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GUARANTEES OF PROTECTION OF PRESCHOOL CHILDREN IN NON-TRADITIONAL FAMILIES

The article deals with the legal status of children in non-traditional families. The latter include families that are actually in marital-family relationships, raise children without legal registration and families with an unconventional structure, that is, same-sex couples and transsexuals. An analysis of the ECHR's decisions on the understanding of the concept of the family and the significant transformation of such an understanding has been made, the prohibition of same-sex partners on equality in the marital-family sphere is determined as a discriminatory factor, although the right to recognize or not recognize such marriages is provided for consideration to separate states. An analysis of American, Canadian and South African scholars' research proves the social discrimination of children from non-traditional families; children experience both verbal and physical persecution not only among peers but also a significant part of the harassment is from the representatives of the teaching staff. Please note that the availability of progressive legislation and legal safeguards do not protect the child. It is indicated on the reluctance of the post-Soviet society (on the example of Ukraine) to legalize marriages and grant the right to same-sex partners for the procreation and adoption.

Keywords: non-traditional families, children, guarantees of rights, protection.

Family is the main element of society, the basis of socialization of the child, especially in the early years of life. The family sphere of life, like all other social relations, is also subject to changes in the light of globalization processes. In general, the family life values remain unchanged, but in the course of millennia and even today, certain trends in the modification of family life are still occurring. All of this is due to economic factors, migration processes, the fight against discrimination based on gender and sexual identity, the development of biomedicine and biotechnology, changes in marriage and premarital relations, and increased attention to women's gender rights.

So the marital-family sphere changes in the context of traditional representations. Therefore, it is particularly relevant to analyze the status of children in non-traditional families (for the first time such a term was proposed by the American psychotherapist V. Satire). These should include families:

- who actually are in marriage-family relations, raise children, while are not registered legally. "Structural changes in fertility on the basis of the marital status of the mother are largely due not only to the increase of the actual extra-marital childbirth activity, but also the modern features of the processes of marriage and divorce, the formation of the marital-family structure of the population. These include the proliferation of unregistered (consensual) marriages in Ukraine over the past 10-15 years, which, based on the experience of Western countries, will tend to further spread. So we can assume that the sum of extra-marital births is represented not only by the births of single women, but also by those newborns whose parents are in consensual marriage"¹.

- Families with an unconventional structure, that is, same-sex couples and transsexuals. The structure of these families is diverse. Lesbian women and gays can become parents in a variety of ways. Some of them become parents in the context of heterosexual relationships before changing their orientation. Others become parents in the context of the existing identity of lesbians and gays. For example, lesbian women can conceive children with known or unknown donors, and donors can take different roles (family friend, father). Lesbian couples can appoint one member to be the biological mother of all their children, or they can change these roles, one of them serves as a biological mother for one child and the other – as a biological mother for another child. Men may have children that are biologically related to them through egg donation and surrogate motherhood. Not only the development of biomedicine has provoked opportunities for such a category of people, but also the development of law, since; in many states adoption

¹ Шлюб, сім'я та дітородні орієнтації в Україні (2008). Київ: АДФ-Україна, 36.

is allowed for such couples, although in practice they are considered as "adopters of the last instance". In general, the presence of children is predominantly among lesbian couples (the ratio is 1:3 on average).

Art. 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms defines the right to marriage, worded it as follows: "a man and a woman who have reached the age of marriage have the right to marry and establish a family in accordance with the national laws governing the exercise of this right."¹ ECHR, which is authorized to consider disputes over the above mentioned convention, in many casual decisions interprets the concept of family classically, also through the marriage of opposing sex. These decisions are usually dated the last century (Rees v. the UK (1986), Sheffield and Horsham v. the UK (1998)). It is also indicated the need for legal recognition of marriage and the criteria for its validity (Abdulaziz, Cabales et Balkandali v. UK (1985), Berrehab v. the Netherlands (1988)).

A thorough analysis of the practice of the ECHR gives us reason to determine that changes in understanding marriage-family relations in the aspect of globalization changes took place in two stages.

