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Istanbul Convention and the sex and number of spouses

Konwencja stambulska a płeć i liczba małżonków

Стамбульская конвенция – пол супругов и их количество

Стамбульська конвенція а стать і кількість подружжя

TOMASZ BARSZCZ
Dr., The John Paul II Catholic University of Lublin
e-mail: tomasz.barszcz@kul.pl, https://orcid.org/0000-0002-6490-0177

Summary: In the paper, I argue that the concept of marriage contained in the Istanbul Convention does not include the resolution of the number of people in a marriage and the sex of the spouses. In pursuing this objective, I first examine the text of the Convention from the perspective of basic principles of legal interpretation, decoding the attributes of marriage *expressis verbis* contained in the text of the Convention. Next, engaging circumstances external to the text, I substantiate the theses: (1) polygamy is excluded from the concept of marriage encoded in the Convention; (2) the Convention includes a concept of marriage from which unions between persons of the same sex are excluded; and (3) the Convention's concept of marriage denotes polygamous or homosexual relationships. I then assess theses (1), (2) and 3) and their substantiations in accordance with standards of correct legal interpretation.

Key words: Istanbul Convention, homosexual partnership, polygamous partnership, marriage

Streszczenie: W artykule wykazuję, że koncepcja małżeństwa zawarta w Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej, sporządzonej w Stambule dnia 11 maja 2011 r., nie obejmuje rozstrzygnięć co do liczby osób w małżeństwie i odnośnie do płci małżonków. Podejmując się tego tematu, w pierwszej kolejności badam tekst Konwencji z perspektywy podstawowych reguł wykładni prawa, dekodując w ten sposób atrybuty małżeństwa *expressis verbis* ulokowane w tekście Konwencji. W dalszej części, angażując okoliczności zewnętrzne wobec tego tekstu, uzasadniam tezy: poligamiczność jest wykluczona z zakodowanego w Konwencji pojęcia małżeństwa (1); w Konwencji jest złożona koncepcja małżeństwa, z której wyłączono realizowanie się między osobami tej samej płci (2) oraz pojęcie małżeństwa z Konwencji denotuje związki poligamiczne lub homoseksualne (3). Następnie zaś każdą tezę – (1), (2) i (3) oraz ich uzasadnienia oceniam według wymogów prawidłowej wykładni prawa.

Słowa kluczowe: Konwencja stambulska, związek homoseksualny, związek poligamiczny, małżeństwo

Резюме: В данной статье доказывается, что понятие брака, содержащееся в Конвенции Совета Европы о предотвращении и борьбе с насилием в отношении женщин и домашним насилием, разработанной в Стамбуле 11 мая 2011 года, не включает в себя решений о количестве лиц в браке и о поле супругов. Подходя к данной теме, сначала исследуется текст Конвенции с точки зрения основных правил юридического толкования, таким образом расшифровывая признаки *expressis verbis* брака, находящиеся в тексте Конвенции. Затем, привлекая внешние по отношению к тексту обстоятельства, автор обосновывает тезисы: полигамия исключена из зашифрованного в Конвенции понятия брака (1); в Конвенции существует концепция брака, исключающая его реализацию между лицами одного пола (2), понятие брака в Конвенции обозначает полигамные или гомосексуальные союзы (3). Далее оценивается каждый тезис – (1), (2) и (3), а также их обоснования в соответствии с требованиями правильного юридического толкования.

Ключевые слова: Стамбульская конвенция, гомосексуальный союз, полигамный союз, брак

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Резюме: У статті показую, що концепція шлюбу, яка передбачена в Конвенції Ради Європи про запобігання та боротьбу з насильством щодо жінок і домашнім насильством, підготовленій в Стамбулі 11 травня 2011 року, не врегульовує кількості осіб у шлюбі та статі подружжя. Аналізуючи цю тему, перш за все розглядаю текст Конвенції з точки зору основних норм тлумачення права, таким чином розшифровуючи властивості шлюбу, які містяться *expressis verbis* в тексті Конвенції. Далі, залучаючи зовнішні по відношенню до тексту обставини, я обґрунтовую тези: полігамія виключена із закодованого в Конвенції поняття шлюбу (1); Конвенція передбачає складне поняття шлюбу, з якого виключена реалізація між особами однієї статі (2) і поняття шлюбу в Конвенції позначає полігамні або гомосексуальні союзи (3). Далі я оцінюю кожну тезу – (1), (2) і (3) та їх обґрунтування відповідно до вимог правильного юридичного тлумачення.

