not allow for reservations that are incompatible with the object and purpose of the treaty; however, many countries ratifying the Convention on the Rights of the Child have made such reservations to particular provisions of the Convention. Reservations incompatible with the object and purpose of the Convention on the Rights of the Child have been made by several Arab states with regard precisely to provisions on freedom of conscience and religion. A sizable group of these countries (Iran, Pakistan, Syria, Tunisia, Saudi Arabia, Qatar, Brunei, Djibouti, Oman, Singapore) have made so-called general reservations stating that they will not comply with those provisions of the Convention on the Rights of the Child that are contrary to Islam.²⁹

The Preamble to the Convention reiterates, following the 1959 UN Declaration of the Rights of the Child, that the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection. It also stressed the need to take 'due account of the importance of the traditions and cultural

26 International Covenant on Civil and Political Rights, Journal of Laws 1977, No. 38, Item 167.

27 Buck *et al.*, 2011, pp. 88–163; Leblanc, 1996, p. 378; Kaime, 2011, pp. 22–26.

28 Vienna Convention on the Law of Treaties, adopted in Vienna 22 May 1969, UN Treaty Series, vol. 1155.

29 Schulz, 1999, p. 130.

values of each people for the protection and harmonious development of the child'. Article 8 requires states to take measures to respect the right of the child to preserve his or her identity, including family relations, as recognised by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, states shall provide appropriate assistance and protection with a view to speedily re-establishing his or her identity. In light of Article 12, a child should have the right to freely express his or her own views (to this end, he or she has the opportunity to speak out in any judicial and administrative proceedings concerning him or her, 'either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law', as long as he or she is capable of forming his or her own views.

Undoubtedly, these rights are fully applicable to children placed in foster care, and they are binding on all state authorities, institutions, and persons involved in foster care.

The standard of Article 20(1) of the Convention on the Rights of the Child stipulates that 'a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State'. The jurisdiction of the courts and other entities in this matter derives from the regulations of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children of 19 October 1996 (the 1996 Hague Convention). The norm of Article 6 of this *Convention* stipulates that for refugee children and children who, owing to disturbances occurring in their country, are internationally displaced, the jurisdiction is vested in the authorities of that Contracting State in which the children reside as a result of the displacement (paragraph 1); the provisions of the preceding paragraph also apply to children whose habitual residence cannot be established. Notwithstanding the above aspects, in accordance with Article 11(1) of the Convention, in all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

The provision of the Convention on the Rights of the Child that directly relates to the issue under consideration here is Article 20(2) and (3). It clearly provides that a child who is temporarily or permanently deprived of his or her family environment shall be placed in foster care by States Parties in accordance with their national law, which,

'[...] could include, inter alia, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background (paragraph 3).'

The issue of upbringing taking into account the religious identity of the child, including a child subjected to substitute forms of parental care, has also been recognised in the Convention against Discrimination in the Field of Education, drawn up under the auspices of UNESCO in Paris on 15 December 1960. The norm of Article 5(b) of this Convention stipulates that parents and, in appropriate cases, legal guardians, should be able to ensure 'the religious and moral education of children in conformity with their own convictions', and also adds that 'no person or group of persons should be compelled to receive religious instruction inconsistent with his or her conviction'. It is worth mentioning that upbringing shapes identity and, therefore, the protection of the continuity of upbringing in principle aims to protect the child's identity, including his religious identity.

3.2. EU Law Perspective

As far as European Union (EU) law is concerned, it should be noted at the outset that it follows from the principle of delegated powers in the Treaty that the EU's legislative competence does not extend to substantive family law. This means that there are no normative acts in EU law on, such as the relationship between parents and children, and the EU has no competence to conclude international agreements regulating these matters.³⁰

The EU treaties do not explicitly mention the family as a value of the EU or its protection or support as an objective of the organisation. Similarly, the rights of the child related to his or her religious identity are not explicitly addressed in the basic international agreements between EU member states. The existence of such protection can only be interpreted from the vague declarations in these acts.

