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Reproductive health and human rights: concept, features and classification

РЕПРОДУКТИВНОЕ ЗДОРОВЬЕ И ПРАВА ЧЕЛОВЕКА: КОНЦЕПЦИЯ, ОСОБЕННОСТИ И КЛАССИФИКАЦИЯ

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Written by:

Shevchuk Oleksandr²³³

ORCID: 0000-0003-4864-7316

Harashchuk Volodymyr²³⁴

ORCID: 0000-0003-1879-2854

Protsiuk Igor²³⁵

ORCID: 0000-0003-0546-6187

Mokhonchuk Sergii²³⁶

ORCID: 0000-0003-2515-261X

Naumova Kseniia²³⁷

ORCID: 0000-0002-7293-4414

Abstract

The article explores the features of reproductive health legal regulation in Ukraine. The concept of “reproductive rights” is proposed, their basic principles are revealed, elements of the system of such human rights and criteria for their classification are introduced. Legal norms don't fully provide opportunities for individuals' reproductive rights realization and preservation of their reproductive health.

The purpose of the article is to disclose the features of legal regulation of reproductive rights implementation when studying the concepts of “health and human rights” and “the concept of reproductive rights”. The methodology of this research is based on use of general scientific and special cognitional methods. Comparative legal and comparative methods have allowed studying of laws governing the human right to access “assisted reproductive technologies”. The formal logical method was used to differentiate the criteria for distinguishing between legal structures “reproductive health”, “protection of reproductive health” and “reproductive rights”. The modeling, analysis and synthesis methods made it possible to identify the legal basis for human rights protection in reproductive health field, the principles for reproductive rights implementation, the reproductive rights system and their classification, and deficiencies in legal regulation. The results of this work allowed us to

Аннотация

В статье исследованы особенности правового регулирования охраны репродуктивного здоровья в Украине. Предложено считать, что репродуктивные права являются неотъемлемыми правами человека. Установлено, что подход к репродуктивному здоровью на основе прав человека обеспечит предоставление современных, доступных и качественных медицинских услуг в сфере репродуктивного здоровья. Непосредственным назначением всех репродуктивных прав является обеспечение продления жизни. Предложено понятие «репродуктивных прав», и раскрыты его основные принципы, наведены элементы системы таких прав человека и критерии их классификации. Выяснено, что правовые нормы не обеспечивают в полной мере условий и возможностей для реализации репродуктивных прав физических лиц и сохранения их репродуктивного здоровья.

Целью статьи является раскрытие особенностей правового регулирования реализации репродуктивных прав при изучении концепции «здоровье и права человека» и «концепции репродуктивных прав». Методология данного исследования основана на использовании общенаучных и специальных методов познания. Сравнительно-правовой и компаративные методы пригодились при изучении

²³³ Doctor of Law sciences, Professor of the Department of Administrative Law and Administratively Activities, Yaroslav Mudryi National Law University, Ukraine.

²³⁴ Doctor of Law sciences, Professor of the Department of Administrative Law, Yaroslav Mudryi National Law University, Ukraine.

²³⁵ Doctor of Law sciences, Professor of the Department of Theory and Philosophy of Law, Yaroslav Mudryi National Law University, Ukraine.

²³⁶ Doctor of Law sciences, Professor of the Department of Criminal Law №1, Yaroslav Mudryi National Law University, Ukraine.

²³⁷ Candidate of Law, secretary of the correspondence faculty №1, Yaroslav Mudryi National Law University, Ukraine.

identify the legal problems of legislation that arise in the reproductive human rights implementation. It was proposed the adoption of a single legislative act in Ukraine, which would comprehensively regulate the reproductive health protection, consolidate reproductive human rights and provide guarantees for their implementation.

Keywords: assisted reproductive technologies, human rights, legal regulation, reproductive health, reproductive.

