CONSTITUTIONAL AND LEGAL REGULATION OF THE RIGHT TO CHANGE SEX IN THE CONTEXT OF THE IMPLEMENTATION OF SOMATIC HUMAN RIGHTS

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Abstract. The article considers the problem of constitutional and legal regulation of the right to change sex in the context of the implementation of somatic human rights. Based on the analysis of ECHR decisions and positive practice of foreign countries, it is noted that gender denial (mismatch between anatomical gender of an individual and his gender identity (mental gender)), i.e. transsexualism, is a type of mental and behavioral disorders of an individual. According to the most Western experts, the only effective method of treating transsexuality that gives more or less satisfactory results is surgical and hormonal correction of sex in accordance with gender self-identification, taking into the account the change of documents and socialization in a new gender role. It is emphasized that the most controversial issue so far is the issue of succession in case of gender reassignment, i.e. related to the transfer of rights and responsibilities from a person before gender reassignment to a person after such a change. Emphasis is placed on the need to consolidate the universal succession in the event of a person’s change of sex, which implies the transfer of all property, a set of rights and obligations belonging to the person to the successor, and it is not only about existing rights and obligations, but also about not yet identified at the time of succession. It is noted that the succession should take into account the ability to accept such rights and responsibilities, the ability of a person (who has changed sex) to bear them (e.g., military service, the right to an old-age pension, etc.), as these provisions form vacuum in legislation. The new legal status of a person who has changed sex is established in full at the time of the final change of identity documents, and this should be the basis for succession in the
event of a change of sex. The correlation of the available definitions gave grounds to assert that the right to change (correction) of sexuality is a somatic right, as it allows for the fundamental reconstruction of a person by changing sex. It is concluded that since Art. 51 of the Constitution of Ukraine clearly states that marriage is based on the free consent of women and men, so it is too early to talk about the mechanism of same-sex marriage in Ukraine, as this institution is not enshrined in law. National law also prohibits adoptive parents who are same-sex or unmarried foreigners.

**Keywords**: somatic human rights, gender reassignment, gender identity, transgenderism, legal regulation, gender.

**INTRODUCTION**

The issue of regulating the right to change gender includes not only legal but also religious, moral and ethical, socio-economic aspects. From somatic rights to the independent category the right to change (correction) of sexuality stood out. This right has been studied not by chance, but due to a number of factors: low research interest; updating national legislation; the extensive case law of the European Court of Human Rights (ECtHR) in this context; variety of problems in the field of transsexuality.

According to the well-known scientist in the field of somatic human rights O. Starovoitova, the right to the body and its legal regulations cover a set of somatic rights based on the worldview belief in the “right” of man to dispose of his body and organs, ie create and eliminate them, “restore” or “modernize” (Starovoitova, 2006). As V. Kruss, notes that these are the rights that allow for “fundamental reconstruction”, change the functional capabilities of the organism and expand them with technical-aggregate or medicinal means (Kruss, 2000). The study of the semantic meaning of the word “reconstruction” led to the use of the principle of analogy of law and the search for a legal definition of this concept in other areas, where it is understood as re-equipment of existing production facilities, design changes, changes in basic technical characteristics.

The ratio of available definitions gives grounds to claim that the right to change (correction) of gender is a somatic right, as it allows for fundamental human reconstruction through gender reassignment.

**MATERIALS AND METHODS**

Given the novelty of the issue and the lack of a clear international understanding, different countries have different perceptions of the ban on gender reassignment, even within Europe: 14 countries view discrimination based on transgender identity as a form of sex discrimination; 2 Member States – as discrimination of sexual orientation; 11 Member States have no law or case law to determine the form of discrimination. The difference between gender discrimination and discrimination of sexual orientation is very large, because in the first case the law on equal treatment between men and women is used. On 27 April 2006, the Court of Justice of the European Union confirmed that discrimination on the grounds
of redistribution of sex should be considered as discrimination on grounds of sex (Strus, 2019).

In the field of transsexuality, the transformation of a woman into a man and, conversely, a man into a woman is possible. And recently, sex reassignment surgery is gaining popularity around the world. It is quite active in countries such as the United States, Iran, Thailand, Russia and Belarus.

The interest of gender research and the relevance of gender reassignment are related to modern socio-cultural changes, which have led to the emergence of women in many areas and actualized interest in gender.

Denial of sex (discrepancy between the anatomical sex of an individual and his gender identity (mental sex)), i.e., transsexualism, is one of the types of mental and behavioral disorders of the individual. According to most Western experts, the only effective method of treating transsexuality that gives more or less satisfactory results is surgical and hormonal correction of sex in accordance with gender self-identification, given the change of documents and socialization in a new gender role.

