

The Polish Catholic Church and the Regulation of IVF in Poland: Polarised Political Discourses and the Battle over ‘Proper’ Reproduction

Dorota A. Gozdecka*

I. Introduction

On 4 October 2010 the Nobel Prize in medicine was awarded to Professor Robert G. Edwards for the development of in vitro fertilisation. At nearly the same time, on 22 October 2010, the Polish Parliament held a heated debate on a proposed legislative ban on the IVF procedure and the question of its morality and compatibility with ‘natural law’. The procedure, which is currently available albeit not specifically regulated under Polish law, is opposed by the Catholic Church which does not recognise artificial methods of procreation. Due to this moral objection the Polish Church in its multiple statements and attempts to influence Polish MPs entered a political battle aimed at the introduction of an absolute ban on access to IVF regardless of a person’s religious convictions.

Religious and philosophical beliefs strongly influence approaches to women’s reproductive rights around the globe. Where liberal approaches see women’s rights, religions often see the domain of their traditional control. And without a doubt many if not the majority of people will give the religious aspect an important role in their reproductive choices. The difficult question is, though, to what extent religions should influence the legislator in making moral choices possible or impossible for everyone. Achievement of the objectives specified in the Beijing Platform for Action advocating for ‘the explicit recognition and reaffirmation of the

* University of Helsinki, Centre of Excellence in Foundations of European Law and Polity Research and Australian National University, Centre for European Studies. dorota.gozdecka@helsinki.fi

right of all women to control all aspects of their health, in particular their own fertility'¹ encounters multiple problems in particular as far as abortion, assisted reproduction and in some cases even contraception² are concerned. Religious opposition to the idea of reproductive rights has prevented any decisive development in that area in many regions of the world. In particular the Catholic Church, who as the Holy See has the status of a permanent observer in the United Nations and was present during the Cairo and Beijing conferences, has remained in firm opposition to full recognition of women's reproductive rights in particular such as access to legal abortion.³ The Catholic understanding of natural law also condemns methods of assisted procreation, in which embryos are created outside the body. According to documents issued by the Vatican, such as for instance the Encyclical *Evangelium Vitae*⁴ or Instruction *Donum Vitae*,⁵ it should be natural to oppose procedures producing a number of human embryos that will not be used and will be eventually experimented on or destroyed. Justifying its position by what it understands as universally binding 'natural law', the Church attempts to continue being a key player in the regulation of biomedical and reproductive issues not only in international law, but also in those countries where the Catholic population is dominant.

This article analyses the position of the Church and its influence on the draft proposals attempting to regulate issues concerning assisted reproduction in Poland. It focuses on the notion of 'politicised religion' in order to understand the position of the Church in Poland as a semi-political organisation and its impact on processes of democratic deliberation. The

¹ United Nations, A/CONF.177/20, 1995.

² Dorota A. Gozdecka, 'Catholic Family Values instead of Equality - Polish Politics Between 2005-2007: Envisioning the Role of Women' in: I. Sulkunen, S.-L. Nevala-Nurmi, P. Markkola, *Suffrage, Gender and Citizenship - International Perspectives on Parliamentary Reforms* (Cambridge: Cambridge Scholars Press, 2009).

³ Rishona Fleishman, 'The Battle Against Reproductive Rights: The Impact of the Catholic Church on Abortion Law in both International and Domestic Arenas', 14 *Emory International Law Review*: 1 (2000).

⁴ John Paul II, *Encyclical letter Evangelium vitae*, No. 1995.03.25, 1995.

⁵ Congregation for the Doctrine of the Faith, *Donum vitae, Instruction on Respect for Human Life in its Origin*, 1987.

objectives of the article are not to criticise the Church's stance on the matter of IVF or to argue in favour of IVF as a form of advancing female liberty. The intention is rather to bring to light the unfortunate results of the intransigent opposition of the Church to any proposals aimed at achieving legislation best reflecting social consensus on the matter. These include not only exclusion of any other conception of femininity than that advocated for by the Catholic Church in Poland, but also a lack of protection of Catholics not willing to be involved in the procedure due to the current lack of any regulation on this specific matter.

Grounding its approach in deliberative democratic theory the article critically approaches the attempts to ban the procedure and the methods used. It examines the effort of politicised dominant religion to minimise the relevance of democratic deliberation through the polarisation of political debate, diminishing the importance of religious pluralism and social diversity and relying solely on a natural law interpretation of human rights. Its objective is also to emphasise the impact of these political processes on the perception of women's bodies and women's reproductive autonomy.

This will be done in the following steps: firstly the article addresses the problem of the 'politicisation' of religion and its impact on the control of women's bodies. Secondly it focuses on the legal proposals and debate concerning the regulation of IVF that took place in Poland during the previous term of the Parliament (the Sejm). Furthermore it engages in critique of the multiple discursive strategies employed by religiously motivated politicians in their struggle for 'proper reproduction', and lastly it emphasises the potential for otherising infertile women and couples as those whose bodies and desires to have children need to give way to a uniform rather than pluralistic conception of religion and nation.

II. The Political Role of Religions in Discourses on Reproduction

Scholars investigating problems of the legal regulation of sexuality, female reproductive rights and other forms of legal control over human bodies frequently remind us that women are the primary ones whose bodies are increasingly regulated.⁶ Due to women's potential roles as mothers, different elements of control are introduced into legislation in the name of protection of the foetus. Examples are numerous: from more radical methods of control, such as abortion bans or control of assisted reproduction, to much milder options such as requirements of maternity clinic control in order to be eligible for maternity social benefits.⁷ Not surprisingly, the area of legislation pertaining to reproduction also falls close to the core of beliefs of many institutionalised religions. The core of many Christian beliefs, including both Catholic and Evangelical, focuses on the role of God in the process of human creation. These diverse beliefs lead to what Nisbet describes as 'competition for worldviews'⁸ among religious populations. Among generally 'poorly' rather than 'fully' informed publics, religions frequently engage in competition for the support of individuals in matters concerning the regulation of reproduction and the creation of embryos.⁹ Focusing on the protection of values and beliefs allows churches to appeal for the support of like-minded members of the population and transforms these essentially non-political organisations into political communities.¹⁰ And since groups usually respond to what they perceive as an attack on sacred values, churches find themselves in the position of 'defenders' of those values, who

⁶ See e.g. Yakare-Oule Jansen, 'The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination', 40 *Akron Law Review* (2007), pp. 314-317; Isabel Karpin, 'Legislating the Female Body: Reproductive Technology and the Reconstructed Woman', 3 *Columbia Journal of Gender and Law*: 1; Fleishman (2000), *supra* note 3, pp. 304-305.

⁷ See e.g. in Finland: Äitiysavustuslaki [Law on maternity grant] 28.5.1993/477, para. 2.

⁸ Matthew C. Nisbet, 'The Competition for Worldviews: Values, Information, and Public Support for Stem Cell Research', 17 *International Journal of Public Opinion Research*: 1 (2005).

⁹ *Ibid.*

¹⁰ Kenneth D. Wald, Dennis E. Owen, Samuel S. Hill, 'Churches as Political Communities', 82 *American Political Science Review*: 2 (1988).

are justified to take political action.¹¹ In the context of assisted reproduction and women's rights, any form of permissive regulation constitutes an attack on the natural order of creation. Thus religion becomes a political force fighting for what is perceived as the protection of values, morals and identity.¹² In this process of politicisation of religion, observe Wald et al., individual religious belief becomes secondary in favour of political homogeneity.¹³ This politicisation of the religious group identity carries a distinctive quality of dividing the electorate¹⁴ and whereas in diverse societies cultural resources may be diverse,¹⁵ this is not true in societies where religious identity is more homogenous. In the case of such societies another element becomes evident in the religious discourses on matters of morality and values - the equation of religious identity with national identity. As Obirek observes, this nationalisation of religion is frequent in many nations with dominant Catholic populations.¹⁶ In these nations discourses on national religious values often blend with discourses on sexuality and gender.¹⁷ The sexual morality of the nation is also treated as synonymous with religious morality. This leads to an equation of the interests of a religion with the interests of the family and through the prism of the family, the interests of the entire state. As Friedland observes in his political analysis of religious nationalisms:

Religious nationalisms are animated by family drama; they all center their fierce energies on the family, its erotic energies, its gendered order. This is because the institutional logic of religion centers on the

¹¹ Kenneth D. Wald, Adam L. Silverman, Kevin S. Fridy, 'Making Sense of Religion in Political Life', 8 *Annual Review of Political Science* (2005), p. 130.

¹² *Ibid.*

¹³ Wald, Owen, Hill (1988), *supra* note 10.

¹⁴ Wald, Silverman, Fridy (2005), *supra* note 11, p. 129.

¹⁵ *Ibid.*, p. 132.

¹⁶ Stanislaw Obirek, 'Katolicki czyli Polski. O nowych formach polskiego nacjonalizmu' [Catholic or Polish: The New Forms of Polish Nationalism], 1 *Jewish History Quarterly* (2009), p. 41.

¹⁷ See e.g. Alan Finlayson, 'Sexuality and Nationality: Gendered Disources in Ireland' in: T. Carver and V. Mottier, *Politics of Sexuality: Identity, Gender, Citizenship* (London: Routledge, 2005), pp. 91-101; Ruth Fletcher, 'Reproducing Irishness: Race, Gender and Abortion Law', 17 *Canadian Journal of Women and the Law* (2005), pp. 365-404.

order of creation, locating humanness in the cosmos, replicating cosmology through ritual, a practical metaphysics that necessarily points before life and death.¹⁸

Politicised and nationalised religion also frequently comes close to political religion, a concept, which albeit not without contestation,¹⁹ is used in political theory to describe qualities of dictatorial, authoritarian or theocratic regimes and their ability to operate in ways which resemble religious forms of life. Both politicised and political religions often concentrate on the denial of personal autonomy. As Burrin observes, political religion's sole focus is denial of the liberal conception of life and the existence of separate spheres of social life. The goal of a political religion is to 'encompass the entire life of society in the political'. And achievement of that goal can be done only by suppressing 'the free display of tastes, preferences and behaviour'.²⁰ As Himmelstein reminds us, after Halebsky and Okraku before him, the common theme in religious conservatism that opposes women's reproductive autonomy is a general opposition to too much freedom, too much autonomy and too much liberty from traditional roles and norms.²¹

The study below does not take as its objective the exclusion of religion from public life or advocating for a uniform and purely secular conception of women's reproductive rights. Instead it attempts to illustrate the homogenising impact of dominant politicised religion on conceptions of femininity and religiosity in increasingly diverse societies. It focuses on the Polish example of the battle for the banning of IVF despite overwhelming popular support for the procedure and the voices of protest of those most concerned.

