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## Types of somatic rights and their legal regulation

### Виды соматических прав и их правовое регулирование

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#### Abstract

The article deals with topical issues of legal recognition of a new type of human rights – somatic rights as rights that appeared in connection with the rapid development of biomedical science. This has given rise to a number of difficulties since these rights are characterized by a purely personal nature and close relationship with the physiological nature of a person. The concept of bioethics is given as an emerging social institution, the meaning of which is to regulate conflicts arising in the field of new medical technologies, on the one hand, and directly with the individual and society on the other. The purpose of this article is to consider the main types of somatic rights, their characteristics and definition, as well as some normative legal acts on the regulation of this type of legal relations in Russia and abroad.

Human rights are not a fixed category. Human rights standards have historically emerged, changed and developed in the process of development of society and statehood. Legal constructions characterizing a person as a subject of law with an inherent set of rights, duties, and freedoms were formed at each historical stage in the development of human rights and freedoms. The institute of human rights is in constant development, aimed at expanding the number of rights and freedoms, as well as improving

#### Аннотация

В статье рассматриваются актуальные вопросы юридического признания нового вида прав человека – соматических прав, прав, которые появились в связи со стремительным развитием биомедицинской науки, что породило целый ряд сложностей, так как эти права отличаются сугубо личным характером и тесной взаимосвязью с физиологической природой человека. Дается понятие биоэтики, как формирующегося социального института, смысл которого состоит в том, чтобы регулировать конфликты, возникающие в области применения новых медицинских технологий с одной стороны и непосредственно с индивидом и обществом с другой. Целью данной статьи является рассмотрение основных видов соматических прав, их характеристика и определение, а также некоторых нормативных правовых актов, посвященных регулированию данного вида правоотношений в России и за рубежом.

Права человека не являются неизменной категорией. В процессе развития общества и государства стандарты прав человека исторически возникали, изменялись и развивались. На каждом историческом этапе развития прав и свобод человека были сформированы свои юридические конструкции, характеризующие человека как

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existing ones. Currently, law enforcement agencies do not have the task of expanding existing rights and freedoms. An important point in the development of the last generation of the institute of human rights is to ensure and guarantee the protection of human and citizen. Human rights must be realized in accordance with modern ideas, the current level of development of society, the new challenges they face and the new requirements of democratic development. Theoretical approaches in the field of somatic rights classification, as well as international legal and national regulation of this problem, are investigated using the system, structural and functional methods.

**Keywords:** bioethics, human rights, somatic rights, right to life.

## Introduction

The development of society and the gradual improvement of its relations with the state allow identifying and forming certain "generations" of rights, enshrined in both national and international legal acts. In general, the theory of rights and freedoms was formed in the modern period and the first generation of rights – natural rights – was later joined by political, economic, social, etc. rights (Loshkarev, Lavrentyeva & Chinarian, 2018). The third group of rights is collective rights based on solidarity; their peculiarity is that they are realized by a community of people. Today, it can be easily said that there is a fourth generation of human rights – somatic rights. The appearance of these rights should answer the question of how to "catch up" and "pull up" other sciences, spheres of life, so as not to lose control over life. A new comparison has now been added to the study of law and morals, law and religion – law and medicine, law and bioengineering.

There is no clear position on the name and content of this group of rights in the theory of law. V.I. Kruss in the article "Personal ("somatic") human rights in the constitutional and philosophical-legal dimension: Towards the statement of problem", identifies these terms and gives the following understanding of the essence

субъекта права с присущей ему совокупностью прав, обязанностей и свобод. Институт прав человека находится в постоянном развитии, направленном на расширение количества прав и свобод, а также на совершенствование уже существующих. В настоящее время у правоприменителей не стоит задача расширения уже существующих прав и свобод. Важным моментом в развитии института последнего поколения прав человека является обеспечение и гарантии и защищенности человека и гражданина. Права человека должны быть реализованы в соответствии с современными представлениями, нынешним уровнем развития общества, новыми вызовами, с которыми они сталкиваются, и новыми требованиями демократического развития. Используя системный, структурно-функциональный методы исследуются теоретические подходы в области классификации соматических прав, а также международно-правовое и национальное регулирование данной проблемы.

