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**Guarantee of marriage and family protection
in the constitution of the republic of poland. The comparative
analysis of the basic law in selected member states of the
European Union.**

Abstract

The aim of this article is to present marriage and family protection in the light of Polish constitutional law. The Constitution of the Republic of Poland provides for this protection through a constitutional guarantee.¹ The publication shall present aspects of marriage and family not only on the basis of the regulations of the Basic Law, but also in accordance with the Family and Guardianship Code.² The discussion in this article focuses mainly on protection of the institution of marriage and family as the fundamental social unit. Furthermore, a comparative analysis of constitutional legislation including the Basic Law of the Republic of Italy and Spain in the field of marriage and family protection has been performed.

Key words: Constitution of the Republic of Poland, family law, marriage, family, European Union, Italy, Spain.

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¹ The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 2009, no. 114, item 946.

² The Act of 25 February 1964, The Family and Guardianship Code, consolidated text, Journal of Laws, item 2086.

1. Introduction

The aim of this publication is not only to present constitutional protection of marriage and family based on the Constitution of the Republic of Poland, but also to make comparative analysis of the constitutional legislation including the Basic Law in selected Member States such as Italy and Spain in the field of marriage and family protection. First, consideration shall be given to the Constitution of the Republic of Poland.

The Constitution of the Republic of Poland was adopted by the National Assembly on 2 April 1997 and, according to its Art. 8, shall be the supreme law of the Republic of Poland (Section 1). The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise (Section 2). The Constitution, also known as the Basic Law, in the constitutional law studies is described as a normative act with the supreme legal value and special rules (formal aspect) that regulate the basics of the political, social and economic system (material aspect).³ The Constitution of the Republic of Poland is the act of written law of superior legal force, which determines the basic principles and competence of the state or other state authorities; a special procedure, different than that applicable to any other legislative act, shall be established in order to pass or to amend ordinary acts.⁴ The particular role of the Constitution ensures that it has the highest level in the hierarchy of statutory law, which means the acts of the lower level cannot exist in breach of it. However, these acts shall be interpreted in accordance with

³ Szmyta (2010): 127.

⁴ Garlicki (2018): 44.

its implementation.⁵ The special procedure of passing and amending the Constitution confirms that it is the supreme and the most significant law in the Republic of Poland. What is more, the Constitution is a type of a foundation for creating new areas of legal practise. The specificity of constitutional law as a branch of law is presented as academic achievements for other law disciplines. According to B. Banaszak, it shall not be claimed that the disciplines, especially related to constitutional law are less important and play as auxiliary role.⁶ However, the role of constitutional law studies is not only to systematise and explain the terms that exists in the provisions of law belonging to the same branch of law, but also to determine what is obligatory on the grounds of constitutional law.⁷

The aim of constitutional law is to conduct comparative studies that lead to better understanding how an institution from a different branch of law should function.

2. The constitutional guarantee in the Republic of Poland

The constitutional guarantee is the overall factors and safety measures of constitutional provisions. This applies to the factors of social forces as well as to legal measures provided by the Constitution.⁸

Effectively, it is the protection of norms in the Constitution. What is more, it is not only a realisation of the entire content of the Constitution, but also implementation of each provision individually. According to B. Banaszak, the constitutional

⁵ Podsiadło (2010): 24.

⁶ Banaszak (2015): 6.

⁷ Banaszak, Preisner (1996): 37.

⁸ Siemieński (1980): 36.

guarantee is a term including the overall measures and systemic institutions used in order to ensure the implementation of constitutional norms.⁹ Therefore, the constitutional guarantee assures that all rights and liberties included in the Constitution are equally applicable for all people without regard to origin, race, or religion.

The constitutional guarantee is a typical feature of all Constitutions in democratic states. It is the overall measures and institutions used for the implementation of constitutional norms. At this point, direct and indirect guarantees shall be distinguished. The direct guarantee is established in order to uphold the Constitution, whereas the indirect guarantee is developed with the purpose of the implementation of constitutional norms. The following examples of the direct guarantee shall be presented: constitutional jurisdiction, institutions of constitutional liability. However, the examples of the indirect guarantee shall be presented with reference to B. Banaszak, who indicates the following division:

- material – including the principles of the political system or basic mechanisms protecting the upholding of the Constitution;
- formal (institutional) – consisting of legal institutions protecting the primacy of the Constitution, the implementation of constitutional norms, regularity of law and the decision-making process (for instance, institutions functioning in order to control the legality of state actions toward individuals).¹⁰

⁹ Banaszak, Preisner (1996): 37.

