



THE DEFINITION OF FAMILY IN INTERNATIONAL AND EU LAW

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JEL Category: I11

Abstract

The family is the oldest social group. It can be observed at all the stages of the development of particular societies and in all countries, regardless of their political systems. Therefore it is a natural element of the social structure, defined as the basic unit of social life. Along with socio-cultural changes, it undergoes various transformations. The changes affect the adopted models of family life or intra-family relations. They also leave a mark on the concept of family itself. Its definition and status are determined by factors such as: one's place of residence, being part of a specific social structure (education, professional group, financial situation), and religious affiliation. Another relevant factor is one's political affiliation. Although the family is evolving (e.g. the way we understand it and its functions are changing), it still remains the basic unit within which specific processes take place, such as passing on values, norms, and patterns of behavior. The article aims to present selected international, European, and Polish legal solutions about the definition of the family and some of its features. The interpretation of international standards relating to the family and its members aims to answer the question of whether the concept of the family itself is permanent in the law, or whether it is evolving. The research method used in the paper is the dogmatic and legal method. The article ends with conclusions.

Keywords: family, marriage, man and woman, same-sex relationships.

1 INTRODUCTION

The family is the oldest social group. It can be observed at all the stages of the development of particular societies and in all countries, regardless of their political systems. Therefore, it is a natural element of the social structure, defined as the basic unit of social life (Article 10 of the International Covenant on Economic, Social and Cultural Rights of 1966, ratified by Poland in 1977). Its special role manifests itself in the fact

that it has so far been the only natural environment for human birth and development. It allows both the child and the adult to satisfy their basic needs.

The development of contemporary civilization is a result of:

- the rapid technicization and computerization of societies, regardless of their political systems,
- the development of science, especially medicine and biology,
- the far-reaching emancipation of women.

On the one hand, all the above factors contribute to further development, but on the other, they force

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a conscious need for changes in the way the basic institutions of social life are organized.

Along with socio-cultural changes, the basic unit of social life undergoes various transformations. The changes affect the adopted models of family life or intra-family relations. They also leave a mark on the concept of family itself. Its definition and status are determined by factors such as one's place of residence, being part of a specific social structure (education, occupation, financial situation), religious affiliation, and finally, political sympathies. Although the family is evolving (e.g. the way we understand it and its functions are changing), it still remains the basic unit within which specific processes take place, such as passing on values, norms, and patterns of behavior.

The article aims to review selected international, European, and Polish legal solutions pertaining to the definition of family and some of its features. The interpretation of these regulations will be focused on the concept of family and its selected elements. The analysis of the definition has been carried out on the basis of selected international, European, and Polish regulations. The interpretation of international standards relating to the family and its members aims to answer the question of whether the concept of family itself is legally permanent or whether it is evolving.

The research method used in the paper is the dogmatic and legal method. The article ends with conclusions.

2 ANALYSIS OF SELECTED INTERNATIONAL AND EUROPEAN REGULATIONS

The fundamental legal act providing for the definition of family is the Universal Declaration of Human Rights (UN, 1948). It is the first international document on the protection of human rights the observance of which has been declared by signatory states. At the same time, the provisions of the UDHR are binding upon UN bodies¹ in the performance of their tasks. The significance of the UDHR is manifested in the fact

that its provisions find reflection in numerous international acts and court decisions. The provisions of Articles 12 and 16 are of particular importance. They recognize the need to protect the family through the right to contract a marriage and the right to start a family. This elementary standard for the protection of family rights established by the UDHR attempts to cater to the cultural and religious differences of UN member states. The right to start a family (Machnij, 2013, pp. 82-99) has aptly been differentiated from the obligation to contract a marriage. Pursuant to Article 16 Paragraph 1, the right to start a family in practice means a union of two people, a woman and a man, which entails the right (possibility) to have children. At the same time, it is the state's duty to provide protection to the family, which is formally a natural and basic unit of social life (Article 16 Paragraph 3). Undoubtedly, the wording of Article 16 is closely related to Article 12. The said provision prohibits unjustified interference in one's private, family, and home life. Thus, a linguistic interpretation allows for the conclusion that every human being has the right to protection from such interference.

The UDHR is a non-binding document, thus it does not have its own system for the protection of individual rights. Therefore, it is difficult to pursue one's individual rights by invoking the provisions of the UDHR directly before both international and domestic courts.

However, taking into account its universal and universalist character, it constitutes an ideological standard for regulating the protection of human rights. It exerts an impact on three levels: international, EU, and national.

