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**THE RIGHT TO HAVE A CHILD USING ASSISTED REPRODUCTIVE  
AND GENETIC TECHNOLOGIES: CONSTITUTIONAL AND LEGAL  
NATURE AND PRACTICE OF JUDICIAL PROTECTION**

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**The relevance of the topic of the dissertation research.** Progress in the field of reproductive genetics, which provides the possibility of medical intervention in the reproductive system and genetic characteristics of a person, is significantly ahead of the development of legal regulation. The discrepancy between the speed of technology improvement and the development of a legal framework regulating the conditions and procedure for accessing them creates a risk of disproportionate restriction and (or) violation of human rights. Assisted reproductive and genetic technologies (hereinafter – ARGTs) are modern scientific methods of treatment that help a person experiencing problems with reproductive health and (or) life-threatening hereditary (genetic) diseases, as well as ensure the reproductive and genetic well-being of future generations. In the dissertation research, the following phenomena in the field of reproductive genetics were studied: in vitro fertilization, surrogacy, prenatal diagnosis and preimplantation diagnosis. These technologies are interrelated and in practice often complement each other. The focus of the study on the totality of these ARGTs is due to the fact that their use generates a large number of legal, medical and ethical disputes and objections.

If earlier the discussion, and even more so the use of ARGTs, seemed to be something incredibly new and exceptional, now both in the Russian Federation and in other states the use of scientific achievements in the reproductive and genetic spheres is becoming the new norm. In 2010, the first Nobel Prize was awarded for the discovery in the field of assisted reproductive technologies, and today ARGTs are widespread medical services available under certain conditions and criteria that vary from state to state, and sometimes even included in the state health insurance program and paid for from the budget.

The Preamble to the Charter of the World Health Organization demonstrates the importance of a person's ability to use high-tech means aimed at maintaining health: "Health is a state of complete physical, mental and social well-being, and not only the absence of diseases or physical defects. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political beliefs, economic or social status."

Modern medical and scientific developments in the field of HRT provide a new attainable level of health for a person facing infertility problems and (or) hereditary (genetic) diseases. There is no consensus on the procedure for the use of ARGts, and States independently decide on the choice of a model of legal regulation, the form of consolidation and the content of the right to have a child using ARGts, depending on a number of factors. Such factors include the existence of a public need for the use of HRT, the willingness of society and the state to promote their introduction into the legal system, the level of technical and professional equipment of the health care system, the economic situation of the state, the openness of the legal system to the dynamic development of law, the ability to quickly respond to the manifestations of negative consequences of the phenomena under consideration. The law enforcement practice of both the European Court of Human Rights (hereinafter – the ECHR) and the judicial bodies of constitutional control in this area is also not stable and unambiguous, and sometimes even contradicts the legislative provisions of the participating countries. Judicial bodies of constitutional control may be involved in resolving controversial issues that arise in practice, influencing the formation of law enforcement practice, and in some cases, the long-term development or correction of legislative provisions.

ARGts are actively integrated into a person's life, but some of their manifestations can be perceived with skepticism. Some practices are rightly regarded as ethically and legally defective and dangerous: the exploitation of prenatal and preimplantation diagnosis of an embryo as a "saviour sibling" – a child born only in order to save another sick child (stem cell donation); the selection of future generations (embryos) only taking into account their gender ; emergencies related to the alleged manufacture of biological weapons, as well as the theft of information from genetic laboratories that could potentially be used against humans and the general population. The use of ARGts in this way threatens the foundations of the constitutional system and constitutional rights and freedoms. In order to avoid negative consequences, ARGts requires constant attention from society and the state. In a rapidly changing reality, the legal regulation of the use of medical and

genetic achievements is relevant as a challenge to the human rights system, as well as ensuring a balance between private and public interests. The constitutional and legal science has not yet formed a unified understanding of human rights aimed at ensuring his reproductive and genetic well-being. In turn, the development of a scientific concept of the human right to the birth of a child using ARGTs, based on a comparative analysis of legal regulation and approaches of judicial bodies of constitutional control, will certainly create a basis for improving legislation and law enforcement practice in this area, as well as expand scientific discussion in this area.

**The degree of elaboration of the topic of the dissertation research.** To date, domestic legal science has not attempted to conduct a comprehensive study of legal regulation and law enforcement practice in the field of reproductive genetics, and has not examined in detail the issues of singling out an independent subjective right to give birth to a child using assisted reproductive and genetic technologies in order to ensure the maximum level of protection of this right by judicial bodies of constitutional control. Generally, studies by legal scientists and experts in the interdisciplinary area of medicine and law deal with certain theoretical aspects of human reproduction and genetics in terms of general conceptual and methodological issues of interpretation: Bobodzhonzoda, I. H. et al. ("On the legal nature of human body parts and tissues and somatic rights as objects of civil law", 2019), Grebenshchikova Ya. S. "Somatic rights as a natural stage in the development of human rights", 2019); Kosenko E.V. and Demina E.A. ("Rights to reproductive material" 2014); Pavlova Yu.V. ("The reproductive function of the body as a form of realization of the constitutional human right to life", 2007); Sergeev Yu.D. and Posadkova M.V. ("The priority of the rights of a surrogate mother at birth: problems of balancing the model of legal regulation, 2021); Khazova O.A. ("Legal aspects of the use of assisted reproductive technologies in Russia"); Khramova T.M. ("The right to respect for gender identity: new standards of personal autonomy", 2019) and others.

