

# THE RIGHTS OF THE STILLBORN CHILD IN POLAND – STATUS *DE* *LEGE LATA* AND POSTULATES *DE* *LEGE FERENDA*

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The legal status of stillborn children is a subject of interest for lawyers specializing in various branches of law. Therefore, the studies organized by the Institute of Justice in Warsaw (Poland) involved experts in civil law, family law, criminal law, law on civil status records, and medical law. The research confirmed the dispersion of regulations concerning the legal protection of stillborn children and the necessity of respecting the inherent dignity of human beings. According to the Constitutional Tribunal's judgment of May 28, 1997 (K 26/96), „Human life at every stage of its development constitutes a constitutional value subject to protection. However, this does not mean that the intensity of this protection at every stage of life and under all circumstances must be the same. The intensity and type of legal protection are not a straightforward consequence of the value of the protected good”.

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## 1 Introduction

The discussion on how to handle the body of a child who has died before birth has been ongoing in Poland and other countries for several decades. Lawyers, medical professionals, ethicists, and even theologians grapple with questions such as: can human remains at an early stage of life be treated as mere medical waste, or do they deserve the same respect as adults or children who passed away, for instance, several years after birth? The answer to this question has far-reaching consequences, not only for parents who have suffered the tragedy of losing a child before birth.

The Institute of Justice in Warsaw, a research unit under the Polish Ministry of Justice, conducted studies on the legal status of stillborn children.<sup>1</sup> These studies involved lawyers specializing in various branches of law, including family law, civil law, criminal law, law on civil status records, and medical law, as well as experts in canon law and theology of the Catholic Church. The result of the research is a publication dedicated to the legal status of stillborn children, titled “The Legal Status of Stillborn Children”, which contains numerous postulates *de lege ferenda*.<sup>2</sup>

The primary issue faced by parents in cases of miscarriage or stillbirth is the lack of a single normative act comprehensively regulating these matters. Furthermore, the definition and regulation of basic terms in an annex to a ministerial regulation raise serious legal and practical doubts. A perspective that recognizes the human essence obliges both lawmakers and entities applying the law (bodies and institutions) to respect and protect the dignity of stillborn children and to provide appropriate legal protection and care to them and their parents.

The purpose of this study is to identify the necessary changes in the Polish legal system to respect and protect the status of stillborn children. This goal will primarily be achieved based on research conducted by the Institute, making the aforementioned publication the most frequently cited source in this study.

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<sup>1</sup> More information on the website: [www.iws.gov.pl](http://www.iws.gov.pl).

<sup>2</sup> Sobczyk, 2024, p. 237.

## 2 Key legal terms

According to the provisions of the Minister of Health's regulation of April 6, 2020, on the types, scope, and forms of medical documentation and the methods of its processing<sup>3</sup>, “[a] miscarriage is defined as the expulsion or extraction from the mother's body of a fetus that does not breathe or show any other signs of life, such as a heartbeat, umbilical cord pulsation, or definite voluntary muscle movements, provided it occurs before the 22nd week of pregnancy (21 weeks and 7 days)”.<sup>4</sup> The same regulation states that “[s]tillbirth is defined as the complete expulsion or extraction from the mother's body of a fetus that does not breathe or show any other signs of life, such as a heartbeat, umbilical cord pulsation, or definite voluntary muscle movements, provided it occurs after the 22nd week of pregnancy”.<sup>5</sup>

## 3 Civil Law

Polish civil law, specifically the Civil Code in Arts. 23 and 24, includes a catalog of personal rights of natural persons.<sup>6</sup> The most important personal right for an unborn child is life. Protecting personal rights such as dignity, life, and health, as well as the status rights of the nasciturus, makes it possible to treat the unborn child as a patient, including maintaining a separate record of medical services provided to them. As Marek Andrzejewski rightly suggests, it is worth considering extending the nasciturus' catalog of personal rights to include the right to dignified birth, protection of genetic heritage, and family ties.<sup>7</sup>

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<sup>3</sup> Dz. U. 2020 poz. 666.

