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**WOMEN IN LAW FROM THE LAW & EMOTIONS
PERSPECTIVE.
CASE STUDY OF THE INFERTILITY TREATMENT
ACT¹**

Abstract

The status of women in law (and not only theirs) is linked to social and cultural perceptions of women's desirable behavior. Going against well-established patterns is not indifferent in both legal and social terms. One of the primary contexts of 'femininity' in the law is close relationships, in which women are viewed through the 'role' of a mother and wife. The purpose of this paper is to determine how the cultural script of romantic love and the emotions associated with it affect perceptions of women in close relationships, such as marriage and parenthood. It assumes that the emotions of participants in legal discourse – dogmatists and those involved in the law-making process – influence the final shape of legal regulations. The cultural script that influences how women are perceived in law is romantic love. To illustrate the issue, the case study of the Infertility Treatment Act is presented in this article. This case shows that from a legal perspective, a woman is seen in indivisible roles in a close relationship of a wife (partner) and mother.

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KEYWORDS

close relationships, Law & Emotions, cultural scripts, parenthood, marriage

SŁOWA KLUCZOWE

bliskie relacje, nurt Law & Emotions, skrypty kulturowe, rodzicielstwo, małżeństwo

1. INTRODUCTION

In the colloquial perception by non-lawyers, emotions and law are complete opposites. Law is supposed to be an emanation of rationality and objectivity, while emotions – of the opposite.² The positivist view of law excludes linking it to emotions, as emotions were treated as a quasi-science.³ This view was challenged by *critical jurisprudence* and one of its currents called Law & Emotions, opening up space for different ways of looking at the law, including the creative development of reflection on emotions treated as essential elements of the law.⁴ As Renata Grossi points out:

“critical jurisprudence has developed a body of scholarship that has explicitly demanded an emotional engagement. (...) Related to this, is the use of the methodology of storytelling, a method that demands that law engages with the way its processes impact upon real individuals rather than abstract entities or categories. It demands that law (in practice as well as in theory) take into account existing social and legal arrangements and actual human behavior”.⁵

The Law & Emotions movement allows us to look at an individual’s situation in the legal system through the lens of their peculiar story. An element of any such story is experience, including emotion. The law adopts a certain vision of individ-

² As R. A. Posner aptly described it: “The law itself is conventionally regarded as a bastion of ‘reason’ conceived of as the antithesis of emotion, as operating to rein in the emotionality of the behavior that gives rise to legal dispute”. (R. A. Posner, *Emotion versus Emotionalis in Law* (in: S. Bandes (ed.), *Passions of Law*, New York 1999, pp. 309).

³ K. Abrams, H. Keren, *Who’s Afraid of Law and the Emotions?* “Minnesota Law Review” 2010, 94, p. 2003.

⁴ R. Grossi, *Looking for Love in the Legal Discourse of Marriage*, 2014, pp. 3-4. The development of the Law & Emotions movement was described in an interesting way in the Polish literature by: J. Wesołowska, *Prawo i emocje – synteza ruchu [Law and emotion - a synthesis of the movement]*, “Forum Prawnicze” 2021, 2 (64), pp. 84-105.

⁵ R. Grossi, *Understanding Law and Emotion*, “Emotion Review” 2015, 7(1), p. 56.

uals – such as women who “are or ought to be as emotional creatures”.⁶ The positivist view of law privileged legal reasoning devoid of such qualities as empathy, traditionally attributed to women as being more emotional and therefore ‘weaker’ individuals.⁷ The Law & Emotions movement grew out of observations of women’s emotional experiences⁸ and shows, among other things, the effects of certain emotions (or perceptions about them) on the way women are perceived in law.

Failure to recognize the emotional determinants of human activities can result in relying on misconceptions about an individual’s ‘proper behavior’ in certain situations when applying or creating laws. This is particularly evident in the examples of women’s experiences cited in the literature. These include situations related to the creation and application of laws on abortion,⁹ rape or domestic violence.¹⁰ The entities that apply the law sometimes act with the belief that they know what a rape victim feels and how they should behave. It is assumed, for example, that a rape victim should behave hysterically, whereas calmness undermines their credibility.¹¹ On the other hand, studies have shown that judges are more favourably disposed to those rape victims who have forgiven the defendant than to those who have shown resentment or aggression towards the defendant during the trial.¹² Elisabeth Spelman uses the expression ‘outlaw emotions’ in this context.¹³

⁶ C. Sager, *Legislating with affect: emotion and legislative law making*, (in:) J. E. Fleming (ed.), *Nomos: Passions and Emotions* 2013, p. 40.