In the Treaty of 7 February 1992 on the EU³¹ after the Lisbon amendment on 1 December 2009, when listing the values of the EU, Article 3 speaks in general terms of, among other things, respect for the dignity of the human person and non-discrimination, while the listing of the goals of the Union mentions the protection of children's rights. The thought of protecting human rights, especially the rights of the child, is repeated in the description of the EU's actions in external relations.

The Charter of Fundamental Rights of the European Union, which has the force of law equal to the treaties, generally states that the EU respects 'the diversity of the cultures and traditions of the peoples of Europe'. In Article 10, the Charter guarantees everyone the right to freedom of thought, conscience, and religion. This right includes freedom to change one's religion or belief and 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. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right (Article 10(2) of the Charter). Directly concerned with the rights of the child is Article

30 Baratta, 2008, pp. 189–194; Lamont 2009, pp. 371–372.

31 Treaty of 7 February 1992 on the European Union, Journal of Laws 2004, No. 90, Item 864/30, as amended.

24, which declares the right of children to such protection and care as is necessary for their well-being. Additionally, it is stipulated that children's position and views shall be taken into consideration on matters which concern them in accordance with their age and maturity. It also declares that the best interests of the child must be a primary consideration in all actions concerning children by public authorities and private institutions.

The European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children,³² drawn up under the auspices of the Council of Europe in Luxembourg on 20 May 1980, and the European Convention on the Exercise of Children's Rights,³³ drawn up in Strasbourg on 25 January 1996, do not contain any regulations that directly or indirectly refer to the religious rights of the child.

By contrast, in the European Convention for the Protection of Human Rights and Fundamental Freedoms, concluded by the member states of the Council of Europe and opened for signature on 4 November 1950 (entered into force in 1953), the key guarantees ensuring the protection of freedom of thought, conscience, and religion or belief are found in two provisions: in Article 9 and Article 2 of Protocol No. 1.

Article 9(1) stipulates that everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance. Further, according to paragraph 2 of this provision, the freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health, or morals, or for the protection of the rights and freedoms of others. In contrast, Article 2 of Protocol No. 1 stipulates that no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

It should be mentioned that Article 5¹ of the Framework Convention for the Protection of National Minorities, drawn up in Strasbourg on 1 February 1995 (entered into force in 1998)³⁴ stipulates that the Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions, and cultural heritage.

32 European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, adopted in Luxembourg on 20 May 1980 under the auspices of the Council of Europe, ETS No. 105.

33 European Convention on the Exercise of Children's Rights, adopted in Strasbourg on 25 January 1996 under the auspices of the Council of Europe, ETS No. 160.

34 Framework Convention for the Protection of National Minorities, adopted in Strasbourg on 1 February 1995 under the auspices of the Council of Europe, ETS No. 157.

Recently, the need to strengthen the protection of the rights of children subjected to foster care to preserve their identity has been clearly recognised within the EU, and there have been fairly unequivocal (for the characteristics of EU law indicated above) attempts to regulate this protection. Indeed, at the meeting of the Council of the EU on 25 October 2019, an agreement was adopted, also on the initiative of Poland, to amend 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 1347/2000.³⁵ The amendments include a provision that explicitly 'obliges EU member states to preserve the child's rights to cultural, religious and linguistic identity in foster care proceedings'³⁶ and a mechanism to ensure the implementation of this right.

This mechanism is based on a system of notification by the state that conducts foster care proceedings for a child of a state with which the child has a significant relationship. The latter country is informed of the fact that such proceedings are being conducted. It should be noted that the authority conducting the proceedings on foster care, if it is aware of the child's close ties with another state, may apply as follows at the earliest possible stage of the proceedings: a) the mode of the Regulation, that is, by notifying the central authority of the Member State with which the child has a significant relationship (in Poland, it is the Minister of Justice) or b) the mode of the Consular Convention – Article 37(b) of the 1963 Vienna Convention on Consular Relations.

