

REPRODUCTIVE RIGHTS OF MILITARY PERSONNEL, THE PRINCIPLE OF JUSTICE, THE RIGHT TO INFORMATION AND COMPENSATION FOR MORAL DAMAGES

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The article analyzes the amendments to the Ukrainian legislation regarding the right of military personnel during the period of martial law to receive free medical services related to ensuring the realization of their right to biological parentage (maternity). A discussion is being launched regarding the fact that the legislation provides the opportunity for military personnel to exercise the above-mentioned right during the period of martial law, but in addition to the martial law regime, a state of emergency may also be introduced in the state, which provides, among other things, the granting to the military command of the powers necessary to avert the threat and ensure security and health of citizens, normal functioning of the national economy, state authorities and local self-government bodies, protection of the constitutional order.

Problems of an applied nature that arise during the collection, cryopreservation and storage of the reproductive cells of a serviceman in case of loss of reproductive function while performing the duties of state defense, protection of the Motherland and other duties assigned to a serviceman in accordance with the law are highlighted. Emphasis is placed on the principle of justice. It is emphasized that the requirement of certainty, clarity, and unambiguity of the legal norm to ensure its uniform application and exclusion of arbitrariness in law enforcement follows from the constitutional principles of equality and justice. Directions for improvement of the Law of Ukraine «On social and legal protection of

military personnel and members of their families» are proposed.

The right to information is analyzed as a guarantee of the right to reproductive technologies. The right to information about the risks to health and life associated with the professional activities of a military serviceman and the obligation of the state to take the necessary measures to protect his health and life are characterized. The legal positions of the European Court of Human Rights are highlighted in the cases of «Roche v. United Kingdom» (exposure to toxic chemicals during tests carried out on a person in the early 1960s while serving in the British Army), «Vilnes and others v. Norway» (the Norwegian authorities did not guarantee that persons who dived in the North Sea received the necessary information to assess the risks to their life and health as a result of the use of rapid decompression tables), Brinkat and others v. Malta (the Maltese government did not fulfill its obligations the obligation to adopt a law or take other measures that would in practice ensure both the proper protection of persons and the informing of such persons about the risks to their life and health). Amendments to the legislation of Ukraine are proposed, taking into account these legal positions.

The circle of subjects that have the right to compensation for non-pecuniary damage if the reproductive right of a serviceman and/or the right to information was violated, the specifics of its compensation, is highlighted. It is noted that after

exhausting all national legal remedies, a person may apply to an international judicial institution or an international organization of which the state that violated the above-mentioned rights of a person is a member or participant. One of the conditions for the admissibility of an individual application by the European Court of Human Rights is the criterion of substantial damage, which includes, among other things, moral damage. Changes to the legislation of Ukraine are proposed.

Key words: reproductive rights, the principle of justice, the principle of equality, the right to information, moral damage, compensation for moral damage, military serviceman, motherhood, parenthood, medical services, martial law, cryopreservation, duties of the state, professional activity of a military serviceman, restrictions on human rights, duty the obligation of the state to take the necessary measures to protect the health and life of a person, trials, the army, the right to life, the right to health care, the European Court of Human Rights, legal positions of the European Court of Human Rights.

Formulation of the problem

Russia's full-scale invasion of Ukraine continues [1; 2]. Military personnel of various ages and genders came to defend Ukraine. Many of them do not have children yet, but would like to become a father/mother. A number of military personnel have children, but would still like to become a father/mother.

At the same time, war is unpredictable - at any time, while defending Ukraine, a serviceman can lose his life, get serious health disorders that disrupt reproductive functions. Strengthening the social protection of servicemen, the state enshrined in the Law of Ukraine «On Social and Legal Protection of Servicemen and Their Family Members» the possibility for servicemen to receive free medical services during the period of martial law, related to ensuring the realization of their right to biological parenthood (maternity). At the same time, in practice there are problems that arise during the implementation of this right and require immediate resolution.

