



INSTYTUT PRAWA USTROJOWEGO

A study prepared as part of the project:

The concept of marriage from the perspective of the theory of imperative requirement

Title of the study:

*Constitutional Protection of Motherhood and Parenthood
(expert opinion)*

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Introductory remarks

The family, as a natural and irreplaceable part of the community, creates a special environment for the birth and personal development of human beings. The concepts of motherhood and parenthood are most fully realized within the family. At present, the crisis of the modern family model is becoming increasingly evident, manifested in the growing number of informal unions, divorces and, in particular, the decreasing number of children births. Women also face purely biological problems, such as the difficulty of getting pregnant and the issue of medically assisted procreation or the use of surrogate mothers.

Crucial to the formulation of the legal status of the terms maternity and parenthood is Article 18 of the Constitution, stating that ‘(...) *the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.*’ This provision, being part of the constitutional axiology, confirms the special importance of these concepts.

This expert opinion is an attempt to reconstruct the concept of motherhood and to determine the components of the institution of parenthood in constitutional terms and the statutory regulation that specifies its content.

Against the current backdrop of the reconstruction of the concepts, the author of this expert opinion will attempt to answer the question of whether the scope of meaning of the concepts, determined by the constitutional framework, remains valid in the face of ongoing changes and challenges of medicine and science, in particular, whether the term parents can also be defined as donors of genetic material of a child born to a surrogate mother.

Modern constitutions address family issues in chapters on individual rights and freedoms. The Polish Basic Law additionally emphasizes the concept of motherhood and parenthood protection in the constitutional provisions, which is considered a rarity.

According to the content of the constitutional norm contained in Article 18 of the Polish Constitution,¹ ‘(...) *motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland*’, while according to Article 71(2) of the Constitution, which is a special kind of supplement to this principle: ‘*A mother, before and after birth, shall have the right to special*

¹ Journal of Laws of 1997, No 78, item 483.



*assistance from public authorities, to the extent specified by statute.*² The obligation to provide care to all pregnant women, contained in Article 68(3) of the Constitution, states that: '*Public authorities shall ensure special health care to children, pregnant women.*'

Situated among the constitutional principles of the Polish state, the provision of Article 18 of the Constitution constitutes a form of programmatic norm that obliges state authorities to implement the constitutional values expressed therein, and provides the basis for guaranteeing the protection of family life and marriage as a union between a man and a woman, as well as protection of the family, motherhood and parenthood. The protection of constitutional values is realized both in the prohibition of any activity by state authorities that undermines or threatens the notion of motherhood and parenthood, as well as in the obligation to create space for the unrestricted realization of these constitutional principles and activities that support them.

² Judgement of the Constitutional Tribunal of 10 July 2000, Ref. SK 21/99, part I, point 3 the Reasons.



Motherhood in constitutional terms

Motherhood resulting from the biological conditions of a woman's body is considered a special kind of bond between mother and child, existing from the moment of conception, through the period of pregnancy until after the child is born.³ Motherhood is a factual event related to the circumstance of childbirth and is an element of a person's civil status.⁴

The concept of motherhood is not expressly defined in the Polish Basic Law. *'The use of the noun phrase in the constitutional provisions indicates a specific relationship between a woman and a child, including a conceived child.'*⁵ Undoubtedly, it refers to the relationship occurring between mother and child. According to the jurisprudence of the CT, *'(...) the concept of motherhood expresses the necessary relationship between mother and child, with this relationship occurring on many levels – biological, emotional, social and legal. The function of this relationship is the proper development of a person's life in its early stages, in which it requires special care.'*⁶

In constitutional terms, motherhood is an intrinsic value, independent of the fact that a woman is bound by the marriage knot or the circumstance that the father of the child is the mother's husband. This is also confirmed by the principle of equal protection for children out of wedlock, anchored in the text of Article 32(1) of the Constitution, stating that *'All persons shall be equal before the law'* and Article 72(1) of the Constitution indicating that: *'The Republic of Poland shall ensure protection of the rights of the child.'*

The subjective scope of the constitutional protection of motherhood includes both the relationship of the woman to the child born, but also protects the woman during pregnancy. The protection of motherhood also extends to the life of the conceived child and its proper development, without which the motherly relationship could not exist.⁷

A special form of protection for the mother, both during pregnancy and after the birth of the child (expressed in Article 71(2) of the Constitution) begins from the moment the child is

³ Judgement of the Constitutional Tribunal of 28 May 1997, Ref. K 26/96, point 3 of the Reasons.