Introduction

Reproductive health care has been identified by WHO at the global level as a priority industry in accordance with a resolution of the United Nations World Health Assembly (1995). Reproductive health of the population is an important determinant of the effectiveness of state social policy. According to the Ministry of Health of Ukraine, the level of infertility in Ukraine reaches almost 20%. This means that every 5th Ukrainian couple cannot conceive a child in the traditional way. In 2016, in the structure of infertility, 77.7% accounted for female and 22.3% for male causes (Stasiv Kh.-O. J., & Zaliska O. M., 2018, p. 32). It is also important that the legal regulation of opportunities securing a person's ability to reproduce and ensuring the exercise of these rights is insufficient and unsystematic (Bilynska M.M. & Mokretsov S.E., 2010, p. 199). Reproductive rights are inalienable human rights that are already recognized in national laws, international human rights instruments and other generally recognized acts (Dashkovska O.R., 2018, p.20). In addition, according to the World Congress of the European Community of Human

законодательных актов, регулирующих право человека на доступ к «вспомогательным репродуктивным технологиям». Формально-логический метод использовался для дифференциации критериев разграничения правовых конструкций «репродуктивное здоровье», «охрана репродуктивного здоровья» и «репродуктивные права». Методы моделирования, анализа и синтеза дали возможность выявить правовую основу защиты прав человека в сфере репродуктивного здоровья, принципы реализации репродуктивных прав, систему репродуктивных прав и их классификацию, а также недостатки правового регулирования. Результаты данной работы позволили нам определить правовые проблемы законодательства, которые возникают при реализации репродуктивных прав человека. Предложено принятие единого законодательного акта в Украине, который бы комплексно урегулировал охрану репродуктивного здоровья, закреплял репродуктивные права человека и обеспечивал гарантии их осуществления.

Ключевые слова: вспомогательные репродуктивные технологии, права человека, правовое регулирование, право на защиту репродуктивных прав, репродуктивное здоровье, репродуктивные права.

Reproduction and Embryology, the number of children born as a result of assisted reproductive technologies in 2012 reached five million since the birth of the first “in vitro” child in July 1978 (Grigorenko O.V., 2016). All of the above indicates the relevance of the work. This study discusses the features of the implementation of reproductive human rights, determines their content, principles, types and criteria for classification, as well as legal problems of law enforcement.

Theoretical framework

In this paper, we consider certain aspects of the legal regulation of the realization of the right to access additional reproductive technologies when studying the concepts of “health and human rights” and “the concept of reproductive rights”. The concept of reproductive rights arose when it became necessary (in addition to controlling population growth and demographic changes in the world associated with epidemics, identifying new diseases) to pay attention to a more holistic approach to women's health

(Hartmann B., 1987, p. 12). Problems in the realization of reproductive rights have been studied by scientists in other countries. So, Wallace M.E., Evans M.G., & Theall K. (2017) studied reproductive rights in connection with preterm birth and low birth weight in different states of the United States. Gozdecka D. A. (2020) addressed the legal issues of women's reproductive rights in Ireland and the United States. DeBeaudrap P., Mouté C., Pasquier E., Mac-Seing, M., Mukangwije P. U., & Beninguisse, G. (2019) examined the features of reproductive health access for Cameroonian citizens with disabilities. Silvers, A., Francis, L. & Badesch B., (2016) drew attention to the implementation of access for women with disabilities to procedures such as cesarean section or sterilization; the authors indicate that such categories of patients should have access to reproductive rights, including family planning. Aiken A.R. (2019) addressed access issues for women's reproductive rights in the United States. Thus, the need to further study the problems of legal regulation of the human right to access assisted reproductive technologies and how to protect it is an urgent research topic both in Ukraine and in the world.

Methodology

The methodology of this research is based on the use of general scientific and special methods of cognition. Comparative legal and comparative methods have allowed to study the legislative acts regulating the human right to access "assisted reproductive technologies". The formal logical method was used to differentiate the criteria for distinguishing between legal structures "reproductive health", "protection of reproductive health", and "reproductive rights". The methods of modeling, analysis and synthesis made it possible to identify the legal basis for the protection of human rights in the field of reproductive health, the principles for the implementation of reproductive rights, the system of reproductive rights and their classification, as well as the deficiencies in legal regulation.

Results and discussion

The Constitution of Ukraine provides that a person, his life and health, honor and dignity, integrity and security are recognized in Ukraine as the highest social value (Article 3); the equality of constitutional rights and freedoms of citizens of Ukraine and the inadmissibility of privileges or restrictions, including on the basis of sex, are proclaimed (Article 24); state

protection of the family, childhood, motherhood and fatherhood (Article 51) (Law of Ukraine No. 254k / 96 of June 28, 1996). These legal norms form the basic conditions for the implementation of reproductive rights.