RESULTS

In Ukraine, the issues of gender reassignment and obtaining a medical certificate until 2016 were regulated by the Order of the Ministry of Health (hereinafter – the Ministry of Health) of Ukraine of February 3, 2011 № 60 “On improving the provision of medical care to persons in need of gender reassignment” (repealed in December 2016), which defined the general criteria for gender reassignment and contraindications for this. These included medical and social events, including those under the age of 18; the presence of children under 18 years of age; the patient’s stay in marriage at the time of his application (Order of the Ministry of Health of Ukraine, 2011). In the same document, medical-biological and socio-psychological indications for the correction of sexuality were established, which are used in the presence of a number of conditions and contraindications.

In addition, the project “On the establishment of medical-biological and socio-psychological indications for change (correction) of gender and the form of primary accounting documentation” was proposed. This project effectively abolishes compulsory sterilization, observation in a psychiatric clinic, and provides the opportunity to obtain permission to change sex from an authorized commission.

In December 2016, another Order of the Ministry of Health “On establishing medical-biological and socio-psychological indications for changing (correcting) gender and approving the form of primary accounting documentation and instructions for its completion” came into force, stating that “socio-psychological indications for gender reassignment there is discomfort or distress due to the discrepancy between the individual’s gender identity and the gender established at birth (and related gender role and / or primary and secondary sexual characteristics)” (Order of the Ministry of Health of Ukraine, 2015). These provisions of current legislation are in line with European standards for defining transgender rights, in particular gender reassignment.

The Council of Europe’s Human Rights and Gender Identity Report calls for the eradication of sterilization and other forms of compulsory medical treatment as a prerequisite for the
legal recognition of a person’s gender identity in the laws governing the process of gender reassignment (Scientific community, 2017). For example, in the Republic of Belarus over the past 20 years, about 70 such operations have been conducted (About 70 people have changed their gender..., 2014). However, such operations are much more common in the United States and other countries.

However, the disharmony of the individual in transsexualism naturally gives rise to numerous specific transsexual conflicts. They are always complex and manifest themselves as a kind of individual combination of internal and external conflicts.

A feature of transsexualism is a high burden of suicidal behavior. Its various manifestations were observed in 86.4% of patients. However, in other countries such a procedure is carried out without much procedural difficulty. After the replacement of the passport or other identity document, the person is monitored for six months by specialists, how fully it adapts to the new gender. If necessary, she is provided with psycho-correctional, psychotherapeutic assistance for optimal social and psychological adaptation in a changed (according to the passport) gender. Only about 5% of transgender people who have been renamed refuse surgery because they have had enough of being recognized in their new gender role. In our opinion, it is appropriate to first go through all the procedures for gender reassignment, and then change the documents, only then is it possible to become physiologically identical with persons of the same sex from birth, and this fact would be documented (SMIZONE, 2017).

The most controversial issue so far is the issue of succession in the event of gender reassignment, i.e., the transfer of rights and responsibilities from person to person to gender reassignment after such a change. Apparently, it is necessary to enshrine universal succession in the event of a person’s gender change, which involves the transfer of all property, a set of rights and obligations belonging to the person to the successor, and it is not only about existing rights and obligations, but also future, not identified at the time of succession. It should be noted that succession should take into account the ability to accept such rights and responsibilities, the ability of a person (who has changed sex) to bear them (e.g., military service, the right to an old-age pension, etc.), as these provisions form legal vacuum in the legislation. The new legal status of a person who has changed sex is established in full at the time of the final change of identity documents, and this should be the basis for succession in the event of a change of sex.

Succession in the event of a change of sex must be based on law, but the laws of many countries include inheritance, reorganization of a legal entity and some cases of contract law, gift, permanent rent (Civil Code of the Republic of Belarus, 2015).

Gender reassignment in foreign countries has a number of differences. In the Republic of Belarus, such an operation is free of charge, as it is based on transsexualism (NAVINY. BY, 2017), but in many countries such an operation is paid for by the person who wants to change sex. Thus, in Iran such an operation costs about 5 thousand dollars, the state can pay up to 50% of the cost, in Thailand – 7–10 thousand dollars, in Russia – about 15 thousand dollars, in the United States – 30–40 thousand $ (Khudyakova, 2009).

