

## DUALISTIC LEGAL REGULATION OF ACQUIRED SUBJECTIVE HUMAN RIGHTS IN THE RUSSIAN FEDERATION

Nikolay Ivanovich Polishchuk<sup>1</sup>, Nikolay Ivanovich Petrenko<sup>2</sup>, Oleg Gennadievich Kovalev<sup>3</sup>,  
Aleksandra Andreevna Orlova<sup>4\*</sup>, Elena Aleksandrovna Aleksandrova<sup>5</sup>

<sup>1,4,5</sup>Academy of the Federal Penitentiary Service of Russia, Sennaya Street, 1, Ryazan, 390000, Russia, <sup>2,3</sup>Pskov State University, Krasnoarmeyskaya Street, 1, Pskov, 180007, Russia.

Email: \*orlova4685@yandex.com

Article History: Received on 19<sup>th</sup> November 2019, Revised on 19<sup>th</sup> December 2019, Published on 14<sup>th</sup> January 2020

### Abstract

**Purpose of the study:** This article analyzes dualistic approaches to the determination of legal facts that grant citizens of the Russian Federation subjective rights. It is obvious that the concept of birth is still not specified in the existing Russian legislation. Different norms of the modern Russian legislation associate the legal fact of birth with the criterion of live birth. An embryo (fetus) cannot have a complex of general civil rights until the time of live birth.

**Methodology:** The authors of the article have compared this constitutional directive with existing rules of other branches of Russian law and revealed a completely opposite situation.

**Main Findings:** Of course, the existing discrepancies in certain legal acts that regulate the same or related social relations represent a classical legal conflict. Moreover, partial contradictions in the Russian legal system are caused by the fact that many sectoral norms conflict with the Constitution.

**Novelty/Originality:** Legal certainty is a basic and system-forming principle that dialectically complements and develops other general-legal, intersectoral and sectoral principles, justifies their functional necessity, determines the accuracy and clarity of legal instructions, established order and limits their actions.

**Keywords:** *Legal Certainty, Human Rights, Live Birth, Embryo, Acquisition of Rights, Inheritance.*

### INTRODUCTION

Russia is currently implementing a whole range of activities aimed at improving and developing the national legal system. It is believed that modern legal policies are characterized by scientific, systematic and consistent activities of public authorities necessary to form an effective mechanism for the legal regulation of social relations. The main characteristic of this activity is a certain system of goals reflecting legal, social, economic, spiritual, moral and other aspects of social life. To objectively understand and respect the law, it is necessary to analyze it through the perspective of certainty, i.e. the accuracy and clarity of its legal prescriptions. Being a possible implementation of basic legal principles and ideas of interpersonal and public relations, it creates the desired model of human behavior that is considered by the whole mechanism of legal regulation.

In recent years, the legal press has been discussing the need for more effective implementation of legal certainty at the international level, in particular, D.K. Kusbekov, A.A. Beissenova, B.I. Karipbaev and D.K. Mamytkanov (2019), A.D. Bekebayeva, Z.E. Nurbayev, L.N. Nursultanova, A.M. Azmukhanova and K.M. Yerimbetova (2019), D.S. Sharipova, A.T. Yespenova, S.Z. Kobzhanova and R.A. Yergaliyeva (2018), M.V. Markhiem, A.E. Novikova and E.E. Tonkov (2013), D.A. Smirnov et al. (2020), A.V. Kochetkov et al. (2019), G.E. Adygezalova et al. (2019), D. Kuteynikov, O. Izhaev, V. Lebedev and S. Zenin (2019), R.V. Kostenko and E.S. Tokarenko (2018), D. Leonov, S. Ayaganova (2018). These sources analyze its fundamental processes at the general theoretical and sectoral levels, justify its legal and social significance, express different opinions on scientific knowledge, real application, etc.

This approach is fully justified since other general legal, intersectoral and sectoral principles are based on legal certainty. In fact, it is a basic principle that dialectically complements and develops other general legal, intersectoral and sectoral principles, substantiates their functional necessity, determines action limits, forms axiological and legal guidelines, and ultimately contributes to the maintenance of legality in all public relations. The essence of other principles cannot be revealed without the principle of legal certainty as their implementation always depends on the accuracy and clarity of legal regulation (Polishchuk, 2018b, 73-74).

