

PAWEŁ SOBCZYK*

When the Polish Constitution is silent: axiological and constitutional basis for the application of ART**

ABSTRACT: The Constitution of the Republic of Poland of 2 April 1997 does not contain a provision referring explicitly to “assisted reproductive technologies” (ART). However, this does not imply the “silence of the Constitution”. In contrast, the recognition of inherent human dignity as the source of freedoms and rights and of freedom and equality as fundamental values and principles underpinning an individual’s status in the state obliges public authorities to respect and protect individuals and citizens when assisted reproductive technologies (ARTs) are applied. In addition to these values and principles, constitutional provisions regarding the protection of human life (Article 38), privacy (Article 47), and health (Article 68) are significant in the context of ART. These provisions establish a framework and point of reference for the legislature and public authorities that apply the law in the context of ART.

KEYWORDS: assisted reproductive technology (ART), constitution, embryo, human rights, and life protection.

1. Introduction

The Constitution of the Republic of Poland of 2 April 1997¹ does not include a provision that directly addresses assisted reproduction technologies.² There are several reasons for this, two of which must be considered as being key. First, work on the new Polish fundamental law formally began after the first partially free parliamentary elections were held

* Professor, University of Opole, Poland. <https://orcid.org/0000-0003-1754-6096>, pawel.sobczyk@icloud.com.

** The research and preparation of this study was supported by the Central European Academy.

¹ The Constitution of the Republic of Poland of April 2, 1997, Dz. U. z 1997 r. Nr 78, poz. 483, z 2001 r. Nr 28, poz. 319, z 2006 r. Nr 200, poz. 1471, z 2009 r., Nr 114, poz. 946.

² Królikowski et. al., 2007.

on 4 June 1989³ and concluded with adopting the Constitution of the Republic of Poland only eight years later. Mentioning these dates is not incidental, as in the 1990s, assisted reproduction technologies (except in vitro fertilisation) were not a subject of public debate, and, consequently, were not part of constitutional work.⁴ Second, because of the substantive scope of the Constitution as the supreme law in a given state and the level of generality characteristic of such a high-ranking normative act, it is difficult to regard assisted reproduction as a constitutional matter, even though there are exceptions in this regard, particularly after 2000.⁵

Should the absence of constitutional provisions directly addressing assisted reproduction technologies be equated with “silence of the Constitution”? Yes and no. Yes, because while reading the Constitution of the Republic of Poland, where the term “assisted reproduction technologies”⁶ does not appear, one can, through a literal interpretation, conclude that the “Constitution is silent” on this matter. No, because by applying a teleological and functional interpretation of constitutional provisions, particularly those concerning human dignity – which is the source of freedoms and rights – as well as selected guarantees related to the individual’s status within the state, and considering the place and role of the Constitution within the legal system, one can argue that “the Constitution does not remain silent.”⁷

Recognising inherent human dignity as the source of freedoms and rights, as well as a subjective right (Article 30 of the Constitution), serves as the starting point for analyses of provisions related to Assisted Reproductive Technologies (ART). This is because the obligation to respect human dignity pertains, among other things, to one’s biological identity, which is only marginally addressed in provisions concerning the protection of human

³ The 10th-term Sejm, elected in the elections of 4 June 1989, established its Constitutional Commission, while the 1st-term Senate created its own commission. The work of both commissions resulted in the development of two different draft constitutions by the end of their shortened term, i.e., by 1991. These drafts played a limited role in the further constitutional work. For more on this subject, refer to studies on constitutional work in Poland, especially those authored by W. Osiatyński, such as Chruściak and Osiatyński, 2001.

⁴ Abortion was a significantly more frequent subject of dispute in the Polish public debate of the 1990s.

⁵ By way of example, one can refer to the Constitution of Serbia.

⁶ Smyczyński, 1996.

⁷ Bosek, 2009, pp. 37–61.

life (Article 38 of the Constitution),⁸ private and family life (Article 47 of the Constitution), and health (Article 68 of the Constitution). Indirectly, the axiological and constitutional foundations for applying assisted reproduction technologies can also be inferred from the principles of freedom (Article 31 of the Constitution) and equality, along with the prohibition of discrimination associated with it (Article 32 of the Constitution).

Therefore, despite the understandable “silence of the Constitution” on the issue of assisted reproduction technologies, the Polish fundamental law – as confirmed by the jurisprudence, particularly of the Constitutional Tribunal, and legal doctrine – contains significant provisions related to the issue at hand.⁹

Given the above, this study decodes selected constitutional provisions which, while not explicitly addressing assisted reproduction technologies, are relevant because of the axiological and normative significance of constitutional principles, freedoms, and rights. These provisions play a critical role in the drafting of sub-constitutional regulations and their application.

2. Legal Definition of "Assisted Reproductive Technologies"

At the outset, it should be noted that the use of assisted reproductive technologies in Poland is regulated at the sub-constitutional level, primarily by the Act of 25 June 2015 on Infertility Treatment.¹⁰ This law addresses both the medical and legal aspects of assisted reproduction by specifying who can access them, which procedures are permitted, and how these procedures are performed.¹¹

Polish law employs the term “medically assisted procreation procedure”, which, according to Article 2(1) point (21) of the Act, is defined as “activities aimed at obtaining and applying reproductive cells or embryos intra- or extracorporeally in a recipient for procreation; it includes direct and

⁸ Garlicki, 2016, pp. 42–43.

⁹ Kuczyński, 2009, pp. 251–258.