⁷ S. A. Bandes, J. A. Blumenthal, *Emotion and the Law*, “The Annual Review of Law and Social Science” 2012, p. 163.

⁸ R. Grossi, *Understanding Law and Emotion...*p. 56: “feminism’s general project of making women’s experiences central, rather than marginal, to the way law thinks and acts has been central to the development of an emotional point of view in law, if nothing else by the long association of women”.

⁹ J. A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, “Washington Law Review” 2008, Vol. 83, pp. 1–38.

¹⁰ C. Sager, *The Role and Reality of Emotions in Law*, “William & Mary Journal of Women and the Law” 2001, 8 (1), p. 108: “Consider a wife who calls the police and reports she was battered. Before the call triggers the police department protocol for battered women, the question may be whether the caller is acting as one expert has explained a battered woman would (or should) respond. Is she passive or is she angry? If the latter, well then, she may not have Battered Women’s Syndrome because those women are supposed to be submissive, as the responding officer learned in domestic violence police training”.

¹¹ J. M. Salerno, L. C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, “Law and Human Behavior” 2015, Vol. 29, No. 6, p. 581.

¹² M. L. Schuster, A. Proppen: *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, “Law, Culture and the Humanities” 2010, Vol. 6, pp. 75-104; J. M. Salerno, L. C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, “Law and Human Behavior” 2015, Vol. 29, No. 6, p. 581.

¹³ E. Spelman, *Anger and Insubordination*, (in:) A. Garry, M. Pearsall (eds.), *Women, knowledge, and reality: explorations in feminist philosophy*, Boston 1989, p. 264 as cited in: C. Calhoun,

By law, women are seen primarily as parties to close relationships: either as wives or mothers. It is in this context, therefore, that one can most fully notice the emotions, from the point of view of which the legislator and legal discourse view a woman and her roles in close relationships.

The purpose of this paper is to determine how the cultural script of romantic love and the emotions associated with it affect perceptions of women in close relationships, such as marriage and parenthood. It assumes that the emotions of participants in legal discourse – dogmatists and those involved in the law-making process – influence the final shape of legal regulations. The cultural script that I believe influences how women are perceived in law is romantic love. To illustrate the issue at hand, I will turn to the case study of the Infertility Treatment Act. My analyses are preliminary in nature – they are only a proposal to look at women in law from the perspective of the Law & Emotions movement.

2. EMOTIONS IN LAW

In psychological and sociological literature, one can find many depictions of emotions.¹⁴ According to Susan Bandes and Jeremy Blumenthal, leading researchers of the Law & Emotions movement, emotions are assumed to be:

“set of evaluative and motivational processes, distributed throughout the brain, that assist us in appraising and reacting to stimuli and that are formed, interpreted, and communicated in social and cultural context. They influence the way we screen, categorize, and interpret information; influence our evaluations of the intentions or credibility of others; and help us decide what is important or valuable”.¹⁵

An emotional reaction to a certain phenomenon or behavior can be an expression of experienced values, including “ingrained desires, habits and customs”.¹⁶ Thus, it can be an expression of approved or disapproved norms and values in a given community.

The above definition indicates that emotions have a social dimension. The emergence of emotions is dependent on socially constructed cultural scripts. Cul-

Making Up Emotional People. The Case of Romantic Love (in:) S. A. Bandes (ed.) *The Passions of Law*, New York 1999, p. 224.

¹⁴ See: A. R. Damasio, *Emotions and Feelings: A Neurobiological Perspective* (in:) *Feelings and Emotions: The Amsterdam Symposium*, A. S. R. Manstead, N. Frijda, A. Fischer (eds.), Cambridge 2004, p. 50.

¹⁵ S. A. Bandes, J. A. Blumenthal, *Emotion and the Law*, “The Annual Review of Law and Social Science” 2012, pp. 163-164.

