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## Protection of Families in National Constitutions, in Particular in the Polish Constitution

- **ABSTRACT:** *This article aims to present the family's legal status in light of constitutional solutions in force in selected European countries, with particular emphasis on Polish regulations. The author aims to present a wide range of regulations functioning in Europe, and at the same time, highlight the similarities and differences between individual countries. An important element of this study is the consideration of Polish legislation, which is to familiarize readers with basic information on the legal situation of Polish families and at the same time show them where the regulations in force in the Republic of Poland fit into European standards, and in which they are original. The article covers the following issues: the constitutional protection of the family, way of understanding the role of the family in society and the state, problem of the constitutional definition of the family, definition of marriage, exercise of parental authority, and legal status of children.*
- **KEYWORDS:** legal status of family, marriage, children, parenthood.

I. In European culture, the family is viewed as one of the foundations of social life. For this reason, it is permanently rooted in the laws of all European countries, which aim to define the normative framework for its operation and to provide legal protection. Importantly, in the vast majority of cases, the basic provisions regulating the family's legal status are found in the texts of the constitutions. Establishing them at such a level, European legislators create a starting point for more complex and detailed solutions contained in lower-level acts; at the same time, they treat the family as a particularly important phenomenon from the perspective of the functioning of the state and society. Undoubtedly, this approach can be considered a widely used standard in Europe.

The Polish legislator also uses the concept of a regulation devoted to the family in the constitution. The solutions adopted in this matter are expressions of respect for the institution of the family in the national social order and, at the same time, reflect

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the previously indicated pan-European tendencies in the field of shaping constitutional provisions. They are also a manifestation of striving to provide a basic social unit with legal protection. The fact that the legislator attaches great importance to this is evidenced by the scope and multifaceted nature of established regulations. The family theme manifests itself in many contexts under the binding law and is strongly exposed to various places in the normative text<sup>2</sup>. The regulations themselves are characterized by clear originality combined with certain normative schemes established in Europe. To see it fully, it seems reasonable to present the constitutional concept of family protection in Poland against a broader comparative background, including functioning solutions in other European countries. It can be assumed that such a cognitive perspective creates an opportunity to show the reader with full sharpness what is unique in this concept and in line with the regulatory standards existing today. This constitutes the research purpose of this study.

II. The constitutional provisions governing the legal status of the family in force in modern European countries differ in many elements (if they exist at all under a given constitution; such provisions do not exist in the Constitution of France<sup>3</sup>, Denmark,<sup>4</sup> and the Netherlands<sup>5</sup>). The distinctions that come into play here mainly concern the content, scope of the standardization, and manner of its presentation. In this respect, a spectrum of possible models of normative solutions emerged. Their comparative legal review allows us to see the specificity and, in part, the template nature of Polish regulations.

III. Most constitutions unequivocally cover the family with legal protection expressed by the active role of the state in this area (this is not done by the continuation of Romania<sup>6</sup> and Luxembourg, for example<sup>7</sup>). In this way, they create a normative basis for pro-family policy, understood as a long-term system of goals and legal solutions to support families<sup>8</sup>. In Poland, a relevant clause is contained in Art. 18 of the Basic Law, which stipulates that the family, marriage, motherhood, and parenthood, are under the protection and care of the Republic of Poland. Additionally, a regulation that manifests the need for the state to provide support to the family, including mothers with children, is Art. 71 sec. 1 and 2 of the Constitution. According to it, the state in its social and economic policy considers the family's welfare, which, if it is in a difficult financial and social situation, has many children and is incomplete—has the right to special assistance from public authorities. It should be emphasized that all these solutions create a normative platform for conducting a broad-based pro-family policy, reflected

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2 Garlicki, 2016, p. 489.