The right to reproductive rights is governed by the Family Code of Ukraine, the Civil Code of Ukraine, the Law of Ukraine "Fundamentals of the legislation of Ukraine on health" and orders of the Ministry of Health of Ukraine and other documents. The Law of Ukraine "Fundamentals of the Legislation of Ukraine on Health Protection" establishes only the use of artificial insemination and implantation of an embryo for medical indications of an adult woman with whom such an action is carried out, subject to the written consent of the spouses, ensuring the donor's anonymity and maintaining medical confidentiality (Article 48) (Law of Ukraine No. 2801-XII of November 19, 1992). However, it does not define: the term "surrogate motherhood"; indication of the use of other methods of assisted reproductive technologies; definitions "assisted reproductive technologies", "artificial insemination", "embryo implantation", "surrogate mother".

The Family Code of Ukraine contains provisions that the wife has the right to motherhood (Article 49), and the husband has the right to fatherhood (Article 50), that is, the right to reproductive rights is provided for at the legislative level. The Family Code of Ukraine also defines the age of marriage (Article 22) and secures the rights and obligations of spouses (section 3). In Ukraine, the marriage age for women and men is set at 18 years. If there are good reasons for a person to apply, a court decision can provide him with the right to marry after reaching the age of 16, if it is established that this is in his interests (Article 22) (Law of Ukraine No. 2947-III of January 10, 2002). The family consists of people who live together, connected by common life, have mutual rights and obligations (Article 3). However, living with a family of a woman and a man without a marriage is not a reason for their rights and obligations of spouses (part 2 of article 21) (Law of Ukraine No.2947-III of 10 January, 2002). Therefore, the application of the right to reproductive rights is determined only for spouses.

The Civil Code of Ukraine enshrines the right to life (Article 281), the right to information about the state of one's health (Article 285) and secrecy about the state of one's health (Article 286). It was also established that the provision of medical services to a person who has reached the age of

fourteen is carried out with his consent. Persons under the age of 14 receive medical care with the consent of their legal representatives (part 3 of article 284). The right to personal security is also defined (Article 289). A capable adult has the right ... to be a donor of reproductive cells (Article 289). Part 7 of Art. 281 of the Civil Code of Ukraine, it is established that an adult man and woman have the right to conduct treatment programs with assisted reproductive technologies for medical reasons (Law of Ukraine No. 435 -IV of January 16, 2003). So, the legislation of Ukraine, regulating the right of access to reproductive rights, is focused on establishing the right of adult men and women to freely decide on the number of children and the length of time between their births.

The implementation of reproductive rights is carried out using assisted reproductive technologies. This definition refers to methods of treating infertility in which manipulations with reproductive cells, individual or all stages of preparation of reproductive cells, the process of fertilization and development of embryos before they are transferred to the patient's uterus are performed *in vitro*. As for the term “*in vitro*”, this is a method for conducting an experiment or other manipulations in special laboratory glassware or in a controlled environment outside a living organism (paragraph 1.2 of the order of the Ministry of Health of Ukraine No. 787 of September 09, 2013). The implementation of reproductive rights is carried out using assisted reproductive technologies. This definition refers to methods of treating infertility in which manipulations with reproductive cells, individual or all stages of preparation of reproductive cells, the process of fertilization and development of embryos before they are transferred to the patient's uterus are performed *in vitro*. As for the term “*in vitro*”, this is a method for carrying out an experiment or other manipulations in special laboratory glassware or in a controlled environment outside a living organism (paragraph 1.2 of the order of the Ministry of Health of Ukraine No. 787 dated September 09, 2013).

In Ukraine, the following types of assisted reproductive technologies are used: 1) *in vitro* fertilization (*in vitro* fertilization, or artificial insemination) - a method of treating infertility in which the egg is fertilized outside the woman's body; 2) intrauterine insemination - one of the forms of infertility treatment, can be carried out by introducing prepared sperm into the uterine cavity; 3) donation of gametes or embryos - a procedure in which donors, after signing a

voluntary consent, provide their germ cells - gametes (sperm, oocytes) or embryos for use by others in the treatment of infertility; 4) surrogacy is one of the types of infertility treatment (Ministry Order health care of Ukraine No. 787 of 09 September, 2013). This normative legal act regulates the implementation of assisted reproductive technologies only for medical reasons, that is, it is used precisely as a method of treating infertility.

