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BIOETHICAL ASPECTS OF RATIO BETWEEN REPRODUCTIVE RIGHTS OF A HUMAN BEING AND THE RIGHT TO LIFE IN THE PROCESS OF USING ASSISTED REPRODUCTIVE TECHNOLOGIES

Actual bioethical problem of ratio between reproductive rights of a human being and his\her right to life was investigated in this work specifically on the legal status of human embryos and gametes (because of their destruction) during assisted reproductive technology (ART). Issues of selection and reduction are considered. Different methods of assisted reproduction (fertilization in vivo, in vitro, homologous and heterologous) are analyzed in detailed. Absence of universal international legal instrument on regulation of the use of ART, that causes discrepancies of human embryo legal status because of different national legislation, is determined. The attention on prevention of narrowing the scope and content of the right to life as a result of the implementation of reproductive rights is accented. The necessity of adopting a uniform act to protect human life regardless its stage of development is proclaimed.

Key words: right to life, reproductive rights, assisted reproductive technologies, fertilization in vivo, in vitro fertilization, embryo, pre-implantation genetic diagnosis, selection, reduction, bioethics.

Modern scientific and technological progress has led to the possibility of implementing the latest achievements in biology (medicine, genetics). Of course, these achievements have influenced the expansion of the content and scope of reproductive rights, as well as the need for legal definitions and regulations, in particular as a result of assisted reproductive technologies (hereinafter – ART).

However, new opportunities in the field of human reproduction led to the problem of ratio between the reproductive rights and the fundamental right to life. In this context arises the question of possibility of new artificial insemination technology usage, that destroys more embryos than implanted.

The international community, realizing the importance and scale of the issue, sought to develop common standards for their international legal regulation to prevent human rights violations in the application of modern science and technology. In particular, this document at the Council of Europe and UNESCO, such as the Convention on the protection of human rights and dignity for the application of biology and medicine include: Convention on Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (also known as the Oviedo Convention of 04.04.1997)¹ Universal Declaration on Bioethics and Human Rights (19.10.2005)².

However, to the great extent the application of the latest achievements through the implementation of reproductive rights remained in the domestic jurisdiction of the states. It generates differences of legal regulation of these issues in different countries. Even in Europe the legal regime applying ART ranges from liberal to conservative.

Ukraine, Russia, Belarus, Kazakhstan, India have a wide freedom of choice of ART in the legal field of these countries. In contrast, legislation in some European countries (above all – Italy, Germany, France) protects the life of the embryo. Countries with loyal legislation to ART are USA, UK, Belgium, Spain, Czech Republic, Greece and others.

Often, in order to realize their reproductive rights citizens of one country, where there are legal restrictions on the use of ART, go to some other country in which these methods were legalized. This

¹ *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* (Oviedo, 4.IV.1997), No. 164. *Council of Europe Website*. <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164>> (2017, January, 15).

² *Universal Declaration on Bioethics and Human Rights. UNESCO Internet portal*. <http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html> (2017, January, 15).

process is called "reproductive tourism". But the consequence of such travel can lead to refusal to legalize a child (recognition of the child's parents, giving citizenship) or even refusal of entry on returning to the country and deprivation of the child.

Bioethical issues related to the life of embryos vary depending on different methods of assisted reproduction.

Overall ART methods can be divided into groups:

I. In place of fertilization:

– *In vivo*¹ (**intracorporal**), in which fertilization takes place inside female reproductive system;

– *In vitro*² (**extracorporal**), in which fertilization does not take place in a woman, but outside in a special laboratory.

II. According to belonging of cellular material for fertilization:

– **Homologous** in which fertilization is carried out by usage of male and female sex cells (gametes) of a married couple (pair);

– **Heterologous** in which donor insemination (male and / or female) sex cells (from one or more donors) are used.

So modern possibilities of human *in vitro* fertilization have led to appearance of actual problems of ethical nature (especially of the right to life), which did not arise with the usage of artificial insemination *in vivo* in a female body.

One of the main bioethical dilemmas in the field of artificial insemination is that the number of embryos fertilized *in vitro*, which can be successfully implanted *in utero*³, is less than the total number of embryos created. In this aspect there is a need of cryobank functioning to preserve by freezing (cryopreservation) of gametes and embryos, the legal regulation of the terms of their storage and their use for the recipients (through reproductive organ donation).