Such studies identify the problems of legal regulation of assisted reproductive and genetic technologies, but do not contain a complex and coherent

analysis of the existing practice of national and supranational courts and its impact on the changing regulatory framework and practice of legal relations.

There are very few interdisciplinary studies focused mainly on judicial practice. Only a few legal publications are devoted to problematic aspects: Blokhin P.D. ("Five theses on the role of the practice of the Constitutional Court of the Russian Federation in the system of legal regulation of healthcare", 2020 and "The structure of fundamental rights and their lawful restriction: the Russian constitutional model", 2022), Borisova T. E. ("Surrogacy in the Russian Federation: problems of theory and practices", 2012), Pevtsova N.A. ("The right to physical existence, 2023); Posadkova M.V. ("The future is already here: the constitutional nature of the reproductive right to have a child using assistive technologies"); Troitskaya A.A. ("Legal answers to questions about editing the human genome (taking into account CRISPR-CAS9 technology)"; Khramova T.M. ("Problems of surrogate motherhood in the format of "surrogate law": commentary to advisory opinion of the ECHR", 2019 and "The right to respect for gender identity: new standards of personal autonomy", 2019).

At the same time, it is important to note that at the present time scientific interest to the problem is increasing both in the Russian Federation and abroad, especially in the context of internationalisation of approaches to dispute resolution in relation to the implementation and protection of subjective rights while using reproductive and genetic technologies both in the framework of branches of law (constitutional law, medical law, administrative law) and in the framework of related scientific areas (medicine, sociology, genetics).

This problem has also not become an independent subject of foreign research, despite the presence of methodological generalisations in the studies: Bayefsky M. («Comparative preimplantation genetic diagnosis policy in Europe and the USA and its implications for reproductive tourism», 2016), Bolton C. («The Consequences of Human Genome Editing on Human Rights, 2017»), Dickens B. («Ethical and Legal Aspects of Noninvasive Prenatal Genetic Diagnosis», 2014), Eileen M. («Human Genome Editing: An Evolving Regulatory Climate», 2017),

Enríquez P. («Genome Editing and the Jurisprudence of Scientific Empiricism: Vanderbilt Journal of Entertainment & Technology Law», 2017), Fantus S. («Experiences of gestational surrogacy for gay men in Canada», 2021), Farah A. («Beijing to fund fertility treatment under public medical insurance scheme», 2022), Matthews D. («Access to CRISPR Genome Editing Technologies: Patents, Human Rights and the Public Interest», 2020), Ombelet W. («Is global access to infertility care realistic? The Walking Egg Project», 2014), Prag P. («Assisted Reproductive Technology in Europe: Usage and Regulation in the Context of Cross-Border Reproductive Care», 2017), Raposo V. («The new Portuguese law on surrogacy - The story of how a promising law does not really regulate surrogacy arrangements», 2017), Spaulding S. («Surrogacy and Japan: A Case for Regulation». 2021) et al.

Finally, the importance of the decisions of judicial bodies of the constitutional control in the system of legal regulation of health is established, subject to the provisions of individual works Kovler A.I. ("The evolutionary interpretation of the European Convention on Human Rights: possibilities and limits. The European Court of Human Rights as a subject of interpretation of law", 2016); Krasnov M. A. ("Limitation of rights of a person or search their natural limits?", 2009 and "Some aspects of the problem of the limitation of constitutional rights (for example, economic rights)", 2013); Dolzhikov A. V. ("Manuscripts do not burn": unwritten law in constitutional justice", 2019); Krejcov V. A. ("Protection of the right to a traditional way of life by means of constitutional justice", 2018 and "The Constitutional Court of the Russian Federation as a participant in the law-making process", 2022); Morshakova T.G ("On some actual problems of constitutional justice", 2017); Romashov R.A. ("Living Law is an innovative product of modern Russian Lawmaking", 2022); Troitskaya A.A. ("Fundamental rights: origin, legal nature and limits of protection", 2013) et al.

So, there are significant regulatory gaps against the background of a lack of serious academic discussion on legal regulation and law enforcement practice regarding the use of ARGTs. This work is an attempt to partially fill the gap in science and give practical recommendations.

**The object** of the dissertation research is the totality of social relations that develop when using ARGTs.

**The subject** of the dissertation research is formed by the material norms established by international and national legislators in the field of reproductive genetics, the legal positions of the ECHR and the judicial bodies of constitutional control arising in connection with the protection of the right to have a child using ARGTs.

**The purpose and objectives** of the dissertation research are predetermined by the object and subject of this research and are reflected in the name of its topic. The purpose of the dissertation research is to form a scientific understanding of the concept and content of the right to the birth of a child using ARGTs, to highlight the advantages and disadvantages of models of legal regulation, as well as to determine the approaches and principles on which its protection is based, taking into account the law enforcement practice of the ECHR and judicial bodies of constitutional control.

