Chapter 14

# Poland: Ineffectiveness of Legislation in Defeating the Demographic Crisis

Marek Andrzejewski

**Abstract**

The author presents the regulations of Polish law and considers whether they can affect the procreative decisions of both Polish men and women. For the past almost thirty years, the reproductive rate in Poland has not exceeded1.5, while replacement of generations can be achieved at a rate of 2.1 children per woman of childbearing age. The demographic crisis is the biggest social policy problem in Poland today. Analysing the current law, the author reflects on possible solutions in the future, also referring to solutions that have been abandoned but were in force earlier. He supports all considerations with data drawn from the Population Census conducted in Poland in 2021, the Demographic Yearbook of the Central Statistical Office for 2022, and demographic literature. He places the greatest emphasis on the analysis of family laws, especially marriage and divorce regulations since demographers see a correlation between these regulations and procreation decisions. However, the correlation seems to be small. The conclusions drawn are disappointing; the disappointment applies both to the assessment of the lack of influence of family law regulations on procreation decisions and social law. The latter has recently undergone significant changes in Poland and they were aimed at ensuring economic stability for the family after the birth of a child. Moreover, no connection between the abortion ban and the increase in births has been found. In fact, a sharp decline in births occurred when the abortion ban was introduced. Besides, the introduction in 2015 of the law allowing in vitro procedures did not improve the poor demographic situation either.

**Keywords:** Demography, family law, marriage, divorce, abortion, artificial procreation, social law, social policy.

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## 1. Context on the law as an instrument of demographic policy

At a time when the world's population is growing rapidly, Europe is experiencing a demographic crisis, if not a demographic disaster. This crisis is a result of multiple, profound processes that gained momentum in the second half of the 20th century. In the last three decades, these processes have significantly intensified and have been further reinforced by new destructive phenomena.

In the 1970s, the Federal Republic of Germany experienced what is now known as a negative growth rate, meaning that more people were dying than were being born. As this issue had been predicted two decades earlier, in 1961, the country had made an agreement with Turkey to take in between 1.5 and 3 million Turkish citizens. The course of this planned measure was controlled, and the newly arrived Turkish citizens assimilated by taking vacant jobs, often in public institutions such as post offices and local administrations.

From the 1950s to the late 1980s, approximately 500,000 to 620,000 children were born each year in Poland. The fertility rate was above 2.15 (2.98 in 1960, 2.27 in 1975, and 2.42 in 1983), ensuring population growth and, thus, a simple replacement of generations. However, since the mid-1990s, only around 350,000 to 400,000 children have been born each year, and in 2022, the number of births hit an all-time low at only 305,000. The fertility rate in that period oscillated between 1.3 and 1.4, which has placed Poland almost at the bottom of the world fertility list for several years now.[1]

As a consequence of the ageing of the population due to declining birth rates and increasing life expectancy in the 21st century, a policy is being pursued in the European Union to support the admission of citizens from African, especially Arab, and Asian countries.[2]In the wake of the war in the Balkans in the 1990s, people from this region also emigrated to the rich countries of Northern and Western Europe.

Particularly notable were the events that took place in 2015, when, at the initiative of the German government, hundreds of thousands of citizens of mainly Arab countries residing in displacement camps in Turkey set off through the Balkans toward rich European countries. The scale of the policy initiated by the German then-government exceeded the capacity to absorb such a large exodus. EU authorities forced Member States to accept economic migrants (referred to as 'refugees'). This order met with resistance from Poland, among other states. The resistance stemmed from the cultural dissimilarity of the incoming population and the lack of respect for European culture in the countries where they arrived,[3]which has been experienced especially by countries such as Italy, France, Sweden, and Belgium.

1 Wikipedia, The World Factbook 2022.
2 European Commission, 2023.
3 Roszkowski, 2019, pp. 538–542; Fallaci, 2003.

A separate argument is the issue of the violation of the sovereignty of Member States by the EU.

In the short term, the introduction of the idea of a multicultural society brought negative consequences, such as, but not limited to, poor assimilation of the immigrant population into local communities, and even the formation of Arab ghettos in large cities that are not accessible to local authorities; an increase in crime with an overrepresentation of perpetrators with African and Asian backgrounds; and, consequently, racial riots and the emergence of strong political parties rejecting previous immigration policy (e.g. in Germany, France, Sweden, Italy, and Spain). From a demographic perspective, it is significant to note that the newcomers did not intend to take jobs to build their economic livelihoods but instead focused their attention on a range of attractive social benefits and applications for permission for their family members to join them. In addition, the newcomers' reproductive decisions, which stem from their culture, including their religion, motivate them to give birth to disproportionately more offspring in comparison with individuals from the rich countries in which they reside. The influx of immigrants will intensify due to famine in Africa, which may be exacerbated by restrictions on grain exports from war-stricken Ukraine.

Since the first decade of the 21st century, about one million citizens who came mainly from Ukraine and Belarus, in other words, countries that are culturally similar to Poland, have worked and continue to work in Poland (before World War II, part of these lands was territory of the Republic of Poland, and many Poles have their roots there).[4] Their stay in Poland does not result in the emergence of the social problems or antagonisms that have been generated by the introduction of the ideology of a multicultural society in many European countries. The influx of people from Ukraine grew enormously after Russia's aggression on 24 February 2022. Of the approximately 6 million refugees who arrived immediately after the outbreak of the war, who were almost exclusively women and children, about 1.5 million have remained in Poland.[5]

The demographic transition in Europe is also affected by phenomena that are much more extended in time, more complex, and less rapid. Arising from civilisational transformations, these phenomena are more difficult (or rather, impossible) to correct, not to mention to resist or avoid. In addition to urbanisation and industrialisation, which have changed the functioning of families[6], another important phenomenon is the change in the social roles assigned to men and women. Of particular importance is the emancipation of women and, therefore, their education and professional activity, which are difficult or impossible to reconcile with the fulfilment of traditional family roles.[7] Another consequence of these changes is the decline in the

4 Konieczna-Sałamatin, 2017, pp. 78–91.
5 Urzędy centralne, 2023.
6 Adamski, 2002, pp. 141–151.
7 Adamski, 2002, pp. 205–208; Szukalski, 2004, pp.145–146; Drobny, 2007, pp. 69–87.

prestige of the man, who is no longer solely responsible for the economic function of the family. This inevitable process is founded on the principle of equality between men and women.

The processes of industrialisation and the subsequent urbanisation have changed the proportions of rural and urban residents. The movement of the rural population to cities and the mingling of newcomers in new spaces have weakened social ties, increased the atomisation of communities, and, in turn, lessened the impact of social, religious, moral, and legal norms. The impact of the rules that traditionally bound rural communities on the new urban residents decreased, giving way to views and behaviours that are 'liberated' from restrictions and prohibitions, primarily with regard to the family, marriage, and parenthood, including childbearing. A notable manifestation of this process was a social phenomenon called the 'sexual revolution'[8]:while not so long ago, the sexual function in a marriage was not separated from the procreative function (every intercourse aims to lead to the conception of a child), now sexuality can be completely decoupled from parenthood, from ethical rules, and even from an emotional bond. Further, a lack of adult role models and growing up in a culture that does not endorse responsibility for others have resulted in the phenomenon of the mass sexual initiation of children.[9]

Given the profound transformations in Western civilisation that have led to a drastic decline in births in Europe, the question arises as to whether it is possible to reverse these unfavourable trends with the help of law. Is it possible, with the help of family law, to effectively create demographic policy, in particular, to influence childbearing decisions or encourage people to enter into marriages, to decrease the divorce rate, as well as motivate people to develop responsible parental interaction with children? Is it possible to do this by introducing regulations in all departments and branches of law that are concerned with the functioning of the family, such as tax law, social law, and labour law? Are we overestimating the role of law in influencing how societies function? Scientific reflection on the possibility of shaping social reality through law is referred to as the politics of law.[10] The essence of this reflection is similar to the dilemma of an educator or pedagogue who wants to achieve an educational goal. Thinking about law in pedagogical terms is called the 'pedagogy of law',[11]which refers to the work of Leon Petrażycki. This approach boils down to searching for an answer to the question, 'How can the addressees of norms be induced to accept the desired behaviour, and how can law stimulate their life choices in the desired direction or at least make them reject behaviour contrary to the goal that the legislator wants to achieve?'

8 Roszkowski, 2019, pp. 213–235.
9 Rojewska, 2018, pp. 123–137.
10 Pałecki, 2009, pp. 179–191.
11 Cf. Stadniczeńko and Zamelski, 2016; Andrzejewski, 2017, pp. 107–121.

## 2. On the (low) importance of family law for shaping childbearing attitudes

### *2.1. Family law and demography in view of the doctrine*

Among the Polish legal literature, no studies have analysed the impact of the Family and Guardianship Code[12](FGC) on the country's demographic situation and, therefore, on its residents' procreative behaviour or attitudes. These issues have been marginally touched upon in studies investigating how demography has been affected indirectly by the provisions regulating the conditions for the validity of marriage and marriage annulment, and especially the conditions and legal consequences of divorce. It is significant to note that the demographic aspect was not highlighted in the passage of the Law of 25 June 2015 on Infertility Treatment[13], which introduced regulations on the *in vitro* procedure and modified the provisions of the FGC.

It should also be noted that recent years have witnessed organisational initiatives aimed at the scientific study of demographic phenomena by teams from many European countries, including Poland. The European Association for Population Studies was established to examine demographic phenomena in a broad context. The effects of these studies are promising.[14] However, contrary to the project title 'Family Demography and Family Law', the reports presented thus far say little about the law as an instrument for causal interference in demography[15] and more about statistical, sociological, political, economic, and other aspects.

Similarly in Poland, the issue of the relationship between law and demography is taken up less often by lawyers than by sociologists, philosophers, demographers[16], and pedagogues.[17] This is probably due to the fact that these groups have more confidence in the causal power of legal norms than lawyers. Interesting analyses of the processes taking place are often authored by those in the political science field.[18]Meanwhile, social politicians try to predict the impact of the law on reproductive behaviour, especially through the regulations of social law (e.g. in Poland, through the Family 500+[19] programme implemented in 2016), tax law (benefits related to family fertility),or labour law (flexible working hours, especially for women). In the Polish scientific literature, a special mention should be given to

12 Act of 25 February 1964 – Family and Guardianship Code, Consolidated text (hereinafter, 'ct.'), Journal of Laws of 2020, item 1359.
13 Ct., Journal of Laws of 2020, sec. 442.
14 European Association for Population Studies, 2024.
15 European Association for Population Studies, n.d.
16 Cf. Slany and Szczepaniak-Wiecha, 2003.
17 Włodarczyk, 2011, pp. 153–178.
18 Gierycz, 2015, pp. 69–83.
19 Act of 11 February 2016, on state assistance in the upbringing of the children, ct. Journal of Laws 2023, sec. 810; Prokopowicz, 2018, pp. 57–76; Borówka, 2016, pp.18–32.

an extensive study authored by the outstanding Polish demographer Edward Rosset (1897–1989).[20]At the end of his life, Rosset wrote a book entitled *Divorces*, which was extremely critical of the legal institution it was investigating.

