

ADOPTION BY HOMOSEXUALS IN THE LIGHT OF MODERN STANDARDS OF HUMAN RIGHTS PROTECTION

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1. INTRODUCTION

The issue of the legal family status of homosexually-oriented persons and relationships they enter into is one of the matters that raise numerous controversies in the Polish society. One of the problems that give rise to dispute is the issue of legal admissibility of adoption by this social group.¹ In the dominating opinion of both the entire Polish society and literature, it is not possible to reconcile adoption by homosexuals with the necessity to protect a child's interests. A belief that homosexuals will demand the right to adoption based on equal rights is sometimes quoted as a scare-argument against granting formal rights to same-sex couples.² It is assumed that if same-sex partnerships are introduced to the legal system, as other countries'

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¹ M. Ukleja, *Rodziny z wyboru. Homoseksualny związek jako współczesna alternatywa rodziny – analiza zjawiska*, Acta Universitatis Lodzianensis. Folia Sociologica No. 51, 2014, p. 124; Centrum Badań Opinii Społecznej, *Komunikat z badań nr 174/2017, Stosunek do osób o orientacji homoseksualnej i związków partnerskich*, December 2017, https://www.cbos.pl/SPISKOM.POL/2017/K_174_17.PDF (accessed 18.12.2018).

² See e.g. T. Królak, *Prof. Andrzej Zoll: homoseksualiści zawalczą o prawo do adopcji*, interview, <https://wiadomosci.onet.pl/kraj/prof-andrzej-zoll-homoseksualisci-zawalcza-o-prawo-do-adopcji/ks38h> (accessed 7.05.2018). Bartosz Banaszekiewicz expressed a similar opinion in legal writings. He argues that the Polish legislator has the following alternative: "either to maintain the stance that the unmarried relationship of two people is their strictly private matter and is not subject to legal institutionalisation, or to take steps to establish some kind of 'miniparamarriage' at first and in the end, if there is a final stage of this route, to implement the idea of *marriage pour tous*, including the right to adopt children, but the Polish public opinion on the issue of adoption by homosexuals is very critical". See B. Banaszekiewicz, *Matężństwo jako związek kobiety i mężczyzny. O niektórych implikacjach Artykułu 18 Konstytucji RP*, *Kwartalnik Prawa Prywatnego* issue 3, 2013, p. 640.

experience shows, it will be necessary to give those partnerships the right to adopt children. Moreover, there is an opinion expressed in literature that the recognition of the legal right to adoption by homosexuals or same-sex couples is in conflict with fundamental human rights. According to Leszek Wiśniewski, who expressed this opinion especially strongly, "The dominating heterosexuals and a small number of homosexuals constitute two different social groups playing opposite social roles in the process of safeguarding the most fundamental and natural human right: the right to preserving the human species and to upbringing children by parents, i.e. a mother and a father. Just this single argument sufficiently indicates that the call for legalising same-sex partnerships has nothing to do with the protection of human rights. Just the opposite, it undermines the essential human right to found a family of a man, a woman and children. Thus, it is not justified to demand equal treatment of same-sex couples and heterosexual marriages or similar rights to adoption. Those two types of human relationships are absolutely incomparable."³

The above-presented stance encourages an analysis of upbringing children by homosexuals from the perspective of modern standards of human rights protection. It is especially important to establish whether a refusal to give permission to adopt a child solely on the grounds of an applicant's sexual orientation in case the law admits adoption by a single person, as it is in Poland, can be reconciled with the principle of equal treatment. Indeed, both the supporters and opponents of adoption by homosexuals refer to this principle, however, as it has been noticed above, the differentiation of access to adoption is justified on the basis of the necessity to protect a child's best interests. For this reason, in order to solve the problem of compliance of refusal to grant the right to adoption by homosexuals with a ban on discrimination, it is essential to assess the influence of adoption by such persons on the appropriate development of a child. If it turned out that homosexuals do not sufficiently ensure appropriate child upbringing, the reference they make to the principle of equality would be groundless.

Solving the above issue with respect to Polish law becomes even more significant if we take into account that adoption by homosexuals and/or same-sex couples is admissible under the legislation of more and more states. At present, the legislation of 27 states in the world allows adoption by same-sex couples but, what is characteristic, mainly highly-developed countries of the European cultural region decided to pass such laws.⁴ In addition, in some countries,⁵ the legislator allows adoption of a partner's child by their same-sex partner but does not allow

³ L. Wiśniewski, *Zdanie odrębne*, [in:] R. Wieruszewski, M. Wyrzykowski (eds), *Orientacja seksualna i tożsamość płciowa. Aspekty prawne i społeczne*, Warszawa 2009, p. 160.

⁴ Adoption by homosexual couples is possible in most Western European countries, the United States, Canada, Australia and New Zealand as well as in some South American countries, Israel and the Republic of South Africa, see A. Carroll, L.R. Mendos, *State-Sponsored Homophobia 2017: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2017, <https://ilga.org/state-sponsored-homophobia-report>, p. 72 et seq. (accessed 30.04.2018). The list in the quoted publication does not include Germany and the Northern Territory of Australia. Adoption by homosexuals was admitted there after the date of publication.