¹⁰ Dz. U. 2015 poz. 1087 (t.j. Dz. U. 2020 poz. 442). It is worth noting that in Poland, a discussion has been ongoing for many years regarding whether assisted reproductive technologies, such as the commonly used in vitro fertilisation, can be considered an infertility treatment. From both a linguistic and logical standpoint, the use of such technologies does not cure infertility but rather helps achieve the goal of fertilisation and, as a result, the birth of a child.

¹¹ Haberko, 2016.

indirect use of reproductive cells and embryos”. In other words, ARTs are medical actions designed to achieve pregnancy in cases of diagnosed infertility using specialised methods and technologies.

The statutory definition, as per Article 9, in conjunction with Article 5(1) point (5) of the Act, encompasses several procedures, including in vitro fertilisation, intrauterine insemination, and micro-manipulative technologies.¹² The first procedure, in vitro fertilisation (IVF), is a technique in which an egg is fertilised outside a woman’s body and the resulting embryo is then transferred to the uterus. In contrast, intrauterine insemination (IUI) involves the introduction of sperm into the uterine cavity to increase the chances of fertilisation during the natural menstrual cycle or after hormonal stimulation. Micro-manipulative technologies, such as intracytoplasmic sperm injection (ICSI), involve the direct injection of a sperm cell into an egg. In the Polish legal system, assisted reproductive technologies can only be used in cases of infertility diagnosed in heterosexual couples who meet specific legal and medical criteria.¹³

According to the Position of the Polish Gynaecological Society¹⁴ on ARTs in infertility treatment, ‘Assisted reproductive technologies are various therapeutic methods aimed at achieving pregnancy in a woman through medical intervention in the natural process of procreation. This intervention involves bypassing or modifying one or more stages of reproduction.’¹⁵ ART methods include IUI, poly-ovulation achieved through controlled hormonal hyperstimulation followed by follicular puncture and egg retrieval, gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), classical IVF, and variations of IVF with micro-insemination (artificial extracorporeal fertilisation).¹⁶

As noted in the literature on the subject, ARTs can exist in two forms: one that preserves the genetic bond between the parents and the child, and the other that alters the genetic bond between them. In the version that preserves the genetic bond, the female and male gametes used in the medical procedure come from individuals who raise offspring resulting from the procedure. In this case, biological parenthood was identical to social

¹² Woźniak, 2017, pp. 66–83; Łukasiewicz, 2021, pp. 226–241.

¹³ Boratyńska, 2017, pp. 168–182.

¹⁴ Currently: The Polish Society of Gynaecologists and Obstetricians.

¹⁵ Quoted from: A. Dowbór-Dzwonka, B. Cegła, M. Filanowicz, E. Szymkiewicz, *Techniki wspomaganego rozwoju a naprotechnologia*, “Zdrowie Publiczne” 3(122) 2021, s. 323 [322-328].

¹⁶ Smyczyński, 1996; Radwan, 2003.

parenthood. In the version that alters the genetic bond, the genetic connection between the offspring and at least one parent changes.¹⁷

3. Constitutional Principles Relating to ARTs

3.1. *The Principle of Dignity*

Human dignity, as referred to in Article 30 of the Constitution, represents a fundamental value and principle within the Polish constitutional and legal order, playing a key role in the context of ARTs. The constitutional framers defined dignity as inherent, inalienable, and inviolable, and obligated public authorities to respect and protect it.¹⁸ Moreover, human dignity has been recognised as the source of freedom and rights for individuals and citizens, including those not explicitly articulated in the Constitution of Poland. This means that even if the Constitution does not specify a particular right or freedom in a given field, the necessity to respect and protect human dignity persists and can be implemented directly under Article 30.¹⁹

Such an approach to human dignity, rooted in the Constitution's provisions, has led legal scholars, including Piotr Tuleja, to treat dignity as a “complementary category.”²⁰ This category recognises human dignity as an independent individual right with a standalone legal significance. Setting aside doctrinal disputes over whether human dignity can be treated as a subjective right based on constitutional work and the language of the Polish Constitution, constitutional jurisprudence and parts of legal doctrine regard dignity as a right with a subjective nature.²¹

¹⁷ Dowbór-Dzwonka et. al., 2021, pp. 322–328.

¹⁸ Article 30 of the Constitution of the Republic of Poland: “The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.”

¹⁹ Cf. The Judgment of the Constitutional Tribunal of 25.02.2002, SK 29/01, The Judgment of the Constitutional Tribunal of 05.03.2003, K 7/01.

²⁰ Tuleja, 2003, pp. 112–126.

²¹ As noted by L. Garlicki, the following arguments support this position: ‘1) the linguistic formulation of Article 30, particularly the directive to ‘respect and protect dignity’; 2) the systematic structure of the Constitution, as if dignity were intended to be treated solely as a constitutional principle, it would have been included in Chapter I rather than Chapter II [...]; 3) the wording of Article 233(1), which lists human dignity as one of the freedoms and rights of individuals [...]; 4) the need to ensure proper protection of dignity—this is possible only if dignity imposes specific obligations on its addressees, and every individual is entitled to legal measures to enforce those obligations. [...]’ Garlicki, 2016, p. 41.