It is also worth mentioning that Polish legal literature has mostly been devoted to the provisions of social law that indirectly affect procreation by destroying the stability of families. A case in point is the legislation that gives informal unions (cohabitation) privileges over married couples in terms of access to various benefits, which encourages divorces and postpones decisions to marry. Frequently, the addressees of such benefits are single parents; however, parents are not required to verify the authenticity of their declarations of single parenthood. As a result, benefits are received by people who are formally single but who are, in reality, cohabiting. The Constitutional Tribunal challenged relevant provisions of the Act of 23 November 2003 on family benefits[21] as incompatible with Art. 18 of the Constitution of the Republic of Poland[22] (hereinafter, 'the Constitution RP'), which mandates the protection of marriage. Nevertheless, such practices are still common, for example, in the preferential enrolment of children of such persons in nursery and kindergarten.

### *2.2. Family relationships in the Family and Guardianship Code regulations*

Family law provisions are formulated in a way that gives high priority to marriage, parenthood, and other family-legal relationships. This is due to the axiological assumptions of the provisions of the FGC,[23]which are strongly intertwined with constitutional axiology. The assumptions foreground the imperative of a responsible (in the moral sense) approach to the formation of marriage and the realisation of the ensuing tasks; the pedagogical, psychological, economic, and social fulfilment of parental roles, including the creation of conditions conducive to the development of the child; and the mutual support of family members (the principle of the solidarity of the family group).

Some special features of legal relationships established in family law against the background of classical civil-law constructions include: a) these relationships unite subjects defined by law, and it is not permissible to swap their roles; b) the goal of these relationships is the permanence and maximum stability of the family group (while respecting its autonomy from the state); c) the content of the family-legal relationship is often determined by general clauses (indefinite phrases that refer to the value system attributed to the legislator,[24] such as the good of the child, the good of the family, and the principles of social interactions) and *leges imperfecta*.[25]

20 Cf. Rossett, 1986.
21 Ct. Journal of Laws of 2023, item 390.
22 Judgment of the Constitutional Tribunal of 18 May 2005. Sign. 16/04, Judgment of Laws of 2005, No.806.
23 Radwański, 1980, pp. 89–93; Ziembiński, 1980, pp.73–86.
24 Zieliński, 2017, p. 223.
25 Andrzejewski, 2014, pp. 3–4; Smyczyński, 2009, pp. 41–46.

Legal relationships binding spouses, parents with children, and persons remaining in other family relationships are established as permanent, although not indissoluble (after all, there is divorce, the deprivation of parental authority, the prohibition of contact, and the termination of adoption). It is implied by the regulations that the persons who establish such relationships must possess specific characteristics (e.g. conditions for marriage and marriage annulment, subjective conditions authorising the adoption of a child, legal capacity). Consequently, in light of the FGC, not everyone can enter into marriage unless they fulfil certain requirements, such as age, degree of social consciousness, and appropriate mental condition[26], all of which are necessary to cope with the obligation to build an emotional, economic, and sexual bond and to be faithful or support each other.[27] Owing to the legal status of divorce, to dissolve a marriage, it is necessary to prove the existence of legally defined grounds, which rules out the possibility of getting a divorce only at the request of one spouse or the other. In the parent-child relationship, in contrast, the former must exercise parental authority with due diligence and with respect for the good of the child and his or her dignity.[28]

All the regulations oblige adults to exercise prudence when making important family decisions. Meanwhile, in the name of the principle of the good of the child, children are obliged to obey their parents, share their earnings, help with family work, and remain in dialogue with their parents. They are seen as members of the family, which is the best approach to ensure the optimal protection of the child's rights.[29]

While treating family members as constituting a social group, family law regulations also respect them as individuals. To this end, the regulations give them rights and freedoms, for example, the rights to marry,[30] get divorced,[31] make some of the economic decisions within the framework of marital property arrangements,[32] enter into a prenuptial agreement,[33] and choose a path for their children's upbringing.[34] In these provisions, a reference to the personalist notion of responsibility – for oneself, one's actions, and one's loved ones – can clearly be found.[35]

The family is entitled to autonomy from the state, whose organs (family court, notary, prosecutor's office, Registry Office, administrative authorities) have the duty to support parents in their exercise of parental authority[36] and to protect marriage,

26 Judgment of the Constitutional Tribunal of 22 November 2016. Sign. K 13/15, 2016, Item 88/A/2016.
27 Art. 23, FGC.
28 Andrzejewski, 2019, pp. 23–27.
29 Preamble, Arts 5, 18, 9(3) United Nations Convention on the Rights of the Child; hereinafter, the 'UNCRC'.
30 Art. 1., FGC.
31 Art. 56., FGC.
32 Arts.$34^1$, 36, $36^1$, 37,39, 40,41, FGC.
33 Art. 47., FGC.
34 Arts. 93§1, 97§2, FGC.
35 Ibid.
36 Art. 100., FGC

the family, parents, and especially mothers. This is because the state is supposed to support the family in carrying out its functions, particularly in its economic, rearing, and education functions, and now also in the reproductive function.[37] In exceptional cases, however, the state may interfere with family relations, specifically, by limiting or depriving parents of their parental authority.[38]

Before analysing some details of the solutions in Polish family law in the context of demography, it can already be highlighted at this point that the law was not created to stimulate reproductive behaviours, prolong life, influence the tendency to get married or reduce the scale of divorces and separations among the addressees of the norms. The regulations adopted in the FGC were rooted in fundamental beliefs, especially ethical beliefs, for example, the need to ensure the permanence of family relations, the solidarity of the family group, and marriage equality. Consequently, a proper legal framework was created for the functioning of the family, so that, with a sense of stability, mature people would make optimal decisions, including those about the birth of children and the proper rearing of these children until adulthood. It was assumed that, within such a legal framework, decisions about conceiving and having children would follow, as it were, by default. What was not foreseen was that fertility would become controllable and, therefore, subject to the will of people, and that without any connection to the law, a transformation would take place, leading from accepting what fate (God?) decided to a situation in which women and men (i.e. mothers and fathers) could conceive and accept a child if they so desired or not. In any case, it is hard to point out how the law could have been drafted if such an evolution had been envisaged.

### *2.3. Family law under pressure*

Modern family law in many European countries, partly including Polish law, is exposed to pressure from groups drawing inspiration from feminism, gender philosophy, and neo-Marxism. This has led to the adoption of various regulations, which permit, for example, same-sex marriages, divorces at the request of the spouses (i.e. without court proceedings), and access to ethically controversial methods of assisted reproduction. Some regulations have weakened the legal position of parents in relation to children by allowing interference in this relationship by public institutions.[39]In this context, extremely liberal abortion laws cannot be overlooked, although they are situated outside family law. As a result, legal systems are becoming axiologically contradictory, and traditional concepts and regulations are being undermined. Whether this has an impact on demographic dynamism, is difficult to say. The ideological currents described above appeal to (or use as a pretext) gender philosophy, including the specifically defined concepts of human rights, especially

37 Adamski, 2002, pp. 36–44, 144–151; Szlendak, 2010, pp. 115–118.
38 Art. 48(1), Constitution RP.
39 Gierycz, 2015, pp. 75–78.

the so-called reproductive human rights. From the viewpoint of these ideologies, the reproductive motif is not an issue; however, the promotion of abortion, the concept of cultural gender, and the permissibility of gender reassignment procedures without a compelling health reason all shatter the established order in the sphere of anthropology, including human sexuality and procreation.[40] What is also promoted is the attitude of selfishness known as 'individualism' and the rejection of rules of conduct that were widely accepted until recently, for example, personal bonds and mutual responsibility for one another among family members.

### *2.4. Scientific problem*

The above remarks constitute the background to formulate the main scientific problem that these considerations are intended to solve. This problem can be expressed in the following questions: Can the constitutional law with regard to the family and the family law, shaped in this way, encourage family formation and childbearing decisions? Is it possible to create a better law if it were evaluated from this point of view?

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## 3. Polish family law from a demographic perspective

### *3.1. Foundational principles of the family as a family safeguard*

The rules of law are the highest-rank legal norms that determine the direction and framework of legislation and influence the interpretation of extant regulations. They are directly expressed in legal regulations or are derived from them through the interpretation of regulations controlling given legal institutions.[41] Rules of law are internal legal norms. They may be either constitutional rules of law, or they may affect only one branch of law. In legal analysis, it is confusing or inappropriate if the word 'rule' is used to signify a 'regulation' or a provision; for example, a rule is the good of a child, whereas a demand to contract a marriage in the presence of witnesses is a regulation.

Rules of law should be distinguished from regulations contained in international documents, which, once ratified, belong to the system of sources of law of a given state.[42] They set a universal or regional (European) standard of legal protection for a given good or value.[43] In Poland, international agreements have primacy over do-

40 Kocik, 2006, pp. 279–288.
41 Zieliński, 2017, pp. 34–35; Wronkowska, 1993, pp. 223–227.
42 Art. 87., Constitution RP.
43 Schulz, 2012, pp. 25–46.

mestic law regulations that cannot be reconciled with any said international agreement.[44] The existence of international standards of protection renders the solutions adopted in the countries that are signatories to a convention largely similar to each other. Comparative studies become justified with regard to those solutions that the standards do not cover or that are implemented to a higher degree than required by the standard.

### *3.2. Principles of marriage and family protection*

#### *3.2.1. Introductory remarks*

The principles of the protection of the family, marriage, equality of spouses, parenthood, motherhood, the autonomy of the family in relation to the state, the primacy of parents in child-rearing, and the good of the child have the rank of constitutional principles. They are expressed in Arts. 18, 33, 47, 48, 71, and 72 of the Constitution RP and are realised in the provisions of the FGC and in all provisions on family issues located in the norms of the entire legal system (i.e. civil law, administrative law, including social law, education law, tax law, criminal law, procedural law).

The theme of the principles/rules of family law was discussed in a 2021paperbythe author,[45] to which it is necessary to refer at this point. Our attention should now be focused on the relationship between these principles and demography, that is, on the regulations addressed to married and cohabiting couples that directly or indirectly affect the performance of their reproductive function.

#### *3.2.2. Family protection principle*

Under Polish family law, the model of the family is one formed on the foundation of marriage. The regulations mainly refer to the so-called 'small family' (spouses-parents and children); however, they also apply to relations within a multigenerational family (maintenance, foster families related to the child) or a reconstructed family (maintenance between a stepfather/mother and stepdaughter/stepson).[46]

The principle of family protection also applies to families not based on marriage but on what is presumed to be enduring cohabitation between a man and a woman (cohabitation). They are mentioned indirectly in the FGC provisions: Art.107 regulates the exercise of parental authority and the realisation of contact with the child by parents who are not married and are not cohabiting and, thus, likely cohabited in the past. On the other hand, by containing provisions that protect formally single parents, social law, in fact, supports those forming *de facto* unions (i.e. cohabitation).

44 Art. 91(2), Constitution RP.
45 Andrzejewski, 2021, pp. 151–190.
46 Ignatowicz and Nazar, 2016, pp.29–34; Smyczyński and Andrzejewski, 2022, pp. 8–11.

In the Social Assistance Act[47], the recipients of benefits are family in the sense of persons forming a common household, which implies that these are also persons not bound by a family-legal bond.