**Ключевые слова:** биоэтика, права человека, соматические права, право на жизнь.

of these rights: "Among the legal claims of the person representing humanity at the turn of the third millennium, it is possible to distinguish and isolate a group of those that are based on a fundamental worldview confidence in the "right" of a person to independently control their body: carry out its "modernization", "restoration" and even "fundamental reconstruction" to change the functional capabilities of the body and expand them with technical-aggregate or medication (Kruss, 2000).

A.I. Kovler in his work on the anthropology of law devoted a separate chapter to personal rights, referring to the definitions presented by V.I. Kruss outlined the formulation of the problem in the field of constitutional law and the philosophy of law. These provisions served as the foundation for constructing ideas about personal rights in the theory of law (Kovler, 2002).

O.E. Starovoytova considers a set of problems related to the legal regulation of somatic human rights in the framework of a new direction in legal science – "legal somatology". She does not give an original definition of the central category in the studied problem, exploring the legal mechanism of somatic rights of the individual,

but she presents a historical and legal analysis of some rights: reproductive rights, rights for transplanting, euthanasia and other somatic rights beyond the scope of her research. Starovoytova identifies a special group among the legal claims of the individual, based on the fundamental worldview confidence in the right of a person to dispose of their body (organ transplantation, gender reassignment, artificial reproduction, body reconstruction, etc.) (Starovoytova, 2006).

### Methods

The emergence of each new generation of rights is associated with many factors. These are, first of all, serious issues related to the changing worldview and views of society on certain phenomena of public life, as well as the incredibly rapid development of new medical technologies that are being introduced into people's lives and require immediate regulation. A conflict arises between science, morality and law. Theoretical studies in the field of classification of somatic rights, as well as international and national regulation of this problem, are investigated based on the system and structural-functional approaches, as well as comparative methods.

### Results

It has been revealed that the problem of somatic human rights belongs to the category of global philosophical and legal problems, which cannot be ignored today. The constitutional decisions on this problem should be preceded by its philosophical and legal understanding. In addition, one cannot ignore the arguments of the theological order. Fundamental normative institutions, on which legal science, religion and philosophy would reach a fundamental agreement on this issue, are necessary not tomorrow, but today, now. The consistent evolution of somatic rights in the direction set by modern trends in life can lead to a total loss for a person, the loss of the person himself.

The following has been determined. In order to recognize that certain public relations are subject to legal regulation, it is necessary that the relevant rules are enshrined in the text of the Constitution or other sources of national law. A number of federal laws have been adopted in Russia and it should be noted that coordination of issues of healthcare, protection of the family, motherhood, fatherhood and childhood is the subject of joint jurisdiction of the Russian Federation and the constituent entities of the

Russian Federation. Therefore, laws relating to somatic rights have also been adopted in the constituent entities of the Russian Federation. Today, a large number of by-laws have also been adopted, but many issues are waiting for legal regulation and the science of bioengineering does not stand still.

It has been established that there are two basic models of recognition of somatic rights in the world. Certain somatic claims found their constitutional entrenchment in the first case. Such entrenchment is possible through the recognition of individual subjective human rights or the establishment of constitutional and legal guarantees or state policy in the field of human corporeality. The recognition of new human rights, the expansion of the existing list in the modern world – this is one of the trends in the development of the individual legal status. Time will show how opportunely and accurately the legislator in the Russian Federation will respond. However, participation in the world community on this issue and bringing the regulatory framework in line with the realities of the modern world is necessary for modern Russia.