As a result, arises the problem the fate of "excess" embryos – in particular, their usage not for "direct purpose" (for further birth of a child), but as a biological material for scientific research, as a source of stem cells for cosmetic purposes and so on. So, for the protection human dignity and the right to life in the process of ART application, it is necessary to regulate the legal status of the embryo and even human reproductive cells, and the ability of participation and rights of third parties in the process of reproduction (donor, surrogate mother).

Generally, in the implementation of reproductive rights arise two opposite groups of issues related to the right to life. They relate to: 1) the right to reproduce and the possibility of its realization using modern ART; 2) the ethical and legal problems of leveling the value of life embryos as future children (regardless of their stage and location).

In both cases, the realization of the right to reproduction occurs by free choice (with the desire of parents to have a child when using IVF as well and with reluctance to have a child, or determine the number of children due to the reduction of "excess" embryos), the result of which may be conscious or unconscious deprivation of future children.

Unfortunately, reproductive rights include not only the possibilities to carry out human potential and protection of reproductive health foreseen by law, but give people the opportunity ("right") to make decisions regarding birth or refusal of birth.

Often reproductive rights are considered in the context of gender rights of a woman. This determined the emergence of the Movement for reproductive choice (Pro-choice), which advocated a woman's "right" to abortion through legislative embodiment opportunities to get rid of "undesirable" child through various methods. However, this "right" is opposed to the right to life of a child, which cannot be absorbed by reproductive right, as no international document defines the right to abortion⁴.

The realization of reproductive choice envisages the possibility of human reproductive function both by natural (biological) way and by usage of ART. It includes the right to donation and preservation of reproductive cells, to surrogacy, artificial interruption of unwanted pregnancy, and sterilization as well.

Fertilization *in vivo*

Use of artificial insemination *in vivo*, compared to fertilization *in vitro* (IVF), leads to fewer ethical problems. Primarily due to the fact that such a conception is maximally close to natural. Thus, one of the

¹ From Latin – "in a living body".

² From Latin – "in glass".

³ From Latin – "within the womb".

⁴ *The San José Articles*. <http://sanjosearticles.com/?page_id=2> (2017, January, 15).

the sense that they either remain unborn or meet an early death in many parts of the world...".

"13. The Assembly notes that foetus selection, the rejection of unborn girls and the lack of care given to girls also takes place in Europe in certain immigrant communities which prefer boys".

"20. The Assembly strongly urges Council of Europe member states and the Commissioner for Human Rights to support at the United Nations and other international bodies in which they participate, the abolition of feminicides, including selective abortions against female fetuses".

In contrast in the United States in October 2005 reproductive clinic received permission on PGD for selection of a child's sex on request of a couple to have the second child of the opposite sex for the balance of sexes in the family.

Ukraine joined the Council of Europe on the 9th of November 1995. When joining, it committed itself to respect its general obligations under the Statute of the Council of Europe, including in the field of human rights. So, 09.02.2006 Ukraine ratified the Protocol number 12 to The Convention for the Protection of Human Rights and Fundamental Freedoms (ETS № 177)¹ about the general prohibition of discrimination p.1. Art. 1 which states: *"The respect for any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"*.

From a medical point of view using PGD technology is the prevention of the transmission of hereditary diseases, identification of which the selective destruction of an embryo takes place even before its implantation. Though, in fact, artificial interruption to a future pregnancy takes place, which is different from abortion only in place of it – not *in vivo*, but *in vitro*.

However, there is the risk of damaging the embryo during PGD, and the probability of a false diagnosis (on average 10%), which may result in destruction of a normally developed embryo by mistake or vice versa a sick embryo can be implanted.

But *"the diagnosis that shows the existence of a malformation or a hereditary illness must not be the equivalent of a death-sentence"*². At the same time *"prenatal diagnosis makes it possible to learn about condition of embryo and of foetus when they are still in the mother's womb... It makes possible to anticipate earlier and more effectively, certain therapeutic, medical or surgical procedures"*³.

In the Convention on the Rights of Persons with Disabilities⁴ adopted by the Optional Protocol (A/RES/61/106) (13.12.2006) The United Nations (The States Parties), guided by the general principle of respect for difference and acceptance of persons with disabilities as part of human diversity and humanity, determined that:

- *"Recognizing that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child" (r) of Preamble);*

- *"In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration" (part 2 Article 7);*

- *"States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others" (Article 10);*

- *"Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others" (Article 17).*

Contrary to the above mentioned Convention, a child diagnosed with birth defects in prenatal stage of development remains unprotected until international law justifies the legal definition of a "person" both

¹ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms Rome, (4.XI.2000) <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (2017, January, 15)

² *Instruction on respect for human life in its origin and on the dignity of procreation Replies to certain questions of the day. Official Vatican Website.* <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html> (2017, January, 15).