⁴ K. Pietrzykowski ed., *Kodeks rodzinny i opiekuńczy*, Warsaw 2021, p. 562.

⁵ K 26/96, point 3 of the Reasons.

⁶ K 26/96, point 3 of the Reasons.

⁷ K 26/96, point 3 of the Reasons.



conceived.⁸ According to the doctrine, it is impossible to point to another moment with which state authorities could link the beginning of the application of this particular form of support.⁹ Protection of the mother is implemented independently of the protection guaranteed to families in difficult living and social situations or the support offered to single parents. The hypothesis of the legal regulation protecting single parents includes only women who have given birth to children in marriage or permanent cohabitation, but are raising their offspring alone. Other mothers, on the other hand, enjoy the protection of state authorities based on the content of Articles 18 and 71(2) of the Constitution, which stipulate the protection of motherhood and parenthood.¹⁰ As a consequence, the protection of a woman during pregnancy, as well as after the birth of a child, does not depend on the material situation of the mother.¹¹ This special form of support was also guaranteed to mothers whose financial and family situation is very good. While, in accordance with respect for the principle of equality, the legislature may make the scope and form of support dependent on the financial and social situation of the woman in question, this must not lead to the complete deprivation of the mother of the assistance provided for in Article 71(2) of the Constitution, realized, for example, in the entitlement to maternity leave or the right to health care. Article 71(2) of the Constitution creates a special kind of subjective right of mothers, protected both before and after the birth of the child, implemented to the extent specified in the statutory regulation.¹² The support ‘(...) *must not be illusory*’, and ‘*the law must guarantee its real character*’.¹³ The specificity of protection should be read as ‘exceeding the usual dimensions’, the scope of which should be open and adapted to changing social conditions and the development of civilization.¹⁴ In the given scope, statutory regulation must not distort the essence of the right itself, as expressed in Article 71(2) of the Constitution, by introducing provisions that do not provide for the support of mothers to a greater

⁸ T. Smoczyński, *Prawo rodzinne i opiekuńcze*, Warsaw 2014, Legalis, p. 190; G. Kowalski, *Założenia prawa rodzinnego w świetle Konstytucji Rzeczypospolitej Polskiej* [in:] *Prawo rodzinne w dobie przemian*, P. Kasprzyk, P. Wiśniewski eds., Lublin 2009, p. 46.

⁹ M. Safjan, I. Bosek eds., *Konstytucja RP. Komentarz tom I, komentarz do art. 71 Konstytucji*, Warsaw 2016, p. 1643.

¹⁰ Judgement of the Constitutional Tribunal of 13 April 2011, Ref. SK 33/09, part III, point 3 of the Reasons.

¹¹ P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.*, Warsaw 2000, p. 172; L. Garlicki, *Konstytucja Rzeczypospolitej Polskiej. Komentarz, tom. 3, komentarz do art. 71*, Warsaw 2003, p. 6.

¹² T. Smoczyński, *Prawo...*, p. 190.

¹³ SK 33/09, part III, point 3 of the Reasons.

¹⁴ J. Boć ed., *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.*, Wrocław 1998, p. 131; M. Zubik, *Podmioty konstytucyjnych wolności, praw i obowiązków*, “Biuletyn Rady Legislacyjnej” 2007/2, p. 42.



extent than the assistance reserved for other legal subjects.¹⁵ This uniqueness is also underscored by Article 68(3) of the Constitution, which stipulates the need to create special health care for children, pregnant women, the disabled and the elderly. On the other hand, however, there is no contraindication for the intensity of the protection of mothers to take different forms during the different periods of maternity.¹⁶

The literature also emphasizes that the protection is extended to the real mother, i.e. a woman who is pregnant, and not to a woman who is planning to become pregnant or who could potentially become pregnant in the future.¹⁷ This leads to the conclusion that the scope of this regulation does not include a woman interested in any form of medical assisted procreation, but a woman during pregnancy and after the birth of the child. In addition, the constitutional regulation extends the scope of protection not only to female citizens of the Republic of Poland, but also to foreign mothers residing in the territory of our country.