To achieve this goal, special attention should be paid to solving the following topical theoretical problems:

- to consider the stages of the formation of the right to have a child using ARGTs. through the prism of the doctrine of generations of human rights;
- explain the content, nature and special characteristics, ways of realizing the right to have a child using ARGTs;
- identify the main positive obligations of the state to protect the right to have a child using ARGTs;
- to identify and classify the main approaches of the legislator to the legal regulation of relations that develop when using ARGTs in the world;
- highlight the main areas of interaction between the ECHR and the judicial bodies of constitutional control in the field of reproductive genetics;
- to analyze the main approaches of the judicial bodies of constitutional control to the protection of the right to the birth of a child using ARGTs;



- systematize the principles of effective judicial protection of the right to the birth of a child using ARGTs.
- In addition, it is necessary to solve more applied tasks:
- identify ways to achieve a balance of private and public interests in the application of ARGTs;
- critically comprehend the impact of the decisions of the ECHR and the judicial bodies of constitutional control on the legal regulation of reproductive genetics;
- to develop proposals and recommendations for improving legal regulation and law enforcement practice, which in the future can be used in teaching lectures and special courses for students of legal and medical specialties, as well as in the work of expert councils, lawmaking and law enforcement practice.

**The methodological basis** of the dissertation research is a systematic, practice-oriented approach. Taking into account the specifics of the purpose and objectives of the study, the comparative legal method and the complex analytical method of studying legislative structures and legal positions of judicial bodies of constitutional control play an important role. Private scientific methods of cognition are actively used: statistical observation, interviewing and others.

The main research methods can also include the classification of the elaborated information according to clear differentiated approaches (directions), as well as modeling of the concept of a new right, which is carried out by analogy with the isolation of other complex rights to predict the order of their protection and possible negative risks of use. We also note the formal-legal method aimed at studying the right to have a child using ARGTs derived from basic human rights.

**Theoretical and practical significance of the dissertation research.** The theoretical significance of the work is determined by the conducted complex, comprehensive, interdisciplinary, practice-oriented research aimed at considering the fundamental problems of the implementation of constitutional rights and freedoms in the use of reproductive and genetic technologies through understanding their unique legal and organizational nature. The obtained proposals and conclusions

can be used for making changes and improvements in the doctrine of constitutional and medical law, as well as for teaching in-depth courses on constitutional and medical topics in higher educational institutions of legal and medical profile.

Practical significance of the conducted research is associated with the use of individual results of the work in the creation and improvement of normative-legal regulation of health care, as well as to assist in the development of a balanced (proportional) position of the Constitutional Court of the Russian Federation.

In addition, some conclusions are reflected in discussions of working groups of the Public Chamber of the Russian Federation, in which the author regularly participates. Moreover, some results of the research are included in the Resolution of the National Congress of patients with inborn immunity disorders, and will be published in the annual bulletin of the Expert Council on orphan (rare) diseases at the State Duma of the Russian Federation.

**Degree of reliability and approbation** of the results of the dissertation study. The credibility of the present study is confirmed by the quality of the sources selected for the study, including the works of both Russian jurists and foreign researchers. In addition to legal monographs and scientific articles, the author uses a significant number of works on medicine and genetics, as well as considering the unique precedent practice of interaction with beneficiaries - patients, taking into account the author's current experience in a non-profit organization of assistance to patients with genetic pathologies. The validity of the conclusions is confirmed as a result of the conducted approbation:

- preparation of a significant number of scientific publications in both Russian and foreign publications recommended for defense in the Dissertation Council of the Faculty of Law "Higher School of Economics" (List C and List D);

- reports at scientific conferences with international participation:

1. Conference on Allergy and Immunology of RAAKI – report on the topic: "The legal status of patients during a pandemic" from June 2, 2020 (Moscow);

2. International Forum: Sociology of Health: Trusted healthcare with a report on the topic: "Legal status of patients with congenital immunopathologies: practical sociology" from November 12, 2020 (Moscow);
  3. All-Russian Congress of patients with impaired immunity - report on the topic: "Legal regulation of prenatal diagnostics" from April 28, 2021 (Moscow);
  4. International Forum: Sociology of Health: Trusted Healthcare – report on the topic: "Legal status of patients with congenital immunopathologies: practical sociology" from November 12, 2020 (Moscow);
  5. All-Russian Congress of Patients with congenital disorders of immunity - report on the topic: "Reproductive rights of patients with congenital pathologies" from April 18, 2023 (Moscow);
  6. NAEPID Conference "Primary immunodeficiency in the era of neonatal screening" - report on the topic: "The role of medical specialists in the implementation of the reproductive rights of patients" from April 13, 2023 (Moscow);
  7. V All-Russian Congress of Pediatric Rheumatologists – report on the topic: "Fundamentals of family planning in rheumatological diseases" from April 19, 2023 (Moscow);
- holding a comprehensive event with the invitation of stakeholders: representatives of legal science and legal practitioners, geneticists and doctors specializing in genetic pathologies and human reproduction, in an online format.