The rights stipulated in the UDHR are repeated, inter alia, in two international agreements adopted by the United Nations on 16 December 1966:

- the International Covenant on Civil and Political Rights (Journal of Laws of 1977, No. 38, item 167),
- the International Covenant on Economic, Social and Cultural Rights (Journal of Laws of 1977, No. 38, item 169).

¹ The United Nations has six main organs:

- General Assembly,
- Security Council,
- Economic and Social Council,

- Trusteeship Council,
- International Court of Justice,
- Secretariat.

The elements that define the family contained therein constitute part of human rights and are considered an international standard for legal regulation in this area. The two cited documents extend the scope of regulations pertaining to the family by pointing also to the economic and social aspects of family life. The above Covenants are undoubtedly binding, which in practice means that their provisions are implemented by the signatory states.

When it comes to the EU, it should be noted that its regulations extensively cover various aspects of the family, including legal, social, and economic issues. Those include:

- the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950 amended by Protocols No. 3, 5 and 8, and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284),
- the European Social Charter, drawn up in Turin on 18 October 1961 (Journal of Laws of 1999, No. 8, item 67),
- the Revised European Social Charter of 3 May 1996 (Poland acceded the European Social Charter in 1997, but did not ratify the Revised European Social Charter and did not ratify the Additional Protocol to the European Social Charter of 1995 introducing a system of collective complaints),
- the European Convention on the Adoption of Children, drawn up in Strasbourg on 24 April 1967 (Journal of Laws of 1999, No. 99, item 1157),
- the European Convention on the Legal Status of Children Born out of Wedlock, drawn up in Strasbourg on 15 October 1975 (Journal of Laws of 1999, No. 79, item 888),
- the European Convention on the Exercise of Children's Rights, drawn up in Strasbourg on 25 January 1996 (Journal of Laws of 2000, No. 107, item 1128),
- the Council of Europe Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse, drawn up in Lanzarote on 25 October 2007 (Journal of Laws of 2015, item 608),
- the Council of Europe Convention on preventing and combating violence against women and domestic violence, drawn up in

Istanbul on 11 May 2011 - not ratified by Poland - (Journal of Laws of 2015, item 961).

3 FAMILY DEFINITION PROBLEMS

To properly tackle the analyzed issue, it is important to answer the question of what "family" is according to the selected legal provisions. The analysis of the provisions of international law allows for the conclusion that none of those regulations attempts to define the term "family". Given the social, cultural, or religious differences of contemporary societies, this seems to be a plausible approach. The aforementioned acts stipulate that the starting of a family is a result of entering into a marriage (Cf: Barlow, Duncan, James, & Park, 2005, p. 65).

Thus, the question arises whether the concept of "family" in international law refers only to an "institutionalized family" or the so-called natural one. It seems that the right direction has been set in Article 25 Paragraph 2 of the UDHR, which explicitly provides protection to both children coming from institutionalized families and children from natural (out of wedlock) families. This means that entering into a marriage cannot be regarded as a *sine qua non* for the international protection of the family.

The very concept of "family" is difficult to explain. It appears in sciences such as sociology, psychology, and law (Szwed, 2007, pp. 23-40). It can be understood in a variety of ways, e.g.:

- parents and their children,
- a wider group of people sharing a common ancestor (blood bonds),
- people living together.

A provision useful for defining "family" can be found in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which safeguards the right to family life (Cf: Folak, 2015, p. 41) and therefore assumes the existence of a structure called "family". A linguistic interpretation of the provision allows for the conclusion that it does not make the legal status of the family conditional based on its existence:

- a legal relationship confirmed with e.g. a marriage certificate,
- a factual relationship, the functioning of which does not result from a formal legal act.

Hence, the type of relationship cannot be, both legally and practically, a factor discriminating non-formalized relationships. National provisions should not introduce measures aiming at infringing upon or diminishing the status of families that have not been "legally sanctioned".

A teleological interpretation of the provision of Article 8 allows for the conclusion that the "informal family" (Oszkinis, 2014, pp. 193-213) should be protected to the same extent as traditional family members.

Another notion that needs to be analyzed is the so-called "family life" mentioned in Article 8. The meaning of the provision is unambiguous because the "family life" is not an exclusive activity of formalized relationships only. The term may also refer to other actual family ties, i.e. when the members live together out of wedlock. It is commonly assumed that a child born in such a relationship ipso iure becomes part of the basic unit of social life called family.

Another important element to be considered when attempting to define "family" is its permanent nature resulting from the fact of living together. This quality was pointed out in a judgment of the European Court of Human Rights (Judgment of 21 December 2010 in the case of *Anayo v. Germany*, LEX 675439, thesis 1). The Court stated that "the mere biological relationship between the biological parent and the child, in the absence of any other legal or factual elements indicating the existence of a close personal relationship, is not sufficient to fall within the scope of the application of the protection under Article 8". The condition of living together seems to be reasonable, as it constitutes a requirement for recognizing a given relationship as living a "family life" and thus being a family. Other factors that may be referred to deem a relationship sufficiently durable to form genuine "family bonds" include kinship and the nature of the relationship between particular individuals, i.e. mutual interest, attachment, and dependence.

