MARRIAGE AND FAMILY IN EU COUNTRIES. AN OVERVIEW OF CONSTITUTIONAL PROVISIONS

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Abstract. The institutions of marriage and family has become a prominent topic of debate in contemporary social discourse. Their recognition, existence and functioning, as well as their ongoing evolution, have led to a shift of this discourse into the realms of politics and law. The recognition of the right to marriage and family entails a number of rights and freedoms. This article seeks to explore these dimensions within the constitutional frameworks of European Union member states. It begins with an analysis of international and EU approaches, followed by an overview of constitutional provisions in different EU countries.

Keywords: marriage; sacrament of marriage; family; constitution; European Union.

INTRODUCTION

The institution of marriage and family has become a prominent topic of debate in today's social discourse. Their recognition, existence and functioning, as well as the ongoing changes within them, have prompted a shift of this discourse into the realms of politics and law. The right to marry and start a family entails a number of rights and freedoms. These include the freedom to voluntarily decide whether to get married and whom to marry (though this freedom is restricted in some countries, e.g. due to sex). It also often involves recognising that neither spouse holds a privileged position over the other, and that their rights and responsibilities are equal. These rights, however, are not universally respected; they are influenced by culture, religion or tradition. They are prevalent in Europe and in countries that are categorised as part of the "Western world". The constitutions of European nations recognise and underscore the role of marriage in establishing a family, and grant them special protection.

Furthermore, the institution of Catholic marriage, which serves as a cornerstone of the family – the fundamental unit of social life, is of particular concern for both the political community (the State) and the religious community (the Church). This concern is primarily manifested in legislation (both state and church legislation), where marriage and family law find their rightful place. While the state legal systems are based on norms exclusively developed by legislative bodies, canon law primarily incorporates precepts of divine law. The binding matrimonial and family law of the Catholic Church, as set forth in the 1983 Code of Canon Law,[1] represents the sole legal system developed over centuries in which elements of divine and human law intersect and coexist [Góralski 2011b, 127]. The Church invariably considers sacramental (canonical) marriage as the only valid and binding union for its faithful, governed by its own laws and subject to its exclusive jurisdiction. On the other hand, civil marriage is recognised as a valid union for individuals outside the Church community. In the Church, it holds no legal significance for those who belong to the Church, i.e. baptised members or those formally accepted into its fold [Idem 2011a, 17].

The article seeks to explore the above aspects at the constitutional level. It begins with an analysis of international and EU approaches, which is followed by an overview of constitutional provisions in different EU countries. The aim is to demonstrate some differences in the approach to family and marriage, as well as to highlight some characteristics dependent on the region or culture that has been shaped by history and tradition.

1. MARRIAGE IN INTERNATIONAL AND EU LAW

In international law, regulations regarding marriage are included in the Universal Declaration of Human Rights (Article 16), which states that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and that marriage must be entered into only with the free and full consent of the intending spouses. They also have the right to found a family, which is entitled to protection by society and the State.[2] Similar provisions can be found in the International Covenant on Civil and Political Rights (Article 23(2) and (3)),[3] and the issue of free consent is reiterated in the International Covenant on Economic,

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[1] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, pp. 1-317.

[2] The Universal Declaration of Human Rights (10.12.1948), http://libr.sejm.gov.pl/tek01/txt/onz/1948.html [accessed: 28.04.2024].

[3] The International Covenant on Civil and Political Rights (16.12.1966), Journal of Laws of 1977, No. 38, item 167.

Social, and Cultural Rights in Article 10.[4] These regulations concerning fundamental rights and the institutional protection of marriage and family are inherently linked to human dignity and the right to privacy. These documents explicitly define marriage as a union between individuals of opposite sexes that is entered into by two persons. No one can enter into marriage alone, such a decision is made by two individuals, on the principle of complementarity. Therefore, the rights of spouses should be interpreted in relation to each other [Drinóczi and Zeller 2006, 16-22].

