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**Special Assistance of Public Authorities to Mothers
before and after Childbirth and the Limits of Pursuing
these Rights in the Light of Article 71 section 2 of the
Constitution of the Republic of Poland – Selected Issues**

Keywords: mothers, maternity, special help,

Słowa kluczowe: matki, macierzyństwo, szczególna pomoc,

Abstract

The aim of the article is to present selected issues related to the implementation of women's right to special state assistance in a period as important as the period of maternity, as well as the scope and limits of this protection. The protection of mothers provided for in Art. 71 sec. 2 of the Constitution requires an increase in the standard of protection and assistance. According to the author, the Constitution creates sufficient grounds for public authorities to provide assistance to mothers in such an important period as motherhood. The Constitution left the scope of this assistance to the statutes.

Streszczenie

Szczególna pomoc władz publicznych matkom przed i po urodzeniu dziecka oraz granice dochodzenia tych praw w świetle artykułu 71 ustęp 2 Konstytucji Rzeczypospolitej Polskiej – wybrane zagadnienia

Celem artykułu jest przedstawienie wybranych zagadnień związanych z realizacją prawa kobiet do szczególnej pomocy państwa w okresie tak ważnym jakim jest okres macierzyństwa oraz zakres i granice tej ochrony. Ochrona matek przewidziana w art. 71 ust. 2 Konstytucji nakazuje podwyższenie standardu ochrony i pomocy. Zdaniem autorki Konstytucja tworzy wystarczające podstawy do udzielania pomocy przez władze publiczne matkom w tak ważnym dla nich okresie jakim jest macierzyństwo. Zakres pomocy Konstytucja pozostawia ustawom.

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I. Introduction

The Constitution of the Republic of Poland shows how important a role marriage, family and motherhood play in society, which is why these institutions are subject to special protection by public authorities.

Assurance of protection and care can be found, among others, in Art. 18 of the Constitution. This provision protects four basic values related to the functioning of an individual in society, i.e. marriage, family, motherhood and parenthood. The legislator is obliged to provide these values not only with protection but also with care. Also from Art. 71 of the Constitution provides a guarantee of legal protection, among others. motherhood. This provision details the systemic principles expressed in Art. 18 of the Constitution.

The legislator, recognizing motherhood as a particularly important constitutional value, creates a certain constitutional framework based on which public authorities can provide special assistance to mothers during motherhood. The aim of the article is to present the basis and scope of possible assistance from public authorities to women before and after giving birth to a child.

II. Maternity protection in the light of Art. 71 sec. 2 of the Polish Constitution

The constitutional principle of maternity protection is included in Art. 71 sec. 2 of the Constitution of the Republic of Poland of 1997, and is included among the rights that state that “The mother, before and after the birth of the child, has the right to special assistance from public authorities, the scope of which is determined by law”¹, and therefore is directly related to the principle of maternity protection, enshrined in Art. 18 of the Constitution².

The provision of Art. 71 sec. 2 of the Constitution is an extension of the regulation contained in Art. 18 of the Constitution, specifying a specific aspect of maternity protection, namely the protection of the mother’s rights in special circumstances: before and after the birth of a child. It is therefore related to the one declared in Art. 18 of the Constitution – care and protection of the family, as evidenced by the way the normative content of the entire article was shaped 71 of the Constitution³.

According to T. Smoczyński, maternity protection applies not only to the mother and the already born child, but also to the pregnant woman⁴. Motherhood as a subject of legal regulation is an element of the structure of human rights and allows to determine the origin of an individual from specific parents⁵.

Mother within the meaning of Art. 71 sec. 2 of the Constitution is every woman, regardless of her marital status and citizenship, as well as regardless of her financial and social situation. Mother’s protection under Art. 71 sec. 2 of the Constitution begins from the moment of conception of the child, because only the real mother can be the beneficiary of the law, and not a woman who could potentially become pregnant⁶.

