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Paradoxes and gaps of Polish regulations on the use of assisted reproductive techniques

Luki oraz paradoksy polskich przepisów dotyczących
zastosowania metod wspomaganego rozrodu

Abstract

At the end of June 2015 the Treatment of Infertility Act was adopted in Poland. This legislation mostly refers to the problem of the use of assisted reproduction techniques (in vitro). Adoption of the law was considered by some experts to be a special moment. Finally, in Poland, the functioning of IVF clinics was regulated.

The adoption of the Treatment of Infertility Act also met with criticism. Although the introduction of regulations concerning the functioning of clinics was considered as a positive action, however, it was also emphasized that legalization of these procedures would lead to the emergence of numerous problems.

In Poland, in vitro – in recent years – has been implemented not only through the Act but also through the health scheme adopted by the minister of health and health schemes adopted by the councils of different cities (Częstochowa and Łódź).

This paper attempts to analyse these documents. This analysis will refer to two key phenomena: a gap and a paradox. The aim of the presented reflections is primarily to show how the adoption of these rules can complicate the biological reality. The presented discussion and analysis will refer mostly to the Polish legislative reality.

Keywords: *In vitro, medical law, patient's rights, treatment of infertility, health care.*

Streszczenie

Pod koniec czerwca 2015 r. uchwalona została w Polsce ustawa o leczeniu niepłodności. Wspomniany akt prawny w większości odnosi się do problemu stosowania technik wspomaganego rozrodu. Uchwalenie ustawy uznane zostało przez część ekspertów za szczególnie ważny moment. Ostatecznie bowiem w Polsce uregulowane zostały zagadnienia dotyczące funkcjonowania klinik stosujących *in vitro*.

Przyjęcie ustawy o leczeniu niepłodności spotkało się również z krytyką. Choć wprowadzenie przepisów dotyczących działania klinik uznane zostało za działanie pozytywne, to jednak jednocześnie podkreślono, iż zalegalizowanie omawianych procedur prowadzić będzie do pojawienia się licznych problemów.

W Polsce *in vitro* – w ciągu ostatnich lat – wprowadzane było za pomocą nie tylko ustawy, ale także: programu zdrowotnego wydanego przez ministra zdrowia oraz programu zdrowotnego uchwalonego przez rady poszczególnych miast (Częstochowy i Łodzi).

W prezentowanej pracy podjęta zostanie próba analizy wspomnianych dokumentów. Analiza ta odnosić się będzie do dwóch kluczowych zjawisk: luki oraz paradoksu. Celem prezentowanych rozważań jest przede wszystkim ukazanie w sposób dokładny, w jaki sposób uchwalone przepisy prowadzić mogą do komplikacji rzeczywistości biologicznej. Prezentowane rozważania oraz analizy odnosić się będą w większości do polskiej rzeczywistości legislacyjnej.

Słowa kluczowe: *In vitro*, prawo medyczne, prawa pacjenta, leczenie niepłodności, ochrona zdrowia.

Introduction¹

At the beginning of November 2015 the provisions of the Treatment of Infertility Act (Treatment of Infertility Act 2015) entered into force in Poland. The adoption of this Act received recognition from the society but also provoked criticism. In this context it was stressed that the adoption of this Act led to the end of the time when all measures connected with reproductive medicine were taken in an area that was not regulated in Poland. On the one hand, it was also underlined that many couples would be able to benefit from therapeutic methods allowing women to get help in order to get pregnant (Material 2005,

¹ This paper reproduces extended and rewritten fragments of the author's articles concerning IVF with the consent of the portal *biotechnologia.pl*. The author has also used the analysis of the identity problem among children conceived by IVF. This analysis was commissioned by the *Ordo Iuris* Institute, which gave its consent to use it in this article. The project was financed with the funds of the Narodowe Centrum Nauki (National Centre of Science) granted based on the decision number DEC-2013/10/E/HS5/00157.

on-line, Szczerbiak 2005, online, Nesterowicz 2005, 265). On the other, however, it was pointed out that the adoption of such an Act was not only unconstitutional but was also an example of a law that is defective and immoral. It was also said that assisted reproductive techniques do not allow to solve a specific and complex problem, i.e. infertility (Karpińska-Morek 2015, online). It was also raised that this Act did not guarantee appropriate protection of human life in its very early stage. This Act was also criticised as regards the rights of born children. In this context, it was stressed that the solutions adopted in this legal Act undermined the basic family and patient rights guaranteed in the Polish Constitution, including the rights of a child as a patient. The provisions of the Treatment of Infertility Act lead to a situation where a child will not be able to receive all information concerning the identity or the health of his/her biological parents (Haberko 2014, p. 3–15). It is also added that the medical law solutions in question do not guarantee the security of embryos or of individuals who engage in assisted reproductive procedures (Jałowska 2015, 1–2, Bober 2012, online, Szóstek 2009, 5–13, Kraj 2008, 107–119)².

Those issues were raised in Poland several years before President Bronisław Komorowski signed the Infertility Treatment Act. A few years earlier the government of Donald Tusk decided to implement a nationwide infertility treatment scheme using the *in vitro* method. This scheme had several key objectives. First of all, it was the first real step towards formal supervision over IVF clinics. It was also stressed that the provisions of the scheme implemented by the Minister of Health aimed at ending protracted idle discussions on the shape of Polish provisions concerning the issue of assisted reproduction.