The European Social Charter, in addition to recognising the family's right to social, legal, and economic protection, ensures assistance to newly married couples through benefits and other appropriate means.[5]

It should also be noted that under the European Convention on Human Rights (Article 12), men and women of appropriate age have the right to marry, in accordance with the national laws of Member States.[6] However, the Charter of Fundamental Rights of the European Union, published 60 years after the ECHR, leaves out the issue of gender, referring only to national laws in individual states.[7] This omission likely stems from the ongoing 21st-century discourse regarding the redefinition of marriage, which no longer requires spouses to be of opposite sexes. It also reflects changes in the legal recognition of same-sex marriages in some Member States [Molnár 2021, 184].

2. MARRIAGE AND FAMILY IN NATIONAL CONSTITUTIONS

At the beginning of our considerations, it is pertinent to note the varying approaches towards marriage evident in the constitutions of EU Member States. These have been categorised based on methodology and content into the following groups.

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[4] The International Covenant on Economic, Social, and Cultural Rights (19.12.1966), Journal of Laws of 1977, No. 38, item 169.

[5] The European Social Charter (03.05.1996), https://rm.coe.int/europejska-karta-spoleczna/16808b6383 [accessed: 28.04.2024], Article 16.

[6] The European Convention on Human Rights (04.11.1950), https://www.echr.coe.int/documents/convention_pol.pdf [accessed: 28.04.2024].

[7] The Charter of Fundamental Rights of the European Union, https://oide.sejm.gov.pl/oide/?option=com_content&view=article&id=14428&Itemid=422 [accessed: 28.04.2024], Article 9.

2.1. Regulations concerning gender of spouses at the constitutional level in EU Member States

The issue of gender has garnered significant attention, particularly in the past two decades. In scholarly discourse, considerable attention has also been devoted to researching the challenges facing marriage and family in this context, including divorce and family breakdown. Another prominent topic is the legal recognition of same-sex marriages. However, it is noteworthy that this issue affects relatively few people compared to the longstanding concept of traditional marriage, which remained unquestioned for centuries. Civil marriages have a rich historical tradition, dating back to the inception of human rights. This tradition is rooted in specific cultural and historical contexts. The family model and the roles of family members are influenced by biological differences between men and women. The 21st century has witnessed the emergence of new voices advocating for a reconsideration of the approach to marriage and the recognition of same-sex marriages. This shift is also reflected in evolving legal frameworks.

Most Member States' constitutions explicitly establish a right to marry. In many of them, marriage is defined as a union of two persons of the opposite sex [Toggenburg 2020]. This is the case in Poland under Article 18 of the Constitution.[8] Marriage, as the only interpersonal bond consisting of a woman and a man, has not only been codified, but also placed under the protection and care of the State at the constitutional level. It should also be noted that no other relationship between individuals has been acknowledged as much as marriage [Maksymiuk 2024; Mączyński 2013, 94-95]. Moreover, Article 18 is included in the first chapter of the Constitution, which means that it constitutes part of the constitutional principles, and changing the wording of this provision is possible only as provided in Article 235(6). It constitutes the *lex generalis* of all other constitutional regulations regarding marriage and family.[9]

In Hungary, the Constitution also defines marriage as a union between a woman and a man, which is entered with the free consent (Article L(1)). Furthermore, it describes family ties as those that are based on marriage or kinship between parents and children. The opposite-sex is emphasised as a conceptual element of marriage.[10] A similar provision can be found in the Constitution of Bulgaria, where Article 46(1) states: "Matrimony shall be a free union between a man and a woman. Only a civil marriage

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[8] "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." See the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483.

[9] See judgment of the Constitutional Tribunal of 11 May 2005, ref. no. K 18/04.

[10] The Constitution of Hungary (25.04.2011), https://njt.hu/jogszabaly/en/2011-4301-02-00 [accessed: 28.04.2024]. See Molnár 2021, 185.

shall be legal."[11] In Spain, Article 32, which relates to marriage, reads: "Men and women have the right to marry with full legal equality." It is worth noting that the Spanish Constitution has not been amended, despite the 2005 statutory regulations that allow homosexual couples to get married.