It is important to note that the approbation of the obtained results was carried out with the grant support of the Russian Foundation for Basic Research (project No. 20-311-90075, implementation period: 2020-2022, project title: "Approaches of constitutional justice bodies to the legal assessment of the use of reproductive and genetically engineered technologies"), as well as on the basis of the scientific and educational laboratory of international justice of the National Research University "Higher School of Economics".

**The structure** of the dissertation is conditioned by the aim, objectives and logic of the research. The work consists of an introduction, two chapters, including six paragraphs, conclusion, list of sources used.

**The main scientific provisions of the study submitted for protection:**

1. Within the framework of the concept of generational rights, the right to have a child using ARGTs refers to the rights of the fourth generation. Despite the fact that the allocation of this right has become possible due to the development of ARGTs, in terms of content and constitutional significance, it is based on the complementary rights of the first generation (the right to personal dignity and the right to privacy) and the rights of the second generation (the right to health and medical care and the right to maternity protection, childhood and family).

2. The main models of legal regulation of reproductive genetics in Russia and foreign countries, which differ in the criterion of availability of ARGTs, include:

- *individual choice*: access to ARGTs is carried out only on the basis of individual choice of a person (no matter for what reasons), and not as therapy for certain diagnoses (infertility, severe hereditary mutations, infectious diseases). Restrictions on any basis are minimal - single people, married couples (heterosexual and homosexual), and cohabitants, both women and men, have access to assistive technologies. It is used in Australia (New South Wales, Tasmania, Queensland, Victoria, Western Australia), Israel, Canada, Colombia, New Zealand, Mexico, USA (California, New Hampshire, Florida, Rhode Island);
- *regulation and control*: ARGTs are considered as infertility therapy and prevention of hereditary (genetic) diseases. A significant number of restrictions are provided for other reasons: in most countries, only married couples and single women have access, an age limit is set. Prenatal diagnosis at own expense is possible without burdened anamnesis. It can be found in

Belarus, Great Britain, Greece, India, Iran, Kazakhstan, Kyrgyzstan, Portugal, Russian Federation, USA (Louisiana), Ukraine;

- *strict restrictions and (or) prohibition*: ARGts are considered as infertility therapy and prevention of hereditary (genetic) diseases, but in the most extreme cases. Surrogacy is completely prohibited, preimplantation diagnosis is also prohibited in some countries, and where it is allowed, it is necessary to obtain a special permission from the competent state authority. In Vitro fertilization and prenatal diagnostics are available for limited medical reasons. It is in demand in Germany, Denmark, Spain, Italy, China, Norway, Singapore, Switzerland, Japan.
- *legal vacuum*: ARGts is not regulated by the legislator, but in practice the available assistive technologies are used. It is represented in Nigeria, Malaysia, Kenya.

3. In comparative constitutional law, there are three main directions of state policy on the application of ARGt: 1) the consolidation of law (or its individual elements) in the constitutions of states (Slovenia, Portugal, Switzerland); 2) the objectification of law in the decisions of constitutional control bodies (Italy, India, Portugal, Israel); 3) the consolidation of rights at the level of laws or by-laws (Russian Federation, USA, Federal Republic of Germany). Although it is desirable to fix the law in the basic laws of States, it cannot be compulsory to recognize its constitutional and legal significance and ensure proper constitutional protection, including the dynamism of technological progress.

4. The right to have a child using assisted reproductive and genetic technologies (in a subjective sense) is a legal opportunity for legal entities to apply advanced technologies in the field of reproductive genetics in order to give birth to a healthy child and the corresponding obligation of the state to provide legal and technological conditions for its realization and effective protection.

The list of subjects of law depends on the chosen model of legal regulation and is most often predetermined by the presence of medical indications (medical infertility, burdened genetic history). In any case, the subjects of law are heterosexual married

couples and single women. Single men and homosexual couples have this right in exceptional cases (California and Florida, Israel). The constitutional reform carried out in the Russian Federation contributed to a clearer definition of the subject composition within the framework of legislative regulation, excluding single men, homosexual couples and cohabiting persons from it.

5. The right to have a child with the use of ARGTs has a dual nature and has a complex nature. The complexity of the right under consideration is expressed in the fact that the right is based on interrelated and complementary negative (the right to respect for the dignity of the individual and the right to respect for private life) and positive rights (the right to health and medical care and the right to protection of childhood, motherhood and fatherhood). Recognition of the right as complex indicates that its structure is much more complex than just the sum of negative and positive rights, which is expressed in the special substantive characteristics of the right, as well as the requirement for public authorities to assist in organizing human access to technology and financing in cases determined by the legislator.

6. The right to have a child with the use of ARGTs is constitutional by nature, which is manifested in the following characteristics:

this right is based on "traditional" constitutional rights, which determine the need for its constitutional and legal protection - a complex right is violated if its components are violated;

the object of protection of the right to have a child using assisted reproductive and genetic technologies is a constitutionally significant value – the reproductive health of the mother and the genetic health of the child, assuming exemption from severe hereditary mutations;

Effective realization of the right to have a child using ARGTs is possible if there are constitutional guarantees and protection at the highest level, including recourse to the mechanism of constitutional judicial control.