By the way, the first sex reassignment operation was conducted in 1930–1931 (in several stages) in Germany. As a result, the artist Einar Wegener became the wife of Lily Elbe. Lily died of postoperative complications in 1931. The first specialized clinics appeared in France.
during the sexual revolution. In 1978, an international professional association of doctors specializing in sex correction was established in the United States. In the USSR, the first such operation was conducted in 1970 in Latvia, then in 1992, and in Belarus (Khudyakova, 2009).

Gender reassignment surgeries are now being conducted in many countries. For example, in the United Kingdom in 2000–2010, 853 men became women through surgery and only 12 women became men. In 2010, 143 gender reassignment surgeries were performed in this country, and this figure has almost tripled in ten years. The average age of a Briton who has decided to have a sex change is 42 (Khudyakova, 2009). The leaders in the number of such operations are Thailand and Iran.

In some foreign countries, the issue of gender reassignment is still not regulated by law, so citizens who want to change their gender, seek help in international courts. There is a well-known case, for example, of a Lithuanian transsexual, L., who was denied sex reassignment surgery in his country and won a case against his country in the European Court of Human Rights. And in 2007 the ECHR ordered Lithuania to pay L. non-pecuniary damage in the amount of EUR 5,000 (LTL 17,200). In addition, the country was obliged to adopt a law on the procedure for sex reassignment within three months, otherwise the amount of the fine increased by another 40 thousand euros. However, Lithuania decided not to pass the law, but to pay the entire fine. He performed an operation to change the male to female sex in Belarus (Khudyakova, 2009).

Thus, the institution of gender reassignment is quite new to many countries, so there are many problems with the legal regulation of its provisions and the provisions that result from gender reassignment. For example, with the proliferation of same-sex unions in the United States, the problem of establishing paternity or maternity of persons raising children in same-sex unions has arisen in practice. In almost all states, same-sex marriage is prohibited. However, in most cases, when considering such cases, paternity (maternity) of two men (women) at the same time cannot be legally established. The courts only protect certain parental rights of such persons, most often the right to communicate with the child and to participate in his upbringing. Therefore, when raising children in same-sex unions, legal paternity or maternity may be established and certified only in respect of one of the members of such a family and if there are grounds established by law.

Gaps in legislation often concern the field of family law, namely marriage, adoption, paternity, military service, succession and a number of other issues. However, what should be done in the marital relationship that happens with the marriage, does it continue to exist?

It should be noted that on September 14, 2021, a resolution of the European Parliament was adopted, which calls for the recognition of same-sex unions – both marriages and civil partnerships – throughout the EU (Cathedral, 2021). However, in Art. 21 of the Family Code of Ukraine provides a definition of “marriage”, which does not allow the conclusion of its “same-sex form”: “Marriage is a family union of a woman and a man, registered in the state registration of civil status” (Family Code of Ukraine, 2002). Therefore, the implementation of same-sex marriages in Ukraine is currently not provided by law.

Many current studies on gender focus not on the presence or absence of psychological differences between the sexes, but on their sociocultural determination and implications for
personal development, socio-psychological adaptation and self-realization, and family life is known to be largely mediated by cultural scenarios (Voronina, 2012).

As you know, the current family law establishes the presumption of paternity and maternity in the question of the origin of children from certain persons. As same-sex marriages are prohibited in Ukraine, the situation of paternity and maternity in a same-sex union is not regulated.

It should be noted that the social phenomenon of “same-sex union” has existed for a long time, but it is usually not mentioned in most societies, states and historical epochs. States have concealed such “deviations” in every possible way, saying that such phenomena do not exist. In the XX century, The concept of “same-sex union” first became the subject of jurisprudence when, on June 7, 1989, Denmark passed a law allowing same-sex couples to register their relationship. In the same year, 340 same-sex couples were registered there (270 – male / male and 70 – female / female). And already in 1993 such an “example of regulation of same-sex unions” was followed by Norway (where the share of same-sex partnerships in 1993 was 0.84 % of the total number of marriages) and Sweden (where such a share was 0.99 %) (Boldizhar, 2021).

In 1996, Iceland, with a population of just over 280,000, also adopted a Registered Partnership Act. In the same year, 21 same-sex unions were registered. All records were broken by the Netherlands, where in 2001, immediately after the entry into force of the law legalizing same-sex marriage, 2,432 same-sex marriages were registered (1,325 – male / male and 1,107 – female / female).