The doctrine considers the subject of the right to dignity to guarantee every person the opportunity to autonomously realise their personality, while also ensuring that they are not reduced to an object of others' actions or merely an instrument for achieving others' goals. Due to the high level of abstraction inherent in this understanding of dignity, constitutional practice often applies the concept of human dignity “in connection with” or “in the context of” specific freedoms or rights. This approach to dignity as a subjective right has allowed the identification of several relationships between dignity and human freedoms or rights. However, given the highly detailed regulations on human freedom, rights, and obligations in the Polish Constitution, this approach can only be applied to exceptional cases. “Textbook examples” include issues, such as the protection of human life, human biological identity, physical integrity, intellectual integrity, privacy, and material living conditions.²²

Concerning these ARTs, the necessity to respect and protect human dignity is emphasised at the legal, ethical (bioethical), and medical levels, as it encompasses respect for the integrity and autonomy of individuals undergoing ART procedures, the protection of embryos, and the ethical aspects of the procreation process.²³

Given this, the key aspects of respecting and protecting human dignity in the use of assisted reproductive technologies should include autonomy and the right to make decisions regarding the use of these technologies, the protection of embryos, the prohibition of surrogacy, the prohibition of commercialisation of assisted reproductive technologies, and the equal treatment of children conceived through ART (which is related to the principle of equality and non-discrimination, as discussed later).²⁴

The protection of human dignity requires respect for patients' autonomy in choosing treatment methods.²⁵ Every individual utilising ARTs must ensure the ability to provide informed consent for procedures and receive full information about the potential consequences. Autonomy is also an expression of human dignity as it allows patients to consciously plan their personal, marital, and familial lives.²⁶ In this context, the wording of Article 18 of the Constitution is particularly significant, as it states:

²² Among others, more on this topic was written by Baładynowicz, 2024.

²³ Niżnik-Mucha, 2021, pp. 31–52.

²⁴ Ryłski, 2020, pp. 123–162.

²⁵ Article 30 of the Constitution of the Republic of Poland.

²⁶ Gałązka, 2010, pp. 98–109.

‘Marriage as a union between a man and a woman, family, motherhood, and parenthood are under the protection and care of the Republic of Poland.’²⁷

The aspect of respecting and protecting human dignity in the application of ARTs is linked to another constitutional principle, freedom, as mentioned in Article 31 of the Constitution. The freedom of the mother, father, and parents to decide on the use of ARTs should be respected, but it must also consider the dignity of the child conceived through such methods and their best interests, which will be discussed in the next section.

Embryo protection is the second aspect of respecting and protecting human dignity in the application of ARTs.²⁸ The Act on Infertility Treatment stipulates that embryos should be protected from destruction and unethical use, reflecting the protection of human dignity from the earliest stages of development. Polish regulations include, among other provisions, limitations on the number of embryos created and a prohibition on selection based on non-medical characteristics to respect potential human life.²⁹

The bans on surrogacy and commercialisation of assisted reproductive technologies are two additional (negative) aspects of respecting and protecting human dignity in this context. In Poland, surrogacy is prohibited, reflecting the belief that this practice may lead to the objectification of a woman’s body and the child.³⁰ This reasoning is based on the conviction that hiring a woman’s body to bear a child for a third party could violate the dignity of both the woman and the child. The Polish Act on Infertility Treatment mandates that processes related to the donation of reproductive cells and storage of embryos must be conducted ethically and without material gain. The commercialisation of assisted reproduction is viewed as a potential threat to human dignity, because it may lead to the treatment of human cells and embryos as commodities.³¹ Therefore, Article 28(1) of the Act states, ‘The sale, purchase, or intermediation in the paid sale or purchase of reproductive cells or embryos is prohibited.’ Furthermore, Article 28(2) specifies that ‘no payment, financial benefit, or personal gain may be requested or accepted for reproductive cells donated by a donor or for the embryos used.’³²

²⁷ Article 18 of the Constitution of the Republic of Poland.

²⁸ Nawrot, 2014, pp. 647–662.

²⁹ Czajeczka, 2016, pp. 20–32.

³⁰ Witczak-Bruś, 2021.

³¹ Rylski, 2020, pp. 123–162.

³² Wilejczyk, 2017, pp. 69–80.

Respecting and protecting human dignity through the application of assisted reproductive technologies also requires the equal treatment of children conceived through such methods. Human dignity and equality obligate public authorities to ensure that children conceived via ART are granted the same legal and social status as naturally conceived children. This primarily means that lawmakers are obligated to shape the content of regulations to prevent the stigmatisation of children born through IVF or other medical methods.³³

3.2. The Principle of Freedom

The second constitutional principle underpinning the status of an individual in the state is the principle of freedom, expressed primarily in Article 31 of the Constitution.³⁴ According to the assumptions adopted by Polish constitutional frameworks, the principle of freedom can be analysed considering its positive and negative aspects.³⁵

Freedom encompasses an individual's right to decide whether to have a child. In situations where natural conception is not possible, the realisation of this right may entail the need to use ARTs to exercise it. As mentioned above, respecting and protecting human dignity requires respecting the autonomy of patients in choosing their treatment methods, including the freedom to decide on the use of ARTs.³⁶

Considering the negative aspects of freedom, one must consider the limitations of exercising freedom provided by the Polish constitutional framers in Article 31(3) of the Constitution.³⁷ In this context, particular importance is placed on restrictions on the freedom necessary to protect other constitutional values, such as the protection of life, public order (public interest), and principles of public morality.³⁸ Consequently, legal

³³ Szymanek, 2021, pp. 9–28.

³⁴ It follows from this provision that: '1. Freedom of the person shall receive legal protection. 2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law. 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.'

³⁵ Wiśniewski, 1997, p. 53.

