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MOTHERHOOD AND LAW: REFLECTIONS ON HUMAN RIGHTS PROVISIONS AND SELECTED JUDGMENTS OF THE EUROPEAN COURTS

Abstract

The article focuses upon the phenomenon of motherhood within international and European legal contexts. The initial remarks concern the analysis of motherhood as an activity deeply rooted in interpersonal relations, in accordance with the feminist theory of care. Relevant human rights provisions dealing with motherhood are identified, and the scope of mothers' legal entitlements and public authorities' duties is analyzed. Selected case-law of the European courts is presented, in order to identify the obligations of public authorities related to providing support to the relationship between mother and child. The selection of cases is based upon their impact on bioethics, healthcare, and medical services. Therefore, the overall goal is to examine the hypothesis of prospective correspondence or lack of correspondence between the provisions of human rights treaties on motherhood (*law in books*) and courts' adjudication (*law in action*). In the final part of the article concluding remarks and observations are offered.

KEYWORDS

motherhood, prenatal rights, prenatal medicine, difference feminism, ethics of care, human rights

SŁOWA KLUCZOWE

macierzyństwo, prawa prenatalne, medycyna prenatalna, feminizm różnicy, etyka troski, prawa człowieka

To really love a woman, let her hold you
Till you know how she needs to be touched.
You gotta breathe her, you gotta taste her
Till you can feel her in your blood,
When you can see her unborn children, in her eyes[1].

1. INTRODUCTION

The aim of this article is to focus upon the phenomenon of motherhood within international and European legal contexts. Firstly, relevant human rights provisions dealing with motherhood are explored, with the intention to identify the scope of mothers' legal entitlements and public authorities' duties. The human rights analysis is twofold: based upon 1. universal human rights law, and 2. regional human rights provisions, namely European legal acts developed within the Council of Europe and within the European Union. Secondly, selected case-law of the European courts[2] is analyzed in order to identify the obligations of public authorities related to providing support to the existence and endurance of the relationship between mother and child. The selection of cases is based upon their impact on healthcare, medical services, and bioethics. Therefore, the overall goal is to examine the hypothesis of prospective correspondence or lack of correspondence between the provisions of human rights treaties on motherhood (*law in books*) and courts' adjudication (*law in action*).

The initial remarks include the analysis of motherhood as an activity deeply rooted in interpersonal relations, in accordance with the feminist theory of care. Therefore, the line of argumentation goes beyond the pure legal analysis and adopts interdisciplinary perspective[3], focusing on the real, everyday feminist

[1] Fragment of lyrics of the song "Have you ever really loved a woman?" from the album "18 til I die" by the Canadian singer-songwriter Bryan Adams, released in June 1996. The writers were Bryan Adams, Robert Lange and Michael Kamen. The song was performed by Bryan Adams (vocals) and Paco de Lucia (flamenco guitar). It proved to be a hit single.

[2] The selected case-law of the European Court of Human Rights and the Court of Justice of the European Union will be analized in the present paper.

[3] L.R. Ross stresses the need to engage in topics on mothers, mothering and motherhood within social sciences as those issues are barely visible in the contemporary research; cf. L.R. Ross, *Interrogating motherhood*, Athabasca 2016, p. 3.

experience of motherhood rather than limiting the scope of analysis to solely formal legal provisions of the parental topic. The final part of the article offers concluding remarks and observations.

2. MOTHERHOOD AND THE FEMINIST THEORY OF CARE

It seems that the phenomenon of motherhood may be analysed from various perspectives: personal, psychological, ethical, philosophical, economic, legal, historical, social or anthropological. One may underline an inspiring new trend within the contemporary feminist theories which is based upon "(…) the awareness of a differently structured 'care' model of activity historically performed by women"[4]. Schwarzenbach concisely characterizes those care theories in the following words:

> (…) the activity of caring for others is clearly different from production: genuine care work is other-directed and is focused upon the needs not of the self, but of the particular cared-for. In turn, it requires special emotional abilities in the carer: capacities for listening, sympathy, patience and so on, as well as a motivation for the other's good or for a transformed good or friendly relation with them. All this contrasts markedly with the goals of competitive production on the market, with a 'mastering' of the physical and even social world and the surmounting of command hierarchies[5].

The origins of the theory (or ethics) of care are to be found in the original and now classical work on difference feminism by Gilligan[6]. In her research and experimental observations Gilligan discovered that young boys tend to rely on 'ethics of rights' (justice) in order to solve a given problem, analyzing the issue in abstract terms of right and wrong, fairness, logic, rationality, and diminishing the importance of context and relationship. On the other hand, young girls seem to rely on different means. Female approach to solving a problem involves a perspective of a moral dilemma instead of a pure justice – the problem is analyzed in terms of relationships, responsibility, caring, and context. Hence, difference feminism, while opposed to equality feminism, tends to emphasize biological preferences of both sexes: males being oriented towards conquests, struggle for survival and need to gain respect, and females preferring 'soft values", such as care, security, and love[7].

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[4] S.A. Schwarzenbach, *On civic friendship: Including women in the state*, New York 2009, p. 210.

[5] *Ibidem*, p. 210. The emphasized words are underlined by the original author.

[6] C. Gilligan, *In a different voice: Psychological theory and women's development*, London 1982.

[7] Cf. W. Larimore, B. Larimore, *His brain, her brain: How divinely designed differences can strengthen your marriage*, Gran Rapids 2008.

It may be stated that traditional psychological theories regarded solely male patterns of reasoning as legitimate and superior modes compared to female patterns based upon relationships. Hence difference feminist theories challenged such approach, demonstrating that those differences should not be regarded as opposite to each other but rather parallel and supplementary modes of problem-solving[8].

Feminist theories of care are based upon the activity of providing care. According to the dictionary definition[9], care is a process of protecting and providing for the needs of someone or something; paying particular attention to the details of a situation or a thing; an action of dealing with something; a feeling of worry or anxiety. Etymologically[10], this word is based upon an old English word *caru* meaning 'sorrow', 'anxiety', 'grief' caused by apprehension of evil or the weight of many burdens. The possible line of etymology is the Proto-Germanic *karo* 'lament', 'grief' or the Old Saxon *kara* 'sorrow'. The affinity with the Latin *cura* seems doubtful, however, this Roman meaning is highly relevant, as it involves concern, trouble, study, administration, means of healing or treatment[11]. Those linguistic and philosophical remarks should be regarded as additional means to focus upon the brightness and burdens of the phenomenon of motherhood from different interdisciplinary analytical perspectives.

The phenomenon of motherhood, viewed through the lens of ethics of care, may be examined in terms of the provisions of human rights law. In particular, one may analyse the scope and content of the obligations of public authorities to organize healthcare system that would create conditions conducive to motherhood, namely proper gestation, labour, and upbringing of children. One may also attempt to formulate a legal standpoint upon the relationship between child and mother (and, more generally, parents). Additionally, one may focus upon the philosophical approach and legal regulatory framework on human embroys formed within the process of *in vitro* fertilization (IVF) treatment. These remarks may serve to formulate more general statements on the nature, scope, and entitlements of motherhood[12].

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[8] The analysis of the topic of feminist theories, however interesting, is beyond the scope of this paper's content. Cf. H. Charlesworth, C. Chinkin, S. Wright, *Feminist approaches to international law*', (in:) R.J. Beck, A. Clark Arend, R.D. Vander Lugt (eds.), *International rules: Approaches from international law and international relations*, New York-Oxford 1996, pp. 253–288.

[9] Cambridge Dictionary, https://dictionary.cambridge.org/pl/dictionary/english/care (accessed 29.12.2020).

[10] Online Etymology Dictionary, https://www.etymonline.com/word/care (accessed 29/12/2020).

[11] *Ibidem*.