¹ Constitution of the Republic of Poland of April 2, 1997 (Dz.U. No. 78 item 483 as amend.).

² L. Garlicki, *Commentary on Art. 30 [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, t. III, Warszawa 2003, p. 3.

³ Judgment of the Constitutional Tribunal of April 13, 2011, file ref. no. SK 33/09.

⁴ T. Smoczyński, *Rodzina i prawo rodzinne w świetle nowej Konstytucji*, “Państwo i Prawo” 1997, no. 11–12, p. 193.

⁵ T. Smoczyński, *Ochrona rodziny w Konstytucji RP*, “Państwo i Prawo” 1994, no. 2, p. 10.

⁶ *Ibidem*.

I believe it is right to define the moment from which the legislator could provide special protection to women. A child exists from the moment of conception, so maternity protection should be activated from that moment in accordance with Art. 18 of the Constitution and the special obligation of the state to help the mother under Art. 71 sec. 2 of the Constitution⁷. At the same time, the Constitution does not specify the time limits of the constitutional protection of the mother after the birth of the child. In each case of granting such assistance, the ordinary legislator should specify the time frame for the applicable special protection of the mother. The definition of mother understood in this way results in the narrowing of the group of persons entitled to receive assistance referred to in Art. 71 sec. 2 of the Constitution. Genetic mothers who were not pregnant and did not give birth to a child cannot receive special assistance, because only actual motherhood related to the fact of pregnancy is protected. Wording of Art. 18 of the Constitution of the Republic of Poland clearly determines the need to introduce such a subjective scope of mothers entitled to protection in the light art. 71 sec. 2 of the Constitution of the Republic of Poland.

The analysis of constitutional provisions leads to the conclusion that the disposition of Art. 71 sec. 2 of the Constitution does not apply to fathers raising children. This does not mean that the Constitution reduces or does not protect fathers. Paternity is protected under Art. 18 of the Constitution and is in no way diminished by the mere fact of protecting motherhood. The content of the law in question is to provide the mother with special assistance. There is no requirement for a difficult financial and social situation here, so it should be assumed that every mother is entitled to such assistance. This assistance is to be of a special nature, i.e. it should go beyond the scope of simply

⁷ The protection referred to in Art. 71 sec. 2 of the Constitution does not cover a conceived child. Even though the life of a human fetus is a constitutional value and is subject to protection, this protection is not absolute and in certain exceptional situations the ordinary legislator may allow interference with this life. An example of this is Art. 4a of the Act of January 7, 1993. on family planning, protection of the human fetus and conditions for the admissibility of termination of pregnancy (Dz.U. 2022 item 1575, as amend.). The Constitutional Tribunal in its judgment of May 28, 1997 file ref. no. K 26/96, stated that the assumption that human life, including life in the prenatal phase, constitutes a constitutional value does not yet determine the issue that in certain situations the protection of this value may be limited or even excluded due to the need to protect or implement other values, rights and constitutional freedoms.

taking into account the needs of the family. Article 71 sec. 2 of the Constitution of the Republic of Poland fits into the broader context of constitutional regulations relating to both the legal situation of the mother and the status of the family. It should be noted that resulting from Art. 68 sec. 3 of the Constitution and the obligation addressed to public authorities to provide special health care to pregnant women. It can be concluded that “special assistance from public authorities” referred to in Art. 71 sec. 2 of the Constitution, which also applies to mothers before the birth of a child, is more general in nature than that declared in Art. 68 sec. 3 of the Constitution “special health care”.

The provision of Art. 71 sec. 2 of the Constitution therefore broadens the perspective of “special” assistance from public authorities in relation to pregnant women, without limiting it only to the sphere referred to in Art. 68 sec. 3 of the Constitution. At the same time, because from the subjective point of view it is also addressed to mothers after the birth of a child, it clearly expands the scope of “special assistance” that women are entitled to from public authorities, extending it not only to the entire duration of pregnancy, but also to the period after childbirth⁸. The use of the same term “special assistance” in Art. 71 sec. 2 of the Constitution, clearly emphasizes the right to more intensive protection of the mother due to the fact of giving birth to a child, and at the same time fits into the broader and more general context of legal protection guaranteed to the family and parenthood on constitutional grounds⁹.