3 France's Constitution of 1958 with Amendments through 2008.

4 Denmark's Constitution of 1953.

5 Netherlands's Constitution of 1814 with Amendments through 2008.

6 Romania's Constitution of 1991 with Amendments through 2003.

7 Luxembourg's Constitution of 1868 with Amendments through 2009.

8 Durasiewicz, 2009, p. 57.

in various statutory instruments. An example is a wide range of family benefits to support their economic conditions of functioning, which consists of several different forms of family benefits (including the famous 500 plus program)<sup>9</sup> and running organizational units of social assistance<sup>10</sup>. Similar constitutional provisions are in force in Slovakia<sup>11</sup>, where the legislator, apart from declaring the family's protection, emphasizes the need to support pregnant mothers and parents bringing up children. This is due specifically to Art. 41 para. 1-2 and 5 of the Slovak Constitution, which states that marriage, parenthood, and family are under the protection of the law, pregnant women shall be entitled to special treatment, terms of employment, and working conditions, and parents taking care of their children shall have the right to assistance provided by the State. The constitutional provisions adopted in the Czech Republic<sup>12</sup>, which emphasize the same elements of state protection, are very similar. Art. 32 sec. 1-3 states the law protects parenthood and the family and that pregnant women are guaranteed special care, protection in labor relations, and suitable work conditions. Parents who are raising children have the right to assistance from the state. This list includes the Spanish regulation<sup>13</sup>, which distinguishes between areas requiring protection by the state and, at the same time, emphasizes special care for children. As stated in the constitution, Art. 39 sec. 1 i 2, the public authorities shall ensure the family's social, economic, and legal protection. In contrast, they shall ensure full protection of children, who are equal before the law, irrespective of the mothers' parentage and marital status. Going further, it is worth indicating the German regulations<sup>14</sup>, including a short declaration and the areas of state protection listed in turn. Under Art. 6 sec. 1-2, 4-5 of the constitution, marriage, and the family are under the special protection of the state order. The care and upbringing of children is a natural right of parents and their primary responsibility. Their activities are supervised by the state community, which is additionally obliged to care for and protect mothers. For children born out of wedlock, the same conditions for physical and spiritual development should be created by law, and the same social position as children born into marriage should be guaranteed. The Hungarian regulation<sup>15</sup> is original in this group, explaining the need for state involvement in this area and, at the same time, encouraging the conduct of an active demographic policy as Art. L para. 1-3 konstytucji, Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision. The family is the basis of the survival of the nation and should also encourage the

9 Family allowance – 2004; Extras for the family gym – 2004; Care allowance – 2004; Benefit care – 2004; Benefits from the fund alimony – 2004; Disposable you birth torso the baby – 2006; Addition to benefits; care – 2013–2014; The special caring bow – 2013; Benefit parental – 2016; Benefit from the program Family of 500 plus – 2016; Benefit from the program Good start – 2018; Durasiewicz, 2014, pp. 113–115.

10 Durasiewicz, 2009, p. 57 and next.

11 Slovakia's Constitution of 1992 with Amendments through 2014.

12 Czech Republic's Constitution of 1993 with Amendments through 2002.

13 Spain's Constitution of 1978 with Amendments through 2011.

14 Germany's Constitution of 1949 with Amendments through 2014.

15 Hungary's Constitution of 2011 with Amendments through 2013.

commitment to have children (a cardinal Act shall regulate the protection of families). The Lithuanian constitution<sup>16</sup> is characterized by a certain difference, proposing a solution focusing on state aid directed only to families bringing up children while laying down certain guarantees for mothers. In contrast, under Art. 39, the state shall take care of families that raise and bring up children at home and render them support according to the procedure established by law. On the other hand, shall provide to working mothers a paid leave before and after childbirth and favored working conditions and other concessions. The originality can be attributed to the Irish constitution<sup>17</sup>, which, when formulating a commitment to protect the family, also emphasizes the need to protect it from unspecified attacks while highlighting the social guarantees for mothers. The provision containing the solution is Art. 41, declaring that the state: guarantees to protect the family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the nation and the state; recognize that by her life within the home, women give to the state a support without which the common good cannot be achieved, and therefore endeavors to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home; pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack. The standard in force in Slovenia<sup>18</sup> has a slightly different content and is much more economical in terms of the text. Art. 53 states that the state shall protect the family, motherhood, fatherhood, children, and young people and provide proper conditions for effecting such protection. The situation is similar in Finland<sup>19</sup>, where the legislator also uses a formula that is limited in its content. The local constitution in Art. 19 provides that the public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health, and medical services and promote the health of the population. Moreover, the public authorities shall support families and others responsible for providing for children to ensure the wellbeing and personal development of the children. Finally, Latvia has concise regulation concerning the family's protection by the state. It is about Art. 110 of the Constitution. The state shall protect and support marriage and provide special support to children with disabilities, children left without parental care, or who have suffered from violence. The most extensive regulation is the Portuguese constitution<sup>20</sup>. In this case, the legislator expresses special care for the good of the family, delineating an extensive catalog of spheres of pro-family activity of the state. Therefore, according to Art. 67, ut. Family 1–2, as a fundamental element in society, shall possess the right to protection by society and the state and to the effective implementation of all the conditions needed to enable family members to achieve personal fulfillment. To protect the family, the state should particularly be charged with promoting the social

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16 Lithuania's Constitution of 1992 with Amendments through 2006.