While assessing the provisions included in the above mentioned Act, as well as in the Scheme, we may see some key phenomena that point at important gaps and paradoxes. The considerations presented below include an in-depth analysis of these documents. This is a critical reflection which does not, in any way, aim at undermining the tragedy of a couple having difficulties conceiving a child. The comments presented here try, above all, to point at the gaps and paradoxes mentioned already in the title, the existence of which has a negative impact on the possibility to guarantee the respect of the rights of assisted reproductive procedures participants. Later on, this paper will mainly analyse the Nationwide Scheme of Infertility Treatment with the *In Vitro* Method. This Scheme was at the basis of consecutive medical law measures undertaken in or-

² Recently the broad context of this issue was also presented in: D. Mazur, A. Muszla, *Bioetyka w dialogu* (Dialogue on bioethics), Magdalenum, Warsaw 2015, and *Przewodnik, Bioetyka dla młodych* (A guide on bioethics for the young), Fundacja Jeden z nas, Międzywydziałowy Instytut Bioetyki UPJPII, Fundacja Jérôme Lejeune, Kraków, 2015.

der to adopt the Infertility Treatment Act. This Act will be presented above all through the prism of its provisions on the anonymity of reproductive cell donors. Specifically these provisions increasingly lead to paradoxical phenomena, so far unknown, when e.g. a woman *de facto* by accident gives birth to a child that is not hers. The presented considerations will particularly refer to, among others, the Polish and the European bioethical debate on the in vitro fertilization. Thus, later on, not only the content of legal materials will be commented on, but also press reports, including materials found on the Internet. Similar considerations and analyses will eventually aim at answering the following question: In what way the gaps and paradoxes found in the provisions on assisted reproductive techniques can impact those who engage in the in vitro procedure as well as on the child who will be conceived this way?

Infertility Treatment Scheme

At the end of March 2013, Bartosz Arłukowicz, the Polish Minister of Health, presented in the media the principles of the *Infertility Treatment Scheme Using the In Vitro Method*. Its implementation was planned for the years 2013–2016. While reading this document one can notice that it is composed of several main elements. First of all, it includes some sociological comments as an introduction to the infertility issue. Secondly, it shows the biotechnological characteristic of the in vitro procedure proposed in the scheme. The third part of the document presents yet another important piece of information, i.e. the cost estimate of different elements the scheme consists of and it also informs that new registration and control procedures concerning the in vitro fertilization were created in Poland (Bańkiewicz-Brożek 2013, 17–18, Ministry of Health Document 2013).

When discussing the Scheme signed by the Minister Arłukowicz, the title itself has to be treated. In the social, legal and medical discussion the following question can be often encountered: Is in vitro a method of treatment, or is it only an assisting measure? Paweł Bortkiewicz, within a series of bioethical broadcasts, points out that in the 80s of the last century the notion of “treatment” was hardly ever used when discussing the in vitro method. The following expressions were used: assisted procreation method or assisted reproduction. It was popular to talk about artificial insemination. It is hard to consider such wording as untrue. In vitro is a technique taking place outside of the body, which may lead to pregnancy. This way it assists reproduction. At the same time this method cannot be defined as natural, so it is justified to use the word “artificial”. Thus, if the word treatment were to be kept in the title of

the scheme, the document would have to bear the following title: *The Scheme of Treatment of a Lack of Pregnancy* (Kmieciak 2015a, online). The ministerial study mentions in some parts the pathological causes of infertility. In consequence it is stressed that infertility is not a disease itself and in vitro is not a medicine that will cure it. This, however, leads to avoiding one of the symptoms – the lack of a child. It is worth mentioning the comments made by those who use the artificial methods of assisted reproduction in practice. The andrologist Professor Maciej Krupisz says that: “While using in vitro we are not treating the causes of infertility but we are avoiding them, and in some cases we even preserve them. For example, it is likely that boys conceived in vitro, due to the poor quality of the father’s semen (especially if it is caused by genetic defects connected with the chromosome Y) will have the same problems in the future. These are the facts, we should not be miffed at them”. (Bielecka 2013, online). It has to be pointed out that disorders such as diabetes or schizophrenia cannot be treated only with insulin or with antipsychotics. These are chronic diseases. However, pharmacotherapy allows given individuals to function on a daily basis and engage in social activities which are possible thanks to the containment of numerous, often complex symptoms. The IVF procedure concentrates on the lack of pregnancy and it aims at obtaining it instead of treating the infertility (Kraj 2009, 284–286).

It has to be stressed at this point that the authors of the scheme are right by saying that having no children when you dream of having them may lead to suffering, fear, frustration and impairment of interpersonal relations, including within the family. However, there is another aspect of this problem. The participation of a woman in the IVF is usually a difficult experience for her:

- women have to undergo hormonal stimulation (which leads to strong changes of mood, sometimes even to depression),
- disappointment when the IVF is not successful (paradoxically hampering the conception of a child because of overlapping emotional problems).

These problems can also lead to depression (Kim 2012, 24–25). This phenomenon was shown by Robin Cook in one of his books. In the novel “Vital Signs” published in 1990, in several places, we can see that during this procedure the desire of becoming a parent is often mixed with the feelings of frustration, humiliation, anger, pain or fear (Cook 2010, 9–10).