Editing of the provision of Art. 71 sec. 2 of the Constitution clearly indicates two stages related to the upbringing of a child, which the ordinary legislator should take into account when specifying individual subjective rights. In order for the aid in question to fulfill its role, it cannot be illusory – the act must guarantee its real dimension. At the same time, however, the discussed constitutional regulation clearly highlights the legislator’s regulatory freedom in adopting specific forms of protection and assistance provided to the mother. Within the limits of the above freedom, the legislator – in accordance with many variable factors, including demographic, economic and social – may adopt various mechanisms of legal rationing of assistance provided to the mother before and after the birth of the child. It is permissible

⁸ Judgment of the Constitutional Tribunal of July 9, 2012, file ref. no. P 59/11.

⁹ Judgment of the Constitutional Tribunal of April 12, 2011, file ref. no. SK 62/08.

to differentiate the intensity of protection in both periods, i.e. “before” and “after” the birth of the child¹⁰.

The Constitution leaves it to the legislator to determine the forms and scope of assistance provided to mothers referred to in Art. 71 sec. 2 of the Constitution. It is assumed in the doctrine and case law that the legislator has far-reaching freedom in specifying this assistance, both in terms of the selection of measures and determining the scope of individual benefits. However, the ordinary legislator must take into account the provisions of other constitutional regulations, including: Art. 68 sec. 3 of the Constitution. Moreover, when granting aid, it cannot violate the provisions of Art. 71 sec. 2 of the Constitution by granting assistance in the same way as is provided for other entities. Pursuant to the wording of Art. 71 sec. 2 of the Constitution, state assistance to mothers should be of a special nature and therefore go beyond the scope of ordinary assistance provided by the state to all citizens. The addressee of the right specified in Art. 71 of the Constitution of the Republic of Poland is public authority.

However, it cannot be ruled out that Art. 71 sec. 2 of the Constitution of the Republic of Poland operates horizontally, imposing specific obligations on private law entities. The obligation to help the mother before and after the birth of the child burdens, in addition to the public authorities, also the child’s father and persons related to the child’s mother by family and legal relations¹¹.

The protection of the family proclaimed by the state does not mean that the state will release people responsible for its fate and proper functioning from efforts to maintain the family. State policy is aimed at supporting the strength of parents and spouses, equalizing life chances, stimulating the initiative of individuals and social groups to create conditions conducive to the existence of the family or help in crisis situations. In my opinion, the order arising from Art. 71 sec. 2 of the Constitution does not release the family from responsibility for its own maintenance and family members from the obligation to provide maintenance. This results from the principle of subsidiarity,

¹⁰ Judgment of the Constitutional Tribunal of April 13, 2011, file ref. no. SK 33/09.

¹¹ L. Bosek, M. Wild, *Kontrola konstytucyjności prawa, zagadnienia ustrojowe, procesowe i materialnoprawne. Komentarz praktyczny dla sędziów i pełnomocników procesowych, wzory pism procesowych*, Warszawa 2014, p. 402.

which is expressed in the preamble to the Constitution and in Art. 71 sec. 2 of the Constitution. Both in doctrine and case law it is assumed that the state cannot replace its citizens in the obligation to meet the needs of the family they have established. The Constitution prohibits releasing family members from their maintenance obligations by, for example, creating a system of family allowances¹².

I believe that the obligation to protect and help the family cannot be fulfilled only by expanding the social security system, but through coherent systemic solutions, such as protection of the employment relationship of pregnant women and women on maternity and parental leave, the right to paid maternity and parental leave, including breastfeeding breaks during working time, family benefits and favorable methods of settling taxes.

