

# LEGAL REGULATION OF HUMAN REPRODUCTIVE RIGHTS: THEORETICAL PRINCIPLES AND PRACTICAL ASPECTS OF THE USE OF ASSISTED REPRODUCTIVE TECHNOLOGIES

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**Annotation.** The article is devoted to the study of the legal nature and content of reproductive rights as a component of somatic human rights. The place of reproductive rights in the system of personal non-property rights is analyzed, and the features of legal regulation of assisted reproductive technologies in Ukraine are examined. It is determined that reproductive rights have a complex nature and cover a wide range of rights related to the implementation of human reproductive function, including both positive rights (the right to artificial insemination, the use of assisted reproductive technologies) and negative rights (the right to sterilization, artificial termination of pregnancy). The absence of a comprehensive regulatory act that would systematically regulate the issue of reproductive rights in Ukraine has been established. The necessity of developing a concept of reproductive rights that would take into account the interests of the state and the nation as a whole and would consolidate the mechanisms of constitutional protection and exercise of reproductive rights is substantiated.

**Key words:** reproductive rights, somatic rights, assisted reproductive technologies, personal non-property rights, surrogacy, artificial insemination, legal regulation.

## 1. Statement of the problem.

The relevance of the subject of research is due to the fact that in accordance with the rapid development of medical technologies, a problem arises in determining the role of reproductive rights, which are included in somatic rights. In international legal documents, which enshrine the basic principles of the development of biomedicine, considerable attention is paid to the issues of legal regulation of somatic human rights. Somatic rights are increasingly becoming an object of study in legal science, because the separation of these rights into a separate category is a logical process that arises as a result of the development of the subjective rights of the individual.

## 2. Analysis of the source base.

Among domestic and foreign scientists who have studied individual aspects of reproductive rights, it is worth mentioning O. Vlasova, E. Perevozchikova, G. Romanovsky, O. Pund, S. Buletsa, L. Krasnytska, P. Rabinovych, O. Ballaev, etc. However, usually reproductive rights are considered by scientists either in the context of the right to life, or in the context of the right to health, or in the meaning of general constitutional law.

**3. The purpose** of the work is to study the legal nature and content of reproductive rights as a component of somatic human rights, analyze their place in the system of personal non-property rights, determine the features of the legal regulation of assisted reproductive technologies in

Ukraine, and develop proposals for improving national legislation in the field of protection and implementation of reproductive rights.

#### 4. Presentation of the research material.

The modern concept of reproductive rights includes the right of married couples and individuals to achieve the highest possible level of reproductive health, the right to freely and responsibly make decisions regarding the reproduction of offspring without any discrimination, coercion and violence, to have the necessary information for this and to have access to the most effective and safe methods of family planning and methods of overcoming infertility.

When determining the legal nature of reproductive rights, it should be noted that they are complex in nature and include a number of personal rights that are enshrined in international legal documents on human rights and freedoms, as well as in the Constitution. Thus, the most direct relationship to reproductive rights is the right of every person to life, the right to health protection, physical integrity, inviolability of private life, personal, family secrets, as well as the right to protection of personal dignity and the principle of equality of men and women.

The formation of the paradigm of sexual and reproductive rights arose in response to the activities of women's movements around the world, which fought for freedom from male violence against women's bodies, from patriarchal control over their sexuality with various manifestations: from rape in marriage to sexual violence in war, from humiliating traditions, such as virginity and pregnancy testing, to pre-sexual selection of the sex of the future child and the murder of female infants.

Article 3 of the Constitution of Ukraine stipulates: "a person, his life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value." At the same time, today in Ukraine there is no separate regulatory act that would enshrine reproductive rights. These rights follow from the content of a person's right to motherhood (Article 49 of the Family Code of Ukraine) and fatherhood (Article 50 of the Family Code of Ukraine). Among scientists, reproductive rights are usually divided into positive rights – the right to artificial insemination, and negative rights – sterilization, abortion. This classification is characterized by the presence of positive and negative aspects of freedom.

Positive human rights record the obligations of the state, individuals and organizations to provide citizens with certain benefits, to perform certain actions. The implementation of positive rights is impossible without the state having sufficient resources, their specific content directly depends on the wealth of the country and the democratic nature of its political system [1, p. 67].