⁵ Croatia, Estonia, Switzerland and Italy.

adoption by same-sex couples. The above-indicated tendency to increase the circle of persons who are given the right to apply for adoption by same-sex couples is reflected in international regulations developed by the Council of Europe. While in the European Convention on the Adoption of Children of 1967⁶ the possibility of adoption was limited to married couples and single individuals,⁷ the Revised Convention on the Adoption of Children of 2008 extends the scope of persons that can apply for adoption. In accordance with Article 7 of the Revised Convention, "The law shall permit a child to be adopted (a) by two persons of different sex (i) who are married to each other, or (ii) where such an institution exists, have entered into a registered partnership together; (b) by one person". Apart from that, State Parties are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together, and to different-sex couples and same-sex couples who live together in a stable relationship. The decision to introduce this regulation to the Revised Convention resulted from the fact that the limitation of the circle of persons entitled to apply for adoption to heterosexual married couples laid down in the Convention of 1967 was the reason for Sweden (partly followed by the United Kingdom and Norway) to withdraw from the Convention. Due to a threat that successive states may withdraw from the Convention, work was started to amend the Convention and eventually the above-mentioned provisions were added.⁸

2. LEGAL REGULATION OF ADOPTION BY HOMOSEXUALS IN POLAND

First of all, it should be highlighted that the establishment of a family relationship between an adopting parent and an adopted child is within the competence of a court that should follow the principle of a child's best interest. Thus, a person applying for adoption does not have any rights and cannot have any claims. Therefore, the possibility of adoption cannot be treated as an individual's right and potential establishment of such a right would mean depersonalising a child.⁹ However, the possibility of applying for adoption may be compared to the right to "equal

⁶ The Convention entered into force in Poland on 22 September 1996, Dz.U. 1999, No. 99, item 1157; hereinafter Convention.

⁷ Article 6 Convention has the following wording: "1. The law shall not permit a child to be adopted except by either two persons married to each other, whether they adopt simultaneously or successively, or by one person. 2. The law shall not permit a child to be adopted save in one or more of the following circumstances: (a) where the child is adopted by the spouse of the adopter; (b) where the former adopter has died; (c) where the former adoption has been annulled; (d) where the former adoption has come to an end."

⁸ A.N. Schulz, *O współczesnych dylematach tworzenia międzynarodowych standardów Rady Europy dotyczących relacji pomiędzy rodzicami i dziećmi*, Acta Iuris Stetinensis, Zeszyty Naukowe Uniwersytetu Szczecińskiego No. 821, 2014, p. 490 et seq. At present, among the seven states that ratified the Revised Convention, Romania and Ukraine as well as the Netherlands with regard to the territory of Aruba and Curaçao had reservations about such a possibility.

⁹ T. Sokołowski, *Dobro dziecka wobec rzekomego prawa do adopcji*, [in:] M. Andrzejewski, *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013, p. 105.

access". The right of access to public service laid down in Article 60 Constitution of the Republic of Poland can be an example of such a right. In accordance with it, one can only request for just assessment of candidates to public service, which does not mean, however, that they can claim the right to be accepted. Similarly, the establishment of a relation between an adoptive parent and an adopted child should result from a positive evaluation of potential adoptive parents' ability to fulfil their adoption-related obligations. Thus, the position of both homosexual and heterosexual applicants should be analysed in terms of the ability to be adoptive parents rather than in terms of legal categories.¹⁰

The Polish legislator allows adoption only by a married couple (Article 115 Family and Guardianship Code, hereinafter FGC). Thus, adoption by an unmarried couple, including a same-sex one, is inadmissible. Moreover, a single individual can adopt a child provided that "his/her personal competences justify the conviction that he/she will properly fulfil an adoptive parent's obligations" (Article 114¹ FGC).¹¹ *De iure* adoption by a single homosexual is possible; at least in case the person does not reveal his/her sexual orientation. Therefore, a question is raised whether the adoption authorities can refuse to give permission for adoption exclusively based on an applicant adoptive parent's homosexual orientation in case they know about it. In other words, it should be considered whether homosexual orientation *per se* constitutes a negative circumstance for adoption.

There is a stand expressed in literature that "due to a child's best interest, individuals with paedophilic inclinations and homosexual orientation cannot be adoptive parents. Adoption by such persons would be in conflict with the principle of a child's best interest"¹² (sic!). What is striking in this statement is the fact that individuals with paedophilic inclinations who can be objectively classified as people who can harm children are listed together with homosexuals as people disqualified from playing the role of adoptive parents. Such a comparison may suggest that the author listing paedophiles and homosexuals together recognises the phenomenon of homosexuality as a dangerous deviation.

Inter alia, Marta Prucnal-Wójcik is also of the opinion that adoption of a child by a homosexual is in conflict with the principle of a child's best interest.¹³ However, the author admits that in the light of the lack of a clear provision banning adoption by homosexuals in Polish law, an opposite stance can also be recognised as justified.

¹⁰ A. Śledzińska-Simon, *Adopcja dzieci przez osoby homoseksualne*, [in:] R. Wieruszewski, M. Wyrzykowski, *Orientacja seksualna i tożsamość płciowa. Aspekty prawne i społeczne*, Warszawa 2009, p. 143.