The first stage is the understanding of the family not only as a legally registered union, but also the admissibility of actual marital relationships without official state registration and recognition of the right of such families to paternity. This practice was related to heterosexual couples. The court recognizes that marriage may also include actual family ties, if its members live together without a marriage. A child born of such relationship is ipso jure part of this family union since birth and due to the very fact of birth, § 43 of the judgment of the Grand Chamber in Elsholz v. Germany (Case No. 25735/94, ECHR 2000 VIII) ; § 44 of the Court's judgment in Keegan v. Ireland, 26.05.1994 (Series A no. 290), as well as § 56 of the judgment in Johnston and Others v. Ireland, 18.12.1986 (Series A no. 112)

The second stage is the consideration of a whole series of cases of discrimination on the basis of sex. For the first time, the issue of changing the essence of marriage in the context of sex related to transsexuals. In §§ 100-104 of the ECHR ruling in the case of Christine Goodwin v The United Kingdom, the Court slightly changed this practice. It believed that the terms used in Art.12 of Convention that pointed to the right of men and women to marry should no longer be understood as defining sex as a purely biological criterion. In that context, the Court noted that significant social changes had taken place at the institution of marriage since the adoption of the Convention. Moreover, the Court referred to Art. 9 Charter of Fundamental Rights of the European Union, the wording of which differed from the wording of Art.12 of the Convention. In the end, the Court noted the widespread acceptance of attitude towards transgender marriage of transsexuals. To sum up, the Court found that the lack of opportunity for the transsexuals who have undergone surgery to transgender marriage violated Art.12 of the Convention².

The case of Schalk and Kopf v Austria is indicative. In the constitutional complaint, the applicants argued that the lack of legal possibility of marriage between them constituted a violation of their right to respect for private and family life and the principle of non-discrimination. They argued that the concept of marriage had evolved since the entry into force by the Civil Code in 1812. In particular, the birth of children and the provision of education to them was no longer an integral part of marriage. In modern conditions, marriage is rather a permanent alliance that covers all aspects of life. There was no objective justification for not granting the right to same-sex couples to marry, more so the European Court of Human Rights has recognized that differences based on gender orientation require a particularly significant justification. Other European states have either allowed homosexual marriages or made changes to their legislation to grant equal to marriage status to same-sex partnerships." In this regard, the ECHR could not reach a single solution and rely on the ability of the state to independently determine its policy in a particular area. Thus, in § 105 of this case, the court noted "the gradual achievement of a pan-European consensus on the legal recognition of same-sex couples. Moreover, this trend has evolved rapidly over the last decade. However, the states which provided legal recognition to same-sex couples do not constitute the majority yet. Therefore, this area still needs to be considered as one of the developing right, but for which consensus has not been reached yet. The state must have the freedom to determine when to introduce appropriate changes to the law"³.

The attitude to the last type of non-traditional families varies depending on the cultural features of society and the legal ideology that prevails in society. According to the publication of Advocate.com,

¹ Конвенція про захист прав людини і основоположних свобод ст. 12. 1950 (Рада Європи). Офіційний-веб-сайт Верховної Ради України. <https://zakon.rada.gov.ua/laws/show/995_004>.

² *Christine Goodwin v The United Kingdom*, no. 28957/95 §§ 100-104 ECHR- 2002.

³ *Schalk And Kopf v Austria*, no 30141/04 §105 ECHR- 2010.

87% of Americans believe that the traditional family institute is outdated and does not meet the requirements of modern times¹. However, in contrast to them, more than half of Russians (54%) believe that homosexuality should be prohibited by law, even criminal liability should be imposed, and another 33% believe that prohibiting is not worth it, but it must be strictly limited². Almost all the Russian society is categorically against the granting of the right to marry to same-sex couples.