³⁶ Kobińska, 2009, pp. 118–132.

³⁷ Piechowiak, 2009, pp. 55–78.

³⁸ Haberko and Załucki, 2023, pp. 33–57.

regulations have been implemented to protect embryos. In Poland, as in many other countries, the number of embryos created or stored is legally regulated, as are the issues related to the donation of reproductive cells. Thus, individual freedom in the use of ARTs is subject to legal limitations owing to the value of human life. Moreover, individual freedom in utilising assisted reproductive technologies may be restricted to protect the public interest, such as through regulations on gamete donation or measures to counteract commercial practices.³⁹

3.3. The Principle of Equality

The constitutional status of individuals in Poland is based on a triad of values/principles, including dignity, freedom, and equality.⁴⁰ As mentioned above, Article 32 of the Constitution ensures equality before the law and prohibits discrimination.⁴¹ Therefore, it can be argued that the lack of access to ARTs for individuals affected by infertility could be considered a form of discrimination in accessing healthcare services.⁴²

Ensuring equality under and before the law in the context of ARTs relates to both access to these methods and equal treatment of children conceived through such procedures.⁴³

Article 20 of the Act on Infertility Treatment of 25 June 2015 specifies, among other things, who may use assisted reproductive methods.⁴⁴ These include heterosexual couples in marital or partnership relationships, and individuals with medically confirmed infertility.⁴⁵ The restricted access to same-sex couples and single individuals raises controversy in the context of the principle of equality. Polish law stipulates that only heterosexual couples can access IVF, implying that other social groups are excluded from the use of these technologies to treat infertility. For some, this constitutes a violation of the principles of equality and

³⁹ Boratyńska, 2017, pp. 168–182.

⁴⁰ This refers to Articles 30, 31, and 32 of the Constitution of the Republic of Poland.

⁴¹ Article 18 of the Constitution of the Republic of Poland: ‘1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.’

⁴² Pawlikowski, 2019, pp. 41–82.

⁴³ Boratyńska, 2017, pp. 168–182.

⁴⁴ Szymańska vel. Sęk, 2017, pp. 93–103; Nauka, 2016, pp. 98–121.

⁴⁵ Szymańska vel Szymanek, 2017, pp. 93–103.

discrimination in access to healthcare.⁴⁶ Advocates of this perspective argue that the prohibition of discrimination requires every individual who qualifies medically for ARTs to have equal access to these methods.⁴⁷

The constitutional principle of equality also implies equal treatment of children conceived naturally and those conceived through ARTs. In the Polish legal system, children conceived through ART are guaranteed the same rights as those conceived naturally. Similarly, parents who have undergone assisted reproductive technologies are legally obliged to care for their children in the same way as those whose children were conceived without these methods. This aspect of equality is crucial for counteracting any form of discrimination against children based on their conceptions. These children are entitled to the same inheritance, legal protection, and family rights as all other citizens, ensuring full respect for their dignity and equality before the law.⁴⁸

The prohibition of discrimination based on the method of infertility treatment includes a ban on stigmatisation by public or private institutions against couples or individuals who choose IVF. It also protects against discrimination in workplaces, educational institutions, and other areas of public life, ensuring that individuals using such technologies are treated equally with those who have chosen other treatment methods or have not used these technologies.⁴⁹

A separate and highly controversial legal and social issue that is difficult to implement in practice ensures equality in financial support and public programmes related to ART.⁵⁰ Poland's legal situation depends on the political decisions of the parliamentary majority. Polish regulations provide financial support only for selected groups, which in practice may limit the equality of access to ARTs. Government or local programmes do not always cover everyone interested in using these methods, potentially resulting in situations in which only individuals with higher incomes can afford such treatments. This raises concerns regarding economic inequality in access to healthcare.⁵¹

⁴⁶ Kobińska, 2009, pp. 118–132.

⁴⁷ Bączyk-Rozwadowska, 2017, pp. 10–36.

⁴⁸ Zieliński, 1992, pp. 3–11; Mendecka, 2023, pp. 82–96.

⁴⁹ Czajeczka, 2016, pp. 20–32.

⁵⁰ Boratyńska, 2017, pp. 168–182.

⁵¹ Haberko, 2016.

In conclusion, the prohibition of discrimination against individuals using ARTs is not only a matter of equal rights but also a necessity of protection from stigmatisation and inequality in access to treatment. Although Polish law guarantees equal rights to children conceived through these methods, restrictions on access to procedures for certain groups and economic barriers pose challenges that may violate the principles of equality.

4. Constitutional Freedoms and Rights Relating to ARTs

4.1. Legal Protection of Life

Article 38 of the Constitution guarantees legal protection of life for everyone.⁵² Since the debate on the content of the Constitution (especially between 1993 and 1997), this provision has sparked discussion and controversies, primarily because of the undefined temporal scope of the protection of human life.⁵³ The framers did not specify whether the Republic of Poland ensured the legal protection of life from the moment of conception to natural death. This ambiguity has implications not only for abortion but also for the permissibility and principles of using ARTs⁵⁴. Such technologies in Poland are closely tied to the legal protection of life, particularly human life, in its earliest stages of development. The Polish legal system, based on the Constitution and the 2015 Act on Infertility Treatment, considers the protection of life to be of fundamental value, influencing the regulations governing procedures such as IVF and IUI.⁵⁵ These regulations aim to ensure respect for the dignity of human life, including that of embryos, and to set limits on the creation and storage of embryos.⁵⁶

Constitutional frameworks did not aim to precisely define guarantees regarding legal protection of human life in relation to ART. The key aspects of legal life protection in the context of assisted reproductive technologies are specified in the aforementioned act, as referenced in Article 4.⁵⁷ For instance, the 2015 Act on Infertility Treatment introduced limitations on the

⁵² Article 38 of the Constitution of the Republic of Poland: “The Republic of Poland shall ensure the legal protection of the life of every human being.”