Assisted reproductive technologies are used in medical institutions licensed to carry out entrepreneurial activities in medical practice, and have been accredited. In addition, the medical institution must have an appropriate set of premises, equipment and specially trained medical staff working in this institution. So the oocytes donor can be a woman aged 18-36 years. Also, a sperm donor can be a man aged 20 to 40 years old with his own healthy child already born (Ministry Order health care of Ukraine No. 787 of 09 September, 2013). So, legislative age restrictions are justified, because only at a certain age people are able to produce high-quality reproductive material.

Please note that in Art. 10 of the Law of Ukraine “On Amending the Law of Ukraine “On Prevention of Acquired Immunodeficiency Syndrome (AIDS) and the Social Protection of the Population”” defined: people living with HIV have the right to participate in assisted reproductive technologies, provided that HIV is not transmitted from parents to an unborn child (Law of Ukraine No. 2861-VI of December 23, 2010). Therefore, the use of any “assisted reproductive technology” methods is not prohibited for HIV-infected patients. However, such services to HIV-infected women are not defined in by-laws and are not provided in Ukraine today.

The principles for the implementation of reproductive human rights are divided into two groups: general and special. The general principles are recommended to include the following principles: reasonableness, justice, honesty, respect for human and civil rights, autonomy of will, legality. In turn, the special principles are: validity, appropriateness and timeliness, proper quality of medical care, information on reproductive health, interdependence of reproductive rights (Grigorenko O.V., 2016, p. 101).

In the field under study, we should distinguish between definitions of such concepts as “reproductive health”, “reproductive health

care”, “reproductive personal non-property rights of individuals”, “reproductive rights”. The term “reproductive health care” should be understood as a set of methods, procedures and services that contribute to maintaining reproductive health and well-being by preventing and resolving reproductive health problems (Radish Y.F, Pozhivilova O.V., & Gakalo V.V. 2011, p. 68). Reproductive health must be considered as part of public health — a medical and social resource and the potential of society to contribute to national security (Mokretsov S.E. 2010, p.127). According to other scientists, “reproductive health” is a state of complete physical, mental and social well-being, and not just the absence of diseases in everything that relates to the reproductive system, its functions and processes in it.

There is no single concept of “reproductive rights” in scientific sources, this term is not defined in national legislation. The definition of “reproductive rights” is given in international documents. For example, the 1994 Program of Action of the International Conference on Population and Development (Cairo) defined reproductive rights as specific human rights that are already established in national legislation, international human rights instruments, and other harmonized documents (Program of Action of the International Conference on Population and Development, 1994). According to the Platform for Action adopted at the Beijing Conference in 1995, reproductive rights are based on a set of fundamental rights of all couples and individuals, namely: 1) on the right to freely decide on the number of children, the intervals between their birth and have the necessary information for this and means; 2) the right to achieve the highest possible level of sexual and reproductive health; 3) the right to make decisions regarding the reproduction of offspring without any discrimination, coercion or violence; 4) the right to information and access to safe and effective family planning methods, including the right to access appropriate health services (International document No. 995_507 of 15 September, 1995).

According to the content and essence of the category of “reproductive rights” in scientific sources, it is advisable to distinguish three of their main characteristics: 1) reproductive rights are independent and separate in nature; 2) have their own affiliation or to the individual’s right to life; 3) are an integral element of the right to health (Mukhamedova E.E., 2012, p. 138; Kurilo T.V., 2017, p. 67). So, reproductive right is the right to health, which is a set of legal norms designed to ensure the normal functioning of a