¹⁸ Roger Friedland, 'Religious Nationalism and the Problem of Collective Representation', *27 Annual Review of Sociology* (2001), p. 134

¹⁹ See e.g. Emilio Gentile, 'Political Religion: A Concept and its Critics – A Critical Survey', *6 Totalitarian Movements and Political Religions*: 1 (2005).

²⁰ Philippe Burrin, 'Political Religion, The Relevance of a Concept', *9 History and Memory*: 1(2) (1997), p. 328.

²¹ Jerome L. Himmelstein, 'The Social Basis of Antifeminism: Religious Networks and Culture', *25 Journal for the Scientific Study of Religion*: 1 (1986), p. 9.

III. Historical Reasons for the Strong Political Position of the Roman Catholic Church in Poland

Catholicism has for centuries been the dominant religion in Poland. In its recent history, the role of the Church has been particularly significant. It played an important role in the re-establishment of the democratic system in Poland in 1989. In the country where more than 90 per cent of a population of almost 40,000,000 is considered Catholic, the Church supported opposition movements leading to the fall of the former Eastern Bloc. The election of a Pope from Poland in 1978 reinforced the strong bond between the opposition and the Church. At the time of the Solidarity movement, the involvement of the Church in the processes leading to the fall of the old regime was seen as a political victory of freedom of religion rather than a danger to other democratic freedoms.²²

After the re-establishment of democracy, however, the Church started to gain more and more political power. The role of religion in Polish society and politics became increasingly significant and political parties originating from the Solidarity movement declared their Catholic commitment due to their historic heritage. During their periods of domination in Parliament, post-Solidarity parties brought in new laws mandating Catholic religious instruction classes in public schools²³ and tightening abortion regulation.²⁴ During the 23 years of democratic changes in Poland, the centre and right-wing parties affirmed their origins in the Solidarity movement and in a stronger or weaker way their commitment to

²² See e.g. Władysław Sila-Nowicki, 'The Role of the Catholic Church in Polish Independence Movement', 6 *New York Law School Journal of International and Comparative Law* (1984–1986), pp. 703–707.

²³ *Rozporządzenie Min. Edukacji Narodowej w sprawie organizowania nauki religii w szkołach publicznych* [Ordinance of the Minister of Education on the organisation of religious instruction classes in public schools], Dz.U z 1992 r. nr 36 poz.155 and *Konkordat między Stolicą Apostolską i Rzeczpospolitą Polską* [Concordat between the Republic of Poland and the Holy See], Dz. U. z 1998 r. Nr 51, poz. 318, Article 12.1.

²⁴ *Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży* [Law on family planning, protection of the foetus and conditions of legally permitted abortion], Dz.U z 1993 r., Nr 17, poz. 78; z 1995 r., Nr 66, poz. 334, z 1996 r., Nr 139, poz. 646, z 1997 r. Nr 141, poz. 943, Nr 157, poz. 1040 i z 1999 r. Nr 5, poz. 32.

Catholicism and Catholic values, or at least to Christianity and Christian values. The political left, on the other hand, evolved over time into what is commonly considered a social democratic movement and embraced in their programmes the values of human and constitutional rights including social rights, state neutrality in religious matters and women's rights along with reproductive rights. Originally, however, Polish social democratic parties consisted of many members who had previously belonged to the former structures of the governing communist party.²⁵ Political polarisation began when the right wing parties began to refer to the left wing as 'post-communists', 'heirs of the old regime' and 'enemies' of national and Catholic values. This polarisation became particularly visible in the pre-electoral discourse in 2005. During their election campaign Prawo i Sprawiedliwosc (PiS)²⁶ used as their leading mottos slogans about clearing the debts of the past and full 'decommunisation'.²⁷ At the same time, the more strongly the parties identified themselves with the political right wing, the greater role in their programmes was given to Catholic values as one of the means of reaffirmation of Polish national interests and opposition to the 'communist' values professed by the socialists. In the political discourse led by the right wing parties, Catholic values became synonymous with patriotic values and opposed to socialist, 'post-communist' and even European values, which were seen as foreign and oppressive.

This reflected upon the position of Polish women and the image of the family. Changes and debated changes pertaining to the sphere of family life included closing down the institution of the Governmental Plenipotentiary for Gender Equality in November 2005 and establishing as a 'replacement' an organ belonging to the legislature, the Parliamentary Committee for

²⁵ See e.g. Frances Millard, 'Poland's Politics and the Travails of Transition after 2001: The 2005 Elections', 58 *Europe-Asia Studies*: 7 (2006), pp. 1007–1031; Aleksander Smolar, 'Poland's Emerging Party System', 9 *Journal of Democracy*: 2 (1998), pp. 122–133.

²⁶ Prawo i Sprawiedliwosc [Law and Justice] is a right wing party led by Jaroslaw Kaczynski, former Prime Minister in the years 2006–2007.

²⁷ *Program Prawa i Sprawiedliwosci 2005–2007*, [Political Programme of Law and Justice 2005–2007], Dokumenty programowe Prawa i Sprawiedliwosci.

Family Matters and Women's Rights, led by the ultra-conservative MP Alina Sobecka representing Liga Polskich Rodzin (LPR).²⁸ Matters discussed during the conservative government's rule included among others an absolute ban on abortion, limitation of access to contraceptives and lengthening maternity leave without the possibility of sharing the leave by both of the parents. The issue of in vitro fertilisation was not actively discussed during that time.

IV. The New Government and the Need for IVF Regulation

When the political situation stabilised after the premature parliamentary elections in 2007 and centrist party Platforma Obywatelska (PO) established the new government, the strong Catholic influence was moderated.²⁹ The institution of Governmental Plenipotentiary for Gender Equality was re-established in March 2008 and the absolute ban on abortion and previous initiatives suggesting limited access to or at least labelling of contraceptives as 'health hazardous' were no longer discussed.

However, the discussion of Catholic morality and the role of the family returned to the public debate when the PO-led government began preparing proposals aiming at regulation of in vitro fertilisation and gamete donation, procurement and conditions of storage. Specialised laws regulating assisted reproduction including IVF, gamete donation and surrogacy³⁰ do not currently exist. Medical practice operates solely on the basis of customary norms of good

²⁸ Liga Polskich Rodzin [League of Polish Families] was an ultra conservative party, belonging to the governmental coalition between the years 2006–2007.

²⁹ Platforma Obywatelska [Civic Platform] is a centrist party, led by the current Prime Minister Donald Tusk and re-elected as a majority party in October 2011.

³⁰ According to current legal scholarship a surrogacy agreement is not a binding agreement under Polish law and cannot be executed, *see e.g.* Marta Soniewicka, 'Sprawozdanie z debaty Polskiego Towarzystwa Bioetycznego „Jak uregulować kwestię macierzyństwa zastępczego?”' [Report on the debate of the Polish Bioethical Society: 'How to regulate surrogacy'], 22 *Diametros* (2009), pp. 178-197.

practice.³¹ Existing law on the procurement, storage and transplantation of human cells, tissues and organs regulates the storage of all human cells and tissues without distinction between gamete cells or human embryos.³² Poland has so far ratified neither the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (referred to as the Oviedo Convention) nor its additional Protocols. The Convention was signed by Poland in 1999, but so far the ratification process has not followed. Specific regulation of the area is, however, required by the collection of bioethical EU Directives: Directive 2004/23/EC, Directive 2006/17/EC and Directive 2006/86/EC, which regulate the quality and safety of donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.³³ The Directives require implementation in order to adjust Polish law to the requirements of EU law. Most of the proposed draft proposals justified the introduction of the regulation by reference to the requirements of European law and European human rights law.³⁴ On the European legal plane, however, common standards regarding the protection of gametes or embryos are not highly specific. In the context of human rights the European Court of Human Rights (ECtHR) has many times underlined that currently no European consensus on the issue of the regulation of the procedure exists.³⁵ The European Union's Directives, on the other hand require only minimum technical standards to be regulated and controlled by law. The requirements provided by the EU Directives do not,

³¹ See further e.g. Eleonora Bielawska-Batorowicz, 'Poland: Provision and Guidelines for Third Party Assisted Reproduction' in: E. Blyth, R. Landau, *Third Party Assisted Conception Across Cultures: Social, Legal, and Ethical Perspectives* (London: Jessica Kingsley Publishers, 2004), pp. 168-188.

³² *Ustawa o pobieraniu, przechowywaniu i przeszczepianiu komórek, tkanek i narządów* [Law on procurement, storing and transplanting of human cells tissues and organs], Dz. U. z 2005 r. Nr 169, poz. 1411.

³³ See below.

³⁴ Each proposal contains a brief paragraph explaining and justifying the proposed provision. The majority of the proposals are justified by the necessity of implementation of the European Directives, see eg. *Projekt ustawy o ochronie genomu ludzkiego i embrionu ludzkiego*, [Draft law on the protection of human genome and embryo], Druk 3466, 18 June 2009, p. 36, para. 3.

³⁵ See e.g. *Evans v. UK*, 10 April 2007, European Court of Human Rights, No. 6339/05; *S.H and Others v. Austria*, 3 November 2011, European Court of Human Rights, No. 57813/00.

however, in most cases differentiate between gametes, embryos or other human cells and tissues. The most important minimum requirements stemming from the Directives include the obligations of the EU member states to:

- establish a competent authority or authorities responsible for implementing the requirements of Directive 2004/23/EC³⁶ and competent authority or authorities to conduct inspection of facilities dealing with the procurement, donation, testing, storage, preservation and distribution of human cells and tissues³⁷
- ensure that testing and procurements of tissues and cells are carried out by persons with appropriate training and experience³⁸ and establishments where testing, preservation, storage and distribution of those cells and tissues take place are accredited, designated, licensed or authorised by the relevant authority³⁹
- ensure that testing of donors should be carried out by a qualified, accredited, authorised or licensed laboratory⁴⁰
- ensure that all tissues and cells should be traceable and that member states implement a tracking system,⁴¹ which will use a single European identifying code⁴²
- ensure that donation is voluntary and unpaid and based on anonymity of the donor and the recipient⁴³

³⁶ European Parliament and the European Council, *Directive on Setting Standards of Quality and Safety for the Donation, Procurement, Testing, Processing, Preservation, Storage and Distribution of Human Tissues and Cells*, 2004/23/EC, Article 4.1.