Ключові слова: Стамбульська конвенція, гомосексуальні стосунки, полігамні стосунки, шлюб

Introduction

This article concerns the Council of Europe Convention on preventing and combating violence against women and domestic violence, drawn up in Istanbul on 11 May 2011.[1] The purpose of this article is to show that the concept of marriage as set out in the Istanbul Convention does not include the resolution of the number of people in a marriage and the sex of the spouses. Firstly, I will show that the attributes of marriage explicitly set out in the text of the Convention include neither the identity nor the sex of the spouses and that the text does not directly refer to the number of spouses. Then, emphasising the reasons outside the text of the Convention dealing *expressis verbis* with marriage (systemic, functional, comparative), I will formulate arguments suggesting that the Convention concept of marriage denotes only monogamous and heterosexual unions, and I will provide justification for the claim that the concept encoded in the Convention indicates polygamous or homosexual unions. Finally, I will show that both of these arguments, however, do not meet the standards of legal interpretation.

It is worth noting that the Istanbul Convention remains a subject of heated academic debate in Poland. This discussion, initially focused on the question "Should the Republic of Poland ratify the Convention?" and currently shifting to the issue "Should the Republic of Poland denounce the Convention?," however, hardly touches upon the Convention's concept of marriage. This is because the participants in the dispute do not attempt to *reconstruct* the attributes of marriage *from* the *text* of the Convention, and do not formulate and weigh arguments for or against whether a particular attribute is a component of the Convention's concept of marriage.

[1] Rm.coe.int/168008482e [access: 31.12.2023]. Hereinafter also referred to as the Istanbul Convention or the Convention.

Instead, the individual positions in the discussion, if they engage the concept of marriage at all, do so by 1. quoting passages of the Convention that include the word 'marriage' (or 'spouses') or by 2. referring to the Constitution of the Republic of Poland of 2 April 197,[2] and in particular to Article 18 thereof; however, quoting the wording of the Convention on marriage (spouses) is oriented not at identifying and including a given attribute into (or excluding it from) the Convention notion of marriage, but at presenting detailed obligations of the States Parties to the Convention (e.g. in the scope of modifying the rules of punishment or sanctioning certain types of behaviours) and possibly to compare them with the solutions of the Polish legislation (e.g. with regard to assistance for victims of domestic violence or with regard to types of criminal acts) or to explain the purposes of the Convention.[3] In turn, in cases of juxtaposition of the Polish Constitution with the Convention, the issue is not to determine the content of the notion of marriage according to the Convention, but to determine whether what the Convention proposes (or requires) – not necessarily as regards marriage – is (or is not) in accordance with the Polish Constitution. In this respect, the dispute mainly concerns the content of the concept of gender (sex, socio-cultural sex, cultural sex[4]), which builds the Convention, and the implementation of this concept in the activities of the Polish state,[5]

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2 Journal of Laws [Dziennik Ustaw] of 1997 no. 78, item 483 as amended. Hereafter referred to as the Polish Constitution.

3 Cf. e.g. E. Zielińska, *Konwencja Rady Europy o zwalczaniu przemocy wobec kobiet i przemocy domowej, jej ogólna ocena oraz celowość przystąpienia do niej przez RP*, Warszawa 2012, pp. 39–40, 68–69; E. Kowalewska-Borys, E. Truskolaska, *Konwencja Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej z 2011 r. – zagadnienia wybrane*, Białostockie Studia Prawnicze 2014, no. 15, pp. 90, 97.

4 The Polish translation of the text of the Convention published in the Journal of Laws (2015 item 961) does not include the word 'gender.' This text, in place of the words 'gender' and 'genre' used in the authentic texts, operates with the terms 'sex' and 'socio-cultural sex.'

5 Cf. e.g. P. Czarny, *Opinia prawna w sprawie zgodności z Konstytucją RP Konwencji Rady Europy w sprawie zapobiegania i zwalczania przemocy wobec kobiet i przemocy domowej*, Zeszyty Prawnicze BAS 2012, no. 4, pp. 67–75; idem, *Konwencja Rady Europy w sprawie zapobiegania i zwalczania przemocy wobec kobiet i przemocy domowej – wybrane problemy konstytucyjnoprawne*, Przegląd Prawa Konstytucyjnego 2013, no. 1, pp. 100–105; *Czy Polska powinna ratyfikować Konwencję Rady Europy o zapobieganiu i przeciwdziałaniu przemocy wobec kobiet i przemocy domowej?*, ed. J. Banasiuk, Warszawa 2014, pp. 22–57; M. Chmaj, *W sprawie zgodności z Konstytucją RP Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej, sporządzonej w Stambule dnia 11 maja 2011 r.*, Przegląd Sejmowy 2015, vol. 23, no. 4, pp. 134–139; M. Jabłoński, *W sprawie zgodności z Konstytucją RP Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej, sporządzonej w Stambule dnia 11 maja 2011 r.*, Przegląd Sejmowy 2015, vol. 23, no. 4, pp. 144–148; Ł. Stefaniak, *Zarys sporu o ratyfikację Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej*, Roczniki Nauk Prawnych 2014, vol. 24, no. 3, pp. 66–73; C. Mik, *W sprawie Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej, podpisanej w Stambule*

especially in the sphere of education and upbringing, as well as protection and care for the family and marriage as a union of a man and a woman.[6]