[12] There are interesting papers dealing with contemporary challenges to motherhood (maternalism), proposals of legislative reforms and modifications of the relationships between children and parents. Nevertheless, the scope of this paper does not allow to review them in detail; cf. C.M. Cahill, *The new maternity*, "Harvard Law Review" 2020, Vol. 133, pp. 2221–2303; J. Jenson, *The new maternalism: Children first, women second*, (in:) Y. Ergas, J. Jenson, S. Michel (eds.), *Reassembling motherhood: Procreation and care in a globalized world*, New York 2017,

3. UNIVERSAL HUMAN RIGHTS LAW ON MOTHERHOOD

It seems that among human rights acts special importance should be assigned to the Universal Declaration of Human Rights (UDHR). Adopted in 1948, after the atrocities of World War II it claimed to represent "a common standard of achievement for all peoples and all nations"[13] to be implemented by progressive measures, both national and international, in order to secure their effective recognition and observance. As regards motherhood, of preliminary importance is Art. 16 dealing with marriage and a right to found a family. It is constructed in the following manner:

> 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
> 2. Marriage shall be entered into only with the free and full consent of the intending spouses.
> 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

One should observe the equality requirements of both spouses (during commencing, duration, and possible dissolution of marriage) as well as recognition of a family as a fundamental unit of the society, with an entitlement to public protection. Family protection, provided for in the Declaration, concerns also social policy and assistance schemes. Those are expressed in the following statements of Art. 25 UDHR:

> 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
> 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

This provision is of vital importance for motherhood. Firstly, Art. 25, similarly to the content of Art. 16 UDHR, is based upon the equality principle, stipulating the same requirements for public authorities as regards children born in or out of a wedlock, and irrespective of whether they are raised in full or single families. Secondly, Art. 25 para 1 provides for a broad social responsibility of the state in order to secure adequate standard of living for everybody. This social responsibility includes the obligation to provide various social services in case

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pp. 269–286; E. Milne, *Putting the fetus first – legal regulation, motherhood, and pregnancy*, "Michigan Journal of Gender and Law" 2020, Vol. 27, pp. 149–211.

[13] Preamble of the UDHR.

of adverse individual life conditions (unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond one's control).

It seems that proper understanding of the content of the first paragraph of Art. 25 is crucial for adequate identification of responsibilities of subsequent provision of para 2 of Art. 25 UDHR. The norm does stipulate a specific entitlement of mothers and children to "special care and assistance". This original and special character of public authorities' obligation should be discerned within a general framework of social assistance, with everyone entitled to benefit therefrom. Hence, motherhood is entitled *expressis verbis* to special care and assistance which is formulated as a means of extraordinary nature, specifically designed for this group and regular in the sense of a continuous rather than single action.

There are other provisions in the Universal Declaration, dealing not solely with mothers' rights but also with fathers' entitlements, within the category of parents' rights. According to the norm of Art. 26 para 3 it is up to the parents to choose the kind of education for their children. This provision directly refers to the parents' rights of a prior character in relation to the public authorities' entitlements.

The final provisions of the Universal Declaration, namely Art. 28, stipulates general entitlement "to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized". Hence, it may be stated that the obligation to support motherhood transcends national borders as it does not refer solely to the duties of the public authorities of the mother's state but it stipulates that mothers are, additionally, entitled to a proper international order in which they can enjoy their rights. This second obligation implies a general duty of all states, which are bound to engage in creation of an economic, social, legal and cultural environment allowing for a full implementation of the Declaration, in the spirit of brotherhood – and one may add – of motherhood.

The above analyzed provisions of the Universal Declaration were subsequently developed in the human rights treaties adopted by an international community in the later period. One should pinpoint here the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). The Covenant on Civil and Political Rights[14] contains Art. 23 dealing with family life, which states:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.

[14] The Covenant was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; with an entry into force on 23 March 1976, in accordance with the Art. 49 of the Covenant.

> 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Those provisions are directly referring to Art. 16 UDHR, providing for the definition of a family, its composition, equality of the rights of spouses, and obligation of the public authorities of the state and society to protect family. What is new in the Covenant norm, compared to the UDHR, is the inclusion of pro-children stance in case of marriage's dissolution.

Within the scope of motherhood provisions, the International Covenant on Economic, Social and Cultural Rights[15] directly refers to the UDHR, confirms the rights stipulated therein and provides a more precise understanding of entitlements stemming from motherhood. The relevant provision is contained in Art. 10 of the Covenant, namely:

> The States Parties to the present Covenant recognize that:
> 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
> 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
> 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law".

This provision is directly linked to Art. 16 dealing with family and Art. 25 focused upon social assistance, motherhood and childhood of the Universal Declaration. As for family arrangements, the Covenant stresses the need to accord it "widest possible protection and assistance". It seems, therefore, that the Covenant provides for a broader protection of a family compared to the UDHR standards. The Covenant repeats the definition of family included in UDHR – the natural and fundamental group unit of society – and confirms the requirement of the free consent of the intending spouses.

What is of vital importance in the Covenant, is the modification of the states' obligation to accord special protection to mothers by indicating particular time

[15] The Covenant was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, with an entry into force on 3 January 1976, in accordance with the Art. 27 of the Covenant.

period: "during a reasonable period before and after childbirth". Hence one may state that the obligation to protect mothers is not a permanent obligation but it concerns directly the crucial period connected to pregnancy and childbirth.

It seems that the evaluation of this provision of the Covenant should be positive – motherhood is understood here as a particular period of women's life, connected to the process of giving birth to children. The time limitation of the obligation to assist mothers to a reasonable period before and after childbirth is in itself reasonable. There should be no specific protection of women based on their potentiality of becoming mothers and likewise there should be no specific protection of mothers with older children, capable of being cared for by both parents and other members of the family or society. Moreover, this limitation is in accordance with the principle of equality of women and men and seems to assert a pro-partnership impact on families, conducive to an equal division of duties and rights among the representatives of both sexes. Children's need to obtain special assistance and protection is being fulfilled with the obligation expressed in the Covenant (Art. 10 para 3) which imposes on the public authorities a duty to implement special measures of protection and assistance on behalf of all children and young persons, without any discrimination for reasons of parentage or other conditions. It should be stressed that other detailed human rights norms connected to children are stipulated in the Convention on the Rights of the Child[16]. Such a division of the need of special care and assistance, directed to motherhood and to childhood, can also be found in the Universal Declaration.

Within the universal human rights law one may also distinguish specialized norms dealing with women's protection in the labour *milieu*, developed by the International Labour Organization (ILO). The most recent relevant treaty is the Maternity Protection Convention[17] which stipulates in its Preamble:

> (…) the need to provide protection for pregnancy, which [is] the shared responsibility of government and society.

In particular, the Convention regulates such issues as health protection of pregnant or breastfeeding women; their entitlement to a period of maternity leave

[16] The Convention was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990, in accordance with Art. 49 of the Convention.

[17] The ILO Maternity Protection Convention (C183) was adopted on 15 June 2000 and entered into force on 7 February 2002. The scope of its validity is rather modest as only 38 states (as of March 2020) have ratified the Convention. Quite interestingly, the Maternity Protection Convention (C183) revised the previous ILO Convention of 1952 (C103) which in turn was a revision of the original ILO Convention (C3) of 1919 (sic!). Those treaties provided for the protection of a woman before and after her confinement (for the period of six weeks); the right to absence from work during this time, the right to financial benefits sufficient for the full and healthy maintenance of herself and her child, and a prohibition for the employer to give her notice of dismissal during her leave of absence.

of not less than 14 weeks; the right to one or more daily breaks or a daily reduction of hours of work to breastfeed the child, the right to leave in case of illness, complications or risk of complications arising out of pregnancy or childbirth; the right to receive medical benefits (including prenatal, childbirth and postnatal care, as well as hospitalization care when necessary), the right to receive cash benefits in case of leave due to the pregnancy. The amount of benefits should be determined at such a level which:

> (…) ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living[18].

In case of women's benefits the Convention provides for protective mechanisms that aim at safeguarding the situation of women in the labour market, namely, the provisions dealing with women's employment protection and non-discrimination, stipulating that the benefits should be:

> (…) provided through compulsory social insurance or public funds, or in a manner determined by national law and practice. An employer shall not be individually liable for the direct cost of any such monetary benefit to a woman employed by him or her without that employer's specific agreement (…)[19].

Domestic authorities are obliged to implement the Convention, in particular to adopt such measures that would prohibit discrimination of women in the workplace (and in particular with regard to access to employment). At the end of the maternity leave, women should be guaranteed the right to return to the same position or an equivalent position paid at the same rate. Within those provisions the overall principle is the prohibition of discrimination.

In an attempt to evaluate the Maternity Protection Convention one may focus upon several points. Firstly, it should be stressed that motherhood recognized as the protection of pregnant women is regarded as a shared responsibility of public authorities (government) and the society. It is based upon the ethical awareness of the importance of life transmission and the need to share the burdens involved with the process of the passage of life to new generations. This social duty had been internationally recognized within the activities of the International Labour Organization as early as 1919, with the adoption of the first Maternity Protec-

[18] Art. 6 para 2 of the ILO Maternity Protection Convention (C183). In case cash benefits are estimated in relation to women's previous earnings, "(…) the amount of such benefits shall not be less than two-thirds of the woman's previous earnings or of such of those earnings as are taken into account for the purpose of computing benefits" (Art. 6, para 3). In specific cases cash benefits may be substituted by adequate benefits from social assistance funds.