⁵³ Piotrowski, 2021, pp. 62–80.

⁵⁴ Soniewicka, 2021, pp. 6–23.

⁵⁵ Rylski, 2020, pp. 123–162.

⁵⁶ Łakomiec, 2014, pp. 54–64.

⁵⁷ Domańska and Rojszczak, 2021, pp. 132–150.

number of embryos that can be created using in vitro procedures.⁵⁸ As a rule, no more than six embryos may be created in one IVF cycle, although this number may be higher in exceptional cases, as justified by medical circumstances. This regulation seeks to reduce the risk of surplus embryos that might otherwise be destroyed or left unused, which is considered contrary to the legal protection of life in Poland.⁵⁹ Surplus embryos that are not immediately used after fertilisation must be stored in embryo banks, where they can be frozen for up to 20 years. This storage method also reflects the legal protection of life, as it allows for the future use of embryos without destroying them. If parents choose not to reuse embryos, they may decide to donate them for prenatal adoption by other couples, which aligns with the principle of life protection.

Current regulations prohibit the selection of embryos based on characteristics, such as sex or other genetic traits, except in cases where there is a high risk of transmission of a genetic disease. This ban on eugenic selection protects embryos from being treated as objects and prevents their destruction based on preferences regarding their traits, contradicting the principle of life protection. The purpose of this regulation was to avoid a selective approach that could undermine the dignity and legal protection of every embryo.⁶⁰

Constitutional guarantees of human life protection also prohibit the destruction of embryos and treat them as a form of human life subject to protection. Embryos that are not used in a given treatment cycle may be stored for future use; however, their destruction is considered unacceptable under the life protection principles. These regulations are based on recognising embryos at an early stage of human development and aim to ensure protection at every stage of existence.⁶¹

Another consequence of respecting and protecting human dignity (as discussed earlier) and protecting life is the prohibition of surrogacy, that is, the renting of a woman to bear a child for another couple or individual. In this context, the legal protection of life encompasses safeguarding against the potential commercialisation of embryos and prenatal life, which could compromise their dignity and treat them as intangible goods.⁶²

⁵⁸ Niżnik-Mucha, 2021, pp. 31–52.

⁵⁹ Nawrot, 2014, pp. 647–662.

⁶⁰ Woźniak, 2017, pp. 66–83; Bączyk-Rozwadowska, 2017, pp. 10–36.

⁶¹ Gałęska-Śliwka, 2021, pp. 78–114.

⁶² Mostowik 2019.

In conclusion, the human embryo, as an early form of human life, deserves legal protection under Article 38 of the Constitution. Restrictions on the number of embryos, prohibition of their destruction, and storage in banks aim to ensure that ARTs align with the constitutional principles of life protection.

4.2. The Right to Protection of Private Life

According to Article 47 of the Constitution, everyone is guaranteed the right to protect their private and family life, honour, reputation, and the right to make decisions about their personal lives.⁶³ In the context of ARTs, the legal protection of privacy, linked to the constitutional principle of freedom, manifests in the right of parents to decide on having children as well as in the right of parents facing difficulties with natural conceptions to decide on the use of ARTs. The conscious decision to have children is undoubtedly an element of both personal and family lives.⁶⁴

It is worth noting that Polish constitutional standards for the right to privacy are modelled on international legal standards, primarily the European Convention on Human Rights.⁶⁵ The right to privacy encompasses various issues related to the application of ARTs, including the rights of patients, children conceived using ART, and entities involved in these methods (infertility treatment centres).

First, the right to privacy applies to individuals who decide to use ARTs. As an element of private and family life, this decision should receive special legal protection. Patients using assisted reproductive methods have the right to protect their personal data, particularly sensitive information related to their reproductive health.⁶⁶ Medical documentation, test results, and all information regarding ART procedures must be kept confidential and cannot be disclosed to third parties without the explicit consent of the patients.⁶⁷ The law also protects against unauthorised access to patient data

⁶³ Article 47 of the Constitution of the Republic of Poland: “Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.”

⁶⁴ Domańska and Rojszczak, 2021, pp. 132–150.

⁶⁵ The Convention for the Protection of Human Rights and Fundamental Freedoms, drafted in Rome on November 4, 1950, subsequently amended by Protocols No. 3, 5, and 8, and supplemented by Protocol No. 2, published in the Journal of Laws of 1993, No. 61, item 284. This primarily refers to Article 8 of the Convention.

⁶⁶ Łuków and Wrześniewska-Wal, 2008, pp. 5–25.

⁶⁷ Łakomiec, 2014, pp. 54–64.

by third parties, which, in practice, means that medical personnel are obliged to maintain patient confidentiality.