A family also includes parents living apart, that is, those who have never been married or are divorced, and their child. The basis for regulating their parental relationship is Art. 107 or Art. 58 of the FGC. The most important criterion for establishing the life conditions of a child of such parents (i.e. place of residence, contact with the other parent, decision-making in connection to the child) is the principle of the good of the child. Both the above situations are sometimes classified as a single-parent family (single parenthood). However, this is justified only when a parent breaks ties with his or her child, and not in situations where the parents cooperate in raising and supporting the child while living separately. A single-parent family, which is to be given special support,[48] is a family composed of a parent and a child when the other parent has passed away, or, while still alive, grossly neglects his or her parental duties.[49]

Under Art. 71 of the Constitution RP, a single-parent family that requires greater support is not a single woman-mother with a child who has chosen this way of life, sometimes against the wishes of the child's father to fulfil his parental duties.[50] The feminist idea of the freedom to single motherhood resonates among women, for it gives them freedom from a man.[51] Single parenthood, if it is not a function of fate (death, abandonment by the child's father) but is the result of a free decision (i.e. choice), should not meet with approval. Rather, as behaviour that threatens the good of the child (making him or her a *de facto* half-orphan), it should be grounds for a court order to limit parental authority.[52]

Another type of family is a 'reconstructed family', which involves an arrangement when a parent, after remarrying, raises a child together with the child's stepfather/mother. If the other parent has parental authority, then the stepfather/mother is not entitled to any of the powers that are part of that authority, other than the power to exercise day-to-day custody of the child. From the perspective of protecting the good of the child, such a situation may raise the issue of loyalty to both parents, especially the one who does not live with the child. The relationship in question may be the basis for a maintenance obligation between the stepfather/mother and the stepchild.[53]

There is no doubt that a family can also be constituted by parents and children born with the use of medically assisted reproductive procedures. Artificial forms of procreation support are controversial, especially surrogacy, which is not permitted

47 Art. 6, item 14 of the Act of 12 March 2004 on social assistance, ct. Journal of Laws of 2023, item 901.
48 Art. 71., Constitution RP.
49 Art. 111§1, FGC.
50 Kocik, 2006, pp. 254–259.
51 Kocik, 2006, p. 259.
52 Art. 109§1, FGC.
53 Art. 144, FGC.

in Poland, and the *invitro* procedure, which is permitted. The legal status of children born as a result of this procedure, or their relationship with their parents, has never been questioned.

#### *3.2.3. Some basic demographic information*

In 2021, the total population of Poland was 37,907,700, falling below 38 million for the first time since 1989. A total of331,500 children were born, and 519,500 people died in 2021, although this was a unique year due to the COVID-19 pandemic.[54]In 2021, the pre-working age population was 6,992,600 people, or about 65% of the number in 2000 (9,333,000), that is, the number of children in the social structure decreased by 35%.In 2021, the working-age population was 22,385,4000 people, or about 96% of the number in 2000 (i.e. 23,261,000). In contrast, in 2021, the post-working-age population was 8,529,700 people, or about *150%* (!) of the 2000 figure, (i.e. 5,660,000).[55] These numbers allow us to conclude that the number of children is decreasing drastically, while the number of people of post-working age is increasing substantially. This is evidence of the ageing of the population and it foreshadows dramatic difficulties in the realisation of social security benefits, the problem of providing support for seniors, and much more.

About 60% of the adult population in Poland is legally married, while 3% of this population is in informal (cohabiting) unions. The number of such unions is consistently increasing. About 60% are formed by unmarried women and unmarried men, and this type of relationship dominates among those under 40. As age increases, divorced people are more represented (about 30% of cohabiting unions). Among the oldest cohabiting persons, a sizeable group is formed by widowed persons (especially women). Gradually, the number of married people is decreasing, and the percentage of divorced people and children of broken families is clearly increasing, as discussed in more detail in sections 3.3 and 3.4.

### *3.3. Entering into marriage*

Under Polish law, marriage is a heterosexual and monogamous union (Arts. 1 and 13, FGC).[56] The law further states that individuals involved in the nuptials should be at least 18 years of age (with court permission, a woman may marry after the age of 16[57]), should not be totally incapacitated,[58] and should not be affected by serious mental illness or intellectual deficiency.[59] Further, they cannot be siblings, relatives in the direct line of descent, brothers and sisters, or kin in the direct line of

54 Central Statistical Office (GUS), 2022a, p. 25.
55 Central Statistical Office (GUS), 2022a, p. 54.
56 Łączkowska-Porawska, 2019, pp. 106–278.
57 Art. 10, FGC.
58 Art. 11, FGC.
59 Art. 12, FGC.

descent.[60] The law does not provide for same-sex couples to marry; nor is it possible to register same-sex partnerships or cohabitation.

### *3.3.1. Marriages in numbers*

From 1980 until now, the number of married couples in Poland has ranged from 8.5 to 9 million (in 2021 – 8,658,400). During this time period, the number of married couples has been declining: in 1980,307,000 couples got married; in 1990, 255,000; in 2000, 229,000; in 2012, 203,000; and in 2021, there were 168,324 married couples[61](i.e. 52% of the number in 1980).

This trend adversely affects birth rates. Similarly unfavorable from this perspective is the increasing age of newlyweds: the average age of men getting married was 24.4 years in 1980, 24.7 years in 1990,25.6 years in 2000, 28.0 years in 2010, and 31.7 years in 2021, that is, 7.3 years older than in 1980 and 6.1years older than in 2000. As regards women, the average age upon entering into marriage was 22.8 years in 1980, 22.2 years in 1990, 23.6 years in 2000,26.0 years in 2010, and 28.8 years in 2021,[62]that is, over 5 years older than in 2000.

A higher age at the time of nuptials means that more marriages are now contracted by individuals with higher education than in the past. In 2021, 60,000 out of a total of 168,300 men (approximately 40%) had a college degree. Among women, 50,000 (30% of the total) had a higher education degree.[63]However, in 1990, only 5% of men and 4% of women had a college degree. These statistics reveal a preference that can be expressed as 'education comes first, marriage follows second'. It should be mentioned that nowadays a bachelor's degree is obtained after just 3 years of study. The increasing number of people studying is also associated with a lowering of the university entry requirements.

Late marriage also implies a delayed decision to have a child. In turn, this gives spouses less time to take action on this decision and make potential decisions about subsequent children. They also have less time for possible treatment should medical problems such as infertility arise.

## *3.4. Divorce*

Embedded in the constitutional principle of family protection is the principle of the permanence of the marriage union. 'Permanence' does not mean the 'indissolubility' of the marriage union as the doctrine of the Catholic Church posits (Canon 1056 of the Code of Canon Law).[64] This distinction is significant in Poland because

60 Art. 14, FGC.
61 Central Statistical Office (GUS), 2022a, p. 181.
62 Central Statistical Office (GUS), 2022a, pp. 185–186.
63 Central Statistical Office (GUS), 2022a, p. 210.
64 Code of Canon Law, 1984.

of the way marriage is understood by some Catholics who enter into the union in a religious form with secular legal effects[65]; this group identifies the secular effects of entering into marriage with the canonical effects and treats marriage as an indissoluble union. In the course of the secularisation process, this mental barrier against divorce has been weakening.

Marriage permanence is particularly safeguarded by regulations concerning the essential conditions for the validity of marriage,[66] the grounds for marriage annulment,[67] and the grounds for granting a divorce.[68] Contrary to the dominant trend in the law in European countries, the granting of divorce is not permitted in Poland solely based on the spouses' request. Rather, spouses must demonstrate a complete and permanent marital breakdown and that divorce is not contrary to the good of their minor children or to other important ethical rules, such as the welfare of an adult child with disabilities or the good of a terminally ill spouse.

Divorce cases fall under the exclusive jurisdiction of district courts. Marriage permanence is also protected by procedural rules on, among other things, divorce mediation. These rules can address the functioning of the family after divorce but can also be used to raise the question of whether divorce in a particular case is justified at all. In addition, the court has the option to suspend divorce case proceedings if there are prospects for reconciliation between the spouses and discontinue the proceedings unless the spouses request a continuation of the process. The only regulation that facilitates the decision to get a divorce is the provisions regarding court costs, which are very low in divorce cases.[69]

Most of the public debate approves of the current solutions; however, some views favour the liberalisation of the divorce laws[70], whereas others demand that in addition to the current regulations, the possibility of entering into marriage without the possibility of dissolving it by divorce should be introduced (along the lines of adoption being not dissolvable).In the aforementioned book, Rosset forcefully argued that divorce should be opposed by formulating laws that would significantly hamstring its adjudication. At the same time, he advocated restrictive jurisprudence as he considered the attitude of the judges of his time to be far too liberal. Rosset believed that widely adjudicated divorces are a source of evil for spouses, their children, and the entire family. He held that they also have a direct negative impact on the reproductive decisions of divorcees, and, at a later time, on the decisions of their children, who when faced with their parents' divorce, learn that a marriage that requires commitment may not be sustainable. The experience of living in a broken family undermines children's self-confidence and confidence in success. It

65 Arts. 1–7, FGC.
66 Arts. 1–7, FGC,
67 Arts. 10–16, FGC.
68 Art. 56, FGC.
69 Art. 26 and Art. 79 point 3, letter b of the Act of 28 July 2005 on court costs in civil cases, Ct. Journal of Laws of 2023, item 1144.
70 Mazurkiewicz, 2012, pp. 451–468.

also undermines, in the children's perception, the value of the family as a stable group. When faced with a crisis, married couples now decide to divorce more easily than people a generation older. Rosset was right to consider divorce a demographic disadvantage, a fact also confirmed by modern demographers.[71] After his death, things only got worse, although the laws changed somewhat for the better as mediation was introduced and divorce adjudication was moved from district courts to county courts. Nevertheless, divorce lawsuits were filed in droves, and judges' attitudes became increasingly liberal. The number of divorces has increased significantly since Rosset's time.

### *3.4.1. Divorce in numbers*

In the 21st century, the number of divorces in Poland has remained steady, with about 65,000 divorces declared annually. This is 20,000 more than the previous figure of just over 40,000, which was stable for several decades. Divorces account for about 30% of the total number of marriages terminated each year, with the rest ending as a result of death. This gives a total figure of about 1.5 million divorces in the 21st century alone, or about 3 million divorced people (10% of the total adult population).

On average, spouses divorce after 14 years of marriage. Men divorce at an average age of 41, and women at 39. The average age of divorce advances year on year.

Invariably, more than two-thirds of divorce cases are filed by women. In more than 3% of cases, the wife is found to be solely at fault for the divorce, while the husband's sole fault is adjudicated in 18% of divorces. In about 74% of divorces, the court does not pronounce fault.

