

Philosophic sciences: A friendship with wisdom

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UKRAINE LEGISLATION REVIEW IN THE FIELD OF ASSISTED REPRODUCTIVE TECHNOLOGIES: HUMANITARIAN AND LEGAL ASPECT

The article presents in accordance with the proposition that the law is a knowable rational measure, and knowledge is the experience of the social mind, we carried out an analysis of all bills on the legal regulation of assisted reproductive technologies (ART) in Ukraine, which were submitted to the Verkhovna Rada of Ukraine and published by scientists. The shortcomings of these draft regulations have been identified, including the use of the term “reproductive age” in current legislation in the context of enabling the use of ART, which in fact limits the ability to use these technologies to people who are physiologically out of this age. There are also proposals to improve the legal regulation of legal relations in the field of ART. It is proposed not to limit the range of entities that

can benefit from the Surrogacy Program (SM), civil status and their gender; limit the allowable number of simultaneously transplanted embryos to one; to establish a ban on sexual selection of embryos, except in certain circumstances; separately envisage the procedure for applying the SM program for discordant couples; include the provisions of the surrogacy agreement in the Central Committee, and not in a separate law; provide for compensatory payment by potential parents in favor of a child born in the program of a certain amount that potential parents may temporarily deposit in a bank account or on a notary deposit; not to narrow the number of parties to the SM agreement; include in the list of required documents from potential parents in the SM programs the documents required for the adoption of a child; the new law will be based on the existing Procedure for the use of ART. The inexpediency of the proposed amendments to the Criminal Code by the authors of the existing draft laws is substantiated, as they duplicate the existing criminal law prohibitions, and therefore their introduction will violate the principles of criminalization and lead to legal conflict and human rights violations. The main oversight of the legality of legal relations in this area should be the responsibility of civil society. The creation of additional supervisory bodies, as well as the introduction of a monopoly position of legal entities providing services in the field of ART, is not appropriate due to the provocation of additional corruption risks.

Keywords: methodology of scientific research, social mind, law, draft law, surrogacy, HIV couples, discordant couples, legal liability, embryo transfer, sexual selection of embryos, humanitarian aspect of sex selection of embryos.

Анотація. *Тріньова Я.О. Аналіз законодавства України у сфері допоміжних репродуктивних технологій: гуманітарно-правовий аспект.* В статті, відповідно до положення про те, що закон є пізнаною раціональною мірою, а знання досвідом соціального розуму, нами було здійснено аналіз всіх законопроектів щодо правового врегулювання допоміжних репродуктивних технологій (ДРТ) в Україні, які подавались до Верховної ради України та були опубліковані науковцями. Виявлено недоліки цих проектів нормативно-правових актів, зокрема акцентовано увагу на застосуванні в діючому законодавстві терміну «репродуктивний вік» в контексті надання можливості використання ДРТ, який фактично обмежує можливість скористатись цими технологіями особам, які вже фізіологічно вийшли з цього віку. Також надані пропозиції щодо удосконалення правового врегулювання правовідносин у сфері ДРТ. Пропонується не обмежувати коло суб'єктів, які можуть скористатись програмою сурогатного материнства (СМ), цивільно-правовим статусом та їх статтю; обмежити допустиму кількість одночасно пересаджених ембріонів одним; закріпити заборону статевої селекції ембріонів, за виключенням певних обставин; окремо передбачити порядок застосування програми СМ для дискордантних пар.

Ключові слова: методологія наукових досліджень, соціальний розум, закон, сурогатне материнство, ВІЛ-пари, дискордантні пари, юридична відповідальність, ембріотрансфер, гуманітарний аспект статевого відбору ембріонів.

INTRODUCTION. Against the background of global decline in human fertility, the use of assisted reproductive technologies (hereinafter – ART) is becoming an increasingly popular medical service. At the same time, there is a clear trilemma at the global level regarding the legal settlement of these legal relations: some states allow their use, others do not allow it, and in some states the legislation does not regulate this socio-legal aspect at all.

Based on this, citizens of countries where the use of ART is prohibited, or certain types of ART (such as surrogacy (hereinafter – SM)) are forced to apply for such a service abroad.

Ukraine occupies a favorable place in the niche of the use of ART on the world stage: this area is sufficiently regulated, although it is not without certain shortcomings. The main thing for consumers of these services in Ukraine is the possibility of in vitro fertilization (hereinafter – IVF) of an unmarried woman; guarantees of potential parents regarding the child, the status of a surrogate mother, permission for pre-implantation diagnosis of the embryo. However, general globalization processes, the development of public morals, public demand, as well as systematic abuses in the use of ART, require updating Ukrainian legislation in the field of ART.