³ *Instruction on respect for human life in its origin and on the dignity of procreation Replies to certain questions of the day. Official Vatican Website.*

<http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html> (2017, January, 15)..

⁴ *The Convention on the Rights of Persons with Disabilities. United Nations Website.*

<<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>> (2017, January, 15).

from biological point of view and also from psychological, spiritual and social points. In addition, there is a need for the international unification of legal *capacity* of a person (especially in the prenatal stage of development).

As mentioned above, there are various methods of artificial insemination outside the mother's body. Depending on the genetic relationship of gametes of parents to a child, as well as the usage of a surrogate mother's services, it can be divided into homologous and heterologous. Let's consider them more in detail in view of the ethical and legal issues that may arise.

Homologous insemination

The positive side of this IVF method is a common genetic relationship of parents with their future child and nurturing of (genetically own) child in a mother's womb.

At the same time, in vitro fertilization with the following transfer of embryo, called Fecundation In Vitro and Embryo Transfer (FIVET), arises the problem of human embryo life preservation, which is associated with multiple fertilization of embryos, whose number is more than necessary.

The percentage of successful embryo implantation and the guarantee of further normal development of pregnancy with in vitro fertilization is quite low (on average 10-20%). Therefore, as a result this method envisages artificial creation of excess "spare" embryos in case the embryo, implanted in the body, is not accustomed in a woman mother and in case of re-fertilization need. It needs the selection of embryos to minimize the risk of death after implantation.

After successful embryos transfer, who has taken root, all other not implanted embryos can:

- be destroyed (just as not necessary);
- be used as a biomaterial (for medical research experiments, for production of cosmetics and medicines);
- be used to fertilize another woman (but as donor material, resulting in transformation of homologous insemination into heterologous).

The problem of "excess" embryos is not only ethical but also a legal problem, because their reduction is similar in its ultimate aim to abortion.

Heterologous insemination

Donation or selling gametes has certain moral aspects: first of all, there is a big artificial gap between the notion of parenthood and its relationship to the couple. That is, when the birth of a child can be separated from any relationship (physiological, legal) of its biological parents.

One should also stress the difference between blood donation or donation of human organs and male or female sex cells, since the latter have problems related to the origin and termination of the new person.

Surrogacy

Exploring the right to life in aspect of surrogacy should always remember that for many couples the opportunity to have genetically native child became real only by IVF and surrogate mother services.

However, surrogacy also requires compliance to certain technologies, accompanied by some ethical aspects:

- it is carried out by transferring of a human embryo into an organism of a surrogate mother conceived as a result of assisted reproductive technologies (IVF) from the genetic parents or donors (one or both);
- simultaneously, with giving life to child, arises the problem of the right to life of "spare" human embryos, that subsequently become "excess" and can be destroyed. Legal registration of this process takes place through the surrogacy contract that reduces the value of embryo life to a donor biological material and valuable source of stem cells that can be produced and destroyed freely for customers' needs until achievement of a desired result. This consumer attitude to the body of human embryos puts a value of his life dependent on the economic law of demand and supply, thereby artificially defines the beginning and the end of his life as a person.

Therefore, the recognition of the legal status of a person from the moment of conception will avoid irreparable mistakes – relationship to the person, not as a full entity, but as an object of ownership, reduced to a commodity in the market of paid medical services.

No national law can narrow the existing human rights and deprive a human being of its inalienable right to life which is inherent to every human being, regardless of the its stage of development (the child in the prenatal stage, or a newborn child or adult or sick, or elderly person). However, none international document does not define "right" to abortion as one of human rights, but defines as inalienable and fundamental – right of every person to life.

The inability of human embryos to protect its own right to life, guaranteed to everyone, determines the necessity recognition the international legal status of the human embryo at the level of born child.

Article 6 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: about protection of persons not able to consent determines: "*an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit*". Realization faces their reproductive rights to paternity are not identical with the acquirement of right for the child, for decision on giving or deprivation of life, and, in general, the perception of the child as the subject of property that contradicts the nature and human dignity.

Some countries define the legal framework of reproductive medicine, including protection of embryo life by its own national law, such as the law of the Federal Republic of Germany "*Embryo Protection Act*" (Gesetz zum Schutz von Embryonen – Embryonenschutzgesetz – ESchG)¹ (13.12.1990). Law regulates allowed and prohibited methods of reproduction on artificial insemination, donation, surrogacy, embryo transfer (including after the death of the donor), artificial change of genetic information and cloning, etc., as well as sanctions for infringement of rules.