¹⁶ M. Soniewicka, *Racje i emocje w dyskusji na temat ingerencji genetycznych w ludzką prokreację* [*Rationale and emotion in the discussion of genetic interference in human procreation*], “Roczniki Filozoficzne” 2019, No. 3, p. 88.

tural scripts are patterns of norms and values accepted and established in a particular community.¹⁷ According to Cashire Calhoun, individuals learn emotions based on specific cultural scripts. The authenticity or ‘correctness’ of one’s emotions is assessed by comparing personal experience to any of the scripts operating in our culture.¹⁸ Hilary L. Berk emphasizes that individuals “learn the cultural ‘vocabulary’ or labels, behaviours, responses and shared social meaning for each emotion, associating them with distinct types of relationship”.¹⁹ The emotions that individuals associate with certain phenomena or behaviors are formed based on norms and values which, among others, are reflected in law or religion.²⁰

Emotions have a signalling function. They can inform individuals of the threat that their expectations will not be met. In the words of Arlie R. Hochschild a “[s]ign juxtaposes what we see with what we expect to see (...) what we see is mediated by our idea of what we expect to see”.²¹ Emotions signal an individual’s subconscious point of view, which may be shaped by the patterns and norms among which he or she functions. Emotional reactions can thus inform an individual that a particular behavior or phenomenon threatens the realization of the vision embodied in the cultural script (e.g. single parenting vs. parenting by a couple).

Judgments about certain phenomena or behaviors may be shared by the majority of members of a particular society due to shared norms and values. On this basis, the so-called *emotion culture* is developed.²² The emotions that individuals experience when participating in social interactions help them assess whether or not they should continue to participate. What is most relevant here is the concept of the ‘reflected self’ according to which each individual “perceives himself or herself through the eyes of other people, evaluates himself or herself precisely from the point of view of others, and then incorporates these evaluations into his or her self-image”.²³

The lawmaker transfers the cultural scripts he approves into law. Thus, he can reinforce individual emotions about certain phenomena or behaviors. If the legislator has a negative attitude towards a given state of affairs, he will not regulate it or will prohibit certain behaviors. In this way, he expresses his disapproval, he does not want a certain condition to be developed in social reality. Thus, he

¹⁷ B. Pawłowska, *Emocje społeczne w pracy nauczyciela i przedstawiciela handlowego* [Social emotions in the work of a teacher and sales representative], Łódź 2013, p. 14.

¹⁸ C. Calhoun, *Making Up Emotional People. The Case of Romantic Love...*, p. 220.

¹⁹ H. L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate*, “Labor, Law & Society Review” 2015, p. 149.

²⁰ *Ibidem*.

²¹ A. R. Hochschild, *Zarządzenie emocjami. Komercjalizacja ludzkich uczuć* [Managing emotions. Commercialization of human feelings], Warsaw 2009, p. 239.

²² P. A. Thoits, *The Sociology of Emotions*, “Annual Review of Sociology” 1989, Vol. 15, p. 335.

²³ M. Sawicka, *Emocje w interakcjach współczesnego społeczeństwa polskiego*, Warszawa 2018, p. 16.

weakens positive emotions about a particular phenomenon or strengthens negative emotions.

The cultural script is a certain pattern, a scheme – it does not take into account the factual circumstances of all cases. It assumes a necessarily simplistic view of the world, including of human relations. The script expresses the norms and values shared in a particular community – it may deliberately exclude certain behaviors or phenomena.

In this paper, I assume that the legislator, who represents a certain community, can express and stimulate certain emotions towards certain phenomena or behaviors. Emotional reactions are based on positive (approving) or negative (disapproving) judgments, signalling a threat.

Approval is about having an affirmative, positive experience. It arises in situations where a certain behavior or event corresponds to “our own directive as to what should be”.²⁴ An example of such an emotion might be pride. Pride arises when individuals adhere to social norms; it is the result of mutual acceptance and respect.²⁵ Approval can cause benevolence on the part of the evaluator and solidarity with the subject of the evaluation.