The sphere of human reproductive activity concerns his private life, note A. Dutko and M. Zabolotna, non-interference in which is guaranteed by the Constitution of Ukraine, norms of international legal acts. The content of the constitutional right to the inviolability of personal and family life is very dynamic. It is constantly changing, and therefore, with the development of legal relations arising in the exercise of reproductive rights, the private life of a person, in addition to other aspects, should include the ability to freely make decisions in the exercise of reproductive activity, thus realizing the right to freedom of reproductive choice. In view of this, scientists believe that the absence of Ukraine's own concept of reproductive rights, which would take into account primarily the interests of the state and the nation as a whole and would consolidate the mechanisms of constitutional protection and exercise of reproductive rights, is unacceptable [2, p. 83].

Interesting from the point of view of our study is the dissertation work of V. Chechersky. The study provides the author's definition of the human right to reproduction (reproduction) – this is a fundamental personal non-property right to free, voluntary, personal decision-making regarding the implementation of the reproductive function, which consists in the birth or refusal to give birth to genetically related children, their number and intervals between their births, as well as the use of available reproductive technologies to achieve this goal. The scientist noted the relationship of this right with other rights and stated that it should be distinguished from other outwardly similar rights, as well as such generalizing definitions as "rights related to the human right to reproduction

(reproduction)" and "reproductive rights". Rights related to the human right to reproduction (reproduction) are those rights that are directly designed to facilitate the realization by a person of his fundamental right to reproduction (reproduction), and human reproductive rights are a set of rights that a person possesses in the reproductive sphere [3, p. 22].

Determining the legal nature of reproductive rights, A. Dutko and M. Zabolotna believe that they should be interpreted as a type of so-called personal rights, which are a subspecies of personal human rights. According to scientists, these rights are complex in nature and cover a whole range of personal rights, which are enshrined in international legal documents on human rights and freedoms, in laws and other legal acts. The norms that form the basic conditions for the implementation of reproductive rights include Articles 27-29 of the Constitution of Ukraine, which enshrine the right to life, respect for dignity, freedom and personal integrity, 86 Article 24 of the Constitution of Ukraine, which proclaims the principle of equality, and others [2, p. 84].

At the international level, writes T. Dlugopolska, the issue of reproductive rights has been little studied, although the problem of their legal definition is given significant importance. The concept of reproductive rights, the scientist believes, was first enshrined in paragraph 7.2 of the Program of Action of the International Conference on Population and Development (Cairo, September 5–13, 1994) and was further developed in paragraph 95 of the Platform of Action, which was approved following the results of the Fourth World Conference on the Status of Women (Beijing, September 4–15, 1995). This act states that reproductive rights are based on a set of fundamental rights, namely: all married couples and individuals to freely make responsible decisions regarding the number of their children, the intervals between their births, the time of their births and the information and means necessary for this; to achieve the highest possible level of sexual and reproductive health; to make decisions about reproductive behavior in the absence of discrimination, coercion to violence; the right to information, access to safe, effective methods of family planning and the right to access appropriate health services. However, the researcher writes, international legal documents relating to human rights and which are basic in this area, in particular the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, do not mention the above-mentioned rights [4, p. 104].

The system of reproductive rights, according to the above-quoted scientist, should include: the right to reproductive choice; the right to reproductive health; a woman's right to artificial termination of pregnancy; the right to artificial insemination and embryo transfer into a woman's body; the right to donation and preservation of reproductive cells; the right to use the surrogacy method; the right to sterilization; the right to use contraception; the right to prevention and treatment of infertility; the right to information about reproductive rights; the right to confidentiality of information regarding the exercise of reproductive rights; the right to protection of reproductive rights [4, p. 107].

The problem of reproductive rights or individual reproductive capabilities was discussed quite a lot in civil science. Thus, the issue of legal regulation of birth rate was raised in Soviet times. However, reproductive rights as an independent category of personal rights of an individual, E. Mukhamedova points out, were not recognized, since it was more about methods of state influence on one of the spheres of human activity [5, p. 138].

According to R. Stefanchuk, the interpretation of reproductive rights exclusively as a component of the right to life, which was adopted by the Central Committee of Ukraine, is unacceptable, since the right to life has its own clearly defined structure. These rights are delimited by object. Thus, if the object of the right to life is a personal non-property good – the life of the person who bears this right, then the object of reproductive rights is the exercise of the reproductive function, which is aimed at conceiving the lives of other persons. Understanding reproductive rights exclusively as a component of the right to health care is also considered by scientists to be a rather narrow understanding, since these rights are also characterized by a number of positive powers. Reproductive rights should be considered as a system of separate personal non-property rights of individuals that ensure their natural existence and are aimed at exercising the reproductive function of individuals [6, p. 348-349].