### Discussion

Considering the problems of somatic rights regulation, one cannot ignore bioethics, a science that has been formed relatively not long ago. For the first time, this term was used by the theologian, pastor and teacher Fritz Jahr in 1927. This concept was mentioned by the American oncologist and biochemist V.R. Potter in 1969 to identify the ethical problems associated with the survival of all humanity in the modern world. This term was used in 1971 in a medical journal. Bioethics as "a systematic study of moral parameters, including moral assessment, decisions, behavior, landmarks, etc., of the achievements of biological and medical sciences" (Potter, 1988). The Ministry of Health of the Russian Federation adopted the Bioethics Program in 2001. Ethics of life, in other words, bioethics, is a section of ethics. Bioethics qualifies, which actions are morally acceptable and which are unacceptable in relation to a living being. In March 1999, V. Potter announced the following at the conclusion of his report: "I ask you to understand bioethics as new ethical teaching that unites humility, responsibility and competence, as a science that is inherently interdisciplinary, that unites all cultures and expands the meaning of the word "humanity". Bioethics is a direct answer to questions of an ethical and legal nature that arise in modern clinical practice" (Potter, 1988). Each important

milestone in the development of humanity is marked by the allocation and consolidation of a new "type of rights", a new classification. Now humanity has taken a step into a new era. The name of the new type of rights is somatic rights (from Greek, soma – body). Thus, bioethics is able to combine and compare law and morality, as well as put restrictions on the development of somatic rights.

The categories of somatic rights and bioethics are interrelated and this relationship is expressed in legal acts in many ways. Many documents and decisions of international organizations are devoted to the ethical component of somatic human rights. It is important to note the following among them: 2003 Declaration on Human Genetic Data, 2005 Declaration on Human Cloning, 2005 Universal Declaration on Bioethics and Human Rights. The Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine 1997 has become a legally binding act in relation to the regulation of somatic rights.

The normative base of research in the Russian Federation was, first of all, the Constitution of the Russian Federation of 1993 (as amended on July 21, 2014), Federal Laws (including Federal Law No. 323-FL of November 21, 2011 "On the foundations of protecting the health of citizens in the Russian Federation" (as amended on July 21, 2014), Federal Law No. 86-FL of July 5, 1996 "On state regulation in the field of genetic engineering" (as amended on July 19, 2011), Federal Law No. 125-FL of July 20, 2012 "On blood donorship and its components" (as amended on June 4, 2014)) and statutory legislative acts (including the Decree of the Government of the Russian Federation from September 20, 2012 No. 950 "On approval of Rules of determination of the person death time, including criteria and procedures for establishing a person's death, the Rules of termination of resuscitation and the form of the Protocol establishing the death of a person", the Order of the Ministry of Health of the Russian Federation of August 30, 2012, No. 107n "On the procedure for using assisted reproductive technologies, contraindications and restrictions on their use").

Today, the theory of law distinguishes various groups of somatic rights. Perhaps the most extensive list of these rights was presented in the works of M.A. Lavrik. (Lavrik, 2005). First of all, it concerns the long-known but still relevant and debatable right to die. The doctrinal definition of this right was given by

A.A. Malinovsky: "This is the possibility (freedom) of a person consciously and voluntarily at a chosen moment of time to pass away in a chosen and accessible way" (Malinovsky, 2002). There are two forms of implementation of this right: suicide and euthanasia. It is important to note that euthanasia is prohibited in Russia, according to Article 45 of Federal Law "On the Foundations of Protecting Citizens' Health in the Russian Federation". There is a lot to think about, but the fact is that the Constitution of the Russian Federation stipulates that Russian state is democratic and, therefore, cannot restrict the freedom of its citizens and citizens are equal in their will (except of course in cases of violation of the freedoms and rights of other persons) (Constitution of the Russian Federation, 1993). Euthanasia is one of the tools of the proclaimed constitutional principle that enshrines the right of everyone to a decent life. Many authors argue that the prohibition of terminally ill people who experience daily suffering, which cannot be eased even by strong medications and drugs, is, in fact, the use of torture to this category of persons. Thus, the conflict of domestic legislation, which has existed for a long time, does not allow sick citizens of the Russian Federation to fully exercise their constitutional rights, which leads to violation of their rights and legitimate interests but most importantly brings suffering. Federal Law of November 21, 2011, N 323-FL (as amended on May 29, 2019) "On the foundations of health protection of citizens in the Russian Federation" contains Article 45: "Medical workers are prohibited from carrying out euthanasia, that is, accelerating, at the request of the patient, their death by any action (inaction) or means, including the termination of artificial measures to maintain the patient's life". In this matter, the state should refer to the experience of foreign countries where is euthanasia legalized in order to create a legal mechanism for the implementation and protection of this type of somatic law. However, is it possible to confine oneself only to the right to die? In this vein, the point of view of S.I. Iventiev is interesting. He writes, "It is absurd to consider the right to die somatic and not to consider such a right to resuscitation <...> the right to use drugs without the right to treatment with medicines, etc. It turns out that this category was created by the author for the volume of phenomena discussed from an ethical point of view" (Iventiev, 2012). He could not agree, in particular, with the view that only human right to euthanasia was involved in this complex. Why then the right to resuscitation is not classified as a right to die? After all, in this case, it questions the possible death of a person

