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ARTICLES

FAMILY AS A CONSTITUTIONAL VALUE*

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Abstract

Numerous constitutional references to "family" raise the question of how – at this level of sources of law – we should interpret this concept and what the consequences of adopting a specific interpretation of the constitutional foundations of family law are. The constitutional model of the family is an expression of a specific axiological choice that prefers the model of social relations based on the marriage between a woman and a man, and a stable and permanent community of parents and their children. The references to the jurisprudence of the Constitutional Tribunal show that the family is perceived as an important constitutional value. Its protection is meant to take measures to strengthen mutual relations between family members and to create conditions enabling them to exercise their mutual rights and obligations. It is therefore problematic for the legislator to use such definitions of the family which, in the process of their interpretation, identify it solely on the basis of the criterion of common household or income community. The financial support of the family must take into account the principle of subsidiarity. Therefore, it cannot lead to the granting of public funds to communities in which the basic obligations of family members are not fulfilled.

Keywords: constitutional concept, family, marriage, parents, family benefits.

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1. The constitutional concept of the family

The Polish Constitution[1] (hereinafter: the Constitution) uses the notion of the family in several different contexts. Article 18 and Article 71 para. 1 of the Constitution are of primary importance in this respect, since they not only refer directly to the family[2], but also impose certain obligations on public authorities – of protection and care – referring to this institution of social life[3]. Moreover, in several other constitutional regulations very explicit references to family issues may be noticed. These include Article 23 of the Constitution, which defines the family farm as the basis of the agricultural system of the State, Article 33 para. 1 and Article 47 of the Constitution, which use the concept of "family life" or provisions referring to the rights and obligations of parents and their relations with children, i.e., Article 48 para. 1 and Article 53 para. 3 of the Constitution. A separate group of constitutional norms is also that which concerns the legal situation of the child, i.e. – apart from the aforementioned Article 48 para. 1 of the Constitution – primarily Article 72, as well as Article 65 para. 3 and Article 70 paras. 1 and 3 of the Constitution.

The mere citation of these provisions proves that the issues of the family and the foundations of family law have a distinct place in the binding constitutional regulation[4]. The point is not only the frequent reference in the Constitution to the key concepts in this field of law, but also their position in the constitutional system, inter alia, in the chapter specifying the basic principles of the political system of the State. This concerns primarily the aforementioned Article 18 of the Constitution. The meaning of this provision has hitherto been considered in a number of aspects[5].

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1 The Constitution of the Republic of Poland of 2nd April, 1997 as published in Dziennik Ustaw No. 78., item 483.

2 Such a direct reference to the family is also included in Article 41 para. 2 of the Constitution that concerns deprivation of liberty and which imposes an obligation to immediately inform the family of the incident.

3 Marek Zubik: Podmioty konstytucyjnych wolności, praw i obowiązków. *Przegląd Legislacyjny,* 2007/2. 39.

4 The situation does not only concern the Constitution in force, as the issues of the family and family law have been constantly present in the Polish constitutional regulations of the last 100 years. Cf. Marcin Stębelski: Elementy prawa rodzinnego w polskich regulacjach konstytucyjnych – między tradycją a nowoczesnością. In: Łukasz Pisarczyk (ed.): *Między tradycją a nowoczesnością. Prawo polskie w 100-lecie odzyskania niepodległości*, Warszawa: Wolters Kluwer, 2019. 125–138 and 147.

5 There are numerous commentaries and studies on Article 18 of the Constitution, which include: Piotr Sobczyk: Małżeństwo i rodzina w orzeczeniach Trybunału Konstytucyjnego. Art. 18, 48, 71 Konstytucji RP. In: Tadeusz Płoski – Justyna Krzywkowska (ed.): *Matrimonium spes mundi. Małżeństwo i rodzina w prawie kanonicznym, polskim i międzynarodowym. Księga pamiątkowa dedykowana ks. Prof. Ryszardowi Sztychmillerowi*, Olsztyn, Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego, 2008. 381. et seq.; Andrzej Mączyński: Konstytucyjne podstawy prawa rodzinnego. In: Piotr Kardas – Tomasz Sroka – Włodzimierz Wróbel (ed.): *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, Warszawa, Wolters Kluwer, 2012. 758–778.; Bolesław Banaszkiewcz: Małżeństwo jako związek kobiety i mężczyzny. O niektórych implikacjach art. 18 Konstytucji RP. *Kwartalnik Prawa Prywatnego*, 2013/3. 591. et seq.; Ewa Łętowska – Jan Woleński: Instytucjonalizacja związków partnerskich a Konstytucja RP z 1997 r. *Państwo i Prawo,*

It is worth pointing out that, apart from the family, Article 18 of the Constitution also enumerates: marriage as a union of a man and a woman, motherhood and parenthood, as well as that all these categories are jointly placed under the protection and care of the Republic of Poland. The adopted method of shaping this provision is the result of a conscious decision of the authors of the Constitution, which should not be disregarded when explaining its meaning[6]. Therefore, when interpreting the concepts included therein, neither the order in which they have been enumerated, nor their mutual relations in meaning may be abstracted from[7]. Thus, when we refer to the constitutional concept of the family, this issue should be considered jointly with those guarantees which, apart from the family, the Constitution applies also to the other categories explicitly indicated in its Article 18. Thus, it may be noticed that the inclusion of this provision in Chapter I of the Constitution was aimed at emphasising the special importance of the institutions of key significance for the creation of such foundations for the social structure, which are based on permanent interpersonal relations. The idea is therefore to undertake activities that will create the appropriate conditions for the building and development of such relationships. Therefore, the aim is to strengthen the bonds between a man and a woman in a marriage, as well as between parents and children, which is to be achieved through protection and care with regard to family, motherhood and parenthood.