7. There are four main forms of influence of the European Court of Human Rights on the judicial bodies of the constitutional control of the member States of the Council of Europe in the issue of protecting the right to have a child using ARGTs:

- respect for the broad discretion of the participating States, which does not require national authorities to make changes to regulatory regulation and law enforcement practice. The role of the ECHR is to exercise general control;
- cautious disagreement with the decisions of national judicial authorities when assessing law enforcement, requiring ensuring an appropriate level of fulfillment of positive obligations of the State. The role of the ECHR is to prevent the violation of human rights in the procedural aspect, to draw the attention of the national legislator to the existing vicious practice;
- categorical disagreement with the decisions of the national judicial authorities and (or) the established legal regulation, the requirement to implement the legal positions of the ECHR into the national legal system. The role of the ECHR is to demand that the decisions of national judicial control bodies, and sometimes legislative regulation, be brought into line with its legal position;
- development of special recommendations for national legal regulation. The role of the ECHR is to propose a vector for further development of legislation and law enforcement practice in the absence of objections from the participating States.

8. In Russian and foreign practice of judicial bodies of constitutional control, there are three main approaches to the protection of the right to the birth of a child using ARGTs:

- the approach of restrained interpretation (courts do not find violations of the constitution or note that the provisions in question are the exclusive prerogative of the legislator, constitutional interpretation is not required);
- the progressive interpretation approach (courts carry out a constitutional-conformal interpretation to adapt constitutional provisions to modern realities or recognize a norm that does not fully correspond to the constitution (not fully);
- the approach of forming a "new" law (courts distinguish an independent subjective law based on the interpretation of "traditional" norms).

Considering cases on the protection of the right to the birth of a child using ARGts, approaches of progressive interpretation and the formation of a "new" right are preferred for judicial bodies of constitutional control, since they not only indicate the reaction of the court to changes in society, but also allow to provide for timely constitutional protection of the right to the birth of a child using VRiGT.

9. The legal positions of the judicial bodies of constitutional control are based on a set of principles that ensure effective protection of the right to give birth to a child using ARGts:

- the principle of child welfare;
- the principle of protecting the health of a woman – a potential mother;
- the principle of personal choice;
- the principle of consistency and reasonableness.

Considering cases in the field of reproductive genetics, maximum protection is provided with the systematic application of these principles. The search for a proportionate balance between them, taking into account the actual circumstances, allows the court to develop the most appropriate approach to solving a particular case and is therefore defined as a tool for ensuring effective protection of the right.

### **The main content of the work**

**The introduction** substantiates the relevance of the research, defines the object and subject, identifies the authors whose works formed the theoretical basis of the dissertation. A brief overview of the normative and empirical base of the study is given. The purpose and tasks that were consistently solved during the dissertation research are formulated. The methods involved in the work are described. The conclusions of the study are presented with the justification of their scientific novelty. Information is given about the practical and theoretical significance of the research, as well as about the approbation of its results during the author's speeches at scientific conferences and during the preparation of scientific articles.



**In Chapter 1, "The right to have a child using assisted reproductive and genetic technologies: substantive characteristics of law and regulatory regulation in a comparative legal aspect",** the legal regulation of achievements in the field of reproductive genetics, which are aimed at diagnosing genetic (hereditary) diseases in the embryo, is investigated. The results of such diagnostics enable future parents (parents) to prepare in advance for the birth of a child with a severe genetic (hereditary) disease, and in some particularly severe cases to prevent pregnancy and (or) the birth of a child with a fatal disease leading to early disability or death. The main focus is on the study of the nature, content characteristics and distinctive features of the right to have a child using ARGTs, the analysis of international and national regulation of legal relations in the field of access to ARGTs and the interpretation of the interpretation of this right presented in the decisions of the ECHR, national judicial bodies of constitutional control and in the doctrine.

**In section 1.1, "Historical prerequisites for the development of human rights in the field of reproductive genetics",** the history of legal regulation of relations arising from the use of ARGTs is considered, the difficulties of legislative consolidation of this sphere are investigated (fear of the past, fear of the possible future, fear of the unknown). The author illustrates the evolution of law in the field of reproductive genetics as complementarity, when subsequent generations of human rights rely on previous ones and develop rights, adapting to modern realities and the needs (requests) of society. The rights of the first generation (dignity of the individual; the right to respect for private life) act as the foundation of the legal regulation of the use of ARGTs; the main content of the right to have a child using ARGTs is determined by the rights of the second generation (the right to health protection and medical care; protection of family, motherhood and childhood); and features and unique characteristics are established at the stage of recognition of the rights of the fourth generation, which includes the right to have a child using ARGTs. The rights of the third generation are intentionally not considered by the author due to their collective nature, unrelated to the subject of this study. Methodological comparison is not aimed at categorical separation of one right from another, on the

contrary, it is of interest to comprehend their interaction (combination) with each other under the influence of changing reality in the field of ARGTs.