Disapproval²⁶ is the experience of affecting “directly some state of affairs, without thinking whether it is compatible or incompatible with some norm, nor considering whether there is a place for it in our world for the benefit or to the detriment”.²⁷ Disapproval can express itself in anger, disgust or shame. Special attention in legal deliberations is given to disgust. When considering the relation of disgust to state law, Martha Nussbaum presents it as “a special aspect of the society’s moral practice”.²⁸

The emotion of disgust can materialize in a “policy of disgust” towards excluded groups as a criterion for determining what should be legally banned (or at least disapproved of). Dominating groups present themselves here as disadvantaged due to holding certain views on certain types of behavior. The policy of disgust is therefore intended to protect dominating groups: to prohibit the activities that arouse their disgust and consequently cause the ‘defilement’ of society. The policy of disgust is based on certain perceptions about members of minorities,

²⁴ Cz. Znamierowski, *Oceny i normy [Evaluations and Norms]*, Warsaw 1957, p. 325.

²⁵ B. Pawłowska, *Emocje społeczne w pracy nauczyciela i przedstawiciela handlowego [Social emotions in the work of a teacher and sales representative]*, Łódź 2013, p. 61.

²⁶ A certain analogy to the emotion of repulsion can be found in the works of L. Petrażycki, who wrote about ‘repulsive impulses’ (ethical repulsions) which can be experienced in relation to human conduct, as well as other phenomena. (L. Petrażycki, *O nauce, prawie i moralności. Pisma wybrane [On Science, Law and Morality. Selected Writings]*, prepared by: A. Kojder, Warsaw 1985, pp. 227–228).

²⁷ Cz. Znamierowski, *Oceny i normy ...*, p. 326.

²⁸ M. Michalik-Jeżowska, *Emocje a praktyka moralna w refleksji Marthy C. Nussbaum [Emotions and moral practice in the reflection of Martha C. Nussbaum]*, Rzeszów 2013, p. 152.

designed by dominant social groups to discredit and exclude communities that do not fit the dominant pattern that is acceptable by the majority.

Emotions can be taken into account and reflected in the course of creating a particular legal institution. Strong emotions (e.g. pride or disgust) can exert an influence on the introduction of a particular regulation, its absence or its final form. Observation of this emotion shows how certain legislative proposals are perceived within the political divide.²⁹ Emotions also influence the process of interpreting the law, i.e. the understanding of the law that is acceptable to the majority, which will be maintained in the legal discourse.

Thus, both at the ‘input’ – in the process of creating the law, and when it is applied to a specific state of affairs, the letter of the law is encased within certain emotions. In this paper, I will focus only on the emotions involved in the creation of a particular regulation. At the same time, I do not want to suggest that only issues related to worldview are connected to the presence of emotions in the process of creating and applying the law. In such cases, these emotions are more prominently expressed through the language used in the discourse. I assume that emotions, to varying degrees of intensity, are an inherent factor that influences both the creation and the application of the law.

3. CULTURAL SCRIPT: ROMANTIC LOVE

There are ‘cultural scripts’ operating in society, with various objects (e.g. losing a parent, getting married), physical symptoms (e.g. crying, falling in love) and fantasies or thought patterns that emotions should be characterized by (e.g. falling in love is associated with imagined kisses). Cultural scripts provide a foundation for collective emotions – they indicate what is allowed and approved in a certain community, and what is not. The legislator can therefore perpetuate these cultural scripts in the content of the law, as long as he accepts them.

In legal discourse, marriage is compared with a **model** rooted in the ideal of romantic love.³⁰ From that perspective, marriage is exclusively the union of a man and a woman. While pointing out the reasons for this state of affairs, Calhoun stresses that, on the one hand, it is related to the disapproval of non-heteronormative relationships, and, on the other hand, to the fact that the definition of marriage as a union between a man and a woman is deeply rooted in a certain cultural script – romantic love,³¹ which constitutes a social pattern for intimate relation-

²⁹ C. Sager, *Legislating with affect: emotion and legislative law making*, *Nomos: Passions and Emotions* 2013, 53, pp. 41-42.

³⁰ E. Brake, *Minimizing Marriage. Marriage, Morality, and the Law*, New York 2012, p. 88.