person, his physical and mental well-being. The structure of such a comprehensive category of “health” also includes components that contribute to the realization of human reproductive capabilities (Krasavchikova L.O., 1994. p. 140). But Romanovsky G. B. (2009) expresses the opinion that reproductive rights are wider than a kind of right to health protection. The author indicates that the purpose of all reproductive powers is to ensure the extension of life. Khazova O. A believes that reproductive rights are embodied in the right to privacy, the right to information, and the right to health (Khazova O. A., 2000, p. 61). Other scholars proclaim that reproductive rights are a complex set of individuals' abilities aimed at ensuring a person's reproductive function in reproducing their own kind (Stefanchuk R.O., 2004, p. 67). The definition of “reproductive rights” should be understood as the personal non-property rights of an individual to exercise and protect reproductive health, to make free decisions about birth or to refuse to give birth to children, as well as medical, social, informational and consulting assistance in this area, if necessary (Dluhopolska T.I., 2016, p. 106). Wallace M.E., Evans M.G., & Theall K. (2017) indicate that reproductive rights-the ability to decide whether and when to have children-shape women's socioeconomic and health trajectories across the life course. From the scientific point of view of another scientist, the term "reproductive rights" is a guaranteed, state-encouraged opportunity associated with the implementation of various aspects of procreation, in particular with the decision to conceive a child, with the determination of the number of children, intervals between births, using assisted reproductive technologies in if pregnancy cannot occur naturally (Kurilo T.V, 2017, p. 68).

Sometimes the legal construction “reproductive personal non-property rights of individuals” is applied. It means the right of a female and male person to have a genetically related child, and for a female person, the right to bear a child (the right to become pregnant and to be pregnant) and the right to physiological birth (Tyukhtiy N., 2013, p. 71)). However, this concept does not reflect all its components. In our opinion, “reproductive rights” is a set of legal norms aimed at implementing and protecting reproductive health, making free decisions about giving birth or not giving birth to children, as well as medical, social, informational and counseling assistance in using assisted reproductive technologies. Reproductive rights are an independent category of rights of individuals. Reproductive rights are associated with fundamental human rights such

as the right to life, the protection of health, the right to liberty and security of person.

There is no consensus in scientific sources regarding the system of reproductive rights. So, Bedenko-Zvaridchuk O. A. (2010) believes that reproductive rights do not form a special system. The author refers to the content of "reproductive rights": 1) the right to protection of reproductive health (safe motherhood and fatherhood, prevention of sexually transmitted diseases, termination of pregnancy at the request of a woman and for medical reasons); 2) the right to start a family and register a marriage; 3) the right to an independent and free reproductive decision, including the use of assisted reproductive technologies (Bedenko-Zvaridchuk O., 2010, p. 48). Most scholars believe that reproductive rights are a system, but do not indicate a single list of such rights. So, some researchers in the system of reproductive rights distinguish the right to: reproductive choice, reproductive health, information on reproductive rights, confidentiality of information on the implementation of reproductive rights, protection of reproductive rights (Stefanchuk R.O., 2004, p. 68). Other scientists supplement: 1) the right of a woman to terminate an pregnancy artificially; 2) the right to artificial insemination and transfer of the embryo into the body of a woman; 3) the right to donate and preserve reproductive cells; 4) the right to apply the method of surrogacy; 5) the right to sterilization; 6) the right to use contraception; 7) the right to the prevention and treatment of infertility (Dluhopolska T.I., 2004, p.106). The following rights also belong to the system of reproductive rights: 1) obtaining services for reproductive health and family planning; 2) infertility treatment, including using modern assisted reproductive technologies; 3) donation of germ cells and preservation of reproductive cells (cryopreservation); 4) decision-making on medical interventions related to reproductive health, with the exception of life-threatening situations requiring urgent intervention, and in other cases prescribed by law; 5) health care during pregnancy, during and after childbirth; 6) protection of their reproductive rights, including from sexual exploitation and violence, forced pregnancy, abortion, sterilization and other violations of reproductive rights (Dutko A. O., & Zabolotna M. R., 2016, p. 87).

We agree with most scholars that reproductive rights include a combination of different rights. From our point of view, such a system of reproductive rights consists of the following components: 1) the right to reproductive health;

2) the right to protection of reproductive rights; 3) the right to medical care and medical services in the field of human reproduction; 3) the right to information in the field of reproduction and its protection; 4) the right to reproductive choice; 5) the right to equality in the application of assisted reproductive technologies.