The solution provided for in Article 18 of the Constitution is undoubtedly an expression of a specific axiological choice, which implies a preference for a model

2013/6. 15. et seq.; Bogusław Banaszak – Maciej Zieliński: Konstytucyjne i ustawowe pojęcie rodziny. *Monitor Prawniczy,* 2014/7. 351–355.; Witold Borysiak: Art. 18. In: Marek Safjan – Leszek Bosek (ed.): *Konstytucja RP. Komentarz*. Vol. I, Warszawa: C.H. Beck, 2016. 464–495; Radosław Puchta: Ochrona rodziny i małżeństwa w Konstytucji RP. In: Marek Zubik (ed.): *Minikomentarz dla Maksiprofesora. Księga jubileuszowa Profesora Leszka Garlickiego.* Warszawa, Wydawnictwo Sejmowe, 2017. 165. et seq.; Paweł Bucoń: Konstytucyjne podstawy wspierania rodziny przez władze publiczne w Polsce. *Przegląd Prawa Konstytucyjnego*, 2019/4. 114–129.

6 The necessity to introduce solutions ensuring protection of the family had been emphasised since the very beginning of work on the binding Constitution. Cf., e.g., the statement of A. Grześkowiak of 30 September 1994. *Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego,* 1995/9. 27–28. The inclusion of the definition of marriage in the Constitution resulted from the conviction that the legal institutionalisation of a union between two individuals was to be in the form of marriage as an institution of a well-established meaning. The examples of institutionalisation of the same-sex unions and granting them with the features similar to marriage, which were known from other legal systems, were also considered. Cf. Andrzej Mączyński: Konstytucyjne i międzynarodowe uwarunkowania instytucjonalizacji związków homoseksualnych. In: Marek Andrzejewski (ed.): *Związki partnerskie. Debata na temat projektowanych zmian prawnych*. Toruń, Dom Organizatora, 2013. 91. More on the origins of the current constitutional regulations see, inter alia: Borysiak op. cit. 428–440. as well as Banaszkiewicz op. cit. 640–652.; Marek Szydło: Instytucjonalizacja związków partnerskich w świetle art. 18 i 32 Konstytucji. *Zeszyty Prawnicze BAS*, 2017/4. 24–26.

7 Therefore, it is necessary to reject each interpretation of particular notions included in Article 18 of the Constitution in complete separation from the others, and thus to apply in this respect a kind of "disjointed" interpretation of that Constitutional provision. Cf. Marcin Stębelski: Jeszcze na temat art. 18 Konstytucji. Uwagi na tle orzecznictwa Trybunału Konstytucyjnego. *Zeszyty Prawnicze*, 2021/21.1. 114.

of social relations based on marriage between a man and a woman[8] as well as, in a broader aspect, a stable and permanent community of parents and their children. The consequence of this choice is therefore entrusting the State with the role of the guarantor of such functioning of the institutions enumerated in Article 18 of the Constitution, so that they become the domain in which individuals may exercise their freedom of shaping interpersonal relations. Moreover, this also concerns the strengthening of communities that are so essential to the way of organising social life under the present Constitution, which, apart from ensuring the protection of individuals' freedoms and rights, also confers specific obligations on them. Thereby, Article 18 of the Constitution clearly refers to this model, which is to develop between two extremes, thus rejecting both a collectivist approach as well as extreme individualism[9]. It is therefore no coincidence that the legislation concerning the family was included in Chapter I of the Constitution, among other provisions that constitute the basis for the functioning of communities and organisations necessary for the creation of civil society[10]. Their key importance for the model of political community adopted in the Constitution is paralleled with the granting of fundamental significance to the family and other values indicated in Article 18 of the Constitution with regard to a particular model of social community[11].

The indicated significance of Article 18 of the Constitution, including the constitutional regulation of the family, has been consistently recognised in the Constitutional Tribunal (hereinafter: the Tribunal, the CT) jurisprudence for a number of years. The Tribunal has interpreted this provision not only against the background of the axiology adopted in the Constitution[12], but it also attributed the family "a particularly high position in the hierarchy of constitutional values"[13]. It emphasised the close connection of Article 18 with Article 71 of the Constitution, deriving from these provisions the obligation for the State to take measures to strengthen the bonds between individuals who constitute the family, particularly

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8 On the nature of the relationship between spouses see, inter alia: Sherif Girgis, Robert P. George – Ryan T. Anderson: *What is Marriage? Man and Woman; A Defense*. New York, Encounter Books, 2012. 23–36.

9 Cf. Marek Zubik: Pomocniczość. Zasada ustrojowa sprawiedliwej struktury społecznej oraz granica oczekiwań realizacji polityk państwa w rozstrzygnięciach Trybunału Konstytucyjnego. In: Marek Zubik (ed.): *Minikomentarz dla Maksiprofesora. Księga jubileuszowa Profesora Leszka Garlickiego*. Warszawa: Wydawnictwo Sejmowe, 2017. 55.

10 This primarily refers to the constitutional guarantees of establishing political parties, other voluntary associations and foundations (Articles 11, 12 of the Constitution), provisions concerning the activity of professional self-governments as well as other types of self-government (Article 17 of the Constitution), churches and other religious associations (Article 25 of the Constitution).

11 The importance of the family for the society results, inter alia, from the fact that it creates a community within which there are conditions for building bonds and strengthening interpersonal relations. Cf. Zbigniew Strus: Znaczenie artykułu 18 Konstytucji Rzeczypospolitej Polskiej. *Palestra,* 2014/9. 236–237.

