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PROTECTING INTERSEX HUMAN RIGHT OF SELF-DETERMINATION

The article examines the social and legal features of recognizing and development intersexual human right of self-determination, which includes the right to adopt children, the right to change their sex and be respected despite on variations in their sex characteristics. It is noted that The Council of the European Union and the European Parliament as well as the Council of Europe and the UN High Commissioner for Human Rights adopted many documents about the Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity and Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity. The article formed basic principles according to which property law was forming and developing the most important right of intersexual people – the right of self-determination by the government and by the society, as well as in the domestic legal system the intersex human are discriminated in education, employment, healthcare, sport and many other sphere of peoples life.

Key words: human rights, intersex people's right, right of self-determination, legislation of intersex people, discrimination of intersex people, types of discrimination of intersex people.

The formulation of the problem. In the context of the tendency to convert Ukrainian legislation on the implementation of basic human rights to the European, there is a need to regulate the legal status of intersexual human in Ukraine, their natural and primary rights to their personality by national legislation. The **actuality** of this article will be leveled by the lack of a comprehensive study of the rights of people with interpersonal rights by domestic scholars and lawyers as well as the social significance of the recognition of the right to self-determination of a human.

To research this problem, we set ourselves **the tasks** of identifying the peculiarities of the legal and biological status of intersexual people, to find out the main vectors of discrimination of intersexes in Ukraine and the world, to study the regulation of the right of intersexual people to determinate themselves in Ukraine and Europe on the basis of which to form methods for overcoming deficiencies in our domestic legislation of basic human rights.

The term 'hermaphrodite' was widely used by medical practitioners during the 18th and 19th centuries before 'intersex' was coined as a scientific and medical term in the early 20th century. Before the current medical classification of the disorder of sex development (DSD) was developed, variations in intersex sex characteristics were classified under different categories, the most common being: congenital adrenal hyperplasia (CAH), androgen insensitivity syndrome (AIS), gonadal dysgenesis, hypospadias, and unusual chromosome compo-

sitions such as XXY (Klinefelter Syndrome) or XO (Turner Syndrome). The so-called "true hermaphrodites" referred to those who had a combination of ovaries and testes.

"Intersex" is used in this paper as an umbrella term to denote a number of different variations in a person's bodily characteristics that do not match strict medical definitions of male or female. These characteristics may be chromosomal, hormonal and/or anatomical and may be present to differing degrees [1, p. 2]. Many variants of sex characteristics are immediately detected at birth, or even before. Sometimes these variants become evident only at later stages in life, often during puberty. While most intersex people are healthy, a very small percentage may have medical conditions which might be life-threatening, if not treated promptly [2].

It is important not to lump all intersex people into one new collective category, such as a 'third sex', perhaps running in parallel to female and male. Such a classification would be incorrect due to the great diversity among intersex people and the fact that many intersex individuals do identify as women or men, while others identify as both or neither.

Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies. According to experts, between 0.05% and 1.7% of the population is born with intersex traits – the upper estimate is similar to the number of red haired people. Being intersex relates to biological sex characteristics, and is distinct from a person's

sexual orientation or gender identity. An intersex person may be straight, gay, lesbian, bisexual or asexual, and may identify as female, male, both or neither. Because their bodies are seen as different, intersex children and adults are often stigmatized and subjected to multiple human rights violations, including violations of their rights to health and physical integrity, to be free from torture and ill-treatment, and to equality and non-discrimination.

The Council of the European Union, and the European Parliament, as well as the Council of Europe, have all pointed out that intersex people can suffer from discrimination that may result in ill treatment, especially during childhood. An overview of the key human rights at stake in the protection of intersex people can also be found in the Commissioner for Human Rights of the Council of Europe's *Issue Paper on human rights and intersex people*. This issue is the second on violence and discrimination based on sexual orientation and gender identity requested by the Human Rights Council. While some progress has been made since the first study in 2011, the overall picture remains one of continuing, pervasive, violent abuse, harassment and discrimination affecting LGBT and intersex persons in all regions. These constitute serious human rights violations, often perpetrated with impunity, indicating that current arrangements to protect the human rights of LGBT and intersex persons are inadequate. There is as yet no dedicated human rights mechanism at the international level that has a systematic and comprehensive approach to the human rights situation of LGBT and intersex persons [3, p. 11].