As a result, the authority in charge of foster custody proceedings will apply the mode of notification it deems most appropriate in the case, taking into account the mandatory nature of the Consular Convention. Such information allows the state with which the child has a significant connection to take appropriate measures to find and identify families from a similar cultural background, and preferably relatives of the child who are willing to take foster care of the child.

Regardless of the notification, a country interested in the fate of its citizens may inform about a close relationship with the child of that country, such as the existence of relatives of the child in that country who are ready to take custody of the child.

The information provided is not binding on the state that is conducting the proceedings, and the final decision on who will be appointed as the child's foster care provider belongs to the authority conducting the proceedings, which should consider all the circumstances of the case and be guided primarily by the welfare of the child. Nevertheless, the regulation obliges Member States to ensure, in proceedings for the establishment of foster care, the right of the child to preserve his or her identity as

35 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, Official Journal of the European Union L 338, ["Brussels II bis"].

36 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, Official Journal of the European Union L 178/1, ["Brussels II bis"].

defined in Articles 8 and 20 of the UN Convention, and to this end, take appropriate measures at the earliest possible stage of these proceedings.

The introduction of the described mechanism should, as planned, make a real contribution to raising and strengthening respect for children's rights to their identity. The introduction of this mechanism in EU law can also contribute to increasing the effectiveness of and compliance with both the Consular Convention and the UN Convention on the Rights of the Child (which have not always been applied although they are in force in member states).

It should be emphasised that a possible violation of the provisions of the Regulation by a Member State may lead to the following outcomes: a) A complaint for violation of a treaty obligation by a Member State – in case of violation of the provisions of the Regulation by the authorities of a Member State; the complaint can be filed by the European Commission as well as by another Member State. The assessment of whether there has been a violation is made by the Court of Justice of the EU. b) Actions for damages for the violation of EU law by a Member State – related to the principle of liability of public authorities to individuals when the state has violated a provision that grants rights to an individual; the violation is sufficiently serious and there is a causal link between the violation and the damage. It is up to the Court of Justice of the EU to assess the violation.³⁷

Recital (11) to the aforementioned Regulation stipulates that any type of placement of a child in foster care, that is, according to national law and procedure, with one or more individuals, or institutional care, for example, in an orphanage or a children's home, in another Member State should fall within the scope of this Regulation unless expressly excluded, which is, for example, the case for placement with a view to adoption, placement with a parent or, where applicable, with any other close relative as declared by the receiving Member State. As a result, 'educational placements' ordered by a court or arranged by a competent authority with the agreement of the parents or the child or upon their request following the deviant behaviour of the child should be included [...] as well. Recital (84) states:

'[...] where a decision on the placement of a child in institutional or foster care is being contemplated in the Member State of the habitual residence of the child, the court should consider, at the earliest stage of the proceedings, appropriate measures to ensure respect of the rights of the child, in particular the right to preserve his or her identity and the right to maintain contact with the parents, or, where appropriate, with other relatives, in light of Articles 8, 9 and 20 of the UN Convention on the Rights of the Child [...].'

Regulation 2019/1111 Brussels II ter entered into force in EU Member States (except Denmark) on 1 August 2022.

37 Cf.: <https://www.gov.pl/web/sprawiedliwosc/wielki-sukces-polski-unia-europejska-bedzie-chronic-tozsamosc-kulturowa-dzieci> (Accessed: 5 August 2023).

4. Protection of a Child's Religious Identity in Polish Law

The Republic of Poland, in ratifying the Convention on the Rights of the Child of 20 November 1989, made a declaration in which it expressed the position that it believes that the child's exercise of, among other things, the right to freedom of thought, conscience, and religion 'shall be carried out with respect for parental authority, by Polish customs and traditions concerning the child's place within and outside the family'.