and the person will die without resuscitation. Of course, the question of what rights can be called somatic is really fundamental for the category as a whole; scientific discussions here is justified and necessary.

The next type of somatic rights is the rights of a person with respect to their organs and tissues. In this category, the figures of the living donor and the donor-corpse are particularly important directly in the transplant process. In many countries, including Russia, there is fairly developed legislation in the field of transplantation. The most important legal act in the field of medicine is the Federal Law of November 21, 2011, N 323-FL "On the basis of health protection of citizens in the Russian Federation", which establishes both general rules of regulation of medicine and rules directly regulating the issues of transplantation. Analyzing this law, it should be noted that the issues of transplantation of human organs and tissues, in addition to the general provisions governing the implementation of medical activities, rights and obligations of the patient, are enshrined in Chapter 4. Attention should be paid to Article 47, which defines the general principles for the removal of human organs and tissues for transplantation. The legislator has established that the removal of organs and tissues from a living donor is allowed only if they have voluntary informed consent, taking into account the fact that significant harm will not be caused to their health. It is not allowed to remove organs or tissues from a minor, as well as from a person recognized as incapacitated in the prescribed manner. Transplantation is carried out with the consent of an adult capable person, or with the consent of one of the parents or another legal representative, in cases where the recipient is underage or declared legally incompetent in the prescribed manner. This Article provides for the possibility of a citizen to express their will to consent or disagree with the removal of organs and tissues from their body after death for transplantation. In the absence of such a statement, the spouse or one of the close relatives have the right to declare their disagreement, if it is minor or legally incompetent, then such consent must be sought from one of the parents. Organs and tissues for transplantation may be removed from a corpse after stating death in accordance with Section 66 of this Federal Law, that is, the moment of brain death, established by a consultation of doctors, or biological death, established by a medical professional (doctor or paramedic). The norm on the prohibition of coercion to remove human organs and tissues for transplantation contained in clause 11 of Article

47 is confirmed by Criminal Law, where Article 120 of the Criminal Code of the Russian Federation stipulates liability for such actions. In most detail, the process of transplantation is regulated by the Law of the Russian Federation dated December 12, 1992, No. 4180-I "On transplantation of human organs and (or) tissues" and the Order of the Ministry of Health "On approval of the instructions for ascertaining the death of a person based on the diagnosis of brain death" dated December 12, 2001 No. 460.

The main issue is the human right to their body after death and the right to a removed organ. Therefore, the presumption of the consent of a deceased person for the removal of organs and (or) tissues for transplantation is legislatively enshrined in the Russian Federation. The peculiarity of this topic makes it necessary to improve the legislation in Russia further. Legal regulation should meet the following requirements: compliance with the spiritual, religious, moral and ethical values of the Russian society, strict observance of the civil rights of relatives of potential donors – the dead, as well as living donors, ensuring the possibility of removing the necessary number of donor organs while respecting the interests of recipients – a huge number of patients, when therapy only for some time alleviates their suffering and it is impossible to save their life without transplantation; contributing to the development of transplantology as a whole in Russia.