1. LITERATURE REVIEW. Content analysis of existing draft laws submitted to the Verkhovna Rada and scientific publications, revealed that as of January 2022 there are (existed) 14 draft laws on ART: draft №8703 from 17.06.2011 (initiators – Rybakov I. O., Sorochynska-Kyrylenko R.M, Kaplienko V.V., Kamchatny V.G., Gasyuk P.P. – hereinafter the project of I. Rybakov)¹; draft № 8282 of 16.10.2012 “On Amendments to Certain Legislative Acts of Ukraine Concerning Restrictions on the Use of Assisted Reproductive Technologies”, but was rejected by the President of Ukraine and the deputies did not overcome the veto²; draft № 8625 of 18.07.2018 «On Amendments to Certain Legislative Acts of Ukraine (on the Protection of Children’s Rights in the Use of Assisted Reproductive Technologies)» (introduced by MPs: P. Ya. Unguryan, O.V. Bilozir, I.V. Sysoenko, Y.I. Solovey, M.I. Lavryk, O.Y. Krishin – hereinafter the project of P. Unguryan)³; № 8629 dated 19.07.2018 of the group of deputies (I.S. Lutsenko, I.V. Gerashchenko, M.M. Ionova – hereinafter the project of I. Lutsenko)⁴, but on 29.08.2019 this project was withdrawn⁵; alternative project № 8629-1 dated

1 Проект Закону №8703 від 17.06.2011 р (І.Рибаків) «Про допоміжне материнство» URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=8703&skl=7

2 Сенюта І.Я. «Сурогатне материнство: нормативна «Ахіллесова п’ята». URL: <https://med-com.unba.org.ua/publications/publications/print/5538-surogatne-materinstvo-normativ-na-ahillesova-pyata.html>

3 Проект Закону № 8625 від 18.07.2018 р. (П. Унгуряна) «Про внесення змін до деяких законодавчих актів України (щодо захисту прав дітей при використанні допоміжних репродуктивних технологій)» URL: http://search.ligazakon.ua/l_doc2.nsf/link1/JH6NL00A.html

4 Проект Закону № 8629 від 19.07.2018 «Про допоміжні репродуктивні технології» (І. Луценко) URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64477

5 Сенюта І.Я. «Сурогатне материнство: нормативна «Ахіллесова п’ята» URL: <https://med-com.unba.org.ua/publications/publications/print/5538-surogatne-materinstvo-normativ>

01.08.2018 (submitted by the People's Deputy of Ukraine V.M. Kupriy – hereinafter the draft of V. Kupriy)⁶; project № 3488 dated 15.05.2020 (initiator – People's Deputy of Ukraine Danutsa O.A. – hereinafter the project O. Danuts)⁷, project from the Ministry of Health of Ukraine (hereinafter – the project of the Ministry of Health) from 2021⁸, project from UARM from 2021 (hereinafter – UARM project)⁹, project 6475 from 28.12.21 (Shmygal project)¹⁰, project 6475-1 from 11.01.2022 (Danutsi project)¹¹, project 6475-2 from 13.01.22 (V. Wagner)¹², project 6517 from 13.01.22 (introduction additions to the Criminal Code)¹³ and the project of a lawyer practicing in the field of ART, Ph.D., S. Antonov¹⁴.

Among Ukrainian scholars, many publications were also devoted to the legal settlement of ART: N. Ablyatipova¹⁵, S. Antonov¹⁶, A. Golovashchuk¹⁷, R. Maidanyk¹⁸,

na-ahillesova-pyata.html

- 6 Проект Закону № 8629-1 від 01.08.2018 р. «Про Допоміжні репродуктивні технології» (В.Купрія) URL: <https://ips.ligazakon.net/document/JH6NP1AI>
- 7 Проект Закон №3488 від 15.05.2020 «Про внесення змін до деяких законодавчих актів України щодо питань застосування допоміжних репродуктивних технологій» (О.Дануца) URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68850
- 8 Проект МОЗ «Про допоміжні репродуктивні технології» від 2021 р. URL: https://www.uarm.org.ua/en/?option=com_attachments&task=download&id=484
- 9 Проект закону УАРМ «Про допоміжні репродуктивні технології» від 2021 р. URL: https://www.uarm.org.ua/en/?option=com_attachments&task=download&id=484
- 10 Проект Закону № 6475 від 24.12.2022 р. «Про Допоміжні репродуктивні технології» (Д.Шмигалья) URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=73524
- 11 Проект Закону № 64475-1 від 11.01.2022 р. «Про Допоміжні репродуктивні технології» (О. Дануца) URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=73571
- 12 Проект Закону № 64475-1 від 11.01.2022 р. «Про Допоміжні репродуктивні технології та заміне материнство» (В.Вагнер) URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=73585
- 13 Проект Закону про внесення змін до Кримінального кодексу України щодо правопорушень у сфері застосування допоміжних репродуктивних технологій URL:http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=73586
- 14 Проект Закону "Про реалізацію репродуктивних прав та допоміжну репродукцію людини" (С. Антонов) URL: http://www.medlawcenter.com.ua/ua/123/repro_law.html
- 15 Аблятіпова Н. А. Проблеми сурогатного материнства в Україні. Актуальні проблеми держави і права: зб. наук. пр. Одес. нац. юрид. акад. О., 2009. Вип. 51. С. 167–173.
- 16 Проект Закону України "Про реалізацію репродуктивних прав та допоміжну репродукцію людини" (С.Антонов) URL: http://www.medlawcenter.com.ua/ua/123/repro_law.html
- 17 Головащук А. П. Правове регулювання допоміжних репродуктивних технологій http://kul.kiev.ua/images/chasop/2013_2/189.pdf; Головащук А. П. Допоміжні репродуктивні технології як спосіб реалізації права на материнство. Верховенство права, законність та права людини: Міжнародна науково-практична конференція (м. Київ, 28–29 червня 2012). Київ. Центр правових наукових досліджень, 2012. С. 32
- 18 Майданик Р.А. Репродуктивні права. Сурогатне материнство. К.: Алерта. 2013. 48с. (Серія «Курс медичного права»).