³⁷ *Ibid*, Article 7.

³⁸ *Ibid*, Article 5.1.

³⁹ *Ibid*, Article 6.1.

⁴⁰ *Ibid*, Article 5.2.

⁴¹ *Ibid*, Article 8.

⁴² European Commission, *Commission Directive Implementing Directive 2004/23/EC of the European Parliament and of the Council as Regards Traceability Requirements, Notification of Serious Adverse Reactions and Events and Certain Technical Requirements for the Coding, Processing, Preservation, Storage and Distribution of Human Tissues and Cells*, 2006/86/EC, Article 10.

- establish a system of notification of serious adverse events and reactions which may take place during procurement or donation⁴⁴
- ensure that in the case of gametes any kind of gamete or embryo misidentification shall be considered a serious adverse event⁴⁵
- ensure that biomedical interventions are undertaken only under conditions of full and informed consent.⁴⁶

A comparative study on medically assisted reproduction in 39 countries issued by the Council of Europe shows great diversity in the methods of regulation of assisted reproduction and access to those methods.⁴⁷ Different levels of social consensus are illustrated in the study. However, none of the analysed countries completely bans the procedure.⁴⁸ The ECtHR also underlines the lack of European consensus on the matter. The recent judgment in the case of *S.H. and Others v. Austria*⁴⁹ concerned the problems of two couples who suffered from types of infertility which prevented them from participating in the IVF procedure based on the use of their own gametes. Meanwhile Austrian legislation did not allow for donation of gametes and in particular donation of ova. The donation of sperm was regulated differently in regard to in vitro and in vivo fertilisation procedures. Initially the ECtHR in its Chamber judgment found that such differentiation in law between various types of infertile couples did not sufficiently balance between public and private interests. In the appeal judgment, however, the Court underlined the lack of European consensus on the matter. At the same time, the Grand Chamber strictly emphasised that whereas regulation of IVF falls into an area enjoying

⁴³ *Ibid*, Article 12.

⁴⁴ *Supra* note 36, Article 11.

⁴⁵ *Supra* note 42, Article 6.2.

⁴⁶ *Ibid*, Article 13 and *Charter of Fundamental Rights of the European Union*, 2000/C 364/01, Article 3.

⁴⁷ Council of Europe, *Medically Assisted Procreation and the Protection of the Human Embryo, Comparative Study on the Situation in 39 States*, Strasbourg, 4 June 1998.

⁴⁸ *Ibid*, p. 22.

⁴⁹ *S.H. and others v. Austria*, 3 November 2011, European Court of Human Rights, No. 57813/00

a wide margin of appreciation of the member States, the key consideration in such regulation ought to be a fair balance between the competing interests of the State and those directly affected by legislative choices.⁵⁰

V. The Proposals Introduced and the Church-Stimulated Debate on the Morality of the Procedure

Given the lack of legal regulation of this area in Polish law, a number of proposals implementing the above mentioned Directives have been introduced. Yet until the end of the 2007-2011 Parliamentary term none of them was successfully adopted.

The main legislative initiatives included six proposals introduced between the years 2008 and 2010. Two of them were introduced by the representatives of the governing party, two by the right side of the opposition, one by the left side of the opposition and one by an independent civil initiative. The first draft proposal prepared by MP Jaroslaw Gowin,⁵¹ representing the governing party, was introduced to the Speaker of the Parliament in December 2008 and later modified. The second draft proposal was introduced by another MP representing the same party, Malgorzata Kidawa-Blonska,⁵² and included more liberal regulations than those submitted by her party colleague.

In addition to the governmental drafts, representatives of the opposition introduced their own legislative proposals. A draft presented by Boleslaw Piecha, representative of the former right

⁵⁰ *Ibid*, paras. 96-97.

⁵¹ *Projekt ustawy o ochronie genomu i embrionu ludzkiego oraz Polskiej Radzie Bioetycznej I zmianie innych ustaw*, [Draft law on the protection of human genome and the Polish Bioethical Council and amendments of other laws], Druk 3467, 28 August 2009.

⁵² *Projekt ustawy o zmianie ustawy o pobieraniu, przechowywaniu i przeszczepianiu tkanek, komorek i narzadow*, [Draft law amending the law on procurement, storing and transplanting of human cells, tissues and organs], Druk 3470, 28 August 2009 and *Projekt ustawy o prawach i wolnosciach czlowieka w dziedzinie zastosowan biologii I medycyny oraz o utworzeniu Polskiej Rady Bioetycznej* [Draft law on human rights and freedoms in biology and medicine and creation of the Polish Bioethical Council], Druk 3468, 28 August 2009.

wing governing party PiS, proposed a total ban and penalisation of in vitro fertilisation.⁵³ The latest draft advocating for an absolute ban on the procedure was introduced at the end of the year 2010 by Teresa Wargocka, a representative of the same party.⁵⁴

Furthermore an independent civil legislative initiative ‘Contra In Vitro’ twice introduced their own draft proposing the banning and penalisation of in vitro fertilisation, identically to the proposals of Piecha and Wargocka.⁵⁵

Meanwhile the left side of the opposition introduced a draft presented by Marek Balicki,⁵⁶ prepared in cooperation with women’s rights organisations, leading constitutional lawyers and scientists.⁵⁷

Despite this plethora of proposals, public debate did not concentrate on the multiple legal aspects of the procedure and the best and safest means of regulation of this difficult area, but rather the morality of the procedure itself. The idea of achieving a consensus between competing views has not been raised, but instead an intransigent and strongly polarised battle over the legislation began.

Even though the IVF procedure was a relatively uncontroversial issue and in 2009 was supported by as much as 77 per cent of the Polish population, the Church began a steady

⁵³ *Projekt ustawy o ochronie genomu ludzkiego i embrionu ludzkiego, [Draft law on the protection of human genome and embryo]*, Druk 3466, 18 June 2009.

⁵⁴ *Projekt ustawy o zakazie zapłodnienia pozaustrojowego i manipulacji ludzka informacja genetyczna, [Draft law on the ban of in vitro fertilization and manipulation of human genetic material]*, Druk 3471, 17 February 2010.

⁵⁵ *Projekt ustawy o zmianie ustawy - Kodeks karny, [Draft law amending the Penal Code]*, Druk 2249, 15 June 2009.

⁵⁶ *Projekt ustawy o zmianie ustawy o pobieraniu, przechowywaniu i przeszczepianiu tkanek, komórek i narządów, [Draft law amending the law on procurement, storing and transplanting of human cells, tissues and organs]*, Druk 2707, 28 August 2009.

⁵⁷ Among others the committee preparing the draft included Professor Marian Filar, Professor Jan Widacki, Jolanta Szymanek-Deresz and Izabela Jaruga-Nowacka.

attack against the legality of IVF.⁵⁸ Already in December 2008, when the first ‘Contra In Vitro’ project was being prepared, the Conference of the Episcopate of Poland issued an official statement which encouraged the members of parliament to introduce an absolute ban on vitro fertilisation:

When the first initiative to regulate [in vitro fertilisation] is taken, all the members of Parliament who are concerned with the protection of human rights should take all the steps necessary to ban this method absolutely. If, however, such a solution were rejected in the Parliament, it is an ethical duty of the members of Parliament to be active in the legislative process and maximally limit the harmful aspects of this regulation.⁵⁹

The same statement referred to the method as ‘evil’ due to destruction of embryos as well as the fact that the method is manipulative and subjects a human being to ‘massive production’.⁶⁰

Throughout the legislative struggle these types of statements have been repeatedly issued on the occasions when the Episcopate’s Groups of Experts has debated. The last two statements issued in 2010 once more expressed condemnation for the procedure. In the first statement issued in March 2010, the Group of Experts on Bioethical Matters underlined again that:

The opposition of the Catholic Church against the in vitro method stems from the Christian faith, which is the guide in taking all decisions. God created a woman and a man to create life in the act of marital love and only by them themselves. During the in vitro procedure, human dignity is infringed, since the

⁵⁸ CBOS, Public Opinion Research Center, *Polish Public Opinion*, July 2010, <www.cbos.pl/PL/publikacje/public_opinion/2010/07_2010.pdf>, accessed on 1 March 2012. According to the study support for IVF dropped from 77 per cent in the year 2009 to 73 per cent in the year 2010.

⁵⁹ Episcopate of Poland, *Oświadczenie Zespołu Ekspertów KEP ds. Bioetycznych w porozumieniu z Prezydium Konferencji Episkopatu Polski* [Statement of the Group of Experts on Bioethical Issues of the Conference of the Episcopate of Poland in cooperation with the Central Board of the Conference of the Episcopate of Poland], 22 December 2008, para. 5, translation by the author.

⁶⁰ *Ibid*, para. 4.

conception does not happen in the act of love, but as a result of an experimental technical procedure. The procedure resembles 'production of human beings'.⁶¹

Furthermore, in the same statement the Group of Experts developed their argument for banning the in vitro method regardless of the person's religious or ethical convictions. The Episcopate's Experts justified the necessity of such a ban by reference to the Catholic understanding of natural law, according to which it should be natural to oppose procedures producing a number of human embryos that will not be used and will be eventually experimented on or destroyed. Such a perception of the nature of IVF has been presented in several official documents issued by the Vatican, such as for instance the Encyclical *Evangelium Vitae*⁶² and Instruction *Donum Vitae*.⁶³ However, the Experts of the Polish Episcopate expressed a more extreme conviction that the arguments of those claiming that an embryo is not yet a human being are not based in science and are equivalent to an ideology.⁶⁴

In May 2010 the Episcopate's Group of Experts on Family Matters issued a statement going even further. When the 'Contra In Vitro' proposal was for the second time rejected in Parliament, the Experts on Family Matters condemned all the Members of Parliament who voted against it, comparing them to child murderers and refusing them the right to participate in Holy Communion:

We must remember, that those who kill [conceived life], those who actively participate in killing or establish laws against conceived life, and such is the life of embryos that a high percentage are damaged

⁶¹ Episcopate of Poland, *Oświadczenie Zespołu Ekspertów KEP ds. Bioetycznych w porozumieniu z Prezydium Konferencji Episkopatu Polski* [Statement of the Group of Experts on Bioethical Issues of the Conference of the Episcopate of Poland in cooperation with the Central Board of the Conference of the Episcopate of Poland], 24 March 2010, paras. 4–5, translation by the author.