According to spouses' declarations, about one in three divorces is blamed on character incompatibility (presumably, in many cases, this is an approach couples jointly agree upon to avoid making sensitive matters public). In one in four divorce cases, the cause is infidelity or an enduring emotional relationship with another person, and in one in five cases, the reason is alcoholism.[72]

The length of the marriage prior to divorces suggests that divorces also affect spouses' children. In 2021, out of 60,687 divorcing couples, as many as 25,415 were childless. Such a significant percentage of divorcing childless couples raises the possibility that, for at least some of them, the choice of life without children led to a rapid burnout of their relationship. The remaining 36,272 divorced couples had a total of 53,138 children. Among the married couples that filed for divorce in 2021, 20,207 had one child, 12,750 had two children, 1,939 had three children, and 376 had four or more children. In total, 5,305 children of divorcing parents were aged 0 to 2 years, 13,830 were aged 3 to 6 years, 30,924 were aged 7 to 15 years, and3,079

71 Szukalski, 2017.
72 Stańczak, Stelmach and Urbanowicz, 2015.

were aged 17 to 18 years.[73]An average of about 50,000 children of divorced couples per year yields about 1.2 million in the 21st century alone. The experience of parental divorce undermines the determination to overcome one's marital crises in the future.

### *3.5. The principle of family autonomy*

This constitutional principle of family autonomy concerns the autonomy of the family in relation to the institutions of the state;[74] in other words, it regulates the family-state relationship, which should ensure that the family can function freely, and limits the possibility of interference by public institutions. In Poland, this relationship is determined by two tendencies: one is close to the concept of the welfare state, and the other– which is justified by the Constitution RP– is the principle of subsidiarity.

In Poland, the realisation of the idea of a welfare state (but not an overprotective one) is justified if it is intended to get some social groups out of poverty. This is done by expanding the range of benefits paid from the budget under the social security system (pensions, maintenance fund benefits, disability benefits, social assistance benefits, family benefits, benefits under the Family 500+ programme, and others). Such state interference in family autonomy garners support from those in power. However, the unintended effect of this support is that it absolves family members of some of their responsibility for each other and, as a result, weakens the solidarity of the family group. In the long run, the effects of reducing family responsibilities may be divorce and disregard for parental duties, among others. As such, the tools typical of the welfare state should be applied in moderation.

The constitutional principle of subsidiarity holds that support should be granted only to individuals and families who are unable to meet their needs on their own and whose relatives are unable to help them. Only then can the state intervene and support the family in fulfilling its functions.[75] An example of such support is foster care, which entails intervention in the functioning of the family, in accordance with the idea of 'help to self-help', by placing the child in a foster care facility or in a foster family, with the intention that the child should return to the family after it has overcome the crisis. If these measures prove ineffective, then the Polish Constitution[76] and the FGC provide the basis for tougher intervention in the life of the family, which includes the termination of parents' parental rights to the child[77] and the provisions of the Criminal Code.

73 Central Statistical Office (GUS), 2022a, pp. 244–245.
74 Art. 47, Constitution RP.
75 Act of 9 June 2011 on family support and foster care (Arts. 1–31), Ct. Journal of Laws of 2023, item 1426.
76 Arts. 48(2), 72.
77 Arts. 109, 111, $113^{2}$–$113^{5,}$ FGC.

#### *3.5.1. The erosion of family autonomy – the demographic context*

The polar opposite to the principle of family autonomy is a phenomenon presently gaining momentum in some European countries that define themselves as liberal, where the state creates laws that allow public agencies, without parents' knowledge or consent, to help children have abortions, initiate gender reassignment procedures, and provide education on children's sexuality. Such laws have a direct impact on the formation of children's views on the role of parents and their understanding of sexuality, including procreation. In Poland, integral to this process is the ongoing dispute over the right of LGBTQ+ activists to enter schools to teach children about sexuality or not. Such classes, conducted without prior parental permission, violate parents' primacy in child-rearing[78] and strike at the principle of the autonomy of family life.

### *3.6. The principle of maternity protection*

The protection of maternity is a constitutional obligation of the state (Art. 18 Constitution RP). This obligation also applies to paternity, which, although not mentioned explicitly in the provision, is included in the collective word for maternity and paternity, 'parenthood'. Such a legislative procedure is intended to emphasise the importance of the unique situation in which a woman finds herself during pregnancy. Art. 71(2) of the Constitution RP stipulates that the mother has a special right to assistance from public authorities during this period.

Under Art. $61^9$ of the FGC, a mother is a woman who has given birth to a child. This regulation was adopted in 2008 to terminate disputes over who is the mother of a child between: a) a woman ordering a surrogate to give birth to a child conceived through artificial insemination; b) the donor of the reproductive cell (the genetic mother); c) the surrogate.

Under family law, the status of a parent involves the exercise of parental authority (if the parent has full legal capacity and the court has not deprived him or her of such authority), the right to have contact with the child (unless prohibited by the court), and the obligation to provide for the child's economic needs (the maintenance fee; Art. 128 et seq. FGC).

Among the family law regulations on prenatal maternity, it is important to point out the right of an unmarried woman to demand maintenance fees during pregnancy from a man whose paternity she establishes.[79] This is an exception to the rule that the family-legal bond is at the heart of the maintenance obligation. Maternity is also the only reason that can justify allowing a minor woman to marry after the age of 16.

Maternity, whether a woman is married, cohabiting, or single, is associated with social protection. The cash benefits include parental benefits, child-rearing benefits

78 Art. 48, Constitution RP.
79 Arts. 141–143, FGC.

paid under the Family 500+ programme[80], family allowance[81], one-time payment for the birth of a child, a one-time benefit under the law on support for women (the so-called 'Pro-Life law')[82] and the Good Start benefit. Non-monetary forms of support are postulated, as is greater access to nurseries and kindergartens.

Maternity protection issues concern the regulations of the 7 January 1993 Act on Family Planning, Human Embryo Protection, and Conditions for Legal Pregnancy Termination,[83]which obliged government administration institutions and local government to provide pregnant women with medical, social, and legal care. The Act also requires these institutions to 'provide citizens with free access to methods and means for conscious procreation' and 'prenatal information and examinations'. In turn, the school is obligated to 'provide pregnant students with leave and other assistance necessary for them to complete their education' (Art. 2) and offer classes covering the topics of 'human sexual life, the principles of conscious and responsible parenthood, the value of the family, life in the prenatal phase, and methods and means for conscious procreation' (Art. 3).

### *3.6.1. Motherhood in numbers*

In 1983, 730,000 children were born in Poland. This number has declined nearly every year since then. Given a similar population then and now, the number of births in 2023 accounts for only about 43% of the 1980 figure. However, the percentage of children born to unmarried women soared, as shown in the table below.

*Table 1. Percentage of children born to unmarried women[84]*

| Year | Number of births (thousands) | Percentage of children born to unmarried women |
|---|---|---|
| 1980 | 701.5 | 4.8% |
| 1990 | 552.5 | 6.2% |
| 2000 | 380.5 | 12.1% |
| 2010 | 415.0 | 20.6% |
| 2020 | 256.5 | 26.4% |
| 2021 | 332.7 | 26.7% |

80 Act of 11 February 2016 on state assistance in the upbringing of the children, Ct. 2023, item 810.
81 Act of 28 November 2003 on family benefits, Ct. Journal of Laws of 2023, item 390.
82 Act of 4 November 2016 on the assistance of pregnant women and family support for life, Ct. Journal of Laws of 2020, item 1329.
83 Ct. Journal of Law 2022, item 1575.
84 Central Statistical Office (GUS), 2022a, p. 250.

| Year | Number of births (thousands) | Percentage of children born to unmarried women |
|---|---|---|
| 2022 | 305.0 | No data available |

The highest rate of female fertility has shifted from the 20–24 years age group. In 1980, 294,000 out of a total of 701,000 births (approximately 43%) were among this age group; in 2021, there were 38,100 mothers of this age (about 9% of the total).[85]

There has been a significant increase in fertility in the 30–34 and 35–44 years age groups, which reflects the trend for 'postponed' births. The average age of women giving birth to their first child has also risen from under 24 years in 2000 to more than 28 years in 2022. 'The observed changes are another outcome of the choice made by younger generations of Poles, who decide first to pursue a certain level of education and economic stability, and only later (around their thirties) to start a family and enlarge it'.[86]

As previously mentioned, since the mid-1990s, the childbearing rate in Poland has been around 1.3–1.4 children per woman of childbearing age, with the average rate across the European Union standing at 1.5. Generational replacement would be ensured by a birth rate of 2.1-2.15.

Demographic analyses of unmarried mothers of children, as well as those living in informal relationships, indicate that they 'differ unfavourably from their married counterparts in terms of their educational level, age, sources of income, and labour force participation'.[87]

A slump has been observed in the number of children born to mothers who have not reached the age of 19, which includes minor mothers. This group numbered 44,500 in 1980, 27,800 in 2000, 18,500 in 2010, 7,100 in 2020, and 6,000 in 2022.[88] Given the increasingly lower age of sexual initiation, this decline should be attributed to sexual education focused on preventing pregnancy. Some minor mothers have applied for permission to marry and, once married, have gained adult status, enabling them to exercise parental authority over their children. However, these marriages, usually enforced by the law requiring parents to have full legal capacity, are not enduring.

### *3.7. The principle of equality in marriage*

Equality before the law regardless of gender, among other characteristics, has the rank of a constitutional principle[89] . In light of Art. 23 of the FGC, examples of the realisation of this principle of marriage are, in particular, the provisions on the name

85 Central Statistical Office (GUS), 2022a, p. 258.
86 Stańczak, Stelmach and Urbanowicz, 2015.
87 Szukalski, 2017.
88 Central Statistical Office (GUS), 2022a, p. 258.
89 Art. 33, Constitution RP.

of the spouses[90] , the management of joint property[91], property-marital agreements[92], and the settlement of family affairs[93].

#### *3.7.1. Equality and demography*

In Europe, the principle of equality between men and women is a civilisational achievement of the 20th century that has been gradually achieved by individual countries. This is an unquestionable principle for Europeans; however, it is not respected by many groups who came to Europe from Africa and Asia, especially those from regions influenced by the Islamic religion. A comparison of the way in which the procreative function is carried out by European and newcomer families unequivocally leads to the conclusion that the emancipation of women, resulting in marriage equality, has an inhibiting effect on the number of offspring. The modern European woman has more options for her life path than running a home and raising children and often chooses a professional or social activity without opting for motherhood or limiting the number of children to one or two. Drawing attention to this issue is not a vote for the rejection of gender equality in Europe. Ways out of the demographic crisis should be sought without surrendering European (or Western) civilisational heritage. The challenge is to ensure respect for gender equality but at the same time to encourage people to have children.

### *3.8. The principle of the good of the child (protecting the best interests of the child) in the context of demography*

#### *3.8.1. The principle of the good of the child*

The principle of the good of the child is the most important principle of family law. Following the ratification of the UNCRC in 1991, it became a principle of the entire Polish legal system. The principle mandates that the best interests of the child must be taken into account in all proceedings that directly or indirectly affect the child (Art. 3). Its rank further rose once the protection of the rights of the human child (Art. 72 Constitution RP) was granted constitutional status. Given that actions respecting the rights of the child are consistent with the good of the child (or, at least, they do not clash with each other), and that behaviours contrary to this good are generally in conflict with one or another right of the child, the scopes of the meaning of the rights and the good of the child intersect and are largely the same.