[19] Art. 6 para 8 of the ILO Maternity Protection Convention (C183). The Convention provides two exceptions to the above-presented rule, namely a different domestic law or practice in force prior to the adoption of the Convention, or a general agreement of the government and representative organizations of employers and workers.

tion Convention[20]. Secondly, the contemporary Maternity Protection Convention of 2020 may be regarded as a holistic and flexible legal instrument, striving to provide means of protection for all women within maternity condition in labour environment. Thirdly, the positive substantive evaluation of the Convention is nevertheless counterbalanced with a relatively short list of states who had ratified the Convention and are bound by its provisions[21].

The above procedural disadvantage is lacking when it comes to the ultimate universal human rights treaty relevant for motherhood protection examined hereto, namely the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by as many as 189 states[22]. It seems that CEDAW plays an important signalling function, establishing general principles of the inclusion and protection of women's rights. One may quote the following initial passages from the CEDAW Preamble:

> Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and potentialities of women in the service of their countries and of humanity, (…)
> Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,
> Aware that a change in the traditional role of men as well as well the role of women in society and in the family is needed to achieve full equality between men and women (…)[23].

The fundamental principles of CEDAW are the intertwined principles of equality between women and men as well as the principle of non-discrimination (prohibition of discrimination). Their application within the motherhood *milieu* may lead to differentiated results. On the one hand, CEDAW contains provisions aiming at recognition of maternity "as a social function" (Art. 5 (b) CEDAW), on the other hand, this proper understanding of motherhood should be simultaneously connected with the parallel recognition of "common respon-

[20] The Convention had been adopted during the first Session of the International Labour Conference in Washington, November 1919.

[21] As an example may serve several European countries which had NOT ratified the Maternity Protection Convention: Denmark, Estonia, France, Germany, Ireland, Poland, Spain, Sweden, United Kingdom.

[22] The Convention had been adopted on 18 December 1979 by the United Nations General Assembly (34/180), and entered into force on 3 September 1981. It is being referred to as "an international bill of rights for women".

[23] Those are the motives 7, 13 and 14 of the CEDAW Preamble.

sibility of men and women in the upbringing and development of their children" (Art. 5 (b) CEDAW). Hence, those provisions stipulate that motherhood requires special protection based upon joint actions and responsibilities of both parents, stemming from the principle of partnership of both sexes.

Within the provisions dealing with employment (Art. 11 CEDAW) the Convention provides for the right to safe and healthy working conditions for women, including the safeguarding of their function of reproduction, the prohibition of dismissal on the grounds of pregnancy or of maternity leave, the obligation of domestic authorities to provide special protection to women during pregnancy in types of work proved to be harmful to them. The important relevant obligations of government are the following:

> (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances,
> (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities (…)[24].

Those provisions, once again, are based upon the twofold principle: specific character of maternity (motherhood) and partnership model of both parents' involvement in the process of upbringing children. The partnership principle may be connected to the requirements of work-life balance which implies that the supporting social services provided for by public authorities should be established with the primary goal of making it possible for parents "to combine family obligations with work responsibilities and participation in public life"[25]. The partnership model of both parents is repeated in the Art. 16 CEDAW, dealing with marriage and family and providing for the same rights and responsibilities of women and men as parents in matters relating to their children.

Last but not least, Art. 12 CEDAW contains provisions connected to health-care services, including those related to family planning. In particular, public authorities are obliged to ensure women:

> (…) appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation[26].

Within provisions related to family planning Art. 16 CEDAW stipulates the principle of equality of women and men as regards the reproductive rights. Both prospective parents should enjoy:

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[24] Art. 11 para 2 (b) and (c) CEDAW.

[25] Art. 11 para 2 (c) CEDAW. In fact, CEDAW provisions refer to the balance between family, work and public life, hence the commonly referred to phrase "work-life balance" should be remodeled into "public-work-life balance".

[26] Art. 12 para 2 CEDAW.

> (…) the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights[27].

One may conclude that the notion of reproductive rights contained in CEDAW is regulated as a double entitlement of both women and men, within their prospective parental function. Hence, reproductive rights should not be characterized solely as a unitary entitlement of a single person, but with the necessary completion of the second-parent assumption. Within such an interpretation, the notion of reproductive rights refers directly to love relationship between women and men and hence it may be described as an essentially relational concept[28].

4. REGIONAL (EUROPEAN) HUMAN RIGHTS LAW ON MOTHERHOOD

Within the regional European human rights arrangements one may focus upon the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), a treaty created by the Council of Europe. The European Convention does not contain a provision directly referring to mothers, though. One may apply in this context Art. 8 of the Convention, stipulating a right to respect private and family life, namely:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This provision does not refer to public authorities' positive obligation to assist mothers or to the need to support them during the period of upbringing children. It refers rather to the negative duty of public authorities to abstain from interfering

[27] Art. 16 para 1 (e) CEDAW.

[28] For the discussion of the modern phenomena within the family and children rights see E. Brake, L. Ferguson (eds.), *Philosophical foundations of children and family law*, Oxford 2018. The details of the contemporary discussion on the reproductive rights are, however, beyond the scope of this article; one may mention in this regard most recent activities such as the Generation Equality Forum (convened by UN Women and co-chaired by Mexico and France, scheduled for the period 2019-2021) with one of six themes relating to "bodily autonomy and sexual and reproductive health and rights (SRHR)", and the Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family, an anti-abortion declaration signed by 34 countries in October 2020.

with private and family life, home and correspondence. Therefore, the right to respect private and family life concerns individuals' autonomy to engage in those activities while a possible interference in the exercise of this right should be justified and legitimized solely by interests expressly stipulated in the art. 8 para 2.

Moreover, the European Convention contains a provision referring to the right to marry. Art. 12 states the following:

> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

One may evaluate this provision only partially positively or may even criticize the norm for its too modest construction. Such a negative approach should be explained by various reasons. Firstly, the provision in the European Convention does confirm the right to marry and to found a family, still there is no express referral to the principle of equality between women and men. There is no referral to the prohibition of discrimination and no mention of a ban on limitation due to individual's characteristics. Secondly, no definition of family is included in the Art. 12. Thirdly, a prospective family's entitlement to protection or assistance is not recognized. Fourthly, the European Convention does not refer to the Universal Declaration of Human Rights (Art. 16) but solely to national laws governing family issues. Hence, one may conclude that the construction of Art. 12 of the European Convention, dealing with the right to marry, imposes in fact a limitation on the right to marry provided for in the Art. 16 of the Universal Declaration. And in this respect it seems difficult to discern the implementation of the overall aim of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as stipulated it is preamble:

> (…) the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in Universal Declaration.

The above-stated omission in the text of the European Convention had been amended in 1984 with the adoption of the Protocol No. 7 to the Convention, which introduces the provision on the equality of spouses. Art. 5 of this Protocol is constructed in the following manner:

> Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

While this provision contains the elements which partially constitute norms similar to those included in the Art. 16 of the Universal Declaration – namely the confirmation of equality between spouses in various phases of marriage (its conclusion, duration and possible dissolution) – it still lacks other factors concern-

ing entitlement of the family to public authorities' protection. One should stress, however, an interesting limitation imposed on the right of equality of spouses – the Protocol recognizes legitimacy of public authorities' interference with this right motivated by the interests of the children. Hence, it seems that this factor should be regarded as a borderline of spouses' entitlements.

The ultimate regional European human rights treaty examined in the present article is the Charter of fundamental rights of the European Union[29]. It contains numerous provisions connected to the phenomenon and environment of motherhood. One may state that the right to integrity of the person is indirectly connected to motherhood within the fields of medicine and biology. Art. 3 para 2 of the Charter stipulates the following:

> In the fields of medicine and biology, the following must be respected in particular:
> (a) the free and informed consent of the person concerned, according to the procedures laid down by law;
> (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
> (c) the prohibition on making the human body and its parts as such a source of financial gain;
> (d) the prohibition of the reproductive cloning of human beings.

This provision deals with the potential phenomenon of motherhood in its very initial phases – those of embryos' life formation. It may be vital as a source of evaluation of cases concerning artificial fertilization techniques.

Charter of fundamental rights recognizes a right to respect for private and family life (Art. 7), constructed in the similar manner as the provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 8 para 1). The relevant Charter provision has the following content:

> Everyone has the right to respect for his or her private and family life, home and communications.

Another similarity of construction is visible with regard to the right to marry and right to found a family (Art. 9 CFR and Art. 12 ECHR). The relevant Charter provision has the following content:

> The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

However, the evaluation of this provision should be critical as the direct referral to domestic laws vastly diminishes the importance and validity of the norm of human rights treaty.