**In Section 1.2, "The doctrinal and judicial understanding of the right to have a child using assisted reproductive and genetic technologies"** is highlighted and considered an independent subjective human right to have a child using ARGTs. The author's definition of subjective law and the characteristics of its subjects are given, the list of which varies depending on the jurisdiction under study. In many states, the right to have a child using ARGTs can be realized only if there are appropriate medical indications, and access to ARGTs for men, homosexual and cohabiting couples is an exception to general practice, which is used extremely rarely (USA (California, Florida) and Israel). In the Russian Federation, the range of subjects for the use of ARGTs was limited, among other things, by the constitutional reform of 2020.

The right to have a child with the use of ARGTs is complex and has a constitutional and legal nature. The complex nature of law is expressed, first of all, in the fact that it is derived from interrelated and complementary negative and positive human rights. Among the negative rights that form it, the right to respect for the dignity of the individual (manifested in the obligation of public authorities to refrain from interference), as well as the right to respect for private life, are highlighted. The relevant positive rights include the right to respect for the dignity of the individual (manifested in the positive obligations of public authorities to ensure the realization of the right: access to technology, the safety of their use and protection from violation of rights), the right to health and medical care, as well as the right to protect childhood, motherhood and fatherhood. At the same time, the structure of complex law is much more complex than the sum of the above-mentioned rights. The paper highlights additional properties of the right to have a child using ARGTs:

- *special content characteristics*. The right to give birth to a child using ARGTs includes the following powers: for free decision-making on the use of ARGTs in pregnancy planning; for freedom in choosing to become a genetic parent;

for freedom in choosing ARGTs methods; for the availability and quality of ARGTs; for reliable information about the state of one's health, the health of the embryo (fetus), the health of the donor, the health of the surrogate mother when using ARGTs; for infertility treatment and prevention of inheritance of severe genetic mutations; to assist state bodies in financing the use of ARGTs in the presence of appropriate medical indications (infertility, the presence of severe genetic diseases in potential parents (in the genus); the presence of severe infectious diseases); to use the donor's genetic material in planning and genetic counseling of the family; to refuse to use ARGTs in the presence of infertility and other reproductive pathologies, severe hereditary mutations in potential parents (in the genus); for judicial protection of each of the components of the right\*

- *special object of protection*: reproductive and genetic well-being of the mother and the unborn child;
- *direct dependence* on the scientific, technical and economic capabilities of the state to organize, at least, access to ARGTs.

The main purpose of identifying an independent subjective right in the field of reproductive genetics is to create the maximum level of its protection, taking into account the vulnerability of the right and a large number of possible encroachments on it (for example, a categorical ban on its implementation (all ARGTs are prohibited or unavailable); coercion to use ARGTs in the presence of a burdened history; discrimination, etc.).

The limits, permissible limitations of the law, positive obligations of the state also depend on the chosen model of legal regulation and approach in law enforcement. Nevertheless, taking into account the complex nature of the right, there are grounds to believe that this right is violated if its components are violated. Without a fixed number of positive obligations of the state, the actual use of ARGTs may give rise to additional legal conflicts.

The right to have a child with the use of ARGTS is constitutional by nature. Accordingly, the volume of positive obligations of the State reflects its highest value. The constitutional and legal nature of the law is evidenced by:

- *international legal recognition* of the right, although not in an imperative, but in a recommendatory form: in the Vienna Declaration ("the right of every woman to affordable and appropriate medical care and to the widest possible range of family planning services"); The Report of the Cairo International Conference ("the right to access to safe, effective, affordable and acceptable methods of family planning and regulation of childbearing"); The Beijing Platform for Action ("women's right to access safe, effective, affordable and acceptable methods of family planning of their choice, to other methods of fertility regulation chosen by them that do not contradict the law", "the right to access appropriate health services that allow women to safely endure the stage of pregnancy and childbirth and provide married couples have the best opportunities to have a healthy child");
- *inclusion of reproductive genetics issues* in the provisions of the basic laws of States (Slovenia, Portugal, the Federal Republic of Germany, Switzerland). At the same time, the fixation of law in constitutions, although desirable, is not mandatory for recognizing its constitutional and legal significance and ensuring proper constitutional protection, especially taking into account the constant dynamic development under the influence of scientific progress;
- *objectification of law through decisions of judicial bodies of constitutional control* (Constitutional Court of Portugal: "the possibility of procreation with medical assistance to eliminate the risk of transmission of diseases of genetic or infectious origin through the prism of "constitutional permissibility of assisted procreation", Constitutional Court of Italy: "the right of a married couple to a healthy child and the right to self-determination in choosing procreation");

- *consideration as an object of protection of an independent constitutionally significant value* - the reproductive and genetic well-being of the mother and the unborn child.

The constitutional and legal nature of the right to have a child with the use of ARGTs gives grounds to demand that the State provide the highest level of protection.