The obligation to protect the rights of the child and to take action in accordance with the principle of the best interests of the child lies with every institution

90 Art. 25, FGC.
91 Arts. 36, 36[1], 37, 41, FGC.
92 Art. 47 et seq., FGC.
93 Arts. 24, 97, FGC.

(especially those dealing with cases concerning children) and every citizen. The protection of the best interests of the child involves an optimal configuration of all aspects concerning them.[94] In the search for optimal configuration, help from all scientific disciplines concerned with the problem (economics, psychology, pedagogy, medicine) should be sought. The generally shared verbal consensus on respecting this principle is misleading; therefore, in practice, efforts should be made to genuinely seek this optimal configuration in each specific case.

In accordance with the UNCRC, the child (the good of the child, the rights of the child) is protected from the moment of conception in Polish legislation. The catalogue of children's rights can be found in the UNCRC and other universal and regional documents, including The Convention on the Civil Aspects of International Child Abduction[95], drawn up in the Hague on 25 October 1980; the European Convention on the Exercise of the Rights of the Child, drawn up in Strasbourg on 25 January, 1996[96]and Council Regulation (EC) No. 2201/2003 of 7November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.[97]

### *3.8.2. A child's right to life*

Given the demographic nature of these considerations, the most essential element of the principle of the good of the child and the child's fundamental human right is the right to life[98]. Art. 38 of the Constitution RP and the decisions of the Constitutional Tribunal[99] pursuant to the Art. based on it stipulate that everyone has the right to life from conception to natural death. At the statutory level, this is confirmed by the content of Art. 2 of the Act of 6 January2000 on the Ombudsman for Children's Rights[100] and the 7 January 1993 Act on Family Planning.

On the basis of these Acts, abortion is prohibited in Poland, except when it is a consequence of a criminal act and when the pregnancy poses a threat to the health and life of the mother[101] The issue of abortion is contrary to what is good for the child; however, in studies of the relationship between law and demography, it is justified to discuss it.

94 Sokołowski, 2016, p. 3; Andrzejewski, 2021, pp. 29–51; cf. Hanas, 2021.
95 Journal of Laws of 1995, No. 108, item 528.
96 Journal of Laws of 2000. No. 107, item 1128.
97 Official Journal of the European Union L 338, 2312. 2003 (Polish Special Edition, Chapter 19, Volume 6, p. 243).
98 Art. 6, UNCRC.
99 Judgment of Constitutional Tribunal of 28 May 1997. K 26/96, Constitutional Tribunal Judgments 1997, No 2/19; Judgment of the Constitutional Tribunal of 22 October 2020. K 1/20, Journal of Laws 2021, item 175.
100 Ct. Journal of Laws of 2023, item 292.
101 Art. 4a (1).

The termination of pregnancy can take place with the consent of the pregnant woman only in a hospital. Performing abortion in violation of the law is a criminal act, and anyone who performs, aids, or abets an abortion is subject to punishment. However, a woman who undergoes an abortion is not subject to punishment[102]. Implied in this protection of the rights of the unborn child is also the right to implement medical procedures.[103]

The doctrine of human rights spells out the so-called 'reproductive rights', which are understood as the ability to freely decide whether or not to have children, which the state is supposed to provide to the person demanding protection of these alleged rights. The right of women and girls (the word 'girls' is included to emphasise that this right also applies to minors) to have an abortion is formulated. Such a thesis implies that the provisions of the Convention on the Rights of the Child need to be amended since they do not (and should not) take into account the right of women and girls to deprive their child of life.[104]

### 3.8.2.1. Abortion and demography

The most significant reproductive Acts in history concerned the prohibition, limited prohibition, or freedom to abort a pregnancy. Historically, the motive for the enactment and repeal of such Acts, or the search for intermediate solutions, has often been a country's demographic policy. For a long time, it was thought that banning abortion would increase the birth rate while the freedom to abort would reduce the birth rate. This simplistic approach is still pursued by the UN, which promotes abortion as a method of birth control in developing nations.[105]The European experience, especially today, does not uphold such a simplistic view of abortion as a demographic policy tool.

Nevertheless, it should be noted that in Poland, where the law consistently protects the life of the unborn, the current birth rate is the lowest in the country's history and one of the lowest among all Western countries (305,000 in 2022, which equates to 1.37 children per woman of childbearing age). Conversely, from 1956 to 1993, when the law allowing abortions on demand was in force, about 500,000–600,000 children were born in Poland each year. According to estimates, as many as 400,000–450,000 abortions were performed annually at that time (note that some data only refer to abortions performed in public health system hospitals, and the numbers of abortions performed in private practices were underestimated).[106]

In Europe, abortion laws no longer have a direct impact on the birth rate. Far more important for procreative decisions than the content of the abortion law is the

102 Art. 157a, para. 3, Criminal Code.
103 Haberko, 2010. pp. 183–256.
104 Ważyńska-Finck, 2023, pp. 59–76; Grygiel, 2023, pp. 77-104.
105 Ośrodek Informacji ONZ w Warszawie–UNIC warsaw, 2003; United Nations, 1995; Różyńska, 2013, pp. 233–235.
106 Dyczewski, 1988, pp. 99–128.

sexual freedom initiated en masse at a very young age and the equally wide use of contraception, which reduces the number of unplanned pregnancies.

The content of abortion regulation has become an issue in the fundamental dispute over the right to life, waged between those who believe that freedom allows one to take the life of a child conceived, and those who link the idea of freedom with responsibility for the life conceived. Among the many different conclusions drawn from the observation of the phenomenon of mass abortion, the one that comes to the fore indicates the triumph of eugenics in the thinking of modern, wealthy, Euro-American societies, which is manifested in the large-scale practice of aborting foetuses with almost any disability.

Studies of legal awareness in Poland conducted in 2016 show that during the period of restrictive anti-abortion law (since 1993), the numbers of opponents of abortion on demand (the will of the woman, not supported by other arguments) and opponents of abortion, in general, have increased.[107] No representative studies have been performed since 2000 when massive pro-abortion demonstrations took place.

The WHO estimates that22 million abortions are performed globally each year, with an upward trend. For a long time, the number of legal abortions performed in Poland totalled several hundred per year, occasionally exceeding a thousand. After a verdict of the Constitutional Tribunal in 2020, this number decreased to about 100–200. The actual number of abortions performed by Polish women is unknown. There is no doubt that illegal abortions are performed in Poland, and there is evidence that Polish women undergo abortions in Germany, Austria, Slovakia, the Czech Republic, and other countries. Pro-life organisations estimate that several thousand of these abortions are performed annually, whereas pro-choice organisations estimate this number at between 100,000 and 200,000. Such a significant disparity undermines the credibility of these figures.[108]

### *3.9. The principle of equity and the protection of the aggrieved party in family relations*

The principle of equity and the protection of the aggrieved party in family relations, which therefore requires counteracting, draws attention to several institutions of family law and public law. Among them, the following are of particular concern: a) the protection of the child from violence inflicted by parents, which is manifested in the prohibition of corporal punishment by parents[109], the deprivation of parental authority, the limitation of parental authority, and the limitation or deprivation of the right to contact with the child[110]; b) the protection of the spouse from economic violence consisting of arbitrary, economically irresponsible acts in property-marital

107 Study report of Public Opinion Research Center (CBOS), 2016.
108 Ideologia, n.d.
109 Art. $96^1$ FGC.
110 Arts. 109, 111, $113^2$–$113^5$ FGC.

relations (obligation to inform the spouse about the intentions of economic acts, the need to obtain the spouse's consent to validify legal acts, specified in Art. 37 of the FGC); c) the protection of the family from domestic violence (2005 Law on Counteracting Domestic Violence)[111]; d) the enforcement of maintenance obligations under procedural law, as well as disciplining maintenance debtors by norms of administrative law, including the Act of 7 September 2007 on assistance for persons entitled to maintenance[112] and Art. 209 of the Criminal Code.

Following the cruel murder of a child by his stepfather in 2023, a law was passed in response to strong public pressure.[113]This law provides for the implementation of procedures that verify, in detail, the circumstances of incidents involving children. The idea is to identify any flaws or shortcomings in the operation of all the institutions, including the family court, social welfare authorities, health services, education system, the police, and others, that made it possible in the Kamilek case for violence to be committed against the child, to punish those guilty of negligence and prevent similar incidents in the future.

### *3.9.1. Counteracting violence (protecting the aggrieved party in the family) and demography*

There is a distant and obscure relationship between the issues described above and demography. The regulations cited are a response to the evil done (economic, psychological, and physical, including sexual violence) in the form of aggression or indifference on the part of those formally close to the victim. A law that protects the vulnerable in the family, though necessary, is not an incentive to form a family. An individual does not create a family because legal guarantees of protection from violence are granted but, rather, to be happy in the family and create an emotionally safe, enriching environment. The regulations in question are lifesaving and do not inspire thoughts about starting a family or conceiving or adopting a child. If used effectively, these regulations can, at most, protect a family from breakup and divorce, although they can also lead a victim of violence to decide to break from the oppression of the aggressor and dissolve the marriage by divorce. The allocation of the Family 500+ benefit in 2016 had the swift and unexpected result of reducing domestic violence-related claims. Women received money that helped some of them separate from their aggressor-husbands and move out to live separately with their children.

The phenomena discussed above (economic violence in the form of unpaid maintenance payments, psychological and physical violence that is an abuse of parental authority) have a particularly destructive effect on children by discouraging those

111 Ct. Journal of Laws of 2023, item 289; Jarosz, 2011, pp. 109–128.

112 Ct. Journal of Laws of 2023, item 1300.

113 Act draft of 11 May 2023; Changes in the Family and Guardianship Code and other Acts passed by the Sejm (Lower Parliament Chamber), parliamentary paper, [Online] available at: https://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-1224-2023/$file/9-020-1224-2023.pdf (Accessed: 28 July 2023).

who have experienced them from forming families in the future.[114]Living through these phenomena may also suggest to children that the violence they grew up in is a possible/acceptable option for solving problems in adulthood. This message is dangerous for their adult relationships.

### *3.10. Civil law regulations and family property regulations protecting children and families*

Civil laws contain instruments that help build economic security for individuals and entire families.

#### *3.10.1. Family law*

The provisions of the FGC on marital property regimes[115] reflect the principle of the equality of spouses.[116] Spouses may jointly decide to function in a community system but may also enter into a marital property agreement.[117] Equality is also manifested in the fact that certain acts of community property management cannot be performed by one spouse alone as the other spouse's consent is necessary for the act to take effect.[118] These provisions have been adjusted to the fact that spouses operate within the framework of the free-market economy and, therefore, the regulations safe guard the freedom of action for self-employed spouses.[119]

If spouses live together in an apartment to which one of them is legally eligible, the other spouse may use the apartment to meet the needs of the family.[120]

Children have no legal capacity until they are 13; from 13 until they reach the age of majority, they have limited legal capacity. During this period, the management of their property is carried out by their parents. If both parents are deceased, deprived of parental authority, or incapacitated, then a legal guardianship is established for the children, and a guardian is appointed, who becomes the child's legal representative.[121]

Parents (or legal guardians) administer the property of minor children. However, without court authorisation, parents may not perform acts beyond the scope of ordinary administration or without the consent to such acts by the child.[122] The donor or heir may stipulate that 'the items that fall to the child by virtue of the donation or the will shall not be included in the management exercised by the parents',[123] and

114 Badura-Madej and Dobrzyńska-Masterhazy, 2000, pp. 87–96.
115 Arts. 31–54, FGC.
116 Art. 23, FGC.
117 Art. 47, FGC.
118 Art. 37, FGC.
119 Arts. 36, $36^1$, 37, 47, FGC.
120 Art. $28^1$ FGC.
121 Arts. 145–174, FGC.
122 Art. 101 para. 3, FGC.
123 Art. 103, FGC.

a probation officer shall exercise management over these items of property. Upon termination of administration, the parents must return to the child or their legal representative the child's property managed by them[124].If the child has been completely incapacitated, then the parents, in exercising parental authority, are subject to the control of the court, just like a guardian[125].

