THE FULFILLMENT OF REPRODUCTIVE RIGHTS IN UKRAINE: BALANCING THE EU STANDARDS AND THE CHALLENGES OF THE WAR*

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The article discusses the importance of ensuring reproductive rights in Ukraine, particularly amidst the challenges posed by war and the need to align with EU standards. The authors emphasize the crucial role of reproduction and bioethics in protecting human life and dignity during armed conflicts. The article underscores the importance of upholding international legal principles and conventions related to reproductive rights and healthcare, including informed consent, non-discrimination, and the protection of privacy and confidentiality. Ukraine's progress towards aligning its national legislation with the EU, as part of its efforts to acquire candidate country status, is also highlighted.

Key words: human rights, preserve the reproductive cells, ectogenesis, ARTs, war in Ukraine.

In times of war, the protection of human life and dignity is of paramount importance. The field of reproduction and bioethics plays a crucial role in ensuring that the rights and well-being of individuals are upheld, even in the midst of international or local conflict. It is essential that international legal principles, such as those outlined in the Universal Declaration of Human Rights, the Convention on the Rights of the Child, the Convention on Human Rights and Biomedicine and the Convention on the Elimination of All Forms of Discrimination Against Women and others, are upheld in regard to reproductive rights and access to healthcare. Additionally, it is vital that the principles of informed consent, non-discrimination, protection of the privacy and confidentiality are upheld in all medical treatment and research related to reproduction. The implementation of these principles ensures that the rights and well-being of individuals are upheld, even in times of war.

With the acquisition of the status of a candidate country for joining the European Union, Ukraine has taken a significant step towards aligning its national legislation with that of the EU [1]. This alignment is necessary to ensure that Ukraine meets the criteria for EU membership and can participate in the benefits of being a member state. The process of legislative reform has been guided by EU legislation and the practice of the European Court of Human Rights (ECHR). Ukraine recognizes the need for reform and is fully committed to the process [2]. The country is open to the challenges that may arise from aligning its national legislation with that of the EU and the ECHR, and it is ready to tackle them head-on. The implementation of the reform plan is essential for Ukraine to meet the standards set by the EU and the ECHR and to ensure the protection of human rights within the country.

The Recovery Plan of Ukraine, which was developed to help the country recover from the massive disruption of economic activity in Ukraine and damage to infrastructure, environment and livelihoods of Ukrainian people caused by the Russian invasion of Ukraine, also addresses the issue of reproductive rights [3]. The adoption of a law on assisted reproductive technologies is
identified as one of the areas to work on, and the development of this law has to be guided by the principles and norms of the EU legislation.

For over a decade, civil society, the scientific community, and the medical community in Ukraine have been advocating for the ratification of the Convention on the Protection of Human Rights and Dignity in the Use of Biology and Medicine: Convention on Human Rights and Biomedicine Further – Oviedo Convention) [4; 5]. This convention sets standards for the use of biology and medicine in a manner that is consistent with human rights and dignity. The ratification of the Oviedo Convention is on the agenda of the Committee on National Health, Medical Care and Medical Insurance of the Verkhovna Rada of Ukraine, and it is recognized as a priority task this year.

Despite facing international sanctions and pressure, Russia persists in violating international humanitarian law with brutal and continuous actions in Ukraine. [6]. The Russia’s war against Ukraine has resulted in significant losses to the population of Ukraine. While there are currently no quantitative studies on this topic, expert opinion from academician of the National Academy of Sciences of Ukraine, Director of the Institute for Demography and Social Studies, Doctor of Economic Sciences, Professor Ella Libanova, confirms that the most difficult problem currently faced is the excessive mortality of both men, children, and women, including pregnant women [7].