**Section 1.3 "Comparative analysis of legislative regulation of assisted reproductive and genetic technologies"** presents the author's comparative legal review of legislative authorities' approaches to the complex regulation of the use of medical and genetic achievements:

a) *individual choice*: ARGTs is considered solely as an individual choice (no matter for what reasons), and not as therapy for certain diagnoses (infertility, severe hereditary mutations, infectious diseases). Restrictions on any basis are minimal - single people, married couples (heterosexual and homosexual), cohabitants, women and men have access. It is used in Australia (New South Wales, Tasmania, Queensland, Victoria, Western Australia), Israel, Canada, Colombia, New Zealand, Mexico, USA (California, New Hampshire, Florida, Rhode Island). The disadvantages include violation of women's rights, commercialization of human reproduction, increased social inequality and lack of medical security.

b) *regulation and control*: ARGTs are considered as infertility therapy and prevention of hereditary (genetic) diseases. A significant number of restrictions on many grounds: in most countries, only married couples and single women have access, age restrictions. Prenatal diagnosis at own expense is possible without burdened anamnesis. Used in Belarus, Great Britain, Greece, India, Iran, Kazakhstan, Kyrgyzstan, Portugal, Russian Federation, USA (Louisiana), Ukraine. As disadvantages, ambiguous and contradictory legal regulation is established; difficulties with the practical implementation of the established norms; the unbalanced nature of restrictions.

c) *strict restrictions and/or prohibition*: the use of the achievements of reproductive genetics is prohibited or seriously restricted (only the non-commercial option is

allowed). ARGTs is considered as infertility therapy and prevention of hereditary (genetic) diseases, but in the most extreme cases. Surrogacy is completely prohibited, preimplantation diagnosis is either also prohibited or allowed, but subject to special permission from the state body. In Vitro fertilization and prenatal diagnosis for limited indications. Used in Germany, Denmark, Spain, Italy, China, Norway, Singapore, Switzerland, Japan). Disproportionate restriction of human rights is considered as disadvantages; stimulation of reproductive and genetic tourism.

d) *legal vacuum*: absence of legal regulation, which generates uncontrolled legal relations leading to violation of human rights. It is found in African countries. Used in Nigeria, Malaysia, Kenya.

The main factors influencing the choice of approach to legislative regulation include: the need and readiness of society to use ARGTs; technical and professional equipment in the infrastructure of the health system; the degree of development of the state economy, the ability to promote the use of achievements in the field of medicine and genetics; openness and dynamism of the legal system.

**In Chapter 2, "The right to have a child using assisted reproductive and genetic technologies in the practice of the European Court of Human Rights and judicial bodies of constitutional control"**, a comparative analysis of the possibilities of protecting the right by judicial bodies is carried out. The study of the practice of the ECHR made it possible to identify the main directions of its influence on the practice of judicial bodies of constitutional control, and a detailed analysis of the decisions of the latter contributed to the development and identification of various approaches of judicial bodies of constitutional control, as well as the systematization of the principles of effective protection of the right to the birth of a child using ARGTs.

**In Section 2.1 "The Decisions of the European Court of Human Rights and their significance for the judicial bodies of constitutional control in the field of reproductive genetics"**, based on the key concepts of interpretation of law (originalism and living law), the author comes to the conclusion that there is a

significant influence of the decisions of the ECHR on the legal positions of the judicial bodies of constitutional control, and in some cases even on the national legislator. Four main areas of interaction are identified:

- respect for the broad discretion of the participating States, which does not require national authorities to make changes in regulatory regulation and law enforcement practice (ECHR Decision No. 6339/05. of April 10, 2007 "Evans v. the United Kingdom"; ECHR Decision No. 25358/12 of January 24, 2017 "Paradiso and Campanelli v. Italy")
- cautious disagreement with the decisions of national judicial authorities when assessing law enforcement, requiring ensuring an appropriate level of fulfillment of positive obligations of the state (ECHR Decision No. 33011/08 of June 24, 2014 "A.K. v. Latvia"; ECHR Decision No. 27617/04 of May 26, 2011 "R.R. v. Poland");
- categorical disagreement with the decisions of national judicial authorities and (or) the established legal regulation, the requirement to implement the legal positions of the ECHR in the national legal system (ECHR Decision No. 44362/04 of December 4, 2007 "Dixon v. the United Kingdom"; ECHR Decision "S.C. and Others v. Austria" No. 57813/00 of November 3, 2011; ECHR Decision No. 54270/10 of August 28, 2012. "Costa Pavan vs. Italy");
- development of special recommendations for national legal regulation (ECHR Decision No. 65192/11 of June 26, 2014 "Menesson v. France"; ECHR Decision No. 65941/11 of June 26, 2014 "Labasse v. France").

This classification of forms of influence is based on the following criteria: the existence of consensus between the participating States; the existence of legal positions indicating a violation of the Convention; the existence of requirements to change national law enforcement or legislative regulation; the legal force of the ECHR decisions.

The author notes that the joint application of originalism and living law in the practice of the ECHR allows maintaining the stability and predictability of the legal system, while providing flexibility and taking into account changes in society.

At the same time, the ability to implement the legal positions of the European Court into the domestic legal system of the Russian Federation is extremely difficult, taking into account the withdrawal of the Russian Federation from the Council of Europe, as well as the expansion of the powers of the Constitutional Court in 2020. to consider in a special procedure case on the possibility of the Russian Federation executing decisions of interstate bodies for the protection of human rights and freedoms.