The Polish legislator, in Article 48(1) and Article 53 in conjunction with Article 72(1)–(3) of the 1997 Constitution of the Republic of Poland,³⁸ guaranteed parents the right to raise their children in accordance with their own beliefs, primarily in the sphere of upbringing, religion, and worldview, with the provision that educational activities are to respect the child's subjectivity and rights, in particular, freedom of conscience, religion, and belief. The right of parents to the religious upbringing of their child is also indicated in Article 12(1) of the Concordat,³⁹ as well as in several other legal acts in force in Poland, including Article 12(1) of the Act of 7 September 1991 on the Educational System⁴⁰ (which stipulates that public kindergartens, primary schools, and lower secondary schools organise religious instruction at the request of parents), Article 2(4) of the Act of 17 May 1989 on Guarantees of Freedom of Conscience and Religion⁴¹ (according to which citizens may bring up their children by their beliefs in matters of religion), or Article 18(1) of the Act of 17 May 1989 on the Relationship of the State to the Catholic Church in Poland⁴² (according to which the State recognises the right of the Church to teach religion and the religious education of children and young people by the choice made by their parents).

It should also be noted that according to Article 32 of the Act of 21 April 1936 on the State's Relationship with the Muslim Religious Union,⁴³ religious instruction for young people of the Muslim faith in 'scientific institutions whose program includes the education of young people under the age of 18, maintained in whole or in part by the State or local government bodies', is compulsory.

The right to religious upbringing has also been guaranteed by the Polish legislature to children subjected to foster care. Article 40(5) and Article 93(4) of the Act

38 Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, No. 78, Item 483.

39 Concordat between the Holy See and the Republic of Poland of July 28, 1993, Journal of Laws 1998, No. 51, Item 318.

40 Act of 7 September 1991 on the Educational System, Journal of Laws 2022, Item 2230, as amended.

41 Act of 17 May 1989 on Guarantees of Freedom of Conscience and Religion, Journal of Laws 1989, No. 29, Item 155, as amended.

42 Act of 17 May 1989 on the Relationship of the State to the Catholic Church in Poland, Journal of Laws 1989, No. 29, Item 154, as amended.

43 Act of 21 April 1936 on the State's Relationship with the Muslim Religious Union, Journal of Laws 1936, No. 30, Item 240, as amended.

of 9 June 2011 on Family Support and Foster Care⁴⁴ stipulates that a foster family, a family foster home, and a foster care centre should not only provide 24-hour care for a child, but also, among other things, meet the child's religious needs. Further, according to Article 18(1) of the Act on the Relationship of the State to the Catholic Church, decisions regarding the religious upbringing of children and young people may also be taken by their legal guardians.

5. Summary

An analysis of the current legal solutions regarding the protection of the religious identity of a child placed in alternative care in the broadest sense leads to the conclusion that the scope of this protection is not only varied but also, in some cases, quite questionable.

The strongest protection of a child's religious identity is undoubtedly in adoption, assuming, of course, that the child placed with an adoptive family from a similar cultural and religious background. In such a situation, by creating legal and family relations analogous to those found in natural families, the child's right to be raised with respect for his or her religious identity is also 'reinforced' by the right of the (adoptive) parents to raise the child in accordance with their religious beliefs (fideistic worldview).

In the case of foster care, the situation is more complex and problematic. The guarantees of preserving a child's religious identity are undoubtedly greater when a child is placed with a related foster family than when placed with an unrelated foster family environment or an institutional care facility.