The most important provisions of the Charter connected to motherhood are to be found in the norms dealing with equality between women and men (Art. 23 CFR), the rights of the child (Art. 24 CFR), and rules on social security and social

[29] 2012/C 326/02 Official Journal of the European Union of 26 October 2012, C 326/391.

assistance (Art. 34 CFR). Moreover, the Charter contains the norm of Art. 33 which directly refers to family and maternity issues, namely:

> 1. The family shall enjoy legal, economic and social protection.
> 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

The Charter stipulates legal, economic and social protection of the family – in accordance with other human rights legal instruments. One may wonder why there is no direct referral in the Charter to mothers' entitlements to special care and assistance. Quite surprisingly, the answer to this question may be positive in the sense of inclusion in the Charter certain means of mothers' assistance: namely one should underline the detailed construction of the Art. 33 of the Charter dealing with the means to reconcile family and professional life, among them the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave. These provisions may be characterized as the ultimate statement on mothers' assistance, formulated in Art. 25 para 2 of the Universal Declaration of Human Rights and gradually developed in the Art. 10 para 2 of the International Covenant on Economic, Social and Cultural Rights.

An additional provision in the Charter dealing with motherhood is Art. 34 devoted to social security and social assistance, stating that:

> 1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

It seems that the above provisions are the essence of motherhood protection within the Charter, forming a minimum standard of mothers' assistance in EU law. Further broadening the scope of mothers' entitlements may be derived from other EU law provisions, international instruments or constitutions of the member states (Art. 53 CFR). The ultimate Charter provision dealing with motherhood is contained in the Charter provision of childhood, namely in the Art. 24:

> 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

This provision stipulates the primary principle as far as childhood is concerned, namely the obligation to be guided by the child's best interests in all actions relating to him or her. Children have the right to special care and protection

in order for them to thrive ("as is necessary for their well-being", as the Charter stipulates). Moreover, every child is entitled to maintain on a regular basis personal relationship and direct contact with both his or her parents (except for the limitations due to the principle of child's best interests). This provision refers directly to motherhood and reaffirms the requirement of a personal linkage and relationship between the mother and her child (children).

The ultimate European treaty dealing, albeit indirectly, with motherhood is the Council of Europe Istanbul Convention on preventing and combating violence against women and domestic violence[30]. The states-parties to the Convention are under the obligation stipulated in Art. 6:

> (…) to promote and effectively implement policies of equality between women and men and the empowerment of women.

One may observe that the above-stated obligation goes beyond the principle of equality between women and men as it is supplemented with another duty, to promote "the empowerment of women". Within the context of motherhood it seems that Istanbul Convention aims at safeguarding peaceful enjoyment of maternity activities, with the preventive goal of avoiding the occurrence of domestic violence[31]. Moreover, the Convention requires state-parties to include in their domestic criminal law provisions dealing with the intentional conducts resulting in an anti-motherhood consequences, namely forced abortion and forced sterilization (Art. 39 of the Istanbul Convention). Hence, the prohibited actions are defined in the following manner:

> Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:
> a) performing an abortion on a woman without her prior and informed consent;
> b) performing surgery which has the purpose or effect of terminating a woman's capacity to naturally reproduce without her prior and informed consent or understanding of the procedure.

[30] Istanbul Convention (Council of Europe Treaty Series No. 210) was adopted in Istanbul on 11 May 2011 and entered into force on 1 August 2014. The overall aim of the Convention is to create a legal framework in order to protect women against all forms of violence, and in particular to prevent, prosecute, and eliminate violence against women and domestic violence. The detailed description of the normative content of Istanbul Convention exceeds the scope of the present article. The Convention had been ratified by 35 states, with the recent withdrawal from the Convention of Turkey (decision of 22 March 2021), and signed without subsequent ratification by 11 states (among them Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Slovakia, Ukraine and United Kingdom). Russia did not sign nor ratified the Convention.

[31] According to Art. 3 (b) of Istanbul Convention the notion of domestic violence shall mean "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim".

5. EUROPEAN CASE-LAW ON MOTHERHOOD

The analysed provisions of the international and European human rights instruments dealing with motherhood may be regarded as the statement of relevant law (*law in books*). Hence, the analysis should be supplemented with an examination of selected relevant judgments of the European courts (*law in action*). Such methodological attempt would serve as a critical tool for verifying the validity and observance of human rights provisions: if those norms are recognized in the judicial verdicts, then the normative force of motherhood entitlements becomes confirmed.

The scope of the present article makes it impossible to analyse in detail all the relevant judgments of the European courts. Hence it is necessary to make a selection of those verdicts in order to formulate tentative statements or certain conclusions as far as the actual contemporary meaning of motherhood entitlements is concerned. The initial choice of the relevant judgments is based upon public authorities' obligation to provide special care and assistance to mothers within organizational duties connected to the properly functioning healthcare system. One may state that the very possibility of motherhood is dependent upon prospective access and quality of medical services as a factor conducive to a proper process of gestation and childbirth. Therefore, judicial verdicts dealing with healthcare *milieu* would be examined.

The selection of case-law would also be made according to the inner criteria of the factual situation of pregnancy (*in utero*) and the rights and legal status of human embryos, created with artificial fertilization techniques (*in vitro*). Within the topic of the present research one may state that both situations correspond to different types of motherhood which may be described as direct motherhood (*in utero*) and indirect motherhood (*in vitro*). Direct motherhood occurs when an embryo, then a foetus and then a child gradually develops inside the body of his or her mother (*in utero*). Direct character of this relationship means that it is the mother who is directly responsible for the baby's well-being, its growth and development in her womb. Hence it is the mother who directly protects her child or children.

Indirect motherhood concerns such situations when an embryo is created outside the body of a prospective mother, with the usage of artificial fertilization techniques (*in vitro*), involving subsequent possibility of embryo's implantation in a woman's body. Indirect character of this relationship means that it is not solely the mother who is responsible for the fate of the embryos. There are other people involved in the process: both those engaged in a concrete IVF[32] action, such as father, physicians and other medical staff (nurses, laboratory technicians),

[32] IVF meaning *in vitro* fertilization.

secretaries, cleaning staff and, more generally, people involved in the legislative process concerning IVF legal requirements in a given state. Hence, one may conclude that in case of indirect motherhood it is public authorities who are responsible for the fate of embryos and who determine conditions concerning their well-being. Ultimately it is the state who protects the embryos.

One should stress, however, that its situation of indirect motherhood may be regarded as a temporal situation, with its possible transformation into the situation of direct motherhood – once the embryo is implanted in a woman's body. It seems that in such a situation indirect motherhood is being replaced by direct motherhood, with the emergence of a prospective mother's entitlement to and responsibility for protection of her child or children. In case implantation does not ensue and cryopreservation is made, indirect motherhood continues with a primary responsibility of the public authorities for the fate of the embryos.

The other criterion for the selection of the relevant case-law is the type of a court. Hence, "motherhood" judgments of the European Court of Human Rights and the Court of Justice of the European Union would be analysed. Nevertheless, the examination of judicial statements would not be performed on a case by case basis but would rather focus upon thematic challenges.

It seems that public authorities' obligation to provide special care and assistance to mothers is connected primarily to the duty to organize the healthcare system, with an appropriate standard of medical services. In particular, services of proper quality should be accessible to prospective mothers in order to allow them to follow their reproductive autonomy and to ensure proper process of gestation. Hence, one may state that imposing duties on public authorities is a positive requirement. It involves certain administrative and managerial actions to be performed aiming at a properly functioning healthcare system. It is also a prospective requirement, imposed in order to prepare suitable medical conditions conducive to women's positive reproductive choices.

As for the relevant case-law of the European courts supporting the above-stated obligations of public authorities one may point to the judgment of the European Court of Human Rights in the case of Asiye Genç v. Turkey[33]. The case concerned the death of a newborn child, Tolga Genç, the son of Ms Asiye Genç, a Turkish national, who was born in 1976. On 30 March 2005 Ms. Genç, who was pregnant and in pain, was taken by her husband to the Gümüşhane public hospital. On 31 March 2005 at around 11 p.m. Ms Genç gave birth by Caesarean section to a boy, who – at 36 weeks' gestation – was premature[34] and weighed 2.5 kg. Shortly after birth the child showed signs of respiratory distress. As there was not a suitable neonatal unit in the hospital of the child's birth, the doctors decided to transfer the baby to the hospital located in Trabzon, 110 km away. The ambulance

[33] Judgment of 27 January 2015, appl. No. 24109/07.