⁶² John Paul II (1995), *supra* note 4.

⁶³ Congregation for the Doctrine of the Faith (1987), *supra* note 5.

⁶⁴ Episcopate of Poland (2010), *supra* note 61, para. 5.

in the in vitro procedure, stand openly against the teaching of the Catholic Church and cannot participate in Holy Communion until they change their position.⁶⁵

This statement resulted initially in a tension within the Polish Church itself and some of the priests and Bishops belonging to the Conference of the Episcopate did not agree with the statement and suggested it was more of an appeal to the conscience of the believers rather than a doctrinal declaration.⁶⁶ However, Father Longchamps de Berier who most strongly expressed such a liberal opinion was later criticised by the Catholic media for ‘meddling with the conscience of the believers’.⁶⁷ Eventually he retracted his statement, underlining that the Church firmly opposes the procedure.⁶⁸

Non-Catholic press debate also focused on the morality of the procedure and the arguments of the Church. Arguments such as ‘no absolute right to have children’ and ‘no right to kill unborn children’ were discussed in the media by the presenters of the drafts and the representatives of the Church.⁶⁹ As a consequence, political debate also became affected and once more polarised into the battle between ‘Catholic values’ and ‘leftist liberal values’.

⁶⁵ Episcopate of Poland, *Komunikat z Konferencji Rady ds. Rodziny KEP, Diecezjalnych Duszpasterzy Rodzin i Diecezjalnych Doradców Życia Rodzinnego* [Announcement of the Conference of the Council of Family Matters, Diocesan Family Priests and Diocesan Family Life Advisors at the Conference of the Episcopate of Poland], 19 May 2010, para. 3, translation by the author.

⁶⁶ Katarzyna Wisniewska, ‘In vitro czy komunია - spór w Kościele’ [In vitro or the Holy Communion – conflict within the Church], *Gazeta Wyborcza*, 26 May 2010, <http://wyborcza.pl/1,75478,7935370,In_vitro_czy_komunia___spor_w_Kosciele.html#ixzz0tYn0BCSL>, accessed on 1 March 2012.

⁶⁷ *Ibid* and ‘Błędy, które popełnił ks. Franciszek Longchamps de Berier’ [Mistakes of Father Longchamps de Berier], *Fronda*, <http://www.fronda.pl/news/czytaj/tytul/bledy_ktore_popelnil_ks_franciszek_langchamps_de_berier>, accessed on 1 March 2012.

⁶⁸ ‘Ks. Franciszek Longchamps de Bérier: Kościół nie dopuszcza in vitro’ [Father Longchamps de Berier: Church does not allow IVF], *Super Express*, 22 October 2010, <http://www.se.pl/wydarzenia/opinie/koscio-nie-dopuszcza-in-vitro_157562.html>, accessed on 1 March 2012.

⁶⁹ Detailed chronological press reports on the in vitro debate in Poland are available at the internet portal of *Gazeta Wyborcza*: <wyborcza.pl/0,87494.html>, accessed on 1 March 2012.

A. Conservative Proposals - the Church's Concerns Envisioned in Some of the Drafts

The discussion revolving around morality affected the final shape of some of the legislative initiatives. Drafts proposed by the right wing reflected in a stronger or weaker way the concerns of the Church. The project 'Contra In Vitro', the draft proposal of MP Piecha and the latest draft introduced by MP Wargocka all proposed an absolute ban on the procedure, manifesting directly the moral stance of the Church.

The earliest civic legislative initiative 'Contra In Vitro' proposed a draft banning the production of a human embryo and a penalty of three years imprisonment for persons involved in the procedure.⁷⁰ A civic legislative initiative is a draft law presented in accordance with article 118.2 of the Polish Constitution. This provision allows for the introduction of a legislative proposal by a group of at least 100,000 citizens. The 'Contra In Vitro' initiative was supported by 160,000 citizens. It focused purely on penalising the procedure. According to the authors the initiative was motivated by the 'sinful' and 'immoral nature' of the procedure.⁷¹ The proposal was rejected by the Parliament on 10 September 2009 by 244 votes to 162. A modified 'Contra In Vitro' draft was again voted upon on 6 May 2010 and rejected by 232 votes to 179.

The draft proposal introduced by MP Piecha included comparable provisions but in addition provided a 'rescue' procedure for already created embryos in the form of implantation of the embryo into its biological mother's body⁷² or in exceptional circumstances an embryo adoption.⁷³ In addition Piecha's draft implemented some of the safety requirements concerning the establishment of central biomedical registers and the Polish Bioethical

⁷⁰ *Supra* note 55, Article 160a, para. 1.

⁷¹ More details on the initiative and their programme is available at the initiative's internet portal: <www.contrainvitro.pl>, accessed on 1 March 2012 .

⁷² *Supra* note 53, Article 21.

⁷³ *Ibid*, Article 22.

Council⁷⁴ - a governmental advisory body on bioethical matters.⁷⁵ MP Piecha did not deny his support for the Church. The MP, who belonged to a pro-life organisation, justified the ban proposed in his draft by reference to the ‘gross immorality’ of the procedure.⁷⁶ The draft’s justification refers directly to the Christian heritage of the nation and implies that moral standards in the case of in vitro ought to be uniform regardless of religious or non-religious beliefs, even in a pluralistic society.⁷⁷ According to the draft, not only destroying an embryo⁷⁸ but any kind of embryo creation outside of a woman’s body ought to be forbidden and penalised by imprisonment for up to two years.⁷⁹ Destroying an embryo was sanctioned by three months to five years imprisonment.⁸⁰ Moreover, it introduced a conscience clause for doctors, with the obligation of mentioning their refusal to conduct the procedure in the medical documentation. It did not however, provide a mechanism of securing access to the procedure or automatic referral to another specialist. The draft’s justification explained that a requirement of referral to another specialist would infringe the rights of a doctor by forcing him or her to provide information on medical procedures which are in contradiction to his or her conscience. Such information, the draft explained further, would lead to a result which is morally unacceptable for a doctor in question.⁸¹

The latest draft expressing a radical approach aimed at banning the procedure was introduced by MP Wargocka. As with ‘Contra In Vitro’ it penalised the creation and destruction of an embryo by imprisonment for up to two years in the case of its creation and up to five years in the case of its destruction.⁸² Any kind of creation of an embryo outside of a woman’s body

⁷⁴ *Ibid*, Article 23.

⁷⁵ *Ibid*, Article 31.

⁷⁶ See e.g. Anna Skibniewska, ‘Zamach na in vitro’ [Attack on in vitro], 24 *Tygodnik Przegląd*, 21 June 2009.

⁷⁷ *Supra* note 53, p. 38, para. 6.

⁷⁸ *Ibid*, Article 14.

⁷⁹ *Ibid*, Article 14 and Article 53.

⁸⁰ *Ibid*, Article 52.

⁸¹ *Ibid*, p. 57, para. 29.

⁸² *Supra* note 54, Article 4, Article 56 and Article 57.

would be forbidden.⁸³ The draft did not include any rescue adoption provisions. However, it did introduce regulations regarding gamete procurement and a conscience clause.⁸⁴

B. Moderate Proposals and the Idea of Balancing Rights

Proposals presented by the centre of the political scene, indirectly also focused on the concerns expressed by the Church. However, these more moderate proposals attempted to balance in various ways both the protection of an embryo and protection of the right to privacy expressed in the desire to have children.

The most loudly disputed draft, the one proposed by Jaroslaw Gowin, included a number of provisions which did not attempt to ban the procedure altogether but responded to at least some of the Church's concerns. Due to the high possibility of Parliament accepting the draft, it raised the concerns of women's rights organisations. Gowin's draft, unlike 'Contra In Vitro', Piecha's or Wargocka's proposal, allowed for the procedure to be carried out, but limited it only to married couples and focused primarily on the protection of created embryos. It did not allow for free donation of gametes but limited the availability of the procedure to the gamete donors taking part in it.⁸⁵ Concern about the life of the embryo was included in Article 21, which prescribed that only one embryo could be created in the procedure. Exceptionally, the proposal allowed for the creation of two embryos but only under the condition of their simultaneous implantation.⁸⁶ Article 20 of Gowin's proposal forbade the freezing of embryos. Instead Article 19 allowed for the freezing of gametes before the procedure. Furthermore, identically to Piecha's draft, it proposed the amendment of Penal

⁸³ *Ibid*, Article 5.

⁸⁴ *Ibid*, Article 19.

⁸⁵ *Supra* note 51.

⁸⁶ *Ibid*, Article 21.

Law and provided a penalty of imprisonment between three months and five years for anyone who destroys a human embryo.⁸⁷

Some of the most criticised provisions of Gowin's draft proposed a conscience clause for pharmacists,⁸⁸ nurses⁸⁹ and doctors.⁹⁰ The changes, analogically to Piecha's draft proposal discussed previously, would introduce the possibility of refusing medical services contrary to the pharmacist's, nurse's or doctor's conscience. The concerns focused on the accessibility of the procedure in the case of refusal by a doctor.

As with Piecha's draft, it also proposed the creation of a specialised body, The Bioethical Council, which would oversee problems related to all bioethical issues, including the procedure of in vitro fertilisation, and decide about the use of each gamete and each embryo.