Constitutionally guaranteed privacy rights protect the anonymity of gamete donors and recipients. In the Polish legal system, gamete donations (eggs and sperm) are conducted anonymously to safeguard the privacy of both donors and recipients. This means that donors cannot learn the recipient of their reproductive cells, and recipients cannot obtain information about the donor's identity. A more complex ethical and legal issue arises concerning the relationship between the donor's right to privacy and the child's right to identity,⁶⁸ which includes information about the donor's origins. Currently, Polish law appears to prioritise the donor's right to privacy at the expense of the child's rights.⁶⁹

The right to privacy also applies to children conceived through ARTs. This means that the manner of their conception should not be publicly disclosed or used as a basis for stigmatisation, aligning with the previously discussed respect and protection of human dignity and equality. Official documents and other registries cannot contain information indicating that a child was conceived using ARTs, aiming to protect their right to privacy and prevent any form of discrimination.⁷⁰

The third group, relevant to privacy rights, includes infertility treatment centres. These entities are required to store patient data following data protection regulations (including General Data Protection Regulations, GDPR).⁷¹ This means that patients must consent to the processing of their data and medical centres must ensure adequate data security. Patients also have the right to access their medical data and request deletion or restriction of processing after the completion of the procedure. In this regard, it is evident that the right to personal data protection, constitutionally affirmed in Article 51 of the Polish Constitution, is an extension of the right to privacy.⁷²

⁶⁸ Bieszczad 2019.

⁶⁹ Łakomiec, 2014, pp. 54–64.

⁷⁰ Domańska and Rojszczak, 2021, pp. 132–150.

⁷¹ Domańska and Rojszczak, 2021, pp. 132–150.

⁷² Sarnecki, 2016.

4.3. The Right to Health Protection

Article 68(1) of the Constitution of the Republic of Poland guarantees everyone the right to health protection.⁷³ Article 68(3) states that public authorities are obligated to provide special healthcare to children, pregnant women, and persons with disabilities.⁷⁴ Although the Polish constitutional framework does not explicitly mention infertility or ARTs, it can be argued that the use of such technologies is one way to realise the right to health protection, particularly in the context of treating infertility.⁷⁵ Analysing the constitutional provision that establishes the right to health protection highlights several aspects of this right that are significant for the application of ARTs in Poland.

Access to ARTs can be considered an element of the right to health protection.⁷⁶ According to the 2015 Act on Infertility Treatment, heterosexual couples diagnosed with infertility can undergo methods such as IVF, insemination, and other medical procedures. This right includes access to the most advanced treatment methods and reflects the right to protect reproductive health. Consequently, individuals struggling with infertility have the right to support and treat themselves using the best available medical technologies.⁷⁷ As part of the right to health protection, patients have the right to receive comprehensive information about available infertility treatment methods, the risks associated with the procedures, and their effectiveness. Clinics specialising in ARTs are obligated to provide patients with all necessary information to enable them to make informed treatment decisions. Informed consent based on comprehensive medical and

⁷³ Article 68 of the Constitution of the Republic of Poland: '1. Everyone shall have the right to have his health protected. 2. Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute. 3. Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age. 4. Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment. 5. Public authorities shall support the development of physical culture, particularly amongst children and young persons.'

⁷⁴ Wołoszyn-Cichocka, 2017, pp. 225–242.

⁷⁵ It should be noted, however, that the extent to which assisted reproductive technologies, such as in vitro fertilisation, "treat" infertility is a matter of debate. This issue goes beyond the scope of this study.

⁷⁶ Gałązka, 2000, pp. 63–74.

⁷⁷ Boratyńska 2017, pp. 168–182

psychological knowledge is the foundation of ethical and lawful treatment, which is consistent with the right to health protection.⁷⁸

The right to health protection also requires all assisted reproductive procedures to be performed per the highest medical standards. In Poland, clinics specialising in infertility treatment must meet stringent requirements to ensure the safety and effectiveness of the procedures. The application of such standards is designed to protect the physical and mental health of patients, minimise the risk of complications, and maximise the efficiency of procedures.⁷⁹

The constitutional provision (Article 68(3)) obligates public authorities to provide special healthcare, including for children. For children conceived using assisted reproductive technologies, this refers to the right to appropriate health support at every stage of life. This provision requires the provision of healthcare, regardless of the method of conception, in line with the principle of equality in access to medical services and the prohibition of discrimination.⁸⁰

A particularly delicate and controversial issue from ethical and legal perspectives is the role of public authorities in supporting and financing ARTs using public funding. The right to health protection is also tied to ART's economic accessibility. These procedures are expensive and their reimbursement depends on the decisions of the political majority. The lack of state funding limits the availability of these methods to individuals with lower incomes, which can be viewed as a restriction on their right to health protection, particularly in the area of reproductive health.⁸¹

In conclusion, the constitutionally guaranteed right to health protection in relation to ARTs ensures access to modern infertility treatment methods, medical safety, and equal treatment of children conceived using these methods. However, restrictions on access to certain social groups and the lack of systematic reimbursement for in vitro procedures can limit the full realisation of the right to health protection in reproductive health.

⁷⁸ Domańska and Rojszczak, 2021, pp. 132–150.

⁷⁹ Wołoszyn-Cichocka, 2017, pp. 225–242.

⁸⁰ Stych, 2023, pp. 7–20.

⁸¹ Czajeczka, 2016, pp. 20–32.

5. Summary

It can be considered a truism to claim that ‘the importance of constitutional provisions related to assisted reproductive technologies is difficult to overstate.’ This is primarily because of the place and significance of the Constitution in the hierarchically structured legal system and its role in setting standards for sub-constitutional legislation. This was confirmed by the provisions of the Act of 25 June 2015 on Infertility Treatment, which are frequently referenced in this academic article.