[34] A birth is considered to occur "at term" when the pregnancy lasts ca. 41 weeks. The birth of Tolga had initially been scheduled for 25 April 2005.

with the child arrived there around 1.15 a.m. but the child still was not admitted to the hospital on the grounds that there were no places available in the neonatal intensive care unit. The negative decision refusing admittance was repeated by the doctors at two hospitals in Trabzon, leading in consequence to the death of Tolga in the very ambulance at around 3.30 a.m.[35].

The Court addressed the situation by referring to the right to life, expressed in the Art. 2 para 1 of the European Convention on Human Rights, and in particular in its first sentence:

> Everyone's right to life shall be protected by law (…).

These provisions impose on public authorities an obligation "not only to refrain from the intentional and unlawful taking off life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction"[36]. Those principles are to be applied within the area of public health. States have to ensure that hospitals (public and private) take appropriate steps to protect patients' lives. Moreover, Art. 2 of the Convention also implies the obligation to guarantee an efficient and independent judicial system, in order to control the cases of death of any individual under the responsibility of health professionals".

In the circumstances of the Genç case, the Court determined that baby Tolga:

> (…) must be considered as having been the victim of a malfunctioning of the hospital departments, in that he was deprived of any access to appropriate emergency care. In other words, the child died not as a result of negligence or an error of judgment in the treatment administered to him, but because he was simply not offered any form of treatment at all – it being understood that such a situation was analogous to a denial of medical care such as to put a person's life in danger.
>
> In conclusion, the Court declares that, in the light, firstly, of the circumstances leading to the failure to provide essential emergency care and, secondly, of the insufficient nature of the domestic investigations carried out in that connection, the State must be regarded as having failed to meet its obligations under Article 2 of the Convention in respect of the child Tolga Genç. There has therefore been a violation of that provision[37].

The analized Genç judgment is relevant not solely within the requirement to provide special assistance to mothers but within a broader perspective concerning

[35] The dramatic situation was described by Tolga's father in the following words: "Instead of caring for my son, the doctors wasted time with administrative formalities. They did not even take the trouble to examine him, although it was an emergency situation. They ought to have diagnosed and treated him. We fought for four hours for my son to be seen by a doctor, but no hospital would agree to admit him. After several trips back and forth between hospitals, he died in an ambulance, in a hospital garden. Had my son been admitted to hospital in time, he would not have died" (para 16 of Genç Judgment).

[36] The relevant Court's argumentation is included in paras 65-87 of Genç Judgment.

[37] Paras 86–87 of Genç Judgment.

the obligations to provide effective healthcare services towards the entire population of the state.

The positive obligation of public authorities to ensure protection of patients' lives may also be examined within the circumstances of the case Vo v. France[38]. Mrs Thi-Nho Vo was born in 1967, and was of Vietnamese origin living in France. In November 1991 she attended a medical examination scheduled for her during the sixth month of pregnancy at the hospital in Lyon. There, the doctor's medical negligence resulted in an involuntary termination of her pregnancy. Ms. Vo intended to carry her pregnancy to full term and her baby girl was in good health at the time of negligence. The Court examined the issue within the scope of Art. 2 of the Convention (right to life), stating that:

> (…) the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that "Article 8 para 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother (…)[39].

Without entering a debate concerning the scope of protection of the right to life of unborn children (in prenatal phase)[40] one may focus upon the obligation of public authorities to ensure proper functioning of the healthcare system with the overall aim of protecting patients' lives. Therefore, one may ask a question concerning the personal scope of healthcare system, namely should unborn children be regarded as patients, and if the answer is positive, are they entitled to receive medical treatment?

Those questions do not refer solely to particular cases with the aim of their resolution. Rather, the questions should aim at providing answers concerning a more general healthcare policy. The dilemma is best illustrated with a real case-study, which is based upon a medical rather than judicial decision[41]: In 2015 a pregnant woman of Polish origin, living in the United Kingdom, had been advised by physicians in London to perform an abortion due to the detected heart defect of the baby. Reluctant to terminate the pregnancy, she then travelled to Warsaw, where

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[38] Judgment of 2 June 2004, appl. No. 53924/00.

[39] Para 80 of Vo Judgment.

[40] Cf. D. Bach-Golecka, *To be or not to be… a parent? Abortion and the right to life within a European legal context*, (in:) A. Stępkowski (ed.), *Protection of human life in its early stage: Intellectual foundations and legal means*, Frankfurt am Main 2014, pp. 191–207.

[41] Case presented by neonatologist M. Dębska who had also applied the relevant treatment; M. Rigamonti interviewing M. Dębska, *Leczymy wady, które na świecie kwalifikują do aborcji* [We are treating defects which are elsewhere regarded as reasons for abortion]; https://wiadomosci.dziennik.pl/opinie/artykuly/518420,marzena-debska-leczymy-wady-ktore-na-swiecie-kwalifikuja-do-aborcji.html (accessed 30.12.2020).

at Bielański Hospital she underwent a successful prenatal surgery *in utero*. After returning to London she gave birth to a healthy child.

The case raises questions concerning the British physicians' actions: Was their proposal to perform abortion grounded in a lack of knowledge about the treatment opportunities of prenatal medicine? Or should one regard their advice as an instance of medical negligence, with the provision of an improper medical advice as to the possible treatment options? Was their action deliberate, in the sense of promoting abortion as a less expensive medical service compared to the higher costs of prenatal operation of the baby? Should one regard the proposal as directed towards "wrongful abortion", with false justifications for the termination of pregnancy? Or was the proposal grounded in lack of expertise as far as prenatal medicine in the United Kingdom is concerned? Should public authorities invest in the development of prenatal medicine, as a means of providing possible treatment to unborn children, regarded as a special vulnerable category of patients?

Those questions are to be discussed in public debate in order to deliberately make decisions concerning public healthcare policy. A similar approach should be taken in case of artificial modes of procreation and the adoption of their normative framework. There seem to be no consensus among the European states as to one preferential method of their regulation. Hence those issues fall within the doctrine of the "margin of appreciation". There are examples of legislation supporting the inclusion of both parents to make decisions concerning the future of the created embryos[42]. There are examples of legislation supporting the legitimacy of public authorities' decisions as regards the fate of the cryopreserved embryos[43].

Within the European Union law, the Court of Justice underlined the need to protect human embryos, in the following statement[44]:

> The exclusion from patentability concerning the use of human embryos for industrial or commercial purposes set out in Article 6(2)(c) of Directive 98/44 also covers the use of human embryos for purposes of scientific research, only use for therapeutic or diagnostic purposes which is applied to the human embryo and is useful to it being patentable.
>
> Article 6(2)(c) of Directive 98/44 excludes an invention from patentability where the technical teaching which is the subject-matter of the patent application requires the prior destruction of human embryos or their use as base material, whatever

[42] One may point to the British legislation confirming the rights of parents, and not solely the mother, to decide upon the fate of the embryos. That line of reasoning was the basis for Court's decision undertaken in the case of Evans v. the United Kingdom (Judgment of 12 March 2007 the European Court of Human Rights' Grand Chamber, appl. No. 6339/05).

[43] One may point to the Italian legislation prohibiting the use of embryos for scientific purposes; cf. the case of Parillo v. Italy (Judgment of 25 August 2015, appl. No. 46470/11), discussed in detail below.

[44] Judgment of the Great Chamber of the Court of 18 October 2011 in case C-34/10 Oliver Brüstle v. Greenpeace e.V.; ECLI:EU:C:2011:669.

> the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos.

This judgment based upon the principle of "ecology of human being" had been evaluated positively by the theorists of EU law, human rights and bioethics. The verdict had been further complemented with another judgment where the Court underlined the following line of argumentation[45]:

> Article 6(2)(c) of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions must be interpreted as meaning that an unfertilised human ovum whose division and further development have been stimulated by parthenogenesis does not constitute a "human embryo", within the meaning of that provision, if, in the light of current scientific knowledge, it does not, in itself, have the inherent capacity of developing into a human being, this being a matter for the national court to determine.

This judgment had been regarded by some theorists as a modification of the earlier standpoint of the Court expressed in Brüstle case. According to other legal thinkers the statement of the Court expressed in the case of International Stem Cell Corporation must be treated rather as a completion of the former verdict, in the sense of providing a more nuanced and detailed description of the problem[46].