By continuing the social reflection on the problem of infertility presented in the document, it is worth paying attention to important contradictions that appear therein. The authors of the Scheme were right when they said that women are most fertile from the age of 20 to 25. It was also pointed out that the Scheme was addressed to women up to 40 years of age. It was also added that

during IVF procedures in patients 35 years old or older it was justified to implant two embryos instead of one. This is to increase the likelihood of success of reproductive measures (Document 2013, 9–10). However, the authors of the Scheme denied themselves to some extent. The changing picture of the society led to a situation where people marry more often around 30 years of age. Even if extramarital pregnancies are not infrequent, still – according to the research – when planned they also take place once the spouses have turned 30 (Kmiecik 2010, 148–158). This phenomenon is also noticed in Great Britain which is the leading country as regards innovations in the area of IVF. Cherrill Hicks, the Health Editor for the Daily Telegraph writes that: “in Great Britain approximately one third of patients using this method are more than 35 years old”. (Hicks 2013, online, Kmiecik 2015b, 141–158). So the conclusion is that the Scheme’s target group are women who for clinical and demographic reasons are less likely to see a positive outcome of the therapy.

Speaking of efficiency, the authors of the Scheme suggested that approximately 15,000 couples might benefit from this help, which is particularly precious as we are facing a demographic collapse in Poland. According to dr Maciej Bartenczewicz who commented on the above assumptions “...if 15,000 couples undergo IVF procedure every year, then we can see, optimistically speaking, around 3000 children being born; taking into account the fact that 400,000 people are born every year, this is less than 1%” (Bałkiewicz-Brożek 2013, 13). It is worth underlining that according to the data of the Polish Central Statistical Office for 2012 concerning live birth, only 390,000 children were born at that time (Dmochowska 2013, 45). Eventually within almost three years of the duration of this Scheme almost 5,500 children were born (Material online 2016). The Ministry of Health assessed the average effectiveness of this Scheme at 30% (Korbasińska 2016, 3).

The biotechnological approach to this Scheme has to include comments on specific IVF procedures as presented in this document.

First of all, this document points out several times the fact that for women participating in the procedure up to the age of 35 it is suggested to implant only one embryo. This recommendation is consistent with the tendencies that we can see, i.e. in English suggestions concerning the in vitro procedure. As pointed out by Janine Elson, Associate Medical Director of *Bridge Centre*, a London-based fertility clinic, it is necessary to limit multiple pregnancies being the result of an assisted reproductive procedure. This type of pregnancy, according to the report published in the “British Journal of Obstetrics and Gynaecology”, can put at risk the health of the unborn, growing baby. In the same magazine it was stated that in the years 1984–2007 an important rate (almost

double) of children were born with physical defects diagnosed during the prenatal stage. The increase of multiple pregnancies, according to the authors of the above report, can be linked with the spreading in vitro technique. According to Bridget Boyle, co-author of the above report, the reason behind prenatal defects (not only chromosomal abnormalities but also physical defects) can be not only the multiple pregnancy but also the IVF technique itself. In the opinion of Geddis Grudzinskas, a retired professor of obstetrics at *Barts and Royal London Hospital*, a higher risk of congenital defects can be connected with the use of the ICSI technique (*intracytoplasmic sperm injection*) during the IVF. This method consists in “injecting a single sperm into an egg instead of placing many sperms in its direct surrounding, like it is done in a standard in vitro procedure”. According to the results published in May 2012 in the magazine “*New England Journal of Medicine*”, for the population of 300,000 new-borns, congenital defects were found among 10% of children conceived using the ICSI method, whereas it was 6% for children conceived naturally. It is also important to note that this research also found congenital defects in 6% of children conceived using a standard in vitro procedure (an egg is placed on a Petri dish “in the presence” of around 100,000 sperms) (Hicks 2013, online).

Speaking of the situation in Poland, it is worth pointing out that the in vitro funding scheme stresses that international research shows that this method is effective and safe. At the same time it is suggested for ICSI to be one of the methods offered to young couples within the scheme. According to the authors similar measures should be offered especially when the health problem concerns the man. Polish researchers, including Professor Alina Midro, stress, however, that this method is dangerous. Professor Midro underlines that “During the in vitro fertilization procedure when we push the sperm inside the egg, we do not know whether it is mature enough and reprogrammed as regards the so-called epigenetic processes and thus defects may occur”. (Bątkiewicz-Brożek 2011, 30).

The implementation of this health scheme was stopped at the beginning of 2016 as decided by the Ministry of Health (Gajos 2015, 1). This scheme was in fact the first document which formally spoke of the assisted reproductive procedure applied in Polish in vitro clinics. This document, as well as the scheme itself, provoked criticism and received recognition as pointed out above. Even though rational critical comments were expressed about the Scheme, at the same time it was always presented as a very good model of support for infertile couples. This phenomenon is explained in an interesting way by Karen Veness, PR & Media Relations Manager at Infertility Network UK. She is a mother of a child conceived thanks to the in vitro method and she says that even if a woman is aware of risks

connected with the assisted reproductive procedure it is of no importance for her as: “The desire to have your own child is so strong that for the majority of women it will not be an obstacle” (Hocks 2013, online).

Legislative Measures

Before the Polish Ministry decided to end the health Scheme for infertility treatment using the *in vitro* method, the Polish Parliament decided to adopt the Infertility Treatment Act. This Act implemented:

- free of charge infertility treatment services; they are to be provided by assisted reproduction centres and reproductive cell and embryo banks (eventually the Ministry of Health abandoned the funding of these services) (Treatment of Infertility Act 2015, Nowicka 2016, 48);
- a “Register of Donors of Reproductive Cells and Embryos” (Infertility Treatment Act 2015).

According to the new law the notions of a recipient and of a donor of reproductive cells or of embryos were introduced. The reception of an embryo can happen within:

- a partner donation, or
- a non-partner donation.