1. Attributes of marriage *expressis verbis* according to the Convention

The Council of Europe Convention on preventing and combating violence against women and domestic violence does not contain a definition of marriage. Moreover, the text of the Convention, which explicitly and directly addresses marriage, is not extensive. The word 'marriage' is used only in one paragraph of the Preamble to the Convention, as well as only in Articles 32, 37 (1) and (2) and Article 59 (1) and (4) of the Convention, while the word 'spouse' ('spouses') was used in the construction of Articles 3 (b), 36 (3), 46 (a) and 59 (1) and (2) of the Convention. The interpretation of the aforementioned provisions, if carried out with a restriction to their form and assuming that each of the words building them is assigned a 'basic and common' meaning (i.e. the so-called common or ordinary meaning),[7] will re-

11 maja 2011 r., jej zgodności z Konstytucją RP oraz o niektórych konsekwencjach jej ratyfikacji dla Polski, Przegląd Sejmowy 2015, vol. 23, no. 3, pp. 91–147; W. Burek, K. Sękowska-Kozłowska, *Pięć lat obowiązywania Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej w Polsce: stan gry*, Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 2020, no. 18, pp. 258–262.

6 The Istanbul Convention remains the subject of much debate outside Poland. These disputes concern (1) the legitimacy of the ratification (denunciation) of the Convention by individual states. Moreover, the Istanbul Convention appears in inquiries about (2) the evolution of systems of legal protection against violence (or the protection of women) and, secondary to the debates on ratification, in excursions on (3) the realisation of political concepts, maintained in different ideological tones; whereby the question of the attributes of the Convention's concept of marriage, insofar as it appears in individual positions (regardless of which category of discussion a given position belongs to), is treated analogously to the academic debate in Poland: the content of the notion of marriage is not so much reconstructed on the basis of the text of the Convention according to the rules of legal interpretation, but only resounds by quoting passages of this text with the words 'marriages' or 'spouses,' or by juxtaposing the provisions of the Convention, its purposes or its object with the legal status of a given state. For an overview of the discussion (1), cf. e.g. M. Đurković, *Disputes Regarding the Ratification of the Istanbul Convention in Europe*, Sociologija 2022, vol. 64, no. 4, pp. 605–622. As an example of research of type (2), cf. M.B. Campmajó, *Forced Marriages in Europe: A Form of Gender-Based Violence and Violation of Human Rights*, The Age of Human Rights Journal 2020, no. 14, pp. 1–18; M. Htun, F. Jensenius, *Fighting Violence Against Women: Laws, Norms & Challenges Ahead*, Daedalus 2020, vol. 149, no. 1, pp. 145–148. For an illustration of work of type (3), see Z. Hesová, *New Politics of Morality in Central and Eastern Europe: Actors, Discourse, and Context*, Intersections. East European Journal of Society and Politics 2021, vol. 7, no. 1, pp. 59–77.

7 Cf. J. Wróblewski, *Sądowe stosowanie prawa*, Warszawa 1988, p. 130; K. Osajda, *Domniemanie języka potocznego*, in: *Teoria i praktyka wykładni prawa*, ed. P. Winczorek, Warszawa 2005, pp. 137–139.

veal data on the numerous and various attributes of marriage. However, they will neither mention the number of spouses nor their sex.

In the Preamble to the Convention, marriage is only mentioned. The word 'marriage' is in fact used there once, namely: "[…] women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called »honour« and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men." Thus, according to the text presented, the attributes of marriage include voluntariness. Forced marriage is described as a 'serious form of violence,' a 'serious violation of human rights' and a 'major obstacle,' which means – referring to the basic and common meanings of the words 'violence,' 'violation' and 'obstacle' – something pejorative, which should not happen. By contrast, in everyday use, the meaning of the word 'coercion' is reduced to the opposite of voluntariness. Nevertheless, the indicated use of the word 'marriage' does not provide grounds to infer anything about the number or sex of spouses, given the shape of the sentence in which it occurs and the basic and common meanings of the words used in it.