The question that emerges at this point is whether the national law may allow interference in family

life. Such interference, irrespective of the political option of the ruling party, will be allowed only if a provision of a national statute so provides. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms lists the exceptions allowed under the national law:

- state and public security and economic prosperity;
- social needs, e.g. protection of order, health, and morality;
- protection of the rights and freedoms of others.

The condition is that such legal actions be proportionate to the intended purpose.

It should be noted here that the recently adopted UN Human Rights Council resolutions (Resolution of 3rd of June 2015, A/HRC/RES/29/22 and Resolution of 1st of July 2016, A/HRC/32/L.35) emphasize the need to protect the family. The analysis of their provisions allows for the conclusion that they do not introduce a legal definition of the family. At the same time, they point to the fact that the family is a natural and basic social group that has the right to be protected by society and the state. The linguistic interpretation of the above-mentioned Resolutions allows for the conclusion that the family is based on biological or legal ties.

Article 2 Paragraph 2 of the Directive 2004/38/EC of the European Parliament and of the Council² presents a different approach to defining the family. Under its provisions, the family member is the spouse, the partner with whom an EU citizen has entered into a registered partnership, provided that the Member State recognizes the equivalence between such a relationship and a marriage, the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner, and the dependent direct relatives in the ascending line and those of the spouse or partner.

It should be emphasized that the family within the meaning of the above directive is based on biological and legal ties between its members. At

²Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU and their family members to move and reside freely within the territory of the

Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

the same time, the presence of the "recognition of partnerships" clause indicates that the EU does not have the competence to shape the concept of family (Slany, 2002, pp. 135–136).

4 DEFINITION OF FAMILY IN POLISH LAW

The analysis of the provisions of Polish law should start from the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483). The issue of family and its definition appears already in the Preamble and provisions such as Article 41 Paragraph 2, Article 233 Paragraph 1, Article 18 and Article 71, which stipulate the special status of the family and confirm that it is under the protection and care of the Republic of Poland. Carrying out its policy, the state should take into account the family's well-being. Families in a difficult financial and social situation, especially those with many children (Piotrowski, 1981, pp. 12-21), or those with only one parent, have the right to special assistance from public authorities (Article 71 of the Polish Constitution). As interpreted by the Constitutional Tribunal, these provisions require the state to undertake actions aimed at strengthening the ties between family members, especially the ties between parents and children and between spouses. In the opinion of the Constitutional Tribunal, these provisions oblige the state authorities to take positive actions, i.e. the ones that strengthen the ties between the family members rather than weaken them. It does not mean, however, that the Constitution favors persons who have families over persons who do not (singles) (Judgment of 18 May 2005, K 16/04). The constitutionally preferred vision of the family is "a durable relationship between a man and a woman, oriented towards motherhood and responsible parenthood" (Zubik, 2007, pp. 26-43).

The constitutional imperative to protect motherhood and parenthood in the context of the marital relationship between a woman and a man creates conditions for the preference of protecting the best interests of the child. For the Catholic Church, this is a natural state of affairs justified by objective biological conditions (Paździor, 2007, p. 184). The importance of the latter was noticed by the Constitutional Tribunal, according to whom the possibility to bring up a child in a natural family, where the relationship between parents and

children is of biological nature, shall be a protected value (The judgment of the Constitutional Tribunal of 28 April 2003, K 18/02, OTK ZU No. 4/A/2003, item 32; The judgment of the Constitutional Tribunal of 26 November 2013, Journal of Laws of 2013, item 1439).

The Constitution of the Republic of Poland confirms the international and European law guarantees which allow to protect the family and to strengthen its positive role in society.

The perception of the family in the Polish legal system has been influenced by the Supreme Court's opinion on the parliamentary draft act on the civil partnership agreement (SEJM, 2012). The Court pointed out that "it is constitutionally preferable to form a family through marriage, understood as a permanent relationship between a man and a woman, oriented towards motherhood and responsible parenthood."

The constitutional legislator made an axiological choice to guarantee the "traditional" normative model of marriage and family (Supreme Court, Opinion on the draft law "on civil partnership agreement" presented by the parliamentary club "Platforma Obywatelska" of 17 October 2012, BSA I - 021 - 345/12).