In the post-Soviet countries, there is virtually no research on children in non-traditional families, in any direction. However, it is surprising that, in general, the international analysis of children's problems in the families of LGBT communities is negligible. It is important to understand that, in general, children from non-traditional families are same as others. Studies have shown that, unlike common beliefs, children of lesbian, gay or transgender parents got about as much chance of being gay as children with heterosexual parents; are not more prone to sexual violence; do not show differences in whether they consider themselves men or women (gender identity); do not show differences in the behavior of men and women (gender role behavior).

The problem of these children is manifested in another matter. All available studies point to the importance of investigating the discrimination of children through their families. Most foreign researchers indicate that such children are particularly bullied in middle and upper grades, but problems start from an early age. Questions about the status of such families are presented as deviant in the social environment (Byard, Kosciw & Bartkiewicz³). Also, scholars point out that they experience deviations, bullying or discrimination from their peers to such children (Breshears, D. and D.O. Braithwaite⁴). Even in a progressive society, by the way, problems are emerging in this context, Kosciw and Diaz⁵ find out that most children are poorly placed in the children's community, and 40% report verbal abuse through their families. At the same time, according to various data, the number of such children is quite significant, only in the USA, according to various data, from 6-12 million people.

In Canada, studies have also shown the social discrimination of children from non-traditional families. In general, the right to marry in this state, same-sex couples have officially received since 2005 and during this time their number has increased by 42%. However, despite the fact that the issue is not new to Canada, verbal (37%) and physical (27%) persecution are still associated with the sexual orientation of their parents. In addition, 1/5 does not make up peers, but adults, usually representatives of the teaching staff⁶.

Please note that the availability of progressive legislation and legal safeguards does not protect the child. Thus, with the legalization of same-sex marriages and adoptions in South Africa and increasing access to adoption and reproductive technologies, there is a visible increase in the presence of lesbian / gay parents in society (Lubbe 2007⁷). However, more than 80% of the polls in this state reported that homosexual sexual relations are wrong, and 61% of South Africans believe that homosexuality should not be accepted in society⁸.

¹ Дослідження: більшість американців не вірять у необхідність збереження традиційної сім'ї (2013). <<https://ua.korrespondent.net/lifestyle/health/1557455-doslidzhennya-bilshist-amerikanciv-ne-virit-u-neobhidnist-zberezheniya-tradicijnoyi-simy>>.

² Дума ухвалила закон про "нетрадиційні стосунки" (2013). <https://www.bbc.com/ukrainian/news/2013/06/130611_gosduma_lgbt_law_rl>.

³ Byard, E., Kosciw, J., Bartkiewicz, M. (2013). Schools and LGBT-parent families: Creating change through programming and advocacy. In *LGBT-parent families: Innovations in research and implications for practice*. New York: Springer.

⁴ Breshears, D., Braithwaite, D.O. (2014). Discursive struggles animating individuals' talk about their parents' coming out as lesbian or gay. *Journal of Family Communication*, 14(3), 189-207.

⁵ Kosciw, J.G., Diaz, E.M. (2008). *Involved, invisible, ignored: The experiences of lesbian, gay, bisexual, and transgender parents and their children in our nation's K-12 schools*. New York: Gay, Lesbian and Straight Education Network.

⁶ Taylor, C., Peter, T., McMinn, T.L., Elliott, T., Beldom, S., Ferry, A., Gross, Z., Paquin, S., Schachter, K. (2011). *Every class in every school: The first national climate survey on homophobia, biphobia, and transphobia in Canadian schools*. Final report. Toronto, ON: Egale Canada Human Rights Trust. <<http://bit.ly/TcqJpo>>.

⁷ Lubbe, C. (2007). Mothers, fathers, or parents: Same-gendered families in South Africa. *South African Journal of Psychology*, 37(2), 260-283.

⁸ Pew Research Center (2013). *The global divide on homosexuality: Greater acceptance in more secular and affluent countries*. <<http://www.pewglobal.org/2013/06/04/theglobal-divide-on-homosexuality/>>.