Part 2 of Article 17 of the Constitution of the Russian Federation recognizes the natural character of human rights and freedoms and states that fundamental rights and freedoms of a person are inalienable and acquired at birth. Consequently, they are realized by the legal fact of birth, which is indicated by the basic law of Russia and associated with the formation, change, and termination of constitutional legal relations. The inalienability of human rights and freedoms means that none of the human and civil rights proclaimed in the Constitution of the Russian Federation can be withdrawn or limited without specifying grounds for their restriction (Polishchuk, 2018a).

However, the existing Russian legislation still does not provide a clear and unambiguous concept of the person's birth. Most regulatory legal acts utilize the criterion for live birth to establish the legal fact of the person's birth. Traditionally, independent breathing was considered the main criterion for live birth. This criterion was established by the instruction

of the People's Commissariat of Public Health of the USSR in 1937. Other signs of life that could be detected in a newborn baby were not taken into account. Later this approach was duplicated in the instruction of the Ministry of Health of the USSR dated June 12, 1986 "On the approval of methodological documents on the definition of concepts relating to the perinatal period and maintenance of primary medical documentation in birth centers". According to this instruction, a newborn weighing less than 1000 g and younger than 28 weeks were considered a miscarriage regardless of the fetus' vital signs. Live birth was recognized only if a fetus lived for 168 hours; otherwise, this newborn could not be called a child.

Influenced by various international legal acts (World Declaration on the Survival, Protection, and Development of Children, the United Nations Convention on the Rights of the Child, etc.), the Ministry of Health (Order of the Ministry of Health of the Russian Federation No. 318 dated of December 4, 1992) and the Federal State Statistics Service (Resolution of the Federal State Statistics Service of the Russian Federation No. 190 dated of December 4, 1992) of the Russian Federation issued a joint regulatory legal act "On the transition to the criteria for live birth and stillbirth recommended by the World Health Organization" that canceled the instruction determining criteria for live birth and maturation (maturity) of a fetus (newborn) (Annex No. 1 to the Order of the Ministry of Health No. 848 dated of June 12, 1986) in the Russian Federation on January 1, 1993.

According to this document, "a live birth is the complete ejection or removal of the product of conception from the mother's body regardless of the duration of pregnancy. After this separation, a fetus should breathe or show other vital signs, including heartbeat, the pulsing umbilical cord or voluntary muscle movements irrespective of whether the umbilical cord is cut and the placenta is detached. Each product of such a birth is considered to be alive".

The WHO recommendations prescribe to include all cases of birth of a fetus and newborn weighing more than 500 g (if the birth weight is unknown, the body length should be 25 cm or more, or the duration of pregnancy 22 weeks or more) into the statistics of perinatal mortality ([Ministry of Public Health Order No. 1687n, 2011](#)).

On February 20, 2012, the Ministry of Health and Social Development of the Russian Federation and the Federal State Statistics Service issued the Order No.144 and Resolution No. 42 "On the cancelation of the Order of the Ministry of Health of the Russian Federation and Resolution of the Federal State Statistics Service of December 4, 1992, No.318/190 "On the transition to the criteria for live birth and stillbirth recommended by the World Health Organization".

## METHODS

The methodological basis of this study is the dialectical method of scientific cognition. While conducting the research, we also used general scientific methods, including system-structural, structural-functional, comparative, logical (analysis, synthesis, deduction, induction, etc.), as well as comparative-legal, statistical, concrete-sociological, logical-legal methods, the analysis of documents.

## RESULTS

According to Annex No. 1 to the Order of the Ministry of Health and Social Development of the Russian Federation of December 27, 2011 No. 1687n "On medical birth criteria, proper birth documents and procedure for their obtaining", a child's birth is the moment when a fetus is separated from its mother by means of labor. Medical birth criteria are as follows:

- Gestational age of 22 weeks or more;
- The child's weight at birth is 500 grams or more (or less than 500 grams for multiple births);
- The body length of a newborn is 25 cm or more (in case the child's weight at birth is unknown).