12 See e.g., the judgement of the CT of 11 May 2011, SK 11/09, part III, point 3.4.

13 See the judgment of the CT of 18 May 2005, K 16/04, part III, point 4.

between spouses, parents and children[14]. In this context, it was also emphasised that the protection of the family, as exercised by the public authorities, must comply with the vision of the community adopted by the Constitution. It constitutes a permanent union of a man and a woman aimed at motherhood and responsible parenthood[15]. It means that the legislator is obliged to undertake such actions that will ensure permanence and thus stability of the family, primarily in the aspect which refers to mutual relations of its members. The particular importance of the family for the society is connected with the obligation to apply such solutions concerning the area of family life, which will enable "the harmonious shaping of family relations for the benefit of all its members"[16]. The Tribunal emphasised in this context that the protection of the family implies not only a demand but also an obligation to shape individual legal institutions in a manner which ensures that the family community can optimally perform the functions which the legislator considers to be the most important for the society, primarily the procreative function as well as the care and socialisation function[17].

The guarantee of protection and care addressed, inter alia, to the family (Article 18 of the Constitution) is regarded as one of the constitutionally defined objectives of the activity of public authorities[18]. Although it is not possible to exhaustively indicate the ways of achieving this objective[19], it certainly concerns such actions of the legislator which will enable individuals to achieve personal fulfilment within a special community, which the family is. It involves the strengthening of the bonds between family members and the creation of conditions enabling them to exercise their mutual rights and responsibilities, in particular their obligation to support and assist one another[20]. Therefore, it is understandable that in its jurisprudence hitherto the Constitutional Tribunal has consistently found that such solutions, which actually

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14 See the judgment of the CT of 4 September 2007, P 19/07, part III, point 6.3.

15 See the judgment of the CT of 12 April 2011, SK 62/08, part III, point 4.3.

16 See the judgment of the CT of 16 July 2007, SK 61/06, part III, point 6.

17 See the judgment of the CT of 22 November 2016, K 13/15, part III, point 4.2.

18 It provides the basis for reconstruction of a norm described as programmatic, which may constitute a model for control of other legal acts. See the judgement of the CT of 22 July 2008, K 24/07, part III, point 3.3.

19 In the jurisprudence it has been indicated, inter alia, that the protection guaranteed to the family prohibits the eviction of families unable to pay the rent (the judgment of the CT of 4 April 2001, K 11/00) or orders to take into account the situation of family members when specifying the rules of taxation (the judgment of the CT of 4 May 2004, K 8/03). Against this background, the obligation, stemming from Article 71 para. 1 sentence 2 of the Constitution, to ensure a "special", i.e., higher than average, standard of protection for families in a difficult financial and social situation, especially large families and single-parent families, was also emphasised. Cf., inter alia, the judgement of the CT of 5 November 2005, P 3/05, part III, point 3.

20 See the judgment of the CT of 25 July 2013, P 56/11, part III, point 5.2.1. The Tribunal very aptly emphasised that the circumstance of including in the Constitution certain institutions of family law must be construed in such a way that it provides – at the constitutional level – certain minimum guarantees concerning the actions that the legislator is to undertake, inter alia, with regard to the family.

undermined the bonds between members of a family, are inconsistent with Article 18 of the Constitution. This concerned, for instance, such shaping of the conditions for obtaining financial assistance paid from public funds, which encouraged the spouses to engage in activities simulating the breakdown of their marriage[21]. The Tribunal also found unconstitutional the implementation of legal provisions which conditioned access to a particular benefit upon a parent's decision as to his or her marital status. The Tribunal held that the constitutional clause protecting the family must be construed not only as an obligation to create statutory solutions protecting the family against disintegration, but also as excluding the option of adopting solutions which – due to the potential loss of certain financial benefits – would discourage individuals from starting a family[22]. In this sense, it can be argued that the Tribunal's statements with regard to the guarantee of care and protection of the family (Article 18 of the Constitution) were not only characterised by their consistency, but also by their specific categorical nature. The Tribunal pointed out that Article 18 of the Constitution sets a limit to the legislator's activities with regard to, inter alia, the family, however, the Tribunal also very firmly questioned the constitutionality of any solutions that posed even the risk of undermining the bonds between family members, which was considered a threat to its proper functioning[23]. Thus, while the obligation to implement the protection and care of the family may – in specific conditions – be subject to various assessments from the perspective of whether a particular solution actually takes into account the well-being of the family, in the light of the jurisprudence of the Constitutional Tribunal, there is no doubt that Article 18 in conjunction with Article 71 para. 1 of the Constitution constitute a barrier to such statutory norms, which would undermine the significance of natural relations between family members and which might, even to a small extent, contribute to the disintegration of bonds between such persons, and consequently to undermining the stability and continuity of the family.

The family, at the constitutional level, is considered to be a value to be protected. This is despite the fact that none of the numerous constitutional provisions specifying the legal status of the family provides its legal definition. This may cause some interpretation problems, nevertheless – referring to the jurisprudence of the Constitutional Tribunal and the statements of the doctrine – the scope of the meaning of this concept may be quite precisely determined.

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[21] Cf. the above-cited judgment of the CT of 18 May 2005, K 16/04.

[22] In this case, it concerned a child's parent entering into a new marriage providing the basis for functioning of a new family, which in the then legal status was connected with the loss of the right to receive an advance of maintenance payment. See the judgement of the CT of 23 June 2008, P 18/06, part III, point 4.4.2.