E. Mukhamedova¹⁹, O. Pokalchuk²⁰, Z. Romovska²¹, I. Senyuta²², R. Stefanchuk²³ and others.

2. MATERIALS AND METHODS

Despite the seemingly sufficient elaboration of this topic and quite a few existing legislative proposals on the regulation of legal relations in the field of ART, the main practical problems that need to be regulated by law have still remained out of the attention of legislators and scholars. Therefore, the purpose of this article is to analyze the current Ukrainian legislation in the field of ART and these draft laws to summarize their positive provisions, identify shortcomings, problems that need to be addressed and formulate their own proposals in this area, as well as correspondence with criminal law. The following methods of scientific cognition were used in the article: materialist dialectics, comparative and content analysis method, historical-legal, sociological.

3. RESULTS AND DISCUSSION. Let's start with the scope of this law, more precisely with the status of persons who can use it. I. Lutsenko's draft contains contradictions, which are manifested in Articles 3 and 9. Thus, Article 3 stipulates that the Law applies to citizens of Ukraine, foreigners and stateless persons. However, Article 9 already stipulates that they cannot use the method of surrogacy, which is a type of ART, in particular, stateless persons. I believe that in addition to the obvious legal conflict, the restriction of the rights of stateless persons is a manifestation of discrimination, which in turn is a violation of the Constitution of Ukraine²⁴. All other projects involve the extension of draft laws to foreign nationals. However, Wagner's law provides for the possibility of applying this law to foreign citizens only in those countries where ART programs are not prohibited (Part 2 of Article 20). Not prohibited – does not mean that it is allowed, but it should be assumed that there is no clearly defined prohibition.

Also, before the legislative definition of the scope of this law by the circle of subjects, it is necessary to focus on the policy of the state in this area, of course, if it is defined. I am convinced that Ukraine, using the existing legislation in this area and

19 Мухамедова Е. Е. Репродуктивні права фізичної особи в системі особистих немайнових прав. *Учен. записки Таврического нац. ун-та им. В. И. Вернадского. Серия «Юридические науки»*. 2012. № 2, т. 25(64). С. 136–141.

20 Покальчук О. Право на сурогатне материнство одностатевих партнерств. *Теорія і практика інтелектуальної власності*. №2. 2020. С. 101-107.

21 Ромовська З.В. *Сімейний кодекс України: Науково – практичний коментар*. К.: Видавничий Дім «Ін Юре», 2003. 532 с.

22 Сенюта І.Я. «Сурогатне материнство: нормативна «Ахіллова п'ята»». URL: <https://med-com.unba.org.ua/publications/publications/print/5538-surogatne-materinstvo-normativ-na-ahillesova-pyata.html>

23 Стефанчук Р. О. *Поняття, система, особливості здійснення і захисту репродуктивних прав фізичної особи. Вісник Хмельницького інституту регіонального управління та права*. 2004. № 1-2. С. 66–72

24 Конституція України URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>

improving it, can count on significant financial revenues, which can become part of the country's budget, of course, with a well-established tax and international policy.

Definition of terminology. It is logical that ART is used in the case of diagnosing infertility. However, in practice, the question arises as to whether this means the age limit for patients within which they can use ART. After all, the diagnosis of infertility is tied to a person's reproductive age. Thus, according to WHO recommendations, a woman's reproductive age is 49 years²⁵. In men, the reproductive age, according to research by various scientists is – 40-45 years²⁶ or up to 60 years²⁷. It turns out that the presence of the term «reproductive age» can be interpreted as the possibility of diagnosing infertility only at this age.

There is no answer to this question in the current Procedure for the use of assisted reproductive technologies in Ukraine, which is approved by the Order of the Ministry of Health № 787 of 09.09.2013 (hereinafter – the Procedure)²⁸ and other current legislation of Ukraine. The projects of the Ministry of Health (Part 3 of Article 7), UARM (Part 3 of Article 7) and the projects of D. Shmygal and O. Danutsa propose to leave this issue to the discretion of the obstetrician-gynecologist in each case individually²⁹.