Over time, influenced by the development of science and medicine, artificial assisted procreation has raised a number of doubts about the correct definition of terms: ‘mother and motherhood’. Questions have arisen as to whether the mother of the child is the woman genetically related to the child, from whom the egg cell fertilized and placed in another woman’s body, or the woman who was pregnant with the conceived child and subsequently gave birth to it. According to some representatives of the doctrine, every human being has the right to know their genetic ancestry and, in accordance with respect for private life, should be aware of their identity, and the issues of implantation of an embryo into the body of a surrogate mother should be regulated by law.¹⁸ Currently, only motherhood closely related to the fact of being pregnant is placed under constitutional protection. In the light of the law, the mother of the child is the woman who gave birth to the child, not the donor of the ovum fertilized through a medical procedure. This interpretation is confirmed by the purpose of the introduced regulation, which is to protect the mother both during pregnancy and after the birth of the child. This hypothesis also follows from the literal wording of Article 71(2) of the Polish Constitution, which addresses ‘*a mother, before and after birth*’.

¹⁵ L. Garlicki, *Komentarz...*, p. 6.

¹⁶ SK 33/09, part III, point 3 of the Reasons.

¹⁷ G. Kowalski, *Założenia prawa rodzinnego...*, p. 46.

¹⁸ K. Gromek, *Kodeks rodzinny i opiekuńczy, Komentarz do art. 61⁹*, Warsaw 2022, ver. 3, Legalis.



Restricting the concept of mother to the donor of an ovum, omitting the stage of a woman's pregnancy, obscures the meaning of the provision and contradicts the systemic interpretation of the definition and constitutional principles, which equate mother with motherhood. The concept of a mother, a woman who gave birth to a child was already presented during the period of the Constitution of the Polish People's Republic.¹⁹ One of the representatives of the doctrine, emphasizing the role of the woman, her great effort during pregnancy and during childbirth, strongly emphasised that the mother of the child is the woman who carried the child in the womb and then gave birth to it.²⁰ This approach is also identical to the premise presented in CJEU case law, in which the denial of paid leave equivalent to maternity leave to the genetic mother of a child born to a surrogate mother was not considered any form of sex discrimination or a form of violation of the directive introducing measures to promote improvements in the workplace safety and health of pregnant workers, workers who have recently given birth and workers who are breastfeeding.²¹

The issue of implantation of another woman's embryo into the womb of a surrogate mother has not been legally regulated in the Polish legal space.²² The provisions of the Polish Constitution do not oblige the legislature to do so. According to Article 58 of the Civil Code,²³ the surrogacy contract should be considered invalid as a form of material abuse of law.²⁴ Due to the subject matter scope of this type of contract, which reduces the born child to the role of an element of a specific transaction, the surrogacy contract is considered incompatible with the principles of social conduct.²⁵ Treating a person as an object of a specific contract also contradicts the concept of inherent dignity of every human being and the principle of protection of personal rights expressed in the content of Article 30 of the Constitution and Article 23 of the Civil Code.

¹⁹ Journal of Laws of 1952, No 33, item 232.

²⁰ Z. Radwański, *Konstytucyjna ochrona małżeństwa, macierzyństwa i rodziny*, [in:] *Prace cywilistyczne*, Warsaw 1990, p. 236.

²¹ Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) OJ EU 1992/L 348/1.

²² P. Witczak-Bruś, *Umowa o urodzenie dziecka surogatki jako problem współczesnego ustawodawstwa*, "Palestra" 2019/1-2, pp. 124–134, thesis 1.

²³ Journal of Laws of 2022, item 1360.

²⁴ P. Witczak, *Prawna sytuacja matek zastępczych*, "IUSTITIA" 2016/2, pp. 88–90.

²⁵ A. Dyoniak, *Pozycja nasticurusa na obszarze majątkowego prawa prywatnego*, "Ruch Prawniczy Ekonomiczny i Socjologiczny" 1994/3, p. 51, <https://repozytorium.amu.edu.pl/bitstream/10593/16117/1/005%20ANDRZEJ%20DYONIAK.pdf> (02.12.2022)



Under Polish law, the motherhood status can be confirmed only with reference to the biological mother, that is, the woman who actually gave birth to the child. Genetic testing of a child born to a surrogate mother and a woman whose fertilized egg cell was placed in the body of another woman will not confirm the fact that a child was born, but only the amount of possession (by the child and the donor of genetic material) of genes of a certain type.