In Croatia, changes in this area were made in 2014. Article 61 of the Constitution of the Republic of Croatia of 22 December 1990, which stated: "The family is under special protection of the State. Marriage and legal relations in marriage, common-law marriage and in families shall be regulated by law," was amended to "Marriage is a living union between a man and a woman. Marriage and legal relations in marriage, common-law marriage and family shall be regulated by law."[12] This amendment was introduced following a referendum held on 1 December 2013, in which 66% of voters were in favour of defining marriage as a union between a man and a woman in the Constitution.[13]

A similar requirement is included in Article 38 of the Constitution of Lithuania, which states that "[…] Marriage is concluded with the free mutual consent of a man and a woman […]."[14] In the Constitution of Slovakia, marriage is defined as a unique bond between a man and a woman. Just as in Croatia, the content of this article was amended, as the Constitution of 1 September 1992 did not define marriage but merely stated that: "Marriage, motherhood and family shall be protected by the Constitution. Special protection for children and young people shall be guaranteed."[15] This amendment was introduced following a bill put forward by the Christian Democratic Movement, banning same-sex marriages. It was adopted and signed by President Ivan Gašparovič in June 2014.[16]

Some Member States allow same-sex couples to marry within their legislative frameworks. These include (in alphabetical order):Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Slovenia, and Sweden).[17] However, it is only the Constitution of Ireland that includes the provision about same-sex marriages; pursuant to Article 41(4), "Marriage may be contracted

[11] The Constitution of Bulgaria (13.07.1991), https://www.parliament.bg/en/const [accessed: 28.04.2024].

[12] Decision of the Constitutional Tribunal of 14 January 2014, no. SuP-O-1/2014.

[13] See more https://www.theguardian.com/world/2013/dec/01/croatia-vote-ban-gay-marriage-referendum [accessed: 28.04.2024]; Marczewska-Rytko 2019, 78.

[14] The Constitution of the Republic of Lithuania, consolidated version of 22.05.2022, https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192 [accessed: 28.04.2024].

[15] Article 41 of the Constitution of the Slovak Republic (01.09.1992), https://www.prezident.sk/upload-files/46422.pdf [accessed: 28.04.2024].

[16] See https://europa.eu/youreurope/citizens/family/couple/marriage/index_pl.htm [accessed: 28.04.2024].

[17] Ibid.

in accordance with law by two persons without distinction as to their sex."[18] This provision was amended following a referendum on 22 May 2015.[19] In contrast, other Member States permit same-sex marriages at the statutory level.

2.2. Constitutional guarantees of spousal equality

As human rights have evolved, equality between men and women has gained legal recognition. Protection of equality by law and the implementation of anti-discrimination measures have facilitated changes in social institutions such as marriage and family. These changes are reflected in the equality of rights of both spouses.

Several European constitutions explicitly require that both spouses have equal rights in marriage. Furthermore, they also frequently highlight that spouses are equal in performing duties. This equality forms the foundation for maintaining the unity of the family, which is understood to arise from marriage. Countries that have enshrined equality between spouses in their constitutions include: Bulgaria, Estonia, Spain, Italy, Lithuania, Portugal, Slovenia, and Romania.[20]

In Bulgaria, Article 46(2) of the Constitution stipulates that spouses have equal rights and obligations in marriage, but also in the family, which arises from marriage. Similarly, In Estonia, Article 27 simply states that spouses have equal rights.[21] The Constitution of Italy addresses this issue more comprehensively in Article 29, which reads: "Marriage shall be based on the moral and legal equality of the spouses within the limits laid down by law to ensure family unity." Thus, it emphasises that spouses have equal rights, and these equal rights form the basis and condition of family unity.[22] In Lithuania, the Constitution stresses equal rights for spouses within the family, reinforcing the institution of family based on equality. In the Constitution of the Portuguese Republic, Article 36 regarding family, marriage and filiation, defines equality in two aspects. Firstly, it recognises the right to found a family and marry under conditions of full equality.

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[18] Constitution of Ireland (01.07.1937), https://www.irishstatutebook.ie/eli/cons/en/html [accessed: 28.04.2024].

[19] See https://www.irishtimes.com/news/social-affairs/president-signs-same-sex-marriage-into-constitution-1.2333882 [accessed: 28.04.2024].

[20] See https://www.eurac.edu/en/blogs/eureka/the-9th-of-all-eu-r-rights-marriage-founding-a-family-and-how-the-charter-contributes [accessed: 28.04.2024].

[21] Constitution of the Republic of Estonia (28.06.1992), https://president.ee/en/republic-of-estonia/the-constitution [accessed: 28.04.2024].

