

Access to reproductive rights through cross border reproductive care

Доступ до репродуктивних прав у призмі транскордонної репродуктивної допомоги

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Introduction. The existence of the humanity is possible till the moment reproduction exists. The level of citizens' health of any country shows us the level of the economic, demographic, cultural and political development of the country. However, despite the importance of the social relations, national laws are not provided with full range of opportunities about the reproductive health. A special place here is dedicated to the national level of legislation of the relationships with the use of artificial reproductive technologies.

Law is designed to take into account some aspects of the existing problems of different nature and at the legislative level to summarize all the views available in the country by permission or prohibition due to a variety of assisted reproductive technologies.

Infertility is known as a disease of the XXI century. Bad ecology, hereditary factors, stress, lack of sports, unhealthy lifestyle – all this is incidental causes of infertility. The percentage of infertility in Ukraine is extremely impressive – its level reaches 15–25% of the population of reproductive age. Every fifth family in Ukraine cannot deliver a child in a natural way. And, unfortunately, this problem is not unique to Ukraine. People around the world suffer from this problem.

This is why artificial reproductive technologies are sometimes the only way for couples (or a single person) to overcome infertility and to get a genetically native baby.

Main part. Growing interest in the development of ART worldwide happens because of infertility problems. This problem appeared not today, it accompanies mankind since long time ago.

The first attempts of so called "in vitro fertilization" started in 1944. Historically, new direction in treating infertility – in vitro fertilization – emerged in 1978 in the UK. The method invented by Robert Edwards (embryologist) and Patrick Steptoe (gynecologist), was named the In vitro fertilization and embryo transfer (IVF & ET)¹.

Leslie Brown is the first woman in the world who gave birth in Manchester (UK) 25 July 1978 the child "from the tube" – a girl Louise. The first such unusual child was the result of a decade of hard work and cooperation of the two scientists. This was an outstanding event in the professional life of Patrick Steptoe and Robert Edwards, kind of a border, time that we count as a beginning of the development of modern IVF technologies. This achievement is not only a landmark in reproductive science, but also a part of technical evolution and the whole history of mankind.

In modern medicine it could be hard to find an example of such an extremely fast development of a new phenomenon such as the development of IVF technologies.

In Ukraine, through the efforts of researchers of the Ukrainian Institute of Cryobiology and Cryomedicine (including V.I. Hryshenko – Director of the Institute, F.V. Dahno – Head of Laboratory, V.I. Pinyayev – gynecologist,

¹ Brinsden P.R. Thirty years of IVF: the legacy of Patrick Steptoe and Robert Edwards. URL: http://www.researchgate.net/publication/38112869_Thirty_years_of_IVF_the_legacy_of_Patrick_Steptoe_and_Robert_Edwards.

who was directly doing the transfer of the embryo to the womb of a mother, N.V. Chub – embryologist) a healthy girl was born on February 19, 1991 in Kharkiv. It was the first baby born after using of ART in Ukraine.

However, we always have to remember that it is a very private and very sensitive sphere of life, in this matter we operate with the “things of heaven”. That is why it leads to new discussions in the field of medicine, ethics, theology and jurisprudence.

The method of in vitro fertilization and embryo transfer is constantly being improved. But as it was, absolutely all existing approaches to infertility treatment require careful legal studies, which have to protect the rights of both patients and doctors.

What are reproductive rights?

So called reproductive rights is a collective conception. In order to make it clear we can distinguish two general rights: right to reproductive health care and right to reproductive self-expression.

When we talk about the first one we have to understand that right to reproductive health care includes access to safe medical services, high-qualified reproductive health care, safe motherhood, access to modern infertility treatments, use of contraception.

Governments are bound to remove legal barriers to reproductive health care. The CEDAW Committee stated in General Recommendation 24 that: “Other barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures”, indicating that laws criminalizing abortion are discriminatory. In the same General Recommendation, the Committee reiterated that: “When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion”².