¹⁰ Banaszak (2015): 94.

The constitutional guarantee may also be presented as a kind of a 'promise' that all rights included in the Basic Law must be exercised. The guarantee in the Constitution relates to marriage and family. The study of constitutional law does not include research about the family law status; however, it utilises the results of other areas of law, especially family law.¹¹

To conclude the above reflection about the constitutional guarantee and the Constitution of the Republic of Poland, I shall quote L. Garlicki : "The Constitution is a value in itself, guaranteeing the stability of a democratic state, so it has to be respected and upheld by all actors of political governance, even if it does not correspond with their interests."¹²

3. Definition of family

Family in Polish law is presented as a fundamental social unit which is subject to special protection by law. This protection is provided by the Constitution and the Family and Guardianship Code. Starting a family is associated with particular rights and duties. The spouses, according to their abilities, have an obligation to satisfy their mutual needs, care for existence of the family, and support each other whenever the circumstances require.¹³ There is a perception in the society that family is formed by a married couple with a child. It is an incorrect comprehension of family because, according to the Polish law, a childless married couple is considered to be a family. As stated in Art. 23 of the Family and Guardianship Code, the spouses have equal rights and obligations

¹¹ Winiarz (2001): 12.

¹² Garlicki (2018): 39.

¹³ Adynowska, Bielak, Brygier (2008): 640.

in marriage, so they have an equal position as a husband and a wife in relation to cohabitation and their children. Equal rights and obligations do not need to be identical as spouses play different roles. A particular attention shall be drawn to the role of a wife, who is involved in motherhood and upbringing of children. However, each of the spouses has a right to make a decision about everyday life independently. By contrast, important decisions about property, upbringing and education of children shall be made jointly. In case of disagreement, the family court shall decide.

To give an unequivocal explanation of family is not a simple matter. According to the definition, a family shall consist of people of common ancestry or biologically related regardless of the relationship between them in different areas of life. The legislator does not provide a definition of family, however, the content is presented in the Social Assistance Act of 12 March 2004.¹⁴ In accordance with Art. 6. 14 of that Act a family shall be formed by people who are or are not related to each other, or by individuals living under one roof and sharing the same household. However, Art. 13.16 of the Act of 28 November 2003 on family benefits¹⁵ presents a family as a group of people comprising of spouses, parents, children, guardians, children under 25 years of age who are dependent and children over 25 years of age with a disability certificate and care allowance, carer's benefit or other benefits for a guardian pursuant to the Act of 4 April 2014 on determination and payment of benefits

¹⁴ The Act of 12 March 2004 about social assistance, consolidated text, Journal of Laws of n 2019, item 2473.

¹⁵ The Act of 28 November 2003, about family benefits, consolidated text, Journal of Laws of 2020, item 111.

for guardians.¹⁶ The Constitutional Tribunal in its judgment of 12 April 2011 declared that every lasting relationship between two people or more, consisting of at least one adult and one child, based on emotional, legal or blood ties is understood as family. A family can be complete, including a family with many children, or incomplete such as a single-parent family. A complete family consists of two adult people who share a household, emotional ties and who raise a child or children.¹⁷ Within a family there are minor children as well as those who are dependent and live together with the parents, at the same time sharing the household. Adopted children are included in a family. According to K. Gromek, family is a social institution characterised by a sexual relationship, normalised and lasting properly in a way so that the society shall be renewed by reproduction. That kind of a family performs the following functions: material, economic, caring, raising, procreating, sexual, controlling, cultural, social, emotional, and expressive. Furthermore, it shall be indicated that a family develops personal functions such as: being a wife, a husband, fatherhood, motherhood, or being a brother and sister.¹⁸ M. Dobrowolski stated that family as an object to be researched falls outside the scope of only a single branch of science. A family cannot be treated as a legal institution because it has a wider meaning as a natural and irreplaceable element of the structure of society named a fundamental social unit. It is a basic form of social life and has a crucial

¹⁶ The Act of 4 April 2014, about determination and payment of benefits to guardians, consolidated text, Journal of Laws of 2019, item 1818.

¹⁷ The judgment of the Constitutional Tribunal of 12 April 2011, SK 62/08, OTK-A 2011, no.3, item 22.