At the European level, there is no consensus on the legality of surrogacy agreements or the possibility of legally confirming the existence of any legal relationship between a child conceived as a result of a medical procedure abroad in connection with a surrogacy agreement and the child's 'genetic parents' living in another country.²⁶

Cases involving surrogacy agreements have also been the subject of ECHR case law, which directly addressed the issue of a child born abroad to a surrogate mother in one of its 2017 judgements.²⁷ According to the claims of the donors of the genetic material, who were Italian citizens, the surrogacy agreement was finalized through a Russian medical clinic, where the procedure to place the fertilized ova in the surrogate mother's body was also performed. According to Italian courts, bringing a child from abroad born to a surrogate mother was a violation of regulations governing the conduct of inter-country adoptions. According to the ECHR, the Italian courts were not obliged to guarantee the protection of the bond between the donors of genetic material and the child born to the surrogate mother. Permitting a child to stay with donors of genetic material that would ultimately aim to become adoptive parents would be a form of legalization of a factual state of affairs occurring as a result of actions taken in violation of the relevant regulations of Italian law. In addition, DNA testing revealed no genetic relationship between one of the donors and the child, which further undermined the existence of any relationship between the genetic donors and the child. In the view of the Italian courts, which was subsequently also reiterated by the ECHR, the surrender of the child to institutional custody did not cause serious or irreparable harm as a result of separation from the parties to the surrogacy agreement. On the backdrop of the ruling in question, surrogacy was claimed to not constitute family ties, while the lack of biological kinship makes the relationship with the child tenuous.²⁸

²⁶ ECHR judgements: of 26 June 2014, Application No 65192/11, *Mennesson v. France*, <https://www.echr.coe.int/Pages/home.aspx?p=home> (02.12.2022), and of 26 June 2014, Application No 65941/11, *Labassee v. France*, <https://www.echr.coe.int/Pages/home.aspx?p=home> (02.12.2022).

²⁷ ECHR judgement of 24 January 2017, Application No 25358/12, *Paradiso and Campanelli v. Italy*, <https://www.echr.coe.int/Pages/home.aspx?p=home> (02.12.2022).

²⁸ K. Warecka, *Strasburg: surogacja nie stwarza więzi rodzinnych*. *Paradiso i Campanelli przeciwko Włochom - wyrok ETPC z dnia 24 stycznia 2017 r., skarga nr 25358/12, LEX.*



Parenthood

Parenthood is a constitutional concept, emphasizing the role of the biological father of the child and the procreative function of the family.²⁹ According to the general principle of indivisibility of marital status, pursuant to the applicable law each person can have one mother and one father.³⁰ Fatherhood is a peculiar relationship linking a child to a father, protected by parenthood laws. Due to the specificity of the assistance provided to a woman both before and after the birth of her child, the scope of the protection of fatherhood is narrower. However, this does not lead to an automatic or significant diminution of the father's role in the child's life and a deprivation of protection whatsoever. The Polish Basic Law, however, provides no definition for the concept of parenthood. Its placement in the body of Article 18 of the Constitution underscores its close connection to the values indicated in the provision, in particular the institution of motherhood. The term 'parent' (Pol. *rodzic*) is also not defined in the statutory regulation. As a pre-existing notion, developed over the course of ongoing changes in legal culture, it stems from the word 'to give birth' (Pol. *rodzić*). This circumstance emphasises the crucial importance of the biological origin of the child and creates a special form of 'presumption' regarding the parents' entitlement to parental authority and the exercise of parental rights. The Polish term *rodzic* also includes persons who are not biologically related, but connected by a legal relationship, such as adoption or recognition of a child.

The right to parenthood is enjoyed by both married parents as well as individuals in informal relationships. The protection of parenthood is realized in the right of parents to determine kinship ties, according to the biological origin of the child. *'The right to establish parenthood is part of the broader context of the right to the protection of family life and implies the protection of the entire family and the good of all its members.'*³¹ Parenthood is also indirectly realized in the child's entitlement to determine, according to the facts, their biological origin. *'The analysis of the filiation mechanisms on which family relations are traditionally based expresses quite clearly the tendency for the legal relationship between parents and child to correspond to biological reality.'*³² *'As the CT*

²⁹ A. Mączyński, *Konstytucyjne podstawy prawa rodzinnego*, [in:] *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, vol. I, P. Kardas, T. Sroka, W. Wróbel eds., Warsaw 2012, p. 774.