The right to reproductive self-expression deals more with every individual. First of all here we understand the freedom to plan a family, freedom to plan children (choice of the quantity, when and how often to give birth to the children). This right has been concluded in numerous consensus documents adopted in the EU. It also means that women and men have equal access to all reproductive health services, all kinds of contraception, they have information about one’s reproductive health.

When an individual wants to realize the reproductive right there can be a problem. Due to different reasons you may have barriers in realization of your right: legislative (when some procedure is prohibited by law), lack of technologies in the country of origin, long waiting lists (talking about donation) etc. Then people find the opportunities abroad – they try so called cross border reproductive care. Motivations on going abroad could be different: legislation, availability of services, law evasion, more successful treatment results, treatment in less stressful environment, dissatisfaction with national health providing system, etc.³.

There are two major definitions in this field – reproductive tourism (which is simpler) and cross border reproductive care (CBRC). There is a discussion between scientists which one should we prefer talking about this phenomenon.

Knoppers and Le Bris were the first to call it “procreative tourism”, “fertility tourism”, “reproductive tourism”. “Reproductive exile” was another variant proposed by Matorras. But the most acceptable definition was given by Guido Pennings. He called it “Cross-border reproductive care”. And his arguments were: we cannot call it “tourism” because it is something to do with pleasure and leisure. “Exile” is something to do with leaving a country for political reason. So the most suitable and most ethical name to call this phenomenon is “Cross-border reproductive care”⁴.

There is no exact data about the quantity of patients that travel abroad in orders to get infertility treatment. In one study, a recent survey of patients in 44 clinics in 6 European countries was estimated that at least

² CEDAW (Committee on the Elimination of Discrimination Against Women) general discussion on access to justice, 18 February 2013. URL: <http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/lpas.pdf>.

³ Rodino I.S., Psych M., Goedeke S., Nowoweiski S. Motivations and experiences of patients seeking cross-border reproductive care: the Australian and New Zealand context. URL: <http://www.ncbi.nlm.nih.gov/pubmed/25241371>.

⁴ van Hoof W., Pennings G. Cross border reproductive care around the world: recent controversies. URL: <http://users.ugent.be/~gpenning>.

12 000–15 000 patients cross border for fertility treatment⁵. In the same study it is also highlighted that one of the main reasons for cross border reproductive care are legal restrictions in their native countries.

There is actually a need to know the accurate numbers of the patients in order to understand the situation. Patients should be educated about the benefits, realities, risks that may happen due to CBRC. Patients may not involve their home physicians or the home country itself if they do not want to. But then the problem for physician appears, because they do not know the numbers and they do not know anything about the services that the patients are given abroad. And finally, health authorities of the country do not get any information about the quality and types of services in other jurisdictions⁶.

Reproductive tourism is a practice associated with the temporary departure to another country for reproductive treatment to conception and/or gestation and/or birth. It can be considered as a special case of the so-called “medical tourism”.

However, the use of assisted reproductive technologies is a growing process worldwide and assumes the character of a global process that knows no boundaries and creates another line of interaction between countries, particularly between the developed and the developing countries.

There is no doubt that this line of cooperation will only be strengthened – for various reasons:

- a lot of people in the world, especially in developing countries, seek for free or low-cost access to enough qualified medical assistance in various areas of health, especially when it is about reproductive health;
- on the other hand, in many developed countries there are legal barriers in using artificial reproductive technologies;
- in so called third countries there are women ready to become surrogates in order to earn some money for their “reproductive work”;
- modern technologies and society allows you to travel from one country to another, to get any procedure you need;
- the prices for such procedures differ a lot from country to country (the price of one IVF cycle in the USA is more than 50 thousand US dollars, in Ukraine it does not reach even 4 thousand US dollars);
- finally, all this can bring and brings profit to some parties of this process.

The major problem in the field of cross border reproductive care is the lack of data. We really should know about the numbers and treatment given to the patients at least at EU level, if not worldwide (worldwide seems quite unreal).