¹⁸ Gromek (2019): 3.

impact on the functioning of the state.¹⁹ A family is a fundamental social unit which has particular functions in the state. Marriage with or without children is considered to be family. The Constitution of the Republic of Poland recognises marriage as an institution under its protection.

4. Definition of marriage

Marriage is an individual, natural, corporeal or spiritual relationship between a woman and a man. The Family and Guardianship Code does not contain a legal definition of marriage. Notwithstanding, Art. 1 of the Family and Guardianship Code lays down the conditions for entering into marriage. According to §1, marriage is concluded when a man and a woman are both present before the head of a civil registry office and make a declaration that they take each other into a marital union, whereas § 2 states that marriage is also concluded when a man and a woman enter into a marital union under common law or the law of a religious order by stating their mutual intention to enter into marriage under Polish law in the presence of a member of the clergy, and the head of the registry office then draws up a marriage certificate. If this conditions are met, the marriage is considered to have been concluded at the moment of making the declaration of intent in front of the cleric. Anyone wishing to enter into marriage should submit or present to the head of the registry office the documents necessary to enter into marriage, as follows:

¹⁹ Dobrowolski, (1999): 21.

- A document which testifies to the identity, an abridged copy of the birth certificate.
- If one of the prospective spouses has already been married - a proof of termination, invalidation, or non-existence of previous marriage;
- A written declaration that they are unaware of the existence of any impediments to marriage;
- An permission to marry as required by the provisions of the Family and Guardianship Code only in the case of a person who is less than 18 years old.

A family court judge may give a permission to conclude marriage in case of a woman who is 16 years old only for the following reasons: childbirth, pregnancy, or a long-lasting relationship.²⁰ Marriage is determined as a long-lasting legal relationship that connects people for life; therefore; those people who, under the constitutional principles contained in the Family and Guardianship Code, have completed a legal act in a form of marriage and as a result have become legal entities with equal rights and obligations in order to realise the social functions of the family relationship.²¹ According to A. Zieliński, marriage is a legal and formal relationship between a woman and a man, concluded in accordance with the provisions of applicable law, for the purposes provided for by law.²² Undoubtedly, marriage is a subject of many studies from different fields of science, not only law, but also sociology, psychology, or theology. According to its formal shape, law provides the finest protection. For society, marriage is an important element of ensuring law and order.

²⁰ Adynowska, Bielak, Brygier, (2008): 344.

²¹ Smyczyński (2014): 70.

²² Zieliński (2011):48.

Marriage shall facilitate to determine the origin of a child and it forms a family relationship within a wide range. However, marriage is not always a relationship that is long-lasting and full of happiness. Marriage concluded by young and immature people often may turn out to be a disaster. Impulsive and irresponsible decisions lead to divorce. I. Ignatowicz presents marriage as a specific, individual, natural, spiritual, corporal social relationship, inherently long-lasting between a woman and a man. This relationship is legally privileged and sanctioned; therefore, it forms a legal and a family relationship, which is at the same time a legal institution.²³ This institution is definitely fundamental for the functioning of society, especially with reference to the procreation function. In the doctrine, the view about marriage is presented as follows: marriage as a relationship between a woman and a man (two people of different genders) is considered to be a legal relationship of a strictly personal nature, connecting only a husband and a wife. However, this view is deemed to be old fashioned. What is more, it is thought to be a discrimination of homosexual relationships.²⁴ It is worth mentioning at this point that marriage shall be based on the traditional model of family which comprises a woman and a man. The relationships of a homosexual nature should be childless. In this case, definitely tolerance shall be given only to the condition of not having children. The European Court of Human Rights in its judgment of 5 January 2010 introduced a ban on impairing the institution of marriage in national law. However, limitation of the right to enter into marriage, established by a national law system, shall consist of formal rules relating

²³ Ignatowicz (2016): 66.

²⁴ Gromek (2019): 13.

to the transparency and validity of marriage. In the context of immigration law and legal justification, states shall be eligible for prevention of a fraudulent marriage concluded only in order to acquire immigration rights. What is more, law shall not deprive a person or a category of persons of the legal capacity to conclude marriage with a chosen partner.²⁵ According to Polish law, marriage may be concluded also in a religious form. It is possible only on condition that there is a formal international agreement or an act regulating the relations between a church or another religious organisation and a state which provides for the possibility of concluding a religious marriage governed by the internal law of this church or another religious organisation. Such an agreement is the Concordat between the Holy See and the Republic of Poland signed in Warsaw on 28 July 1993.²⁶ It is worth mentioning here that on the basis of family and religious law similar reasons for the existence of marriage may be underlined. These reasons can be named as follows: sexual difference, presence of a bride and a groom at the time of giving a statement, accuracy of the statement expressing the will to enter into marriage, participation of two witnesses.