However, regardless of the above aspects, it should also be borne in mind that foster care covers not only children whose parents have been deprived of parental authority, or who do not have biological parents, but also frequently those whose biological parents retain full parental authority or have it only slightly limited. It should be noted that natural parents only lose influence over issues concerning their child's religious upbringing when they lose the prerogatives of parental authority. In *Eriksson v. Sweden*,⁴⁵ in its judgment of 22 June 1989, the ECHR held that parents and legal guardians may lose the right guaranteed in Article 2 of Protocol No. 1 if they are deprived of parental rights as a result of a court judgment or the termination of an adoption. Conversely, in *Olsson v. Sweden*,⁴⁶ in its judgment of 24 March 1988, the Court held that where parental rights are merely restricted, for example, as a result of illness, the placement of a child with a foster family or 'placing of the child in care' does not create a situation where the children are not to be brought up in accordance with the parents' beliefs or religion.

44 Act of 9 June 2011 on Family Support and Foster Care, Journal of Laws 2011, No. 149, Item 887, as amended.

45 *Eriksson v. Sweden*, application No. 11373/85, 22 June 1989.

46 *Olsson v. Sweden*, application No. 10465/83, 24 March 1988.

Such a state of affairs, for reasons that are quite clear, can generate numerous problems. After all, how would it look in practice (and in legal terms) to implement the mentioned protection of the religious identity of a child placed with a foster family of people professing, for example, Catholicism or with a non-religious worldview, in the case where the child's parents—who have not been deprived of parental authority—are, for example, Jehovah's Witnesses demand that the child be raised in the spirit of this religion? In principle, it is difficult to answer such a question unequivocally, just as it is difficult to explain fully why the guarantees related to the preservation of the identity of the child in foster care have been strengthened, in EU law only for cross-border cases. In this context it is worth emphasising that the provisions of the Brussels II ter Regulation referred to above apply only to foreign foster care (albeit within the EU) since the essence of this EU regulation is to define the principles of establishing foster care in cases beyond the jurisdiction of a single state. Therefore, it only applies to situations where the child in foster care either emigrates or is placed there as a result of such placement.

However, the institution of the *kafala* appears to be the most controversial issue. The fundamental question arising from this context is whether the related prohibition on educating a child in the Islamic spirit and the punishments for apostasy imposed by the *Sharia* are compatible with the values of the European cultural sphere, including the protection of human rights. If not, the question arises whether this system should be respected in the European legal order. An attempt to answer this question is illustrated using the example of the Republic of Poland.

On the surface, it would seem that since the *kafala* is an institution of Islamic law and the Quran does not belong to the sources of Polish law as defined in Article 87(1) and (2) of the Polish Constitution, there is no legal basis to respect the solutions adopted in *Sharia* in Polish law. The above conclusion is not without reason; however, it does not mean that the thesis of the existence of references between the said institution and Polish law should be entirely dismissed. The fact is that the *kafala* is 'recognised' by certain provisions of international law to which Poland is a party, and this institution is not excluded by private international law either.⁴⁷

Taking into account the content of the indicated paragraph 2 of Article 20 of the Convention on the Rights of the Child, it can be said that since this provision orders state parties to provide alternative care to a child deprived of a family environment in accordance with their domestic law, and the legislation in force in Poland does not provide for *kafala*, it is clear that the courts in Poland, when ruling on foster care for a minor follower of Islam, will not apply it in the form of the *kafala* system. However, can the conclusion be drawn from this fact that *kafala* is a completely irrelevant to the Polish legal order and the courts are in no way obliged to take it into account in their decisions?

47 Act of 4 February 2011 on Private International Law, Journal of Laws 2011, No. 80, Item 432, as amended, hereinafter referred to as the "PIL Act".