No less urgent is the issue of the state providing information to military personnel regarding the conditions of their service, which may negatively affect their life and health in the future.

For example, by analogy with how it happened in Great Britain (the decision of the European Court of Human Rights in the case «Roche v. United Kingdom» (exposure to toxic chemicals during tests carried out on a person in the early 1960s while serving in the British Army), Norway (the decision of the European Court of Human Rights in the case «Vilnes and others v. Norway» (the Norwegian authorities did not guarantee that persons who dived in the North Sea received the necessary information to assess the risks to their life and health as a result of using tables of rapid pressure relief), in Malta (the decision of the European Court of Human Rights in the case «Brincat and others v. Malta» (the Maltese government did not fulfill its obligation to adopt a law or take other measures that would in practice ensure adequate protection of persons, and informing such persons about the risks to their lives and health). A certain composition of chemicals dangerous to the human body, or when military personnel are exposed to special military equipment, etc., not only in wartime, but also in peacetime, not knowing that such a negative impact on their health and life is carried out during their military service.

No less relevant is the question of the circle of persons who can receive compensation for moral damages, if the serviceman's right to reproductive technologies was violated, and the serviceman himself died.

The above shows that the chosen research topic is relevant, almost ripe.

The purpose of this article is to start a discussion about the state of emergency, which should also include the right to free medical services related to the implementation of the right of a serviceman to biological parenthood (maternity), to identify practical problems that arise in the implementation of the right military personnel on reproductive technologies, and compensation for moral damage in case of its violation, to develop proposals for improving the legislation of Ukraine.

In legal science, the issue of a person's reproductive rights, as well as other rights of a person in the field of health care, which are a guarantee of these rights, were studied by S. Buletsa, L. Dshko, V. Zaborovsky, M. Menjul, I. Senyuta and other scientists [3-11]. At the same time,

the change in social relations, the development of the latest technologies and other factors indicate that the study of reproductive rights and guarantees of their realization does not lose its relevance.

Presenting main material

According to the preamble to the Law of Ukraine «On Social and Legal Protection of Servicemen and Members of Their Families» dated December 20, 1991. in accordance with the Constitution of Ukraine, it defines the basic principles of state policy in the field of social protection of servicemen and their family members, establishes a unified system of their social and legal protection, guarantees to servicemen and their family members favorable conditions for the realization of their constitutional obligations in the economic, social, and political spheres connection regarding the protection of the Motherland and regulates relations in this field [12].

The first thing to pay attention to from a practical point of view is the condition, in the presence of which it is free to receive a medical service related to ensuring the realization of a serviceman's right to biological parenthood (maternity), in particular, to the collection, cryopreservation and storage of their reproductive cells on the case of loss of reproductive function while performing duties for the defense of the state, protection of the Motherland and other duties assigned to them in accordance with the legislation is a state of martial law in the state (paragraph 10 of paragraph 1 of Article 11 of the Law of Ukraine «On social and legal protection of military personnel and members of their families»). But in addition to martial law, a state of emergency may also be introduced.

According to Art. 1 of the Law of Ukraine «On the State of Emergency» a state of emergency is a special legal regime that can be temporarily introduced in Ukraine or in some of its localities in the event of emergency situations of a man-made or natural nature not lower than the national level, which have led or may lead to human and material losses, pose a threat to the life and health of citizens, or in the event of an attempt to seize state power or change the constitutional order of Ukraine by means of violence and provides for the provision of the

relevant state authorities, military command and local self-government bodies in accordance with this Law with the powers necessary to avert the threat and ensure the safety and health of citizens, the normal functioning of the national economy, state authorities and local self-government bodies, the protection of the constitutional order, and also allows for temporary, threat-related, restrictions on the exercise of the constitutional rights and freedoms of a person and a citizen, and the rights and legitimate interests of legal entities with indicating the term of validity of these restrictions [13].