Talking about Ukraine we may suggest that it is quite a popular country for receiving cross border reproductive care for foreigners. The availability and variety of modern technologies in the field of reproduction increases the chances of infertile couples to have children in Ukrainian clinics.

In Ukraine, the field of reproductive technologies is well organized, and Ukrainian doctors rightfully enjoy a high reputation abroad. What is also important is that legal regulations in Ukraine are very polite – donation of the eggs and sperm, donation of embryos, surrogacy, prenatal genetic diagnostic (PGD), sex selection according to medical prescriptions, IVF, ICSI, cryopreservation of the embryos – all these kinds of artificial reproductive technologies are permitted by Ukrainian law.

The first child, after the use of IVF program, was born in Ukraine in 1991 in Kharkov in the center of human reproduction. Today, the Ukrainian Association of Reproductive Medicine does not send patients abroad for treatment at all. We can make any procedure in Ukraine. Moreover, some procedures are performed in Ukraine for the first time in the world.

All the techniques that are now used in the world have been successfully applied in Ukraine. On the contrary, foreign patients are now turning to Ukrainian doctors for the treatment of infertility.

Geography looks extensive – the former Soviet Union, patients from Europe, USA, Australia etc. There are a lot of reasons why foreigners come to Ukraine for curing infertility:

- lack of access to any technology at home, age restrictions; long waiting list in the country of origin;
- significant difference in the cost of medical services;

⁵ Shenfield F., de Mouzon J., Pennings G., Ferraretti A.P., Andersen A.N., de Wert G., Goossens V. ESHRE Taskforce on Cross Border Reproductive Care. Cross border reproductive care in six European countries. *Hum Reprod.* 2010 June 25 (6). P. 1361–1368. DOI: 10.1093/humrep/deq057. Epub 2010 Mar 26. URL: <http://www.ncbi.nlm.nih.gov/pubmed/20348165>.

⁶ Collins J., Cook L. Cross-border reproductive care: now and into the future. URL: [http://www.fertstert.org/article/S0015-0282\(09\)04177-6/abstract](http://www.fertstert.org/article/S0015-0282(09)04177-6/abstract).

- the good reputation of Ukrainian medical facilities;
- geographical location of Ukraine;
- huge variety of clinics (there are more than 30 private clinics in Ukraine).

Reproduction procedures of Ukrainian clinics are well known in the world. They work not only with the patients, but also with biomaterials. From the latest innovations in the field of reproduction there is a process of “vitrification” – a procedure of fast freezing of the eggs or embryos. Throughout the world, this technology is actively used in many cases, for example, if a woman becomes ill with cancer and must undergo chemotherapy, so before that she can freeze some eggs, so that after some time to be able to give birth to a healthy baby. Also, this technology is used among socially active women who are building carrier. For example, 40–45 years businesswomen can use their “young” egg, frozen years earlier, and give birth to a genetically native and healthy child. This procedure is very popular among European women too, especially in the United Kingdom; a lot of women undergo the cryopreservation of their eggs.

Another popular phenomenon is surrogate motherhood, despite the active discussion about this method of child bearing and possible legal conflicts.

In many countries, this method is not used due to legislative restrictions. Surrogacy is forbidden in Finland, Iceland, Italy, Pakistan, Serbia etc.⁷. However, Ukraine allows surrogacy and for that reason there are a lot of women who undertake this procedure in Ukraine. The procedure is always followed by lawyers. Very important is the fact that by Ukrainian law the child’s parents are his genetic parents.

Also, in addition to assisted reproductive technologies, foreigners use the services of Ukrainian hospitals and for the genetic diagnosis of the embryo. Preimplantation genetic diagnostic (PGD) is a modern technology that makes possible to carry out genetic testing of the embryo prior to its transfer into the uterus. This research is carried out during the IVF program and allows doctors to transfer genetically ‘healthy’ embryos only into the uterus. PGD was first used in 1988 in London, Hammersmith Hospital. Nowadays the PGD is a widespread phenomenon; in 2001 a professional association for the PGD was established. Ukrainian clinics have very good facilities and instruments to make successful PGD testing.