The legal problems associated with the field of nontraditional family are the following issues:

- The possibility to legalize civil partnership (union, marriage). It should be noted here that legislation is currently being actively introduced by the states, which provides an opportunity for an official union of same-sex partners. Among them, the following countries are: Netherlands (2001), Belgium (2003), Spain (2005), Canada (2005), South Africa (2006), Norway (2008), Sweden (2009), Mexico (2009), Portugal (2010), Argentina (2010), Iceland (2010), Brazil (2011), Denmark (2012), United Kingdom (2013), Uruguay (2013), France (2013), New Zealand (2013), USA (2015), Greece (2016), Italy (2016), Australia (2017), Czech Republic (2018).

- The ability to adopt children by same-sex couples. The Contemporary European Convention on the Adoption of Children (revised) "tried to implement as much as possible the modern practice of non-discrimination, while taking into account the interests of the child as a priority. It introduces the latest standards of adoption that promotes the implementation of modern legal standards in the field of adoption in order to maximally take into account the child's highest interests. In accordance with the Part 1 of Art. 7 of the Convention, the law allows the adoption of a child: a) by two persons of different sex; i) who are married to each other; or ii) who are in a registered partnership, if such an institution exists; b) to one person. The indicated norms still have recommendatory, but not obligatory character. Most of the normative acts of the aforementioned states, in fact, also establish their recognition of all family relationships, including the right to procreate, the use of all possible means including reproductive technologies and the right to adoption. However, on the last point the states practically did not come to a common opinion. For example, in Italy, same-sex couples were still not allowed to use the right to adoption, taking into account the considerable opposition of civil society.

- The right to meet with the biological father / mother of the child and their partner. There is no clear international experience in this field. Even progressive American legislation varies according to state. In some states, such as Massachusetts and California, there is generally a rule that sexual orientation is considered irrelevant for custody and disputes about the visit. In others, the parent's sexual orientation is considered to be irrelevant unless it is proven that it has a negative effect on the child. In these states, a clear link must be demonstrated in court. For example, in *Boswell v. Boswell* (1998), the court refused to restrict the children from visiting with their gay parent in the presence of his sexual partner, as there was no evidence of harm to children from such visits. *Eldridge v. Eldridge* (2001), the Tennessee Court allowed a child an unlimited night visit to a lesbian mother, regardless of the presence of a lesbian mother's partner, but this resolution was canceled when appealed.

Thus, lawyers determine a significant level of judicial review considering visiting issues¹.

Many professional foreign studies in unison argue that children in non-traditional families do not feel discomfort, are raised as their peers, have proper or even raised level of attention and care, even in the future show higher levels of knowledge and are more successful. Almost every author, cited in this section, pointed out that there is no negative impact on children. The American Psychologists Association, based on a long-term analysis in 2004, made an official statement that "Adjustment, development, and mental well-being of children are not dependent on the sexual orientation of their parents." On this basis, APA also opposed "any discrimination based on sexual orientation in matters of adoption, custody of children, attending education, and reproductive health services"².

Regardless of their identity, these children become de facto members of the gay community. Therefore, they are likely to face a homophobic society, especially in the children's environment. Problems usually arise under the following circumstances: incomprehensibility for the juvenile and his/her peers of family identity (that is, children cannot understand the presence of two mothers or two fathers); the negative attitude towards the children by the caregivers, which automatically entails a similar behavior from the other children (almost all of them indicated that they are teased); the confidence of the society that in the future such children will also create non-traditional families; non-acceptance and negative attitude of the parents' community; the denial of such a family model by religious representatives (for example, at a children's event the clergyman noted that representatives of non-traditional sexual orientations fall into hell, which inflicted a serious psychological trauma to a child who realized that her mother would soon

¹ Patterson, J.Ch. (2009) Children of Lesbian and Gay Parents: Psychology, Law, and Policy University of Virginia *American Psychologist* Nov, 64 (8), 727-36.