¹¹ It should be taken into account that following the principle of a child's best interest, "complete families composed of both parents are sought for children that are qualified for adoption". Thus, adoption by a single person should be treated as an extraordinary situation. See *Odpowiedź podsekretarza stanu w Ministerstwie Pracy i Polityki Społecznej – z upoważnienia ministra – na interpelację nr 20167 w sprawie przysposobienia dziecka*, <http://www.sejm.gov.pl/sejm7.nsf/InterpelacjaTresc.xsp?key=32CD30D4> (accessed 4.05.2018).

¹² K. Pietrzykowski (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2018 (5th edn), discussion of Article 114¹ (Legalis).

¹³ M. Prucnal-Wójcik, *Omówienie art. 114¹*, [in:] K. Osajda (ed.), *Kodeks rodzinny i opiekuńczy, Komentarz. Przepisy wprowadzające KRO*, Vol. 5, Warszawa 2017, paras 20–20.3 (Legalis).

Moreover, some authors argue that Polish constitutional reasons are legal arguments against adoption by homosexuals. Namely, there is a model of a family preferred by the Polish legislator,¹⁴ which is expressed in Article 18 Constitution. According to Elżbieta Holewińska-Łapińska, based on the purposefulness-related interpretation of this provision, one can see in it a constitutional ban on adoption by homosexuals. The above-mentioned provision of the Constitution of the Republic of Poland guarantees the protection and care for marriage, being a union of a man and a woman, from which a conclusion can be drawn that partnerships of persons who are not married, including partnerships of same-sex persons, cannot enjoy similar protection and care.¹⁵ Such interpretation of Article 18 Constitution implies the adoption of narrowing interpretation of the constitutional principle of equality and non-discrimination. If the possibility of applying for adoption by homosexuals resulted from the principle of equal treatment, it should be assumed that in the name of equality, from the point of view of the State, founding a family based on marriage and based on the relationship that does not have the status of marriage is equally desired. However, this results in “annulment of the fundamental systemic preference of marriage as a basis of parenthood and a ‘family creation’ factor: it is suggested that in our pattern of marriage-family-motherhood-parenthood, the first element may be replaced by another one provided that it is recognised as equivalent to marriage”.¹⁶

On the other hand, without a negation of the functional and axiological relationship of marriage, family, motherhood and parenthood assumed by the quoted author,¹⁷ one can assume that making adoption by homosexuals and same-sex couples possible actually departs from the constitutional vision of a family based on marriage but it is admissible, provided it is not in conflict with a child’s best interest. This is the stand of the legislator because if Family and Guardianship Code lays down the possibility of adoption by a single individual, the argument that only adoption by a married couple is in a child’s interest is not valid (based on the assumption that adoption by a couple of unmarried partners does not guarantee a stable family relationship and due to that is inadmissible). As Anna Śledzińska-Simon notices, in the legislator’s opinion, adoption by a single individual is “another optimal situation in accordance with the principle that an untypical family is better than none”.¹⁸ Based on the above assumption, the quoted author states that the ability to care for a child’s interests and not the sexual orientation is the decisive criterion for the evaluation whether a given person can qualify for an adoptive parent. From the point of view of the ban on discrimination, sexual orientation should not be treated *per se* as a condition excluding the ability to adopt a child.

¹⁴ E. Holewińska-Łapińska, [in:] T. Smyczyński (ed.), *System prawa prywatnego. Prawo rodzinne i opiekuńcze*, Vol. 12, Warszawa 2011, p. 528. Approval: M. Prucnal-Wójcik, *supra* n. 13, paras 20–20.3; J. Gajda, „Adopcja” przez pary homoseksualne. *Aspekty prawne*, [in:] M. Andrzejewski (ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013, p. 121.

¹⁵ E. Holewińska-Łapińska, *supra* n. 14, p. 528, footnote 83.

¹⁶ B. Banaszkiewicz, *supra* n. 2, p. 617.

¹⁷ *Ibid.*, p. 613.

¹⁸ A. Śledzińska-Simon, *supra* n. 10, p. 145.

The considerations below aim to establish to what extent this stance can be justified based on modern standards of human rights protection, in particular with regard to the European Court of Human Rights case law.

3. ADOPTION BY HOMOSEXUALS VERSUS THE RIGHT TO FOUND A FAMILY

In the light of the European Court of Human Rights (ECtHR) case law, undoubtedly the right to pursue adoption cannot be derived from the right to respect for private life regardless of the fact that this right includes, *inter alia*, the right to found a family and develop relations with other people, especially in the emotional sphere. The possibility of applying for adoption does not result from the right to respect for family life guaranteed in Article 8 para. 1 Convention. The provision refers to the already existing family relations and does not cover a desire to found a family.¹⁹

However, a question arises whether the right to pursue adoption may be derived from the right to found a family, which, beside the right to marry, is guaranteed in Article 12 Convention. Such interpretation of the right to found a family was adopted by the authors of the Yogyakarta Principles;²⁰ in accordance with Principle 24, “everyone has the right to found a family, regardless of sexual orientation”. In order to exercise the right, states should “take all necessary legal, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity.”²¹

It seems that the above-quoted legal interpretation of the right to found a family guaranteed based on international conventions on human rights protection is too broad and constitutes a proposal *de lege ferenda* rather than the reconstruction of the existing standards of protection.²² It should be assumed that the right to found

¹⁹ ECtHR, Grand Chamber judgment of 22 January 2008, *E.B. v. France*, application no. 43546/02, para. 32.