The other draft, introduced by another MP representing PO, Kidawa-Blonska, provided more relaxed proposals entrenched in two separate draft laws dealing with technical requirements and human rights and freedoms.⁹¹ The protection of the embryo was still crucial in the proposed provisions. The proposal allowed for in vitro also for unmarried couples but limited the availability of the procedure only to heterosexual couples.⁹² It provided for the protection of created embryos but unlike in Gowin's proposals, only of those embryos capable of healthy and undisturbed development. It allowed for pre-implantation diagnostics of the embryos in order to exclude genetic diseases which would later legally allow the mother to undergo an abortion.⁹³

⁸⁷ *Ibid*, Article 53.

⁸⁸ *Ibid*, Article 63.

⁸⁹ *Ibid*, Article 64.

⁹⁰ *Ibid*, Article 65.4.

⁹¹ *Supra* note 52.

⁹² *Projekt ustawy o prawach i wolnościach człowieka w dziedzinie zastosowań biologii i medycyny oraz o utworzeniu Polskiej Rady Bioetycznej [Draft law on human rights and freedoms in biology and medicine and creation of the Polish Bioethical Council]*, Druk 3468. 28 August 2009, Article 19.

⁹³ *Ibid*, Article 9 and Article 11.

C. The Primacy of Women's Reproductive Choices – the Liberal Proposal

The draft presented by Marek Balicki, former social democratic Minister of Health and Social Matters, did not include provisions focusing on the concerns presented by the Church. Instead it envisioned a very liberal version of the legislation which allowed for the choice of the best method of assisted procreation in accordance with the best interest of the patients taking part in the procedure and their health.⁹⁴ It allowed for IVF both in marital and non-marital relations and for the donation of gametes and embryos.⁹⁵ It provided specific regulations concerning the conditions of procurement and storage of both gametes and embryos, which followed the requirements of the EU Directives.⁹⁶ Furthermore, it prepared certain provisions enabling ratification of the Oviedo Convention. In accordance with the Oviedo Convention's Protocol it banned human cloning and the creation of hybrids and chimeras.⁹⁷ It protected the embryo from trade and usage or destruction without the consent of the gamete donors.⁹⁸ Moreover it banned testing for the purposes of sex selection of the future child.⁹⁹

D. The Feminist and Infertility Organisations Versus the Arguments of the Church – Polarisation of the Debate

⁹⁴ *Supra* note 56, Article 1.7.

⁹⁵ *Ibid*, Article 1.3f and 1.9.

⁹⁶ *Ibid*, Article 1.

⁹⁷ *Ibid*, Article 1.32 and *Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings*, Paris, 12 January 1998, Article 1 and *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, Oviedo, 4 April 1997, Article 13.

⁹⁸ *Supra* note 56, Article 1.4, 1.22 and 1.32.

⁹⁹ *Ibid*, Article 1.32.

When the first drafts had been introduced in Parliament feminist, pro-women and infertility organisations attempted to take an active part in the discussion on the regulation of IVF. First, feminist organisations took part in demonstrations against the proposals of Gowin and ‘Contra In Vitro’.¹⁰⁰ On 30 June 2010 Federacja na Rzecz Kobiet i Planowania Rodziny [Federation for Women and Family Planning] and Stowarzyszenie na Rzecz Nieplodności Nasz Bocian [Association for Infertility Problems Our Stork] organised a press conference on in vitro legislation and appealed for objective and rational legislation.¹⁰¹ They stood in opposition to the initiatives representing the position of the Church and raised the following arguments against some of the proposals.

Firstly, the drafts such as the ones proposed by Gowin, Piecha and ‘Contra In Vitro’ stigmatised persons suffering from infertility. Secondly, the draft presented by Gowin was criticised for a variety of other reasons. The primary concern was the usage of the controversial and scientifically risky practice of freezing ova instead of embryos and the limitation of the number of embryos to be created. Feminist organisations underlined that the creation of only one or two embryos and the implantation of all created embryos were risky and put women’s health in danger. In the situation where pre-implantation diagnostics would not be possible, women would have to endure not only the painful hormonal therapy and procedure but also undergo a risk of future abortion and repetition of the procedure if the embryo carried serious genetic diseases or disorders. Moreover, women’s rights organisations argued, the limitation of the procedure only to married couples infringed the right to privacy.¹⁰² Wanda Nowicka analysed the draft as ‘dangerous, incoherent and badly written’ and in addition aimed exclusively at protecting the embryo in accordance with Catholic

¹⁰⁰ ‘Demonstracja przeciwko ustawie Gowina’ [Demonstrations against Gowin’s draft], *Polish Press Agency*, 24 January 2009.

¹⁰¹ *Konferencja prasowa pt.: "In Vitro, Kościół, Polityka"* [Press Conference on In Vitro, Church and Politics], <www.nasz-bocian.pl/node/15997>, accessed on 1 March 2012.

¹⁰² *Ibid.*

morality and not helping couples suffering from infertility.¹⁰³ She warned against the dangers of introducing control over the lifestyles of citizens, including the decision to marry and have children.¹⁰⁴

Furthermore, in the opinion of the women's rights organisations, legislating a conscience clause could lead to further ineffectiveness in the provision of medical services in the area of reproductive health. It may give rise to further violations of the right to privacy and access to legally permitted services, like those of legally allowed abortion or in vitro fertilisation. It would increase the number of cases like those of Alicja Tysiac¹⁰⁵ and should not be done without legislating an obligation to refer further to a specialist who could provide such services according to his or her conscience.¹⁰⁶

Catholic feminists have not expressed any strong views on the matter due to the novelty of Catholic feminism in Poland. The first Catholic feminist organisation was registered in Poland only in 2009.¹⁰⁷ However, in her article concerning the position of women in the Polish Church, Ewa Karabin expressed regret that Church organs such as the Group of Experts on Bioethical Issues of the Conference of the Episcopate of Poland consist solely of men, even if discussion within the Group, such as that concerning IVF, focuses primarily on women's bodies.¹⁰⁸

¹⁰³ Wanda Nowicka, 'Gametes More Important than People – Poland Gets Closer to the Ban on In Vitro Fertilisation', 12 *Law and Gender* (2009), p. 100.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Tysiac v. Poland*, 20 March 2007, European Court of Human Rights, No. 5410/03.

¹⁰⁶ See e.g. Wanda Nowicka, 'In Vitro według Gowina' [In Vitro According to Gowin], 19 December 2008, <www.wanda-nowicka.blog.onet.pl>, accessed on 1 March 2012.

¹⁰⁷ Ewa K. Czackowska, 'Katolickie feministki łączą siły' [Catholic feminists join forces], *Rzeczpospolita*, 2 January 2009, <<http://www.rp.pl/artykul/242383.html>>, accessed on 1 March 2012.

¹⁰⁸ Ewa Karabin, 'Nadchodzą zmiany? Kościelna teoria i praktyka wobec kobiet' [Are changes coming? Church theory and practice and women], *Amicta Sole*, <<http://amictasole.pl/2011/07/06/nadchodza-zmiany-koscielna-teoria-i-praktyka-wobec-kobiet/>>, accessed on 1 March 2012.

E. Legal Debate and the Fate of the Polish Legislative Proposals

The protests of feminist and infertility organisations did not, however, meet with the full support of legal experts writing on the most controversial of the drafts, namely Gowin's draft. Few scientific articles concerning the IVF proposals have been published in Poland during the time of the debate.¹⁰⁹ Whereas Paweł Łuków agreed with many feminists' concerns criticising discriminatory provisions, such as those introducing age limits¹¹⁰ or those favouring, as the author put it, 'backward conceptions of the family model',¹¹¹ others were far less critical. Leszek Bosek in his constitutional analysis of the proposals discussed here did not find sufficient reasons why they would cause constitutional difficulties or infringe anyone's rights. He underlined that the Constitution does not have any provisions which would make the existence of the procedure unconstitutional. However, according to Bosek, in the light of article 38 of the Constitution (protection of human life), article 30 (protection of human dignity) and article 18 (protection of marriage, family, maternity and parenthood), limitations on IVF, even those which exclusively aim at protection of an embryo, could be

¹⁰⁹ These include primarily: Leszek Bosek, 'Refleksje wokół prawnych uwarunkowań wspomaganą prokreacji' [Reflections on the legal conditions of assisted reproduction], 37 *Diametros* (2009), pp. 48–61; Paweł Łuków, 'Technologia dwudziestego pierwszego wieku w rękach piewców dziewiętnastowiecznej rodziny' [Twenty first century technology in the hands of supporters of the nineteenth century family model], *PTB Debate 'Jak uregulować zapłodnienie in vitro?'* 14–24 March 2009, < www.ptb.org.pl/pdf/lukow_in_vitro_1.pdf >, accessed on 1 March 2012; Joanna Haberko, 'Kilka uwag na temat statusu cywilnoprawnego ludzkiego embrionu w świetle projektu Ustawy o ochronie genomu ludzkiego i embrionu ludzkiego oraz Polskiej Radzie Bioetycznej i zmianie innych ustaw' [A few remarks on the legal status of a human embryo in the draft law on the protection of human genome and the Polish Bioethical Council and amendments of other laws], *PTB Debate 'Jak uregulować zapłodnienie in vitro?'* 14–24 March 2009, < www.ptb.org.pl/pdf/haberko_in_vitro_1.pdf >, accessed on 1 March 2012. Other more general discussion not related directly to the proposed drafts can be found in: Marian Machinek, 'Znaczenie argumentacji teologicznej w sporach dotyczących bioetyki' [Relevance of theological argumentation in bioethical arguments], 19 *Diametros* (2009), pp. 66 – 77; Joanna Haberko, Krzysztof Olszewski, 'Moralne i prawne aspekty dążenia małżonków do posiadania dziecka w kontekście techniki zapłodnienia pozaustrojowego (in vitro)' [Moral and legal aspects of the desire of spouses to have children in the context of IVF], 30 *Prawo i Medycyna*: 10(1) (2008); Joanna Haberko, Krzysztof Olszewski, 'Jeszcze o moralnych i prawnych aspektach dopuszczalności zabiegów in vitro – polemika' [Once more on moral and legal aspects of IVF – polemics], 31 *Prawo i Medycyna*: 10(2) (2008); Maria Boratyńska, 'Prawne aspekty zapłodnienia pozaustrojowego – odpowiedź J. Haberko i K. Olszewskiemu' [Legal aspects of IVF – reply to J. Haberko and K. Olszewski], 30 *Prawo i Medycyna* : 9(1) (2008).