Even the purpose of introducing a state of emergency shows that there is an unavoidable need to eliminate the threat and eliminate particularly severe emergencies of man-made or natural nature as soon as possible, normalize the situation, restore law and order in the event of attempts to seize state power or change the constitutional order through violence, restore the constitutional rights and freedoms of citizens, and as well as the rights and legitimate interests of legal entities, creating conditions for the normal functioning of state authorities and local self-government bodies, other institutions of civil society (Article 2 of the Law of Ukraine «On the State of Emergency») [13]. That is, actions or events have actually taken place or are taking place, will take place, which pose a threat to the highest social good - people, their life and health, their integrity and security, the foundations of the constitutional system, the rights and freedoms of a person and a citizen. These are not standard everyday situations for the state.

Therefore, in the conditions of a state of emergency, military personnel carry out averting the threat and ensuring the safety and health of citizens, the normal functioning of the national economy, state authorities and local self-government bodies, and the protection of the constitutional order.

It would be wrong to claim that the role of a serviceman in a state of emergency is less than in a state of war. For example, when there was an accident at the Chernobyl nuclear power plant, 526,250 people, most of whom were military personnel, were involved in its liquidation. As a result of exposure to radiation, a number of them lost their reproductive functions.

A state of emergency may be introduced in a certain territory of Ukraine and a military serviceman may be deployed there to perform the duties assigned to him. Thus, it is expedient to paragraph 10 of clause 1 of Art. 11 of the Law of Ukraine «On the Social and Legal Protection of Servicemen and Members of Their Families» to introduce changes that would provide that a serviceman is provided free of charge with medical services related to the realization of the serviceman's right to biological parenthood (maternity), not only during the period of military service of the state, and when the legal regime of the state of emergency is introduced.

Another situation is that, in accordance with the Law of Ukraine «On Social and Legal Protection of Servicemen and Members of Their Families», the right to free medical services related to ensuring the exercise of a serviceman's right to biological parenthood (maternity) is not guaranteed after the termination of the regime martial law. That is, immediately after the termination of the martial law regime, such a service is provided on a paid basis.

But there may be situations when a serviceman may be in captivity at the time of the cancellation of the martial law regime, or may be alive and illegally held by the aggressor state, and be recognized as missing in Ukraine. It can be seen that in such a case, the legislation of Ukraine should provide that the above-mentioned medical service for such servicemen is provided free of charge for a certain number of years.

As for the approach applied in the Law of Ukraine «On Social and Legal Protection of Servicemen and Members of Their Families», free medical service related to ensuring the realization of the right of a serviceman to biological parenthood (maternity) is provided as long as martial law is in effect. It can be seen that upon the cancellation of the martial law regime, if a serviceman has lost reproductive function, such medical service should continue to be provided free of charge. This would strengthen social guarantees for military personnel. As for military personnel who have not lost reproductive functions, it can be seen that this medical service should be provided to them free of charge after the lifting of martial law for a certain number of years (for example, 3 years) or until the birth of a child.

Equally important is the provision of long-term storage of reproductive cells of military personnel in the conditions when Russia is bombing hospitals and other facilities in Ukraine that are under the protection of the Geneva Convention [14]. It is seen that the state should ensure the storage of reproductive cells of military personnel abroad. Another set of issues that we would like to draw the attention of scientists to in this article is the issue of providing servicemen with full and comprehensive information by the state regarding factors that negatively affect their reproductive health.

Thus, when a serviceman is performing his sacred duty to protect the Motherland, the issue of receiving from the state comprehensive, complete and reliable information about all factors that can harm the life and health of a serviceman, and which are related to the influence of medicinal products on him, is an urgent issue, the surrounding natural environment in which the serviceman is. For example, it can be the use of the latest military weapons that have not yet passed all the tests, or weapons based on the latest technologies, the impact of which on the human body is not sufficiently studied or revealed, but objectively, its use itself causes harm to health. I am a military serviceman. These can be situations where a serviceman is in the accident zone at the Chernobyl nuclear power plant, or situations when a serviceman is in an area where there is a concrete capsule under the ground that protects a person infected as a result of an underground nuclear explosion in 1979. square («Yuny Komunar» mine), etc.