[23] Another example of such a judgment was finding unconstitutional solutions that prevented assigning different registration numbers to spouses running separate farms. The Tribunal emphasised that the existing "advantage" of having separate registration numbers could not only influence the decision not to enter into marriage, but also encourage the persons remaining in such a relationship to end their marriage. See the judgment of the CT of 3 December 2013, P 40/12. Especially part III, point 10.

The Tribunal emphasised that the constitutional concept of "family" should be construed primarily by reference to its linguistic meaning. There are no grounds for departing from the common meaning of constitutional concepts as shaped in the Polish language when interpreting them. Thus, it considered the family to be a community of parents, most often a marriage with children, and an incomplete family as a family in which one parent is absent. Hence, the Tribunal considered that, in the light of the constitutional provisions, the family consists of every permanent union of two or more individuals, comprising as a minimum one adult and one child, based on emotional, legal and usually blood ties[24]. This approach referred to earlier doctrinal statements identifying the family as a specific community of individuals – parents and children – that pursue common objectives and its members have a permanent and close relationship to one another[25]. Thereby, the Tribunal explained the constitutional concept of the family, indicating that it is a permanent union between a man and a woman that is aimed at motherhood and responsible parenthood[26].

The family as referred to in the Constitution concerns the natural community of parents and their children[27]. It is created either by birth or adoption[28]. It has been aptly emphasised in the doctrine that the family, constituting a group of individuals united by a bond based on lineage, has a primary character in relation to existing legal provisions, including those provided for in the Constitution[29]. Its normative status at the constitutional level is thus closely related to the fact that such a community performs certain functions that are considered essential and – for that specific reason – are subject to the care and protection of the State, which takes into account the well-being of the family[30]. This concerns both the procreative function, in the exercise of which the family is irreplaceable, as well as other – related to it – important functions regarding the safeguarding of the existence of dependent family members (the care function) and the appropriate shaping of their attitudes and behaviour necessary for independent life in society (the educational-socialisation function)[31]. In this sense, the mere absence of a definition of the family in the Constitution does not mean either

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24 See the judgment of the CT of 12 April 2011, SK 62/08, part III, point 4.2.

25 Cf. Marek Dobrowolski: Status prawny rodziny w świetle nowej Konstytucji Rzeczypospolitej Polskiej. *Przegląd Sejmowy*, 1999/4. 23–24.

26 See the judgment of the CT of 12 April 2011, SK 62/08, part III, point 4.3 and the judgment of the CT of 9 July 2012, P 59/11, part III, point 3.1.

27 In the CT jurisprudence it has been emphasised that it is: "a complex social reality being the sum of relations connecting primarily parents and children". See the judgement of the CT of 28 May 1997, K 26/96, point 3.

28 It is pointed out that in the case of adoption the family bond is established on a different legal basis. Cf. Borysiak op. cit. 487.

29 See Mączyński (2012) op. cit. 768.

30 Thus, the issue concerns the relationship between the obligation imposed on public authorities in Article 18 of the Constitution as well as the criterion for its fulfilment that is introduced by Article 71 para. 1 of the Constitution.

31 See Mączyński (2012) op. cit. 768. For more on the family function see, inter alia: Marek Andrzejewski: *Ochrona praw dziecka w rodzinie dysfunkcyjnej (dziecko-rodzina-państwo)*. Kraków, Zakamycze, 2003. 24.

that we can interpret this concept in an arbitrary manner at this level of legal sources, or that its scope may be arbitrarily shaped by the legislator.

The constitutional concept of the family refers to the exercise of a function within a particular community of individuals: parents (a man and a woman) and their common children[32]. The possibility of its proper functioning requires undertaking such actions by the State which will ensure the permanence and stability of the family as a life community. This – to a large extent – is connected with the guarantee nature of Article 18 of the Constitution, and subsequently, the obligation stemming from Article 71 para. 1 of the Constitution to take into account the well-being of the family in the social and economic policy of the State[33].

Defining the family as a union of parents and children based – in principle – on consanguinity, is clearly confirmed and developed on the constitutional grounds. It results both from the normative context of the entire Article 71 of the Constitution[34], as well as from previous normative provisions conferring on parents the rights necessary for the exercise of functions performed within the family and being subject to constitutional protection[35]. It is also connected with the constitutionally defined status of the child as the entity to whom the actions taken by parents relate and serve. Safeguarding children's rights and ensuring the conditions for their personal development is achieved primarily within the family, which is the child's natural environment for development and life[36]. Thus, the obligation of the State to undertake measures taking into account the well-being of the family represents a more general criterion, which at the same time is to ensure the protection of the rights of the child (Article 72 para. 1 of the Constitution), in accordance with the criterion of the well-being of the child. This aspect has also been emphasised by the Constitutional Tribunal, which pointed out that the most comprehensive implementation of the principle of the well-being of the child consists of ensuring the possibility of the child's upbringing in the family, primarily in the natural family[37].

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32 Cf. Borysiak op. cit. 489.

33 This concerns the creation of a permanent and safe environment for the personal development of family members, manifested in activities that strengthen their natural bonds and enable their development. Cf. Borysiak op. cit. 1637.

34 Regardless of the method of interpreting the concepts of a large or a single-parent family, undoubtedly this is a community which exists with regard to the child. Similarly, to the provision of Article 71 para. 2 of the Constitution, in which special assistance from the public authorities is guaranteed to the mother due to her relationship with the child before and after its birth.

35 This primarily concerns the rights of parents under Article 48, Article 53 para. 3 or Article 70 para. 3 of the Constitution.

36 This aspect is explicitly emphasised in the Preamble to the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, OJ. 1991, No. 120, item 526 as amended, where it is indicated that "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully exercise its responsibilities within the community".