¹¹⁰ Łuków (2009), *ibid*, pp. 1–4.

¹¹¹ *Ibid*, p. 10.

allowed.¹¹² He referred to the judgment of the Polish Constitutional Court which provides that ‘the value of human life cannot be evaluated on the basis of age, health, foreseeable duration or any other criteria’.¹¹³ According to Bosek, despite the strong tendency to protect individual interests and the rights of the parents, in the lack of a clear dominating regulatory model and in the light of this judgement, it is constitutionally allowed for the legislation to focus primarily on securing the life of an embryo as constitutionally protected life.¹¹⁴ Joanna Haberko concurred, finding Gowin’s proposal aimed at maximum protection of an embryo as deserving approval.¹¹⁵

Parliamentary debate, however, marginalised many aspects of the drafts and foregrounded the question of the protection of unborn life and the protection of Catholics rather than engaging in a comprehensive discussion of the multiple legal details of the drafts. In the last Parliamentary debate concerning the matter held on 22 October 2010, the majority of the voices concentrated on the dichotomy between religious and non-religious understandings of the beginning of human life. The drafters of the proposals themselves underlined the religious or non-religious background of their proposals and its significance for the understanding of human life. MP Piecha referred to the process of eugenics and underlined the ‘rightfulness’ of the Bishops’ opinion on the matter.¹¹⁶ MP Gowin, on the other hand, attempted to root the understanding of the beginning of life stemming from religious convictions in other, non-religious sources.¹¹⁷ MP Wargocka underlined the religious roots of human dignity and expressed the conviction that moral compromises in controversial matters like IVF, abortion

¹¹² Bosek (2009), *supra* note 109, pp. 48–61.

¹¹³ Judgment K 44/07, 30 September 2008, Polish Constitutional Court.

¹¹⁴ Bosek (2009), *supra* note 109, pp. 57–61.

¹¹⁵ Haberko (2009), *supra* note 109, p. 16.

¹¹⁶ *Sprawozdanie Stenograficzne z 76 posiedzenia Sejmu Rzeczypospolitej Polskiej [Minutes of the 76th Session of the Sejm of the Republic of Poland]*, 22 October 2010, pp. 226–227.

¹¹⁷ *Ibid*, pp. 229–231.

or euthanasia constituted the greatest dangers for this dignity.¹¹⁸ MP Kidawa-Blonska, on the other hand, carefully oscillated between religious and non-religious aspects. She justified her draft with the necessity of maximum limitation of the dangers to the embryo given the lack of agreement as to when the life begins.¹¹⁹ MP Balicki, representing the left, underlined the secular nature of the Polish state and juxtaposed religious views with the view that IVF is a scientifically recognised infertility treatment and religious views did not allow Catholics to limit the access of non-Catholics to this treatment.¹²⁰

Eventually, none of the draft proposals discussed in this article has succeeded in being adopted. As mentioned above, the proposal banning and penalising in vitro was rejected by the Parliament on 10 September 2009 by 244 votes against 162. A modified ‘Contra In Vitro’ draft was again put to the vote on 6 May 2010 and rejected by 232 votes against 179.

The draft proposed by MP Piecha banning the procedure and proposing the adoption of already existing embryos was returned to its author after legal review and work in the Parliamentary Committees. Similarly, two draft proposals proposed by the representatives of the governing party PO were returned to the authors – Gowin’s controversial draft and the less restrictive one of Kidawa-Blonska. The Parliamentary Legal Review Office found all three drafts either contrary to EU law or insufficiently implementing EU law.¹²¹ The reviews underlined primarily formal failures or contradictions affecting proper implementation of the Directives.¹²² Very few opinion giving organs engaged in any discussion on the appropriate

¹¹⁸ *Ibid*, p. 234.

¹¹⁹ *Ibid*, pp. 231-233.

¹²⁰ *Ibid*, pp. 240-241.

¹²¹ Polish Press Agency, ‘Projekty o in vitro sprzeczne z prawem unijnym’ [In vitro drafts contrary to EU law], 24 September 2009.

¹²² See e.g. Zespół Prawa Europejskiego i Międzynarodowego [European and International Law Expert Group], *Opinia w sprawie stwierdzenia, czy poselski projekt ustawy o ochronie genomu ludzkiego i embrionu ludzkiego w wersji uwzględniającej autopoprawkę (przedstawiciel wnioskodawców: poseł Bolesław Grzegorz Piecha jest projektem ustawy wykonującej prawo Unii Europejskiej, [Opinion on the draft law on the protection of human*

balancing of rights and those who did were predominantly experts working in the health sector rather than the legal sector.¹²³ After corrections, all three drafts were again re-introduced to the Parliament but none of them was successfully adopted up to the end of the 2007-2011 term.¹²⁴ The draft proposed by Balicki, which was prepared with the representatives of women's rights organisations, was never returned from the scrutiny of an extraordinary Parliamentary Committee where it was sent on 17 March 2010.¹²⁵

The discussion on the legal aspects and observed shortcomings of the drafts in terms of their compatibility with EU law has, however, never emerged publicly and played a secondary role in the Parliamentary proceedings.¹²⁶ As the Parliamentary debate illustrated, the primary discussion topic was the religious or non-religious conception of life. Due to this polarisation and lack of more comprehensive legal debate, resolution of the problems concerning reproductive medicine was ultimately not reached up to the end of the 2007-2011 term of the Parliament, leaving the European Directives without adequate adoption.

VI. Excluding Subjects in Question – the Limits of Deliberative Democracy

The central problem apparent in the current efforts aimed at legislating with regard to assisted reproduction procedures is the polarisation of the Polish political debate. Where discussion is visible it is conducted in a form of binary opposition rather than an inclusive dialogue. Inclusive social deliberation appears missing. As emphasised by Dryzek, the challenge of discursive democracy is to embrace pluralism and communicate across difference rather than

genome and human embryo (introduced by Boleslaw Grzegorz Piecha) and its nature as a law implementing the law of the European Union], BAS-WAL-2539/09, 28 December 2009.

¹²³ See e.g. Naczelna Rada Pielęgniarek in Poloznych [National Council of Nurses and Midwives], *Opinion NIPiP/NRPiP/DM/0055/237/09*, 19 August 2009.

¹²⁴ *Supra* note 116.

¹²⁵ Komisja Polityki Społecznej i Rodziny [Parliamentary Committee on Family Matters and Social Policy], *Biuletyn 3558/VI*, 17 March 2010.

¹²⁶ See the full transcript of the debate, *supra* note 116.

erase the difference. Deliberative theory in this sense still encounters multiple challenges.¹²⁷

Does, however, one powerful group sufficiently represent social consensus?

Iris Marion Young observes that problems of injustice are often caused not by mere oppression or exploitation but instead by marginalisation.¹²⁸ Such marginalisation becomes particularly dangerous when an entire group of people are expelled from participation in social life.¹²⁹ Analogically, in deliberation, inclusion is frequently violated by exclusion from democratic debate.¹³⁰ Young distinguishes forms of external and internal exclusion. One of the forms of external exclusion occurs when socially powerful actors are able to dominate public discussion. That leaves other actors excluded and leads to outcomes in which citizens with formally equal rights have no real access to the fora and procedures through which they might influence decisions. However, even if they are included in the discussion, participants holding minority views are often internally excluded. This form of internal exclusion, in Young's account, occurs when those more powerful ignore, dismiss or patronise the statements of the minority.

Similar conditions of fair deliberation are laid down by Habermas who, following his model of communicative action as the basis for social deliberation,¹³¹ advocates for public discourse which will be conducted under conditions of broad and active participation and in an egalitarian political culture.¹³² Cohen, on the other hand, underlines the framework of free expression that is required for reasoned consideration.¹³³ Such free expression is necessary

¹²⁷ John S. Dryzek, *Deliberative Democracy and Beyond* (Oxford: Oxford University Press, 2002).

¹²⁸ Iris Marion Young, *Justice and the Politics of Difference* (Princeton, New Jersey: Princeton University Press, 1990).

¹²⁹ *Ibid.*, p. 53.

¹³⁰ Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), pp. 53-80.

¹³¹ Jürgen Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996).

¹³² Jürgen Habermas, 'Popular Sovereignty as Procedure' in: J. Bohman, W. Rehg, *Deliberative Democracy* (Cambridge, Massachusetts: The MIT Press, 1997), pp. 35-66.

¹³³ Joshua Cohen, 'Deliberation and Democratic Legitimacy' in: J. Bohman, W. Rehg, *Deliberative Democracy* (Cambridge, Massachusetts: The MIT Press, 1997), p. 83.

for the efficient outcome of deliberations, since it advances the common good. And the common good, in Cohen's understanding, cannot be fixed prior to deliberation, but instead is established by means of successful deliberation.¹³⁴

These conditions appear to be missing in the Polish legislative efforts. Fuszara underlines that the public conflict in Poland is suspended between two polar oppositions - the Church and Catholic politicians on the one hand and liberal feminists on the other hand.¹³⁵ The common good is not negotiable. Instead, two pre-existing and antagonistic conceptions of the good are used in the debate: national Catholic morality versus freedom of women to control their bodies. The lack of willingness of the Polish Catholic Church to negotiate is manifested by its readiness to go as far as using the means of political blackmail. The statement of the Episcopate Council refusing Holy Communion to Parliamentarians voting in favour of the availability of IVF¹³⁶ goes much further than participation in an open public discussion where all the voices are weighed equally. This attempt to take the role of an extra-Parliamentary political force not bound by the wider social consent of the majority of the population or the voices of those primary affected - infertile women and couples - perpetuates external exclusion. Minimisation of the importance of internal voices within the Church and within the Catholic community, on the other hand, constitutes a form of internal exclusion. Voices such as those of Father Longchamps de Berier or Catholic women who do not take part in issuing statements such as those of the Episcopate are ignored in order to present the position of the Church as homogenous. This antagonises the discussion even further.

¹³⁴ *Ibid.*

¹³⁵ Małgorzata Fuszara, 'Between Feminism and the Catholic Church: The Women's Movement in Poland', 5 *Czech Sociological Review* (2005), quoted in: J. Heinen and S. Portet, 'Religion, Politics and Gender Equality in Poland', *Final Research Report Prepared for the Project Religion, Politics and Gender Equality*, September 2009, p. 31.