Legislators have established the following vital signs: respiration, palpitation, the pulsing umbilical cord or voluntary movements of muscles irrespective of whether the umbilical cord is cut and the placenta is detached. If these signs are absent, a child is considered stillborn.

According to paragraph 2 of Article 17 of the Constitution of the Russian Federation, an unborn embryo (fetus) cannot have any civil rights. However, comparing this constitutional directive with the existing norms of other branches of the Russian legislation, one can reveal a completely opposite situation. There is a classical legal conflict characterized by discrepancies and contradictions in certain legal acts that regulate the same or related social relations. Moreover, sectoral norms ignore the Constitution, which has led to partial mismatching of the Russian legal system ([Abramova et al., 2017, 705](#)).

In conformity with modern theoretical and applied jurisprudence, the Russian civil law retains a common approach establishing that a person acquires legal capacity at birth. However, Article 1116 of the Civil Code of the Russian Federation states that "persons who can be called upon to inherit are those left alive as of the date of opening of the inheritance and also persons conceived during the lifetime of the deceased and born after the opening of the inheritance". Unlike the Constitution of the Russian Federation, this legal norm protects the rights of inheritance of an unborn person.

According to paragraph 2 of Article 7 of the Federal Law dated of July 24, 1998, No. 125-FZ "On compulsory social insurance against accidents at work and occupational diseases", the child of the deceased born after his or her death has the right to insurance provision in case of the death of the insured as a result of an insured event. Therefore, this regulatory legal act also establishes the right of an unborn child to obtain insurance coverage ([Belyanskaya, 2018, 28](#)).

The Labor Code of the Russian Federation contains many conflicts of laws rules protecting the fundamental rights of an unborn person. While forming guarantees for pregnant women, the Labor Code of the Russian Federation prohibits the following actions:

- To refuse to conclude an employment contract for motives related to pregnancy or parental status (Article 64 of the Labor Code of the Russian Federation);
- To establish any tests when hiring pregnant women (Article 70 of the Labor Code of the Russian Federation);
- To make pregnant women work at night, from 10 pm to 6 am (Article 96 of the Labor Code of the Russian Federation);
- To work extra hours (Article 99 of the Labor Code of the Russian Federation);
- To recall a pregnant woman from a vacation under any circumstances (Article 125 of the Labor Code of the Russian Federation);
- To replace the leave for pregnant women with cash compensation (Article 126 of the Labor Code of the Russian Federation);
- To terminate an employment contract with a pregnant woman at the employer's initiative except for the organization liquidation (Article 261 of the Labor Code of the Russian Federation);
- To involve a pregnant woman or a woman with children under the age of 3 years in the performance of rotational work (Article 298 of the Labor Code of the Russian Federation).

In addition, the state guarantees that the average salary of pregnant women will be preserved during mandatory dispensary examination (Article 254 of the Labor Code of the Russian Federation). It gives them the opportunity to work on a part-time basis and receive payment in conformity with the hours worked or the amount of work done (Article 93 of the Labor Code of the Russian Federation). Similar legal guarantees are contained in Articles 123, 253, 254, 255, 260 and others of the Labor Code of the Russian Federation.

It should be noted that similar collisions are present in the Criminal Code of the Russian Federation. For instance, Part 1 of Article 82 of the Criminal Code of the Russian Federation provides convicted pregnant women with the possibility of a deferred sentence. In this case, the gestational age does not matter. According to Article 63 of the Criminal Code of the Russian Federation, an aggravation is the commission of a crime against a woman whose pregnancy is evident for an offender. Article 105 of the Criminal Code of the Russian Federation states the increased public danger of killing a pregnant woman due to a higher social nature of the object of the offense ([Nesterova, 2015, 74](#)).

The Penal Code of the Russian Federation also contains a wide range of legal norms aimed at protecting the rights of an unborn person. Thus, Article 20 of the Penal Code of the Russian Federation states that the court controls the execution of punishment when deciding on a parole, replacing the unserved part of punishment with lighter punishment, releasing on medical grounds, pronouncing a deferred sentence for pregnant women and women with children under the age of 14 years and changing correctional institution types (Article 177 of the Penal Code of the Russian Federation) ([Orlova, 2018, 222](#)).