³¹ C. Calhoun, *Making Up Emotional People. The Case of Romantic Love...*, pp. 127-128.

ships.³² It transforms sexuality from desire to the expression of a relational ideal that moves towards perfect unity. Romantic love, being a carrier of ideas about the ideal union of a man and a woman, produces certain socially desirable fruits. It embeds specific individuals in specific social roles that are determined by a person's gender. This position is well illustrated by the words of John M. Finnis:

“[t]he union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their personal reality); reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union, therefore, can actualize and allow them to experience their real common good – their marriage with the two goods, parenthood and friendship, which (leaving aside the order of grace) are the parts of its wholeness as an intelligible common good”.³³

In a marriage or parenting relationship, a woman is seen through the prism of the ‘role’ assigned to her by her biological sex.³⁴ This kind of thinking can be found in the statements made by the Polish Supreme Court:

“the sex determines those social roles that a person can perform only as a person of a certain sex. For the law, the roles of husband or wife, father or mother, are momentous. Their proper fulfillment is not only important for the family community, but also for the state community”.³⁵

Similar statements can be found in the family law dogma:

“the marital status should also include the sex of a person, i.e., his or her inherent characteristic, which is particularly important in family law relations, since **it pre-determines and permanently determines one's role in society**, either as a man or

³² Calhoun characterizes emotional scripts as, “(...) transitory social roles. Like social roles, emotional scripts may be generic – as are the scripts for basic emotion types such as jealousy, happiness, pride, love, and discontent – or they may be highly specific, as are the scripts for the jealous husband, the ecstatic lottery winner, the proud parent of a newborn, the loving adult child of elderly parents, or the dissatisfied customer. We learn emotions by learning emotional scripts. We assess the genuineness of our own emotions by comparing our own experiences to those scripts”. See *ibidem*, p. 220.

³³ J. M. Finnis, *Law, Morality, and 'Sexual Orientation'*, “Notre Dame Law Review” 1994, 69, p. 1062.

³⁴ For example, we can point here to the citizens' bill “Yes to family, no to gender” filed in December 2020. The primary purpose of the act was to denounce the so-called Istanbul Convention. As indicated in the explanatory memorandum to the bill, “The Constitution – pointing to the complementarity of man and woman in marriage (...) - does not treat gender as a social convention, but as an essential given of human nature, defining the identity of every human being”. The bill was ultimately rejected after the first reading. Citizens' bill “Yes to family, no to gender”, form No. 915, 9th term Sejm, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/10E6636A779C0B4AC12586790039D-3B3/%24File/915.pdf>.

³⁵ Judgment of the Supreme Court of 6 December 2013, I CSK 146/13, LEX No. 1415181.

a woman, and in the family, it determines whether one is a husband or a wife, a son or a daughter”.³⁶

Romantic love script refers to the social norms and patterns associated with romantic relationships. It assumes that the proper form of such a relationship is the union of a man and a woman, which is the only one that can lead to natural procreation. The script rejects (as inappropriate) non-heterosexual relationships and other forms of parenting that will not be realized in the relationship between a man and a woman (such as single parenting). The script of romantic love sees a woman in two indivisible roles of a wife and mother. This might seem an archaic statement – nevertheless, the legislator (and with it at least some part of the legal discourse) approves of such a view, which is indeed illustrated by the case of the Infertility Treatment Act.

4. THE CASE OF THE INFERTILITY TREATMENT ACT

The Infertility Treatment Act of 2015³⁷ adopted the requirement that two people (i.e. a husband and wife or a woman and a man in cohabitation confirmed by their declarations) can enter the in-vitro fertilization procedure not only for partner donation but also for non-partner donation. The transfer of produced embryos into a woman’s body is possible if she has a husband or partner who consents to the procedure (Article 20(1)(1) and (2) of the Act). Wives and concubines who, before the act entered into force, underwent the stage of the procedure in which the embryo was created, under the current state of the law cannot independently decide concerning the next stage – the transfer of embryos into their bodies. This is because for this stage it is necessary to have the consent of the husband or a statement from the cohabitee (male).

The Act does not provide for a procedure to obtain substitute consent (e.g., when the husband/partner objects to the transfer of embryos without good reasons). Thus, in the absence of the man’s consent, it will not be possible to use the created embryos, and according to Article 97 of the Act, embryos created and stored before the effective date of the Act will be transferred to embryo donation after 20 years.

The above means that currently the *in vitro* fertilization procedure cannot be used by: **a woman without a husband or partner** or a **person in a same-sex relationship**. These individuals also cannot benefit from a procedure using

³⁶ T. Smoczyński, *Pojęcie stanu cywilnego* [The concept of marital status] (in:) *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze* [Private Law System. Family and Guardianship Law], T. Smoczyński (ed.), Warsaw 2014, p. 12.