The first of the provisions of the Convention that explicitly touches upon marriage (as constructed from the word 'spouse') is Article 3 (b). Namely, "[f]or the purpose of this Convention […] »domestic violence« shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim." The cited provision – without attempting to link the words that constitute it to some unique meaning, and taking into account its construction and the interpretative directive prohibiting the combination of different phrases with the same meaning[8] – thus points to three attributes of marriage. Firstly, marriage constitutes something different from a family and a relationship between partners. Secondly, for a marriage, just as for a family and a civil partnership, it is not necessary to share a place of residence. Thirdly, marriage can cease (despite the fact that its subjects are alive). As regards the understanding of marriage in the context of the sex of its subjects or their number – the same as with regard to: (a) the differences between marriage and family, and marriage and civil partnership, (b) the content relevant to the interaction of the spouses, (c) the characteristics of the reasons for the cessation of

[8] This is the so-called directive prohibiting synonymous interpretation, cf. L. Morawski, *Zasady wykładni prawa*, Toruń 2010, pp. 117–119.

marriage – the Convention text referred to, in the indicated context of interpretative assumptions, does not contribute anything.

Information on the cause justifying the cessation of marriage according to the Convention is contained in Articles 32 and 37. Under them, the States Parties to the Convention undertook to adopt "the necessary legislative or other measures to [a] ensure that marriages concluded under force may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim;" [b] criminalise "the intentional conduct of forcing an adult or a child to enter into a marriage." In each of these provisions, due to the use of the expressions "concluded under force" and "forcing […] into a marriage," the voluntariness of marriage is therefore again emphasised; and this attribute *verba legis* is linked in each case to the very establishment of this relationship. Moreover, although Article 32 treats marriage as a dissolvable, annulable or voidable union, it only declares that these are the options provided for those unions that function in social circulation under the name of 'marriage' and which were devoid of the attribute of voluntariness at the time of their conclusion. The shape and content (assuming that it is formed by colloquial meanings) of these regulations, however, do not provide grounds to justify any conclusion on the number or sex of the spouses.

A number of attributes of marriage are indicated in Article 36 of the Convention. Sections 1 and 2 thereof define acts of a sexual nature which, without "consent […] given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances," should be criminalised in the legal system of each State that is party to the Convention. What is more, Article 36 (3) of the Convention emphasises that the criminal acts categorised in sec. 1 may be committed by "former or current spouses or partners." Thus, the shape and colloquial meaning of the wording of Article 36, taking into account the directive prohibiting the combination of different words with the same meaning, indicate that the concept of marriage encoded in the Convention: a) includes the possibility of the cessation of the union; the acts referred to in this provision may be committed, inter alia, by "former […] spouses;" b) differs from a civil partnership; the acts in question may be committed, inter alia, by "spouses or partners." Furthermore, the wording of Article 36 indicates that c) the reality of marriage – like the content of a civil partnership – allows for consensual sexual intercourse, which is an expression of the free will of its subjects. However, it is not possible to determine the sex of the spouses or their number solely on the basis of the wording of the expression "former or current spouses or partners," or from the mere fact that among the attributes of marriage is the openness to consensual and voluntary sexual intercourse.

Data on marriage are also directly provided by Articles 46 and 59 of the Convention. The former indicates that, in determining criminal liability, an aggravating circumstance should be the commission of an offence against "a former or current spouse or partner" (i.e. Article 46 uses an expression almost of the same form as in Article 36(3) discussed above, which, according to the directive of terminological consistency, leads to the conclusions indicated in the previous paragraph). By means of Article 59 (1)–(4), a number of obligations have been designated to its parties to organise the right of residence of the spouse or partner, irrespective of the "duration of the marriage or the relationship." Thus, the aforementioned provisions *expressis verbis* indicate that marriage is different from civil partnership, and that marriage and civil partnership may cease (despite the fact that their subjects are alive). However, based on the formulation of the text of these regulations (as well as on the rule of colloquial speech and the rule prohibiting synonymous interpretation), not only is it impossible to ascertain anything about the attributes that distinguish a marriage from a relationship between partners or about the reasons for the dissolution of marriage, but it is also impossible to ascertain anything about the number of spouses or their sex.

At this point, bearing in mind Article 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969, it is worth noting that on the basis of the purposes declared in Article 1 of the Istanbul Convention,[9] based on the provisions formulated in Article 2 of the Convention, the characteristics of what its regulations are to refer to,[10] as well as due to the current interpretative context (in particular the so-called explanatory report[11]), modification of the above conclusions (on the lack of determining the number of spouses or their sex by the presented provisions of the Convention and the fragment of the Preamble) does not seem justified. Below,

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9 Article 1 (1): The purposes of this Convention are to: a protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence; b contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women; c design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence; d promote international co-operation with a view to eliminating violence against women and domestic violence; e provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

10 Article 2.1. This Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately. 2. Parties are encouraged to apply this Convention to all victims of domestic violence. Parties shall pay particular attention to women victims of gender-based violence in implementing the provisions of this Convention.