In divorce and separation cases, the court's role is to hand down a ruling on child maintenance. This obligation is fulfilled both by the assistance given to the child within the household framework and the provision of certain amounts of money each month[126]. The child is entitled to enjoy a life standard similar to that of their parents. An economic, and even more so, educational problem arises when the child's parents live apart and their economic situations are different. The legal family problems related to maintenance payments are discussed in detail in section 3.13.

### *3.10.2 Inheritance law and family protection*

Inheritance law protects the family: in inheritance cases, this law considers the interests of the spouse, children, further descendants, parents, siblings, and their descendants, and, in some situations, direct or secondary kins (Arts. 931–940 Civil Code).[127] If the inheritance is based on a will in which the decedent did not include relatives, then the spouse, children, and further descendants, as well as the parents if they are unable to work, are protected by legal protection and can claim the inheritance in court.[128]

The rules of inheritance law contain a strong axiological justification, in particular, concerning the solidarity of the family group, the duty of loyalty, and mutual support. Sanctions for reprehensible behaviour toward the decedent may involve finding the heir unworthy of inheritance[129] or disinheriting him or her[130]. The formative role of the law may be seen in inducing people to treat their elders with respect, if not for the sake of high standards of upbringing, then at least for fear of legal consequences.

### *3.10.3. Maintenance function of contract law*

Some contracts carry economic weight and ensure economic stability, especially for older adults. In addition to contracts under the Civil Code, which have a maintenance function[131], new contracts regulated by Acts other than the Civil Code have

124 Art. 105, FGC.
125 Art. 108, FGC.
126 Art. 13, para. 2, FGC.
127 Act of 23 April 1964 –the Civil Code, ct. The Journal of Laws of 2022, item 1288 as amended (hereinafter,'the Civil Code').
128 Art. 991, Civil Code.
129 Art. 928, Civil Code.
130 Art. 1008, Civil Code
131 life annuity: Arts. 908–916, Civil Code; pension: Arts.903–907, Civil Code.

emerged. One is the contract for the transfer of a farm to a successor.[132] On the basis of Art. 84 of the law on the social insurance of farmers, through a contract with a successor, a farmer who owns (or co-owns) a farm is obliged to transfer the ownership (or share in co-ownership) and possession of this farm to a person at least 15 years younger than him or her (a successor) once he or she becomes entitled to a pension or disability pension. The successor continues to work on this farm until that time.[133]

Another form of securing the livelihoods of older adults is the reverse mortgage contract[134] under which 'the bank undertakes to place at the disposal of the borrower for an indefinite period of time a certain amount of money, the repayment of which will take place after the death of the borrower, and the borrower undertakes to provide security for the repayment of this amount together with the interest due and other costs'. The function of this agreement is to provide economic security, especially to older adults who have property but cannot rely on the support and care of relatives, and for whom the benefits from the social security system (especially pensions and annuities) do not fully satisfy their needs.[135]

#### 3.10.3.1. The demographic aspect

The assumptions of this chapter stem from a common-sense belief that people who are economically successful are more likely to make the decision to have a child. Economic stability and a good economic outlook can promote social optimism and encourage people to marry and decide to bear children. Meanwhile, it is easily observable that with economic affluence, many people desire to live in comfort, and this desire is perhaps the strongest obstacle to procreation, especially in the rich societies of Europe: it is not that economic security does not encourage the procreative function but rather that it is a mental barrier to it. This security favours satisfying various luxury needs and delaying the decision to have one child, let alone more children.

The subject of contracts pertinent to older adults relates to the topic of demography in such a way that it can contribute to prolonging their lives and ensuring decent living conditions for them.

### *3.11. Filiation law*

It is the right of a child to have his or her birth certificate issued immediately after birth in order to realise the child's right to know his or her parents (i.e. to know his or her origins) and to remain under their parental authority.[136] The purpose of the

132 Act of 20 December 1990 on social insurance for farmers, ct. Journal of Laws of 2023, item 208.
133 Niedośpiał, 1989, pp. 259–283.
134 Ct. Journal of Laws of 2023, item 152. Art. 4, para. 1, Law of 23 October 2014 on reverse mortgage credit.
135 Willmann, 2016, pp. 152–168.
136 Art. 7(1), UNCRC.

FGC's provisions on filiation relations is to create stability for a person's civil status. Hence, these provisions are characterised by formalism and reluctance toward individuals' attempts or requests to change their civil status, which arise in exceptional situations.

Determination of a person's descent from specific persons of a specified sex (the father and mother) is questioned by those that reject a division into two sexes based on biology in favour of the so-called 'cultural gender', which a person can choose for themselves. In Poland, controversy has arisen as a result of attempts to register children by same-sex couples who obtained the status of parents abroad by undergoing a same-sex adoption process (which is not allowed in Poland) or through medically assisted reproductive procedures conducted in other countries. The public policy clause is the basis for defining this type of registration as being contrary to the fundamental principles of the political system of the state.

The determination of maternity was laid down in the FGC by a provision that was introduced in 2008and states that the mother is the woman who gave birth to the child.[137] In contrast, the determination of paternity depends on whether the mother is a married woman or not. For a married mother, her husband is presumed to be the father of the child.[138] In order not to undermine confidence in the woman-wife-mother, no tests are conducted to verify the compliance of this presumption with the biological reality. However, it is possible to apply to the court to deny the paternity of the mother's husband. The active standing to sue is vested in each spouse and the prosecutor. In a lawsuit, it must be proven that the husband cannot, in a given case, be the father of the child born by the wife. The husband's consent to his wife's insemination through medical procedures that promote procreation precludes the husband from seeking paternity denial.

The identification of the father of a non-marital child takes the form of an acknowledgement of paternity or a judicial determination of paternity. An acknowledgement occurs as a result of a declaration of acknowledgement of paternity by the biological father of the child. This must then be confirmed by the mother. Acknowledgement is intended to create a legal situation that is consistent with the biological reality so that, by means of such acknowledgement, there can be no circumvention of adoption laws. Recognition of paternity mainly serves cohabitating couples and has the value of stabilising the relationship.

From the perspective of the theme of this chapter, the possibility of recognising the paternity of an unborn child is important: it provides security for the pregnant mother, and in urgent cases, may encourage her to push away thoughts of abortion. In turn, the man's legal status as a father gives him (like the mother's husband) the competence to legally function in medical procedures concerning the unborn child (at the very least, he has the right to medical information).The stabilising value of the institution of the acknowledgement of paternity has been undermined by the

137 Art. $61^9$ FGC; see section 3.14.
138 Art. 62, FGC.

possibility, introduced in 2015, of acknowledging a child who will be born in the future as a result of infertility treatment.

The paternity of anon-marital child can be legally established in a lawsuit brought by the mother, the child, the man who claims to be the father or the prosecutor. Today, these proceedings are settled on the basis of genetic evidence and do not stir emotions in the same way as when no such (certain) proof was available.

Parenthood in the 21st century is increasingly the result of a medically assisted procreation procedure, as described in section 3.14.

#### *3.11.1. The origin of the child – the demographic aspect*

In Poland, as in many other countries, more and more children are being born outside of marriage. This is a result of an increasing number of informal unions, the reluctance to marry, and the weakening of previously strong social, religious, and moral sanctions against sex and premarital parenting and cohabitation. The phenomenon of single parenthood by choice is also statistically relevant.[139]

Nevertheless, 73.6% of children in Poland are currently born to married women (this figure was 94% in 1990).[140]Along with Cyprus, Croatia, and Greece, Poland is among the European Union countries with the highest percentage of such births. 'In the remaining countries – apart from Romania, Lithuania and Switzerland – almost one-third of births are non-marital, while in France it is 61% of all births'.[141]

Until recently, pregnancy prompted marriage; this now occurs to a far lesser degree. Today, it is easy to challenge the notion that a legally stable and regulated marriage is the optimum way for a human couple to live and is conducive to procreative decisions by pointing to France and Sweden. In these countries, the fertility rate over the past few years has been around 1.8, one of the highest in Europe, and the percentages of children born to non-marital couples and single women were 61% and 55%, respectively.

### *3.12. The problem of adoption in the context of demography*

In the 20th century, adoption has long been used for the good of the child, as evidenced by the content of the Convention on the Rights of the Child; the European Convention on Adoption, drawn up in Strasbourg on 24 April 1967[142]; and the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, drawn up in The Hague on 29 May 1993.[143] However, in the 1980s, a proposal was put forward to allow the adoption of children by same-sex couples, and

139 Kocik, 2006, pp. 254–260.
140 Kotowska, 2021.
141 Kotowska, 2021.
142 Journal of Laws of 1999, No. 99, item 1157.
143 Journal of Laws of 2000, No. 39, item 448.

work was launched on a new European Convention on Adoption that took this proposal into account.[144] Since then, the concept of adoption for the sake of the adopters, rather than for the good of the child, has gained significant support in many countries, which marks a departure from the ancient rule that adoption is an imitation of natural relations. The standard that the relevant institutions and courts should seek to create conditions within the adoptive family that are close to the model to meet the child's developmental needs is also not widely upheld.[145]

Under Polish law[146], children are adopted by adults wishing to experience parenthood; however, spouses with offspring of their own can also decide to take this step. Single persons can also adopt a child. Their motivations and ability to provide the child with proper care are verified by the Adoption Centre. The adopted child's parents must be deceased, must not exercise parental authority (due to deprivation or incapacitation), or must have consented to the adoption of their children. The question of informing the child about the adoption is left by law to the adopters, who are trained in such a way as to respect the child's right to know their roots. Until almost the end of the 20th century, fear of revealing this information to the child prevailed. Adoption is not monitored in Poland: on ceit is decided, the adopters are not obliged to inform any institutions about the child's situation.

### *3.12.1. Demographic aspect*

The absolute number of adoptions in Poland has declined by almost half over the last two decades, although it remains at a similar level in relation to the number of live births. For a long time, about 4,000 adoptions per year were adjudicated, with the number of births exceeding 500,000; today, approximately 300,000–400,000 children are born annually, and there are about 2,000 adoptions. The decline in the absolute number of adoptions is paralleled by a growing number of infertile couples. Today, if these couples wish to experience parenthood, they can now choose between adoption and medically assisted procreation procedures. The issue is dynamic, and it is currently difficult to predict whether the *in vitro* method will supplant adoptions or whether they will coexist.[147]

The number of adoptions in Poland will likely be affected by the approach based on the child's right to know his or her roots, which has been dominant for some time, at least with regard to the child (the risk of finding the family and the uncertainty about the impact of this event on the child).