[22] Constitution of the Italian Republic (27.12.1947), https://www.senato.it/application/xmanager/projects/leg19/file/repository/relazioni/libreria/novita/XIX/Costituzione_INGLESE_2023.pdf [accessed: 28.04.2024]. See also Pańtak 2021, 91-93.

Secondly, it states that spouses have equal rights and obligations in relation to their civil and political capacity and to the maintenance and education of their children. Therefore, it defines the catalogue of areas to which equality of rights and obligations applies.[23] The Constitutions of Romania and Slovenia recognise full equality between spouses without specifying what it refers to.[24] The Constitution of Spain, mentioned earlier, in Article 32 refers to full equality before the law.

2.3. The right to found a family and guarantees of family support

In addition to marriage, European constitutions refer to the concept of "family". By including this concept in national constitutions, legislators affirm the significance and role that families hold in society, and more broadly, within the state. When constitutional provisions address both marriage and family, this is often done in consecutive articles or within a single chapter, which underscores that family formation is a consequence of marriage, without prejudicing against other forms of unions permitted in certain European countries. Several European constitutions specify that marriage results in the establishment of a family. These two are inextricably linked. Such provisions were adopted, for instance, in Ireland (Article 41(3)(1)) or Italy (Article 29).

In the Constitutions of Lithuania, Estonia, Greece, and Ireland, the family is regarded as a fundamental element crucial for the preservation and advancement of society. In Ireland, the family is even described as an institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. The Constitution of Estonia underscores that the family serves as the cornerstone of society, ensuring Estonia's survival and development (Article 27(1)).

Moreover, constitutional arrangements in Italy, Spain, and Poland ensure support for families through pro-family policies. In Italy, Article 31 of the Constitution states: "The Republic shall, through economic measures and other benefits, encourage the creation of families and the fulfilment of corresponding duties, with special regard to large families. The Republic shall protect mothers, children and the young, favouring the institutions that are necessary to that end." In the Constitution of Spain, Article 39(1) reads: "The public authorities shall ensure the social, economic and legal

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[23] Constitution of the Portuguese Republic (02.04.1976), https://biblioteka.sejm.gov.pl/wp-content/uploads/2016/03/Portugalia_ang_010116.pdf [accessed: 28.04.2024].

[24] Article 48(1) of the Constitution of Romania, https://www.presidency.ro/en/the-constitution-of-romania [accessed: 28.04.2024]; Article 38 of the Constitution of the Republic of Slovenia (23.12.1991), https://www.varuh-rs.si/en/about-us/legal-framework/the-constitution-of-the-republic-of-slovenia/ [accessed: 28.04.2024].

protection of the family."[25] In the Constitution of the Republic of Poland, Article 71 states: "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 families – shall have the right to special assistance from public authorities."[26] However, the Constitution does not explicitly define the concept of family, treating it as given. The doctrine clearly states that assistance is guaranteed regardless of the size of the family and its wealth [Borysiak 2016, 1673]. In Greece, large families are promoted under Article 21(2) of the Constitution, just as it is the case in Poland under Article 71. In Hungary, the state undertakes to assist those with children (Article L(2)).

2.4. Constitutional protection of marriage and family

Some European Union Member States include provisions for the protection of marriage within their constitutional frameworks. This institutional protection involves the state providing support for marriage through its social policies, as it bears the responsibility of ensuring conditions conducive to marital and family life. For instance, Hungary's Constitutional Tribunal has affirmed the protection of the institution of marriage, despite the fact that the Constitution of Hungary mentions only the family in this regard [Molnár 2021, 193-94]. In the Basic Law for the Federal Republic of Germany, Article 6(1) expressly states that "Marriage and the family shall enjoy the special protection of the state."[27] Marriage is the only union that is formally recognised and protected by law. Other unions cannot be favoured over marriage.[28] This wording in the Basic Law is intended to safeguard the family under law. Furthermore, the Constitutional Tribunal in Germany has ruled that if unions of same-sex couples cannot produce children, marriage cannot be extended to them [Molnár 2021, 193]. In 2001, Germany recognised registered partnerships for same-sex couples by the Act on Registered Life Partnerships, reinforcing the special protection afforded to traditional marriage under Article 6 of the Basic Law, as same-sex couples are not covered by its provisions.