³⁷ The Infertility Treatment Act of 25 June 2015 (Journal of Laws of 2020, item 3, No. 16).

embryos **that were created from their own reproductive cells and those of an anonymous donor before the Infertility Treatment Act came into effect.** The adoption of such solutions was motivated during work in parliamentary committees as follows:

“the government bill uses the concept of infertility, based on the World Health Organization’s definition, where infertility is defined as the inability to get pregnant despite regular attempts to do so. **So, if someone does not have a partner, by definition, he or she cannot be an infertile person.** And this is one of those arguments (...) the government’s submission assumes, first of all, special protection for the rights of future children and the right to be raised in a complete family, that is, one that has both a mother and a father. Therefore, the government’s bill assumes permissibility of using this only for couples who, first, are infertile, and second, constitute a family”.³⁸

Meanwhile, during parliamentary deliberations, the argument was raised that in the case of single motherhood or parenthood of non-heteronormative people:

“[T]he child is brought into existence while excluding in advance, as it were, one of the parents. Socially and axiologically, the meaning of the concept of family is already being lost. The child is rather a **victim** of the so-called secular bioethics, and the rights of the child should be above the right of freedom of choice of the adult. We must constantly remember that the child is a gift of love, not a product of it”.³⁹

The Commissioner for the Citizens’ Rights intervened in the case at issue here, filing a petition with the Constitutional Court to examine the constitutionality of the provisions of the Infertility Treatment Act,⁴⁰ insofar as they apply to women who are unmarried or in cohabitation with a man, and who deposited embryos created from their germ cell and the cell of an anonymous donor before the date of entry into force of this act.⁴¹ The Court discontinued the proceedings⁴² citing the inadmissibility of the ruling.⁴³ Nevertheless, the Court addressed the

³⁸ Undersecretary of State at the Ministry of Health Igor Radziejewicz-Winnicki at the Health Committee /No. 203/ on 9 June 2015, <https://www.sejm.gov.pl/Sejm7.nsf/biuletyn.xsp?skrn-r=ZDR-203> Letter from the Undersecretary of State at the Ministry of Health dated 30 September 2015, reference No. MD-P.0213.3.2015(AB), Available online: http://www.nasz-bocian.pl/webfm_send/73 (accessed 15 January 2020).

³⁹ Deputy Czesław Hoc, Stenographic Report of the 90th session of the Sejm of the Republic of Poland on 9 April 2015 (second day of deliberations, p. 167, https://orka2.sejm.gov.pl/StenoInt-er7.nsf/0/223E9D3C58347340C1257E2800377CB9/%24File/90_b_ksiazka_bis.pdf).

⁴⁰ In order to examine the compatibility of article 20(1)(2) and Article 21(1)(3) in conjunction with Article 78 and Article 97 of the Infertility Treatment Act of 25 June 2015 with Article 2 in conjunction with Article 47 of the Polish Constitution.

⁴¹ <https://www.rpo.gov.pl/pl/content/wniosek-do-tk-ws-procedury-vitro> (accessed 20 January 2023).

⁴² Order of the Constitutional Court of 18 April 2018, file reference No. K 50/16.

⁴³ Article 59(1)(2) of the Act on the Organization and Procedure Before the Constitutional Court of 30 November 2016 (Journal of Laws of 2019, item 2393).

request quite extensively in its reasoning. It pointed out that the restriction of the group of persons is not merely a legislative omission:

“The legislator, (...) consciously, as evidenced by materials from the legislative process – decided on a stricter concept (...), based on the child’s right to grow up in a family based on marriage or in an environment as close to it as possible. Under these circumstances, the challenged regulation cannot be seen as a legislative omission but as an omission by the legislator – its conscious decision to limit the group of people who can benefit from medically assisted procreation (...)”.

The limitation of that group of people is, in the Court’s opinion, “even dictated by the best interests of the child”.⁴⁴ It is also stressed that:

“[in] the context of violations of single women’s right to privacy, it is important to note here that the Infertility Treatment Act specifically mandates the protection of the life, health, best interests and rights of the child (Article 4), and there is no justification for the exclusion of these guarantees on account of single women’s right to privacy, regardless of its definition”.