²⁰ The Yogyakarta Principles constitute a set of 29 principles that are doctrinal interpretation of international provisions of human rights within the scope of regulations of the issues concerning sexual orientation and gender identity. The authors of the document aimed to reconstruct international standards of protection. The Yogyakarta Principles are the result of an international meeting of human rights experts organised on 6–9 November 2006 by the International Service for Human Rights and International Commission of Jurists at Gadjah Mada University in Yogyakarta (Indonesia). Every principle is accompanied by detailed recommendations concerning its implementation addressed to states. See R. Wieruszewski, *Zasady Yogyakarta – geneza i znaczenie*, [in:] K. Remin (ed.), *Zasady stosowania międzynarodowego prawa praw człowieka w stosunku do orientacji seksualnej oraz tożsamości płciowej*, Warszawa 2009, p. 17 et seq., <http://docplayer.pl/403153-Zasady-yogyakarta-zasady-stosowania-miedzynarodowego-prawa-praw-czlowieka-w-stosunku-do-orientacji-seksualnej-oraz-tozsamosci-plciowej.html> (accessed 5.05.2018).

²¹ The text of the principles in accordance with the translation by A. Bodnar et al., [in:] K. Remin (ed.), *supra* n. 20, p. 48.

²² Roman Wieruszewski formulates a similar opinion on the Yogyakarta Principles and states that “after reading some principles, one can have doubts whether it is really a reconstruction or perhaps rather a construction”; R. Wieruszewski, *supra* n. 20, p. 18.

a family in the meaning of Article 23 para. 2 of the International Covenant on Civil and Political Rights and Article 12 of the European Convention of Human Rights is a consequence of marriage entered into and is the right of spouses. The provisions referred to do not cover the right of single individuals or persons in partnerships that do not constitute marriage to found a family through procreation or adoption.²³

In Polish literature, Tadeusz Smoczyński expresses the opinion opposite to the stance formulated by the authors of the Yogyakarta Principles. He believes that cohabitation of same-sex couples cannot be assessed in terms of family categories. It is due to the fact that "there is no feature of such cohabitation that might justify its family and legal regulation; in particular, sexual cohabitation of such a couple that indeed raises doubts concerning its natural character is not one".²⁴ In the author's opinion, the forms of family cohabitation cannot be subject to choice following the wish of people concerned. It is not a good or a normative model that can be extended or narrowed with respect to the scope of obligations, rights and their consequences in various legal fields. "For legal family relationships between a father and a mother that ensure the protection of a family, including children in particular, (...) the legislator cannot develop a few models for choice."²⁵

On the other hand, the authors of the Charter of Fundamental Rights did not assume the existence of an independent (unrelated to the right to marry) right to found a family. In the Explanations relating to the Charter it is stated that the national legislator may recognise "arrangements other than marriage for founding a family".²⁶ In the light of the Charter, a family (founding it) is not perceived as a potential consequence of marriage only, but also as a result of being in another relationship recognised by law and following informal cohabitation that is stable in nature.²⁷ However, it should be taken into account that the intention of the authors of Article 9 Charter was not to establish a common international standard. The protection of the right to marry and found a family stipulated in the Charter is granted in such a scope in which the rights are ensured in national legislations.

²³ L. Garlicki, *Omówienie art. 12 Europejskiej Konwencji Praw Człowieka*, [in:] L. Garlicki, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, Vol. 1, *Komentarz do art. 1–18*, Warszawa 2010, p. 722. It seems that also Marek Antoni Nowicki has a similar opinion. Making commentaries on Article 12 Convention concerning the right to found a family, he states that "a family founded as a result of marriage enjoys a special type of protection based on this article". See M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2010, p. 666. Christoph Grabenwarter presents a different opinion on the issue and believes that the right to found a family is closely connected with the right to marry but marriage should not be recognised as a requirement for the exercise of the right to found a family. The right is guaranteed so it is independent of the marital status of the parents concerned; Ch. Grabenwarter, *European Convention on Human Rights. Commentary*, München 2014, p. 321.

²⁴ T. Smoczyński, *Małżeństwo – konkubinaty – związek partnerski*, [in:] M. Andrzejewski (ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013, p. 75.

²⁵ *Ibid.*, p. 76.

²⁶ *Explanations relating to the Charter of Fundamental Rights*, OJ 2007/C 303/02.

²⁷ I.C. Kamiński, discussion of Article 9 Charter of Fundamental Rights of the European Union, [in:] A. Wróbel, *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, Warszawa 2013, p. 315.