5. Protection of marriage and family in the constitution of the Republic of Poland

The Constitution of the Republic of Poland in its preamble refers to the principle of subsidiarity,²⁷ in which the guarantee

²⁵ The Judgment of the European Court of Human Rights from 5 January 2010 in the case *Frasik against Poland*, no. 22933_2.

²⁶ The Concordat of 28 July 1993 between the Holy See and the Republic of Poland, *Journal of Laws* of 1998, no. 51, item 318.

²⁷ Andrzejewski (2003): 59.

of state support to marriage and family is provided. According to Art. 18 of the Constitution “marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.” Marriage and family are values in themselves that play an instrumental role in the social and legal order. Therefore, the Constitution includes appropriate norms related to the relationship between the state and family, especially in the field of family protection. The provision of Art. 18 has a dual function: it is an element of constitutional axiology as well as sets the goals and determines the tasks of public authority resulted from the obligation of giving protection to marriage and family.²⁸ The provision precisely indicates that the Constitution defines marriage as a relationship between a woman and a man. That is why there is no doubt that a relationship between people of the same gender does not have any characteristics of marriage. The legislator does not define the term family. Family law states that marriage is a family made up of a woman and a man. Hence, Art. 18 of the Constitution not only provides protection to marriage, but also to broadly understood family. Protection of family rights is not a common term.

The following aspects can be considered:

- Protection in its narrower meaning (including the system of property claims, which is intended to restore the situation that complies with the law – it is material and legal protection) and the guarantee provided through the procedure for investigating the rights infringed (legal and procedural protection),

²⁸ Garlicki (2003): 2.

- Protection in its broader meaning (provided by institutions which support and enhance legal and family situation of an individual).²⁹

Art. 47 of the Constitution is the provision that protects family. According to it everyone shall have the right to legal protection of their private and family life, of their honour and good reputation and to making decisions about their personal life. Private family life requires a statutory guarantee of civil liberties and permissibility of their limitation with respect to the right to live a private life in family. In the assessment whether there has been any interference in the field of private life, which is protected by law, the term privacy shall not be idealized. Hence, because of the level of its generality, it requires an interpretation which takes into account all circumstances related to a particular situation. "The private sphere of life includes circumstances that form the area of personal and family life. The regime of legal protection of privacy, referring to common personal interests based on constitutional provisions and provisions of civil law (the regime of personal data protection) are independent of each other."³⁰

According to Art. 48.1 of the Constitution parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as their freedom of conscience and belief and also his convictions. However, as stated in Art. 48.2, limitation or deprivation of parental rights may be effected only in the instances specified by the Act and only on the basis of a final court judgment. This provision determines the principle of parental priority to initiate educational

²⁹ Bieliński, Pannert (2016): 10.

³⁰ The Supreme Court Judgment of 28 April 2004, III CK 442pro-pr/02, LEX no 1125280.

activities for their children. The right to rear their children in accordance with their own convictions shall not be absolute. Parents' convictions that interfere with the legal order shall not be the basis of educational activities for children. Parents may be deprived of custody or their custody may be restricted only in the case provided for in the Act or under a legally binding decision. In the doctrine, there is a claim that "in order to assess the proportionality of legislator's interference into this constitutional law, Art. 31.3 of the Constitution should not be applied. However, the limitation of parental rights is shaped by a child's best interests based on art. 72 of the Constitution."³¹ The Constitution of the Republic of Poland broadly protects marriage, family and child, which is confirmed by Art. 71, which reads: "1. Families, finding themselves in difficult material and social circumstances – particularly those with many children or single parents – shall have the right to special assistance from public authorities." What is more, Art. 72 provides that "1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense. 2. A child deprived of parental care shall have the right to care and assistance provided by public authorities. 3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child. 4. The competence and procedure for appointment of the Commissioner for Children's Rights shall be specified by statute." This provision

³¹ Cizińska, Karakulski, Kos, Pyłko, (2017): 128.

protects a child and establishes a special authority in order to protect its rights. This authority is the Ombudsman for Children, whose competence is regulated by the Act of 6 January 2000 on the Ombudsman for Children.³² This person is appointed by the Sejm of the Republic of Poland with the approval of the Senate for a period of 5 years. According to the above Act, a child is every human being from the moment of conception to the legal age (Art 2. 1). The Ombudsman for Children is obligated to protect the legal provisions that stabilise a person's legal situation also in the prenatal phase. As it has been presented, the Constitution provides for the protection of marriage, family, and child. State support is provided through the constitutional guarantee.