Regarding the classification of reproductive rights, we note that according to the semantic content, the rights of a person and a citizen are divided into: 1) personal (civil), 2) political, 3) socio-economic and 4) the cultural rights of person and citizen (Kolishnik V.P., & Barabash Yu.G., 2008, p.110-112). Reproductive rights can be classified into: 1) fundamental: (a) the right to reproductive choice, the right to reproductive health, the right to motherhood, the right to fatherhood, the right to information about reproductive rights, the right to secrecy on the realization of reproductive rights, to protect reproductive rights); (b) those aimed at improving reproductive function (the right to artificial insemination and implantation of the embryo, the right to donate and preserve reproductive cells, the right to use the method of surrogate motherhood); (c) those aimed at maintaining and restoring reproductive function (right for the prevention and treatment of infertility); (d) those that are aimed at terminating the reproductive function (the right to sterilization, the right to contraception, the right of a woman to terminate the pregnancy artificially); 2) according to the degree of spreading reproductive rights: can be common, belonging equally to all individuals; 3) by way of fixing: a) constitutional (basic) - reproductive rights established and guaranteed by the Constitution of Ukraine; b) sectoral, prescribed by law and which are a specification of fundamental human rights (Dutko A. O., & Zabolotna M. R., 2016, p.87- 88).

There are a number of shortcomings and gaps in the legislative regulation of the implementation of reproductive rights. So, in Ukraine there is no single legislative act that would comprehensively and unequivocally determine the protection of reproductive health, consolidate reproductive human rights and provide guarantees for their implementation. Scientific sources indicate the absence of a legislative definition of the concepts of "surrogate mother" and "potential parents", the use of assisted reproductive technologies for unmarried people is not regulated, the rights, duties and responsibilities of participants in assisted reproductive technologies are not defined. There is no clear definition of the legal regime for the human embryo, and there are no

norms that reinforce its protection (Golovashchuk A.P., 2017, p. 56). The quality system in institutions working with human tissues and cells is incomplete, including staff training, procedures for reporting serious negative cases and reactions, informing donors and examining them before taking tissue or cells. There are no donor selection criteria. standards for the preparation of tissues and cells, their processing and for the distribution of the direct supply of individual tissues and cells to the recipient need to be improved, the requirements for the quality and safety of tissues and cells do not meet European standards (Pugach D.O., 2018, p.163).

An urgent problem of legal regulation is also the lack of definition of the rights, duties and responsibilities of citizens, the public administration, legal entities and individuals providing medical services in the field of reproductive health. As a result, numerous human rights violations (Kirichenko T., & Starikova N., 2015, p. 97). In addition to legal, individual scientists point out bioethical problems in the implementation of reproductive rights: 1) the rights of spouses in deciding whether to have or not to have offspring; 2) commercialization of services by assisted reproduction centers; 3) the rights of the doctor and scientist to use for the treatment of assisted reproductive technologies and to conduct research and development in the field of human reproduction; 4) donation of gametes and human embryos; 5) conservation of gametes and human embryos (Kiselev V.A., 2006, p. 142). The resolution of the above problems would be facilitated by the adoption of a single legislative act in Ukraine, which would comprehensively regulate the protection of reproductive health, consolidate reproductive human rights and provide guarantees for their implementation.

Conclusions

The reduction in the population of Ukraine continues for various reasons and is the basis for the active development of areas of the “concept of reproductive rights”, which should be enshrined and guaranteed in a single legislative act of Ukraine, secured and supported by state policy with the aim of procreation, reproduction of the population.

In terms of content, reproductive rights belong to physical rights, which ensure the preservation and development of person as part of the social structure of society and the state. Reproductive rights are inalienable human rights that are

already enshrined in national law and international human rights instruments. A rights-based approach to reproductive health affects the effective development of a public health system. Such an approach will ensure the provision of modern, affordable and high-quality reproductive health services. In addition, it will allow entities that need to protect and protect reproductive health to determine what types of medical services they need.

The problems of the realization by citizens of their reproductive rights are associated with the ineffectiveness of guarantees designed to ensure their real implementation. Among the causes of this problem can be called the contradictions of legal acts regulating the sphere of human reproductive activity, the presence of many gaps. Overcoming these negative phenomena will allow filling reproductive rights with real content and ensuring patients' access to “assisted reproductive technologies”.

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