4. ADOPTION BY HOMOSEXUALS IN THE LIGHT OF THE PRINCIPLE OF EQUAL TREATMENT

The most common argument for granting homosexuals legal possibility of adoption is the statement that refusal to do this constitutes the infringement of the ban on discrimination against them. However, many authors are of the opinion that different treatment of homosexuals with respect to access to adoption is justified by the protection of a child's interests. The European Court of Human Rights also expressed this stand in its judgment (which is invalid now) in the case of *Fretté v. France*.²⁸ According to ECtHR, "Even if the decision to refuse authorisation had been based exclusively or chiefly on the applicant's sexual orientation, there would be no discrimination against him in so far as the only factor taken into account was the interests of the child to be adopted."²⁹

Various arguments for harmful influence of upbringing by homosexuals on the interests of a child are provided in literature. The most important of them is one that states that a family composed of two heterosexual parents is the optimal environment for appropriate upbringing of children. This way a child can "fully" understand the essence of human sexuality, differences between a woman and a man and the complementary nature of the two genders in their mutual relations. As the values passed to children in the process of upbringing are immanently connected with each parent's gender, a child reared by same-sex couples will not have an opportunity to get the whole "set" of values necessary to function properly. Same-sex persons, despite all their efforts, are not able to pass all the necessary values to children.³⁰

Anna Śledzińska-Simon challenges the view. In her opinion, homosexual couples can match a model of "mother-father-child", provided that we take into account the

²⁸ Judgment of 26 February 2002, application no. 36515/97: The applicant was a single homosexual man. He alleged that the decision to dismiss his application for authorisation to adopt was based on his sexual orientation and, thus, the authorities discriminated against him, which means they breached Article 14 (equal treatment obligation) in conjunction with Article 8 para. 1 (the right to respect for his private and family life) of the Convention. According to adoption authorities' findings, the applicant had psychical and intellectual qualities necessary to play the role of an adoptive parent. Moreover, the authorities did not recognise any other circumstances concerning the applicant's way of life that might be hazardous for the child's interests. Nevertheless, they decided that due to the applicant's "choice of lifestyle", he did not provide sufficient guarantees that he would offer a child a suitable home from a psychological, child-rearing and family point of view.

²⁹ *Ibid.*, para. 36.

³⁰ J. Gajda, *supra* n. 14, p. 118. The quoted argument seems to be based on common sense and *prima facie* it is hard to deny that it is to some extent convincing. On the other hand, however, the argument is general in nature; the author does not indicate what particular skills and competences compose the *minimum minimorum* of values he assumes that a child should be provided in order to function properly. Determination of all the necessary requirements for "appropriate" development alone encounters difficulties. Moreover, the author does not indicate particular values a woman can and a man cannot provide (and vice versa), and first of all does not show the causal relationship between potential "deficit" of values passed to a child by same-sex guardians and a risk that his/her development will be "inappropriate".

category of social gender “determined by the life attitude, the type of character and the type of domestic chores and jobs done”.³¹

On the other hand, Tomasz Pietrzykowski adopted an opposite stance. To tell the truth, he does not exclude a possibility of granting same-sex couples the right to apply for adoption, but he perceives it as less evil than the situation when a child must be placed in a youth detention centre. According to the author, the need to ensure that children with no family have possibly best conditions of upbringing is an argument for giving priority to a heterosexual couple when there is a choice between different and same-sex adoptive parents. This does not mean, however, that every particular heterosexual couple *ex definitione* constitutes a better choice than any other homosexual couple.³²

The above-presented opinions concerning the legal possibility of applying for adoption of a child seem intuitive. It is so because supporters of particular solutions do not provide any scientific findings to substantiate their views. It is important because, as Anna Śledzińska-Simon indicates, a child’s interest, which is a decisive condition when an adoption decision is taken, is an unclear term, which can depend on beliefs, prejudices or stereotypes of the authorities taking decisions on adoption.³³

On the other hand, the European Court of Human Rights referred to the state of research into the issue discussed herein in the already mentioned case of *Fretté v. France*. The Court notices that adoption is aimed at providing a child with a family, and not a family with a child. That is why, the state should guarantee that persons chosen to adopt are only those who can offer the child “the most suitable home in every respect”.³⁴ Next the Court states that the opinions of experts, in particular psychiatrists and psychologists, are divided over the possible influence of a child’s upbringing by one or both homosexual parents on their development, and that there has been a limited number of scientific studies conducted on the subject to date. Moreover, national and international opinions vary. Therefore, the national authorities were entitled to consider that the applicant’s right to apply for authorisation of adoption was limited by the interests of children. Taking into account the need to protect children’s interests and that the broad margin of appreciation is left to states in this area, the Court decides that the authorities did not infringe the principle of proportionality. As a result, the different treatment of the applicant is recognised as objective and reasonable justification; thus, the ban on discrimination was not infringed.³⁵

The argument referring to differences in scientists’ opinions concerning the influence of raising children by homosexual couples on their development was not taken into consideration (actually, it was silently ignored) by the Court in the justification for the judgment in the case of *E.B. v. France*, which was heard six years later, regardless of the fact that the government had raised the argument.³⁶

³¹ A. Śledzińska-Simon, *supra* n. 10, p. 148.

³² T. Pietrzykowski, *supra* n. 12, p. 321.

³³ A. Śledzińska-Simon, *supra* n. 10, p. 145.

³⁴ *Fretté v. France*, *supra* n. 28, para. 34.

³⁵ *Ibid.*, para. 35 et seq.

³⁶ *E.B. v. France*, *supra* n. 19, para. 66.

Referring to former case law, the Court stated that a difference in treatment because of sexual orientation may be justified only in case there are “particularly convincing and weighty reasons”.³⁷ In the Court’s opinion, there were no such reasons in the case. Thus, according to the judgment in the case of *E.B. v. France*, the Court had no doubts that upbringing by homosexuals was not harmful to children.