17 Ireland's Constitution of 1937 with Amendments through 2015.

18 Slovenia's Constitution of 1991 with Amendments through 2013.

19 Finland's Constitution of 1999 with Amendments through 2011.

20 Portugal's Constitution of 1976 with Amendments through 2005.

and economic independence of family units, promoting the creation of, and guaranteeing access to, a national network of crèches and other social facilities designed to support the family, together with a policy for the elderly; cooperating with parents in relation to their children's education; with respect for individual freedom, guaranteeing the right to family planning to promote the information and access to the methods and means required, and organizing such legal and technical arrangements as are needed for motherhood and fatherhood to be consciously planned; regulating assisted conception in such a way as to safeguard the dignity of the human person; regulating taxes and social benefits in line with family costs; after first consulting the associations that represent the family, drawing up and implementing a global and integrated family policy; by concerting the various sectoral policies, promoting the reconciliation of professional and family life.

IV. Some European constitutions manifest their relationship to the institution of the family. They do it through *expressis verbis* declarations, emphasizing the importance of this institution in the functioning of society or nation (some constitutions speak of society, others speak of the nation). Formulations of this type, showing a strong axiological character, manifest unequivocally the legislator's conviction that the family is among the most significant constitutional values. It should be noted that there are no such provisions in Polish basic law. However, their lack does not mean that the legislator depreciates the family in any way. As it can be assumed, he uses the concept of the family intuitively, treating it as an existing term, defined by tradition and customs<sup>21</sup>, which have placed the discussed institution at the center of the country's social life for centuries. Therefore, it is difficult to doubt that the constitution perceives the family differently. This is evidenced by the jurisprudence of the Constitutional Tribunal, which requires one to be guided by "the awareness of the value of the family in social life and the importance of this basic unit for the existence and functioning of the nation"<sup>22</sup>

An example of the declaration mentioned above is provided by the Estonian constitution<sup>23</sup>, whose Art. 27 states directly about the family as a factor "fundamental to the preservation and growth of the nation and as the basis of society." A similar example is the Hungarian constitution, recognized in Art. L for "the basis of the survival of the nation." In this case, the adopted regulation is supplemented by a call contained in the preamble, which states that the authors of the constitution "(.) hold that the family and the nation constitute the principal framework of our coexistence and that our fundamental cohesive values are fidelity, faith, and love." In the Greek constitution<sup>24</sup>, which is yet another example, the legislator sees the family (including marriage, motherhood, and childhood) as the "cornerstone of the preservation and the advancement of the

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21 Winczorek, 2008, p. 58.

22 Judgment of the Constitutional Tribunal of May 8, 2001, file ref. Act P 15/00; see Garlicki, 2016, pp. 490–491.

23 Estonia's Constitution of 1992 with Amendments through 2015.

24 Greece's Constitution of 1975 with Amendments through 2008.

Nation.” (Art. 21) In turn, in the Lithuanian constitution, it is referred to as the “basis of society and the State” (Art. 38). The same is true of the Portuguese constitution, which states that the family is a “fundamental element in society” (Art. 67 (1)). It is also true of the Latvian constitution<sup>25</sup>, which places the family among the “foundations of a cohesive society” (an excerpt of this is included in the preamble to the act in question). Against this background, an example of a regulation contained in the Irish constitution is presented in an interesting and original way. The one in Art. 41 1 1 ° declares that “the state recognizes the family as the natural primary and fundamental unit group of society and a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.”