According to E. Mukhamedova, reproductive rights should be understood as rights related to human reproduction, aimed at achieving a state of complete physical, mental and social well-being in the sphere of exercising reproductive capabilities (reproductive health) by freely resolving issues of childbearing and family planning, and consist in the possibility of a woman freely performing artificial abortion, performing sterilization at the request of a woman or man, using assisted reproductive technologies only for medical indications, and are also characterized by the properties of the personal non-property right of an individual to health, as part of which they are provided for, or an integral element of which they are [5, p. 140].

At the same time, it should be noted that the concept of reproductive human rights is based, first of all, on the human right to life. With the development of scientific and technological progress in biology and medicine, writes B. Ostrovskaya, its content is expanding, which encourages the transformation of the idea of the right to life, not only as the main fundamental human right, but also as a complex of rights that relate to human life (directly related to the physical existence of a person as a biological being) through the prism of bioethics and international law. As a result, the issues of protecting the human genome from unlawful interventions, protecting the right to life at the prenatal stage of human development, violating the principle of informed consent in matters of donation and transplantation, protection from involuntary biomedical intervention in the human body, etc. are raised. The right to life as a fundamental natural human right is inextricably linked to the concept of human dignity and permeates all areas of research in biomedicine that raise the question of the moral permissibility of their application to humans [7, p. 332].

O. Punda fills the content of the right to life with two groups of rights. At the same time, the first group of rights, which he calls reproductive, includes the right to artificial termination of pregnancy, the right to sterilization, the right to artificial insemination and embryo transfer into a woman's body [1, p.96]. Within the scope of our research, we consider it necessary to consider the right to artificial insemination in more detail.

The right to artificial insemination should be considered in accordance with the subjects, on the one hand, as the right to surrogate motherhood, that is, this right of a man and a woman granted to a third party (surrogate mother) to carry and give birth to a child and, on the other, as the right of the woman herself, with the help of assisted reproductive technologies to conceive and bear a healthy child. Assisted reproductive technologies (hereinafter referred to as ART) are methods of treating infertility, in which manipulations with reproductive cells, individual or all stages of preparation of reproductive cells, the processes of fertilization and development of embryos before their transfer to the patient's uterus are carried out *in vitro* [8].

In Ukraine, the legal regulation of the right to artificial insemination using assisted reproductive technologies is defined in the Civil Code, the Family Code, the Order of the Ministry of Health No. 787 "On Approval of the Procedure for the Application of Assisted Reproductive Technologies in Ukraine", the Law of Ukraine "Fundamentals of the Legislation of Ukraine on Health Care".

Today, the current legislation of Ukraine grants a person a number of new biomedical rights. Thus, in accordance with Article 48 of the Fundamentals of the Legislation of Ukraine on Health Care, the use of artificial insemination and embryo implantation is permitted – in accordance with the conditions and procedure established by the Ministry of Health of Ukraine, according to medical indications of an adult woman with whom such an action is performed, provided that there is written consent from the spouses, the anonymity of the donor is ensured and medical confidentiality is maintained. The implementation of the right to artificial insemination and germ cell donation is defined by the Order of the Ministry of Health of Ukraine dated September 9, 2013 No. 787 "On Approval of the Procedure for the Application of Assisted Reproductive Technologies in Ukraine" [8]. The document deals with the use of reproductive technologies such as *in vitro* fertilization, intrauterine insemination, gamete and embryo donation, and surrogate (substitute) motherhood.

Part 7 of Article 281 of the Civil Code of Ukraine establishes the norm according to which an adult woman or man has the right, on medical grounds, to conduct treatment programs of assisted reproductive technologies in accordance with the procedure and conditions established by law. And Part 1 of Article 290 of the Civil Code of Ukraine allows an adult capable individual to be a donor of blood, its components, as well as organs, other anatomical materials, and reproductive cells.

One of the most common bioethical problems, notes B. Ostrovska, is the correlation of human reproductive rights with the right to life when using various methods of assisted reproductive technologies (homologous and heterologous fertilization *in vivo*, *in vitro*). Typically, the scientist points out, artificial insemination (in particular *in vitro*), which aims to assist in human reproduction, is accompanied by a high percentage of embryo mortality (due to their natural death and deliberate destruction), compared to the number of those who will be given a chance to live. The technology involves the creation of a deliberately larger number of embryos for the purpose of their further selection (selection) both at the pre-implantation stage (when unnecessary frozen embryos are used for experiments as biomaterial or destroyed), and at the post-implantation stage (which subsequently ends with the reduction of "excess" embryos – the performance of selective abortion). In this regard, at the level of international law, the issue of the legal status of human embryos and gametes is raised in view of their destruction (selection and reduction) when using assisted reproductive technologies. The lack of a single international legal act regulating the use of ART, the scientist we quoted also emphasizes, causes discrepancies in the legal status of the human embryo due to different national legislation of countries, in particular, problems related to surrogacy. This urgent problem is also closely intertwined with the problem of artificial termination of pregnancy. Currently, there is an urgent need in international law to adopt a unified act to protect human life at the prenatal stage of its development [7, p. 335].