The demographic factor related to adoption concerns those women who, if it were not for the possibility of placing a child for adoption, would have made the decision to have an abortion. The idea of fighting abortion through adoption ('adoption

144 Schulz, 2008, pp.101–118.
145 Gajda, 2013, pp. 117–126; Sokołowski, 2013, pp.103–116.
146 Arts. 114–127, FGC.
147 Haberko, 2014, pp. 3–15; Andrzejewski, 2019, pp. 9–36

instead of abortion!') was formulated by the first prominent Polish legal theorist Zygmunt Ziembiński.[148]In addition, it is thanks to adoption that children who already exist, not those who would possibly be conceived, have the right to a family.

### *3.13. The principle of solidarity in a family group*

The principle of the solidarity of the family group is manifested primarily in the obligations of family members to provide means of subsistence (and, if a child is eligible, means of upbringing), in other words, maintenance costs. Maintenance obligations are designed to meet the current needs of those entitled to it. The obligation may be imposed on family members, including spouses, relatives in the direct line, siblings, and, if it is in accordance with the rules of social relations, relatives in the relationships of stepfather or stepmother and stepson, stepdaughter, or grandchild. Over 90% of cases involve parents' obligations to their children. The remainder mainly relates to maintenance for a former spouse after divorce.

The amount of maintenance payment depends on the justified needs of the entitled person and the earning capacity and assets of the person obliged to pay. If maintenance is demanded by a child from his or her parents, or by a spouse not guilty of divorce from the spouse solely responsible for the disintegration of their marriage, and if the obligation is to meet the needs of the family (but the spouse or father does not fulfil this obligation), the entitled person can request an amount that will ensure him or her the same standard of living as that of the obliged person. Thus, the entitled person can obtain maintenance even though he or she is not impoverished. In other relationships, the entitled person can obtain maintenance if he or she falls into poverty.

In addition to maintenance payments, the principle of family solidarity is also manifested in spouses' obligation to jointly meet the needs of the family[149] and in the obligation of a child who has income and assets to meet the needs of their siblings from the income derived from those assets[150]. Such a child should contribute part of the income to the needs of the family.[151]

A demand for maintenance payment by an adult may be dismissed if it is contrary to the principles of community life, for example, if the defendant shows that their adult child is not studying to become economically independent or if a parent demands maintenance payments from an adult child whom he or she has never supported or raised.[152] A parent may also be exempted from performing his or her obligations to an adult child if he or she demonstrates that doing so would entail undue hardship for him or her.[153] In addition to the needs of the entitled person, the

148 Ziembiński, 1956, pp. 197–198; Mazurkiewicz, 2022, pp. 176–177.
149 Art. 27, FGC.
150 Art. 105, FGC.
151 Art. 91, FGC.
152 Art. $144^1$ FGC.
153 Art.133 §3 FGC.

amount of maintenance payment also depends on the earning capacity and assets of the person obliged to pay the maintenance cost.

According to Article 135 §3 of the FGC, in determining the amount of maintenance payments, the court should not take into account benefits from the Family 500+ programme, maintenance funds, or social assistance. However, in practice, it does. Some women do not even apply for maintenance payments to the court, instead meeting their child's needs through social benefits and accepting any amount of money the man will contribute. Sometimes, it is easier to take advantage of the welfare system if a child is raised by a single person (in a formal sense), especially to get access to nurseries, kindergartens, and schools. This scenario favours cohabitation– couples continue to cohabit but are recorded in documents as single.

In Poland, the ineffectiveness of the enforcement of ordered maintenance payments is a huge problem. This problem continues despite the fact that asserting claims in court and enforcement proceedings have been simplified, and special laws have been put in place to force a debtor to take a job or revoke the debtor's driving licence. The latter measure, which damages men's prestige, has proved effective in disciplining debtors and has remained in place despite challenges to its constitutionality.[154]

If ordered maintenance payments cannot be enforced and the household of an entitled person has a low income per person, this person is eligible for benefits from the maintenance fund in the amount of maintenance ordered, but not more than the statutory amount. The amount of public fund benefits paid to the maintenance creditor becomes the creditor's debt to the fund administrator. The number of maintenance debtors who, as a result of evading their obligations, have become debtors to the maintenance fund stands at 300,000, and their average debt exceeds 40,000 zlotys (10 times the amount of the lowest salary). Persistent evasion of alimony is a crime in Poland.[155]

Maintenance payments to seniors residing in social welfare homes are often equal to payments for their stay in the facility (Art. 61(1) 12 March 2004 Social Assistance Act).[156]

### *3.13.1. Maintenance and demography*

Maintenance creditors who are forced to pursue enforcement proceedings to obtain ordered maintenance payments are generally people living at a low economic level. In addition to facing poverty, they may also feel humiliated that their present condition is the result of the actions of the person closest to them, usually the father.

154 Judgment of the Constitutional Tribunal from 12 February 2014. K 23/10, available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20140000236/T/D20140236TK.pdf (Accessed: 25 July 2023).

155 Art. 209, Criminal Code.

156 Ct. Journal of Laws of 2023, item 901.

An adult raised by people who did not properly carry out the economic function of the family, or the rearing and education functions (socialisation), as the parents had to use social benefits, may have less determination to raise their own children in the future. With the message inculcated in their mind that, in the hierarchy of values, children are not a highly ranked good, they may decide on not having children of their own.

### *3.14. The role of assisted reproductive methods in solving demographic problems*

Assisted reproductive methods are the result of several factors, beginning with the development of biological and engineering sciences, which created technological possibilities for their realisation. These methods are a response to a social need to become a parent, given that infertility affects couples who wish to experience parenthood. The exact scale of this problem is unknown as published data raises doubts – after all, little is explained by the statistics reporting that infertility affects between 60 and 168 million couples worldwide.[157]Sources frequently indicate that between 15 and 20% of couples are affected.[158] The causes of infertility are varied: in addition to medical issues, these causes are also related to changes in civilisation.

In the second half of the 20th century, medically assisted procreation provoked heated ethical disputes over its moral permissibility. For example, the Catholic Church pointed to its excessive interference in the creation of human beings. With regard to the *invitro* method, it was argued that it leads to the creation of surplus embryos, which are entitled to the dignity of a human person.[159]In the wake of this criticism in many countries, unused embryos are not destroyed but frozen. It was also argued that in contracting surrogacy, the child becomes an object of a transaction; similarly, objectification also applies to so-called 'surrogate mothers'(i.e. surrogates). This argumentation lost its strength with the process of secularisation, social transformations, and the evolution of ethical beliefs toward a weakening of the moral resistance to ethically controversial procedures. The impact of the dilemma of whether everything that is technically possible is also ethically permissible has weakened: in the case of artificially assisted procreation, technology has won over ethics. Attitudes have changed to the point that for a part of society, *in vitro* fertilisation (IVF)and surrogacy procedures have ceased to be a form of infertility treatment and have become a commodity for obtaining a child without the need to experience pregnancy and postpartum (e.g. for the sake of a woman's looks or career).[160]

157 Bidzan, 2010, p. 15.
158 Bidzan, 2010, p. 15; Jędrzejczak and Jósiak, 2005, p. 7.
159 Congregation for the Doctrine for the Faith, 2008; Kumór, 2016, pp. 137–150; Malina, 2020, pp. 142–163.
160 Haberko, 2018, p. 187.

The ethical dilemmas associated with medically assisted procreation are thoroughly described in the literature.[161] In legislation, these dilemmas have mostly been resolved in favour of a particular formula for their application. 'The scope of permissibility … depends on establishing the limits to which a person can dispose of his or another's procreative possibilities …'.[162]Very broadly defined, permissibility is claimed to be justified by autonomy, procreative freedom, and the right to manage procreative health.[163] This line of reasoning has been supported by the ideology of human rights, within the framework of which the so-called 'reproductive rights' have been promoted for three decades, among them the right to have a child[164] (in addition to other manifestations of the erosion of human rights, such as the alleged rights of same-sex couples to adopt a child, the right to abortion, etc.).[165]

The 25 June 2015 Law on Infertility Treatment allows married and heterosexual cohabitating persons to use the IVF procedure, confirmed by their consensual declarations. These declarations are not verified, and there are no sanctions if they are shown to be falsified. This opens up the possibility for single people or same-sex couples to benefit from the IVF procedure.[166]

Infertility treatment must be performed with respect for human dignity and the right to a private and family life, and with particular regard to the legal protection of the life, health, good, and rights of the child[167]. Such treatment comprises, among other methods, medically assisted procreation procedures, including IVF conducted in a medically assisted procreation centre.[168] It may be initiated after other treatments conducted for no less than 12 months have been exhausted. The time limit does not apply if, according to medical knowledge, these treatments do not make it possible to obtain a pregnancy.[169]

Preimplantation genetic diagnosis for the purpose of selecting phenotypic characteristics, including the sex of the child, is prohibited. Exempted from this prohibition are cases when such selection prevents a severe, incurable hereditary disease.[170]

It is illegal to create human embryos for purposes other than a medically assisted procreation procedure.[171] The legal protection of embryos is grounded in the fact that they are entitled to the attribute of human dignity and that none can be treated like objects.[172]

161 Cf. Syniewiecka, 2018; Syniewiecka, 2010, pp. 82–112; Oszkinis, 2019, pp. 112–225; Smyczyński, 2005, pp. 92–109; Ślipko, 2009, pp. 192–197; Kowalski, 2009, pp. 115–180.
162 Gałązka, 2018, p. 138.
163 Gałązka, 2018, pp. 139–142, 154–155.
164 Witczak-Bruś, 2021, p. 31.
165 Kołakowski, 2003; Andrzejewski, 2012, pp. 41–58.
166 Gałązka, 2018, p. 163.
167 Art. 4, Law on Infertility Treatment.
168 Art. 5(1), Law on Infertility Treatment.
169 Art. 5(2), Law on Infertility Treatment.
170 Art. 26(2), Law on Infertility Treatment.
171 Art. 25(1), Law on Infertility Treatment.
172 Gałązka, 2018, p. 145; Judgment of 15 October 2002. SK 6/02, OTK-A No. 5, para. 65, item 6.1.

It is authorised to fertilise no more than six female reproductive cells unless the recipient is over 35 years of age or medical indications justify fertilising more.[173] Unused embryos formed from reproductive cells that are capable of normal development shall be stored under conditions that ensure their due protection until they are transferred to the recipient. It is forbidden to destroy embryos capable of normal development.[174] At the end of 2020, 122,000 embryos were stored in Poland (20,000 more than a year earlier). Destruction of embryos capable of normal development incurs a punishment of 6months to 5yearsin prison. If a couple does not use all their embryos, then after 20 years they will be given for anonymous donation.