It is important to address the issue as cloning. The development of modern science makes us pay attention to this problem in a legal format. It is likely that both Russian society and science are ready to legalize therapeutic cloning. Statistics show that today 90% of people in Russia in need of donor biomaterial die while waiting for transplantation. This means that cloning can become a real tool for saving the lives of sick citizens in Russia. The development of medical science is far ahead, in contrast to the development of modern Russian law. Federal Law of May 20, 2002, N 54-FL "On the temporary ban on human cloning" (as amended on March 29, 2010) introduces a temporary ban on human cloning, based on the principles of respect for human beings, recognition of the value of the individual, the need to protect human rights and freedoms and taking into account the insufficiently studied biological and social consequences of human cloning. Given the prospect of using existing and developing technologies for cloning organisms, it is possible to extend the ban on human cloning or to cancel it as scientific knowledge in this area is



accumulated, to determine moral, social and ethical standards when using human cloning technologies.

The next category of rights is sexual human rights. This category is new to jurisprudence and includes the ability to seek, receive and transmit information relating to sexuality, sexual education, marriage, choice of partner, ability to decide whether a person is sexually active or not and so on. The recognition of these rights raises a number of questions, in particular, the question of prostitution legalization. Thus, the State Duma of the Russian Federation considered the draft law in 2004 "On the regulation of paid sexual services", which implies the legalization of prostitution by analogy with Germany and the Netherlands (the justification was, in particular, the provision of Article 34 of the Constitution of the Russian Federation on the use of one's abilities and property for entrepreneurial and other activities not prohibited by law). Other issues in the field of sexual human rights include, for example, pornographic product circulation and the legal regulation of sexual minorities. The issue is extremely important and also needs attention and not only in Russia. On the one hand, once again, this refers to the freedom of the individual. However, is this area of human life too "personal" for legislative consolidation, will it not undermine the moral and ethical foundations in the modern world? This is a fine line that should be clearly understood at the legislative level, but not ignored.

Such a disease as gender identity disorder is already quite common in the modern world. In this regard, such a somatic right as the right to genital reconstruction is important. If such a disease is identified in medicine and it is diagnosed in a patient, then this person should have the right to treatment and, in this case, the right to surgery, which is already successfully done in a number of countries. After numerous scientific and, most importantly, political discussions, due to the active work of human rights organizations in Russia, transsexuals are recognized as full-fledged citizens. One of the positive outcomes of this debate was the adoption of the Russian Federation of the Order of the Ministry of Health of the Russian Federation of October 23, 2017, No. 850n "On approval of the form and procedure for the issuance by a medical organization of a document on genital reconstruction" regulating the issuance of a document on genital reconstruction to a person by a medical organization, which became the basis for genital reconstruction.

One of the most important categories of somatic rights is reproductive human rights. There are different points of view regarding the concept of these rights in science. O.E. Starovoytova emphasizes the important position that "a person's personality is not limited only to their genetic characteristics. International instruments affirm the right of any person, regardless of their genetic characteristics, to respect their human dignity and rights. The concept of human dignity, according to the author, should extend to the unborn person (embryo and fetus)" (Starovoytova, 2006). There are often two main groups of reproductive rights in science: positive reproductive rights (artificial insemination) and negative reproductive rights (abortion, sterilization, contraception). Even in Roman law, it was believed that legal capacity appears at the time of birth and ends at the time of death. Nevertheless, the law took care of ensuring the interests of the person in the womb. This raised the question of what was considered birth. The ancient Roman thinker and philosopher Ulpian in the 41st book "Commentary on the Edict" noted that "just as the praetor takes care of those children who are already among the living, he also, due to the hope of birth, does not disregard those who have not yet been born". From this, it is possible to conclude that Ulpian indicated the need to protect the life of the child before birth. A similar position was taken by ancient Greek philosophers. If we turn to the Hippocratic oath, which says, "Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course. Similarly, I will not give to a woman a pessary to cause abortion. But I will keep pure and holy both my life and my art" (Besedkina, 2006), we see a negative attitude toward abortion. Turning to religion, votes are divided here, namely in Islam and in Hinduism.