V. An analysis of the texts of European constitutions leads to the conclusion that virtually none of them uses the legal definition of the term family. Some only indicate the constituent elements of this concept (in particular marriage, parents, children). However, by creating only an interpretative plane, it does not give a clear answer to which links qualify for recognition as a family and which do not. In the traditional sense, family relationships go beyond the sphere of the functioning of a married couple and their children. In this respect, certain doubts may arise, the removal of which requires an analysis of the normative text and the cultural conditions of a given country. In Poland, the problem of the lack of a definition of the family has been noticed many times in the literature on constitutional law. The voices made here suggest that the spouses are the family, their children (if any), and the single parent with the child. Moreover, the concept of family can also be extended to intergenerational relations based on blood ties and relations of adoption. In addition, it can be extended to cohabitation with children and foster families and families based on adoption<sup>26</sup>. However, it is debatable whether the family consists of childless marriages<sup>27</sup>.

The lack of a definition of the family in European constitutions is often accompanied by a lack of explanation of the institution of marriage (there are also constitutions that do not use this term at all, such as the constitution of Estonia or the Czech Republic). Only some constitutions break out of this pattern, introducing clarifications formulated normative directives in this respect. The latter’s content varies and depends on the individual preferences of the individual constituents. Among them, there is a discernible group of solutions that define marriage as a relationship between a woman and a man, resulting in the state’s obligation to protect heterosexual marriages. It should be noted that this is the type of regulation that we deal with under the Polish constitution. Art. 18 clearly states that a marriage is under the protection and care of the Republic of Poland if it is based on the relationship between a woman and a man. From this formulation, it can be concluded that, in principle, there is no legal possibility for the term marriage to define relationships formed by persons of the same sex. Constitutional regulation

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25 Latvia’s Constitution of 1922, Reinstated in 1991, with Amendments through 2016.

26 Banaszak, 2009, p. 119.

27 Tuleja, 2019, p. 81; Winczorek, 2008, p. 54.

creates a blockade for such legislative activities, thus establishing a legal prohibition<sup>28</sup>. In contrast, it is not clear whether, based on the existing constitutional solutions, it is permissible to introduce other forms of factual relationships between two natural persons under statutes (there is no such institution in the Polish legal system; the Sejm opposed an attempt to introduce it in the past). There is a polemic against the background of this dilemma among Polish lawyers, from which two contradictory positions emerge. Supporters of the view on the constitutionality of the so-called partnerships emphasize, *inter alia*, that the evangelical institutionalization of interpersonal relations of this type could find constitutional support in Art. 31 sec. 1 and Art. 47 of the Basic Law, because “these provisions impose the obligation of the state to guarantee to every person the right to free development and the possibility of pursuing private life.” In contrast, opponents refer to legal obstacles in Article 18 of the Basic Law. Bogusław Banaszak briefly states that this regulation “(...) implies the prohibition of all kinds of actions by public authorities to create regulations for such unions that would equate them or make them legally similar to marriage, both in terms of determining the scope of rights and obligations of persons who are in such a relationship and in the matter of its conclusion or dissolution.”<sup>29</sup> In contrast, Witold Borysiak notes that this prohibition means that there is no possibility of creating relationships that would be stylized as marriage, not only in terms of the name but also the essential features of this institution. As the author emphasizes, “If the legislator creates a legal institution of a partnership between two persons of the same sex, which is to respond, due to its legal registration of the institution of marriage, then it ignores the purpose of Article 18.” The reasoning that a departure from one of the essential structural elements of marriage makes the article inapplicable to such an institution as a model for controlling that regulation is erroneous. When adopting such a view, the circumvention of the purpose for which Art. 18, it would be possible by simply naming the relationship differently than marriage (such as solidarity pact, registered partnership.) and referring its regulation to the provisions on marriage or their duplication (...)”<sup>30</sup>.

Notably, the acceptance of the institution of a partnership relationship leads some to conclude that its establishment in the Polish legal order is a constitutional obligation of the state authorities. Such a view is formulated by Mirosław Wyrzykowski, whose opinion, by guaranteeing and protecting dignity, freedom, equality, and privacy, obliges the ordinary legislator to institutionalize partnerships<sup>31</sup>. However, this view is opposed by Dariusz Dudek, who adopts the opposite interpretation of the norms of the constitution. According to him, the “assumed” state “recognition” of the indicated normative “necessity” is not supported by any argument relating either to state policy or reliable public opinion polls. Therefore, regulating the situation (“matter”) of persons

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28 Tuleja, 2019, p. 80; Winczorek, 2008, p. 115. Otherwise see: Łętowska and Woleński, 2013, p. 29; Jezusek, 2015, pp. 74–76.