¹³⁶ Episcopate of Poland (2010), *supra* note 65.

The availability of IVF for infertile couples is supported by the vast majority of society, including practising Catholics. 73 per cent of Polish society, including as many as 63 per cent of regularly practising Polish Catholics, support the method.¹³⁷ This fact, however, is rarely mentioned in the Episcopate's explanations regarding the necessity of the legislation. In contrast, support for the ban on abortion with the inclusion of certain exceptional situations has been steadily rising. As Heinen and Portet observe, the influence of the Church on that rise was substantial and led to the situation in which most of society supports the current legal *status quo*.¹³⁸ The situation with IVF is diametrically different and the decrease in support has been minimal.¹³⁹ Nevertheless, regardless of public opinion and the voices of those directly affected by the legislation, the Church attempts to promote the Catholic vision of the family as the only morally correct vision of the 'common' good. Thanks to its dominant position in Polish society and its influence on political parties, this non-negotiable opposition to IVF successfully marginalises those who are in practice the most affected by the legislation.

In its statements quoted earlier in this text, the Church chooses to present a stance in which understanding of the beginning of life as the moment of conception is beyond social discussion, and supports this position and the necessity of legislation banning IVF by reference to natural law. In the legal discussion in which politicians appeal to the concept of natural law and immorality,¹⁴⁰ however, the fact that natural law is only one of many legal doctrines, which currently is predominantly associated with the legal and philosophical doctrine of the Catholic Church, and not a universally recognised theory in contemporary jurisprudence, is hardly addressed. This strong struggle to ban or limit IVF against the will of

¹³⁷ CBOS, Public Opinion Research Center, *Polish Public Opinion*, July 2010, <www.cbos.pl/PL/publikacje/public_opinion/2010/07_2010.pdf>, accessed on 1 March 2012. According to the study support for IVF dropped from 77 per cent in the year 2009 to 73 per cent in the year 2010.

¹³⁸ Jacqueline Heinen and Stephane Portet, 'Religion, Politics and Gender Equality in Poland', *Final Research Report Prepared for the Project Religion, Politics and Gender Equality*, September 2009, pp. 23-25.

¹³⁹ *Supra* note 58; Katolicka Agencja Informacyjna [Catholic Information Agency], 'Spada poparcie dla in vitro [Decreasing support for in vitro]', July 2010.

¹⁴⁰ *Supra* note 53, p. 38, para. 6.

society produces a hard to resist impression that the Church attempts to discipline the non-obedient ‘flock’ by the measures of universally binding law, rather than participating in honest ethical and legal discussion where many views are taken into account. In this intensified battle, the image of women and the family is the one primarily affected.

A. ‘Proper’ Women and ‘Proper Polish Families’ Only – The Church and the Stereotyping of Women and Families

The central focus of Polish debates concerning reproduction always revolves around the rights of an embryo. Woman is rarely presented as a bearer of rights but instead treated too often solely as a vessel carrying the life of the unborn. Both in the case of abortion regulation and IVF regulation, the rights of an embryo have prevailed in the discussion over a woman’s right to privacy or the right to health and reproductive choices.¹⁴¹ In addition to omitting the role of woman as a rights bearer, the Polish proposals limiting the availability of the procedure to married couples perpetuate the social stereotypes of motherhood as exclusively belonging to marriage. A single woman is not recognised as a subject of the reproductive freedom of becoming a mother, and especially not a single woman suffering from infertility problems or one choosing to become a mother through IVF. In Linell Secomb’s words, ‘improper pregnancies [are] excluded and only proper pregnancy permitted’.¹⁴²

¹⁴¹ Linell Secomb observes a similar tendency of thinking about the woman and the embryo as if they belonged to different bodies in Australian discourses. Secomb observes that the once opaque and solid body of a pregnant woman has been transformed into a vessel containing the foetus. As a result woman’s status as a person has been replaced with medical care for a ‘future child’: ‘IVF: Reproducing the ‘Proper’ Family of Man’, 4 *Australian Feminist Law Journal* (1995), p. 20.

¹⁴² *Ibid*, p. 32.

In the politicised struggle the ‘proper’ pregnancy, moreover, has a strong link with Polishness, which is understood as allegiance to Catholicism.¹⁴³ The Mother-Pole¹⁴⁴ figure originating from the Virgin Mary cult represents the basis of the Church’s conception of femininity. The woman, following the Mother-Pole ideal, in Kwiatkowska’s words, is expected to ‘accept everything that life brings her’,¹⁴⁵ including infertility. The Church’s struggle against IVF reinforces the Mother-Pole image. The equation of religion with nation and control over the means and methods of reproduction is aimed at reproducing not only ‘proper’ womanhood but also ‘proper’ Polishness.¹⁴⁶ Fletcher analyses an analogous mechanism in the context of Irishness and the struggle for abortion. When the race cannot be a determining factor of national identity, religion often replaces it and becomes the core of the understanding of the nation. And when it so does, it often becomes a powerful tool in the hands of pro-natalists.¹⁴⁷ As mentioned above,¹⁴⁸ the family and reproduction become central for politicised religion and as Yuval-Davis’ emphasises, discourses on gender and nation intersect and become constructed by each other.¹⁴⁹

This article is not suggesting that IVF is only beneficial to women and the realisation of their rights. Feminist literature, even though diverse, has also been sceptical in its approach to assisted reproduction.¹⁵⁰ It is important, however, to observe that feminist and the Church’s concerns remain at two opposite ends of the debate. Whereas feminists challenge assisted reproduction on the grounds of its influence on strengthening rather than relieving social

¹⁴³ Obirek (2009), *supra* note 16.

¹⁴⁴ Anna Kwiatkowska, ‘Gender Stereotypes and Beliefs about Family Violence in Poland’ in: R.C.A. Klein, *Multidisciplinary Perspectives on Family Violence* (London: Routledge, 1998), pp. 129–152, p. 132.

¹⁴⁵ *Ibid.*

¹⁴⁶ Fletcher (2005), *supra* note 17, pp. 365-404.

¹⁴⁷ *Ibid.*

¹⁴⁸ Friedland (2001), *supra* note 18.

¹⁴⁹ Nira Yuval-Davis, *Gender & Nation* (London: Sage, 1997), p. 4.

¹⁵⁰ See e.g. Karen Thorsby, *When IVF Fails: Feminism, Infertility and the Negotiation of Normality*, (Basingstoke: Palgrave, 2004); Michelle Stanworth (ed.), *Reproductive Technologies: Gender, Motherhood and Medicine* (Cambridge: Polity Press, 1987); Maureen McNeil, *Feminist Cultural Studies of Science and Technology* (New York: Routledge, 2007).

expectations of motherhood,¹⁵¹ the Church's concerns centre on ensuring 'proper' motherhood. One should make no mistake that the Church-supported ban on IVF was dictated by a concern for women's health and the societal pressure on becoming a mother. Not only is the mother treated as a dichotomous entity consisting of the mother and the foetus,¹⁵² but the rights of the foetus are treated as overriding the rights of the mother in all circumstances. Regulations such as those proposed by Gowin, which limit the availability of the procedure to married couples and allow for the creation of only as many embryos as will be implanted to the womb, express in a milder way the same concept of a family and reproductive choices. In the Polish context the proposals which allow only for medical procedures of questionable effectiveness and from the medical point of view imposing more strain on a woman's body¹⁵³ illustrate the difference between the Church's and the feminist concerns. The Church's struggle is not for empowering women, but instead for unconditional protection of the unborn in accordance with the Catholic doctrine of natural law and the maintenance of 'proper' Polish families only.

B. Universalising Morality - Back to Natural Law in the Era of Diversity?

While the liberal model of democracy has been extensively criticised for a variety of reasons by, for instance, multiculturalists¹⁵⁴ and post-modern feminists,¹⁵⁵ the concern of the Polish

¹⁵¹ Secomb (1995), *supra* note 141, pp. 25-26.

¹⁵² For more on the emergence of the two-patient model of pregnancy, *see e.g.* Susan S. Mattingly, 'The Maternal-Fetal Dyad: Exploring the Two-Patient Obsteric Model', 22 *Hastings Center Report* (1992), quoted in: Secomb (1995), *supra* note 141, p. 20.

¹⁵³ *Supra* note 51, Article 19.

¹⁵⁴ *See e.g.* Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1996); Bikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (New York: Macmillan Press/Palgrave, 2006).

¹⁵⁵ *See e.g.* Seyla Benhabib, Judith Butler, Drucilla Cornell, Nancy Fraser, *Feminist Contentions: A Philosophical Exchange* (New York: Routledge, 1995); Mary Joe Frug, *Postmodern Legal Feminism* (New York: Routledge, 1995); Patricia Cain, 'Feminism and the Limits of Equality', 24 *Georgia Law Review* (1990), pp. 803-847.

legislators inspired by Catholic ideology is rather different than that of greater inclusion and targeting the cultural blindness of liberalism or the religious blindness of secularism. It is not the postmodern recognition of diverse circumstances and the challenging of exclusionary dimensions of blanket equality. Quite the contrary, the objective of the proposals is to bring back universally binding law which is directly of a religious nature. The point of departure is thus different than in liberalism. Moral universalism is not based on blindness to differences hidden by the veil of neutrality or secularism. It is based on the denial of recognition of diversity and the availability of any other moral conception than the one affirmed.

The essence of this approach can be found in the postulates of theorists such as John Finnis. Finnis argues that the liberal approach advocating the adoption of a perspective of every person's understanding of himself and the world is incoherent.¹⁵⁶ While listening to different perspectives is important, acting upon them may not be.¹⁵⁷ In Finnis' words, 'no-one could intelligently call good the life of an individual who is enslaved to his subrational desires for gratification and thus, too, cut off from the reality'.¹⁵⁸ Finnis finds the Kantian distinction between ethics and morality to be a mistake.¹⁵⁹ In reference to women's reproductive rights, Finnis takes the example of abortion and the liberal defence of not penalising abortion. Finnis refers to abortion as an example of the liberal mistake and instead constructs it as killing which ought to be penalised. He finds the liberal defence of not penalising abortion based on the notion of e.g. Rawlsean reasonable consensus and lack of social agreement as to the moment of the beginning of life unconvincing.¹⁶⁰ He argues that legal reasoning greatly exaggerates the extent to which reason is able to determine the boundaries of the greater good

¹⁵⁶ John Finnis, 'Natural Law and the Ethics of Discourse', 12 *Ratio Juris*: 4 (1999), pp. 354-373, 356-357.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, p. 361.