We will study Russian legislation to determine the borderline for the start of the right to life and immediately find some inconsistency. The Constitution of the Russian Federation does not specify the moment when the human rights guaranteed by it begin to take effect (Skuratov, Lavrentieva & Kuchenin, 2019). The citizen's legal capacity shall arise at the moment of their birth and shall cease with their death in accordance with paragraph 2 of Article 17 of the Civil Code of the Russian Federation. The intrauterine embryo, regardless of the period of its development, is considered as the physiological part of the body, which a woman has the right to dispose of at her own discretion. At the same time, Russian legislation contains a certain number of normative acts that testify to the protection of human rights even before birth.

Thus, in accordance with Article 1116 of the Civil Code of the Russian Federation, 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 can be called upon to inherit. Article 1166 protects the economic interests of a conceived, but not born child. Article 17 of the Family Code establishes that the husband has no right without the consent of the wife to initiate proceedings on annulment of marriage during pregnancy of the wife and within a year after the child's birth. In this case, the failure of the child to reach the age of 1 year also does not matter. As is known, any injuries (both physical and psychological) received by the mother, shocks, experiences – all this can affect the health of the child who is to be born. As a result, it can be concluded that Article 17 of the Family Code protects the child even before birth, as well as during the year after their birth from problems related to the divorce of parents, etc. The following solution is seen for this problem: give the conceived, but not born person limited legal capacity, as the provisions relating to the right of the embryo to life must be enshrined in the Constitution of the Russian Federation. This right should be enshrined in the Basic Law of the state.

### Conclusions

The article considers the most popular classification of somatic rights, but this list cannot be considered exhaustive. Most scholars believe that it is necessary to focus attention not only on the somatic rights themselves, but also to carry out the interaction of such scientific directions as legal, biological and ethical directions. The provisions of the theory of law should be reflected in law enforcement and practical implementation. Personal rights should receive the appropriate legal tools for their implementation and protection moving from the religious and moral spheres of public life to the legal sphere.

Today, in Russia, some people require immediate legal regulation, especially with regard to therapeutic cloning. Speaking of the ethics and unethical nature of some aspects of therapeutic cloning, it is worth considering the fact: is it humane to leave sick people without decent medical care? Is it ethical to let die a patient who has been waiting in line for years for donated biological material and sincerely believes that one day they will receive it? The government of the Russian Federation, as a social state, should legalize the use of stem cells for medical purposes and adopt an appropriate regulatory

framework that legalizes the cloning of donor biological objects in order to implement and protect human rights. However, according to Article 1 of the Additional Protocol of 1998 to the Convention on Human Rights and Biomedicine of 1997, "On the prohibition of cloning human beings", any interference aimed at creating a human being genetically identical to another human being, living or dead, is prohibited.

It is necessary to decide whether to preserve human rights in their traditional form or to extend these rights to other reasonable entities (transhumanism). Other entities today include genetically modified humans with superpowers, technical and biotechnical objects with artificial intelligence (androids), entities and other objects with intelligence. The main question is, what is the person of the future? Transhumanism transforms not only the entire system of social relations but also the law. Transhumanism changes the very foundations of law as such. It is difficult to disagree with this necessity, but the human body should be considered not only from an anatomical point of view but also as a being with a certain spirituality. It is the combination of this spirituality, intelligence and the vast spectrum of feelings that a person is capable of experiencing should stimulate them to move forward. In the modern world, the recognition of new human rights and the expansion of the existing list are one of the trends in the development of the legal status of an individual. Time will show how opportunely and accurately the legislator in the Russian Federation will respond. However, participation in the world community on this issue and bringing the regulatory framework in line with the realities of the modern world are necessary for modern Russia.

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