29 Banaszak, 2014, p. 80.

30 Borysiak, 2016, p. 485.

31 Wyrzykowski, 2012, p. 233.

living in extra-marital relationships, although it may be purposeful or necessary, is not necessary to implement the norms of the Polish Constitution (...). »It is devoid of any real and legal basis<sup>32</sup>.

Apart from Poland, the directive defining marriage as a union between a man and a woman also appears in the constitutions of Bulgaria<sup>33</sup>, Latvia, and Hungary. In the first case, the issue is governed by Art. 46 sec. 1–2 explicitly states that matrimony shall be a free union between a man and a woman, noting that only a civil marriage shall be legal and that spouses shall have equal rights and obligations in matrimony and the family. The legislator does not provide more details on the institution of marriage, limiting itself to the stipulation that the form of a marriage, the conditions and procedure for its conclusion and termination, and all private and material relations between the spouses shall be established by law. In the second case, the characteristics of marriage indicated here are determined by Art. 110, explicitly stating that it is a union between a man and a woman. This provision, containing such a clear normative solution, clearly obliges the state to protect and care for marriage. It is thus evident that such a relationship enjoys a special privilege under the constitution<sup>34</sup>. In contrast, in the third case, marriage is understood traditionally is mentioned in Art. L us. 1 of the constitution. According to it, Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decisions.

To complete the above argument, it is worth adding that, in Hungary, the existence of legally recognized partnerships of homosexual couples is allowed (this is the result of the law passed in 2007, before the adoption of the present constitution). In Bulgaria and Latvia, such a possibility does not exist, making both countries similar to Poland and Lithuania, Slovakia, and Romania<sup>35</sup>.

However, the majority of legislators refrains from precisely indicating the gender of the parties entering marriage and is limited to a general mention of the spouses. Such a solution, which gives the concept of marriage clear flexibility, extends the scope of the regulatory freedom of the ordinary legislator and removes, at least in the normative dimension, an obstacle to the establishment of the institution of marriage for homosexuals. An example of a constitution referring to this concept is the constitution of Portugal, which in Art. 36 1-3 proclaims that everyone shall possess the right to marry in terms of full equality, stating that the law shall regulate the requirements for and the effects of marriage and its dissolution by death or divorce, regardless

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32 Dudek, 2012, pp. 172–174.

33 Bulgaria's Constitution of 1991 with Amendments through 2015.

34 An interesting fact is that it was introduced in 2005 to prevent the creation of an institution of marriage for homosexual couples; L. Sheeter (2006) *Latvia defies the EU over gay rights*, „BBC News Riga,” <http://news.bbc.co.uk/2/hi/europe/5084832.stm> (available: 01.12.2021).

35 It is worth noting that in Latvia, Lithuania, Slovakia, and Romania (Poland has already been mentioned earlier), there have been attempts to create some form of civil partnership for homosexual persons through statutory provisions. By no means, however, were these attempts to produce any result.

of the form in which it was entered into. Spouses shall possess equal rights and duties in relation to their civil and political capacity and the maintenance and education of their children. Another example is the Romanian Constitution declaring briefly in this matter in Art. 48 sec. 1, in which the family is based on a freely consented marriage by the spouses, their full equality, and the rights and duties of the parents to raise, educate, and instruct their children. The solution is provided for in the Portuguese Constitution in Art. 36 sec. 1-3, assuming marriage is based on the equality of each spouse, and adding that the institution itself and the legal rights and obligations flowing from marriage, the legal rights and obligations within the family, together with the legal rights and obligations arising because of relationships outside marriage, shall be determined by statute.