In this regard, as well as to ensure that Ukraine fulfills its international obligations in good faith under the Convention for the Protection of Human Rights and Fundamental Freedoms [15], we will reveal the legal positions of the European Court of Human Rights in the cases «Roche v. the United Kingdom», «Vilnius and others v. Norway», «Brincat and others v. Malta».

In the case of «Roche v. United Kingdom», dated October 19, 2005, considered by the Grand Chamber of the European Court of Human Rights, the applicant was registered as a person with disabilities since 1992 - he suffered from health problems that were the result exposure to toxic chemicals during tests that were

conducted on him while he was serving in the British Army. At the same time, he did not have access at all to all relevant and proper information that would have allowed him to assess any risk he was exposed to while participating in these trials [16].

Establishing a violation by the United Kingdom of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights formulated the legal position that a serviceman should be able to obtain information about the risks associated with his participation in the tests being conducted or were conducted by the army.

Therefore, in the Law of Ukraine «On Military Duty and Military Service» [17], it is necessary to enshrine a norm that would provide for the state's obligation to provide a military serviceman with information about the risks associated with his participation in tests that are being conducted or were conducted under participation of servicemen and obtaining informed consent from the serviceman.

In another case, *Vilnius and Others v. Norway*, dated 5 December 2013, divers raised the issue that they had been incapacitated as a result of diving in the North Sea for oil companies during the initial period of oil exploration. Of course, potentially tasks that involve diving can also be performed during military operations (for example, in the Black Sea, the Sea of Azov). Therefore, the legal positions expressed by the European Court in this case have practical value for Ukraine. All the applicant divers complained that Norway: 1) failed to take the necessary measures to protect the health and life of deep-sea divers while working in the North Sea and, in relation to the three applicants, in test facilities; 2) Norway did not provide them with sufficient information about the risks associated with deep-sea diving and research diving [18].

Establishing a violation of Art. 8 of the Convention and Art. 2, the European Court of Human Rights has formulated legal positions, which are that: 1) the authorities must guarantee that the person receives the necessary information to assess the risks to health and life as a result of the use of rapid pressure reduction tables; 2) the government must be able to prevent the health and life of persons from being endangered.

Therefore, the state has an obligation to guarantee that servicemen receive all the information that would allow them to assess professional risks for life, health, and safety.

In the case «*Brincat and others v. Malta*» dated July 24, 2014. workers in the repair shop of a shipyard were exposed to asbestos for several decades [19]. Such exposure led to asbestos-related diseases, and the Maltese government refused to protect them from the ill effects. Establishing a violation of Art. 8 of the Convention and Art. 2, the European Court of Human Rights has formulated a legal position, which is that: the state must adopt a law or take other measures to ensure adequate protection of individuals and inform them about the risks to their health and life; the seriousness of the threat of exposure to a chemical substance on human life and health determines that, despite the «limits of discretion» of states in making a decision regarding the management of such risks, the state must fulfill its obligations under the Convention: issue a law or take other measures to confront the risk of causing harm to human health and life.

We propose to enshrine in the Law of Ukraine «On the Armed Forces of Ukraine» [20] a norm that would provide for the state's obligation to provide military personnel with full information about the risks associated with the performance of their professional duties, which would allow them to assess professional risks for life, health, safety.

Another relevant issue is compensation for moral damage caused by the violation of a serviceman's reproductive rights. The legislation of Ukraine provides for a general way of protecting civil rights: compensation for moral (non-property) damage (clause 9 part 2 of article 16 of the Civil Code of Ukraine); one of the main ways of protecting non-property rights is the right to monetary compensation for moral damage caused by interference with such non-property goods (Article 280 of the Civil Code of Ukraine) [21].