Moreover, the Supreme Court, in its opinion on the act, expressed concern about the failure to limit the availability of medically assisted procreation procedures to married couples only.⁴⁵ It argued that the possession of offspring by unmarried persons can be treated in the process of medically assisted procreation “in a completely instrumental way, for the sole purpose of providing a particular person with offspring in this way”.⁴⁶ The preferred pattern of life for individuals, the Supreme Court argued, is the creation of a family that is based on marriage, which is “a permanent union between a man and a woman, directed towards motherhood and responsible parenthood”.⁴⁷ A different view can be found in the expert opinion submitted to the draft which stressed that the solutions adopted in the act constitute “a barrier to exercising the right to infertility treatment using this method for single people”.⁴⁸

On the grounds of the doctrine of family law, one can also find negative opinions on the possibility of single women to use the in-vitro fertilization proce-

⁴⁴ “The legislator, making an effort to normalize these issues for the first time in Polish law, chose - consciously, as evidenced by the materials from the legislative process – the more stringent second concept, based on the child’s right to grow up in a family based on marriage or in an environment as close to it as possible”. (Decision of the Constitutional Court of 18 April 2018, file reference No. K 50/16).

⁴⁵ Comments of the Supreme Court to the government infertility treatment bill, BSA 1-021-1 04/15. 13 May 2015, pp. 11-18.

⁴⁶ *Ibidem*, p. 13.

⁴⁷ *Ibidem*, p. 11.

⁴⁸ E. Zielińska, *Opinia na temat rządowego projektu ustawy o leczeniu niepłodności (druk sejmowy Nr 3245) [Opinion on the government bill on infertility treatment (Sejm print No. 3245)]*, 21 May 2015, p. 11.

ture.⁴⁹ Marta Jadczyk-Żebrowska points out that “a request by a single woman or a cohabiting couple for any method of unnatural insemination should be rejected”.⁵⁰ Similarly, the possibility for cohabitantes to use the procedure was rejected by Joanna Haberko.⁵¹ Tadeusz Smoczyński speaks in a similar vein:

“Even if a single woman wants to have a child, it often does not mean that she wants to cohabit with the child’s father. Such an attitude is found in feminists demanding that even single women should be allowed to have medically assisted reproduction with a stranger donor. This individualistic (and selfish) approach to family life results in a sort of family relationship without the existence of the family itself”.⁵²

The solutions adopted in the Infertility Treatment Act are based on the premise that the best environment for procreation and raising offspring is the union of a man and a woman. Only a woman and a man (acting together, as a couple) can guarantee the “best interests of the child”. This is an expression of the legislator’s approval of a certain vision of a family based on the script of romantic love.

On the other hand, the possibility of a single woman using an *in vitro* fertilization procedure meets with disapproval. It is seen as unjustified, contrary to the best interests of the child and, moreover, as an instrumental (and selfish) use of the law. Moreover, the legislator accepts the need to ask for the husband’s or partner’s consent for transferring the embryo into the woman’s body. It is not difficult to imagine

⁴⁹ “(...) in the face of social processes which, among other things, consist of changes in the traditional roles played by women and men and changes in their needs, which in turn affects not only the relationship between them, but also the relationship between parents and children, this modifies the model of the entire family. For these reasons, the criteria for assessing the best interests of the child as inextricably analyzed against the background of family, especially the relationship with the parents, cannot be uncorrelated with the aforementioned changes. Among those most contemporary *prima facie* impacting the best interests of the child, are: the increasing establishment of relationships without marriage, getting married at a later age, the uninterrupted rise in divorce rate, rising age of women giving birth to their first child, aging population, single motherhood, biological reproduction outside the family, *in-vitro* fertilization and other genetic engineering methods”. J. Zajączkowska-Burtowy, *Potrzeba aktualizacji pojęcia dobra dziecka [The need to update the concept of the best interests of the child]* (in:) J. Mucha (ed.) *Realizacja zasady dobra dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów [Implementation of the principle of the best interests of the child in mediation in cases concerning the exercise of parental authority and contacts]*, Warsaw 2021.

⁵⁰ M. Jadczyk-Żebrowska, *Prawa i obowiązki małżonków [Rights and obligations of spouses]*, Warsaw 2017, p. 113.