Foreign practice of legislative regulation of ART, knows cases of restriction of access to ART programs for women over 50 years (Belarus³⁰, Greece³¹). Draft Law on ART I. Lutsenko in Art. 6 also provided for a maximum age for the use of ART for women of 55 years, but no age was set for men. In the project of V. Kupriya in Art. 6 this age for women is increased to 60 years, in the absence of restrictions for men. Such unequal opportunities to exercise their reproductive rights can be seen as an example of discrimination, which is expressly prohibited by the Constitution. I. Rybakov's project provides for the possibility of women's participation in state programs of SM

25 Women's health URL: <https://www.who.int/ru/news-room/fact-sheets/detail/women-s-health>

26 Репродуктивный возраст Главный редактор Д.И. Валентей. Демографический энциклопедический словарь. М.: Советская энциклопедия. 1985. URL: demography.academic.ru

27 Гамидов С.И., Попова А.Ю., Овчинников Р. И. и др. Репродуктивные нарушения у мужчин позднего отцовского возраста. *PMЖ*. 2016. № 8. С. 474-475. URL: <http://health-ua.com/article/32198-reproduktivnyie-narusheniya-umuzhchin--pozdnego-ottcovskogo-vozrasta>

28 Порядок застосування допоміжних репродуктивних технологій в Україні, затверджений Наказом МОЗ № 787 від 09.09.2013 URL: <https://zakon.rada.gov.ua/laws/show/z1697-13#Text>

29 Проекти МОЗ та УАРМ URL: https://www.uarm.org.ua/en/?option=com_attachments&task=download&id=484

30 Закон Республики Беларусь «О вспомогательных репродуктивных технологиях» от 7 января 2012 года №341-3 URL: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/92757/108213/F-471462638/BLR-2012-L-92757.pdf>

31 ελληνικός νόμος για τις τεχνολογίες υποβοηθούμενης αναπαραγωγής 3305/2005 . Β' Διεύθυνση Επιστημονικών Μελετών – Τμήμα Νομοτεχνικής Επεξεργασίας Σχεδίων και Προτάσεων Νόμων, Έκθεση στο Νομοσχέδιο «Εφαρμογή των μεθόδων ιατρικώς υποβοηθούμενης αναπαραγωγής», Βουλή των Ελλήνων, Ιανουάριος 2005 URL: <https://www.hellenicparliament.gr/User-Files/7b24652e-78eb-4807-9d68-e9a5d4576eff/E-MEDIPAR-EPIS.pdf>

up to 40 years (Article 21)³². In the latest projects of 2021-2022, such restrictions are no longer defined.

Thus, the legal interpretation of a person's ability to exercise his right to reproduction depends on the agreement of professionals on this aspect. More precisely, is it possible today, for example, for a woman who was 50 years old at the time of applying to the CHP, to use ART programs without breaking the law?

Also, one of the fundamental aspects of the legal regulation of the use of ART is to determine the range of entities that can exercise this right. According to item 1.7 of the Procedure, adult women and / or men have the right to carry out ART treatment programs on medical grounds. However, this right is limited to the type of ART that an adult can choose. And the interpretation of the legislation in the field of ART regulation shows that women have more opportunities to exercise their right to reproduction than men.

Thus, the basic program of ART is in vitro fertilization (hereinafter – IVF). According to Art. 48 of the Procedure, the use of artificial insemination and embryo implantation is carried out in accordance with the conditions and procedure established by the central executive body that ensures the formation of state health policy, according to the medical indications of an adult woman with whom such action, subject to written consent of the spouses, ensuring the anonymity of the donor and maintaining medical secrecy. According to clause 3.6 of the Procedure, the semen of a man or donor prepared according to the appropriate technology is used for IVF. However, in paragraphs 3.1.-3.6 of the Procedure for the procedure of IVF, there is no requirement to be in a registered marriage for persons wishing to use this program. However, in Annex 2 to this Procedure in the Patient / Patient's Application for the Use of Assisted Reproductive Technologies, there is a column that mentions the husband / partner of a woman who wishes to use IVF. However, by applying a systematic interpretation of the law, it can be concluded that this statement is intended for all types of ART programs (IVF, VMI, SM, etc.), and in some of them marriage is mandatory (SM program). So the question may be, can a single woman benefit from the IVF program? – I consider that the current legislation does not contain an obstacle for this as Art. 48 of the Law of Ukraine «Fundamentals of the legislation of Ukraine on health care» (hereinafter – the Fundamentals) refers to paragraphs 3.1.-3.6. The order in which such a requirement is absent. In addition, paragraph 1.7 of the Procedure guarantees the possibility of adult women and / or men on medical grounds to conduct ART treatment programs. Mention in item 3.6. The procedure for the use of male sperm in IVF, designed for cases of a female patient in marriage. Therefore, if such a woman is not married or in other circumstances, the donor's semen is used in her case.

However, a single man cannot count on such a program.

All other programs, except the SM program, are also designed either for single women or for persons living together without registration of marriage and are designed for women (Intrauterine insemination (IUD), Intracytoplasmic sperm

32 Проект Закону №8703 від 17.06.2011 р. «Про допоміжне материнство» (І.Рибаківа) URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=8703&skl=7

injection (hereinafter – ICIS), donation gametes, embryos). Unfortunately, the projects of 2021-2022 do not change this situation.

It turns out that single men can not exercise their reproductive rights. Meanwhile, Art. 24 of the Constitution guarantees equality of rights of men and women, as well as the inadmissibility of discrimination on the grounds of sex, and paragraph 1.7. The order declares the right, including men, to use ART.