Convicted pregnant women and convicted women with children can purchase food and basic necessities at the expense of their personal funds without any restriction (Article 88 of the Penal Code of the Russian Federation).

Article 99 of the Penal Code of the Russian Federation regulating the material and welfare support of inmates states that convicted pregnant women and nursing mothers are provided with free meals during their release from work. They receive improved living conditions and enjoy increased nutritional standards.

Convicted pregnant women and nursing mothers may receive additional food parcels whose quantity and variety are determined by a medical certificate. Convicted pregnant women, convicted women during childbirth and in the postnatal period are provided with specialized medical care (Article 100 of the Penal Code of the Russian Federation). Social support in the field of maternity and childhood mostly aims to create conditions for family well-being, therefore the state focuses on improving housing conditions, educational and medical services, increasing family income and other areas ([Aleksandrova, 2017, 93](#)).

Similar legal provisions can be found in other legal acts regulating penal relations.

These conflicts of laws rules protecting the rights of an unborn person are present in other regulatory legal acts of the Russian Federation. For example, when determining tax base in accordance with Articles 210 and 218 of the Tax Code of the Russian Federation the right to tax deduction is enjoyed by taxpayers who received diseases due to radioactive

contamination or other environmental disasters, as well as children who were in a state of intrauterine development at the time of evacuation.

According to paragraph 13.2 of Sanitary Regulations and Standards 2.2.2/2.4.1340-03 dated June 30, 2003, a pregnant woman is transferred to work not related to using a PC or the work with limited PC use (no more than three hours per shift). Pregnant women must not work with copying-and-duplicating equipment.

The Law of the Russian Federation dated December 22, 1992 No. 4180-1 "On transplantation of organs and (or) tissues of man" does not involve organs, their parts, and tissues related to the process of human reproduction, including reproductive tissues (ovum, semen, ovaries, testicles or embryos), as well as blood and its components ([The Law of the Russian Federation No. 4180-1, 1992](#)).

## DISCUSSION

According to the Constitution of the Russian Federation, the fundamental rights and freedoms of a person are inalienable and are acquired by the fact of birth. Although the basic Russian law excludes the legal protection of the unborn, sectoral legislation contains some conflicts of laws rules that directly protect individual human rights long before one's birth. There is a contradiction between the basic law of the state and minor regulatory legal acts since labor, criminal, criminal executive, civil and other branches of the Russian legislation consider the future life of a person as a guarded object. It seems that dualistic approaches to the legal regulation of acquired fundamental rights and freedoms can be eliminated by enshrining guaranteed protection of human life from the moment of its conception in the Constitution of the Russian Federation.

While improving the Russian legal system, it is necessary to clearly define its fundamental principles, goals, tasks, and priorities. Otherwise, regulatory legal acts will be doomed at the stage of their adoption due to their insufficient support and low efficiency ([Polishchuk, 2017, 75-76](#)). Such documents will be characterized by inconsistency, collision and simplicity. In the course of implementation, they are likely to need a large number of amendments, changes, additions, etc.

## CONCLUSIONS

Legal certainty is a basic and system-forming principle that dialectically complements and develops other general-legal, intersectoral and sectoral principles, justifies their functional necessity, determines the accuracy and clarity of legal instructions, established order and limits their actions. Other principles cannot be fulfilled without regard to legal certainty since their implementation is always associated with the above-mentioned phenomenon.

As a result of this study, we have concluded that shortcomings in the sphere of legal certainty cause inconvenience or harm not only to some person, group of individuals, team or society but also to the state since the low effectiveness of adopted legal norms does not contribute to the achievement of the necessary objectives, undermines state power, brings economical damage and gives rise to a nihilistic attitude to the law (an effective regulator of public relations aimed to protect those who observe it).

Taking into account the above-mentioned facts, legal certainty should be understood as an effective and uniform legal presentation, interpretation and implementation of regulatory legal acts that let subjects of legal relations predict legal consequences ([Polishchuk, 2018a, 79](#)).

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