Within the case-law of the European Court of Human Rights one may regard the Court's Grand Chamber judgment in the case of Parillo v. Italy as the most relevant verdict of the Strasbourg tribunal. The case originated in the application of Ms Adelina Parillo who lodged a complaint against Italy concerning the ban under section 13 of Law No. 40 of 19 February 2004 (Law 40/2004) on donating to scientific research embryos conceived through medically assisted reproduction. According to the applicant, the prohibition of the Italian authorities was incompatible with the right to respect for private life (Art. 8 ECHR) and with the right to peaceful enjoyment of possessions (Art. 1 of the Protocol No.1 to the ECHR). Moreover, Ms Parillo claimed that the Italian standpoint was incompatible with the freedom of expression (Art. 10 ECHR) within the context of freedom of scientific research.

Ms Parillo was born in 1954. In 2002 she had undergone with her partner an *in vitro* fertilisation treatment at the Centre for reproductive medicine at the European Hospital in Rome. The five embryos obtained from the IVF were frozen (cryopreserved). Before any of the embryos was implanted, Ms Parillo's partner died in November 2003 in a bomb attack in Nasiriya (Iraq) while he was reporting

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[45] Judgment of 18 December 2014 of the Great Chamber of the Court in case C-364/13 International Stem Cell Corporation v. Comptroller General of Patents, Designs and Trade Marks; ECLI:EU:C:2014:2451.

[46] A similar line of reasoning may be adopted within the evaluation process of the Judgment of the 23 April 2018 of the Court of Justice of the EU in case T-561/14 European Citizens' Initiative *One of Us* v. European Commission; ECLI:EU:T:2018:210.

on the war. Subsequently, Ms Parillo resigned from implanting the embryos and tried to transfer them for scientific (stem cell) research[47]. Nevertheless, her requests were declined as incompatible with Italian domestic regulation on medically assisted fertilisation (Law 40/2004)[48].

The relevant provisions stated that the procedures of medically assisted reproduction should guarantee the rights of all the persons concerned, including those conceived (section 1). Experiments on human embryos were forbidden, clinical or experimental research could be authorised solely on condition that it was performed exclusively for therapeutic or diagnostic purposes, with the aim of protecting the health and development of the embryo and on condition that no alternative methods exist (section 13). The infringement of those prohibitions resulted in the sanction of imprisonment (from two to six years) and a fine (from 50,000 euro to 150,000 euro). Any health professional convicted of the offence should be debarred from practicing medicine for from one to three years. Moreover, the Law 40/2004 stated that cryopreservation or destruction of embryos was forbidden. Nevertheless, in the explanatory notes on assisted reproduction (Ministry of Health Decree of 11 April 2008) confirmed the possibility of cryopreservation of embryos awaiting implantation, including those frozen prior to the entry into force of the Law 40/2004.

The embryos produced on behalf of Ms Parillo belonged to the latter category. According to the opinion of the National Bioethics Committee of 18 November 2005 on the fate of cryopreserved embryos the optimal procedure was the so-called "adoption for birth", meaning that a couple or a woman adopts surplus embryos for implantation, thus bringing them to life and starting a family. This proposition was reviewed favourably in the final report of 8 January 2010 of Study Commission on Embryos enacted by the Ministry of Health, as one of the feasible options concerning embryos stored in cryopreserved form in assisted reproduction centres. The other option was connected to the situation of embryos' natural death or permanent loss of viability as organism, on condition of obtaining medical certificate of the relevant fact. The report underlined the legal ban on the destruction of embryos since the fate of cryopreserved embryos was described as their storage not their destruction; hence they should be kept alive even though their fate was uncertain.

Within the proceedings before the European Court of Human Rights the Italian government maintained that the issue of possible donation of embryos to

[47] Initially the requests were verbal until the formal written request was made in December 2011.

[48] In force since 10 March 2004. Ms Parillo did not manage to make a definite decision concerning the embryos before that date. She claimed that the possible options were limited as the implantation of embryos *post mortem* was illegal; para 133 of the Judgment. In the proceedings it turned out that the latter statement was not correct: the use of cryopreserved embryos for non-destructive purposes, such as heterologous fertilisation, was possible in the Italian legal order.

scientific research does not fall within the concept of the right to respect for private life, as stipulated in the Art. 8 of the Convention. Even if the Court would have found otherwise, the alleged interference in the applicant's private life should be regarded as legitimate because done in accordance with domestic law and in pursuit of the aim of protecting the embryos' potential for life[49]. Ms Parillo maintained that her will to donate the embryos to research should be regarded as fulfilling a public interest and pursuing a noble cause. Moreover, this decision could be a source of comfort to her after all the past painful events[50].

The Court indicated that the vital issue to be examined in the case was the concept of "private life": whether it included the right to decide upon the fate of one's embryos? According to the relevant case-law of the Court the notion of "private life" should be understood in a broad manner and may not be restricted to an exhaustive definition[51]. It encompasses the right to self-determination; it incorporates the right to respect for a decision to become (or not to become) a parent; it should embrace the parties' freedom of choice as to the fate of embryos obtained from assisted reproduction. The Court underlined the linkage between the person who had undergone *in vitro* fertilisation and embryos thus conceived, because "the embryos contain the genetic material of the person in question and accordingly represent a constituent part of that person's genetic material and biological identity"[52]. Therefore it is legitimate to conclude, according to the Court, that the applicant's ability to make a conscious and considered choice about the fate of her embryos relates to her right to self-determination within the intimate aspect of her personal life[53].

In the later stage of the proceedings the Court examined whether the aim pursued by Italian legislation, namely the protection of the embryos' potential for life, consisted a legitimate interference with the right to respect the private life. The Court acknowledged a possible linkage of this aim with the broader clause of protecting morals and the rights and freedoms of others[54]. Within the perspective of the past cases the Court underlined that the normative legal framework of the medically assisted procreation may be characterized by some unique features: firstly, by a procedural element of rapid, dynamic development in national legal orders; secondly, by its substantive content raising delicate moral and ethical questions; and thirdly, by wide margin of appreciation of the national authorities in choosing the most appropriate regulations. Nevertheless, even though

[49] Paras 121–123 of Parillo Judgment.

[50] Paras 134–136 of Parillo Judgment.

[51] The Court mentioned the udgments in the following cases: Pretty v. the United Kingdom (appl. No. 2346/02); Evans v. the United Kingdom (appl. No. 6339/05); A, B and C v. Ireland (appl. No. 25579/05); Knecht v. Romania (appl. No. 10048/10).

[52] Para 158 of Parillo Judgment.

[53] Para 159 of Parillo Judgment.

[54] Para 167 of Parillo Judgment.

the Court's role is not to supplement domestic legislator, still it is competent to examine the solutions adopted at the national level.

While examining the provisions of the Parillo v. Italy case the Court stressed that the essence of the dispute did not concern prospective parenthood, hence it did not fall within the particularly important aspect of an individual's existence and identity. The question of donation of embryos not destined for implantation did raise, in the opinion of the Court, delicate moral and ethical questions. Within the comparative perspective there was no European consensus; some European states adopted a non-prohibitive approach, allowing research on human embryonic stem cell lines while others enacted legislation partially or completely prohibiting any research on embryonic cells. Hence, national authorities enjoyed a broad margin of discretion to enact restrictive legislation where the destruction of human embryos was at stake. Moreover, the Court stressed those actions undertaken at the European level, that were designed to temper excesses in this area[55]. The margin of appreciation of national authorities was not unlimited, however, as domestic legislation should struck a fair balance between the interests of the state and of those individuals directly affected by the enacted solutions.

In the circumstances of the analysed case the Court stated that Italian legislation did not infringe the margin of appreciation and the prohibition of using embryos for scientific research was made within the limits of necessity in a democratic society. Moreover, the Court stressed a unilateral character of Ms Parillo's declaration concerning her willingness to donate embryos for scientific research as there was no analogous declaration of her deceased partner. The will of the partner, according to the Court, should have the same impact on the future of embryos as he had the same interest in their fate as Ms Parillo since the moment of fertilization[56]. Therefore, the conclusion of the Court stated (by sixteen votes to one) no infringement of the right to protection of private life (Art. 8 ECHR).

As for the alleged violation of the right to peaceful enjoyment of one's possessions the Italian government stated that embryos could not be regarded as "things"; hence it is unacceptable to attribute economic value to them. Within domestic Italian legal framework human embryos were regarded as subjects rather than objects of law. Moreover, they were entitled to respect due to human dignity[57]. Ms Parillo stated that embryos which were not implanted were not destined to develop into foetuses and be born; in her view embryos were her possessions, and as such were destined to be eliminated[58].

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[55] The Court referred to the Art. 18 of the Oviedo Convention stating the prohibition on creating human embryos for scientific research and the ban on patenting scientific inventions where the process involved the destruction of human embryos (the Judgment of the Court of Justice of the European Union of 18 October 2011 in the case of Olivier Brűstle v. Greenpeace).

[56] Paras 196–198 of Parillo Judgment.