The issue in question is regulated somewhat differently in Cyprus, where the legislator reserves in Art. 22 sec. 1 of the Constitution that any person reaching nubile age is free to marry and find a family according to the law relating to marriage, applicable to such persons under the provisions of this Constitution. The Italian Constitution also deals with the problem differently, which in Art. 29 states that marriage is based on the moral and legal equality of the spouses within limits laid down by law to guarantee the unity of the family. However, the Irish regulation is particularly interesting, as the only one in the circle of analogous European solutions stipulates *expressis verbis* that marriage may be contracted in accordance with law by two persons without distinction with respect to their sex. Moreover, this is not its only original element, as it also provides a framework for a divorce between spouses. Art. 41 sec. 3 pt 1<sup>o</sup> states that a court designated by law may grant a dissolution of marriage only when it is certified that there is no reasonable prospect of a reconciliation between the spouses. Such provision as the court considers proper regarding the existing circumstances will be made to the spouses, children of either or both of them, and to any other person prescribed by law, and any further conditions prescribed by law are complied with.

VI. When regulating the functioning of the family, the constitutions of European countries generally refer to the legal situation of children in a broad sense. The solutions in this matter concern various aspects of this issue, with the issue of parental responsibility and the resulting legal possibilities and obligations of action being of key importance. In the case of the Polish constitution, these are provisions that create guarantees for parents and impose certain obligations on the state. It is specifically Art. 53 section 3, which states that parents have the right to provide their children with moral and religious education and teaching following their convictions and Art. 72 sec. 1, which states that parents have the freedom to choose schools other than the public for their children. The regulation of Art. 72 sec. 1 formulates a declaration on ensuring the protection of children's rights, also in the context of family life. According to it, everyone has the right to demand that public authorities protect a child against violence, cruelty, exploitation, and demoralization. The same provision in para. 2 and 3 also stipulates that a child deprived of parental care has the right to the care and

assistance of public authorities. In the course of establishing children, public authorities and persons responsible for the child are obliged to hear and, as far as possible, take into account the child's opinion. The Italian constitution<sup>36</sup> contains similar regulations, although there are also some differences. The latter includes, in particular, a strong emphasis on paternity (the legislator creates a statutory delegation in this respect). According to Art. 30, it is the parents' duty and right to support, raise, and educate their children, even if born out of wedlock. In the case of parents' incapacity, the law provides for the fulfillment of their duties. The law ensures that such legal and social protection measures are compatible with the rights of the legitimate family members to any children born out of wedlock. The law establishes rules and constraints for the determination of paternity. In turn, according to Art. 31, the Republic assists the formation of the family and the fulfillment of its duties, with particular consideration for large families, through economic measures and other benefits. The Republic also protects mothers, children, and young people by adopting the necessary provisions. Appropriate regulations in this regard are also contained in the Portuguese Constitution. An interesting solution in their case is that explicit guarantees cover married spouses and parents (i.e., people who have not married or divorced). Art. 26 sec. 4 and 5 determines this construction, stating that both spouses and parents shall possess equal rights and duties in relation to the maintenance and education of their children. In addition, this provision creates a rule whereby children born outside wedlock shall not be the object of any discrimination for that reason. Neither the law nor official departments or services may employ discriminatory terms in relation to their filiation. Children shall not be separated from their parents, save when the latter do not fulfill their fundamental duties towards them, and then always by judicial order. Another regulation determining the legal situation in the family is Art. 67 sec. 2 point c of the Constitution, stating that to protect the family, the state shall particularly be charged with cooperating with parents in relation to their children's education. Another regulation is Art. 68 devoted entirely to fatherhood and motherhood. Given their irreplaceable role in relation to their children, particularly concerning children's education, fathers and mothers shall possess the right to protection by society and the state, together with the guarantee of their professional fulfillment and participation in civic life. Moreover, motherhood and fatherhood shall constitute eminent social values, and women shall possess the right to special protection during pregnancy and following childbirth. Female workers shall also possess the right to an adequate period of leave from work without loss of remuneration or any privileges. Finally, the law shall regulate the grant to mothers and fathers for an adequate period of leave from work, in accordance with the interests of the child and the needs of the family unit. The last important regulation in the matter under discussion is Art. 69, sec. 1 and 2 of the Constitution. It proclaims that considering their integral development, children shall possess the right to protection by society and the state, especially from all forms of abandonment,

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36 Italy's Constitution of 1947 with Amendments through 2012.