It follows from the above that the lack of legislation in the possibility of exercising the right of a man to use ART for the treatment of infertility, contrary to the Constitution. It would also contradict the principle of inadmissibility of discrimination, in particular on social status, proposals to include in the future law a requirement for married couples to stay married for at least one year / 2 years to be able to use the SM program (Part 1 of Article 20 of the Wagner project).

This situation can be remedied by providing equal opportunities for all persons in the new law, regardless of gender and the existence and duration of marital relations to exercise their reproductive rights through the use of ART programs. An example is the legislation of the Republic of Armenia³³. Similar proposals regarding the absence of the requirement of marriage for potential parents were provided in the project of V. Kupriy³⁴. However, the draft Ministry of Health (Article 1) and UARM (Article 1) does not set such requirements³⁵.

It is advisable to limit the legal definition of the number of embryos in embryo transfer to one embryo, as this is necessary to maintain a woman's reproductive health, because even two embryos (especially three or five) are considered multiple pregnancies that are atypical for humans. a threat to health. The analyzed draft laws on ART do not contain such a requirement. The current legislation provides for the possibility in exceptional cases of transfer of even three embryos, usually with their future reduction (paragraph 3.8 of the Procedure), which in practice often escalates into abuse in the form of advertising offers of persons providing services in the field of ART. And the reduction is then not carried out due to lack of medical indicators, due to which the surrogate mother is forced to bear a multiple pregnancy.

The new law must provide for a direct restriction on the choice of sex of the embryo for its further transfer to the human body, which is also a manifestation of discrimination, and most existing draft laws do not contain requirements (except for the UARM project – Article 12, Shmygal – Article .12, W. Wagner – p.8)³⁶. The current legislation does not explicitly provide for this. There are only mentions of such a ban in the RH Procedure (conducting Preimplantation medical-genetic diagnostics

33 Закон Армении «О репродуктивном здоровье и репродуктивных правах человека» URL: <https://www.arlis.am/documentview.aspx?docid=75284> станом на 28.06.21

34 Проекту Закону № 8629-1 від 01.08.2018 «Про Допоміжні репродуктивні технології» (В.Купрія) URL: <https://ips.ligazakon.net/document/JH6NP1AI>

35 Проекти закону МОЗ та УАРМ «Про Допоміжні репродуктивні технології» URL: https://www.uarm.org.ua/en/?option=com_attachments&task=download&id=484

36 Проект УАРМ «Про Допоміжні репродуктивні технології» URL: https://www.uarm.org.ua/en/?option=com_attachments&task=download&id=484

(hereinafter – PGD)). In practice, such selection occurs in the form of the creation of several embryos of different sexes, of which only embryos of a particular sex are transferred in the future. And although objectively there is no violation of the law, but the direction of intent is an offense for which the current legislation of Ukraine does not yet have the means of state and legal response. However, at the international level there is a direct ban on sexual selection of embryos: for example, Art. 14 of the Convention for the Protection of Human Rights and Dignity regarding the Application of Biological and Medical Achievements: The Convention on Human Rights and Biomedicine of 12 May 2003 was adopted by the Council of Europe (Ukraine signed it on 22 March 2002 but did not ratify it)³⁷. K. Moskalenko wrote more about the international regulation of sexual selection of embryos in her publication³⁸. By the way, D. Shmygal's draft in Article 2 contains references to this normative legal act, although it is not part of Ukrainian legislation!

Clause 10.1 of the Procedure provides for PGD, the purpose of which is to prevent the birth of a person with hereditary diseases. A systematic interpretation of the law, together with international norms, allows us to assert that the legislator prohibits the choice of the sex of the embryo, except as described in paragraph 10.1. However, not every person who will read the text of this legal act is aware of other regulations in this area. Given the above, it is unexpected that in Art. 12 of the Ministry of Health project, the permission to choose the sex of the future child is allowed without any restrictions³⁹, and in the project of D. Shmygal – on social grounds (the presence of 2 children of the same sex in the family).

Speaking about the manifestations of discrimination in legal relations in the field of ART, it is necessary to emphasize the need to regulate in law the procedure for exercising the right of HIV-infected couples to reproduce. An example of such a settlement is the order of the Ministry of Health of the Russian Federation from 31.07.2020 №803н «On the use of assisted reproductive technologies, contraindications and restrictions on their use.⁴⁰» The current Procedure, as well as draft laws do not provide for this. In practice, ART is used in Ukraine for this category of people. The legal settlement of such relations takes place in accordance with the lawyer's systematic interpretation of the current legislation. That is, there is a general Procedure for the use of ART in Ukraine, which in paragraph 3.7 provides a procedure for laundering sperm and separation of morphologically normal and actively motile sperm, and in 2011 issued

37 Конвенція про захист прав і гідності людини щодо застосування досягнень біології та медицини: Конвенція про права людини та біомедицину від 12.05.2003 прийнята Радою Європи URL: https://zakon.rada.gov.ua/laws/show/994_529#Text

38 Москаленко К. вибір статі URL: <http://www.pgp-journal.kiev.ua/archive/2018/12/8.pdf>

39 Проект МОЗ «Про допоміжні репродуктивні технології» від 2021 р. URL: https://www.uarm.org.ua/en/?option=com_attachments&task=download&id=484

40 Приказ Министерства здравоохранения РФ от 31 июля 2020 г. N 803н "О порядке использования вспомогательных репродуктивных технологий, противопоказаниях и ограничениях к их применению" Система ГАРАНТ: URL: <http://base.garant.ru/74776088/#ix-zz6zvTTtagXS>

Guidelines «Preparation for pregnancy discordant couples», which in more detail it is about this procedure (P.18,19)⁴¹.