The first one concerns married couples or people who have an intimate physical relationship. The second, however, concerns the donation of reproductive cells or of embryos by people who are not spouses or partners (it concerns anonymous donors) (Jałowska 2015, 1-2).

This document also presents detailed procedures concerning the functioning of Infertility Treatment Centres. Also rules were introduced for: labelling, tracing and storage of embryos and reproductive cells as well as for safety criteria of the assisted reproductive procedure (Jałowska 2015, 1-2).

When reading the Infertility Treatment Act, at the very beginning it is worth pointing out an important aspect. It turns out that a great majority of the Act refers only to the *in vitro* method (Kurzawa 2014, 1-2). The Act does not raise the issue of diagnosing the causes of infertility. However, the procedure of embryo testing is discussed at length i.e. preimplantation diagnosis as regards embryos that will be used during the procreation procedure in question. The Act does not raise the issue of testing physiological causes of infertility, but only stresses that if a couple proves that they have been trying for a year to conceive a child to no avail, this allows them to start a therapy in an *in vitro* clinic. Even though the medical community often quotes the one year stand-

ard, it is hard not to notice the view expressed by Polish gynaecologists and obstetricians, expressed already during the legislative works on the Infertility Treatment Act, who stressed that “In fact the in vitro fertilization concerns approximately 5% of the population who is affected by infertility (either of a woman or of a man)” (Kurzawa 2014, 1–2).

The analysis of the Polish *Infertility Treatment Act* raises important doubts of legal nature. When we speak of a situation when an embryo is created, also the content of the Ombudsperson for Children Act has to be taken into account (Ombudsperson for Children Act 2000, Convention on the Rights of the Child 1991). This Act says that a child is every human being since his/her conception. The doctrine points out that in this context the way the embryo was conceived is of no importance (Kmieciak 2016, 28). This standpoint was also shared by the European Court of Justice in the judgment *Oliver Brüstle v. Greenpeace e.V.* The judges held in this case that the human embryo, regardless of how it was created, deserved dignity, which is at the basis of a prohibition to introduce a possibility to patent an invention, the creation of which would be connected with the necessity to destroy such embryos (Brachowicz 2012, 68–69, Maśnicki 2013, 193–209). This is why the provision of the Infertility Treatment Act which provides a sanction for destroying embryos, but only those which are considered to be capable of further development, is not understandable. The Polish legislator did not introduce any criteria to assess embryos in this regard. The Act does not institute any rules on the control of the decision of a lab worker who decides to destroy an embryo. By referring to the provisions of the Ombudsperson for Children Act we clearly see that this means the end of a child’s existence at the very early stage of his/her development (Kmieciak 2016, 149).

This legal act – which is the key for the discussion concerning children’s rights – also stresses that the right to a family is one of the most important rights that every child has. The Infertility Treatment Act introduces significant changes in this respect. On the one hand, the so-called partner donation was allowed during the in vitro procedure, meaning a situation when a husband and a wife decide to undergo in vitro fertilization using their own reproductive cells. However, it turns out that people who are not in any formal relationship can also decide to undergo the same procedure. This means partners who are living together. It is not known, though whether such a couple will stay together until the end of the in vitro procedure and until the birth. The Polish Constitution, under its article 18, says that a marriage is a union between a man and a woman (Constitution of the Republic of Poland 1997).

If we are dealing with a relationship of partners – and this is very important to take into account the right of a child to a family – there are no formal com-

mitments that would constitute a legal guarantee of security of the conceived child. It is worth elaborating on this a little bit more. The Polish Infertility Treatment Act mentions several times that donors of reproductive cells have the right to information about the health and legal effects of their actions. As regards the first aspect, it is possible to receive results of tests and analyses concerning the safety of the *in vitro* procedure. However, as regards the legal aspect, the Act in question did not explain the legal effects. The key question is as follows: who will be the parent of the child – the mother as well as the father – when a woman receives an embryo created as a result of fertilization with biologically foreign reproductive cells? Does the husband or the partner of this woman by consenting to this, also declare that he will recognize this embryo as his child? The legal perspective in the case of the woman is clear only in theory. A woman who gives birth to a child – in accordance with the provisions of the Polish Family and Guardianship Code – is the child’s mother. In Poland, however, an important doubt was raised in this regard. Several months after the implementation of the above Infertility Treatment Scheme using the *in vitro* method, an error occurred during the insemination process in an *in vitro* clinic in the city of Police. One of the patients was implanted with an embryo inseminated with the sperm of her husband and the egg of another woman: during the procedure the eggs were mixed up. This error came to light several months after birth when genetic testing became necessary due to defects which occurred after the birth. It turned out that the woman, by mistake, gave birth to a child that was not hers. However, according to the Polish law she is the mother of this child and formally speaking she cannot deny it. Similar, paradoxical situations are described in detail by Marta Soniewicka. This researcher analysed cases treated by American courts and mentions situations when courts had to deal with the problem of the so-called “children without parents”. This concerns embryos from *in vitro* clinics that were not recognized by donors of reproductive cells or the parents who previously wanted to use them (Stelmach, Brożek, Soniewicka, Zaluski 2010).