11 Cf. *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, https://rm.coe.int/1680a48903 [access: 31.12.2023].

however, an attempt will be made to build – with reference to one of the purposes of the Convention and some of its provisions that do not directly concern marriage, as well as using circumstances entirely outside the text of the Convention – arguments suggesting that the Convention's concept of marriage does include definitions as to number of spouses and their sex.

2. Arguments involving reasons outside the text of the Convention

In the text of the Istanbul Convention there are no direct and explicit references to the number of spouses or their sex. However, the interpretation of the law is not limited to stating what the legal text explicitly and clearly states. On the contrary, there is a view that legal interpretation begins when the legal text is not clear. Consequently, the "basic and common" meanings of the words constituting the interpreted text of the act should, in accordance with the teleological and functional rules (directives) of legal interpretation,[12] be corrected due to circumstances external to these formulations, and in particular take into account other provisions of this act (i.e. provisions that do not contain a word whose meaning is reconstructed), provisions (and interpretations) of other normative acts and the objectives (purposes) of the regulation being interpreted.

The involvement of circumstances outside the text of the Istanbul Convention, which deals directly with marriage, enables the construction of an argument that polygamy is excluded from the concept of marriage encoded in this act (i.e. it denotes only monogamous unions). Thus, polygamy between more than two persons is excluded from the concept of marriage in the Convention, since by virtue of Article 1 (b) of the Convention, its purpose is to "[…] contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women." In turn – and this is a circumstance external to the text of the Convention – polygamy is a relationship assuming the lack of equality and exclusivity (independent position) of the persons it includes. In such a relationship, one subject exclusively remains the partner of another subject, and this other subject does not remain exclusively that subject's partner.[13] Furthermore, the Convention's concept of marriage does not include

12 On rules of legal interpretation, cf. e.g. Z. Ziembiński, *Practical Logic*, Warszawa 1976, pp. 304–314.

13 Cf. T. Ślipko, *Zarys etyki szczegółowej*, vol. 2, Kraków 2005, pp. 152–153; W. Chudy, *Pedagogia godności. Elementy etyki pedagogicznej*, Lublin 2009, pp. 133–146.

polygamous relationships, as its Preamble states that the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966, was taken into account in the drafting of this act.[14] However – and here again there are circumstances external to the text of the Convention – the Human Rights Committee (i.e. the entity ultimately competent to control the correctness of the interpretation of the Covenant) established in relation to Articles 3 and 23 (4) of the Covenant that "equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist."[15] This interpretation of the Covenant by the Committee was valid at the time of the drafting of the Convention and remains valid today.

Based on circumstances outside the text of the Convention, an argument can be made that the Convention includes a concept of marriage from which unions between persons of the same sex are excluded (and therefore: it denotes only heterosexual relationships). The Convention distinguishes marriage from civil partnership in Articles 3 (b), 36 (3), 46 (a), 59 (1), but assumes that the two types of relationship are the same as regards: 1. the voluntary nature of their conclusion; 2. the openness to voluntary sexual intercourse of its subjects; 3. the degree of legal protection (in terms of criminal law, protection against domestic violence and institutions related to residence law), and 4. the irrelevance of cohabitation of its subjects. Thus, since marriage and civil partnership, according to the Convention, do not differ in the four aforementioned attributes, and are different types of relationship, it may be the case that, according to the Convention, the attribute of marriage that distinguishes it from civil partnership is the difference in the sex of the spouses; and this option is supported by considerations external to the text of the Convention. According to Article 23 (2) of the Covenant on Civil and Political Rights (which, as the Preamble to the Convention states, was taken into account as the basis for its establishment), it is the case that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognised." In turn, the Human Rights Committee stated that "[A]rticle 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term men 'and women,' rather than 'every human being,' 'everyone' and 'all persons.' Use of the term 'men and women,' rather than the general terms used elsewhere in Part III of the Covenant,

14 www.ohchr.org/sites/default/files/ccpr.pdf [access: 31.12.2023]. Hereinafter referred to as the Covenant.

15 Human Rights Committee's General Comment no. 28 of 29 March 2000, point 24.

has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from Article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman […];"[16] and, importantly, the quoted interpretation of Article 23 (2) of the Covenant, according to which the sex difference of the spouses is a necessary and specific attribute of marriage, was valid at the time the Convention was established and remains valid.