Analysing the above problem in relation to adoption itself, it should be stated that in the case of foreign adoption (adoption, as a result of which the child moves to another country; adoption of a child from outside the Republic of Poland), the *kafala* problem is partly solved by private international law and the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993 (the 1993 Hague Convention). This is because, according to Article 57(1) of the PIL Act, although adoption is governed by the native law of the adopter, according to Article 58(1) of the PIL Act, adoption may not take place without observance of the native law of the person to be adopted, concerning the consent of that person, the consent of his or her legal representative, and the permission of the competent state authority. Thus, the primary obstacle to the adoption in Poland for a minor immigrant follower of Islam may not be the *kafala* per se, but rather the lack of consent of the competent entities specified in international law. For instance, adoption is explicitly prohibited in Pakistan, among other countries. In contrast, it is not regulated by law in Algeria, Iraq, or Afghanistan, among others.⁴⁸

A more complex issue is that of *kafala* and foster care. Articles 56(1) and 59(1) of the PIL Act provide that the law applicable to matters of parental responsibility and access to the child, and custody and guardianship, is to be determined by the 1996 Hague Convention. That Convention lays down in Article 16 that parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State, whereby, in accordance with Article 1(2) of that Convention, the term 'parental responsibility' includes parental authority or any analogous relationship of authority determining the rights, powers, and responsibilities of parents, guardians, or other legal representatives concerning the child's property or person. According to Article 20 of the aforementioned 1996 Hague Convention, the provisions of this Chapter (Chapter III Applicable Law) apply even if the law designated by them is the law of a non-contracting state. It should be emphasised that the Brussels II ter Regulation also regulates foster care abroad for all children with permanent residence in the EU (except Denmark) – with well-established case law showing that nationality is only one of the criteria for examining this link (ECJ judgment of 2 April 2009 C-523/07).

It follows, therefore, that Polish authorities will be obliged to protect the cultural or religious identity of a Muslim child placed in Polish foster care, and if there are children in the territory of the Republic of Poland who have been cared for in the form of *kafala* in their place of habitual residence, this fact should be respected under Polish law.

Such an interpretive direction, mandating that the *kafala* system be respected in the domestic legal order, also seems to derive from earlier case law of the European Court of Human Rights. In its 4 October 2012 judgment in *Harroudj v. France* (Application no. 43631/09), the ECtHR explicitly noted that Article 20 of the Convention on the Rights of the Child explicitly recognises the *kafala* system, which is derived from

48 See: Bagan-Kurluta, 2009.

Islamic law, as a form of foster care. In this judgment, the Court also noted that the refusal to grant the adoption of a child who had been entrusted to a French citizen in Algeria under the *kafala* form of care does not violate the right to respect for family life, as stipulated in Article 8 of the European Convention on Human Rights. In this ruling, the ECtHR pointed out that ‘the recognition of the kafala system by international law is a decisive factor in assessing how States address this issue within their national legal systems and how they regulate potential conflicts of law that may arise’. According to the Court, the applicant was denied adoption due to the need ‘to abide by the spirit and purpose of international conventions’. Further, in its judgment of 16 December 2014, *Chbihi Loudoudi v. Belgium* (Application no. 52265/10), the ECtHR held that the failure to grant an application for recognition of the adoption of a child over whom the applicants had an Islamic form of custody in the form of a *kafala* did not violate the right to respect for family and private life.

The above analysis leads to the conclusion that in the current legal framework, it is questionable whether the protection of the religious identity of a child subjected to alternative care in the broad sense is regulated in a consistent manner and adequate to the gravity of the problem. One would expect more in-depth legislative changes in this matter, although further harmonisation or unification of family law worldwide seems unlikely in the near future.⁴⁹ While greater international consensus on issues known as “child protection”, seemed achievable in the past, which includes private law issues. The continuation of this process, however, seems questionable given recent deepening cultural differences and local traditions, including the abandonment in some countries of assumptions that have ‘always’ underpinned family law, such as, viewing parenthood as the sum of motherhood and fatherhood, and adoption as an institution that imitates nature.⁵⁰