A global UN campaign for equal rights and the fair treatment of lesbian, gay, bi, trans (LGBT) and intersex people established that Member states of UN should facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons' right to self-determination. Flexible procedures should be observed in assigning and reassigning sex/gender in official documents while also providing for the possibility of not choosing a specified male or female gender marker. Member states should consider the proportionality of requiring gender markers in official documents [1, p. 4].

The regulation of the legal status of intersexual people in Europe is a normative basis for documents that institutionalize the right of such persons to self-determination, as well as other important rights. One of the basic legislation is documents adopted on 24 June 2013 by the Foreign Affairs Council of the European

Union which regulate Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons.

The main normative bodies that receive documents that regulate the rights of intersexual people in Europe are: **The Council of the European Union** (*Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBT) persons*, Foreign Affairs Council Meeting, Luxembourg, 24 June 2013); **the European Parliament** (*Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity* e2013/2183(INI)), Plenary sitting, No. A7-0009/2014, 7 January 2014, Strasbourg); **Council of Europe** (*Children's right to physical integrity*, Resolution 1952, Parliamentary Assembly, Strasbourg. See also Council of Europe (2014); **the UN High Commissioner for Human Rights** (*A boy or a girl or a person – intersex people lack recognition in Europe*, 9 May 2014); **the UN Special Rapporteur on Torture** (*Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Mndez, Human Rights Council, Twenty-second session, Report No. A/HRC/22/53, 1 February 2013) and many other issues and documents.

In seven EU Member States, policy makers or courts embrace broader concepts. These may implicitly cover intersex, for instance: gender (in Austria, Denmark, Finland and the Netherlands); gender identity (in Romania and Slovenia); or both gender and gender identity (in Sweden). Intersex covers a large and diverse variation of sex characteristics. Therefore, it is likely that in the absence of specific protective legislation, intersex cases will be legally approached in different ways, even within the same legal system.

When basic aspects of a person's legal status (e.g. birth or death registration), social status (e.g. access to services) or health conditions are frequently defined by the so-called 'sex binary' classification of being either 'male' or 'female' intersex people are often discriminated against. This is because their sex characteristics cause them to fall outside of this classification. It can also lead to grave violations of their rights to physical and psychological integrity as well as other fundamental rights.

It is known that on 4 May 2015 the Office of the UN High Commissioner for Human Rights issued a report entitled "Discrimination and violence against individuals based on their sexual orientation and gender identity", on the base of which we can denote main types of discrimination against intersex people nowadays. There-

fore intersex persons are often subjected to **discrimination** and abuse if it becomes known that they are intersex, or if they are perceived not to conform to gender norms. Anti-discrimination laws do not typically ban discrimination against intersex persons, leaving them vulnerable to discriminatory practices in a range of settings, including access to health services, education, public services, employment and sports [3, p. 12].

Health-care professionals often lack the needed training, knowledge and understanding to take into account the specific health needs of intersex persons, provide appropriate health-care, and respect the autonomy and rights of intersex persons to physical integrity and health.

Some intersex people also face barriers and discrimination if they wish to or need to amend sex markers on birth certificates and official documents.

We strongly proved that intersex people should also be consulted in the development of legislation and policies that impact on their rights.

Intersex people face stigmatization and discrimination from birth, particularly when an intersex variation is visible. In some countries (particularly in Africa and Asia) this may include infanticide, abandonment and the stigmatization of families. Mothers in East Africa may be accused of witchcraft, and the birth of an intersex child may be described as a curse. Intersex persons are often subjected to **discrimination** and abuse if it becomes known that they are intersex, or if they are perceived not to conform to gender norms.

European Parliament reported on the EU Roadmap that there are some types of discrimination about homophobia and discrimination on grounds of sexual orientation and gender identity.

The first one is in **education** such as an Australian survey of 272 persons born with atypical sex characteristics, published in 2016, found that 18% of respondents (compared to an Australian average of 2%) failed to complete secondary school, with early school leaving coincident with pubertal medical interventions, bullying and other factors. [4, p. 5].

The second type of discrimination is sphere of the **employment**.

A 2015 Australian survey of people born with atypical sex characteristics found high levels of poverty, in addition to very high levels of early school leaving, and higher than average rates of disability. An *Employers guide to intersex inclusion* published by Pride in Diversity and Organisation Intersex International Australia also discloses cases of discrimination in employment.