In opposition to the argued theses is the claim that the Istanbul Convention's concept of marriage denotes polygamous or homosexual relationships. A justification can also be formulated for this claim, taking into account circumstances outside the text of the Convention directly concerning marriage. According to Article 12 (1) of the Convention, "[p]arties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men;" however, the expression 'stereotyped roles of women and men' is not defined in the Convention. However, if it is assumed that the word 'stereotyped' is a synonym for the word 'common,' which in turn – and from that moment on, circumstances outside the text of the Convention are included in the interpretation – remains synonymous with the words 'usual' and 'frequent,' and in the European cultural circle, marriage is usually and most frequently understood as a union of one woman and one man,[17] it can be assumed that according to Article 12 (1) heterosexual and monogamous marriage constitutes a practice based on stereotypical roles of women and men, that is, a practice that needs to be 'eradicated.' This indicates that the Convention does not include the concept of marriage as a union between one woman and one man; and this thesis is close to the claim that the concept of marriage under the Convention covers the existence of such a union between persons of the same sex or more than two persons. If the Preamble and Articles 32, 37 (1) and (2), 59 (1) and (4), 3 (b), 36 (3), 46 (a) and Article 59 (1) and (2) of the Convention – due to the fact that they contain the words 'marriage' and 'spouse' – indicate that some concept of marriage is encoded in the Convention, and it being the case that the concept of marriage as a union between one man and one woman is not included in the Convention, it may be inferred that the attributes of this concept include union between persons of the same sex or between more than two persons.

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16 Decision of 17 July 2002, Ms. Juliet Joslin et al. v. New Zealand, no. 902/1999, point 8.2.

17 Cf. L. Kocik, *Wzory małżeństwa i rodziny. Od tradycyjnej jednorodności do współczesnych skrajności*, Kraków 2002, pp. 19–21.

3. The perspective of legal interpretation

Interpreting the text of the Istanbul Convention dealing directly with marriage only by means of the main rules of linguistic interpretation shows that the Convention's concept of marriage does not include the determination of the number and sex of the spouses. Nevertheless, taking into account in the interpretation of directives other than the basic linguistic rules (and reproducing the concept of marriage from the Convention with reference to one of its purposes and using circumstances outside its text *expressis verbis* regarding marriage) leads to the conclusion that the number and sex of the spouses are encoded in the Convention; however, different passages of its text and different extratextual contexts suggest mutually exclusive statements on the number of spouses and their sex. This fact brings up the need to address two issues. Firstly, whether the preliminary conditions for conducting interpretation according to rules other than the basic directives of linguistic interpretation of law have been met at all. If so, then – secondly – is any of the three interpretations (arguments) presented correct?

The solution to the question of prerequisites for conducting legal interpretation according to rules other than basic (intuitive) linguistic directives is determined by the fact that the Istanbul Convention is a treaty within the meaning of the Vienna Convention on the Law of Treaties of 23 May 1969. This is because "the rules of treaty interpretation laid down in the Vienna Convention require that a treaty be interpreted [primarily] 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (Art. 31 and 32)."[18] The interpretation of treaties thus involves "a sequence of applying linguistic rules (ordinary meaning of words), systemic rules (context) and purposive and functional rules (object and purpose of the treaty). All these rules are obligatory and interrelated."[19] The need to address the second of the issues identified therefore materialises: is any of the interpretations presented in the second part of the article correct?

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18 Resolution of the Supreme Court of Poland of 19 February 2003, I KZP 47/02, OSNKW 2003, no. 3–4, item 22.

19 B. Liżewski, *Wykładnia prawa międzynarodowego a wykładnia prawa Unii Europejskiej*, in: *System Prawa Unii Europejskiej*, vol. 3. *Wykładnia prawa Unii Europejskiej*, ed. L. Leszczyński, Warszawa 2019, p. 355. Cf. Judgment of the Voivodeship Administrative Court in Gliwice of 14 June 2022, I SA/Gl 1504/21, LEX no. 1519751; Judgment of the Supreme Administrative Court of 3 December 2009, II FSK 917/08, LEX no. 550105; M.H. Arsanjani, W.M. Reisman, *Interpreting Treaties for the Benefit of Third Parties: The "Salvors' Doctrine" and the Use of Legislative History in Investment Treaties*, The American Journal of International Law 2010, vol. 104, no. 4, pp. 599–602.

The correct result of interpreting a legal text (i.e. a certain understanding of the text) is to be found when it was obtained 1) according to uncontested interpretative rules, 2) which were applied adequately. In relation to the first requirement, it should be added that the reconstruction of what a given legal text means may be accomplished according to guidelines that in legal science or practice have been considered inadmissible for texts of this kind; e.g. it is generally accepted in legal parlance that provisions characterising types of criminal acts should not be interpreted using the rule *per analogiam*.[20] However, one may venture to argue that the conclusion of each of the three arguments presented in the previous part of this article is linked to the text of the Convention only by means of directives, which have not been objected to in jurisprudence or legal theory as to their applicability to any legal texts.