Nevertheless, it would be appropriate in the future law to devote a separate section to the regulation of legal relations between these entities. As this area of relations is quite vulnerable, it should leave no room for ambiguity.

It is necessary to agree with the proposals of the Ukrainian Association of Reproductive Medicine (UARM) to supplement the Procedure (if left with the new law) provisions prohibiting skin-to-skin contact between surrogate mother and newborn, attachment of the newborn to the surrogate mother's breast, and establishing a requirement to keep these SM program persons in different wards immediately after birth⁴². Now all these aspects can be spelled out in the surrogacy agreement. If it is tripartite (a health care facility (HCF) where the birth takes place is attached), both the surrogate mother and the HCF are equally responsible for complying with these requirements.

Posthumous reproduction is one of the most important aspects of reproductive programs, which should also be given special attention in the law. There are already several cases when individuals have applied to the HCF with a request to use the biological material of the deceased for the treatment of infertility. They were denied due to unresolved issues. It should be noted that in the draft laws I. Lutsenko, №6475-2 (2022), V. Wagner and S. Antonov this aspect is covered.

It is advisable to include a clause on visual reproduction in the marriage contract.

Given that the law on ART, which regulates legal relations resulting in the creation of human embryos, it is advisable to include in it provisions that would prohibit the creation of chimeras. This idea, together with the establishment of a ban on the creation of clones, is proposed by S. Antonov in his project⁴³. However, the creation of clones, except for medical purposes, was already prohibited in Ukraine by the law «On the Prohibition of Reproductive Cloning of Man» in 2005, so it is not advisable to duplicate this ban again⁴⁴.

Given the particularly vulnerable status of a child born in an ART program compared to other ART participants, the law should provide for a guarantee of the rights of such a child (which is absent in all projects!). To do this, it is advisable in the contract to provide compensation to potential parents in favor of the child born in the program a certain amount that potential parents can temporarily put in safekeeping in a bank account or on a notary deposit. In case of violation of the child's rights (potential

41 Підготовка до ведення вагітності дискордантних пар (Методичні рекомендації). МОЗ; НАМН України; КМАПО ім. П.Л. Шупіка; ДУ «Інституту стратегічних досліджень МОЗ України». Київ. 2011. С. 18-20

42 Матеріали нарада керівників клінік ДРТ. УАРМ. 15.12.2018 URL: <https://uarm.org.ua/component/attachments/download/368.html>

43 Проект Закону "Про реалізацію репродуктивних прав та допоміжну репродукцію людини" (С. Антонов) URL: http://www.medlawcenter.com.ua/ua/123/repro_law.html

44 Закон України «Про заборону репродуктивного клонування людини» від 11.01.2005 URL: <https://zakon.rada.gov.ua/laws/show/2231-IV#Text>

parents refused the child) – this amount is transferred to the child’s bank account and is kept until the child reaches the age of majority, after which he can dispose of these funds. This amount is refunded to potential parents if they have fulfilled their contractual obligations to register the child and adopted it into their family.

Regarding the definition of the form and main provisions of the surrogacy agreement in the law on ART. A review of foreign legislation in this area shows a tendency to specify in the law the form of the contract, in particular surrogacy. The authors of the draft laws also propose a legislative definition of the form and main provisions of the surrogacy agreement in the ART law, given the lack of such an agreement in the Civil Code and its sufficient prevalence in practice. However, I believe that the possibility of amending the Civil Code in the form of the institution of a surrogacy agreement should be considered, especially since work is currently underway on the Concept of the new Civil Code. These changes, along with other changes related to the enactment of the ART law, should be submitted at the same time as the ART bill.

In general, it should be noted that according to the best traditions of legislative technique, the basic principles and provisions of any legal institution should be prescribed in the relevant code (Civil Code), this institution can be detailed in the relevant law (ART law), and certain aspects, procedures, needs, should be reflected in the bylaws. Adherence to such an algorithm will be the key to a better understanding of the system of legislation and its interpretation.

It should be noted that the projects of the Ministry of Health (parts 1, 3 of Article 13) and UARM (parts 1, 3 of Article 13), the project of I. Lutsenko (Article 12)⁴⁵, the project of V. Kupriy (Article 9)⁴⁶ and the projects №6475 – №6475-2 reduced the list of possible parties to the surrogacy agreement only to the spouses (under current law it is possible to conclude a contract with a spouse) and the surrogate mother, which, I believe, significantly limited the rights of potential parents⁴⁷.