37 See the judgement of the CT of 28 April 2003, K 18/02, part III, point 1.

The position of the family among other elements of the normative content of Article 18 of the Constitution provides – as it has already been emphasised – an important interpretative context, which obliges to interpret individual concepts in a specific relation to one another, while preserving their semantic autonomy. Since the legislator used the concepts of "marriage" and "family" separately, these institutions should not be equated with each other[38]. It is correct the view according to which the specific features of marriage, namely its stability and permanence resulting from the inclusion of the existing relationship between a man and a woman in a specific framework of a legal relationship, is the constitutionally preferred basis of the family[39]. However, taking into account the normative context referred to above, the existence of children, connected with their parents by blood ties or by a legal relationship defining their mutual relationship, must be considered an essential feature distinguishing a family. The constitutional interpretation of the family is thus not conditioned by marriage of the child's parents[40]. However, while maintaining the conceptual distinction between the marriage and the family, it is difficult to accept that childless spouses can be equated with the family, as provided for in Article 18 of the Constitution[41]. Nevertheless, that does not change the fact that the protection and care ensured on that basis applies to every marriage of a man and a woman and to every family, regardless of the number of children[42]. Taking into account the entire normative content of Article 18 of the Constitution, the family referred to in this provision cannot be equated with any informal relationship in which a child is brought up[43]. Defining the family in relation to the natural, and in some cases legal relationship between parents and children, is connected – most frequently and as a rule – with consanguinity resulting from the descent of children from their parents. This excludes the possibility of equating the constitutional concept of the family with

38 Cf. Mączyński (2012) op. cit. 772.

39 Cf. Borysiak op. cit. 488.

40 The family as constitutionally construed will also include the informal union of a man and a woman who are bringing up their common child or children.

41 Otherwise, inter alia, Leszek Garlicki: Art. 18. In: Leszek Garlicki – Marek Zubik (ed.): *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. I, Warszawa: Wydawnictwo Sejmowe, 2016. 501; Piotr Tuleja: Art. 18. In: Piotr Tuleja (ed.): *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warszawa: Wolters Kluwer, 2019. 82; Banaszak, Zieliński op. cit. 354.; Bucoń op. cit. 119.

42 Cf. Dobrowolski op. cit. 26.

43 In the jurisprudence of administrative courts, it has been emphasised that the family in the constitutional concept is closely related to such concepts as marriage, i.e., the union of a man and a woman, motherhood and parenthood. These concepts and the underlying values are under the protection and care of the Republic of Poland. See the judgement of the Supreme Administrative Court (hereinafter: the NSA) of 20 March 2012, II FSK 1704/10. See the judgement of the NSA of 20 March 2012, II FSK 1704/10. It has also been indicated that including the same-sex unions in the concept of family and regarding them as spouses is contrary to the Constitution. See the judgment of the NSA of 19 June 2013, II OSK 475/12; the judgment of the WSA in Warsaw of 25 November 2014, VI/ SA/Wa 1733/14.

the actual same-sex unions which bring up children[44]. However, also in this case, there is no doubt that the relationship between a mother or father and his or her child is protected by the Constitution[45].

The remarks regarding the constitutional approach to the family concern, what is worth emphasising, the model of legal regulation of such a community as adopted in the binding Constitution. Even this circumstance alone means that the constitutional definition does not have to comprehensively reflect all meanings that are attributed to the family in its commonly accepted sense. Particularly, since it is an ambiguous notion, which is subject to different perceptions in accordance with ongoing cultural and social changes. The Constitution uses a uniform – on the ground of particular norms – concept of family, and its essence refers to the relationship between parents and their children. According to this approach, it may not be particularly surprising that relationships that we customarily define as family may not fall within the scope of the concept used in Article 18 of the Constitution. Therefore, it does not seem that taking this provision into account, and interpreting it in connection with Article 71 of the Constitution, it may be concluded that the family is constituted by every life community, even if it concerns factual bonds of special importance for a human being[46]. Although there is no doubt that the bonds existing within the family are of significant importance for its members, however, at the same time they cannot be referred to any group of entities, disregarding the fact that the basic justification for the constitutional regulation of the family is to ensure protection and care for a specific community: parents and their children, performing the functions attributed to it.

2. Problems with the application of the constitutional concept of the family

The essence of the constitutional concept of the family as a community of parents and their children does not exclude entirely and categorically the possibility of equating the family – as a constitutional value – with its broader concept[47]. The condition for such an approach, as well as the limit for recognising a permanent union of two individuals

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44 A union of two or more persons of the same sex in cohabitation is not a marriage, and the persons bound by this union, as they cannot perform the pro-creation function, are not a family under Article 18 of the Constitution. See Mączyński (2012) op. cit. 771. and 776.; Borysiak op. cit. 485. Otherwise: Garlicki op. cit. 502.

45 The relationship of the mother and the child is protected under Article 18 of the Constitution by the protection of "motherhood" and "parenthood" ensured therein. As far as the father is concerned, the protection of his relation with the child is also safeguarded by Article 18 of the Constitution in that part which concerns "parenthood". Cf. Borysiak op. cit. 489.

46 Otherwise: Puchta op. cit. 172–173. The author defines the family as a life community, within which there are relatively permanent, close factual ties, based primarily on feelings, but also on economic interdependence.