With regard to the question of the adequate application of the directives of legal interpretation, it is worth noting two undisputed circumstances. Firstly, no one disputes that the starting point for the interpretation of a legal text – even when this text constitutes an international agreement – are linguistic guidelines (the directive on the priority of linguistic interpretation). More precisely, the interpretation of a legal text must begin by linking the expressions that construct that text to meanings that are normally (i.e., as a rule, intuitively) associated with expressions of the same shape outside legal parlance (colloquial speech rule), unless the legislator itself has indicated how the word in question is to be understood (legal speech rule[21]) or, in the absence of such an indication, it has an established meaning in legal literature and case law (legal speech rule) or it belongs to the vocabulary of a particular social practice (specialist speech rule); whereby, irrespective of whether the expression in question has a colloquial, legal, juridical or specialised meaning, words of the same shape in the text of the act to be interpreted should not be understood differently (the rule of terminological consistency), words of different shape should not have the same meaning (the prohibition of synonymous interpretation), and, in order to determine the meaning of complex expressions, the rules of logic and the grammatical rules of the natural language in which the interpreted act was formulated should be taken into account, bearing in mind that there are no superfluous words in the legal text (prohibition of *per non est* interpretation).[22] Secondly,

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20 Cf., e.g., J. Giezek, *Rozdział I. Zasady odpowiedzialności karnej*, in: *Kodeks karny. Część ogólna. Komentarz*, ed. J. Giezek, Warszawa 2021, p. 35; Judgment of the Supreme Court of Poland of 9 February 2021, II DK 44/21, LEX no. 3119796.

21 In the case of treaty interpretation, the application of this rule is explicitly justified by Article 31 (4) of the Vienna Convention.

22 Cf. L. Morawski, *Zasady*…, pp. 68–70.

it is also undisputed that the finding that a statement about the content of the interpreted expression (or any of the premises justifying it) is absurd, leads to a grossly unfair decision or violates the *ratio legis* of the interpreted text constitutes an excuse to modify (in other words: question the correctness) of the interpretation carried out, regardless of what kind of interpretation directives determined it. This means, in particular, that the absurdity or gross injustice of the interpretation and the violation of the *ratio legis* of the interpreted act constitute the criteria for the correctness of an interpretation based on circumstances outside the interpreted text.

In the second part of the consideration, three interpretations are formulated using circumstances outside the text of the Convention, namely: (1) polygamy is excluded from the concept of marriage encoded in the Convention; (2) the Convention includes a concept of marriage from which unions between persons of the same sex are excluded; and (3) the Convention's concept of marriage denotes polygamous or homosexual relationships. Resolving the issue of the correctness of these interpretations, in the context of the circumstances indicated in the previous paragraph, therefore requires assessing them (and their premises) in terms of absurdity, gross injustice and failure to correspond to the *ratio legis*. It should be noted, however, that absurdity, gross injustice and non-compliance with the *ratio legis* as criteria for correct interpretation are broad and vague. As a result, the thesis that a given case of interpretation (i.e. its result or the premises for it), formulated on the basis of circumstances outside the text being interpreted, is absurd or grossly unfair, or that it fails to fulfill the purpose of the act being interpreted, usually remains more or less open to discussion.

Interpretations (1), (2) and (3) are wide open to discussion in places where they are based on circumstances outside the text of the Convention. Since the purposes of the Convention – according to Article 1 thereof – are to eliminate violence against women and domestic violence, as well as to promote substantive equality between women and men, it can be argued that the arguments in favour of (1), (2) and (3) violate the *ratio legis* of the Convention. This is because equality is not something uniformly understood. Therefore, the interpretation that (1) "polygamy is excluded from the concept of marriage encoded in the Convention" is based on the assumption, extra-textual for the Convention, that polygamy ruins the equality and independent position of the persons between whom it occurs. However, it can be argued, precisely by making up the concept of equality, that this premise is flawed. Interpretation (2) stating that "the Convention includes a concept of marriage from which unions between persons of the same sex are excluded" is supported by the premise that marriage and civil partnership (according to the Convention) are partly the same and partly different; the inclusion of circumstances

outside the text of the Convention in the interpretation here is based on the failure to specify this difference in the text of the Convention; and it is precisely this underdetermination that opens the way to a modification-prone concept of equality. In turn, with regard to interpretation (3) "the Convention's concept of marriage denotes polygamous or homosexual relationships," it is debatable whether there is "semantic equality"[23] between the word 'stereotyped' and the words 'usual' and 'frequent,' as well as – whether the understanding of heterosexual and monogamous marriage as a practice "to be eradicated" promotes equality between women and men who form such marriages and women and men who do not.

An analogous situation applies to gross injustice. This is because the concept of justice (injustice) is formally based on equality, understood as the possession by the compared subjects of a certain characteristic which acts as a criterion of fair treatment.[24] Of course, in this case, the orbit of a potential discussion on causing gross injustice by the interpretation (1), (2) and (3) includes not only the issues of equality indicated in the previous paragraph, but also the issue of understanding the measure of justice itself and the problem of whether a deviation from it in a given case would already be a gross injustice.