III. The subjective and objective scope of Art. 71 sec. 2 of the Polish Constitution

Article 71 sec. 2 of the Constitution, guaranteeing protection of motherhood, is included in economic, social and cultural freedoms and rights, also known as second-generation freedoms and rights. Social rights protect individuals who, for various reasons, are unable to independently ensure the conditions of their material existence. These are the rights of an individual to various public benefits of a state aid nature. Social rights are referred to as the basic rights of human existence and therefore it was assumed that they should be universally guaranteed by the state. Their goal is to provide all citizens with decent living conditions. The goods constituting the essence of social rights as autonomous goods were considered sine qua non conditions for the exercise of freedom and civil liberties. The state was established as the guarantor of the implementation of social rights¹³.

The essence of social rights is to establish an obligation for the state to undertake specific projects. Recording these rights in the Constitution obliged the state to develop organizational activity, and created a claim on the part

¹² Judgment of the Constitutional Tribunal of July 8, 2014, file ref. no. P 33/13.

¹³ L. Dziewięcka-Bokun, *O znaczeniu obywatelskich praw socjalnych dla rozwoju demokracji* [in:] *Prawa i wolności I i II generacji*, eds. A. Florczak, B. Bolecjowa, Toruń 2006, p. 326.

of the citizen allowing him to claim the benefits he was entitled to. These rights are recognized as positive rights understood as a sphere in which an order to act is formulated for the state. Social rights are recognized as principles of state policy that establish the obligation for the state to take specific courses of action, but they do not result in any claims that can be pursued by citizens¹⁴. It can be assumed that social rights constitute a subjective right of a specific category of entities, and the constitutional obligation to implement them rests with the state, and in certain circumstances also with certain private entities. The distinction between subjective law and programmatic norm seems to be important for these considerations. Subjective law is a norm indicating a precisely defined addressee, giving him the opportunity to choose whether he will pursue his right and shaping his legal situation. The program standard is addressed to public authorities and specifies the goal to be achieved¹⁵.

Social rights are not autonomous. They require specification at the statutory level. The statutory provisions specifying them, and not the Constitution, determine the scope of their implementation. As a consequence, an individual will be entitled to claim positive action by the state on the basis of such rights only within the limits specified by law¹⁶.

The Constitution does not specify the method and scope of special assistance for mothers before and after the birth of a child. Detailing the scope of this assistance is left to the ordinary legislator. Legal regulations guaranteeing special assistance to pregnant women and mothers after childbirth include protection of the employment relationship of both pregnant women and during maternity, parental and parental leave. Also in the Act of November 4, 2016 on support for women and families “for life” provides for the rights of pregnant women and families in terms of access to health care services and policy instruments for the family.

These include: in terms of health support:

1. providing pregnant women with access to prenatal diagnosis,

¹⁴ L. Garlicki, *Polskie prawo konstytucyjne, zarys wykładu*, Warszawa 2016, p. 104.

¹⁵ M. Derecz, *Konstytucyjne prawo dziecka do szczególnej opieki zdrowotnej*, Warszawa 2016, p. 111.

¹⁶ M. Jagielski, *Konstytucyjna regulacja materii społecznych i gospodarczych (aspekty teoretyczne)* “Gdańskie Studia Prawnicze” 2014, t. 31. p. 601.

2. ensuring appropriate health care services for women during pregnancy, childbirth and postpartum, with particular emphasis on women with complicated pregnancies and in the event of obstetric failure,
3. appropriate health care services for the child, with particular emphasis on a child diagnosed with a severe and irreversible disability or an incurable disease that threatens his or her life, which occurred during the prenatal period of the child's development or during childbirth,
4. access to coordination, care and rehabilitation services, with particular emphasis on a child diagnosed with a severe and irreversible disability or an incurable disease that threatens his or her life, which occurred in the prenatal period of the child's development or during childbirth,
5. possibility of giving birth in a hospital of the 3rd reference level.