47 This aspect has been pointed out in the jurisprudence of the Constitutional Tribunal. In the quoted judgment of 28 May 1997, K 26/96, the Tribunal indicated that in: "in a broader sense, the concept of family should also include other relations which arise on the basis of ties of blood or relations of adoption" (point 3). The Tribunal adopted a similar approach in the above-cited judgment of

as a family, should however be the existence of ties of consanguinity or affinity[48]. The content of the constitutional regulation of the family does not categorically exclude the use of specific definitions by the legislator that define family relations in a manner appropriate for a specific field of law. This may be clearly observed on the example of the regulation of the marriage and the connection of this union with the family in the Family and Guardianship Code[49]. Thus, the constitutional approach does not exclude other solutions, especially those which use a broader definition of the family. However, it should provide a point of reference for the norms implemented at the statutory level, due to the basic assumptions of the system of sources of law, i.e., the principle of supremacy of the Constitution and the directive regarding the use by the legislator of solutions that will serve the achievement of constitutional objectives.

The accomplishment of this more general assumption, however, raises certain problems which may be noticed when referring to the practice of application of certain provisions defining the family. In this context, I would like to focus solely on signalling two issues. Firstly, the manner of defining the family at the statutory level with regard to its constitutional concept. Secondly, the issue of the consequences that the constitutional concept of the family should evoke with respect to the conditions and circumstances of granting financial assistance to the family as specified on the statutory level.

An exhaustive analysis of all the examples in which the legislator uses definitions of the family appropriate for a specific field of legal regulation is beyond the scope of the present paper[50]. It can only be mentioned that such definitions have been introduced e.g., in the Act on Family Benefits[51], the Act on Assistance to Persons Entitled to Alimony[52] or the Act on Social Assistance[53], and their application concerns, inter alia, the manner of determining family income, which constitutes one of the basic criteria for granting certain benefits. In this context, the definition of the family was also provided for in the Act on State Assistance for the Upbringing of

4 September 2007, P 19/07, which provided for the application of a broad definition of the family including parents' siblings – part III, point 6.5.

48 See Borysiak op. cit. 1637. Similarly: Krystian Complak: Art. 18. In: Monika Haczkowska: *Komentarz. Konstytucja Rzeczypospolitej Polskiej*. Warszawa, Wolters Kluwer, 2014. 33.

49 Referring to the content of, inter alia, Articles 23, 24 and 27 of the Polish Family and Guardianship Code (hereinafter: the Family Code), entering into marriage establishes a family regardless of whether the spouses have common children. The doctrine emphasises the fundamental relationship between the marriage and the family. The normative model of marriage at the statutory level was established in order to protect the family due to its socially important functions. Cf. Maciej Domański: *Względne zakazy małżeńskie*. Warszawa, Wolters Kluwer, 2013. 18–19.

50 Cf. e.g., Katarzyna Sterna-Zielińska: Zakres semantyczny pojęcia „rodzina" w prawie polskim. *Krytyka Prawa*, 2016/8. 99–117.

51 The Act of 28 November 2003, Journal of Laws, 2020, item 111 as amended. The definition of the family is provided in Article 3 para. 16 of the Act.

52 The Act of 7 September 2007, Journal of Laws, 2020, item 808 as amended. The definition of the family is provided in Article 2 para. 12 of the Act.

53 The Act of 12 March 2004, Journal of Laws, 2020, item 1876 as amended. The definition of the family is provided in Article 6 para. 14 of the Act.

Children, in the legal status that conditioned granting of an upbringing benefit upon the fulfilment of the income criterion[54]. The practice of applying such definitions, the basic scope of which is most frequently related to determining the group of entities which are entitled to benefits, very often also results in generalised statements, thus defining the perception of the family in a perspective exceeding a specific statutory regulation. Thus, judicial decisions create a specific way of deciding upon the very essence of what the family is and who can be a member of it[55]. This perspective raises serious objections in comparison with the previously presented constitutional approach. Undoubtedly, pursuant to the provisions of the Constitution, the family cannot be regarded as an arbitrary life community, which may be distinguished on the basis of the economic, income or common household criterion. The very fact of the inclusion of the family in the Constitution, in conjunction with the adopted method of its legal regulation, excludes the possibility of treating such community in a subjective way, which depends on personal needs, and thus which tends to relativise this concept. While referring to the jurisprudence of the Constitutional Tribunal, it is difficult to doubt that Article 18 in conjunction with Article 71 para. 1 of the Constitution provide a barrier to such statutory provisions, which would undermine the importance of natural relations between family members and could, even to a small extent, contribute to the disintegration of bonds between them, and consequently to the undermining of the stability and permanence of the family.

From this perspective, it is difficult to accept those interpretations of the statutory definitions that identify the family solely on the basis of the assessed life situation and the factual circumstances in which its members remain. The approach which ultimately results in the conclusion that the father (mother) of the child is not a family member due to his or her actual "absence" and remaining outside the "income community" does not comply with the constitutional concept of the family[56]. This is because it questions consanguinity, which is the only relevant criterion for understanding the concept of family. Thus, defining a particular community for the

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[54] The Act of 11 February 2016, Journal of Laws, 2019, item 2407 as amended. The definition of the family, equal to the definition under the Family Benefits Act, was provided for in Article 2 para. 16, in force until 1 July 2019.

[55] This concerns, for instance, the manner of interpretation of the concept of "family", adopted on the basis of the Act on Family Benefits as well as the Act on Assistance to the Persons Entitled to Alimony, which conditions the inclusion of the child's parents or spouses in the family on the fact whether they constitute an "income community", thus, whether they prove the existence of a relevant relationship connected with their living situation. See e.g., the judgments of the NSA of: 14 February 2012, I OSK 1709/11; 3 March 2017, I OSK 2339/16; 13 September 2017, I OSK 2955/16 and, inter alia, the judgments of the WSA in: Szczecin of 18 January 2018, II SA/Sz 1199/17; Gdańsk of 7 February 2019, III SA/Gd 906/16; Warsaw of 14 November 2019, I SA/ Wa 1760/19. See also Tomasz Rakoczy: Wykładnia celowościowa pojęcia „rodzina". Glosa krytyczna do wyroku WSA w Szczecinie z dnia 18 stycznia 2018, II SA/Sz 1199/17. *Forum Prawnicze,* 2020/2. 88–97.