[57] Para 200 of Parillo Judgment.

[58] Para 204 of Parillo Judgment.

According to the Court, the notion of "possession" has an autonomous meaning which is not limited to the ownership of material goods; certain other rights and interests constituting assets may be regarded as property rights and fall within the protective rules on possession. Moreover, the autonomy of the term "possession" means that it is constructed independently from the meaning assigned to it within the domestic legal orders[59]. The Court underlined the economic and pecuniary scope of the Art. 1 Protocol No. 1 to the ECHR and declared briefly but unanimously that "human embryos cannot be reduced to 'possessions' within the meaning of that provision"[60].

The judgment of the Court in the Grand Chamber is supplemented with three concurring opinions and three dissenting opinions. The first, very much elaborated concurring opinion was presented by the judge Pinto de Albuquerque whereas the main focus of his analysis concerned the scope of discretion (margin of appreciation) of national authorities[61]. The European Court of Human Rights is recognized as the ultimate interpreter and guarantor of rights, freedoms and obligations set out in the Oviedo Convention (Art. 29 of this Convention) and hence, with the growing number of ratifications of the Convention itself and its Protocols, the process of emergence of the European consensus has already been started. Therefore, as judge Pinto de Albuquerque argued, the margin of appreciation of the Council of Europe's member states should be recognized as a relatively narrow one, acknowledging legal protection of the human embryo[62]. The opinion contained a definite statement concerning the positive obligations of national authorities to protect the embryo and other forms of pre-natal human life (both *in vitro* and *in utero*): it should be based upon the provisions of the Oviedo

[59] Para 211 of Parillo Judgment. The Court referred to the following cases: Iatridis v. Greece (appl. No. 31107/96); Beyeler v. Italy (appl. No. 33202/96); Broniowski v. Poland (appl. No. 31443/96); Gratzinger and Gratzingerova v. the Czech Republic (appl. No. 39794/98); Kopecký v. Slovakia (appl. No. 44912/98).

[60] Para 215 of Parillo Judgment.

[61] The concurring opinion stated that the same judicial result was a proper result of the analysis of the applicant's situation, however, pointed to different reasons for reaching this coclusion.

[62] Judge Pinto de Albuquerque cited part of the joint dissenting opinion of judges Riza Tűrmen, Margarita Tsatsa-Nikolovska, Dean Spielmann, and Ineta Ziemele in the case of Evans v. the United Kingdom, stating that an identical comment could be made in the present Parillo case. The relevant text of the joint dissenting opinion reads as follows: "(…) a sensitive case like this cannot be decided on a simplistic, mechanical basis, namely, that there is no consensus in Europe, therefore the Government have a wide margin of appreciation; the legislation falls within the margin of appreciation (…) that margin of appreciation should not prevent the Court from exercising its control, in particular in relation to the question whether a fair balance between all competing interests has been struck at the domestic level. The Court should not use the margin of appreciation principle as a merely pragmatic substitute for a thought-out approach to the problem of proper scope of review" (para 24, ft. 29 of the concurring opinion by judge Pinto de Albuquerque).

Convention[63]. According to judge Pinto de Albuquerque, those obligations may be described in the following way: firstly, to promote the natural development of embryos; secondly, to promote scientific research on embryos for the benefit of an individual embryo subject to it; thirdly, to define precisely the exceptional cases of the possible use of embryos (embryonic stem lines), with providing for criminal liability for the possible infringement of those rules.

The concurring opinion of judge Pinto de Albuquerque gave a profound statement concerning the competence and importance of the Court's oversight of the state's interference with unborn life:

> (…) Precisely because this domain may evolve in a manner seriously dangerous to humankind, as we have seen in the past, attentive scrutiny of the states' narrow margin of appreciation, and potentially preventive intervention by this Court, is an absolute requirement today. Otherwise the Court would be giving up the most basic of its tasks, namely, protecting human beings from any form of instrumentalisation[64].

According to judge Pinto de Albuquerque it is possible to discern an evolution of the standpoint of the Court concerning the protection of embryos regarded as the most vulnerable members of all humanity; in particular it is noteworthy that in the present case the Court did not refer to the Evans anti-life principle or to the classic statement of Vo v. France but rather supported the opinion expressed in the case of Costa and Pavan v. Italy, that the embryo is an "other", a subject with legal status that may be weighed against the legal status of progenitors[65].

The second concurring opinion which was presented by judge Dmitry Dedov confirmed the legitimacy of the aim consisting in preservation of the "embryo's potential for life". Such an important aim, according to judge Dedov, should not be reduced to a question of margin of appreciation. It is based upon the presumption that the embryo's existence is a condition for human being's development, and as such it imposes a positive obligation upon national authorities to safeguard the beginning of life[66]. In fact, the statement of judge Dedov is very explicit:

> (…) In my view, the embryo's right to life is a key criterion for reaching the right decision. I am sure that if this criterion had been applied, many previous cases, such as Evans, Vo and S.H. (cited in the judgment), would have been decided in favour of the applicants, who indeed wanted to become parents and, as a result, to save the embryo's life[67].

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[63] The opinion referred to the Art. 2, stipulating primacy of the human being, and (incorrectly) to the Art. 8 dealing with emergency situation, instead of the Art. 18, providing rules concerning research on embryos *in vitro*; para 25 of the concurring opinion by judge Pinto de Albuquerque.

[64] Para 25 of the concurring opinion by judge Pinto de Albuquerque.

[65] Paras 31 and 40 of the concurring opinion by judge Pinto de Albuquerque.

[66] Para 3 of the concurring opinion by judge Dmitry Dedov.

[67] Para 5 of the concurring opinion by judge Dmitry Dedov. Another transparent statement of judge Dedov reads as follows: "(…) The right to life is absolute, and this fundamental tenet makes in unnecessary to explain why a murderer, a disabled person, an abandoned child or an

Therefore, the recognition of the embryos' right to life as a fundamental and absolute norm is of crucial importance within biomedicine, taking regard of its rapid development[68]. Moreover, the Court should have reached such a conclusion, irrespective of the doctrine of margin of appreciation, sovereignty of states or lack of consensus among the Council of Europe's member states. According to judge Dedov, margin of appreciation should serve as an instrument to determine which measures were necessary to protect a fundamental value; in case of cryopreserved embryos those measures may consist of time-limits or of public expenditure schemes[69].

The third concurring opinion was of a collective character (it was a joint partly concurring opinion of judges Josep Casadevall, Guido Raimondi, Isabelle Berro, George Nicolaou and Dmirty Dedov) and concerned procedural issues linked to the question of possible lack of exhaustion of domestic remedies by the applicant. The three concurring opinions were supplemented with three dissenting opinions, starting from a joint partly dissenting opinion of judges Josep Casadevall, Ineta Ziemele, Ann Power-Forde, Vincent De Gaetano, and Ganna Yudkivska[70]. This joint partly dissenting opinion stated different reasons for confirming non-violation of the Art. 8 of the Convention than those forming the basis of the majority ruling of the Court. The main judgment approached the issue of determining the fate of embryos from the biological-genetic side, stating that there is a linkage between the person who had undergone IVF treatment and the embryos thus conceived. According to the Court this mutual connection formed the basis for the possible application of the right to protection of private life:

> (...) the embryos contain the genetic material of the person in question and accordingly represent a constituent part of that person's genetic material and biological identity[71].

The partly dissenting opinion negatively evaluated this statement, which expressed a positivist and reductionist view of the human embryo; according to the joint partly dissenting opinion:

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embryo should be kept alive. We do not need to evaluate their usefulness for society, but we remain hopeful regarding their potential" (para 9 of the concurring opinion by judge Dmitry Dedov.

[68] Judge Dedov issued a warning against the Court's delay in the recognition process: "(…) Since new biotechnology objectively expands our perception of the forms and conditions of human existence, I am not aware of any objective obstacles to legal recognition of this achievement, as soon as possible, as it is well known that any delay in such recognition at national and international level is potentially life-threatening and arbitrary" (para 14 of the concurring opinion by judge Dmitry Dedov).

[69] Para 8 of the concurring opinion by judge Dmitry Dedov.

[70] The opinion is partly dissenting, hence expressing only partial disagreement with the majority opinion of the Court.

[71] Para 158 of Parillo Judgment.

> (...) the mere sharing of genetic material is an unsafe and arbitrary basis for determining that the fate of one human entity falls within the scope of another person's right to self-determination[72].

Therefore, the analysed situation did not fall within the right to self-determination as an aspect of Ms Parillo's private life. Moreover, the claim of the applicant that making use of the embryos would give rise to certain noble feelings on her part should not be regarded as a right protected by the Convention. The application should be rejected as incompatible *ratione materiae* with the provisions of the Convention, in accordance with Art. 35 paras 3 and 4 thereof[73].