In terms of social support:

1. providing access to information on solutions supporting families and pregnant women,
2. access to counseling on family support solutions,
3. one-off benefits for the birth of a child diagnosed with a severe and irreversible disability or an incurable life-threatening disease that occurred during the prenatal period of the child's development or during childbirth,
4. other benefits in the field of family support and foster care¹⁷.

However, the Act of November 28, 2003 on family benefits provides for the possibility of granting the mother, father or legal or actual guardian of a child a family allowance and an addition to the family allowance for the birth of a child or for providing care during parental leave, as well as a one-off allowance for the birth of a child to partially cover child maintenance expenses. Mothers who are not entitled to benefits and supplements to family benefits in accordance with Art. 17c of the Family Benefits Act, they acquire the right to receive parental benefit for a period equal to the period of maternity benefit. Another form of support for families, and therefore also for mothers, is the legislator's granting of the right to parental benefits, which was introduced in the Act of February 11, 2016. on state aid in raising children.

¹⁷ A. Brzeziński, *Ustawa za życiem oraz inne zmiany w pomocy społecznej*, Warszawa 2017, p. 10.

IV. Limits of asserting rights arising from the content of Art. 71 of the Polish Constitution

For families in difficult financial and social situations, the Constitution of the Republic of Poland establishes a law that provides for special assistance from public authorities¹⁸. The norms expressed in Art. 71 of the Constitution of the Republic of Poland are classified by the doctrine as principles of state policy, i.e. norms ordering the state to take actions aimed at achieving a given goal¹⁹. The provision of Art. 71 sec. 1 of the Constitution imposes on the state the obligation to take into account the good of the family in social and economic policy. Under this provision, an individual has no individual claims against the state. This does not mean, however, that this regulation is not important. A violation of the constitutional provision on the tasks of state policy may occur when the legislator has incorrectly interpreted a provision of the Constitution that determines the purpose or task of public authority²⁰. According to the Constitutional Tribunal, Art. 71 of the Constitution constructs one of the elements of the social state by taking into account the “good of the family” in its social and economic policy. These provisions, formulated as principles of state policy and not individual rights, cannot constitute the basis for individual redress. It is widely believed, not only in the doctrine of constitutional law, that provisions formulated in this way specifying the objectives of the activities of public authorities are program norms and that as such they cannot be the basis for a citizen’s claims, including the basis for a constitutional complaint, because their addressee is primarily the legislator²¹.

This position is confirmed by the Constitutional Tribunal in its judgment of April 13, 2011, in which it states that subjective rights can only be asserted under Art. 71 sec. 1 sentence 2 and from Art. 71 sec. 2 of the Constitution of

¹⁸ Judgment of the Constitutional Tribunal of December 20, 2012, file ref. no. K 28/11, OTK-A 2012, no. 11, item 137 and the judgment of the Constitutional Tribunal of May 7, 2013, file ref. no. SK 11/11, OTK-A 2013, no. 4, item 40.

¹⁹ A. Mączyński, *Konstytucyjne podstawy prawa rodzinnego* [in:] *Państwo prawa i prawo karne: księga jubileuszowa Prof. A Zolla*, t. 1, eds. P. Kardas, T. Sroka, W. Wróbel, Warszawa 2012, p. 767.

²⁰ Judgment of the Constitutional Tribunal of July 22, 2008, file ref. no. P 41/7.

²¹ Judgment of the Constitutional Tribunal of July 10, 2000, file ref. no. SK 21/99.

the Republic of Poland²². The adopted assumption results from the distinction between the obligations to provide “average” family assistance and to provide “special assistance” to families in a difficult financial and social situation as well as to mothers before and after the birth of a child²³.