⁵¹ J. Haberko, *Zagrożenia dla instytucji przysposobienia wobec projektowanych rozwiązań legislacyjnych w zakresie leczenia niepłodności [Threats to the institution of adoption in the face of proposed legislative solutions in the field of infertility treatment]*, “Legal Forum” 2014, No. 4, p. 14: “it remains possible to undergo the procedure for a recipient remaining in a cohabiting relationship, in which if a child is conceived and born, its rights to establish a legal relationship of paternity with the cohabitant are not properly secured”.

⁵² T. Smoczyński, *Pojęcie rodziny i jej funkcje [The concept of family and its function]* (in:) T. Smoczyński (ed.), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze [Private Law System. Family and Guardianship Law]*, Warsaw 2014, p. 3.

basis of biological sex criteria. In each of these roles, a woman should remain in a relationship with a man so that she can still fit into the cultural script accepted by the majority. Deviation from the pattern is frowned upon, can arouse disapproval, and in law can result in the inability to exercise certain rights if the woman does not remain in a certain legal relationship.

In the Infertility Treatment Act, the legislator but also the legal discourse explicitly refers to the script of romantic love and attributes special qualities to the relationship between a man and a woman in the context of procreation and raising offspring. The best interests of the child can only be realized in this union. On the grounds of the Infertility Treatment Act, the combination of the roles of a mother and wife (partner) was adopted as inseparable. On the grounds of the Infertility Treatment Act, the legislator has strengthened the script of romantic love. In turn, attempts to adopt a different understanding of the role of women have met with disapproval. To quote Znamierowski:

“disgust lowers, undermines the target thing or person, by the very fact that it does not want to interact with it: it does not want to include it in its world. Thus, the emotion is offensive if it is directed towards a person or their thing, for it violates the possibility of two people interacting on an equal footing: it is a testimony that the evaluator does not want to include in their world a thing that belongs to the other person, or that person themselves. Hence, it is an emotion that **undermines the social balance or preemptively makes it impossible**”.⁵⁴

In the example analysed in the text, the legislator approved of parenthood realized in a romantic relationship between a man and a woman. On the other hand, single parenthood or parenting in same-sex relationships, is met with disapproval. In the case of *in vitro* fertilization, the cultural script dictates the rejection of such behavior that does not lead to the creation of a ‘proper family’.⁵⁵ The rationale behind the solution adopted in the act is that the category of ‘the best interests of the child’ is quite full of meaning – but it is impossible to determine its content *in abstracto*, without knowing the premises of a specific factual situation. However, the cultural script works in a simplistic way – it indicates what is right and desirable, without considering the consequences of realizing the ideal. The reasoning behind the solution adopted in the act is emotional, but it is deliberately concealed by the participants in the discourse. By considering emotions as something shameful, they try to hide them behind ‘fig leaves’ – seemingly rational arguments.⁵⁶

⁵⁴ Cz. Znamierowski, *Oceny i normy (Evaluations and Norms)*, p. 327.

⁵⁵ M. Soniewicka, *Racje i emocje w dyskusji na temat ingerencji genetycznych w ludzką prokreację [Rationale and emotion in the discussion of genetic interference in human procreation]*, “Roczniki Filozoficzne” 2019, No. 3, p. 87.

⁵⁶ Z. Tobor, *To do a great right, do a little wrong - rzecz o sędziowskich kłamstewkach*, “Przeгляд Podatkowy” 2015, No. 6, p. 21.

People who had deposited their embryos before the Infertility Treatment Act came into force were unable to use them after it came into force. These people had a legitimate expectation of the legislator to regulate their legal situation.⁵⁷ By failing to fulfil these expectations, the legislator can influence the emergence of negative emotions (such as anger) that can undermine their authority but also pride, solidarity in those who share the pattern the legislator accepts.⁵⁸

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⁵⁷ See: Commissioner for Human Rights, Speech to the Speaker of the Sejm on the in vitro fertilisation project, 25 March 2019, <https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Marsza%C5%82ka%20Sejmu%20w%20sprawie%20projektu%20dotycz%C4%85cego%20zap%C5%82odnienia%20in%20vitro.pdf>.

⁵⁸ J. Deigh, *Emotions, Values, and the Law*, Oxford 2008, p. 140.

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