The Federal Constitutional Court for Germany also referred to scientists’ opinions concerning the issue. In the justification for the judgment of 19 February 2014 in the case of adoption by homosexuals, the Court took into account the fact that ten out of eleven institutions, including organisations of psychologists and pedagogues, which presented their stance, believe that such adoption is advantageous to children. One of the opinions that judges quoted starts with the following sentence: “It should be assumed that adult homosexuals are competent parents”.³⁸ Research into the influence of the circumstance of upbringing children by same-sex parents on them has also been conducted in many other countries, mainly in Europe and the United States.³⁹ For example, in 2005, the American Academy of Pediatrics founded a committee for the assessment of the research into legal, economic and psychological and social aspects of health and well-being of children raised in homosexual families. The committee concluded that research conducted throughout a period of 25 years demonstrate “a lack of links between parents’ sexual orientation and the level of their emotional and psychosocial adaptation”.⁴⁰ Moreover, it can be said at present there is a consensus among scientists that children raised by same-sex couples develop equally well as heterosexual parents’ children.⁴¹

³⁷ *Ibid.*, para. 91.

³⁸ 1 BvR 3247/09, justification paras 25–32, <https://lexetius.com/2013,294> (accessed 26.11.2019).

³⁹ For example: World Association for Sexual Health, *Position Statement: Co-Adoption of Children by Same Sex Couples*, 2013, <http://www.worldsexology.org/position-statement-co-adoption-of-children-by-same-sex-couples/> (accessed 18.12.2018); American Psychological Association, *Sexual Orientation, Parents, & Children*, 2004, <https://www.apa.org/about/policy/parenting.aspx> (accessed 18.12.2018); Psychological Society of Ireland, *Psychological Society of Ireland President Warns of the Detrimental Emotional Consequences the Marriage Equality Debate may Have*, 2015, <http://archive.is/ck2xu> (accessed 18.12.2018); Ordem dos Psicólogos Portugueses, *Relatório de Evidência Científica Psicológica sobre Relações Familiares e Desenvolvimento Infantil nas Famílias Homoparentais*, https://www.ordemdospsicologos.pt/ficheiros/documentos/relatorio_de_evidencia_cientifica_psicologica_sobre_as_relaes_aoes_familiares_e_o_desenvolvimento_infantil_nas_familias.pdf (accessed 18.12.2018).

⁴⁰ D.E. Newton, *Same-Sex Marriages. A Reference Handbook*, Santa Barbara 2010, p. 60. The author also lists a series of other independent institutions that conducted such research and came to similar conclusions.

⁴¹ J. Adams, R. Light, *Scientific Consensus, the Law, and Same Sex Parenting Outcomes*, *Social Science Research* 53 (2015), pp. 300–310. Bogdan Wojciszke also indicates there is consensus in scientific circles about the lack of harmfulness of adoption by homosexuals for the development of children: “There are no negative consequences of such a solution for children. To date, the findings of research comparing the development of children raised by same- and different-sex partners have unambiguously confirmed that. The research is not abundant (there have been dozens of studies so far), nevertheless it is methodologically correct so legitimate conclusions can be drawn from it. The findings are clear: with regard to psychological adaptation, i.e. psychical health understood as a lack of disorders, appropriate cognition development and sexual identity, children raised by homosexual couples are not in any way inferior to children raised by heterosexual families.”; *Dzieci dla gejów*, interview of Tomasz Stawiszyński with Professor

Apart from that, it should be noticed that the requirement for a potential adoptive parent to provide a different gender role model cannot be reconciled with the legal possibility of applying for adoption by a single person. In the case of *E.B. v. France*, the Court took such a stance.⁴² The case concerned the compliance of the refusal of an application for authorisation of adoption by the applicant who was in a stable homosexual relationship under Article 14 in conjunction with Article 8 para. 1 Convention. The applicant made an application for authorisation of adoption and mentioned that her female partner had not been involved in the plan to adopt. The application was rejected, inter alia, because of the lack of a male role model in the applicant's household. Referring to the argument indicated, the Court rightly noticed that the authorities' requirement for the applicant to establish the presence of a referent of the other sex might in fact annihilate the possibility of applying for authorisation of adoption by a single person, which is actually stipulated in national law. Moreover, in the Court's opinion, there is a risk that the authorities will use the requirement as a pretext for rejecting an application on grounds of an applicant's homosexual orientation and hide the real reason for that,⁴³ especially as, according to the applicant, the government on which the burden of proof lay that it was necessary to interfere into the rights stipulated in the Convention did not produce statistical information on the frequency of reliance on that ground towards women applying for adoption who were not in a relationship with a male partner.⁴⁴ Considering the above, the Court stated that the national authorities had discriminated against the applicant and thus violated Article 14 in conjunction with Article 8 para. 1 Convention. However, as Łukasz Kułaga rightly noticed, the Court failed to undertake a detailed analysis of the grounds for the requirement to provide an adopted child with both sex role models from the point of view of the necessity to protect the child's best interest. This way, the Court departed from the opinion adopted in the case of *Fretté v. France*.⁴⁵

There is also an argument against admissibility of adoption by homosexual couples that refers to the negative attitudes of the majority of society towards the issue. According to Elżbieta Holewińska-Łapińska, "it seems that, in general,

Bogdan Wojciszke, Newsweek.pl, 21 June 2011, <https://www.newsweek.pl/polska/dzieci-dla-gejow/6bnt5e4> (accessed 18.12.2018.)