However, art. 71 sec. 2 of the Constitution indicates that the scope of special assistance from public authorities to which a mother is entitled before and after the birth of a child is to be determined by law. It does not express a right that can be applied independently, but nevertheless requires the legislator to pay special attention to the mother’s situation during pregnancy and after childbirth. There is no doubt that he has considerable discretion in this respect. The constitutional provisions do not in any way determine specific forms of protection and assistance provided to the mother. Acting within this freedom, the legislator may therefore adopt various mechanisms and solutions adapted to the changing demographic, social and economic situation²⁴.

The provision of Art. 71 sec. 2 of the Constitution of the Republic of Poland may be the basis for a constitutional complaint. However, because pursuant to Art. 81 of the Constitution of the Republic of Poland, this right may be asserted only within the limits specified in the act, such a complaint is limited only to situations where specific obligations of the state are clearly indicated in a given legal norm²⁵.

W. Sadurski believes that the implementation of some socio-economic rights can be pursued directly, while the implementation of others is left to the discretion of the legislative authority. In his opinion, the Constitution of the Republic of Poland contains a general clause that makes the ability to claim rights dependent on the choice of the legislator. This clause only applies to selected socio-economic rights. The Constitution lists a group of socio-economic rights to which the general restrictive clause is not applied, even if they are equipped with their own clauses which oblige the legislator to determine the scope and forms of their implementation. W. Sadurski claims that the jurisprudence and doctrine of the Constitutional Tribunal extend the scope of the

²² Judgment of the Constitutional Tribunal of April 13, 2011, file ref. no. SK 33/09.

²³ L. Bosek, M. Wild, *Kontrola konstytucyjności prawa, zagadnienia ustrojowe...*, p. 402.

²⁴ Judgment of the Constitutional Tribunal of July 9, 2012, file ref. no. P 59/11.

²⁵ L. Bosek L., *Commentary on art. 30 [in:] Konstytucja RP, t. I, Komentarz do art. 1–86*, eds. M. Safjan, L. Bosek, Warszawa 2016, p. 415.

possibility of pursuing also those socio-economic rights to which the restrictive clause applies. According to the prevailing view in the doctrine, constitutional norms that define the state's tasks in the area of socio-economic policy have the full normative force of constitutional provisions and, therefore, may constitute the basis for constitutional control²⁶.

I do not share the view presented by W. Sadurski and I believe that the views presented by most representatives of legal doctrine, including L. Garlicki, are more convincing²⁷.

V. Conclusions

The right to found a family and participate in family life is considered a basic human right. This means that the state cannot repeal, change, limit or suspend them. It is the state's duty to provide protection to the family. The basis this protection is provided for in Art. 18 of the Constitution of the Republic of Poland, which implies a certain obligation of the state to provide care for the family. This provision is developed, among others, by: in art. 71 of the Constitution. It is the state's duty to provide assistance to mothers and families in need of support by developing appropriate family policy. Family policy activities should be adapted to the needs of families, along with the changing needs of people. In the author's opinion, the Constitution guarantees the protection of motherhood and parenthood, but leaves the scope of this protection to the discretion of the ordinary legislator. It is up to the legislator to choose solutions that he considers optimal from the point of view of the needs of citizens and the requirements of the country's economic development.

However, please remember that this freedom is not unlimited. Each time the legislator introduces various types of regulations affecting the legal situation of the mother in such a special period for her, the legislator must maintain the minimum rights granted to her by Art. 71 sec. 2 of the Constitution of the Republic of Poland. This means that public authorities should provide

²⁶ W. Sadurski, *Prawo przed sądem, studium sądownictwa konstytucyjnego w postkomunistycznych państwach Europy Środkowej i Wschodniej*, Warszawa 2008, pp. 248–249.

²⁷ L. Garlicki, *Commentary on art. 81 [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, t. III, Warszawa 2003, p. 2.

the mother with real assistance of a special nature. However, it should be remembered that protection covers a narrow group of women, i.e. those who are pregnant and have given birth to a child. Therefore, genetic mothers are not protected.

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