Currently, the number of states that legalize same-sex marriage is growing, improving the legal structure of such a union, the form, scope of rights and responsibilities (Boldizhar, 2021). However, the issue of same-sex unions and the legal consequences of the legislative solution of such unions in foreign countries has been little studied. Because “spouses” in a homosexual marriage are completely equal in legal status with persons who are in a traditional marriage, the only difference between such couples is the same sex. Same-sex partners who are married are given the same amount of rights as same-sex couples, taking into account the right to artificial insemination and the right to adopt (adopt) children. Therefore, the concept of “marriage” in its legal sense is also applied to same-sex unions. However, with the institution of marriage should be distinguished parallel institution of registered partnership, similar in many respects to marriage. In fact, it is a specially created legal structure aimed at both the protection of traditional marriage (union between a man and a woman), and the normative consolidation of the realities of the existence of permanent same-sex relationships. This design gives partners much the same rights and responsibilities as a married couple, with some exceptions: a ban on the adoption of children, the impossibility of artificial insemination, and some others (Lesur & Linsky, 2013).

However, in most countries such differences are gradually disappearing and the institution of registered partnership is almost no different from the institution of marriage. And in some countries (such as the Netherlands) both institutions are recognized, and marriage registration is open to both heterosexual and same-sex couples (Boldizhar, 2021).

According to world statistics, in each society on average about 4 % of people have a non-traditional sexual orientation, but even this percentage must be regulated by law (Boldizhar,
2021). It is the state’s denial of the existence of such a fact, the lack of proper regulation that can lead to arbitrariness, because if a same-sex union is not recorded anywhere, then it is not controlled. However, we do not mean the mandatory registration of same-sex unions, but the fact that the state should develop a mechanism for regulating such relations, which would include accounting, statistics, and so on.

The possibility of raising children by same-sex parents is now widely discussed. In most countries, this phenomenon is possible through the adoption of each other’s children (for example, when there are children from the first marriage), through artificial insemination or through adoption (adoption). The central link in such a chain is the question of the possibility of a full-fledged mental education of the child in such a union. The society is dominated by two opinions:

1) proponents of legalizing same-sex couples believe that a child needs a family in any case, and it does not matter whether it is traditional or not. Double child care is a priority, as there are no statistics showing that children in same-sex unions are happier than children in same-sex unions;

2) opponents of the legalization of same-sex unions are convinced that same-sex marriages in principle contradict the dogmas of the world’s major religious denominations. There is a negative attitude towards same-sex unions and their categorical non-recognition. The issue of the division of status in a same-sex union is also debatable, and the issue of establishing paternity and / or maternity remains unknown.

In the United States, the laws of Florida, Mississippi, Nebraska, Oklahoma, Utah, and Virginia have laws that prohibit same-sex couples from adopting children. At the same time in California, Connecticut, Massachusetts, New Jersey, New York, Pennsylvania, Vermont, Washington, adoption is allowed by a second partner in a same-sex couple by court decision or in the manner prescribed by law (Melnyk, 2016).

In other US states, courts have also allowed same-sex couples to adopt a second partner’s child, although there is no general law or court order. Courts in the same state, but in different jurisdictions, may make conflicting decisions.

Single-parent adoption is legal in all states of the United States except Florida. This allows same-sex couples to adopt children in jurisdictions where adoption by two partners is not allowed, although only one partner will be the official guardian. An exception to this rule exists in the state of Utah, which prohibits the adoption of “a person who is in a relationship that is not a registered marriage”, which, however, gives a legal opportunity to a single person to adopt children, but makes it illegal to adopt a couple living together, regardless of sexual orientation. Critics of such a prohibition policy also point to the fact that although in many states there is a ban on same-sex adoption, these same couples can act as guardians without the child’s right to live with them (Melnyk, 2016).

In Canada, adoption is the responsibility of the local government, so the law varies by province or county. Same-sex adoption is legal in provinces such as British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario, Quebec, Saskatchewan and the Northwest Territories. In the province of Alberta, it is allowed to adopt the child of a second partner. Same-sex adoptions are illegal in New Brunswick, Prince Edward Island and Nunavut. In the Yukon, adoption law allows for two interpretations. Member of Parliament
from the New Democratic Party Libby Davies advocates the introduction of the same national standards for adoption in same-sex couples (Melnyk, 2016).

**DISCUSSION**

In February 2006, the French Court of Cassation ruled that both partners in a same-sex union could have parental rights over the partner’s biological child. This decision was made in the case of the transfer of rights to two daughters of one woman to her partner in a civil union (Judgment of the European Court of Human Rights..., 2012). Note that France became the fourteenth country in the world and the ninth in Europe to legalize same-sex marriage and same-sex adoption. Adopted on 17 May 2013, Law № 2013-404, which allows same-sex couples to marry same-sex couples living in France, including foreigners, provided that at least one of the partners has a permanent residence in France whether a resident of France. Same-sex marriages concluded before the adoption of this Law are also recognized (French law No. 2013-404, 2013).