Today, A. Golovashchuk points out, there are a large number of types of ART used in the treatment of infertility in the world. Analyzing the content of the Order of the Ministry of Health No. 771, the scientist notes, we can conclude that the following types of assisted reproductive technologies are used in Ukraine:

- *in vitro* fertilization – a method of treating infertility, in which fertilization of the egg is carried out outside the woman's body. It is also called *in vitro* fertilization, or artificial insemination;
- intrauterine insemination – one of the forms of infertility treatment and can be carried out by introducing prepared sperm into the uterine cavity;
- gamete or embryo donation – a procedure in which donors, with written, voluntary consent, provide their reproductive cells – gametes (sperm, oocytes) or embryos for use in other persons in the treatment of infertility;
- surrogacy – one of the types of infertility treatment. However, the current legislation of Ukraine does not define the concept of surrogacy, it exists only in social relations related to modern reproductive technologies;
- ICSI method (from the international name of the ICSI method – Intracytoplasmic Sperm Injection);
- IMSI method (from the international name IMSI – Intracytoplasmic Magnificant Sperm Injection);
- MEZA method (from the international name MESA – Microsurgical epididymal Sperm Aspiration);
- PEZA method (from the international name PESA – Percutaneus Sperm Aspiration);
- TEZA method (from the international name TESA – Testicular Sperm Aspiration); – TESE method (from the international name TESE – Testicular Sperm Extraction);
- transfer of gametes, zygotes or embryos to the fallopian tube (GIFT, ZIFT and EIFT) and others [9, p. 190].

However, today not all scientists share the need for ART. Thus, in particular, according to G. Tereshkevych, an alternative to assisted reproductive technologies is NaProTechnologies (Natural Procreation Technologies), which are based on establishing the causes of infertility and correcting disorders of natural processes that cause infertility in the body of a man and a woman, and are aimed at conceiving and carrying a child, which involves modern medical and surgical treatment. In addition, NaProTechnologies make it possible to overcome the problem of habitual miscarriages and premature births in cases where it is impossible to detect such disorders with the standard approach. With their help, early diagnosis and treatment of various gynecological disorders is



possible: premenstrual syndrome, recurrent ovarian cysts, uterine bleeding, as well as postpartum depression. They make it possible to determine in detail the date of conception of the child, which is very important for planning examinations during pregnancy and predicting the date of birth. This new direction in reproductive technology was initiated in the 1990s by T. Gilgers (USA), professor at Creighton University, director of the Pope Paul VI Institute for the Study of Human Reproduction, who was one of the few doctors and scientists in the world to begin scientific research into the natural cycle of a woman in the 1970s. The treatment of female infertility is based on the Creighton model, a popular method of observing the female fertility cycle in the USA, which allows for an objective assessment of hormonal changes during the cycle. NaProTechnologies clinics also operate in Ireland, England, France, Germany, Slovakia, Poland [10, p. 24].

## 5. Conclusions.

The conducted research allows us to assert that reproductive rights are a complex legal phenomenon that occupies a special place in the system of personal non-property human rights. These rights are of a complex nature and cover a wide range of rights related to the implementation of human reproductive function, including both positive rights (the right to artificial insemination, the use of assisted reproductive technologies) and negative rights (the right to sterilization, artificial termination of pregnancy).

An analysis of the current legislation of Ukraine indicates the absence of a comprehensive regulatory act that would systematically regulate the issue of reproductive rights. Currently, legal regulation of this area is carried out fragmentarily through the norms of the Constitution of Ukraine, the Civil and Family Codes, as well as by-laws of the Ministry of Health. This creates certain gaps in the legal provision for the implementation of citizens' reproductive rights.

Special attention is required by the legal regulation of assisted reproductive technologies, which in Ukraine is carried out mainly at the level of departmental orders. The absence of a single international legal act regulating the use of ART leads to discrepancies in the legal status of human embryos due to different national legislation of countries, which is especially relevant for the institution of surrogacy. Prospects for further research are related to the need to develop a concept of reproductive rights in Ukraine, which would take into account primarily the interests of the state and the nation as a whole and would consolidate the mechanisms of constitutional protection and exercise of reproductive rights. It is also important to study the international experience of legal regulation of this area and the possibilities of its adaptation to the national legal system of Ukraine.

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