The question of absurdity also seems open. Although – without processing the concept of polygamy – interpretation (1) can hardly be considered absurd, the matter appears to be simpler when it comes to the interpretation (2). The justification for the statement that "the Convention includes a concept of marriage from which unions between persons of the same sex are excluded" is based on circumstantial reasoning without completing the chain of circumstantial evidence: since marriage and civil partnership in the Convention have a certain number of the same attributes, and the civil partnership according to the Convention is something different from marriage, it is only possible for this to be so, as thesis (2) states; and the question whether closing this argument with the International Covenant on Civil

[23] There are several interpretations of the word 'stereotypical' in Article 12 of the Convention in the Polish jurisprudence; and none of these reconstructions explains the meaning of the term 'stereotypical' using words that can be translated with the words 'ordinary,' 'frequent' or 'common.' Besides, these interpretations differ from each other and have little explanatory power. Thus, in particular, the word 'stereotypical' in Article 12 of the Convention is supposed to mean: a) 'untrue,' b) 'invalidating the subjectivity of an individual' (E. Zielińska, *Konwencja Rady Europy*…, p. 18), c) '[one that] does not withstand confrontation with reality' (E. Zielińska, *Artykuł 12. Zobowiązania ogólne*, in: *Konwencja o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej. Komentarz*, eds. E. Bieńkowska, L. Mazowiecka, Warszawa 2016, p. 212), d) 'repeated without change, always the same, being a reflection of some stereotype, lacking originality' or e) 'constituting a far-reaching generalisation' (P. Czarny, *Opinia prawna*…, p. 74).

[24] Cf. Ch. Perelman, *Justice, Law, and Argument. Essays on Moral and Legal Reasoning*, Dordrecht 1980, pp. 7–22.

and Political Rights remains "on point" seems debatable. One of the premises of interpretation (3) is the claim that "the Convention does not include the concept of marriage as a union between one woman and one man." This premise is used to indicate that heterosexual and monogamous marriages are practices to be 'eradicated' according to the Convention. This suggestion, especially taking into account the fact that the Convention is to be applied in the European cultural sphere, can be argued as absurd.

Conclusions

The aim of this article was to show that the concept of marriage as set out in the Istanbul Convention does not include the resolution of the number of people in a marriage and the sex of the spouses. The implementation of this task was organised in three stages. In the course of the first stage, it was shown that interpreting the text of the Convention dealing explicitly with marriage by means of the basic rules of linguistic interpretation *only* provides the information that marriage is a union: (a) voluntarily entered into; (b) whose subjects are equal in rights and obligations as spouses; (c) whose intrinsic reality is openness to voluntary sexual intercourse of its subjects; (d) which may cease by dissolution, annulment or invalidation if entered into under force; (e) which is something other than a family and a civil partnership; (f) whose subjects do not have to share their place of residence. This situation suggests that the concept of marriage under the Convention does not include arrangements as to the number and sex of spouses.

The second stage of achieving the objective of the present study was to show that, based on interpretative directives other than basic (intuitive) linguistic rules, it is possible to formulate neat arguments in favour of the claims (1) "polygamy is excluded from the concept of marriage encoded in the Convention" and (2) "the Convention includes a concept of marriage from which unions between persons of the same sex are excluded." Moreover, the use of circumstances outside the text of the Convention made it possible to organise a justification for the interpretation that excludes (1) and (2), i.e. that (3) "the Convention's concept of marriage denotes polygamous or homosexual relationships." Thus, the very formulation of mutually incompatible interpretations creates grounds for discussion as to their correctness and, as a consequence, indicates the lack of resolution regarding the number and sex of spouses in the Convention's concept of marriage. What is important,

however, is that the arguments in favour of (1) and (2) and (3) remain debatable from the perspective of the standards of interpretation of legal texts.

The criteria for the correctness of such an interpretation come down to the absurdity of the result of the interpretation, the gross injustice of the interpretation result and its violation of the *ratio legis* of the interpreted act. In the third stage – apart from the fact that a considerable effort of argumentation is required by the thesis proclaiming that it is absurd, grossly unjust or in violation of the purposes of the Convention to claim: "the set of attributes of marriage explicitly indicated by the text of the Convention (the aforementioned attributes a–f) implies that the Convention's concept of marriage lacks any determination as to the number and sex of the spouses" – the fact that the arguments constructed from theses (1), (2) and (3), where they refer to circumstances outside the text of the Convention, are open to allegations of absurdity, gross injustice and violation of the purposes of this normative act, were highlighted.

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