[56] See e.g., the judgment of the NSA of 21 June 2016. I OSK 2361/14; the judgment of the WSA in Szczecin of 3 December 2015, II SA/Sz 616/15; the judgments of the WSA in Warsaw of: 26 October 2016, I SA/Wa 1208/16; 14 November 2019, I SA/Wa 1760; 30 June 2020, I SA/Wa 429/20; the judgments of 27 August 2019, II SA/Rz 607 and II SA/Rz 627/19.

purpose of a financial benefit from the State clearly departs from the perception of the family which not only justifies its constitutional regulation, but also explains the very fact of granting it such support. Therefore, it leads to a gradual redefinition of the concepts, which at the constitutional level have a completely different meaning.

This is connected with yet another negative effect. The substitution of the family defined – in principle – as the kinship of parents and children by another community of the same name, though distinguished on the basis of the criterion of income or life interests, depreciates the significance of the constitutionally preferred family model based on the marriage. It appears that a married applicant loses the chance to be granted the benefit, e.g., due to actual separation of spouses, due to the fact that his or her income is determined on the basis of the legal status and not on the basis of the actual status or the prerequisite of common household[57]. However, since judicial decisions often take into account the factual circumstances of unmarried parents of children, this may provide an "incentive" for the formal ending of ongoing relationships, in particular in view of the problems existing between the spouses. It may also effectively "discourage" the formalisation of unions, which have not previously formed an "income community", and which could, by entering into marriage, lose financial support in the form of benefits[58].

In this context, the frequently cited reasoning of the above-questioned method of interpretation, which refers to the necessity of "appropriate" application of particular elements of the statutory definition, is not convincing[59]. Each use by the legislator of the term "appropriate" cannot disregard the literal meaning of the definition of the family. This would mean that the definition – as such – cannot have any practical effect as long as an authority or a court does not provide it with a proper – "appropriate" – interpretation. However, this would undermine the point of including such a definition in the statute. Therefore, it should be assumed that if the legislator decides to define the family, the individuals indicated by it should automatically be regarded as members of the family, in accordance with the wording of the relevant provision[60].

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57 See, inter alia, the judgment of the NSA of 18 December 2018, I OSK 1806/18, along with the jurisprudence cited therein indicating – in the court's assessment – an established view in this respect: the judgments of the NSA of: 23 September 2005, I OSK 150/05; 13 January 2010, I OSK 1128/09; 22 February 2012, I OSK 2543/11. The same position may also be observed in the recently issued judgments, see, inter alia: the judgment of the NSA of 16 May 2019, I OSK 2543/17; the judgment of the WSA in Rzeszów of 4 July 2019, II SA/Rz 258/19.

58 The above, however, recalls the previously quoted judgments of the Constitutional Tribunal concerning norms posing the risk of weakening family bonds. See the abovementioned judgments of the CT of: 18 May 2005, K 16/04; 3 December 2013, P 40/12; 23 June 2008, P 18/06.

59 See, e.g.: the judgment of the NSA of 14 June 2017, I OSK 752/16; the judgment of the NSA of 3 March 2017, I OSK 2339/16. The use of the term "appropriate" by the legislator is supposed to exclude "mechanical application of a legal norm", imposing its necessary adaptation to "the essential objectives and forms of a specific proceeding, as well as taking full account of the nature and purpose of a particular proceeding".

60 Cf. Maciej P. Gapski: Definicja pojęcia „rodzina" zawartego w ustawie o świadczeniach rodzinnych. Glosa do wyroku NSA z dnia 14 lutego 2012 r., I OSK 1709/11. *Samorząd Terytorialny*, 2017/12. 93.

It appears, however, that the abovementioned problems concerning the interpretation of statutory definitions in the constitutional context might be solved by assuming that what, at the statutory level, is to constitute the "family" primarily for the purpose of granting financial support to a particular community, may be regarded only as a concept that serves the technical identification of the basis for determining specific benefits. Thus, numerous statutory definitions, which serve various purposes and – in this context – require adjustment to the specific circumstances of a "given case", would no longer raise such significant objections as those referring to a different category than the one which would define the family as a specific community being the subject of constitutional regulation. However, this issue would require more extensive analysis as well as an attempt to use certain concepts differently from the current one by the legislator.

The second problem worth pointing out concerns the conditions of support which, according to the provisions of the Constitution, should be granted to families. The general objective in this regard is provided for in Article 18 of the Constitution, which concerns the care and protection of the State to which the family is entitled. The above is also confirmed by Article 71 of the Constitution, which establishes the well-being of the family as a general and universal criterion for the conduct of State policy, while emphasising the necessity of adapting assistance to the family to the specific situation it may face. A separate and at the same time key determinant of all actions aimed at the family is also the principle of subsidiarity, which expresses one of the basic axiological assumptions of the binding Constitution, and thus constituting an important interpretative key for its provisions. Subsidiarity in more general terms determines the necessary limit of State interference in those domains in which individuals can exercise their rights autonomously[61]. It emphasises the principle that protects against arbitrary action of the State, while also imposing an obligation on the individual to undertake active measures to express his or her concern for their own interests[62]. From this perspective, the compliance with the principle of subsidiarity always conditions granting of support to an individual by the State on his or her ability to take efficient measures to improve his or her situation.