As of the beginning of 2023, the population of Ukraine is estimated at 34-35 million people (these are approximate figures), a significant decrease from the 48.4 million people recorded in the 2001 all-Ukrainian population census [8; 9; 10]. As military and police officers are particularly susceptible to various injuries and deaths as a result of their engagement in hostilities, this article will focus on the rights of these two groups of individuals. These staggering numbers of losses, including the thousands of victims of the war and tragic civilian and military deaths, as well as the high number of refugees from Ukraine, along with the well-developed field of reproductive medicine in Ukraine (with high success rates), necessitate a re-examination of society's attitude towards assisted reproductive technologies, including post-mortem reproduction.

The gross violation of international humanitarian law by the Russian Federation prompted us to invoke Article 16 of the Constitution of Ukraine. Pursuant to this constitutional provision, the state of Ukraine has a duty to guarantee the preservation of the genetic heritage of the Ukrainian people. [11]. Adhering to the World Health Organization's definition of «reproductive health» as a state of complete physical, mental, and social well-being in all matters related to the reproductive system and its functions and processes [12], it is imperative that we guarantee free access to assisted reproductive technologies for our military and police personnel, at least during times of martial law, state of emergency, or when deployed to participate in international military operations to maintain peace and security. Also, it is imperative to acknowledge
in Ukraine the definition of «reproductive health» as defined by the World Health Organization, which encompasses a state of complete physical, mental and social well-being, rather than simply the absence of disease or infirmity, in all matters related to the reproductive system and its functions and processes.

In 2022, members of the Ukrainian Parliament initiated appropriate legislative changes to preserve the reproductive cells of Ukrainian military and police personnel under state financial guarantees. The Draft Law No 8011 of Ukraine «On Amendments to Certain Laws of Ukraine to Ensure the Rights of War Participants to Biological Post-Traumatic Paternity/Maternity» (further referred to as Draft Law No 8011) was registered in the Parliament of Ukraine on September 8, 2022 [13]. The primary objective of the Draft Law No 8011 is to address the challenges posed by the ongoing Russia’s war against Ukraine and to utilize the possibilities of modern medicine to assist those most affected by the war — specifically, the Ukrainian military and police personnel. Draft Law No 8011 establishes state guarantees for the right to participate in a set of measures implemented by the state to ensure the right to biological parenthood through the collection, preservation, and storage of reproductive cells for male and female defenders (military and police) of Ukraine, in the event of injuries that affect their reproductive functions.

However, it is important to be aware of the ethical and legal challenges that may arise from the concept of cryopreservation of reproductive cells and post-mortem reproduction. The Ukrainian Parliament website and the Committee on Medical and Pharmaceutical Law and Bioethics of the National Bar Association of Ukraine have submitted an Analytical Report on Draft Law No 8011, which proposes changes and amendments to current Ukrainian legislation [14]. These include the addition of provisions to Article 11 «The rights of servicemen» of the Law of Ukraine «On Social and Legal Protection of Servicemen and Members of Their Families» and Article 95 «Medical Insurance of Police officers» of the Law of Ukraine «On the National Police».

While experts have provided reasonable remarks on the Draft Law No 8011, primarily related to legal and medical terminology and compliance with EU legislation, it is important to note that the consequences of its adoption should be considered in a broader context. A purely normative approach does not take into account the full range of new social relations that this law generates. In this regard, it is essential to consider the following key areas when assessing the consequences of the adoption of the Draft Law No 8011:

- Compliance with the principle of the «best interest of the child» as determined by the European Court of Human Rights [15];
- Compliance with the principle of equal access to all forms of assisted reproductive technologies for both female and male military and police personnel;
- Rights of parents in regard to post-mortem reproduction, taking into account different principles of parenthood: genetic links and social links;
• Rights of a same sex partner of both female or male military or police personnel in regard to post-mortem reproduction.

Unfortunately, all these questions remain unanswered and the Draft Law No 8011 doesn’t give any answers.