³⁰ A. K. Bieliński, M. Pannert, *Prawo rodzinne*, Warsaw 2022, p. 164.

³¹ Judgement of the Constitutional Tribunal of 26 November 2013, Ref. P 33/12, point 2 of the Reasons.

³² P 33/12, point 3 of the Reasons.



*notes, the protection of parenthood includes, among other things, the right of a man to determine the origin of his child out of wedlock, while the specification of this right is up to the legislature, which has a wide range of discretion in this regard. The Constitution allows for the establishment of restrictions on this right if it is necessary to ensure the protection of other constitutional values, but the restrictions established must be within the limits set by Article 31(3) of the Constitution. Restrictions on the exercise of constitutional freedoms and rights may therefore be established only by law and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. Furthermore, these restrictions must not violate the essence of freedoms and rights. The legislator, when specifying the father's right to establish fatherhood, must keep in mind not only his good, but above all the good of the child and the good of the family and marriage. In some situations, these assets may collide. It is therefore up to the legislator to carefully balance all the listed goods. The good of the child may justify limiting the establishment of biological parenthood. De lege lata, the right of parents to establish their parenthood is exercised, among other things, through the institutions of child acknowledgement and judicial determination of fatherhood.*³³

The protection of parenthood is also expressed in negative terms, through the ability to challenge the existence of kinship ties or the legally established filiation status of a person. The negative aspect of the protection of parenthood is important in its own right, but it is also subsidiary, being implemented only after a prior denial of fatherhood or motherhood of a legally established parent, such as a woman listed on the child's birth certificate or the husband of the mother of a child born during a marriage. In addition, the concept of filiation is not always related to the parents' right to exercise parental authority or custody.³⁴

The concept of parenthood contained in the constitutional provisions is also developed by the Basic Law in the section on individual rights and freedoms. This concept is implemented in particular by the right to raise children in accordance with the parent's beliefs, taking into account the maturity of the child, as well as the child's freedom of conscience and religion and their own beliefs.

The provision of Article 48 of the Constitution unambiguously indicates that: *'Parents shall have the*

³³ P 33/12, point 2 of the Reasons.

³⁴ Judgement of the Constitutional Tribunal, Ref. K 18/02, part B, point 3 of the Reasons.



right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions.’ On the other hand, the restriction or termination of parental rights can be carried out only in cases specified in the law and only on the basis of a final court decision.’

Although the concept of parenthood does not appear *expressis verbis* in the text of Article 48 of the Constitution, it immanently weaves itself into its provisions. The right to educate a child is considered part of the more general rights of parents over their children, deriving from the inherent and natural subjective rights of the human person, ‘(...) *not derived from state bestowal, although realized under state and social control*’.³⁵

According to the CT, raising a child in constitutional terms means: ‘(...) *inculcating and reinforcing in children a certain worldview, beliefs, value system, moral and ethical principles – through the conscious activity of parents*’.³⁶ In fact, child rearing has, on the one hand, an individual dimension, involving the relationship between parent and child, and on the other hand, also a social dimension, involving the particular society that the child is a part of.

The Polish Basic Law indicates the powers of parents only in a subjective sense. The Constitution does not capture parental rights in an object-oriented sense and does not contain a detailed compilation or catalogue of norms defining the relations existing between parents and children or other family members, including those united by the ties of adoption.³⁷ According to the CT jurisprudence, ‘(...) *the Constitution also does not define the concept of “parental rights” or equate them per se with the concept of parental authority found in family law*’. There is also no definition of such a concept in the jurisprudence of the Constitutional Court, although the judgement of 28 April 2003 (ref. K 18/02) indicated that – in light of Article 48(1) of the Constitution – this concept undoubtedly includes the right to raise a child. Since the Constitution also does not enumerate the rights of parents, it should be considered to refer to the provisions of ordinary legislation in this regard. Thus, in connection with the current norms of family and guardianship law, one should mention not only the right to custody of the child as a person, but also the right to custody of the child’s property and the right to represent the child (as per the judgement of the

³⁵ Judgement of the Constitutional Tribunal of 11 October 2011, Ref.. K 16/10, part III, point 5.2 of the Reasons.

³⁶ Judgement of the Constitutional Tribunal of 12 April 2011, Ref. SK 62/08, part III, point 4.7 of the Reasons.

³⁷ K 18/02, part B, point 3 of the Reasons.