Children’s Identity and Safety Issues

While showing the gaps and paradoxes of the Polish Infertility Treatment Act, we shall ponder a bit on the legal and medical situation of a child who was conceived with reproductive cells from anonymous donors. A child who is in a similar situation, once he/she has come of age, according to this Act, will have the right to know the health condition of such a donor/donors. However,

this concerns only the moment when the donor gave a reproductive cell or an embryo to a given bank. Professor Andrzej Kochoński, mentioned above, points out that the majority of genetic disorders show up later in life. A donor may see some disorders much later after his/her visit to the in vitro clinic. So a child will not have access to the knowledge about the health condition of his/her biological parent or will not be able to know their personal data (Gadziński et al., 2014, 11–13). It is not infrequent to hear that the child's right to identity may be infringed. This context is worth presenting more broadly, by paying attention first to the publicity of donors.

First of all, the situation in two European countries has to be referred to, i.e. Sweden and Great Britain. As Jan Lipski points out, in Sweden, until 2002 the process of transferring an embryo created with a third person's reproductive cell to a woman's womb was criminalized. Right now, the author adds: "It is only allowed to import semen – under the condition of receiving authorisation from the National Board of Health and Welfare. The provisions do not provide for exports of gametes. The amended law will no longer provide for the anonymity of donors (underlined by B.K.). Physicians (in vitro clinics) will be thus obliged to keep data allowing to identify the person whose gametes were used to conceive a specific child, in order to allow him/her, once he/she reaches the right age, to receive this information". Speaking of donors' publicity, usually people refer to the current legal situation of Great Britain, where the donation of reproductive cells is regulated by the provisions of the Human Fertilisation and Embryology Authority. Jan Lipski adds: "Until 2005 the donation was anonymous, however, since that year it has become necessary to indicate identifying information such as: personal data (first and last names, date and place of birth, sex), the last known address, information on the donor's ethnical group, number of children (their sex), a description of the donor's visual appearance, data of his/her parents, marital status, results of medical tests and passed diseases, and optional: profession, religion, education and interests as well as other information a donor would like to pass on to the person conceived from his/her donation. Data (collected in a special register) will be presented to the child at his/her request, when he/she turns 18 years old. If the data are disclosed to an unauthorised person this will lead to criminal liability. However, when the required data are not collected, this shall be considered as a crime of "using gametes without authorisation" (Lipski 2008, 77–78). By commenting on the above changes in the British law, the Minister at the Department of Health at the time, Stephen Ladyman said: "We recognized the right of the people conceived with an anonymous egg or semen who have been asking for years to be allowed to get to know their genetic roots. Some of them spend their whole

life looking for and trying to identify their father or mother” (Kossabudzka 2015 Author archive). Psychologists started stressing the importance of the above phenomenon. Members of the organisation Children’s Society said that: “We have been creating a serious problem that will have to be solved in a dozen or so years. We are seeing a whole generation of people being born who will not know who they are and where they come from”. We see more and more often people who were conceived in vitro and who have been claiming their right to receive biological identity. One of the people conceived in vitro, Zannah Mericks, adds: “This lacking knowledge is a missing puzzle. The most important element of a puzzle. I am not looking for a father. I already have one but if I could at least get an idea of who my biological father is, I could find out more about myself” (Kossabudzka 2015 Author archive).

This issue raised the interest of German courts of law. In 2013 the German court in Hamm rendered a judgment in a suit brought by Sara P. against the infertility treatment clinic in Essen. The court ruled that a person conceived with a donor’s semen had the right to know who her biological father was. As reported by Bartosz T. Wieleński the court’s judgment shows that “children’s rights are more important. Katzorke (heading the work of the above clinic – recalls BK) is to pass this girl her parents’ data. If the clinic does not do it – as it says – Sarah P. can send a court bailiff and the police to seize the documents. And the physician may be sent to prison for refusing to comply with the court’s judgment”. Whereas “Kölner Stadtanzeiger” (Wieleński 2013, online) stressed in its dispatches that “This wise and brave step constitutes a milestone. Many children, who were born thanks to medical advances, are going through some serious emotional problems when they find out that their father is not their father. Now, if they want, they will be able to find out who they come from” (Wieleński 2013, online). The applicant, having received the final judgment, also said that: “I feel incomplete. I imagine that once I find my father I will find my other half” (Wieleński 2013, online).

It has to be added that right now there are not standards defined by the jurisprudence of international courts in this matter. However, it is worth mentioning the judgment of the Grand Chamber of the European Court of Human Rights, which held in the case *S.H. and Others v. Austria* that “the prohibition of using third party donor eggs or sperm during in vitro fertilisation does not amount to discrimination under the Human Rights Convention. This way the Grand Chamber confirmed the position of the Austrian government and thus other countries can maintain this prohibition. This time the judgment is final (Łaszewska-Hellriegel 2012, online).

An exact analysis of positions presented as regards the issue of anonymity of reproductive cells' donors enjoys a particular interest from the advocates of in vitro implementation and legalisation. Several comments presented by Polish advocates of legalizing assisted reproductive techniques should be presented as well. Anna Krawczak, who is heading the work of the Association "Stowarzyszenie na Rzecz Leczenia Niepłodności i Wspierania Adopcji NASZ BOCIAN", says that when analysing the provisions of the Infertility Treatment Act one may see important gaps therein connected with a lack of the possibility to find out important information by the people who were conceived in vitro. This activist stresses that: "We cannot find out whether this family had a history of abdominal cavity cancer, diabetes, schizophrenia or Alzheimer's disease. Things that we do not really pay attention to in our daily life because they are transparent for us – we know very well what Aunt Sophie or Grandpa Anthony died of. This is a natural part of our knowledge whereas we do not really pay attention to it. People who are born thanks to a donation will receive very little of this knowledge and the information that the donor was born in 1978 in Kalisz does not make him/her any more realistic. The knowledge about who the donor was, what his/her name was, what he/she liked, the education, what he/she did for a living can be of importance for the children," as Krawczak points out. "Even though the Polish law does not define genetic parenthood, regardless of what the Polish legislator will say, every one of us is a sum of our genetic parents' DNA. Even if we were adopted, the story of our life did not begin when our adoptive parents brought a tiny bundle from the adoption centre. The idea that the State can convince us that it is of no importance for us whose genes we carry, because only our social parents should matter (those that raised us), is a questionable idea at the very least" (Ziółkowska 2015, online).