The death of the donor of reproductive cells taken for partner donation (the recipient is the wife or partner) prevents their use in a medically assisted procreation procedure.[175] However, based on the written consent of a donor who was not the recipient's husband or partner, embryos resulting from such donation may be transferred to the recipient after the death of the donor of the reproductive cells from which the embryo was created.[176] This is justified by the protection of the embryo's life.[177]

The law does not comment on so-called 'surrogate motherhood', a situation in which 'assisted procreation techniques are used, after the use of which one woman remains pregnant and gives birth to a child with the intention of giving it up after delivery to another woman or couple'.[178] This matter is addressed by Art. $61^9$ of the FGC, which stipulates that the mother of the child is the woman who gave birth to it. This article is an expression of the legislator's negative attitude to surrogacy, which, apart from the adoption of a child, does not allow a change in a child's marital status (here, in relation to the mother).[179] Under Polish law, a surrogacy contract is invalid as it goes beyond the framework set by the principle of freedom of contract[180] owing to its contradiction with the law and the principles of social coexistence and good morals.[181]

### *3.14.1. Demographic aspect*

Medically assisted reproductive procedures are seen by some governments, for example, in Israel, as a tool of demographic policy.[182] Individual countries' approval of such procedures is manifested not only in their statutory authorisation but also

173 Art. 9(2), Law on Infertility Treatment.
174 Art. 23, Law on Infertility Treatment.
175 Art. 18, Law on Infertility Treatment.
176 Art. 33, Law on Infertility Treatment.
177 Gałązka, 2018, p. 164; Lis, 2022, pp.189–226.
178 Haberko, 2018, p. 187.
179 Haberko, 2018, p. 170; see: Mostowik, 2019, p. 853.
180 Art. 58 §1, §2 Civil Code.
181 Haberko, 2018, pp.192–193. Arts. 58 §1, §2 Civil Code.
182 Bagan-Kurluta, 2022, pp. 49–71.

in their full or partial funding. In Poland, the implementation of the IVF procedure is not combined with demographic policy but is aimed at helping couples who are infertile.[183]

## 4. Programmes and activities to support having children and starting a family

In 2021, the Government Plenipotentiary for Demographic Policy prepared a document entitled '2040 Demographic Strategy',[184] which was intended as the basis for undertaking intensive efforts to reverse demographic trends. This strategy is a multifaceted document, which content-wise matches the importance of the issues it is designed to address.

From the perspective of the topic of this chapter, it is important to note that the 2040 Demographic Strategy does not address the relationship between family law and demography at all. In the section dedicated to measures aimed at sustaining the permanence of marriage, which is a legal and demographic category, attention was focused on counselling, family mediation, education on conflict resolution and conflict resolution skills, and other similar pedagogical and psychological aspects.[185]

In view of the limited possibilities that the norms of family law have to influence procreation, a question arises whether the norms of other branches of law, as well as economic or social projects, etc., can solve the problem of low procreation. The state is the main subject of social policy and has the tools to implement demographic strategies. Such attempts are being undertaken in Europe and Poland; however, their results so far have been disappointing.

### *4.1. Law on the eligibility for abortion*

The 2040 Demographic Strategy omits the subject of abortion law, thus presumably acknowledging the lack of a positive correlation between the social respect for and legal protection of the life of the unborn and the number of births. Moreover, the demographic slump began around the same time that the law banning abortion, upheld in a 1997 Constitutional Tribunal ruling, was passed. During the period this law has been in effect, fewer and fewer children have been born in Poland (from 730,000 in 1983 to 305,000 in 2022). Many factors may have negatively affected

183 Urząd Marszałkowski Województwa Wielkopolskiego, Departament Zdrowia, 2020.
184 Pełnomocnik Rządu do spraw Polityki Demograficznej (The Government Plenipotentiary for Demographic Policy), 2021.
185 Urząd Marszałkowski Województwa Wielkopolskiego, Departament Zdrowia, 2020, pp. 54–55.

the procreative decisions of Poles[186], and despite the time coincidence, the lower birth rate should not be attributed to the anti-abortion law. Nevertheless, this law has undoubtedly not helped procreation either. It has, however, the assumed goal of minimising the number of abortions performed in Poland.

It is argued in the left-wing media that the anti-abortion law generates fear of having to give birth to a child with a disability, which discourages some women from making procreative decisions in general. The available empirical results do not identify this to be the cause of childlessness, although the idea that it is tenable is suggested by the fact that the reproductive rate among Polish women living in Great Britain, where abortion laws are liberal, is as high as 3.1[187] (compared with 1.3–1.4 in Poland). In addition, the elimination of this fear by France's extremely pro-eugenics legislation has been attributed to an increase in births (to 1.83 in 2021).

### *4.2. Employment – labour law*

Between 1990 and 2015, unemployment was structural, with the unemployment rate reaching as high as around 40% in many regions of Poland (for the country as a whole, it was between 10 and 15%during this period). High unemployment overlapped with areas suffering from equally structural poverty. For several years, unemployment in Poland has been low; in 2023, the country had the lowest unemployment in Europe, and the third lowest in the world after Japan and Korea). This indicator is too short-term to stabilise the economic situation of families in disadvantaged areas of the country and, thereby, impact the sphere of reproductive behaviour.

It follows from the experience of some countries, for example, France, that it might be worthwhile to adopt measures to facilitate flexible employment for women, such as remote work options and the provision of childcare. Otherwise, striving to keep a job may push thinking about children to the back burner. The Demographic Strategy 2040 points to the need for changes in labour law related to flexibility in working hours, the organisation of work, and remote work, etc., for pregnant mothers and parents. The strategy also highlights the necessity of increasing the stability of parental employment and support for parents who want to have another child shortly after a previous child. It is also planned to support employers who hire women after a career break for childbirth and foster the combination of work and childcare.[188]

### *4.3. Social law*

Since 2015, the system of social benefits for families with children in Poland has been constantly expanded. In addition to the old benefits, new ones have appeared, in particular, those paid for each child under the Family 500+ programme.

186 Kotowska, 2014, p. 126.
187 Rymsza, 2017, p. 12.
188 Strategia Demograficzna 2040, pp. 56–59.

Families are also recipients of allowances, family allowance supplements (e.g. for raising a child in a large family, raising a child with a disability, childbirth, the beginning of the school year, single parenting), the Good Start programme benefits, the Large Family Card, maintenance fund benefits, care allowance, a one-time maternity grant, and social and health insurance premiums.[189]

The inauguration of the Family 500+ programme in 2016, which offers a payment of PLN 500 for each child every month, raised hopes that it would have a positive demographic effect.[190] The programme succeeded in lifting many families out of deep poverty, which indicates the effects these benefits have on the dignity aspect. However, the programme did not contribute to an increase in the number of births as only 305,000 children were born in 2022. In particular, it did not result in an increase in decisions to have a first child. Only some progress can be seen among those people who decided to have another child. In addition, despite the expansion of social support, the high cost of raising children[191] is still emphasised, indicating that this is a major hindrance to the decision to have children.

Low birth rates and increasingly longer lifespans are resulting in an ageing population. The forecasts in this regard are very unfavourable. By 2050, Poland's population is predicted to be 33.1 million, decreasing by 4.8 million people relative to 2023. The number of older adults will increase by approximately 4.5 to 11.9 million. The number of people of pre-working age, meanwhile, will decrease from 7.0 million to 5.3 million, that is, a decrease of 1.7 million people).[192]'The direction of change is irreversible …. The development challenge facing Poland, therefore, lies in pursuing efforts to limit negative changes in the population structure, rather than attempting to reverse the trend'.[193]

In this context, demands to raise the retirement age have been put forward as a response to the ageing of the population and the threat of a lack of funds for retirement benefits. The manner in which this operation was carried out in Poland at the beginning of the second decade of the 21st century essentially rules out its implementation in the foreseeable future for political reasons. The ageing of the population undermines the prospects of families providing care to older-adult members[194], which has been the prevailing form of care so far.[195]

### *4.4. Housing law*

A persistent problem throughout the post-World War II period that is relevant to procreation decisions is the shortage of apartments in Poland. This issue has become

189 GUS, 2022b.; Witkowska, 2017, pp. 24–31.
190 Szukalski, 2016, pp. 1–5; Rymsza, 2017, p. 12.
191 Bałdyga, 2023.
192 Kolek and Sobolewski, 2021, p. 5.
193 Kotowska, 2021, p. 1.
194 Thel, 2011, pp. 203–211.
195 Górecki, 2019, p. 95.

particularly acute in recent years due to inflation and high-interest mortgages. The Demographic Strategy 2040 includes many points on this issue, a discussion of which is beyond the scope of this chapter. In 2023, the government cooperated with the banking sector to launch a programme to support individuals and families to purchase housing in the form of loans at a fixed low-interest rate of 2%.

### *4.5. Medical law – infertility treatment*

The 25 June 2015 Law on Infertility Treatment contains a legal basis for infertility procedures. The state does not finance IVF treatments, although some liberally oriented local governments of larger cities do. In this context, it is important to note that in 2020, 32,878 embryos were used in IVF procedures in Poland (22,000 were frozen embryos). The Health Ministry does not collect data on how many pregnancies have been successfully confirmed as a result of this method. Scientific studies suggest that the pregnancy success rate is around 30%, which is the same as the European average.[196]Actual births, in contrast, are estimated to represent around 20% of the procedures implemented. This amounts to approximately 6,500 children per year, or about 2% of the total number of births.

The Demographic Strategy 2040 contains an extensive section on healthcare,[197] which covers the issue comprehensively, framing procreation through various ideas of an organisational, preventive, psychological, and therapeutic nature. The theme of infertility treatment is taken up in the section '9.10 – Dissemination of highly specialised medical care for infertile couples, including the establishment of a model infertility treatment centre'. The document does not explicitly reference any methods of artificially assisted procreation; rather, it discusses only in general terms an action plan for infertility treatment.[198]

### *4.6. Against the postmodern cult of childlessness*

Poland's Demographic Strategy 2040[199] emphasises the need to popularise a family-friendly culture, given that contemporary culture tends to generate distance from, or even aversion to, having children. The issue seems urgent in light of the phenomenon described as the postmodern *cult of childlessness (anti-nativism)*, which encompasses voluntary childlessness as an attitude.[200]This trend has been statistically significant since the late 20th century and has long generated alarm in the face of its easily predictable social and demographic consequences.[201]

196 Gałązka, 2018, pp. 135–136.
197 Strategia Demograficzna 2040, pp. 61–62.
198 Ibid.
199 StrategiaDemograficzna 2040, pp. 55–56.
200 Muszyński, 2010, pp. 438–463; Mikołajczyk-Lerman, 2004, pp. 212–213; Slany and Szczepaniak, 2003.
201 Kocik, 2006, pp. 267–270; Szukalski, 2014, pp. 83–110.

Both casual observations and sociological studies indicate that an increasing number of people are adopting a selfish, individualistic attitude to life, valuing freedom from obligation. For them, building in-depth relationships creates needless constraints on themselves. These individuals shy away from permanent cohabitation relationships, let alone marriage, and, consequently, resent the prospect of parenthood. They do not feel sufficiently mature to take responsibility and make decisions. For these people, the responsibilities, even the elementary ones set out in family law, are too difficult, beyond their mental horizon, and for some, absurd. Their opposition to having children is rooted in selfishness (convenience) that is termed, to soften the overtones, as 'individualism'. This is sometimes ideologically bolstered by slogans about saving the planet from overpopulation and the alarmist claims of environmentalists about the carbon footprint that humans produce. From these positions, such individuals voice criticisms of those who choose to have children. The arguments that children are social capital, which nothing can replace, do not carry weight.

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