⁴² ECtHR, Grand Chamber judgment of 22 January 2008, application no. 43546/02.

⁴³ *Ibid.*, para. 71.

⁴⁴ *Ibid.*, para. 48. Another argument for refusing authorisation for adoption quoted by the authorities was the ambivalence of the commitment of the applicant's partner to her plans to adopt. When a potential adoptive parent lives with a partner, the attitude of this partner to adoption should be taken into consideration in order to assess whether the requirement to safeguard the child's best interest has been met. It also concerns a situation in which no legal relationship takes place between a child and an adoptive parent's partner. According to the Court, there is no evidence that the assessment of the partner's role in the child's life was based on the criteria connected with the applicant's sexual orientation. Thus, there was no violation of the ban on discrimination. However, the Court considered that two grounds for the refusal to grant authorisation contributed to the overall assessment of the applicant's situation. Therefore, the illegitimacy of one of the grounds has the effect of influencing the entire decision. The opinion should be recognised as very controversial and it is hard to approve of it. It was rightly criticised in dissenting opinions annexed to the judgment.

⁴⁵ Ł. Kułaga, *Głosa do wyroku Europejskiego Trybunału Praw Człowieka z dnia 22 stycznia 2008 r. w sprawie E.B. przeciwko Francji (nr skargi 43546/02)*, Przegląd Sejmowy 6(89), 2008, p. 255.

adoption of a child by a homosexual person would be recognised in Poland as being in conflict with a child's best interest because, according to a public opinion survey, only 6% of respondents accept such a possibility, while 90% reject it. In particular, such an opinion would also concern an applicant for adoption that lives in a stable same-sex partnership."⁴⁶ The opinion is based on the assumption that the term "a child's best interest" is a relative concept, which means that the opinions of the majority of society constitute one of the factors that determine its content. However, the author does not believe that the opinions must be based on rational grounds. Such a relative approach to the concept of a child's best interest is worrying because it cannot be excluded that a negative social attitude towards adoption by homosexuals is the expression of unreasonable fears or prejudices. On the other hand, the content of legal solutions should be based on rational grounds and, first of all, the present scientific knowledge of the field that is subject to legal regulation. As far as the discussed issue is concerned, as it has been indicated above, most research confirms that upbringing by homosexuals does not have a negative impact on a child's development.

In addition, authors who refer to the majority of society's attitudes towards adoption by homosexuals warn that children brought up by such persons would most probably become victims of intolerance, meet with an unfavourable reception, dislike and probably also aggression in peers, their parents and even teachers.⁴⁷ The threat cannot be ignored but it is hard to fail to notice that such reasoning might lead to unwanted social consequences. Based on this argument, it might be, e.g. stated that in society characterised by relative religious intolerance, upbringing children to practice minority religions and evoking dislike should be abolished in order to protect them from negative consequences of intolerance. Thus, it should be strongly emphasised that in case the opinions of the majority of society are not based on rational factors and moral assessment made by this majority does not result from universal values, *vox populi* cannot be awarded the rank of *vox Dei*. It concerns in particular democratic societies which are obliged to ensure the protection of the rights of minorities. On the other hand, taking into account the educational function of law, it is worth quoting Leon Petrażycki, who said that "rational law is a school of morality",⁴⁸ and "rational legal policy results in or accelerates moral progress".⁴⁹

The above considerations indicate that, in the light of the lack of sufficient reasons for different treatment of homosexuals in their access to adoption, a denial of the possibility of applying for adoption by such people based only on their sexual orientation constitutes the breach of the ban on discrimination. It should be noticed, however, that the conclusion concerns only the situation when national law admits

⁴⁶ E. Holewińska-Lapińska, *supra* n. 14, p. 528. According to the latest CBOS survey, answering the question: "In your opinion, should gay and lesbian couples, i.e. same-sex couples being in an intimate relationship, have the right to adopt children?" the respondents stated as follows: Yes – 11%, No – 84%, It is hard to say – 5%. Centrum Badań Opinii Społecznej, *supra* n. 1, p. 4, https://www.cbos.pl/SPISKOM.POL/2017/K_174_17.PDF (accessed 30.04.2018).

⁴⁷ J. Gajda, *supra* n. 14, p. 120.

⁴⁸ L. Petrażycki, *Wstęp do nauki polityki prawa*, Warszawa 1968, p. 29.

⁴⁹ *Ibid.*

adoption by a single person. Still, there is no obligation to provide homosexuals with the same rights to adoption as only married couples have if the national legal system does not legalise same-sex marriages.