Consequently, summing up on the use of ART as one of the topical issues in international law and bioethics, note that in the result of scientific and technological progress should not be harmed the interests and well-being (and first of all – life) at least one person. Article 2 Convention on Human Rights and Biomedicine about primacy of the human being said: "*The interests and welfare of the human being shall prevail over the sole interest of society or science*» as well as part 2 article 3 Universal Declaration on Bioethics and Human Rights about human dignity and human rights "*The interests and welfare of the individual should have priority over the sole interest of science or society*".

Protecting the right to life of the embryo fertilized in vitro prior to its implantation in vivo in the mother (both biological and surrogate) still remains a problem of international importance as recognized for embryo inherent right to life entails new high ethical standards for artificial fertilization and responsibility for all involved people who concerned in it.

Therefore, today there is a real need for application of new conceptual methods of infertility treatment that would guide by the principle of inalienability the right to life, respect for the value of life and dignity of every person, independently of the stage of development.

In practice, the use of assisted reproductive technologies often rise problems relating to bioethical and legal aspects of the right to life in the prenatal stage of human development as part of international human rights law. It includes:

- The difference between the legal status of embryos *in vitro* and *in utero* (for example, in Ireland the right to life of the child in the womb is protected by the state recognition the legal status of the embryo and the prohibition of abortion). "*The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother...*" (Art. 40 of the Constitution of Ireland)². However, there is no consensus in the medical environment in the issue of legal protection of embryos in vitro fertilization before their implantation in the maternal organism, about what was made reservations to the list of recommendations of the Irish Commission on Assisted Human Reproduction)³;
- Deviation of intention created by IVF human embryo (using them not for further fertilization);
- The problem of "postmortem" reproduction⁴ as possibility using the frozen male and female gametes or embryos in case of death of the donor (for example, fertilization with gametes of late husband);
- Using the Frozen embryos in case of incapacity of one or both of the married couple and at divorce;
- Solution future destiny of the child which bears of surrogate mother in case of the death its biological parents (customers) etc.

Therefore, in view of the foregoing should conclude that ART should execute a supporting function for the realization of human reproduction to provide procreation. That is the purpose of assisted

¹ Gesetz zum Schutz von Embryonen. 13.12.1990. Das Bundesministerium der Justiz und für Verbraucherschutz. <<http://www.gesetze-im-internet.de/eschg/index.html>> (2017, January, 15).

² Constitution of Ireland. The electronic Irish Statute Book. <<http://www.irishstatutebook.ie/eli/cons/en/html>> (2017, January, 15).

³ Report of the Commission on Assisted Human Reproduction. Lenus, *The Irish Health Repository*. <<http://www.lenus.ie/hse/bitstream/10147/46684/1/1740.pdf>> (2017, January, 15).

⁴ "Postmortem" reproductive program is completely prohibited, even in countries where legislation on assisted reproduction is quite liberal (as in the UK).

reproduction should assistance to people in case of the realize its reproduction, but not by destruction the life which has begun.

However, some methods of ART include the destruction of "spare" embryos, violating the right to life as each person pass embryonic stage of development.

But this artificial preference reproductive rights over the child's right to life on the prenatal stage of development is possible only in one case – if the capacity recognizes the person as a natural person according to the civil law). While the result of the interpretation of human nature according to the civil law is a violation of human rights.

Consideration reproductive human rights solely on the national level (according to the civil law of countries) leads to a narrowing of the scope and content of existing human rights and therefore has to be an object of regulation of international law in deciding bioethical problems.

In the process of using ART should not be destroying already begun life regardless of the method and place of conception as a person at any stages of its development is a unique independent personality, but not as property, what reduces the value of human life to the level of civil law.

If the Article 1 of Universal Declaration of Human Rights proclaims that: "*All human beings are born free and equal in dignity and rights*"¹ (12.10.1948), it means that these rights are innate but not acquired as a result of the physiological act of childbirth. So, is it humanely and legal to derivate of the right to be human, in terms of international law? This right should apply to all people without exception: "... *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*" (art. 2) and importantly without distinction of stage and extent of their development that is more defining than, for example, the aforementioned property status of the individual.