Regarding the definition of the financial form of the legal relationship between the surrogate mother and the potential parents, it is necessary to leave the existing one – non-commercial / commercial. The latest projects also mention this.

Regarding control in this area, I am convinced that society should be the best controller in civil society. That is, the «breeding» of additional regulatory bodies in this area is not needed, but will be just another corruption risk.

Setting the age limit for SM is proposed differently in draft laws. Thus, in Article 10 of the project I. Lutsenko proposed to establish the age of the surrogate mother of 18-55 years. S. Antonov in Art. 23 of his project proposed age 20-35; almost the same age (21-35) – in the project of W. Wagner, and the projects of D. Shmygal and O. Danutsa – do not have such a requirement; in item 6.4. There is no age limit for

45 Проект Закону № 8629 від 19.07.2018 «Про допоміжні репродуктивні технології» (І. Луценко) URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64477

46 Проекту Закону № 8629-1 від 01.08.2018 «Про Допоміжні репродуктивні технології» (В.Купрія) URL: <https://ips.ligazakon.net/document/JH6NP1AI>

47 Проекти законів МОЗ та УАРМ «Про допоміжні репродуктивні технології» від 2021 р. URL: https://www.uarm.org.ua/en/?option=com_attachments&task=download&id=484

a surrogate mother, but there is a requirement for her adulthood. I believe that setting the age limit is still appropriate, given the commercial component of this legal relationship and medical fertility criteria. At this age, taking into account the general medical recommendations for the birth rate, it is advisable to set 35 years. However, the law should leave the possibility of a surrogate mother to a member of the family of potential parents (as proposed in Article 9 of the draft I. Lutsenko and draft №6475-2), whose age may be much older than 35. Therefore, in the case of a surrogate mother 'You are a member of the family of potential parents / one of them, the age limit does not need to be set, as it may be limited by medical indicators.

In some foreign jurisdictions (Belarus), an additional requirement for obtaining the status of a surrogate mother is to provide the latter with a certificate that she has not been convicted of a serious / especially serious crime against humanity⁴⁸.

However, if the surrogate mother's general requirement to obtain a certificate of no criminal record can still be accepted, as the absence of a criminal record guarantees the absence of additional stressors that may complicate the surrogate mother's program (fertilization, pregnancy, childbirth), the restriction criminal record of the gravity of the criminal offenses seems inappropriate. It turns out that if a surrogate mother has committed murder (a felony, but not against humanity), she can be admitted to the program. Not to mention that the potential surrogate mother is less likely to commit crimes against humanity, at least because the share of such crimes in the aggregate of all others is much lower than, for example, the commission of crimes against the person.

As for the requirement from the surrogate mother to provide a certificate of absence from her registration with a psychiatrist, this is a very reasonable idea, which should be implemented in the new law. It is proposed in the project of Wagner (Part 3 of Article 21). However, other restrictions on SM identified in this article cannot be considered appropriate is registered or treated in a psychoneurological or narcological dispensary;

In particular, the restriction on the inability of a woman to participate as an accused or suspect is generally contrary to the principle of the presumption of innocence.

Simultaneously with the requirement to provide such documents from a surrogate mother, it is advisable to provide in the law for the provision of such documents by potential parents. In addition, it is advisable to require potential parents to have documents that are determined by the legislation of the country to conduct ART programs for the adoption of a child. In part, these requirements are formulated in the project W. Wagner

The presentation of the text in the penultimate paragraph is evidence of low legislative technique.

We can not agree with the proposal of S. Antonov, expressed in his draft law on the preference of one legal entity (Article 4: «Agency for the Organization of Reproductive

48 Закон Республики Беларусь от 7 января 2012 г. № 341-З «О вспомогательных репродуктивных технологиях» URL: https://kodeksy-by.com/zakon_rb_o_vspomogatel_nyh_reproduktivnyh_tehnologiyah.htm

Programs (Agency)» and «Specialized Law Firm») over others to provide services in the field of ART, as this is a violation of antitrust law and poses additional corruption risks⁴⁹.

It is also impossible to agree with the proposal for additional licensing of business entities in the field of surrogacy (Part 2 of Article 7 of the draft O. Danutsa). After all, activities that pose an additional threat to the rights of citizens are subject to licensing. However, it is difficult to agree that surrogacy is more dangerous than adoption.

Wagner's draft provides for a ban on intermediary agencies (Article 9), a ban on advertising surrogacy programs and gamete donations (Article 9). At first glance, the legal settlement of relations in the field of ART may resemble the legal relationship in the field of adoption. However, social advertising on adoption is legal and even necessary!

Wagner's project banned the export of embryos / gametes from Ukraine, which was not the case in all previous projects. The legal regulation of gamete / embryo donation should be similar to the legal regulation in the field of transplantation, and the export of organs outside Ukraine is allowed there. However, in the latest draft laws of 2021-2022. identified the owner of reproductive cells, which is a significant step forward. They also propose to conduct a DNA test in public laboratories to confirm the genetic relatedness of the child and potential parents.