<sup>4</sup> Załącznik nr 1 Kryteria oceny stosowane przy dokonywaniu wpisów w dokumentacji dotyczących czasu trwania ciąży, poronień, urodzeń żywych i martwych pkt 2 do Rozporządzenia Ministra Zdrowia z dnia 6 kwietnia 2020 r. w sprawie rodzajów, zakresu i wzorów dokumentacji medycznej oraz sposobu jej przetwarzania, Dz. U. 2020 poz. 666.

<sup>5</sup> Załącznik nr 1 Kryteria oceny stosowane przy dokonywaniu wpisów w dokumentacji dotyczących czasu trwania ciąży, poronień, urodzeń żywych i martwych pkt 4 do Rozporządzenia Ministra Zdrowia z dnia 6 kwietnia 2020 r. w sprawie rodzajów, zakresu i wzorów dokumentacji medycznej oraz sposobu jej przetwarzania, Dz. U. 2020 poz. 666.

<sup>6</sup> The starting point for recognizing that the personal rights of a stillborn child are subject to civil law protection is the acknowledgment that the child possesses legal capacity and the capacity to perform legal acts. The positions of legal scholars on this issue are not uniform; it is worth referring to the following publications in this regard: Mazurkiewicz, 2019, p. 9; Haberko, 2010; Smyczyński, 1989, pp. 3–28; Sokołowski, 2022, pp. 117–166.

<sup>7</sup> Andrzejewski, 2024, pp. 16–18.

One of the personal rights of individuals is the right to burial, which in the case of the nasciturus means the right to be buried, as well as the right of the parents to bury their stillborn child. Another personal right is the remembrance of the deceased, understood as a set of entitlements forming the right to a grave, considered a personal right of the deceased's relatives and a subject of legal protection based on Arts. 23 and 24 of the Civil Code.

An example illustrating the rights of a child before birth is the condition known as Fetal Alcohol Syndrome (FAS), caused by alcohol consumption by pregnant women.<sup>8</sup> Alcohol consumption during pregnancy, especially given the known effects on the child, can be considered a tort committed against the child, whether intentionally or negligently. The reprehensibility of behavior endangering a child has led to legislative proposals aimed at criminalizing such actions and mandating the placement of pregnant women who consume alcohol in treatment facilities.<sup>9</sup>

Although civil law provisions rarely address the burial of stillborn children directly, they provide a solid basis for advocating the formulation of detailed regulations on this matter within administrative law. The existence of civil-law protection of the unborn child's interests supports the argument for showing respect to the unborn human being in the face of death. As Andrzejewski notes, the coherence of the legal system favors the introduction of consistent regulations concerning the burial of stillborn children, ensuring the dignity owed to a human being from the moment of conception. The lack of such coherence, exemplified by the permissibility of abortion, cannot justify further inconsistencies in this protection.<sup>10</sup>

It is also worth noting that one of the key provisions of civil law concerning the unborn child is Article 927 § 2 of the Civil Code.<sup>11</sup> Its origins trace back to Roman law, where the possibility of inheritance by an unborn child, provided it was born alive, was introduced.

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<sup>8</sup> Andrzejewski, 2024, p. 18 and subsequent.

<sup>9</sup> On the subject of FAS syndrome and legislative attempts to counteract this issue, primarily in Bernfeld et al., 2020.

<sup>10</sup> Andrzejewski, 2024, pp. 31-32.

<sup>11</sup> More on this topic Longchamps de Berier, 2009, pp. 257–262.

*De lege ferenda*, it is therefore worth considering, in relation to civil law (specifically the Civil Code), extending the catalog of personal rights of the nasciturus to include the right to dignified birth, the protection of genetic heritage, and family bonds.

#### **4 Law on Civil Status Records**

Procedures for issuing death certificates do not adequately protect the rights of stillborn children and their families, particularly concerning determining the child's gender, which is necessary to obtain permission for burial. These matters are regulated in Poland by the Act on Civil Status Records (hereinafter: ACSR).<sup>12</sup> This act introduced various changes, including the form of the abbreviated birth certificate for a stillborn child, the content of this certificate with an annotation that the child was stillborn, and a clear basis for its issuance.