The answer to the question at what moment the human embryo has the right to life, and therefore is human, will allow to define the legal basis of the manipulation of human gametes and embryos, the possibility or impossibility of selective reduction at will, and will determine participation of "spare" gametes and embryos in particular for their use in research.

Defining this point must be based not only on the natural law, but also on scientific data onto the human being that should serve as a basis of determining the legal status of person on the prenatal stage of development.

The Vatican as the subject of international law and the spiritual center of Catholicism acute raises the problem of human dignity, human rights and freedoms in relation with the implementation of new scientific achievements, which raise the question about the moral side of their application².

Recognizing the value of every human life can agree with the statement of one of the fundamental documents of Vatican on important bioethical issues of humanity – Instruction *Donum Vitae* (22.02.1987), that: "*The human being is to be respected and treated as a person from the moment of conception; and therefore from that same moment his rights as a person must be recognized, among which in the first place is the inviolable right of every innocent human being to life*"³.

References:

1. *Constitution of Ireland*. The electronic Irish Statute Book <<http://www.irishstatutebook.ie/eli/cons/en/html>> (2017, January, 15). [in English].
2. *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* (Oviedo, 4.IV.1997), No. 164. *Council of Europe Website*. <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164>> (2017, January, 15). [in English].
3. Gamete Intrafallopian Transfer: GIFT. *The American Pregnancy Association Website*. <<http://americanpregnancy.org/infertility/gamete-intrafallopian-transfer/>> (2017, January, 15). [in English].
4. *Gesetz zum Schutz von Embryonen [The Law on the protection of embryos]*. 13.12.1990. *Das Bundesministerium der Justiz und für Verbraucherschutz [The Federal Ministry of Justice and Consumer Protection]*.

¹ *Universal Declaration of Human Rights* <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> (2017, January, 15).

² Островська, Б.В. (2016). Позиція Ватикану щодо захисту цінності людського життя у світлі біоетики. *Часопис Київського університету права*, №4. *Сайт Київського університету права*. <<http://kul.kiev.ua/>>.

³ *Instruction on respect for human life in its origin and on the dignity of procreation Replies to certain questions of the day. Official Vatican Website*. <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html> (2017, January, 15).

- <<http://www.gesetze-im-internet.de/eschg/index.html>> (2017, January, 15). [in German].
5. *Instruction on respect for human life in its origin and on the dignity of procreation Replies to certain questions of the day. Official Vatican Website.* <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html> (2017, January, 15). [in English].
6. Ostrowska, B.V. (2016). Pozycja Watykanu shchodo zakhystu cinnosti liudskogo zhytia u svitli bioetyky [The position of the Vatican on protecting value of human life in light of bioethics]. *Chasopys Kyjivskogo universitetu prava* [Scientific Journal "Chronicles of KUL"], N 4. <<http://kul.kiev.ua/>>. [in Ukrainian].
7. *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms.* (4.XI.2000) <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (2017, January, 15). [in English].
8. *Report of the Commission on Assisted Human Reproduction. Lenus, The Irish Health Repository.* <<http://www.lenus.ie/hse/bitstream/10147/46684/1/1740.pdf>> (2017, January, 15). [in English].
9. *Resolution 1654* (2009). *Feminicides. PACE website.* <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=17716&lang=EN&search=UmVzb2x1dGlvbiAxNjU0ICgyMDA5KXx0eXB1X3N0cl9lbjpsZXNvbHV0aW9u>> (2017, January, 15). [in English].
10. *Rezoliucia 1466* (2005) PARE Pro vykonnia obovyazkiv ta zobovyzan Ukrainoju [Resolution 1466 (2005) of The Parliamentary Assembly of the Council of Europe (PACE) Honouring of obligations and commitments by Ukraine] 5.10. 2005. *Ofitsiyni veb-sait Verkhovnoi Rady Ukrainy* [The official website of the Verkhovna Rada of Ukraine]. <http://zakon4.rada.gov.ua/laws/show/994_611> (2017, January, 15). [in Ukrainian].
11. *The Convention on the Rights of Persons with Disabilities. United Nations Website.* <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>> (2017, January, 15). [in English].
12. *The Convention on the Rights of the Child.* The United Nations High Commissioner for Human Rights. <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> (2017, January, 15). [in English].
13. *The San José Articles.* <http://sanjosearticles.com/?page_id=2> (2017, January, 15). [in English].
14. *Universal Declaration of Human Rights* <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> (2017, January, 15). [in English].
15. *Universal Declaration on Bioethics and Human Rights. UNESCO Internet portal.* <http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html>. (2017, January, 15). [in English].