**In Section 2.2 "Comparative analysis of the approaches of the judicial body of constitutional control to the protection of the right to the birth of a child using assisted reproductive and genetic technologies", the author's classification of the approaches of the judicial bodies of constitutional control to the protection of the right to the birth of a child using ARGTs is proposed, its significance and relevance are substantiated.**

The approach of *restrained interpretation* is typical for judicial bodies of constitutional control with low judicial activity. It is limited to a modest explanation of the norms of the constitutions and their application to the circumstances of a particular case: the courts either confirm that the norm fully complies with the constitution, or determine that the current legal regulation is the choice of the legislator, and if necessary, the decision should be made by the legislature, not the judiciary. This approach contributes to maintaining the stability and predictability of law enforcement, as courts tend to avoid abrupt and radical changes. As an example, the practice of the Constitutional Court of Italy on the issue of the maximum number of embryos, as well as the Constitutional Court of the Russian Federation on surrogacy is given.

The *progressive interpretation* approach is typical for judicial bodies with moderate and (or) high judicial activity. The application of the approach is relevant both for the judicial bodies of constitutional control and for the higher courts of general jurisdiction in cases where the effective protection of the right to the birth of a child with the use of ARGTs is provided by the interpretation of the federal law. When following this approach, the courts are authorized to act as negative legislators



and recognize the norm as not conforming to the basic law of the state, and also have a wide scope for interpretation when interpreting it. This approach contributes to the balance of the legal system in the application of ARGTs. Examples are the decisions of the Federal Supreme Court of Germany on the prohibition of preimplantation diagnostics, the Constitutional Court of Italy on the legislative establishment of the maximum number of embryos for fertilization and on access to preimplantation diagnostics without a diagnosis of infertility, the Supreme Court of Justice of Israel on the access of single men and homosexual couples to surrogacy.

The approach of *forming a "new" law* is characteristic of judicial bodies of constitutional control with extremely high judicial activity. Following this method of interpretation allows the judicial bodies of constitutional control not only to disagree with the legislative regulation, but also to single out a "new" subjective right in the field of reproductive genetics, which is not contained in the text of the basic law of the state, in order to ensure the maximum level of its protection. Often, the approach under consideration is applied together with the approach of progressive interpretation and contributes to the development of law, expanding the scope of protection of existing rights.

On issues of reproductive genetics, the approach was applied in the practice of the Constitutional Court of Italy on the inaccessibility of preimplantation diagnostics for people with severe diseases, the Supreme Court of India in the case of quality access to prenatal diagnostics, the Constitutional Court of Portugal on the use of reproductive and genetic technologies in the presence of medical indications. The judicial bodies of constitutional control are not burdened with applying consistently the same approach in their practice. In order to effectively protect the right to have a child with the use of ARGTs, the most preferred approaches are progressive interpretation and the formation of a "new" right, contributing to the creation of a balance of private and public interests.

**In Section 2.3 "Principles of effective judicial protection of the right to have a child using assisted reproductive and genetic technologies", based on the**

legal positions of the judicial bodies of constitutional control, a set of principles is identified to ensure effective protection of the right to have a child using ARGTs:

- the principle of child welfare;
- the principle of protecting the health of a woman – a potential mother;
- the principle of personal choice;

the principle of consistency and reasonableness.

Examples of the use of these principles in the consideration of specific cases in the practice of judicial bodies of constitutional control in Germany, India, Italy, Spain, Portugal, Singapore are analyzed. The nature of the principles stems from the main provisions of the basic human rights acts and is reflected in court decisions, and their correlation in each particular case determines the approach of the judicial body of constitutional control and ensures a balance between interests and values in society. Following the principles and their integrated use by the constitutional justice bodies helps to take into account the different needs of citizens and achieve a balance between competing interests and values.

**In conclusion,** the results of the dissertation research are summarized, the main conclusions are presented in a generalized form, and proposals for improving legal regulation and law enforcement practice in the territory of the Russian Federation are outlined.

## **THE MAIN PUBLICATIONS ON THE TOPIC OF DISSERTATION RESEARCH**

*Publications in journals recommended by the HSE (List C and List D):*

1. Pospelova S. I., Kamenskaya N. A., Posadkova M. V., Pospelov S. V. COVID-19 in Russia: Novels of Legal Regulation of Healthcare // *Medicine and Law*. 2020. No. 2. P. 291-314.
2. Posadkova M. Restrictions of the migrant rights as a measure to preserve public health: a comparative legal aspect // *Medicine and Law*. 2020. No. 4. P. 553-570.

3. Posadkova M.V. The future has arrived: the constitutional nature of a right of access to reproductive and genetic technologies // Comparative Constitutional review. 2022. No. 6 (151). P. 16-39.

*Other publications:*

4. Posadkova M.V. Constitutional and legal status of a patient with congenital immunopathologies: practical sociology // Sociology of medicine. 2021. No. 1. P. 67-75.

5. Posadkova M. V. Priority of the rights of a surrogate mother at the birth of a child: problems of balancing the model of legal regulation in Russia // Medical law. 2021. Vol. 2. P. 39-47.