However, the current legal state regarding civil status records is far from perfect. As Piotr Kasprzyk observes, the first shortcoming of the ACSR is the lack of a possibility to bury the child without issuing a birth certificate when the child's gender is not determined. This solution disregards the individuality of the child, which is guaranteed in other legal acts, such as the Civil Code, through the personal rights afforded to the unborn child. Therefore, medical procedures should be introduced to quickly determine the child's gender, ensuring that the stillbirth record includes the child's gender, leading to the issuance of a complete birth certificate that accurately documents this information. This is essential for the integrity of the civil status record as a reference document.<sup>13</sup>

“It should be mandatory to include the child's gender in the stillbirth record based on, for example, reimbursed genetic testing conducted by medical facilities or a statement from the parents regarding the child's gender when preparing the stillbirth record. In today's era of progress and the availability of genetic testing, determining the gender of a stillborn child should not pose significant challenges. Furthermore, the death of the child should not be a barrier to determining its gender. Establishing the child's gender is both the right and duty of the parents”.<sup>14</sup>

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<sup>12</sup> Dz. U. 2014 poz. 1741.

<sup>13</sup> Kasprzyk, 2024, p. 53 and the following.

<sup>14</sup> Kasprzyk, 2024, p. 61.

Kasprzyk also rightly proposes that, considering the feelings of parents who have lost their child, the registration of stillborn children should take place in the death registration department rather than the birth registration department of the relevant Civil Registry Office. This issue concerns the registration of the child's death. Therefore, it is worth considering amending the regulation of the Minister of the Interior of February 9, 2015, on the method of maintaining civil status records and collective civil status records<sup>15</sup> to include the following provision: “The registration of stillborn children is carried out at the same location as the registration of deaths in the relevant Civil Registry Office”.<sup>16</sup>

*De lege ferenda*, in the context of civil status law, it is necessary to propose the introduction of medical procedures that allow for the rapid determination of the child's gender so that the stillbirth record includes the child's gender, ultimately leading to the issuance of a complete birth certificate. This is crucial for the integrity of the civil status record as a reference document.

## 5 Medical Law and Internal Hospital Regulations

In the 1960s, stillborn children accounted for 1.2 percent of all births, whereas today, this figure is only 0.3 percent.<sup>17</sup> Regardless of the number of such family tragedies, Polish hospitals are obligated, under the Act on Medical Activities, to properly prepare the deceased body by washing and covering it with due dignity for its handover to the person or institution entitled to its burial. Considering that human life is the most valuable asset at any stage of development, including the prenatal phase from its inception, stillborn children must also be treated with respect and dignity. It is unacceptable for the tissues of miscarried fetuses to sometimes be treated as medical waste.<sup>18</sup>

According to section 3, item 5, part XV of the annex to the Minister of Health's regulation of August 16, 2018, on the organizational standards of perinatal care<sup>19</sup>, a patient must be allowed to say goodbye to their deceased child in the presence of close persons if they wish to do so. The woman may be accompanied by a staff

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<sup>15</sup> Dz. U. 2015 poz. 225.

<sup>16</sup> Kasprzyk, 2024, p. 62.

<sup>17</sup> Główny Urząd Statystyczny, 2021, p. 131.

<sup>18</sup> Najwyższa Izba Kontroli, 2020, pp. 15, 42-50. More on this topic Sadowska, 2024, pp. 104-106.

<sup>19</sup> Dz. U. 2018 poz. 1756.

member (psychologist, doctor, midwife, or nurse), clergy, social worker, or family members. Most women who have lost a child feel the need to say goodbye, to touch, hold, and spend time alone with the child, to welcome and simultaneously bid farewell. The literal wording of the provision indicates that the mother's right to bid farewell to her deceased child is initiated when the mother expresses such a need. However, it cannot be excluded that for various reasons, including lack of awareness of their rights, the woman might not inform medical staff of her desire to bid farewell to her deceased child, potentially resulting in this goodbye not taking place. Therefore, for obvious reasons, the woman should first be informed by medical staff about this right and the possibility of exercising it in the event of a stillbirth, including the opportunity to say goodbye to the deceased child in the presence of loved ones. According to section 3, item 8, part XV of the 2018 regulation on perinatal care, women in special circumstances are to be informed of their rights. Furthermore, the patient's right to information about their rights stems from Article 11, paragraph 1 of the Act of November 6 on Patient Rights and the Patient Ombudsman.<sup>20</sup> As Monika Sadowska notes, the obligation to inform patients about their rights is absolute and must be interpreted strictly, meaning that the information must be provided to every patient in a tangible and accessible manner; otherwise, it can be assumed that healthcare providers have only superficially fulfilled their statutory duty. Consequently, a woman who has given birth to a stillborn child should be informed by the healthcare facility of her rights so that she can relate them to her situation.<sup>21</sup>