The second partly dissenting opinion was submitted by judge George Nicolaou, with a composed line of argumentation based on both procedural and substantive arguments. The main focus of dissent was based upon the temporal aspect of the application; the majority of the judges within the judgment of the Court took the view of the applicant's situation being a continuing situation as Italian legislative provisions gave rise to an interference of an unlimited duration with the exercise of the Convention rights. Judge Nicolaou underlined that in his view Ms Parillo was not entitled to wait *ad infinitum* before seeking redress and therefore her application should have been dismissed as having been lodged out of time[74]. Moreover, certain substantive inconsistencies in the Court's reasoning were identified:

> (…) the applicant's ability to exercise a conscious and considered choice regarding the fate of her embryos concerns an intimate aspect of her personal life and accordingly relates to her right to self-determination (para 159 of the Court's judgment)

and

> (…) the right invoked by the applicant to donate embryos to scientific research is not one of the core rights attracting the protection of Art. 8 of the Convention as it does not concern a particularly important aspect of the applicant's existence and identity" (para 174 of the Court's judgment).

The last dissenting opinion was elaborated by judge András Sajó. His line of argumentation was grounded in the firm conviction upon the applicant's right to act as a free and autonomous person with regard to her genetic footprint, her freedom of choice as far as the fate of embryos was concerned which related to

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[72] Para 7 of the joint partly dissenting opinion.

[73] Those provisions concern applications incompatible with the provisions of the Convention, applications manifestly ill-founded, and applications abusing the right of individual application – in case the applicant had not suffered a significant disadvantage or in case the Court considered the application inadmissible.

[74] In particular, judge Nicolaou doubted the circumstances of the case as the facts presented by the applicant were sketchy. It remained unexplained why the applicant did not bring the matter to Strasbourg earlier, soon after the new Law came into force, and instead waited for more than seven years before doing so (paras 3-4 of the partly dissenting opinion by judge Nicolaou).

the applicant's right of self-determination, and in essence the right to private life. Judge Sajó underlined that the applicant possessed a right to determine whether or not to become a parent; likewise Ms Parillo could not be compelled into parenthood by requiring her consent to allow her embryos to be adopted[75]. Therefore, in the opinion of judge Sajó, the law in force in Italy adopted in the name of the protection of a potential for life of frozen embryos should be regarded as a disproportionate measure compared to Italian legislation allowing for the execution of abortion and research on foreign stem cell lines[76].

It seems that the relevance of the Court's judgment in Parillo case transcends the circumstances of the case and defines the scope of public protection of human embryos in case of indirect motherhood. In particular, it seems that one should positively evaluate Court's denial to allow the "ownership" of embryos (even by parents) as well as the recognition by the Court legitimacy of the prohibition to use embryos for scientific purposes.

6. CONCLUDING REMARKS

From the above-presented analysis one may extract the following remarks concerning international and European human rights legislation and adjudication of the European courts dealing with motherhood. Firstly, motherhood should be regarded as a relationship between a woman and her child (children). The nature of this relationship is based upon care, love and assistance provided by an adult person to a weak and dependent child in need of such support for his or her growth and integral physical and psychological (emotional) development.

Secondly, it seems that one should differentiate and respect the specific character of a philosophical and legal approach to motherhood. From a philosophical point of view, motherhood is a limitless, permanent and complete relationship between a women and her child (children)[77]. From a legal perspective, however, this relationship should be examined using a temporal approach – one should respect the division between different stages of children's growth, such as

[75] Judge Sajó referred to the statement of the applicant who had made a clear choice not to allow her embroys to be used for implantation and commented on her willingness to donate the embroys to scientific research, rather than allowing them to remain unused, as "a deeply personal and moral decision" (dissenting opinions of judge Sajó, paras 16–17).

[76] Dissenting opinion of judge Sajó, para 19.

[77] Philosophers tend to emphasize the relationship between self-love ("the dear self") and parental love; cf. H.G. Frankfurt, *The reasons of love*, Princeton 2004, pp. 89–90; C.M. Korsgaard, *Morality and the logic of caring: A comment on Harry Frankfurt*, (in:) D. Satz (ed.), *The Tanner lectures in moral hilosophy: H.G. Frankfurt taking ourselves seriously and getting it right*, Stanford 2006, pp. 55–76.

the period connected to childbirth and then the later stage of children's development. Legal concept of motherhood concerns primarily the first stage of a human being formation, prenatal and natal, directly referring to the appearance of a new member of human society.

Thirdly, motherhood within human rights approach concerns mothers' entitlement to receive special care and assistance. Universal Declaration of Human Rights stipulates a parallel entitlement of children to receive special care and assistance. The scope of social protection of motherhood and childhood is different, however, as mothers' entitlement should be accorded during a reasonable period before and after childbirth, while children's entitlement to special measures of protection and assistance should be practiced throughout the whole period of childhood. In particular, in case of working mothers, their entitlement consists of a paid leave or leave with adequate social security benefits.

Fourthly, motherhood entitlements are simultaneously connected to public authorities' obligations. According to the selected case-law of the European courts presented in this article, the duties of public authorities are mainly of an organizational nature, connected to the duty to guarantee a suitable level of healthcare services in order to protect a proper process of gestation as well as the duty to provide an appropriate scheme of social support and benefits. Those obligations are directed towards mothers and children alike; with the primary aim of safeguarding the proper, and in particular healthy, process of gestation, labour and further children's growth during the period of upbringing.

There is an additional comment to be made at this point. It seems that one should emphasize the existence of the complementary goal of public authorities, which is to provide remedies and support in case of children's illness or disability during pregnancy and afterwards. As stipulated in the recent judgment of the Polish Constitutional Tribunal[78] – a verdict much commented and fiercely opposed during winter 2020 street manifestations – the burdens and additional costs connected to the process of upbringing a disabled child should not be placed solely upon the mother of the child. According to the Tribunal, the main responsibility to provide care and assistance to the most vulnerable should be placed upon public authorities and upon society as a whole. Within this line of reasoning the Republic of Poland should be regarded as a common good of all its citizens with the goal of providing support for their development and conducive to the flourishing of the communities formed by the citizens, in particular families. It should be stressed that the very same aspirations of providing care and assistance to the most vulnerable and disabled children are to be found in the recent European Commission legislative programme[79]. Within the strategic goal of "a new push for European democracy" the Commission announces the following actions:

[78] Judgment of 22 October 2020, case K 1/20.

[79] Commission Work Programme 2021, *A union of vitality in a world of fragility*, Communication from the Commission to the European Parliament, the Council, the European Economic

> (…) the Commission will present an **EU disability rights strategy**, notably to ensure the full implementation of the UN Convention on the Rights of Persons with Disabilities. An **EU strategy on the rights of the child** will look at how to prepare children and young people participation in the EU's democratic life, to better protect vulnerable children, protect their rights online, foster child friendly justice and prevent and fight violence.

Fifthly and lastly, as Parillo case shows, the contemporary legal perception of motherhood should not allow for nearly absolutist power (*patria potestas*) of the father of the family (*pater familiae*), a key figure in the ancient social life in the period of Roman Empire. *Pater familiae* had the power to decide whether the newborn child should live or die (*ius vitae necisque*)[80]. Therefore, one should notice and confirm the positive evolution of law, in particular the contemporary emergence of human rights and their calming effect upon human relationships. This evolution ("human rights revolution") concerns also the modification of the relationship of parents (father and mother) towards a child (children). Hence, the parental relationship should not be based upon cruel behavior or atrocity (*atrocitas*) but rather be firmly grounded in parents' transmission of love (*pietas*) towards their offspring.

One may conclude the reflections of the present paper with an overall statement of a gradual recognition, implementation and prospective support of women's rights within the evolution of human rights treaties. Those legal phenomena are being supplemented with the general process of the "empowerment of women". Hence, it seems that the traditional German view of the societal role of women summarized in terms of *drei K: Kinder, Kűche und Kirche* should now be modified to assume a broader, more proper perspective on women's contemporary role: *vier K: Kinder, Kűche, Kirche und Karriere*.

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[80] *Patria potestas,* the perpetual power that the *pater familias* wielded over his descendants, was, from archaic times, nearly unlimited. With the passage of time, this parental power constantly diminished, particularly in the imperial era and with a positive influence of Christianity upon Roman law; cf. M.D. Radu, *The protection of children in the post-classical Roman law*, "Fiat Iustitia" 2017, Vol. 11, issue 2, p. 171.

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