² American Psychological Association. (2004). Resolution on sexual orientation, parents, and children [Policy statement]. (Adopted by the APA Council of Representatives, July 2004).

die); a feeling of being different while taking place different kinds of family events (Father's Day, Mother's Day, the creation of family trees or family collages). Consequently, all of the aforementioned scholars have found that children who have faced disapproval of their peers about the sexual orientation of their parents lose self-confidence and show more behavioral problems.

After all, the improvement of the microclimate in the children's environment, which reduces homophobia and transphobia, can contribute to improving individual well-being, improving academic achievement and more educational achievement among children most affected by these forms of bias and violence. Scientists propose, first of all, to improve the climate in the educational environment, that is, to increase the level of awareness and tolerance of educators and teachers, as a result they would not allow the manifestation of discriminatory factors and eliminated the possibility of conflict in children's and parents' environment. For example, in the United States, the tolerance of educators is indicated at the normative level by the National Association for the Education of Young Children¹, the anti-discrimination policy of pre-school institutions was introduced, training courses against prejudice for staff. However, again, scholars have stated that over the past 20 years, there has been little focus on this problem and there was virtually no progress towards cessation of child abuse².

Conclusion. The problem of protecting children arises not only in the states where marriages were legalized. In other countries which do not legally recognize the possibility of non-traditional families to have family, relations of this nature still take place. Therefore, even in states where prohibitive legislation has been adopted, in fact, there are families that belong to non-traditional, and in which children are raised. Adults with a particular sexual identity require direct protection, often even physical protection, because of the lack of acceptance of such an ideology by society. Children as family members need increased attention and protection.

Ukrainian society is not ready to legalize marriages of non-traditional families. In the state there is an actual threat to the lives of such people (LGBT Center "Our World" in 2017 documented 226 cases of violation of LGBT rights in Ukraine on the basis of homophobia and transphobia)³. Moreover, most members of the Ukrainian society are not even ready to discuss the problems of the LGBT community. An example of this is not only a sharp critique of gay parades and marches, but also the position of the intelligentsia. In particular, at 24's forum of publishers in Lviv, the latter appealed to exclude from the program of the event a discussion of a work that covered the issues of the life of a girl in the same-sex family.

At the same time, at the level of lawmakers, it was determined that the Cabinet of Ministers of Ukraine should work out a bill by the end of 2019 and pass it on to the Parliament, with a review about discriminating against representatives of LGBT communities, to indicate the possibility of legalizing their marriage unions. This position is based on the principle of equality, which, among other things, is defined in Art.24 of the Constitution of Ukraine. In our turn, we do not share the position of representatives of the authorities. It seems that the legal norm will be efficient and effective only if it is approved by a majority. Moral values, religious norms, traditions of our society do not support the above mentioned proposal. It seems that time is needed to ensure that the principle of tolerance is actually embodied in public life, therefore imposing it exclusively by legal methods is impossible.

We believe that effective guarantees will not be normative-legal, but ideological. In particular, by organizational and informative-explanatory methods, we need to prepare society for the perception of various kinds of persons with other manifestations of gender and sexual identity as full members of society; to develop tolerant approaches to communication with them. In general, it is necessary to increase the level of awareness of the pedagogical stuff regarding possible problems in the children's environment and the means of their solution. It is necessary to introduce educational programs for teachers, in particular, preschool teachers, and special courses on pedagogical competence for children who are raised in non-traditional families.

¹ National Association for the Education of Young Children (2005). *Code of Ethical Conduct and Statement of Commitment*. <<http://www.naeyc.org/files/naeyc/file/positions/PSETH05.pdf>>.

² Averett, P., Hegde, A., Smith J. (2017). Lesbian and gay parents in early childhood settings: A systematic review of the research literature *Journal of Early Childhood Research*, 15(1), 34–46.

³ В Україні минулого року правозахисники зафіксували 226 порушень на ґрунті гомофобії та трансфобії (2018). <https://humanrights.org.ua/material/minulorich_pravozahisniki_zafiksuvali_ponad_200_vipadkiv_porushen_prav_lgbt_v_ukrajini>.

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