There is currently no mention of post-mortem reproduction in the legislation of Ukraine, that is why it is imperative to establish the role of post-mortem reproduction within the framework of reproductive rights in Ukraine. Reproductive rights encompass certain human rights that are already recognized in Ukraine on the national and international level and in international human rights documents [16, p. 176]. These rights are based on the recognition of the basic rights of all couples and individuals to freely and responsibly decide on the number and spacing of their children, and to have access to the information, education, and means to exercise these rights, as well as the right to attain the highest standard of sexual and reproductive health. They also include the right to make decisions concerning reproduction free of discrimination, coercion, and violence, as outlined in human rights documents.

Agreeing with the position of N. Kvit it worth to say that addressing the challenges of ongoing warfare, particularly in ensuring unobstructed access to reproductive rights for military personnel, requires immediate completion of a legislative process that has been in motion for years. The law should better the provisions in place, and foster the optimal conditions for the posthumous utilization of cryopreserved gametes and embryos. This will fulfill the right to procreation for military service families.

Additionally, the Committee on Legal Policy and the Ministry of Justice of Ukraine are currently reviewing three draft laws relating to civil partnerships. All three drafts are focused on granting reproductive rights to same-sex couples. One of the draft laws on civil partnerships provides equal rights for same-sex partners to utilize assisted reproductive technologies, equivalent to those of heterosexual spouses.

At the legislative level in Ukraine, legal support for the use of assisted reproductive technologies is limited to a few normative provisions, which are primarily general in nature. These include:

• the provisions outlined in Part 7 of Article 281 of the Civil Code of Ukraine, which state that adult individuals have the right, based on medical indications, to undergo treatment programs of assisted reproductive technologies in accordance with the laws and regulations in place [17];
• the regulations outlined in Article 123 of the Family Code of Ukraine, which govern the requirements for determining the origin of a child born as a result of the use of assisted reproductive technologies [18];
• the provisions outlined in Article 48 of the Law of Ukraine «Fundamentals of the Legislation of Ukraine on Healthcare,» which define the types of assisted reproductive technologies, and regulate that the use of artificial insemination and implantation embryo transfer is carried out in accordance with the conditions and procedure established by the central
medical executive body responsible for formulating state healthcare policy, based on the medical indications of the adult woman undergoing the procedure, with the written consent of the spouses, ensuring donor anonymity and preserving medical confidentiality. Specifically, this Article stipulates that artificial conception and embryo implantation are conducted in accordance with the conditions and procedures set forth by the Ministry of Health of Ukraine for women of legal age with medical indications and with the written approval of the married couple, while ensuring donor anonymity and protecting medical confidentiality [19].

The Draft Law No 8011 amends the current Ukrainian legislation in other legal documents. It introduces the following changes:

(I) The Law of Ukraine «On Social and Legal Protection of Military Men and Members of Their Families» and the Law of Ukraine «On the National Police» are supplemented by a new paragraph in Article 11 «The rights of servicemen» and Article 95 «Medical Insurance of Police officers» respectively, which states that: «During a period of martial law or a state of emergency, as well as during a special period provided for by the Law of Ukraine «On the Defense of Ukraine» and in the case of deployment to another country to participate in an international operation to maintain peace and security, servicemen shall have the right to a range of measures provided free of charge by the state, in order to ensure their right to biological paternity (maternity) by taking, preserving and storing reproductive cells obtained from military personnel, in case of loss of reproductive functions due to injury, trauma or contusion. The list of specified measures, the order of their implementation, financing, conditions and the order of registration of the participants shall be established by the Cabinet of Ministers of Ukraine» [20; 21].

(II) The Law of Ukraine «On State Financial Guarantees of Medical Care for the Population» is amended by the addition of a new paragraph which guarantees financing for the cryopreservation of germ cells of servicemen and police officers at the expense of the State Budget.