The institutions of marriage and family are also protected under the Greek Constitution in Article 21(1), which defines the family as the cornerstone for

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[25] The Constitution of Spain (27.12.1978), https://www.boe.es/legislacion/documentos/Constitucion INGLES.pdf [accessed: 28.04.2024].

[26] See more Prokopowicz 2017, 57-75.

[27] Constitution of the Federal Republic of Germany (23.05.1949), https://www.bmi.bund.de/EN/topics/constitution/constitutional-issues/constitutional-issues.html [accessed: 28.04.2024].

[28] See more Perelli-Harris and Sánchez Gassen 2021, 435-67.

the preservation and development of the Greek Nation.[29] Similarly in Ireland, Article 41(3(1)) reads: "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack." The Constitution of Ireland also includes protection of the family as the necessary basis of social order and as indispensable to the welfare of the Nation and the State (Article 41(1)(2)). The Latvian solutions are included in Article 110 of the Constitution, which declares not only protection but also support for marriages and families, and recognises the rights of parents and children[30]. Such provisions are also included in Article 36(1) of the Constitution of Portugal, which provides general, though implicit protection of marriage, through the guarantee that everyone has the right to found a family and marry on the principles of full equality. The doctrine has repeatedly pointed out that cohabitation cannot be granted the same protection as marriage, as this would infringe upon the freedom of marriage and the right to enter into it [Oliveira, Martins, and Vítor 2015].

2.5. Lack of marriage and family regulations in constitutions of EU Member States

The constitutions of some countries, especially of Western and Northern Europe, do not contain provisions regarding either the right to marry or found a family. There are no such regulations in France or Finland [Toggenburg 2020], for example. There are also no constitutional provisions concerning marriage in Norway, Sweden or Denmark [ibid.]. Similarly, there are no constitutional provisions on family and marriage in the Kingdom of the Netherlands or the Czech Republic. The Czech Republic grants the protection to parenthood and family, but under the Charter of Fundamental Rights and Freedoms.[31] Malta recognises only the right to respect for private and family life. Family protection and support are regulated by the Civil Code.

CONCLUSIONS

It seems that these deliberations have allowed for reflection on how the right to marry and found a family is construed in national constitutions of EU Member States. An analysis of different constitutional provisions

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[29] The Constitution of Greece (revised 25.11.2019), https://www.hellenicparliament.gr/UserFiles/ f3c70a23-7696-49db-9148-f24dce6a27c8/2019_SYDAGMA_EN_2022_WEB.pdf [accessed: 28.04.2024].

[30] The Constitution of the Republic of Latvia (15.02.1992), https://likumi.lv/ta/en/en/id/57980- the-constitution-of-the-republic-of-latvia [accessed: 28.04.2024].

[31] Article 32(1) of the Constitution of the Czech Republic (16.12.1992), https://www.hrad.cz/en/ czech-republic/constitution-of-the-cr [accessed: 28.04.2024].

concerning marriage and family demonstrates some pattern, mirroring the geographical location of the country in Europe, but also influenced by its history, tradition and culture. Although drawing clear distinctions may not always be possible, it is worth noting that policies and constitutional provisions vary slightly between countries in Western Europe compared to those in Eastern Europe. Additionally, the time when a constitution was adopted in a given country also appears to be significant. With some exceptions, European constitutions can be categorised into "older" ones (adopted before the changes of the 1980s and 1990s) and the so-called "new democracies", i.e. countries that transitioned from Communism and strengthened their democracy by adopting new constitutions. In these constitutions, provisions concerning marriage and family are generally more detailed, and the very concept of marriage is most often associated with the traditional concept of marriage as a union of a man and a woman. Religion has also played a significant role in shaping the concepts of marriage and family in this part of Europe, as well as in Southern European countries.

It is noteworthy that in the last 20 years, there have been new proposals regarding the possibility of recognising same-sex couples as married. While some countries have decided to recognise same-sex marriages in their legal frameworks, only very few have done it at the constitutional level. For instance, Spain has allowed same-sex marriages at the statutory level despite a clear stipulation in the constitution. This trend depends on the geography, but is also shaped by historical and cultural contexts.

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