Luspenyk D. and Lidovets R. correctly point out that «There is no legal definition of moral damage. This is true and is connected with the impossibility of a clear definition of such an evaluative concept, which is rightly recognized by many scientists, therefore in Art. 23 of the Civil Code of Ukraine, the legislator defined only the

ways of manifesting such damage. At the same time, any legal definition would be incomplete, since it is impossible to single out universal, defining, generic features in the concept that would be characteristic of it as a whole» [22].

Judicial practice gave the following definition of moral damage: it is loss of a non-property nature as a result of moral or physical suffering, or other negative phenomena caused to a natural or legal person by illegal actions or inaction of other persons (clause 3 of the Resolution of the Plenum of the Supreme Court of Ukraine dated March 31, 1995 No. 4 (with relevant changes) «On judicial practice in cases of compensation for moral (non-property) damage») [23].

As is well known, in accordance with Art. 55 of the Constitution of Ukraine [24], after exhausting all national remedies, a person may apply to the European Court of Human Rights. Direct victims of violations of human rights and fundamental freedoms, guaranteed by the Convention on the Protection of Human Rights and Fundamental Freedoms, are persons whose fundamental right is violated by one of the states listed in the list attached to the Convention. Indirect victims of violations of human rights and fundamental freedoms guaranteed by the Convention are the following persons: close relatives of persons who died due to the fault of the state - participants of the Convention; close relatives who continue to defend the rights or freedoms of the deceased applicant in the European Court of Human Rights in a case initiated by the deceased applicant who is their relative and who died before the decision of the European Court of Human Rights. Potential victims are persons who may actually suffer as a result of the application of the legislation of the country that is a party to the Convention, which violates or may potentially violate the rights and fundamental freedoms of a person or a group of persons).

It is seen that in the Law of Ukraine «On Social and Legal Protection of Servicemen and Members of Their Families» it is expedient to enshrine a rule that would provide that in the event of a violation of a serviceman's right to free medical services related to ensuring the exercise of a serviceman's right to biological parenthood (maternity), a serviceman and his close relatives have the right to appeal to the court if he died.

Conclusions

1. It is proposed to make changes to paragraph 10 of clause 1 of Article 11 of the Law of Ukraine «On Social and Legal Protection of Servicemen and Members of Their Families», which would provide that a serviceman is provided free of charge with medical services related to the realization of the serviceman's right to biological parenthood (maternity), not only during the period of martial law, and when introducing a legal state of emergency; It is proposed that the Law of Ukraine «On Social and Legal Protection of Servicemen and Members of Their Families» provide for norms according to which:

1) if a serviceman is in captivity at the time of the cancellation of the martial law regime or is recognized as missing, then the medical service related to the provision implementation of the serviceman's right to biological parenthood (maternity), provided free of charge within three years after the cancellation of martial law;

2) upon cancellation of the martial law regime, if a serviceman has lost reproductive function, such medical service must continue to be provided free of charge;

3) military personnel who have not lost reproductive functions have the right to free provision of this medical service for 3 years or until the birth of a child;

4) the state provides long-term storage of reproductive cells of military personnel in foreign countries.

2. In the Law of Ukraine «On Military Duty and Military Service» it is proposed to enshrine a norm that would provide for the obligation of the state to provide a serviceman with information about the risks associated with his participation in tests that are being conducted or have been conducted with the participation of military personnel and obtain informed consent from the serviceman. In the law of Ukraine «On the Armed Forces of Ukraine» it is proposed to enshrine a norm that would provide for the obligation of the state to provide military personnel with full information about the risks associated with the performance of their professional duties, which would allow them to assess professional risks to life, health, safety.