Projects №6475 – №6475-2, entitled “on the use of ART”, do not have any other methods of infertility treatment other than gamete / embryo donation, cryopreservation and surrogacy. That is, such methods as IVF, ICSI – are absent. Thus, the subject defined in the project title is not disclosed in the content of the projects.

Simultaneously with the submission of the draft law on the use of ART, it is advisable to submit draft laws on amendments to the Criminal Code, Administrative Code, Civil code, Family Code, etc. Proposals for appropriate changes were provided only in the projects of V. Kupri⁵⁰, O. Danutsa⁵¹, P. Unguryan⁵² and V. Wagner⁵³. Special attention should be paid to the proposed changes to the Criminal Code (projects by O. Danutsa, P. Unguryan and V. Wagner). Proposed changes to Art. 149, addition of new criminal offenses (Articles 138-1, 168-1, 169-1) of the Criminal Code can not be considered appropriate because they violate the principles of criminalization of acts, in particular

49 Проект Закону "Про реалізацію репродуктивних прав та допоміжну репродукцію людини" (С. Антонов) URL: http://www.medlawcenter.com.ua/ua/123/repro_law.html

50 Проекту Закону № 8629-1 від 01.08.2018 «Про Допоміжні репродуктивні технології» (В.Купрія) URL: <https://ips.ligazakon.net/document/JH6NP1AI>

51 Проект Закону №3488 від 15.05.2020 «Про внесення змін до деяких законодавчих актів України щодо питань застосування допоміжних репродуктивних технологій» (О.Дануца) URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68850

52 Проект Закону № 8625 від 18.07.2018 р. «Про внесення змін до деяких законодавчих актів України (щодо захисту прав дітей при використанні допоміжних репродуктивних технологій)» (П. Унгурияна) URL: http://search.ligazakon.ua/l_doc2.nsf/link1/JH6NL00A.html

53 Проект Закону про внесення змін до Кримінального кодексу України щодо правопорушень у сфері застосування допоміжних репродуктивних технологій URL:http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=73586

proposed to criminalize «new» acts already regulated by current provisions of the Criminal Code: ст. 149 in the current wording and Art. 145. Duplication of prohibitions will lead to legislative conflicts, which will lead to difficulties in law enforcement and, as a result, to human rights violations. More about this in my other publications.

My own proposals for the criminal law and not only regulation of some aspects of the use of ART are set out in my monograph^{54 55}.

The global issue should also be addressed: we are creating a framework law outlining the basic requirements and keeping the details of the procedures in place (as proposed by UARM⁵⁶), with the exception of provisions that contradict the new law; or we, on the basis of the Procedure, make changes to it and add everything necessary to it, and it acquires the status of a new law.

In the drafts of the analyzed laws, in the presence of important additional provisions, there are no detailed procedures defined in the Procedure (R.II-XII), in particular there is no list of ART methods, one of which is the basic method of ART – in vitro fertilization (hereinafter – IVF). I believe that the current Procedure should be based on the new LA (legal act), updating its provisions. To date, the proposed LA projects in the field of ART further complicate activities in this area, creating unnecessary conflicts of norms instead of filling legislative gaps.

CONCLUSIONS. Summing up, it should be noted that the Procedure should be supplemented with relevant new provisions on the range of entities that may use ART techniques; the rights and obligations of persons to whom ART, visual reproduction may be applied; to give the new normative act the status of a law, and to place the content of the surrogacy agreement in the Civil Code. Adhering to the modern concept of informatization of society, an all-Ukrainian database (Unified Electronic Data Bank) should be created for all participants in legal relations in the field of ART, especially for the method of SM. Databases of potential parents, surrogate mothers, children born in ART programs should be included in this database; HCF practicing in this field; certificates of genetic relatedness, birth certificates of children born in ART programs, donor data and information on their donations. Such information will be useful in detecting and investigating violations in this area and will prevent illegal behavior of all participants in legal relations in the field of ART. It will also allow you to monitor the number of children born to one donor in a given area over a period of time.

When modernizing the legal regulation of ART, in particular the SM, it is impossible to do without concluding additional international agreements aimed at simplifying the procedure for legalization of a child born in the SM program.

In general, when creating a new LA, it is necessary to keep in mind the expediency of such actions, as the current legislation in the field of ART is quite workable. The

54 Триньова Я.О. Біоетика кримінально-правового забезпечення протидії злочинності: монографія. Харків. Право, 2019. 536 с.

55 Триньова Я.О. Сурогатне материнство. (настільна книга адвоката, лікаря, сурмами, генетичних батьків та правоохоронця). Норма права. Київ. 2021. 386с

56 Матеріали наради керівників клінік ДРТ. УАРМ. 15.12.2018 URL: <https://uarm.org.ua/component/attachments/download/368.html>

problem is legal nihilism, which is spreading in society as a pandemic. Under these circumstances, any new LA will have the same consequences as the current one. In addition, every law enforcer should keep in mind the general legal and sectoral principles of law that apply in the absence of specific legal norms. The application of the analogy of law and law should not be an obstacle to law enforcement. With such a professional approach to law enforcement practice, it will not be necessary to create new, additional LAs. And it should always be remembered that the law is not a textbook, it should not contain the basis of law.

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