On 2 June 2006, the Icelandic Parliament voted in favor of a proposal to allow adoption, upbringing and assistance in artificial insemination for same-sex couples along with heterosexual couples. The decision was taken unanimously and came into force on June 27, 2006. Australian law allows adoption in the federal capital and in Western Australia. Adoption of a second partner’s child is possible in Tasmania. In January 2005, a decision of the Supreme Court of Israel allowed same-sex couples to adopt the child of a second partner. Earlier, limited guardianship rights for bloodless parents were allowed in Israel. In 2007, on behalf of the Catholic adoption agencies in the UK, which account for a third of all charities, they said they would close if the government issued an order ordering them to be treated as foster parents, among other candidates, and same-sex money (Same-sex marriages in Iceland, 2021).

With the recognition of same-sex marriages in the Netherlands, the law on adoption has also changed. Thus, from April 1, 2001, two women or two men can adopt a child in this country. However, this only applies to children who reside in the Netherlands. Today, only heterosexual couples can adopt a child from another country (Lukyanyuk, 2021).

The Dutch law of 1 April 2001 also provides for adoption by homosexual couples. Therefore, children raised by two persons of the same sex are protected by law, regardless of whether they are married or not. The only requirement is that they must have lived together for at least three years and raise a child together for at least a year before applying for adoption.

The required period of cohabitation and care of the child by a partner (actual or legal) is the same as in the case of adoption by two persons: cohabitation with the child’s father – at least three years, period of child care – at least a year. This last requirement (one year) is not mandatory if the child was born in a lesbian union and the mother’s partner wants to adopt her. The latter may apply for adoption immediately after the birth of the child. This rule applies regardless of the form of cohabitation (marriage, registered partnership, actual marital relationship). However, two women must also live with each other for at least three years (Lukyanyuk, 2021).

The case law of the European Court of Human Rights on the possibility of adoption by same-sex couples is very interesting, due to the peculiarities of national legislation on
this issue. For example, the Grand Chamber of the European Court of Human Rights fined Austria 38,000 euros for discriminating against same-sex couples - women challenged the right of the country’s authorities to deny one of them the right to adopt the son of another. In particular, two 46-year-old women have been living together for many years and are raising a son, one of whom was born out of wedlock in 1995. Shortly after the birth of the child, the mother’s friend as the second father decided to adopt him and submitted a request (Hertz, 2018).

In 2005 and 2006, district and regional courts denied adoption to a homosexual couple, noting that under Austrian law, only two people of the opposite sex can be parents. In addition, the court took into account that the boy’s biological father sees the child regularly. In September 2006, another appeal was rejected by the Supreme Court, considering the provisions of the Civil Code fully in line with the Constitution (Collection of educational materials..., 2018).

In 2007, the women appealed against the national court’s decision to the European Court of Human Rights. They claim that the Austrian authorities discriminated against them on the grounds of sexual orientation, as the adoption of a child would be possible in the case of a heterosexual union, even if the partners were not married. According to them, Austria violated Art. 14 and Art. 8 (prohibition of discrimination and respect for private family life) of the European Convention on Human Rights (hereinafter - the Convention). In June 2012, the case was transferred to the Grand Chamber of the European Court of Human Rights. The Court held that there had been a violation of Articles 14 and 8 of the Convention in comparing the plaintiffs’ situation with that of an unmarried couple where one of the partners wished to adopt the other partner’s child. By 11 votes to 6, the court ordered the Austrian authorities to pay the victims € 10,000 in compensation for non-pecuniary damage and € 28.4 thousand in legal costs within three months.

CONCLUSIONS

Article 8 of the Convention, aimed at protecting a person from arbitrary interference by public authorities. In addition, it creates positive commitments inherent in true “respect” for family life. In all circumstances, the importance of maintaining a fair balance between the opposing interests of the individual and society as a whole should be taken into account, with the state having certain limits of discretion. Since Art. 51 of the Constitution of Ukraine clearly states that marriage is based on the free consent of women and men, so it is too early to talk about the mechanism of same-sex marriage in Ukraine, as this institution is not enshrined in law. National law also prohibits adoptive parents who are same-sex or unmarried foreigners.

REFERENCES