49 Mostowik, 2014, p. 30.

50 Khazova, 2005, pp. 373–391; Berrick, 2011, pp. 17–40.

Bibliography

- Act of 4 February 2011 on Private International Law, Journal of Laws 2011, No. 80, Item 432, as amended.
- Act of 21 April 1936 on the State's Relationship with the Muslim Religious Union, Journal of Laws 1936, No. 30, Item 240, as amended.
- Act of 17 May 1989 on Guarantees of Freedom of Conscience and Religion, Journal of Laws 1989, No. 29, Item 155, as amended.
- Act of 17 May 1989 on the Relationship of the State to the Catholic Church in Poland, Journal of Laws 1989, No. 29, Item 154, as amended.
- Act of 9 June 2011 on Family Support and the System of Foster Care, Journal of Laws 2024, Item 177, hereinafter referred to as the "Foster Care Act".
- Act of 29 July 2005 on Prevention of Domestic Violence, Journal of Laws 2024, Item 424, hereinafter referred to as "Domestic Violence Act".
- Act of 7 September 1991 on the Educational System, Journal of Laws 2022, Item 2230, as amended.
- Armour, R. (2004) *Islam, Chryścijaństwo i Zachód. Burzliwe dzieje wzajemnych relacji*. Kraków: WAM.
- Baecker, R. (2005) 'Islam: między fundamentalizmem a totalitaryzmem' in Baecker, R., Kitab, S. (eds.) *Islam a świat*. Toruń: Adam Marszałek, pp. 7–95.
- Bagan-Kurluta, K. (2009) *Adopcja dzieci. Rozwiązania prawne w wybranych państwach*. Białystok: Temida 2.
- Baratta, R. (2008) 'Short Remarks on EC Competence in Matters of Family Law' in Malatesta, A., Bariatti, S., Pocar, F. (eds.) *The External Dimension of EC Private International Law in Family and Succession Matters*. Padova: Wolters Kluwer.
- Berrick, J. (2011) 'Trends and Issues in the U.S. Child Welfare System' in Gilbert, N., Parton, N., Skivenes, M. (eds.) *Child Protection Systems: International Trends and Orientations*, edn. Oxford: Oxford University Press, pp. 17–40.
- Biszytyga, A. (2013) 'Zachodnia a islamska koncepcja praw jednostki', *Przegląd Prawa Konstytucyjnego*, 2013/1, pp. 77–92.
- Buck, T., Gillespie, A., Ross, L., Sargent, S. (eds.) (2011) *International Child Law*. 2nd edn. London and New York: Routledge Publishing. Available at: <https://doi.org/10.4324/9780203845981>.
- Cairo Declaration on Human Rights in Islam, adopted in Cairo on 5 August 1990, University of Minnesota, Human Rights Library, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation].
- Charter of Fundamental Rights of the European Union, adopted in Lisbon on 12 December 2007, Official Journal of the European Communities, 2012/C 326/02.
- Concordat between the Holy See and the Republic of Poland of July 28, 1993, Journal of Laws 1998, No. 51, Item 318.

- Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, No. 78, Item 483.
- Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950 under the auspices of the Council of Europe, ETS No. 5.
- Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, HCCH, concluded on 19 October 1996, Official Journal L 048.
- Convention on the Rights of the Child, adopted in New York on 20 November 1989, UN Treaty Series No. 27531.
- 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, Official Journal of the European Union L 178/1, ["Brussels II bis"].
- 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, Official Journal of the European Union L 338, ["Brussels II bis"].
- European Convention on the Exercise of Children's Rights, adopted in Strasbourg on 25 January 1996 under the auspices of the Council of Europe, ETS No. 160.
- ECtHR, *Eriksson v. Sweden*, Application No. 11373/85, 22 June 1989.
- ECtHR, Judgment *Olsson v. Sweden*, Application No. 10465/83, 24 March 1988.
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, adopted in Luxemburg on 20 May 1980 under the auspices of the Council of Europe, ETS No. 105.
- Family and Guardianship Code, Journal of Laws 2023, Item 2809.
- Foster carers. Types of Foster care. Available at: <https://www.gov.uk/foster-carers/types-of-foster-care>, (Accessed: 5 August 2023).
- Framework Convention for the Protection of National Minorities, adopted in Strasbourg on 1 February 1995 under the auspices of the Council of Europe, ETS No. 157.
- Gunn, J. (2003) 'The Complexity of Religion and the Definition of «Religion» in International Law', *Harvard Human Rights Journal*, 2003/16, pp. 189–215.
- Harbatski, A. (2015) 'Tożsamość religijna a bezpieczeństwo konfesyjne: współczesne wyzwania (na przykładzie Republiki Białorusi)', *Pogranicze. Studia Społeczne*, 2015/15, pp. 135–150.
- Human Rights Library, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation].
- Ignatowicz, J. (2023) 'Małżeństwo' in Pietrzykowski, K. (ed.) *Kodeks rodzinny i opiekuńczy. Komentarz*. 8th edn. Warszawa: C.H.Beck.
- International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, UN General Assembly resolution 2200A (XXI).