The third type of discrimination is gender non-equality in **healthcare**.

Discrimination protection intersects with involuntary and coercive medical treatment. Maltese protections on grounds of sex characteristics provides explicit protection against unnecessary and harmful modifications to the sex characteristics of children. In May 2016, the United States Department of Health and Human Services issued a statement explaining Section 1557 of the Affordable Care Act stating that the Act prohibits “discrimination on the basis of intersex traits or atypical sex characteristics” in publicly-funded healthcare, as part of a prohibition of discrimination “on the basis of sex” [5, p. 17].

The fourth type of discrimination is **sport-discrimination**. It is known that in 2013, it was disclosed in a medical journal that four unnamed elite female athletes from developing countries were subjected to gonadectomies (sterilization) and partial clitoridectomies (female genital mutilation) after testosterone testing revealed that they had an intersex condition.

Testosterone testing was introduced in the wake of the Caster Semenya case, of a South African runner subjected to testing due to her appearance and vigor. There is no evidence that innate hyperandrogenism in elite women athletes confers an advantage in sport. While Australia protects intersex persons from discrimination, the Act contains an exemption in sport.

Anti-discrimination laws do not typically ban discrimination against intersex persons, leaving them vulnerable to discriminatory practices in a range of settings, including access to health services, education, public services, employment and sports.

United Kingdom, the Scottish Offences (Aggravation by Prejudice) Act 2009 includes intersex issues in its very wide definition of gender identity i.e. “not standard male or female”²³ – thus also equating intersex with a form of gender identity. In at least 10 EU Member States (Bulgaria, Estonia, Hungary, Italy, Luxembourg, Poland, Portugal, Romania, Spain and Slovakia) the law has an open list of grounds of discrimination. Here, intersex may be included under the protected characteristics or social groups category of ‘other’.

Recognizing intersex people as “not standard male or female” could help protect intersex people from discrimination. However, given the social and legal invisibility of intersex issues in society and in the legal system, considering such an approach can perpetuate this invisibility. It could also result in acts of discrimination against intersex people remaining unchallenged. Using this ground of protection remains largely

untested and unclear in practice, given the scarcity of case law.

The Constitution of Ukraine (1996) in the Article 23 denote that “Every person has the right to free development of his personality, provided that the rights and freedoms of other persons are not violated thereby, and has duties to society in which free and comprehensive development of his personality shall be guaranteed”.

In its turn, the Order no. 60 of the Ministry of Public Health “on improvement of medical assistance for persons requiring gender reassignment (correction)” of 3 February 2011 (repealed with effect from 30 December 2016) provided for a cumbersome and restrictive procedure for gender reassignment, which included an established clinical diagnosis only of “transsexualism” (not intersexualism), a mandatory stay for at least one month in a psychiatric hospital, and irreversible sterilisation. The numerous counter-indications included “anatomic particularities complicating (or making impossible) the person’s adaptation to the desired gender (such as hermaphroditism and disorders in development of genitalia)”. To provide the position of Ukrainian Government there is Order no. 1041 of the Ministry of Public Health which denote that “on establishing medico-biological and social-psychological indications for gender reassignment (correction), approval of the form of primary accounting documents and instructions on completing them” of 5 October 2016, enacted on 30 December 2016 (repealing Order no. 60 mentioned above).

As an example of inadequate regulation of Ukrainian legislation, the rights of intersex people we have an **Application no. 40296/16 P. against Ukraine lodged on 6 July 2016. This case is about** The applicant who is an intersex person registered as male, but identifying herself as female. Respecting her self-identification, the Court will refer to her gender as female. The applicant is a Ukrainian national who was born in 1977 and lives in Kyiv. She is represented before the Court by Ms O.O. Guz, a lawyer practising in Kyiv. The President decided that the applicant’s name should not be disclosed to the public (Rule 47 § 4 of the Rules of Court). It noted that, indeed, the legislation provided for the civil status records of transsexual persons to be changed following sex reassignment surgery, but did not regulate the situation of intersex persons.