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**РЕПРОДУКТИВНІ ПРАВА
ВІЙСЬКОВОСЛУЖБОВЦІВ,
ПРИНЦИП СПРАВЕДЛИВОСТІ,
ПРАВО НА ІНФОРМАЦІЮ ТА НА
ВІДШКОДУВАННЯ МОРАЛЬНОЇ
ШКОДИ**

У статті аналізуються новели українського законодавства щодо права військовослужбовців у період дії воєнного стану на безоплатне отримання медичної послуги, пов'язаної із забезпеченням реалізації їхнього права на біологічне батьківство (материнство). Започатковується дискусія щодо того, що законодавство надає можливість військовослужбовцям реалізувати вище зазначене право в період дії воєнного стану, але, окрім режиму воєнного стану, у державі може запроваджуватись і режим надзвичайного стану, який передбачає серед іншого надання військовому командуванню повноважень, необхідних для відвернення загрози та забезпечення безпеки і здоров'я громадян, нормального функціонування національної економіки, органів державної влади та органів місцевого самоврядування, захисту конституційного ладу.

Виділяються проблеми прикладного характеру, які виникають при здійсненні забору, кріоконсервації та зберіганні репродуктивних клітин військовослужбовця на випадок втрати репродуктивної функції при виконанні обов'язків із оборони держави, захисту Вітчизни та інших покладених на військовослужбовця обов'язків відповідно до законодавства. Акцентується увага на принципі справедливості. Підкреслюється, що з конституційних принципів рівності та справедливості випливає вимога визначеності, ясності, недвозначності правової норми для забезпечення її однакового застосування та виключення сваволі при правозастосуванні. Пропонуються напрями вдосконалення Закону України «Про соціальний і правовий захист військовослужбовців та членів їх сімей».

Аналізується право на інформацію як гарантія права на репродуктивні технології. Характеризується право на інформацію щодо ризиків для здоров'я та життя, пов'язаних з професійною діяльністю військовослужбовця, та обов'язок держави вживати необхідні заходи для захисту його здоров'я та життя. Виді-

ляються правові позиції Європейського суду з прав людини у справах «Рош проти Сполученого Королівства» (вплив токсичних хімічних речовин під час випробувань, проведених на особі на початку 1960-х років під час служби в Британській армії), «Вільнес та інші проти Норвегії» (влада Норвегії не гарантувала особам, які здійснювали занурення в Північному морі, отримання необхідної інформації для оцінки ними ризиків для свого життя та здоров'я в результаті використання таблиць швидкого зниження тиску), «Брінкат і інші проти Мальти» (урядом Мальти не було виконано зобов'язання прийняти закон чи вжити інші заходи, які б на практиці забезпечили і належний захист осіб, і інформування таких осіб про ризики для їхнього життя та здоров'я). Пропонуються зміни до Закону України «Про військовий обов'язок і військову службу», Закону України «Про Збройні сили України».

Виділяється коло суб'єктів, які мають право на відшкодування моральної шкоди якщо було порушено репродуктивне право військовослужбовця та/або право на інформацію, особливості її відшкодування. Зазначається, що після вичерпання всіх національних засобів правового захисту особа може звернутися до міжнародної судової установи чи міжнародної організації, членом або учасником якої є держава, що порушила вище зазначені права особи. Однією з умов прийнятності індивідуальної заяви Європейським судом з прав людини є критерій суттєвої шкоди, який включає серед іншого і моральну шкоду. Пропонуються зміни до Закону України «Про соціальний і правовий захист військовослужбовців та членів їх сімей».

Ключові слова: репродуктивні права, принцип справедливості, принцип рівності, право на інформацію, моральна шкода, відшкодування моральної шкоди, військовослужбовець, материнство, батьківство, медичні послуги, воєнний стан, кріо консервація, обов'язки держави, професійна діяльність військовослужбовця, обмеження прав людини, обов'язок держави вживати необхідні заходи для захисту здоров'я та життя особи, випробовування, армія, право на життя, право на охорону здоров'я, Європейський суд з прав людини, правові позиції Європейського суду з прав людини.