The above standpoint was presented in a critical opinion that the above Association prepared about the Infertility Treatment Bill. The document stressed that: "Many Polish couples have been using the semen of non-anonymous donors through the agency of commercial, foreign sperm banks that offer the possibility to choose between an anonymous or an open donor. This phenomenon has been present in Poland as confirmed by the results of our public consultation conducted in May 2014, where patients asked to evaluate „the possibility of choice between an anonymous or non-anonymous donor” on the scale from 1 – very important to 5 – not important, 81% of them said that this solution was either very important or important (respectively: 58% and 23%, sample size n-722). In our opinion there are no reasons why this need of patients benefiting from non-partner donation should be ignored and why only anonymous donations should be admitted by the Polish law (Document

“Nasz Bocian” 2014, 1-3). In this context it was added that “...with the current legislation providing only for anonymous donations, there is an asymmetry between the rights of an adopted child and those of a child conceived as a result of a non-partner donation, also called a prenatal adoption (underlined by B.K.). The second group of children will not be authorised to fully enforce their right stemming from Article 8 of the Convention on the Rights of the Child” (Document “Nasz Bocian” 2014, 1-3). The authors of the above comments conclude as follows: “The implementation of anonymous non-partners donations seems to ignore the voice of children who have come of age and of their parents and to follow the biomedical paradigm, which – being the only one decisive in bioethical issues – has been challenged since the beginning of the 21st century by experts of research institutions dealing with assisted reproductive medicine, such as the European Society of Human Reproduction and Embryology (ESHRE)” (Document “Nasz Bocian” 2014, 1-3).

Towards a Conclusion

The existence of a gap in the law is a phenomenon that is natural to a great extent. The law, by using formal tools, tries to put in order a specific area of reality. However, it does not have the possibility to see all expected, or potential, aspects that may accompany the entry into force of a legal provision. Thus, when analysing such an area as the regulation of medical aspects, it has to be expected that during the validity of specific legal norms there will be specific difficulties and problems stemming directly from e.g. gaps or contradictions detected in the act. The existence of the presented imperfections also stems from another, yet important phenomenon. The law cannot keep pace with the dynamically changing biomedicine. First of all, the science of law and natural sciences are using different research methods, secondly, lawyers, while doing their analyses or conducting reflections, do not have the possibility to assess a given idea or the outcome of research on an on-going basis. However, the existence of gaps in the provisions concerning medicine shows a slightly different reality. It is a paradox i.e. a contradiction that was not really expected between specific phenomena. Similar paradoxes are becoming even more clear when the society is discussing the in vitro method. The above mentioned in-vitro fertilization method, when presented in different documents, is shown as a key element taking into account the scourge of infertility. It is indicated that in-vitro is an innovative method, the knowledge of which is getting better and better among researchers. It is also added that this method is effective. In the social context it is stressed that it refers to

a fundamental human right, the right to a family. Going deeper in the content of formal documents (such as the above mentioned scheme or the act), but not only, shows that this method is in fact a mystery. It is interesting to note that among gynaecologists there are people who, on the one hand, support the promotion of this assisted reproductive technique, and, on the other, point out its low effectiveness and that it is not entirely secure. Certainly, the appearance of the in vitro method has become an important element of the fight against infertility. Even though its advocates repeat that it is a treatment, when looking at its effects it is difficult to consider this method to be a therapy. This procedure does not lead to the disappearance either partial or total solution of the problem with conceiving a child. On the other hand, however, if we consider the in vitro technique as a method of avoiding the infertility issue, another important element cannot be avoided. In the case of couples trying to conceive a child the cause of infertility is not known. Going round unidentified difficulties in such a matter which is key for many, certainly constitutes a particularly precious possibility. Thus, a question appears: can we locate barriers that we should not break down? On the one hand, it is indicated that assisted reproductive techniques help enforce the human right to a family. On the other, however, it is worth pondering whether while undertaking such actions the child's right to identity is guaranteed. The appearance of the consent and a spreading acceptance for the in vitro method with the use of reproductive cells coming from anonymous donors constitutes a critical moment in the modern history of medicine. Positive law (so a collection of laws) in its activity and diagnosis always referred to the laws governing biology. In consequence it was natural to put in family law provisions that the woman who gave birth to the child is the mother. How should this provision be interpreted when a woman who gives birth to a child of an anonymous donor? How this should be done when the woman gives birth to a child of another woman by accident? Can the law at all refer more broadly to a situation when a conceived child has a biological mother and a mother who gave birth to this child? What is the situation of a man who decides to become a father by accepting a third person's sperm to be used in the in vitro procedure? Similar questions are increasingly repeated and it seems that so far there has been no answer to them. Also the child's situation is the key as well as his/her relation with the parents. The question: Who am I and where do I come from? is entirely obvious. In a situation when a child born to a biologically foreign woman – who previously participated in the in vitro procedure – this question will remain without a full answer. Certainly a child is not fully defined by the parents' first name or surname. However, the provisions proposed in Poland lead to a situation where, in fact, there will never be a possibility to reach a single history of each person. Moreover, and it is also paradoxal,

assisted reproductive techniques, considered by many to be the achievement of contemporary medicine, can contribute to the infringement of the patient's right to healthcare provided in accordance with the current state of medical knowledge. It has become a standard to take genetic history during the examination. When we are dealing with prenatal adoption (the use of a third party's embryo or reproductive cell), no physician can carry out such an examination as he/she will not be able to collect the information.