*De lege ferenda*, in the context of medical law, it is necessary to advocate for even more precise regulations regarding the handling of the remains of stillborn children. Furthermore, hospital regulations should refine the principles regarding parents' (not just mothers') farewell to their child if they wish to do so. Regarding the aforementioned right to information, it should also be proposed that "Both parents – not just the mother – should be the recipients of information about their rights, including the right to burial in connection with the stillbirth".<sup>22</sup>

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<sup>20</sup> Dz. U. 2009 Nr 52 poz. 417.

<sup>21</sup> Sadowska, 2024, pp. 117-118. A separate but equally important issue is the support for medical staff caring for women who have lost a child, in accordance with the principle that „helpers need help”. More on this topic is written by Kornas-Biela, 1999, pp. 179-200.

<sup>22</sup> Sadowska, 2024, p. 119.

## 6 Criminal Law

The criminal law protection of stillborn children is limited to Articles 262 § 1 and 2 of the Penal Code of June 6, 1997.<sup>23</sup> According to these articles, anyone who desecrates human remains, human ashes, or a burial site is subject to a fine, restriction of liberty, or imprisonment for up to two years. As Łukasz Pohl states, “The Polish criminal legislator did not choose to create a unique, exclusive regime of protection for stillborn children. The adopted solution applies generally to every individual from the moment of their death”.<sup>24</sup>

Given the above, the assumption of non-discrimination in the value of human life holds critical importance for the criminal law protection of stillborn children.<sup>25</sup> According to the Supreme Court, “The life of every human being, regardless of age, health condition, level of knowledge, culture, family status, or practical social utility, is a universal value without any qualifier and is subject to the same legal protection”.<sup>26</sup> Although debates among legal scholars persist, many authors argue that prenatal life is accorded the same value under Polish criminal law as postnatal life. As Andrzej Zoll notes, referencing a Constitutional Tribunal ruling, “Life, as an objective value, does not allow for differentiation in its valuation, meaning that every human life is equally valuable. Introducing any differentiation in the value of life among individuals can lead to consequences that are dangerous for a lawful state. In this sense, the life of a renowned artist or scientist and the life of a degenerate drug addict hold the same value as the subject of legal protection. Life is a process that lasts from the moment of conception to death (See the ruling of the Constitutional Tribunal, K 26/96).<sup>27</sup> Throughout this period, life is a value deserving legal protection”.<sup>28</sup>

*De lege ferenda*, in the context of criminal law, it is necessary to propose maintaining the current provisions regarding the protection of human remains, ashes, and burial sites, as well as ensuring their proper application by authorized entities.

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<sup>23</sup> Dz. U. 1997 Nr 88 poz. 553.

<sup>24</sup> Pohl, 2024, p. 65.

<sup>25</sup> In this context, it is worth referencing the work Williams, 1966.

<sup>26</sup> Judgment of the Supreme Court of 17 lutego 1989 r., IV KR 15/89, „Orzecznictwo Sądów Polskich” 1990, nr 5, poz. 234.

<sup>27</sup> Judgment of the Constitutional Tribunal z dnia 28 maja 1997 r., K 26/96, „Orzecznictwo Trybunału Konstytucyjnego” 1997, nr 2, poz. 19.

<sup>28</sup> Zoll & Zoll, 1999, pp. 213-214. Similarly Daszkiewicz, 2000, pp. 13-14.

## 7 Conclusion

The dispersion of legal protection for the remains (remnants) of stillborn children within the Polish legal system is significant. At this stage of cultural and legal system development, a single normative act consolidating these regulations into one law seems challenging.

Nevertheless, it is necessary to propose, in line with the recommendations of this study, amendments to the regulations to fully realize international and national guarantees regarding human dignity and children's rights.

Human dignity cannot be differentiated based on age, whether before or after birth. The duration of pregnancy or the manner of its termination does not negate the humanity of the lost child, given the inherent dignity that belongs to every individual and, consequently, the legal subjectivity of a human being from the moment of conception to natural death, regardless of the stage of life at which death occurs.

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