However, it should be noted that the Draft Law No 8011 is quite limited in scope and does not provide any regulations for the following sensitive issues:

• Legal regulation of the usage of germ cells in post-mortem reproduction;
• Legally enshrined possibility for individuals, such as single women or men who have lost their reproductive function under the circumstances defined by law, to have access to treatments such as in-vitro fertilization and gestational motherhood;
• Possibility to use the reproductive cells of one of the spouses in the event of the death of the other;
• Possibility to use cryopreserved cells stored under government-funded programs for other couples in the event of a donor refusing to use such cells;
• Determining the rules for access to cell banks in the event of the death of a person who provided them, and whether they can be used for identification in case of death of such person;
• Possibility to use the reproductive cells of the person who provided them within the framework of the state program by other close relatives or same-sex partner of the deceased person.

When developing legislation in the field of reproductive medicine to ensure the right to reproduction of military personnel, who are a particularly vulnerable group in terms of mortality, it is important to consider ethical issues and legal regulations for post-mortem reproduction. This approach is guided by the European Court of Human Rights.

We find it necessary to provide a brief comment on the last provision made above, which reflects trends in the development of reproductive rights. In particular, it is worth noting the case of Petithory Lanzmann v. France (12 November 2019) which was decided by the Committee on the admissibility of the European Convention on Human Rights [22]. This case involved the applicant’s request to have her deceased son’s sperm transferred to an establishment capable of arranging medically assisted reproduction. The petitioner, a French citizen and resident, sought to fulfill her son’s last wish to have children of his own, even in the event of his death. However, her request was denied by the administrative court of Paris, which she challenged in court. The Conseil d’Etat, France’s supreme jurisdiction for issues of administrative law, ultimately rejected her complaint [23].

The ECHR observed that the applicant’s complaint actually comprised two distinct parts. In the first part, she claimed to be an indirect victim, on behalf of her late son, while in the second, she claimed to be a direct victim since she had been deprived of the possibility of becoming a grandparent. The Court declared both parts of the application inadmissible, noting in particular that the right for an individual to decide how and when to become a parent was a non-transferable right and that Article 8 (right to respect for private and family life) of the Convention did not guarantee a right to become a grandparent.

Another case worth mentioning is Baret v. France (Application no. 22296/20) communicated to the French Government on 11 January 2021. This application concerns the refusal of the administrative authorities to proceed with the transfer of the gametes of the applicant’s deceased husband to Spain, a country which authorizes post-mortem insemination. The Court gave notice of the application to the French Government and put questions to the parties under Article 8 (right to respect for private and family life) of the Convention. This judgment will become final in the circumstances set out in Article 44 § 2 (final judgments) of the European Convention on Human Rights [24].

It is important to note that while these cases provide insight into the legal considerations surrounding post-mortem reproduction, they are not binding precedent and the laws and regulations surrounding this issue may vary...
by country. In developing legislation in the field of reproductive medicine, particularly with regards to the rights of military personnel, it is crucial to consider the ethical issues and legal regulations for post-mortem reproduction, including any guidance provided by the European Court of Human Rights.

The case of Caballero v. France (no. 37138/20) concerns the refusal of the administrative authorities to transfer the embryos of the couple, formed by the applicant and her deceased husband, to Spain, a country which authorizes post-mortem insemination [25]. The application was communicated to the French Government on January 11, 2021, and the Court has given notice of the application to the French Government and has put questions to the parties under Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The guarantee of human cells cryopreservation without further regulation of post-mortem reproduction creates legal uncertainty and raises more questions without giving any legal or ethical answers. The European Union (EU) has established a number of legal principles and standards in the area of bioethics, particularly in the field of reproduction. These principles and standards are intended to protect the rights and welfare of individuals involved in reproductive procedures, as well as to ensure the safety and quality of the procedures themselves.

The Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells determines the procedure for obtaining and storing cells of the human body [26]. One of the key principles established by the EU in the field of reproduction is that of informed consent and it requires that individuals involved in reproductive procedures be fully informed about the risks and benefits of the procedure, and that they provide their voluntary and informed consent before the procedure is carried out. This principle is reflected in several EU legal documents, including the Directive 2004/23/EC. The EU Tissue and Cells Directive lays out the minimum standards for the quality and safety of reproductive procedures and requires that member states take measures to ensure that these standards are met. As a matter of principle, tissue and cell application programs should be based on the philosophy of voluntary and unpaid donation, anonymity of both the donor and the recipient, altruism of the donor, and solidarity between the donor and the recipient. Member States are urged to take steps to encourage a strong public and non-profit sector involvement in the provision of tissue and cell application services and the related research and development. Voluntary and unpaid tissue and cell donations are a factor that may contribute to high safety standards for tissues and cells and, therefore, to the protection of human health.

But, the Draft Law # 8011 does not define the procedure for informed consent obtaining information the risks and benefits of the procedure and
does not contribute to the idea of voluntary and unpaid donation, for example post-mortal donation.

Another important principle established by the EU in the field of reproduction is that of non-discrimination. This principle prohibits discrimination on the basis of factors such as age, sex, sexual orientation, and disability in relation to access to reproductive services. This principle is reflected in the Charter of Fundamental Rights of the European Union, as well as in the Oviedo Convention [27; 5]. Neither the aforementioned Charter nor the Convention makes express provision for harmonization or prevents Member States from introducing more stringent or more liberal requirements in their legislation.

As were mentioned above, the Draft Law # 8011 does not provide any regulations for the following sensitive issues: legally enshrined possibility for individuals, such as single women or men who have lost their reproductive function under the circumstances defined by law, to have access to treatments such as in-vitro fertilization and gestational motherhood; possibility to use cryopreserved cells stored under government-funded programs for other couples in the event of a donor refusing to use such cells; possibility to use the reproductive cells of the person who provided them within the framework of the state program by other close relatives or same-sex partner of the deceased person.

The EU also has regulations in place to protect the privacy and confidentiality of individuals involved in reproductive procedures. The Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals regarding the processing of personal data and the free movement of such data applies to personal data processed in application of this Directive [28]. Article 8 of Directive 95/46/EC prohibits in principle the processing of data concerning health. Directive 95/46/EC also provides for the controller to implement the appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access and against all other unlawful forms of processing. Moreover, the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data requires that Member States take all necessary measures to ensure the anonymity of both donors and recipients of data, including genetic information, within the scope of the Directive. To achieve this, Member States must implement appropriate data security measures, including safeguards against unauthorized data additions, deletions, or modifications to donor files or deferral records, and the transfer of information. Furthermore, procedures must be in place to resolve data discrepancies, and measures must be taken to ensure that there is no unauthorized disclosure of information, while guaranteeing the traceability of donations.
The Draft Law No. 8011 does not define the procedure for restricting (inadmissibility) obtaining information from such cells without the permission of their owner. Instead, the Directive 95/46/EC in Article 14 «Data protection and confidentiality» determines the strict rules for the protection and confidentiality of human cells.

The EU has established a number of legal principles and standards in the area of bioethics, particularly in the field of reproduction. These principles and standards are intended to protect the rights and welfare of individuals involved in reproductive procedures, as well as to ensure the safety and quality of the procedures themselves. And it is very important that any changes in the legislation of Ukraine would take place precisely taking into account the requirements of the EU legislation. Moreover, in EU the legal regulation of human cells cryopreservation and usage is based on the respect of the fundamental rights and observes the principles reflected in the Charter of Fundamental Rights of the European Union [27] and considers as appropriate the Oviedo convention [5]. The ratification of the Convention on human rights and biomedicine must be the first step towards the assurance of high standards in the field of reproductive medicine. Neither the mentioned above Charter nor the Convention makes express provision for harmonization or prevents Member States from introducing more stringent or more liberal requirements in their legislation. Thus, the ratification of the Convention on human rights and biomedicine must be the first step towards the assurance of high standards in the reproduction medicine.