Specific discussions of a legal nature of this procedure are now being discussed. The main issue is what to do with so called ‘bad’ embryos. But this is problem that is in need of separate paper.

Unlike Ukraine, genetic diagnosis of embryos is strictly forbidden in Switzerland, Austria, Germany, Italy, only partially allowed in France and the Netherlands.

As an example, in Germany, the preimplantation genetic diagnosis is not carried out only because of the lack of specific articles of the law on this issue. Existing German law has no clear position in this field. However, German law prohibits the use of totipotent embryonic cells, fertilized oocytes without transferring them to the same cycle and the use of micromanipulation, which can then damage the development of the embryo. In addition, the German law also limits the number of embryos transferred and prohibits research on embryos. Thus, the existing provisions can indirectly discourage, but not prevent the development of preimplantation diagnosis in Germany.

Conclusions. The field of reproductive science and reproductive medicine is “too sensitive”. This is the main statement in the field of reproductive rights. Unfortunately, European lawyers, scientists, academics do not think that there ever would be a Directive in reproduction or infertility treatment in general. As for me, the EU could provide any kind of general document about general conditions of infertility treatment throughout Europe leaving all the details to the member states themselves.

Ukraine is a country in Europe, but not in the European Union that can provide a wide range of infertility procedures. That is why a lot of people from all over the world come to Ukraine in order to receive qualified reproductive health care. Such a “travel” is generally called “cross-border reproductive care”.

Cross-border reproductive care (CBRC) is a new phenomenon. The number of the patients who are doing CBRC is growing. The Directive 2011/24/EC is giving to the patients the right to have reimbursement for care in any European Union Member State without prior authorization. But they will be reimbursed only up to the level to which the patient is entitled according to his home country legislation⁸.

⁷ Surrogacy laws by country. URL: http://en.wikipedia.org/wiki/Surrogacy_laws_by_country.

⁸ van Hoof W., Pennings G. Cross border reproductive care around the world: recent controversies. URL: <http://users.ugent.be/~gpenning>.

There is a thought that a country should allow CBRC for law evasion as a form of tolerance. The movements by patients to other countries could change current legislation if the lawmakers knew about the extent of the problem. If the lawmakers understood that patients who need these restricted treatments go abroad, they might soften the restrictions.

Cross border problems are global, mutual, and international. That is why all the services provided should be well organized on international level to ensure their safety and quality. The reason for creating an EU cross border reproductive registry is clear – EU does need enough data in order to cope with all the issues that come from CBRC.

Many countries of the world have their national registries of IVF procedures; cycles proceeded in the country, clinics and hospitals that provide such services etc. But there is no one general base of such cycles, no general information about patients who need and take cross-border reproductive care. So we have to admit that without good clinical data on the cycles and procedures we cannot improve the health care. Our suggestion is to create on EU level a registry that would deal at least with the EU cross border reproductive care. It should be provided cooperation and mutual help throughout the EU member states. However, it is not possible until there is one united database. The government support in this field is extremely needed.

Summary

The article is to do with general information about basic principles of reproductive medicine, reproductive rights of people, access to these rights. So called reproductive rights are a collective conception and we describe all of its parts. Article also deals with legal regulations of in vitro fertilization, egg donation, surrogacy etc. Special attention is paid to cross border reproductive care and legal issues of this process in Ukraine and some other countries.

Анотація

Стаття стосується загальної інформації про основні принципи репродуктивної медицини, репродуктивні права людей, доступ до цих прав. Так звані репродуктивні права – це колективна концепція, і ми описуємо всі її частини. Стаття також стосується правових норм запліднення "in vitro", донорства клітин, явища сурогатного материнства тощо. Особлива увага приділяється транскордонному репродуктивному догляду та правовим питанням цього процесу в Україні та деяких інших країнах.

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