Constitutional Tribunal of 11 October 2011, Ref. K 16/10). Parents also raise and direct the child under their parental authority (Article 96 § 1 of the Family and Guardianship Code). They are obliged to care for the physical and spiritual development of the child and prepare them properly for work for the good of society, according to their talents. Parental authority should be exercised as required by the good of the child and the interests of the society (Article 95 § 3 of the Family and Guardianship Code).³⁸

The right of parents to raise their child according to their own beliefs is one of the most important and crucial parental rights. This principle implicitly constitutes a form of guarantee of having one's own beliefs and the authority to pass them on to one's children. The principle also underscores the need to create – in accordance with the child's developmental level, under the care and supervision of the parent – conditions for self-determination, respect for the young person's distinctiveness, individuality and own beliefs, and, in particular, the realization of the right to be heard.

In the jurisprudence of the Constitutional Tribunal, the right to raise children is also referred to as a constitutional freedom, realized as a prohibition of interference in the protected sphere of the conduct of parents by third parties and public authorities, and expressing a kind of priority of parents in a given sphere over other entities, institutions or establishments, with the proviso that the exercise of parental rights will be carried out with respect for the good of the child and their proper development.³⁹ This hypothesis is also confirmed by the systemic placement of Article 48 of the Constitution, indicating the impossibility of arbitrary interference by state authorities in the sphere of the family life of society. Any restrictions introduced in a given area having an exceptional character can be applied only with respect to the premise of the child's welfare and can only apply to specific cases of restriction or termination of the parental rights of parents.

4. Statutory regulation

After the enactment of the Basic Law, the constitutional regulation was reflected in the Family and Guardianship Code,⁴⁰ which explicitly states that the mother of the child is the woman

³⁸ Judgement of the Constitutional Tribunal of 21 January 2014, Ref. SK 5/12, part III, point 3.1.1 of the Reasons.

³⁹ M. Nazar, *Niektóre zagadnienia małżeństwa i rodziny w świetle unormowań Konstytucji RP z dnia 2 kwietnia 1997 r.*, "Rejent" 1997/5, p. 121, <https://u227.e-cryptex.pl/app/appStowarzyszenieS/publikacje/1997/5/387.pdf> (02.12.2022).

⁴⁰ The Family and Guardianship Code of 25 February 1964, Journal of Laws No 2020, item 1359.



who gave birth to them. Ultimately, the law takes the fact of childbirth as the criterion for establishing maternity, regardless of the circumstances of whether the child was born alive or stillborn. Concurrently, the powers related to parenthood are included in ordinary legislation in the concept of parental authority, which, according to the content of Article 95 of the Family and Guardianship Code, constituting a totality of powers and duties with respect to the child, being a special type of legal relationship, where children are subordinate to parents ‘(...) *includes in particular the duty and right of parents to exercise custody over the person and property of the child and to raise the child, with respect for their dignity and rights.*’

Some representatives of the doctrine also interpret parental authority in terms of the subjective right of the parent, the components of which include a number of duties, strictly implemented in accordance with the interests of the child.⁴¹ A peculiar kind of controversy arises in terms of determining the point at which parental authority arises. Of particular importance in this context is the question of the origin of the child, closely linked to the moment of birth. In the given scope, Article 61⁹ of the Family and Guardianship Code leaves no doubt that the mother is the woman who gave birth to the child. Only after motherhood is determined can the process be repeated to identify the father of the child. This is also confirmed by the disposition of Article 75 of the Family and Guardianship Code, which provides for the possibility of acknowledging a conceived child, which, however, will be considered effective when the child is born. The argument in question is further strengthened by the regulation concerning the rules for drawing up birth certificates only after the child is born and the evidentiary power of such documentation. As a rule, parental authority will arise from the moment at which the biological origin of the child is established, the determination of child’s mother and the subsequent establishment of the fatherhood ascribed to a given man, with the proviso that there will be no revocation or termination of parental authority. This hypothesis is confirmed by the systemic rationale, because according to the current legislation, in some cases, the mother may deprive the unborn child of their life, which is in strict contradiction to the concept of simultaneous existence of parental authority of the mother during pregnancy.⁴² However, the circumstances indicated should in no way undermine or override the obligation of

⁴¹ H. Dolecki, *Ingerencja sądu opiekuńczego w wykonywanie władzy rodzicielskiej*, Warsaw 1983, pp. 24–25.