- International Covenant on Economic, Social and Cultural Rights, adopted in New York on 16 December 1966, UN General Assembly resolution 2200A (XXI).
- Jabłoński, M. (2005) 'Wolności i prawa jednostki w regionalnym systemie Ligi Państw Arabskich' in Banaszak, B., Bisztyga, A., Complak, M., Jabłoński, M., Wieruszewski, R., Wójtowicz, K. (eds.) *System ochrony praw człowieka*. Kraków: Wolters Kluwer.
- Judgment of the Supreme Court of 4 December 1968, II CR 375/68, LexPolonica nr 300813, OSNCP 1969, nr 10, poz. 174.
- Kaime, T. (2011) *The Convention on the Rights of the Child. A Cultural Legitimacy Critique*, edn. Groningen: Europa Law Publishing.
- Khazova, O. (2005) 'Allocation of Parental Rights and Responsibilities after Separation and Divorce under Russian Law', *Family Law Quarterly*, 39/2, pp. 373–391.
- Khazova, O. (2007) 'Family Law In the Former Soviet Union: More Differences or More Common?' in Antokolskaia, M. (ed.) *Convergence and Divergence of Family Law in Europe*. Antwerpen-Oxford: Intersentia, pp. 97–103.
- Lamont, R. (2009) 'Evaluating European Values: the EU's Approach to European Private International Law', *Journal of Private International Law*, 2009/3, pp. 371–381.
- Leblanc, L. (1996) 'Reservations to the Convention on the Rights of the Child: A macroscopic view of state practice', *The International Journal of Children Rights*, 1996/4, pp. 357–381.
- Mostowik, P. (2014) 'Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym'. Kraków: Wydawnictwo JAK.
- Mrozek-Dumanowska, A. (1999) *Islam a demokracja*. Warszawa: Askon.
- Piwko, A. (2010) 'Muzułmańscy rodzice', *Nurt SVD* 2010/1, pp. 157–173.
- Schulz, A. (1999) 'Zastrzeżenia, deklaracje, sprzeciwy do Konwencji o Prawach Dziecka' in Smoczyński, T. (ed.) *Konwencja o Prawach Dziecka. Analiza i wykładnia*. Poznań: Ars Boni et Aequi, pp. 111–134.
- Tomkiewicz, M. (2017) 'Islamska «kafala» a prawo polskie' in Nikołajew, J., Sobczyk, P., Walczuk, K. (eds.) *Wolność sumienia i religii a bezpieczeństwo i porządek publiczny*. Siedlce: Wydawnictwo Diecezji Siedleckiej UNITAS, pp. 149–164.
- Treaty of 7 February 1992 on the European Union, *Journal of Laws* 2004, No. 90, Item 864/30, as amended.
- Universal Declaration of Human Rights, adopted in Paris on 10 December 1948, UN General Assembly resolution 217 A, pp. 71–79.
- Vienna Convention on the Law of Treaties, adopted in Vienna 22 May 1969, UN Treaty Series, vol. 1155.