The Ukrainian legal system is actively searching for solutions to infertility and the right to genetically native children. In this quest, the issue of surrogate motherhood as a method of infertility treatment poses complex ethical considerations. To address these challenges, a bill was introduced in December 2022 that proposes amendments to the Civil Code and Family Code of Ukraine with regards to determining the origin of a child raised through artificial means outside of a human body (further referred to as the Draft Law No. 8306) [29]. The Draft Law No. 8306 aims to introduce the right to ectogenesis, or the use of artificial means to bearing a child outside a human body. Ectogenesis has the potential to provide assistance to couples who are unable for medical reasons to bear a child on their own. However, it is crucial that proper regulations and control mechanisms are in place to ensure that this new technology is used ethically and responsibly.

A deep legal and ethical analysis is needed to understand the full implications of ectogenesis and the rights and responsibilities of all parties involved. This includes parents, donor(s), and child. The Ukrainian legal system must consider the potential consequences of this technology and ensure that it is used in a way that is in the best interests of all parties.

While ectogenesis has the potential to help many couples overcome infertility, it is important to proceed with caution. The introduction of this technology must be carefully thought out and regulated to ensure that it does
not harm individuals or society as a whole. The Ukrainian legislator has a duty to carefully consider the ethics and legality of ectogenesis and determine the best course of action for its citizens.

In light of Ukraine's aspirations towards EU membership and the challenges posed by the ongoing Russian aggression in Ukraine, it is imperative that the legislative initiatives in the field of reproductive medicine are well-considered and guided by the highest standards of human rights. It is important to amend the proposed Draft Law No. 8011 in a way that make it regulate the broadest possible provision of rights in this area. It is important that any changes to the existing Ukrainian legislation (like the Draft Law No. 8306 or the Draft Law No. 8011, or any other) would be comprehensive in nature and would take into account the rights and interests of all parties involved in the process. To achieve this, the government must exercise caution and refrain from any short-sighted legislative actions. Instead, the principles of the Oviedo Convention, EU standards in the field of bioethics, and the highest standards of human rights must guide the development and implementation of new legislation in this area.

In light of the ongoing Russian aggression in Ukraine, it is imperative that the Ukrainian government prioritize the reproductive rights of military and police personnel of Ukraine who are at risk. The availability of assisted reproductive technologies and post-mortal reproduction options can provide a sense of security and comfort to those who are putting their lives on the line in the service of their country. The principles of the Oviedo Convention and EU standards in the field of bioethics serve as a guide for ensuring that these reproductive rights are upheld.

Furthermore, it is important to note that the ability to have biological offspring is a fundamental human right. The government has a duty to ensure that this right is protected for all individuals, including military and police personnel who are at risk in the line of duty.

In conclusion, the importance of providing access to assisted reproductive technologies and post-mortal reproduction options foremost for military and police personnel cannot be overstated now. It is a matter of both human rights and national security. The government must take immediate action to ensure that these reproductive rights are protected, first, for all those who serve and protect their country and after for all other people in Ukraine.

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Кашинцева О. Ю.
кандидат юридичних наук, запрошена наукова співробітниця
Цюрихського університету в рамках URPP Human Reproduction Reloaded H2R, підпроєкт 1: Нормативність людської репродукції
https://orcid.org/0000-0002-2598-5614
kashyntseva@ukr.net

Покальчук О. Ю.
аспірантка НДІ інтелектуальної власності НАПрН України
https://orcid.org/0000-0003-3399-4753
pokalchuk.aiua@gmail.com

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принципів і конвенцій, пов'язаних з репродуктивними правами та охороною здоров'я, включаючи інформовану згоду, недискримінацію та захист приватного життя і конфіденційності. Також наголошується на прогресі України на шляху узгодження національного законодавства зі стандартами ЄС у межах її зусиль щодо отримання статусу країни-кандидатки.

Ключові слова: права людини, збереження репродуктивних клітин, ектогенез, допоміжні репродуктивні технології (ДРТ), війна Росії проти України.

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