⁴² T. Smoczyński, *Prawo rodzinne...*, p. 139; K. Piasecki, *Kodeks rodzinny i opiekuńczy*. Komentarz, wyd. V, 2011, LEX, pp. 729–730.



statutory delimitation of rights and obligations to the conceived child.

Also correlated with the rights of parents are certain duties, which, although not explicitly articulated in the text of the Basic Law, can be determined together by reading Articles 18, 48, 70–72 of the Constitution. Parental authority should primarily be reduced to a series of duties to the child, and parental powers should be considered a secondary element of this authority. In the opinion of the CT, the powers of parents should be closely linked to their duties.⁴³ According to the current norms of family and guardianship law, the concept of parental authority (parenthood) is, as a rule, associated with the right to exercise custody over the person of the child, their property and the power to represent them. Parental custody extends to the duty to raise a child, guide and support them in all kinds of life moments, as well as the right to have contact with their child and live together with them.

The statutory regulation also implies the duty to bring up the child, to direct the child, to materially secure the child's interests, and to take care of the child's proper physical, mental and spiritual development, to prepare the child for life in society and to work for the good of society in accordance with the child's talents, that is, to actually exercise custody over the child's person and property.⁴⁴ Raising a child involves many areas of the young person's life. In particular, it shapes the child's personality sphere and emotional attitude, their worldview and attitude to universal values, intellectual predisposition, ability to function in society and independence.

⁴³ Judgement of the Constitutional Tribunal of 18 May 2005, Ref. K 16/04, point 5 the Reasons.

⁴⁴ Article 96 § 1 of the Family and Guardianship Code: *'Parents raise and direct the child under their parental authority. They are obliged to care for the physical and spiritual development of the child and prepare them properly for work for the good of society according to their talents.'*



Conclusion

Despite the differences that exist between the constitutional concepts and statutory regulation, their content is convergent. This is because the law is a more detailed elaboration of constitutional values and principles. Under Polish law, the mother of a child is the woman who gave birth to the child, and the concept of parenthood and fatherhood is closely correlated with the motherhood of a particular woman. The father of a child can only be determined after identifying the child's mother. Parental authority shall be exercised as the welfare of the child requires, respecting the dignity of a human being. Parental authority arises when a child is born. Parental authority is not vested in the parents of the conceived child during pregnancy. Currently, in strictly defined cases provided by law, the mother of the child can terminate the pregnancy. Assuming that parental authority is vested from the moment of conception, such an act would constitute a significant violation of that provision. This assumption, however, does not deprive nasciturus of statutory protection, implemented at the level of family, criminal and civil law.

In the opinion of some representatives of the doctrine, the current legislation violates the good of a child born as a result of a medically assisted human procreation.⁴⁵ Lacking the possibility of asserting the constitutionally guaranteed right to know one's existence (derived from the content of Articles 30, 47 and 72 of the Constitution), the possibility of establishing the genetic origin of the child has been ruled out. The current law on infertility treatment⁴⁶ does not provide for the possibility of obtaining child donor individualization data for cell donations other than those from a parent's partner or embryo donation. The scope of the information that could be shared was limited to the year and place of the donor's birth and some information on the donor's health.

However, the significant development of science and medicine does not make that constitutional values obsolete. The issue of recognizing the motherhood and parenthood of donors of genetic ova placed in the surrogate mother's body raises serious controversies of a purely ethical nature. On the European level, the mother of the child is also considered to be the woman who gave birth to the child. In the given scope, the bond between the foetus and the woman arising during pregnancy, and the hardship associated with the process of pregnancy and childbirth itself, are also important issues.

⁴⁵ P. Witczak-Bruś, *Umowa o urodzenie...*, thesis 1, LEX.

⁴⁶ Journal of Laws of 2020, item 442.



Genetic ancestry only confirms the fact of having certain genes and does not create any kind of relationship between the child and the donors of genetic material. Presently, the interpretation of the constitutional provisions seems to be correct. Perhaps in the future the occurrence of demographic decline, the increasingly common problem of inability to have children, the drama of many families and the ever-galloping progress of medicine creating more opportunities for women to become pregnant will result in a slight broadening of the interpretation of the constitutional regulation, but only to the extent that does not violate the main and original assumptions of the constitutional values, taking into account the interests of the conceived child and related entities, and the mother of the child will always be defined as the woman who gave birth to it.



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