discrimination, and oppression, and from the abusive exercise of authority in the family or any other institution. The state shall ensure special protection for children who are orphaned, abandoned, or deprived of a normal family environment in any way. When looking for further examples, one can refer to the Romanian constitution. In this case, legal regulations are much shorter. It includes Art. 48, which provides that parents are entitled to rights and obligations to raise, educate, and instruct their children and that children born outside marriage enjoy equal rights as those born in marriage. It also includes Art. 49, which establishes that children and youth will enjoy special protection and assistance in implementing their rights. The state shall grant benefits for children and provide aid for the care of sick or children with disabilities. Other forms of social protection for children and youth shall be determined by law. Another example is the Slovak constitution, which is also text-saving. In Art. 42 sec. 3-6 we read that equal rights shall be guaranteed to both children born of legitimate matrimony and those born out of lawful wedlock, and that child care and upbringing shall be the right of parents; children shall have the right to parental care and upbringing. Next, we also read that parents taking care of their children shall have the right to assistance provided by the state and that pregnant women shall be entitled to special treatment, terms of employment, and working conditions.

The issue that requires separate reflection in these considerations is the regulations on adopting children, which appear in some European constitutions. At this point, it is worth mentioning them in the context of the problem of adoption by homosexual couples, which, as we know, has been legalized in many European countries. Before beginning our discussion on this subject, it should first be noted that the adoption problem does not arise within the framework of the solutions of the Polish constitution. The constitution-maker resigns from this element, which leaves free space for regulations at the oral level. In the current legal state, the issue of adoption is regulated by the Act of February 25, 1964–Family and Guardianship Code<sup>37</sup>. The provisions contained in this act allow only for adoption by a natural person (Art. 114) and by persons who are married (Art. 115) but in no case authorize any other relationships to do so, including same-sex relationships. As it may be assumed, such a legal construction complies with the constitutional provisions, which in Art. 18 very clearly defines the family model preferred and protected by the state<sup>38</sup>, while in Art. 72, it is necessary to be guided by the child's best interests<sup>39</sup>.

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37 Act of February 25, 1964 – Family and Guardianship Code, Journal of Laws No. 2020 item 1359.

38 The doctrine formulates a view according to which the adoption of children by homosexual couples would be in contradiction with the family model defined in Art. 18 of the Basic Law; see Holewińska-Łapińska, 2011, p. 528. This direction of thinking can also be related to the Constitutional Tribunal statement, which in the judgment of April 12, 2011, indicated that “protection of the family carried out by public authorities must take into account the vision of the family adopted in the Constitution as a permanent relationship between a man and a woman focused on motherhood and responsible parenthood.” Judgment of the Constitutional Tribunal of April 12, 2011, file ref. no. SK 62/08.

39 Pietrzykowski, 2018.

Moreover, it is fully in line with the case-law of adoption already established in Poland. As an example, we can quote the statement of the Supreme Court, which in one of its rulings stated:

‘Because for the proper development of a child, especially a small one, it is advisable that it should be brought up by the father and mother, i.e., by a man and a woman, who is the most advantageous for the adopted child. The situation is when they are jointly adopted by the spouses (joint adoption of a child by non-married persons is not an option) or when it is adopted by the spouse of one of the parents. In such cases, the decision to adopt creates conditions that fully correspond to family conditions, and, as a rule, it can be said that the decision to adopt is in the best interest of the child and is made for the child’s benefit unless the adopters do not have the appropriate subjective qualifications to raise the child<sup>40</sup>.

On the sidelines of these considerations, as part of curiosity, it can be mentioned that there were proposals to tighten the adoption regulations adopted in Poland in the past. In 2020, the President submitted a draft constitution to the Sejm, which expresses *verbis*, excluding the right to adopt children by same-sex couples living together<sup>41</sup>. In 2021, at the initiative of the Ministry of Justice, there was a proposal for legislative changes going essentially in the same direction<sup>42</sup>. None of these ideas, however, gained support from the Polish parliament.

As for the other European constitutions, it should be noted that the regulation on adoption appears in only two cases. This clearly shows that most legislators, like the Polish legislator, prefer to leave these issues in the sphere of legislative activity of the ordinary legislator. Particular attention is paid to regulations established in the legal order of Ireland. Its characteristic feature is a relatively wide scope of regulation and a

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40 Decision of the Supreme Court of 25 October 1983. III CRN 234/83.