As far as the issue of financial support for families is concerned, the principle of subsidiarity has been repeatedly and very precisely referred to in the jurisprudence of the Constitutional Tribunal. It has been emphasised in this context that the State can never substitute the family in the exercise of its functions, since in this scope it performs an auxiliary and complementary role. It does not absolve persons responsible from taking measures aimed at maintaining the family[63]. In the context of maintenance obligations, the Tribunal unequivocally stated that the scope of the State's obligation is determined by the constitutional principle of subsidiarity and the

[61] More extensively see Marek Andrzejewski: Świadczenia socjalne a obowiązki alimentacyjne członków rodziny w świetle zasady pomocniczości. *Prawo i Zabezpieczenie Społeczne*, 2019/11. 22–23.

[62] Cf. Zubik (2017) op. cit. 56.

[63] See the judgment of the CT of 22 July 2008, P 41/07, part III, point 4.3.

prohibition of interference in the autonomy of the family, including in the material domain (minimum subsistence)[64]. Thus, the State assistance cannot have the effect of releasing the family from its maintenance obligation[65].

The subsidiary nature of the State activities also applies to that domain of the family functioning that concerns the fulfilment of parental duties. Also in this aspect, the provision of social assistance must not lead to the neglect of the parents' obligation of bringing up their child[66]. This idea was expressed even more emphatically by pointing out that it is unacceptable to relieve parents of the burden of supporting their children at the price of abandoning their upbringing[67]. As the Tribunal emphasised, the involvement of the State in the domain of social security should not therefore lead to the atrophy of parental obligations[68].

The analysis of these court judgments, in which the definition of the family is interpreted in the context of the current life situation of the individuals applying for a particular benefit, leads to the conclusion that the State assistance, which is guaranteed in such situations, is in fact granted without taking into account the aforementioned criteria arising from the principle of subsidiarity. If, within the meaning of the statutory definition adopted by the courts, the decisive condition for including a father in the family depends on whether he remains in the income community with the mother and child, then each actual separation of the father also means that he is relieved of the obligation to maintain his family. The finding that, for instance, the father of a child, sometimes also married to the mother, does not maintain regular contact with his family, does not participate in deciding important matters and thus does not create bonds with the members of the family, results in his exclusion from the "formally" understood family and, consequently, in the takeover by the State – in the form of a particular benefit – of maintenance obligations, under which specific benefits are granted from the whole society.

Obviously, we cannot deny that life and family situations are sometimes complicated, which partly explains the frequently repeated judicial statement concerning the need to depart from "rigid" regulation of the issue of family relations. Paradoxically, however, the interpretation of the concept of "family", which is supposed to refer to the life situation of applicants, features a kind of automatism. Regardless of the reasons for the "absence" of a parent or spouse, the mere circumstance is sufficient to exclude that person from the family circle, which thus enables the granting of one of the benefits provided for by the statute. Consequently, the finding that persons who have the obligation to maintain the family community are actually outside it provides *per se* a prerequisite for the financial involvement of the State. This circumstance not only abstracts from the premises of subsidiarity, but also strengthens the conviction

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64 See the judgment of the CT of 12 February 2014, K 23/10, part III, point 5.2.

65 See the judgments of the CT of: 15 November 2005, P 3/05, part III, point 3; 19 April 2011, P 41/09, part III, point 3.3; 10 March 2015, P 38/12, part III, point 5.1.

66 See the judgment of the TC of 18 May 2005, K 16/04, part III, point 4.

67 See the judgement of the CT of 23 June 2008, P 18/06, part III, point 4.4.1.

68 See the judgment of the CT of 12 April 2011, SK 62/08, part III, point 4.6.

that the lack of undertaking the activities to which family members are obliged poses no problem and requires no remedy, since in the systemic context it is "someone else", which means, in fact, the other members of society, who solve this problem for the obliged persons.

3. Concluding remarks

The objective of the presented analysis was to draw attention to those elements of the constitutional content which allow for considering the "family" as a constitutional concept with a specified scope of meaning. This more general view from the constitutional perspective was intended – on the one hand – to systematise the issues which, in various aspects, are the subject of discussion and divergent assessments. On the other hand, it was to provide a point of reference for the manner of regulating the issue of family relations that may be noticed at the statutory level. The juxtaposition of the two levels – statutory and constitutional – allowed to notice and indicate two problems. The first one concerns the adopted manner of defining the family and it leads to a situation in which the concept used by the legislator for specific purposes – defining the group of entities entitled to receive financial assistance from the State – diverges significantly from the criteria required for identifying the family on constitutional grounds. Thus, it leads to a discrepancy which, at the statutory level, not so much extends the constitutional concept, as actually replaces it. As a consequence, the "family for benefit purposes" stops having much in common with the family whose support has its source in the constitutional provisions. Additionally, the second recognised problem arises. The mere disturbance in the way the family is identified results in the fact that assistance granted to the family by the State raises objections as to its compliance with the principle of subsidiarity. The substitution of the family as a community of parents and children for an undefined group distinguished by the criterion of common household and income poses the question of the admissibility of financing such entities – defined by the legislator as the family – by means of allowances financed by all members of the society[69]. This question seems to be all the more justified in the context of the objections that certain existing social benefit mechanisms raise from the perspective of subsidiarity[70].

[69] Cf. the criteria for granting such allowances – the judgment of the CT of 21 October 2014, K 38/13, part III, point 2.1.

[70] Cf. Andrzejewski (2019) op. cit. 23–27.