In Poland, the implementation of in vitro fertilization provisions, as it was pointed out, received great recognition, but also provoked criticism. However, it has to be pointed out that it put an end to a very uncertain period when this important issue i.e. the use of assisted reproductive techniques was not regulated at all. There are some positive changes in Europe as regards the fight for the identity and dignity of the children conceived through this technique. They may constitute the basis for further reflection of Polish politicians, lawyers, and physicians.

Bibliography

- Act as of 2 April 1997 the Constitution of the Republic of Poland.* (J.L. no. 78, item 483 with subsequent amendments).
- Act as of 6 January 2000 on the Ombudsperson for Children.* (J.L. no. 6 item 69).
- Act as of 25 June 2015 on the Treatment of Infertility.* (J.L. of 2015, item 1087).
- BIELECKA, M. 2017. In vitro to nie tylko szczęście, ale i ryzyko (*In vitro means not only happiness but also a risk*). *Gazeta Wyborcza*, http://poznan.wyborcza.pl/poznan/1,36001,13490528,In_vitro_to_nie_tylo_szczescie__ale_i_ryzyko.html (access: 04.04.2017).
- BĄTKIEWICZ-BROŻEK, J. 2011. In vitro się zemści (IVF will come back to haunt us). *Gość Niedzielny*, no. 42, p. 30.
- BĄTKIEWICZ-BROŻEK, J. 2013. Skazani na in vitro (Doomed to IVF), *Gość Niedzielny*, no. 16, p. 17–18.
- BOBER, M., 2012. Mutacje po in vitro. *Nasz Dziennik*, <http://www.radiomaryja.pl/informacje/mutacje-po-in-vitro/> (access: 11.05.2017).
- Convention on the Rights of the Child* adopted by the United Nations General Assembly on 20 November 1989 (J.L. as of 23 December 1991).
- COOK, R. 2010. *Vital Signs*. Warszawa: Dom Wydawniczy Rebis.
- FUNDACJA JEDEN Z NAS, MIĘDZYWYDZIAŁOWY INSTYTUT BIOETYKI UPJPII, FUNDACJA JEROME LEJEUNE. 2011. *Przewodnik, Bioetyka dla młodych* (A guide on bioethics for the young). Kraków: Wydawnictwo eSPe.

- GADZINOWSKI, J., KOCHAŃSKI, A., LEWANDOWICZ, A., BANASIUK, J., KMIECIAK, B., STĘPKOWSKI, A., SZAFRAŃSKI, A., ZYCH, T. 2014. *Opinia w sprawie projektu ustawy z dnia 16 lipca 2014 r. o leczeniu niepłodności*. Warsaw. p. 11–13.
- GAJOS, J. 2015. Rządowy program in vitro nie zostanie przedłużony. *Newsletter Bioetyczny*, no. 19, p. 1.
- HICKS, Ch. 2013. *Wrodzone wady z in vitro (IVF congenital defects)*. Onet.pl zdrowie, <http://kobieta.onet.pl/zdrowie/zycie-i-zdrowie/wrodzone-wady-z-in-vitro/1jx7x> (access: 12.07.2017).
- JALOWSKA, A. 2015. Ustawa o leczeniu niepłodności wejdzie w życie. *Newsletter biotyczny*”, No. 15, p. 1–2.
- KARPIŃSKA-MOREK, E. 2015. *In vitro powoduje rozleniwienie mentalne lekarzy*. http://fakty.interia.pl/tylko-u-nas/news-dr-blazej-kmieciak-in-vitro-powoduje-rozleniwienie-mentalne-,nId,1913087#utm_source=paste&utm_medium=paste&utm_campaign=firefox, (access: 11.05.2017).
- KIM, R. 2012. In vitro? Szczęście, nie grzech. Wywiad Renaty Kim z Bogną Swarowską, Interview conducted by R. Kim with Bogna Sworowska, *Newsweek*, no. 27, p. 24–25.
- KMIECIAK, B. 2010. Socjopedagogiczny kontekst dyskusji dotyczącej prawnego usankcjonowania metod zapłodnienia pozaustrojowego. In: R. Żarow (ed.). *Człowiek w zdrowiu i chorobie. Promocja zdrowia i rehabilitacja*. T. III. Tarnów: Wyd. WSD Tuchów, p. 148–158.
- KMIECIAK, B. 2013. *Bioetyczny detektyw (A bioethical detective)*. <http://biotechnologia.pl/bioetyka/aktualnosci/bioetyczny-detektyw-innowacyjny-projekt-tv-trwam,536> (access: 04.07.2017).
- KMIECIAK, B. 2015a. *Zapłodniony bluff – wywiad z prof. A. Lewandowiczem (Fertilized bluff- interview with prof. A. Lewandowicz)*, „Biotechnologia.pl”, <http://biotechnologia.pl/bioetyka/gen-i-etyka/zaplodniony-bluff-wywiad-z-prof-andrzejem-lewandowiczem,15578> (access: 04.03.2017).
- KMIECIAK, B. 2015b. W stronę chirurgii zarodka: Socjoprprawne aspekty innowacyjnych technik wspomaganego rozrodu. *Ethics Progress*. Vol. 6, no. 1, p. 141–158.
- KMIECIAK, B. 2016. *Prawa dziecka jako pacjenta*. Warszawa: Wydawnictwo C.H. Beck.
- KORBASIŃSKA, D. 2016. *List do Marty Górnej, Przewodniczącej Zarządu Stowarzyszenia Na Rzecz Leczenia Niepłodności i wspierania Rodziny Nasz Bocian*. Ministry of Health, Warsaw.
- KOSSOBUDZKA, M. 2015. Dawcy spermy przestają być anonimowi (Sperm donors no longer anonymous). *Gazeta Wyborcza* (Author archive).
- KRAJ, T. 2008. Wokół dyskusji na temat zapłodnienia in vitro. *Teologia i Moralność*. V. 4, p. 107–119.