The apparent "silence of the Constitution" regarding assisted reproductive technologies is understandable for the reasons outlined in the introduction. Provisions that indirectly address this issue regulate it almost comprehensively. The analyses led to the conclusion that, although the Polish Constitution was drafted in the last decade of the 20th century, it remains remarkably relevant to the rapidly evolving field of new technologies, including ART. While the term "living instrument" is informally reserved for the European Convention on Human Rights of 1950, it seems entirely justified to apply it to the Constitution of the Republic of Poland of 2 April 1997, at least in the context discussed here.

The two elements of constitutional regulations related to assisted reproductive technologies deserve positive recognition. The first element comprises the constitutional principles of dignity, freedom, and equality. The principle of inherent human dignity, which serves as a source of freedom and rights, while also being a subjective right of the individual, is of fundamental importance in this regard. Public authorities must respect and protect them. The second element of the system concerning the application of ART includes rights related to the use of these methods, namely the legal protection of life, right to privacy, and right to health protection.

One potential issue related to ART is the interpretation of constitutional provisions by legislative and judicial authorities. Unfortunately, the provisions of the Constitution are increasingly being interpreted contrary to the principles of legal logic and interpretation, a problem that regrettably extends beyond the application of assisted reproductive technologies.

Bibliography

- [1] Bałandynowicz, A. (2024) 'Podmiotowość człowieka a tożsamość prawa'. Warszawa: Wydawnictwo Akademii Wymiaru Sprawiedliwości.
- [2] Bączyk-Rozwadowska, K. (2017) 'Procedura in vitro a poszanowanie autonomii prokreacyjnej pary realizującej projekt rodzicielski', *Prawo i Medycyna*, 4, pp. 10–36.
- [3] Bieszczad, M. (2019) 'Dobro dziecka jako klauzula generalna – ustalenie znaczenia pojęcia dobra dziecka w XXI w.', *Monitor Prawniczy*, 17.
- [4] Boratyńska, M. (2017) 'Dostęp do metod wspomaganego rozrodu a ustawa o leczeniu niepłodności. Głos w dyskusji', *Prawo i Medycyna*, 4, pp. 168–182.
- [5] Bosek, L. (2009) 'Refleksje wokół prawnych uwarunkowań wspomaganiej prokreacji', *Diametros*, 20(6), pp. 37–61.
- [6] Chruściak, R. and Osiatyński, W. (2001) 'Tworzenie konstytucji w Polsce w latach 1989–1997'. Warszawa: Instytut Spraw Publicznych.
- [7] Czajeczka, M.A. (2016) 'Kilka uwag prawnych do ustawy o leczeniu niepłodności', *Państwo i Prawo*, 6, pp. 20–32.
- [8] Domańska, M., Rojszczak, M. (2021) 'Wspieranie rodziny jako cel krajowej ustawy o leczeniu niepłodności a indywidualne prawa podstawowe (uwagi krytyczne)', *Państwo i Prawo*, 8, pp. 132–150.
- [9] Dowbór-Dzwonka, A., Cegła, B., Filanowicz, M. & Szymkiewicz, E. (2021) 'Techniki wspomaganego rozrodu a naprotechnologia', *Zdrowie Publiczne*, 3(122), pp. 322–328; <https://doi.org/10.12923/j.0044-2011/122/3/a.19>.

-
- [10] Gałązka, M. (2010) 'Niemiecka ustawa o ochronie embrionów w kontekście polskiej debaty na temat zapłodnienia in vitro', *Przegląd Sejmowy*, 4, pp. 98–109.
- [11] Gałęska-Śliwka, A. (2021) 'Prawo do świadomego planowania rodziny – wybrane zagadnienia', *Prokuratura i Prawo*, 2, pp. 78–114.
- [12] Garlicki, L. (2016) 'Artykuł 30', in Garlicki, L. & Zubik, M. (eds) *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Tom II. Art. 30–86. Warszawa: Wydawnictwo Sejmowe.
- [13] Haberko, J. (2016) *Ustawa o leczeniu niepłodności. Komentarz*. Warszawa: Wolters Kluwer.
- [14] Haberko, J., Załucki, M. (2023) 'Dopuszczalność i prawnośpadkowe konsekwencje postmortalnej implantacji zarodka', *Prawo w Działaniu*, 56, pp. 33–57; <https://doi.org/10.32041/pwd.5603>.
- [15] Kobińska, A. (2009) 'Ograniczenie in vitro tylko dla małżeństw', *Prawo i Medycyna*, 3, pp. 118–132.
- [16] Królikowski, M., Bajor-Stachańczyk, M., Odrowąż-Sypniewski, W. (2007) *'Konstytucyjna formuła ochrony życia'*. Warszawa: Biuro Analiz Sejmowych.
- [17] Kuczyński, W. (2009) 'Regulacje prawne rozrodu wspomaganego medycznie (ART) - punkt widzenia lekarza', *Przegląd Filozoficzny — Nowa Seria*, 18(3), pp. 251–258.
- [18] Łakomic, K. (2014) 'Wybrane konstytucyjne aspekty funkcjonowania biobanków populacyjnych', *Państwo i Prawo*, 12, pp. 54–64.
- [19] Łukasiewicz, R. (2021) 'Dawstwo identyfikowalne komórek rozrodczych – proponowany standard europejski a prawo polskie', *Państwo i Prawo*, nr 8, pp. 226–241.