6. Comparative analysis of the basic law in the Republic of Italy and Spain including the constitution of the Republic of Poland in relation to marriage and family protection

In the analysis presented below, the Constitution of the Republic of Italy of 27 December 1947³³ and the Constitution of the Republic of Spain of 27 December 1978³⁴ have been discussed. According to Art. 32 of the Constitution of the Republic of Spain: "1. Man and woman have the right to marry with full legal equality. 2. The law shall make provision for the forms of marriage, the age and capacity for concluding it, the rights and duties of the spouses, the grounds for separation and dissolution, and their effects." This provision shall indicate that marriage can be concluded by a woman

³² The Act of 6 January 2000 on the Ombudsman for Children, consolidated text, Journal of Laws of 2020, item 141.

³³ The Constitution of the Republic of Italy of 27 December 1947.

³⁴ The Constitution of the Republic of Spain of 27 December 1978.

and a man, whereas a marriage of people of the same gender is impermissible. It should be mentioned that in Art. 18 of the Constitution of the Republic of Poland also a woman and a man can enter into marriage that is protected by law. The Basic Law of the Republic of Italy does not present any legal regulation; however, it indicates directly the entities who are able to conclude marriage. According to Art. 29, marriage and family is presented as follows: "The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family."

The right to protect private life, including family life, is provided by Art. 47 of the Constitution. A similar provision is found in Art. 18 of the Spanish Basic Law as follows: "1. The right to honour, to personal and family privacy and to the own image is guaranteed. 4. The law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights." The Italian and Spanish legislators provide for the right to personal and family life privacy. Those Constitutions, according to their supremacy, provide for the guarantee of private life protection on the basis of the legal order. The Basic Law in Italy and Spain give special status to illegitimate children. Art. 39.4 of the Constitution of the Republic of Spain indicates that: "Parents must provide their children, whether born within or outside wedlock, with assistance of every kind while they are still under age and in other circumstances in which the law so establishes." According to Art. 30 of the Constitution of the Republic of Italy: "It is the duty and right of parents to support, raise and educate their children, even if born out of wedlock."

In the case of incapacity of the parents, the law provides for the fulfilment of their duties. The law ensures such legal and social protection measures as are compatible with the rights of the members of the legitimate family to any children born out of wedlock. The law shall establish rules and constraints for the determination of paternity.” As it is mentioned above, these legal regulations, in their concept, refer to a child born out of wedlock; what is more, the legislator ensures that children are taken under special protection due to the situation they are in. These children are not discriminated; quite the reverse, they are presented in a privileged situation, which is this special protection provided by both Constitutions. In this analysis, it should be indicated that Italy, Spain, and Poland provide support for families through their policies. Art. 31 of the Constitution of the Republic of Italy presents the state support for the families in the following way: “The Republic assists the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits. The Republic protects mothers, children and the young by adopting necessary provisions.” This provision underlines the rank of education according to parents convictions; however it does not indicate any material support of the state to family. At this point, it should be mentioned that Art. 71 of the Constitution of the Republic of Poland also focuses on state support for families as follows: “The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances – particularly those with many children or a single parent – shall have the right to special assistance from public authorities.” In this analysis, the Spanish and Italian constitutional legislation

as well as the constitutional legislation of the Republic of Poland were discussed. In conclusion, it should be mentioned that all these countries guarantee constitutional protection of marriage and family in many areas not only economic but also social.

7. Conclusion

In this article, the subject of the guarantee of marriage and family protection in the Constitution of the Republic of Poland has been presented. It should be mentioned that discussed the guarantee offers the sense of security, legal order and protection provided by the state to family and marriage. The Constitution of the Republic of Poland protects these institutions in a special way. This publication presents the institutions of marriage and family on the basis of Polish Family and Guardianship Code and the Constitution of the Republic of Poland. Furthermore, the comparative analysis of the Basic Law in two member states of European Union – Spain and Italy, and the Polish Basic Law, is presented. The analysis performed shows that the constitutional legislation in Spain and Italy presents marriage and family as a fundamental social unit that must be protected.

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