¹⁵⁹ *Ibid.*, p. 367.

¹⁶⁰ *Ibid.*, pp. 367-368.

and the lesser evil.¹⁶¹ Instead he would prefer a few absolute moral rights and duties to be respected as the basis for legal reasoning.¹⁶²

In the case of the Catholic Church, such absolute moral rights would be based on the doctrine of the Church. And indeed, in similar fashion to Finnis, the Church sees abortion and IVF as the killing of the unborn.¹⁶³ The ban on in vitro or at least severe limitations on the procedure were intended to bring the moral teaching of the Church into the realm of law, which would be applied equally to all citizens and residents of Poland regardless of their moral, ethical or religious convictions.

This natural law approach refers also to human rights. However, it promotes a model in which the mother and the foetus compete for their rights. As Secomb observes, ‘the law is treating the state of pregnancy as a relation between two human beings in which each “person” has a “right” to equal protection’.¹⁶⁴ This is also one of purposes of the Church’s utilisation of the vocabulary of human rights. Positioning the foetus as an equal bearer of rights makes a defence of the absolute moral rights in the meaning of natural law more convincing.

I am far from following Okin’s argument that all religious dogma and all cultural rights are a simple superstition that always aims at the control of women by men.¹⁶⁵ In the context of IVF, Patricia Jennings has illustrated, in her study concerning the responses of religious women to IVF, that religious attitudes may be diverse and the impact of religion on women’s

¹⁶¹ John Finnis, ‘Natural Law and Legal Reasoning’, 38 *Cleveland State Law Review* (1990), pp. 1-13, 13.

¹⁶² *Ibid.*

¹⁶³ See e.g. Congregation for the Doctrine of the Faith (1987), *supra* note 5.

¹⁶⁴ Secomb (1995), *supra* note 141, p. 33.

¹⁶⁵ Susan Moller Okin, ‘Is Multiculturalism Bad for Women?’ in S.M. Okin, J. Cohen, M. Howard, M. C. Nussbaum (eds.), *Is Multiculturalism Bad For Women?* (New Jersey: Princeton University Press, 1999), p. 13ff.

choices different.¹⁶⁶ For some, religion in fact provides a spiritual platform enabling reconciliation with infertility.¹⁶⁷ Due to these differences, both religiously and non-religiously motivated choices ought to be acknowledged in the best possible manner. But this is not the approach that the majority of the Polish proposals presented. Just as the seemingly neutral standards of secular legislation otherwise religious believers, religiously inspired legislation which affects non-Catholics does not respond to the requirements of the era of increasing pluralism. As Shachar underlines, the increasingly pluralistic era requires more elegant solutions than simple ‘yes-no’ and ‘one size fits all’ legal standards in the area of women’s rights.¹⁶⁸ Of course the discussion of the best relationship between women’s rights, religions and the obligations of a democratic state is ongoing,¹⁶⁹ similarly to the discussion of whether any state or any law can ever reach the objective of arriving at justice.¹⁷⁰ The religiously motivated Polish proposals, however, such as those advocating for a complete ban on IVF, do not aim at the achievement of a fair balance between the interests of the state and the rights of the mother, the parents and the protection of the embryo.

VII. Conclusion

In the majority of the Polish proposals aimed at banning and penalising IVF, the natural law conception of morality was based on Catholic morality which was treated as synonymous with the morality of the nation. The central problem in the Polish IVF legislative discourse

¹⁶⁶ Patricia Jennings, ‘“God Had Something Else in Mind”: Family, Religion and Infertility’, 39 *Journal of Contemporary Ethnography* (2010), pp. 215–235.

¹⁶⁷ *Ibid.*, pp. 232–233.

¹⁶⁸ Ayelet Shachar, *Multicultural Jurisdictions – Cultural Differences and Women’s Rights* (Cambridge: Cambridge University Press, 2001), pp. 115–150.

¹⁶⁹ See e.g. Susan Moller Okin, Joshua Cohen, Matthew Howard, and Martha C. Nussbaum (eds.), *Is Multiculturalism Bad For Women?* (New Jersey: Princeton University Press, 1999).

¹⁷⁰ Susanna Lindroos-Hovineimo, ‘Is Law Necessarily Unjust?’, 6 *NoFo: Journal of Extreme Legal Positivism* (2009), pp. 69–88.

proved to be monopolisation and politicisation of the discussion by only one religious community, which at the same time continues to be dominant in the country. At the same time this dominant religion displayed features characteristic of nationalised and politicised religions, in its focus on the reproduction of the nation. Opinions released by the Polish Episcopate's bodies were loaded with emotional wording, constantly emphasising words connected with what Friedland called the 'order of creation'. Words such as 'love', 'faith' and 'creation of life' were reiterated throughout every opinion of the Episcopate. Furthermore, they projected an image of imminent threat to that order in frequent references to 'eugenic practices', 'genetic modifications' and 'artificial creation of life'.¹⁷¹ In the case of the Polish IVF debate this wording was not only present in the discussion stimulated by the Church, but was also transferred to the political and legal debate. Justifications of legal drafts provided by MPs such as Piecha and Wargocka included similar wording and analogical perceptions of a threat.¹⁷² In the case of the Polish Catholic Church this 'unfortunate connection between politics and religion', as Obirek called it,¹⁷³ reinforced a one-sided view of history and society leaving little room for 'the other', including 'the other' within the Church.

The Polish Catholic Church in the discussion on IVF displayed characteristics of a political rather than religious organisation in its striving for domination in the legal sphere. In this struggle the Church went as far as to use a dubious method of blackmailing the conscience of the Members of Parliament in a similar manner to that in which political parties attempt to consolidate their vote. Whereas the goal of the Church remained religiously motivated and

¹⁷¹ Episcopate of Poland (2010), *supra* note 61.

¹⁷² See e.g. *Projekt ustawy o ochronie genomu ludzkiego i embrionu ludzkiego*, [Draft law on the protection of human genome and embryo], Druk 3466, 18 June 2009, para. 6; *Projekt ustawy o zakazie zapłodnienia pozaustrojowego i manipulacji ludzka informacja genetyczna*, [Draft law on the ban of in vitro fertilization and manipulation of human genetic material], Druk 3471, 17 February 2010, pp. 51–53, paras. 10–11.

¹⁷³ *Ibid.*

embedded in doctrine, the means of its achievement became strictly political and remote from the religious. I would therefore argue that the Catholic Church in Poland in its battle for IVF legislation displayed characteristics of what could best be characterised as ‘politicised’ and ‘nationalised’ religion.

Such religious militancy was identified by Parekh as characteristic of societies facing assimilation pressures. According to Parekh, in such societies easily negotiable cultural demands take on a form of non-negotiable religious demands with religious leaders assuming undue authority and the consequent polarisation of society instead of the normal process of political deliberation.¹⁷⁴ Interestingly enough, even though the political struggle of the Polish Catholic Church seems to follow this pattern, Catholicism is not a minority but a majority religion in Poland. This politicisation may, instead of assimilation pressure, be a result of historical pressure.¹⁷⁵ As mentioned above, before 1989 the Church was the bastion of the fight for democratisation and recognition of religious claims in the forcefully secularised society.¹⁷⁶ Thus it has adopted the position of a persecuted minority struggling for recognition.

The failure to regulate matters of IVF is a sign of the strong polarisation of Polish politics. As a matter of fact, due to its polarising potential, discussion on the issue was deliberately postponed before the autumn 2011 election.¹⁷⁷ While at the moment the failure to regulate may seem like a temporary victory of liberal feminism, the battle for the regulation of assisted reproduction in Poland is still ongoing. Even though the influence of the Church appears to be on the wane and the result of the October 2011 election, in which the centrist

¹⁷⁴ Parekh (2006), *supra* note 154, p. 198.

¹⁷⁵ See e.g. Marjane Osa, ‘Resistance, Persistence and Change: The Transformation of the Catholic Church in Poland’, 3 *East European Politics and Societies*: 2 (1989), pp. 268–299.

¹⁷⁶ Sila-Nowicki (1984–1986), *supra* note 22.

¹⁷⁷ ‘Ustawa o in vitro? Przed wyborami nie ma na co liczyć’ [IVF law before the elections?: Unlikely], *Dziennik*, 18 February 2011, < <http://wiadomosci.dziennik.pl/polityka/artykuly/322789,ustawa-o-in-vitro-przed-wyborami-nie-ma-na-co-liczyc.html>>, accessed on 1 March 2012.

PO took a decisive victory over right-wing PiS, appears to be a confirmation of this tendency,¹⁷⁸ it seems likely that the Church has not said their last word on the matter. In fact, it appears that even greater militancy is to be expected as the new Parliament begins the preparation of new drafts regulating this difficult legal area.¹⁷⁹

A further and more detailed regulation, which will fairly balance the interests of the state with the interests of its citizens, is undoubtedly needed. But this cannot be achieved without proper democratic deliberation, including women and persons suffering from infertility as the legal subjects primarily concerned, as well as various fractions of society, including dissenting voices within the Church. Legal discussion, in order to fully grasp the depth of the problematic, ought to include all constitutional and social aspects of the regulation, in addition to Catholic and non-Catholic approaches to the status of an embryo.

¹⁷⁸ See e.g. John Besemeres, 'Poland at the Polls: A Win for Pragmatism', *Inside Story* (Swinburne Institute: Swinburne University of Technology), 14 October 2011.

¹⁷⁹ Katarzyna Wiśniewska, 'Kościół o "hodowli" in vitro' [Church on in vitro "husbandry"], *Wysokie obcasy*, 2 January 2012, <http://wyborcza.pl/1,96165,10897910,Kosciol_o_hodowli_in_vitro.html>, accessed on 1 March 2012.