5 SAME-SEX FAMILY STATUS

Recently we have been witnessing rapid changes in social attitudes towards same-sex couples, which in some countries has resulted in recognizing such couple's right to legalize their relationships and form a family. It can be said this tendency is growing (Cf: Smoczyński, 2013, p. 73).

It should be emphasized that social, economic, and family aspects justify giving the cohabitation of homosexual persons a legal form. Thus, the protection of individual rights provided for in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms can be said to have changed radically with respect to marriage and family. However, same-sex couples do not fall under the category of "family life" provided for in Article 12 of the said Convention.

The extension of the list of persons allowed to form a "family" depends on the decisions of the European Court of Human Rights. The above-mentioned interpretation of the notion of "family life" does not in practice oblige the state to

consider "same-sex relationships" equivalent to "marriages" and provide them with protection under the said Convention. In this respect, particular states have considerable freedom of regulation. The European Court of Human Rights has pointed out that the legislative authorities of individual states have a mandate to assess the social needs of this kind. The institution of marriage itself has deeply rooted social and cultural connotations, which shows significant differences between societies. Thus, it is at the discretion of individual states to assess the legislative need to shape the legal situation of same-sex relationships. In its recent judgments, the European Court of Human Rights has pointed to the narrowing margin of the states' discretion to recognize the need to institutionalize same-sex relationships (Vallianatos and others v. Greece - Judgment of 7 November 2013, applications no. 29381/09 and 32684/09 and Oliari and others v. Italy - Judgment of 21 July 2015, applications no. 18766/11 and 36030/11).

The states have not been obliged to grant parental rights to partners in respect to their partners' children. The granting of parental rights to transsexuals as well as the way of regulating the relationship between a child conceived through artificial insemination and a person acting as biological father (Judgment of 22 April 1997 in the case of X., Y. and Z. v. Great Britain, application no. 21830/93) have also been left to the discretion of the signatory states.

6 CONCLUSIONS

There is no legal definition of "family" in international, European, and Polish law, which should be perceived positively. The lack of an unambiguous definition makes it possible for the concept of family to evolve along with ever-developing societies. Both the formal and the informal family remain a concern for international and European law, which protects them as basic

units of social life and sets standards for the protection of the rights and obligations of individual family members. In Polish law, the family is fully protected only after a marriage has been concluded.

However, the so-called welfare regulations at the international and EU level cover also informal families in matters such as e.g. social assistance for one-parent families or children brought up in informal families.

Due to the changing attitudes towards entering into a marriage, a considerable number of individuals living as singles, and the growing divorce rate, the social acceptance of the new forms of a family becomes greater and greater. In countries characterized by the strong position of the Catholic Church, the traditional family model, the one in line with the Convention for the Protection of Human Rights and Fundamental Freedoms, is deeply rooted in social life and awareness. Nevertheless, in the era of rapid social changes, the definition of "family" becomes less and less clear-cut. The roles assigned to spouses and partners are undergoing significant transformations both in formal and informal relationships.

The tendency towards the partnership model is visible not only in preferences but also in declarations about the actual division of roles. Yet, given the rigidity of international law regulations, it cannot be assumed that the institution of the family is fading away.

All things considered, it is at the discretion of individual states to assess the legislative need to shape the legal situation of same-sex relationships. One can currently observe the emergence of European consensus regarding the legal recognition of same-sex relationships. Therefore, the contemporary family is undoubtedly evolving.

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Received for publication: 07.09.2020
Revision received: 06.10.2020
Accepted for publication: 30.12.2020

How to cite this article?

Style – APA Sixth Edition:

Stych, M. (2021, January 15). The definition of family in international and EU law. (Z. Cekerevac, Ed.) *MEST Journal*, 9(1), 192-198. doi:10.12709/mest.09.09.01.22

Style – Chicago Sixteenth Edition:

Stych, Marek. 2021. "The definition of family in international and EU law." Edited by Zoran Cekerevac. *MEST Journal (MESTE)* 9 (1): 192-198. doi:10.12709/mest.09.09.01.22.

Style – GOST Name Sort:

Stych Marek The definition of family in international and EU law [Journal] // MEST Journal / ed. Cekerevac Zoran. - Belgrade – Toronto : MESTE, January 15, 2021. - 1 : Vol. 9. - pp. 192-198.

Style – Harvard Anglia:

Stych, M., 2021. The definition of family in international and EU law. *MEST Journal*, 15 January, 9(1), pp. 192-198.

Style – ISO 690 Numerical Reference:

The definition of family in international and EU law. **Stych, Marek**. [ed.] Zoran Cekerevac. 1, Belgrade – Toronto : MESTE, January 15, 2021, MEST Journal, Vol. 9, pp. 192-198