- [20] Łuków, P., Wrześniewska-Wal, I. (2008) 'Prywatność pacjenta a kształcenie medyczne', *Państwo i Medycyna*, 3, pp. 5–25.
- [21] Mendecka, K. (2023) 'Ochrona zdrowia dzieci – aspekty prawne i etyczne (na kanwie wyroku NSA z dnia 17 grudnia 2021 r., sygn. akt III OSK 4794/21)', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 1, pp. 82–96.
- [22] Mostowik, P. (2019) 'Fundamentalne prawne problemy surrogate motherhood. Perspektywa krajowa'. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości.
- [23] Nauka, G. (2016) 'Aquis communautaire w odniesieniu do badań DNA, pojęcia "embrion ludzki" i "element wyizolowany z ciała ludzkiego" a nasciturus', *Przegląd Sądowy*, nr 3, pp. 98–121.
- [24] Nawrot, O. (2014) 'Biorąc konstytucję poważnie. Konstytucyjne ramy regulacji medycznie wspomaganey prokreacji (uwagi na marginesie oceny zgodności z Konstytucją Rzeczypospolitej Polskiej poselskich projektów ustawy o zmianie ustawy o pobieraniu, przechowywaniu i przeszczepianiu komórek, tkanek i narządów, druk 607 i 608)', *Gdańskie Studia Prawnicze*, 1, pp. 647–662.
- [25] Niżnik-Mucha, A. (2021) 'Diagnostyka preimplantacyjna zarodków ludzkich in vitro a ochrona godności człowieka', *Państwo i Prawo*, 10, pp. 31–52.
- [26] Pawlikowski, J. (2019) 'Spór o medyczną klauzulę sumienia a konstytucyjne zasady równości i bezstronności światopoglądowej władz publicznych', *Studia z Prawa Wyznaniowego*, 22, pp. 41–82; <https://doi.org/10.31743/spw.5476>.
- [27] Piechowiak, M. (2009) 'Klauzula limitacyjna a nienaruszalność praw i godności', *Przegląd Sejmowy*, 2, pp. 55–78.
- [28] Piotrowski, R. (2021) 'Nowa regulacja przerywania ciąży w świetle Konstytucji', *Państwo i Prawo*, 8, pp. 62–80.

-
- [29] Radwan, J. (2003) 'Niepłodność i rozród wspomagany'. Poznań: Ars boni et aequi.
- [30] Rylski, M. (2020) 'Zakres prawnej ochrony embrionów ludzkich w polskim porządku konstytucyjnym na tle procedury in vitro', *Przegląd Sejmowy*, 3, pp. 123–162; <https://doi.org/10.31268/PS.2020.37>.
- [31] Sarnecki, P. (2016) 'Art. 51', in Garlicki, L., Zubik, M. (eds.) *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Tom II. 2nd edn. Warszawa: Wydawnictwo Sejmowe.
- [32] Smoczyński, T. (1996) *Wspomagana prokreacja ludzka. Zagadnienia legislacyjne*. Poznań.
- [33] Soniewicka, M. (2021) 'Spór o dopuszczalność przerywania ciąży z perspektywy etycznej i filozoficznoprawnej (komentarz do wyroku TK w sprawie K 1/20)', *Państwo i Prawo*, 8, pp. 6–23.
- [34] Stych, M. (2023) 'Wiek a zasada równości pacjentów w świetle Kodeksu Etyki Lekarskiej. Doświadczenia z okresu pandemii SARS-CoV-2', *PPP*, 1, pp. 7–20.
- [35] Szymanek, J. (2021) 'Spory o aborcję w różnych systemach norm', *Przegląd Legislacyjny*, 4, pp. 9–28.
- [36] Szymańska vel Szymanek, P. (2017) 'Prawo do bycia rodzicem czy autonomia woli? Problemy prawne związane z procedurą in vitro w przypadku rozvodu', *Państwo i Medycyna*, 4, pp. 93–103.
- [37] Tuleja, P. (2003) 'Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)'. Kraków: Kantor Wydawniczy Zakamycze, pp. 112, 126.
- [38] Wilejczyk, M. (2017) 'Znajomość czy nieznajomość pochodzenia genetycznego rzeczywistym dobrem osoby urodzonej w wyniku procedury medycznie wspomaganej prokreacji. Uwagi na marginesie ustawy o leczeniu niepłodności', *Przegląd Sejmowy*, 11–12, pp. 69–80.

- [39] Wiśniewski, L. (1997) 'Prawo a wolność człowieka - pojęcie i konstrukcja prawna', in Wiśniewski, L. (ed.) *Podstawowe prawa jednostki i ich sądowa ochrona*. Warszawa.
- [40] Witczak-Bruś, P. (2021) 'Surogacja. Aspekty prawne macierzyństwa zastępczego'. Warszawa: Wolters Kluwer.
- [41] Wołoszyn-Cichocka, A. (2017) 'Konstytucyjny obowiązek zapewnienia szczególnej opieki zdrowotnej dzieciom, kobietom ciężarnym, osobom niepełnosprawnym i osobom w podeszłym wieku przez władze publiczne', *Annales UMCS*, 1, pp. 225–242; <https://doi.org/10.17951/g.2017.64.1.225>.
- [42] Woźniak, A. (2017) 'Kontraktowe aspekty zabiegu zapłodnienia pozaustrojowego. Przechowywanie zarodków - ocena warunków umów', *Prawo i Medycyna*, 4, pp. 66–83.
- [43] Zieliński, T. (1992) 'Ochrona praw nabytych - zasada państwa prawnego', *Państwo i Prawo*, 3, pp. 3–11.