41 According to the presented proposal to Art. 72 wanted to add a paragraph 7a, which reads as follows: “You can adopt a child only for its good. Only spouses can adopt them together. Adoption is forbidden by a person living together with a person of the same sex.”; draft amendment of 6 July 2020, [https://www.prezydent.pl/storage/file/core\\_files/2021/8/5/4bad51aa665957e2cd12ec241e17eab5/s22c-6e20070613530.pdf](https://www.prezydent.pl/storage/file/core_files/2021/8/5/4bad51aa665957e2cd12ec241e17eab5/s22c-6e20070613530.pdf), (Accessed: 08.12.2021).

42 As stated in the press release: “The amendment to the Act – Family and Guardianship Code introduces an unequivocal ban on the adoption of a child by a man or woman who is cohabiting with a person of the same sex. The draft clearly states that the welfare of the adopted child is ensured when it is for marriage. Only in exceptional circumstances, when there is no other way to provide a family environment, will an unmarried person adopt a child. Provisions governing the conduct of the adoption interview will be introduced to the Act on supporting the family and the foster care system. The adoption center will be required to carefully analyze the candidate’s situation for adopting a child. (...) In turn, the Act – Code of Civil Procedure will introduce a provision that will introduce an obligatory promise for persons applying for adoption of a child that they will tell the court the truth and nothing but the truth. There is a risk of criminal liability for giving false statements”; *Gwarancja adopcji zgodnej z prawami dziecka, oficjalna strona Rady Ministrów*, <https://www.gov.pl/web/sprawiedliwosc/gwarancja-adopcji-zgodnej-z-prawami-dziecka> (access: 08.12.2021).

broader normative context of the application, related to the unequivocal recognition of marriage by persons of the same sex (as mentioned earlier). It can be assumed that in this state of affairs, there is a bond between the constitution and the provisions of the Children and Family Relationship Act 2015<sup>43</sup>, which allows for married, civilly partners, or co-habiting couples, to apply to adopt a child jointly. According to the regulation in question, taking the form of a constitutional delegation, provisions shall be made by law for the adoption of any child where the parents have failed for such a period as may be prescribed by law in their duty towards the child and where the best interests of the child so require 'Provision shall be made by law that in the resolution of all proceedings: brought by the State, as guardian of the common good, to prevent the safety and welfare of any child from being prejudicially affected, or concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration'(Art. 42A). The regulations relating to the institution of adoption are also included in the Portuguese Constitution. In this case, we are also dealing with statutory delegation, although it is generally defined. It is introduced specifically by Art. 26 sec. 7, proclaiming that adoption shall be regulated and protected by law, which shall lay down swift forms of completion of the requirements.

VII. The above findings clearly show that in contemporary Europe, the exceptions include countries whose constitutions do not regulate the family's status. The conclusion is that, in principle, such provisions constitute a standard and are considered to be a legally significant element of the constitutional legal order. These findings also show that individual legislators make extensive use of discretionary power regarding the content and scope of the created regulations. This results in different legislative ideas and different emphases. However, the wealth of solutions we deal with here does not mean that it is impossible to identify regulatory tendencies that characterize all, or at least some, constitutions. Such tendencies are present and concern several elements. First, the concept of imposing on the state obligations related to the conduct of pro-family policy is accepted everywhere. Second, in some cases, the predilection is visible to emphasize in the constitutional provisions the role of the family as the basic social unit that determines the functioning of the state and nation. Third, there is a visible division into constitutions that make up the traditional family model. The marriage union is perceived as a relationship between a woman and a man, and constitutions are open to the modern model, where same-sex marriage is allowed. Fourth, striving to guarantee the rights of parents and children was found in many constitutions.

Separate arrangements are concerned with the legal regulations adopted in Poland. The broad comparative background outlined in this study allows us to state that the Polish constitution is original does not shy away from European standards. It is certainly distinguished by a relatively broad regulation and far-reaching care for the family to be covered by legal protection at various levels of the functioning of this

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43 Children and Family Relationship Act 2015, No. 9 of 2015.

institution. A characteristic feature is also the attachment to the traditional concept of the family, understood as an institution based on the relationship between a woman and a man, established to raise children (not many legislators in Europe prefer this concept). In contrast, the manifestation of standardization is the definition of the legal framework of pro-family policy, combined with the indication of its elements. This shows that we are contending with a carefully formulated regulation, referring to social needs, and at the same time placing the family—as is usually the case in Europe—at the forefront of values considered constitutionally important.

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