However, the court held that it remained open for the applicant to apply for such a change under point 2.15.10 of the applicable rules, that is “in other particular cases, if that does not contradict the legislation in force”. In other words, the applicant could seek a judicial deci-

sion acknowledging that her gender had been erroneously defined as male at birth. Her identity documents could be subsequently adjusted on those grounds. The applicant appealed. She maintained that her situation was special given that her biological features were a combination of both genders. She further argued that, although the legislation did not regulate for such a situation, it did not prohibit changing the civil records accordingly. The applicant emphasised that the desired change in her case would neither run contrary to the interests of society in general, nor infringe anybody’s rights and freedoms in particular. On 19 January 2016 the Kyiv Administrative Court of Appeal upheld the first-instance court’s judgment and endorsed its reasoning. On 17 February 2016 the Higher Administrative Court rejected the applicant’s request for leave to appeal on points of law.

Despite the fact that intersexual people can not have their own children due to peculiarities of the endocrine and reproductive systems, domestic legislation of **Ukraine** does not enable them to adopt a child without mentioning sex of the adopter in his or her passport. Due to that, intersexual peoples right to adopt children is regulated partly by the art. 221 of The Family Code of Ukraine which defines only that adolescent of a child may be a full-time capable person. As we can see, there are no requirements for the sex of a person who can adopt a child, but Ukrainian legislation does not foresee the definition of intersex as a separate gender category, therefore, in practice, Ukrainian legislation does not recognize cases of adoption of children by intersexual people.

From the above research we can **conclude** that the right of intersexual people to self-determination, which includes the possibility of obtaining documents posing a person, the possibility of an intercessory to independently choose the gender to which he belongs or to identify himself as a person not belonging to any of the articles, recognition in society and a state that will guarantee the right of such persons to create a family, adoption of children, due respect in society is not properly protected in Ukraine and requires radical reform and opens up prospects for a survey of ways and opportunities for improving the implementation of the right of intersexual people to self-determination.

We formed some action points which can help us to recognize the most important aspects of domestic Ukrainian legislation of intersex peoples right of self-determination.

First of all, the special laws to provide for facilitated procedures to amend sex markers on the birth certificates and official documents of intersex people should be enacted. We must improve our domestic legislation to provide

intersex people a real legal right to adopt children due to their specific body and biological type that makes impossible to have their own children.

Secondly, health care personnel should be provided with training on the health needs and human rights of intersex people. Appropriate advice and care should be given to parents of intersex children, being respectful of the intersex person's autonomy, physical integrity and sex characteristics.

Thirdly, it should be ensured that members of the judiciary, immigration officers, law enforcement, healthcare, education and other officials and personnel are trained to respect and provide equal treatment to intersex persons.

Fourthly, intersex people and organizations should be consulted and participate in the development of research, legislation and policies that impact on their rights.

References:

1. European Parliament Report on the EU Roadmap against homophobia and discrimination

Стаття присвячена дослідженню проблем реалізації права інтерсексуалів на самовизначення, що включає в себе право на усиновлення дітей, право на зміну статі й відповідних документів, які посвідчують особистість фізичної особи, а також право на повагу їхньої індивідуальності з боку суспільства. За результатами проведеного дослідження зроблено висновок, що сучасне законодавство України, яке регулює права інтерсексуалів, у багатьох аспектах не відповідає європейському, в ньому домінують радянський спосіб регулювання відповідних відносин між інтерсексуалами та державою й недостатня увага з боку держави щодо визнання на належному рівні природного права інтерсексуальних людей на самовизначення.

Ключові слова: права людини, права інтерсексуалів, право на самовизначення, законодавство інтерсексуальних осіб, дискримінація інтерсексуальних осіб, види дискримінації інтерсексуальних осіб.

Статья посвящена изучению проблем реализации права интерсексуалов на самоопределение, главными составляющими которого являются право на усыновление детей, право на смену пола и соответствующих документов, удостоверяющих личность физического лица, а также право на уважение обществом их индивидуальности. По результатам проведенного исследования сделан вывод, что современное законодательство Украины, регулирующее права интерсексуальных людей, во многих аспектах не соответствует европейскому и сохраняет преэминентность относительно как советского периода регулирования прав интерсексуалов, так и отечественного невнимания к проблемам признания природного права интерсексуалов на самоопределение.

Ключевые слова: права человека, права интерсексуалов, право на самоопределение, законодательство интерсексуальных лиц, дискриминация интерсексуальных лиц, виды дискриминации интерсексуальных лиц.