- KRAJ, T. 2009. Instrukcja Dignitas Personae: Wskazania moralne i kontrowersje wokół nich na przykładzie adopcji prenatalnej. *Studia Warmińskie*, no. 46, p. 283–294.
- KURZAWA, R. 2014. *Stanowisko Sekcji Płodności i Niepłodności PTG w sprawie rządowego projektu ustawy o leczeniu niepłodności*, Szczecin Polskie Towarzystwo Ginekologiczne. . p 1–2.
- LIPSKI, J. 2008. Warunki i zasady dokonywania dyspozycji materiałem genetycznym (dawstwa gamet) w wybranych krajach europejskich (Terms and rules of genetic material [gamete donation] management in selected European countries). *Zeszyty Prawnicze – Biuro Analiz Sejmowych*, no. 1, p. 77–78.
- ŁASZEWSKA-HELLRIEGEL, M. 2012. *ETPCz, in vitro i problem dawców komórek rozrodczych*. Warszawa: Wydawnictwo Naukowe. http://pewp.pl/index.php?option=com_content&view=article&id=55&Itemid=62 (access on 04.07.2017).
- MAZUR, D., MUSZALA, A. 2015. *Bioetyka w dialogu*. Warszawa: Magdalenum.
- MINISTRY OF HEALTH, 2013. *Document Infertility Treatment Scheme with IVF 2013–2016*. Warsaw.
- NESTEROWICZ, M. 2005. *Prawo medyczne*. Toruń: Zakład Poligraficzno-Wydawniczy Pozkał.
- NOWICKA, W. 2016. Polityka w Polsce w kontekście UE; prawa kobiet i prawa reprodukcyjne. In: *Raport Kongresu Kobiet i Stowarzyszenia Równość i Nowoczesność*. Warszawa: Wyd. Kongres Kobiet, p. 48.
- Prezydent podpisał ustawę o in vitro. Jeden punkt zbada Trybunał Konstytucyjny* (The President has signed the In-Vitro Act. One aspect will be examined by the Constitutional Court). 2015. <http://www.tvn24.pl/wiadomosci-z-kraju,3/prezydent-bronislaw-komorowski-podpisal-ustawe-o-in-vitro,562092.html>, (access: 11.05.2017).
- STELMACH, J., BROŻEK, B., SONIEWICKA, M., ZAŁUSKI, W. 2010. *Paradoksy bioetyki prawniczej*. Warszawa: Oficyna Wolters Kluwer Business.
- SZCZERBIAK, A. 2015. *Prezydent podpisał ustawę o in vitro, ale chce, by jeden z jej przepisów zbadał Trybunał Konstytucyjny* (The President has signed the In-Vitro Act. He wants one of its provisions to be examined by the Constitutional Court). <http://www.polityka.pl/tygodnikpolityka/kraj/1626-943,1,prezydent-podpisal-ustawe-o-in-vitro-ale-chce-by-jeden-z-jej-przepisow-zbadal-trybunal-konstytucyjny.read> (access 11.05.2017).
- SZÓSTEK, A. 2009. Etyczne aspekty zapłodnienia „in vitro”. *Chrześcijaństwo – Świat – Polityka*, no. 1. p. 5–13.
- Uwagi Stowarzyszenia na Rzecz Leczenia Niepłodności i Wspierania Adopcji NASZ BOCIAN do projektu Ustawy o leczeniu niepłodności z dnia 16 lipca 2014 roku*. Warsaw 2014, p. 1–6.

- WIELEŃSKI, B.T., 2013. *Kobieta poczęta z nasienia dawcy ma prawo wiedzieć, kto jest ojcem*. http://wyborcza.pl/1,76842,13359691,Kobieta_poczeta_z_nasienia_dawcy_ma_prawo_wiedziec_.html?disableRedirects=true (access: 04.06.2017).
- Wielka porażka promowanego przez PO rządowego programu in vitro. Poznaj dane (A big failure of the governmental IVF scheme promoted by the party PO. Get to know the data)*. 2016. <http://wpolityce.pl/spoleczenstwo/298881-wielka-porazka-promowanego-przez-po-rzadowego-programu-in-vitro-poznaj-dane> (access: 12.01.2017).
- ZIÓŁKOWSKA A., KRAWCZAK A., 2015. *Po kim masz oczy? Po in vitro*. <http://www.krytykapolityczna.pl/artykuly/zdrowie/20150403/krawczak-vitro-nie-je-st-tylko-kwestia-medyczna-rozmowa> (access: 04.07. 2017).

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