The case of *Gas and Debois v. France*⁵⁰ concerning the refusal of authorisation to adopt a child by the applicant's partner illustrates the issue. The authorities justified the refusal by stating that in this case adoption would have been in conflict with the child's best interest because it would have deprived the mother of her parental rights and transferred them to her female partner. In the light of national law, sharing parental authority as a result of adoption is only possible in case of adoption by the spouse of the child's biological mother or father. The applicants accused the authorities of unjustified discrimination against them because, although they were not married, their situation was similar to that of married couples. The Court did not share the opinion and noticed that marriage grants spouses a special legal status, which results in specific personal, social and legal effects. The state parties are not obliged to enable homosexuals to get married.⁵¹ In addition, the Court noticed that homosexual couples who are not married are exposed to the risk of being refused the right to adoption for the same reasons as the applicants. Therefore, the Court decided that Article 14 in conjunction with Article 8 Convention was not breached in the case.⁵²

On the other hand, in the case of *X and others v. Austria*, the Court came to a different conclusion.⁵³ Similarly to the case of *Gas and Debois v. France*, this case concerned the refusal of adoption by a biological mother's partner. In accordance with national law, in case of adoption by a single person, an adoptive parent substituted for a parent of the same sex. The approval of the applicant's application would result in breaking the legal bond between the biological mother and the child and, at the same time, the legal bond between the father and the child would be maintained. A national court hearing the case decided that there was no need to substitute for the natural father, especially as he was in regular contact with the child. At the same time, the court failed to examine whether, as the applicants claimed, there were extraordinary circumstances justifying not taking into account a father's refusal to give consent to adoption. The applicants claimed discrimination against them and stated there were no objective and rational grounds for the existence of legal regulations that laid down a possibility of adoption of a partner's child by the other partner in case of heterosexual couples, regardless of whether they were married or not, and there was no such a possibility in case of same-sex couples.

The Court decided that the relationship between the partners being in a stable relationship and the child with whom they shared a household should be classified as "family life" within the meaning of Article 8 para. 1 Convention; therefore, Article 14 in conjunction with Article 8 para. 1 Convention is applicable in the case. In addition, the Court indicated that the difference in treatment because of sexual orientation must be justified by especially convincing and weighty reasons, however,

⁵⁰ ECtHR judgment of 15 March 2012, application no. 25951/07.

⁵¹ *Ibid.*, para. 68.

⁵² *Ibid.*, para. 69 et seq.

⁵³ Grand Chamber judgment of 19 February 2013, application no. 19010/07.

the margin of appreciation by national authorities in such cases was narrow. The Court also noticed that, in accordance with the Convention, difference in treatment based solely on sexual orientation is unacceptable.⁵⁴

In the Court's opinion, in cases concerning adoption of one homosexual partner's child by the other partner, homosexual couples are in a relatively similar situation to heterosexual couples that are not married.⁵⁵ Thus, the authorities treated the applicants in a different way than heterosexual couples. However, this does not concern the issue of adoption by homosexual couples *in abstracto* but a narrow problem of alleged discrimination against homosexual couples in a situation concerning adoption of the partner's child.⁵⁶ The present case differs from the case of *Gas and Debois v. France* because, under French law, second-parent adoption was open neither to unmarried different-sex couples nor same-sex couples.⁵⁷

The government justified the difference in treatment of homosexuals by the necessity of protecting a traditional family. Although the Court recognised the reason as legitimate, it noticed that the Convention as "a living instrument" must be interpreted in present-day conditions. The state, in its choice of means designed to protect the family and secure respect for family life within the meaning of Article 8 para. 1 Convention, must take into account changes in contemporary society, including the fact that there is not one main way of leading private and family life.⁵⁸ In the Court's opinion, the government did not adduce any specific evidence and any scientific studies to show that a family with two same-sex parents could not adequately provide for a child's needs. As far as adoption is concerned, same-sex couples could be as suitable or unsuitable as different-sex couples.⁵⁹ Thus, the Court found that the difference in treatment of the applicants was a violation of Article 14 in conjunction with Article 8 Convention.

The Court's judgment confirms that if national authorities decide to extend the possibility of adoption and offer it to unmarried couples and single persons, national legislation should not lead to discrimination against people with homosexual orientation. However, the provisions of the Convention do not impose an obligation on national authorities to legalise homosexual marriages or to guarantee a possibility of adoption by unmarried couples.

5. ADOPTION BY HOMOSEXUALS VERSUS CHILDREN'S RIGHT TO PROTECTION OF THEIR IDENTITY

Finally, it is worth drawing attention to the implications of the issue of adoption by homosexual couples for children's right to the protection of their identity. The right should be taken into account among a wide catalogue of elements constituting a child's best interest. States are obliged to undertake to respect the right of the child

⁵⁴ *Ibid.*, para. 99.

⁵⁵ *Ibid.*, para. 112.

⁵⁶ *Ibid.*, para. 127.

⁵⁷ *Ibid.*, para. 131.

⁵⁸ *Ibid.*, para. 138 et seq.

⁵⁹ *Ibid.*, para. 142.

to preserve his or her identity in accordance with Article 8 para. 1 Convention on the Rights of the Child. However, the provision does not stipulate a definition of the term "identity". According to Jaap Egbert Doek, the development of a definition of identity for legal purposes seems to be impossible. At the same time, the author quotes the interpretation of the concept proposed by Erik Erikson, according to which identity is "an individual's subjective feeling that he or she is continuously the same person".⁶⁰

On the other hand, according to Tadeusz Sokołowski, one of the elements of human identity is their gender identity within the meaning of awareness of their origin in parents, a woman and a man. "In other words, a child must have an opportunity to 'identify' with his or her adoptive parents",⁶¹ who personify natural parents to some extent. The above-quoted author gives an example of non-fulfilment of the obligation to protect a child's identity and refers to the judgment based on which two school-age siblings were placed in a same-sex adoptive family after their natural parents had been killed in an accident. It is hard to disagree with the author's opinion that placing the children in a completely different upbringing environment flagrantly violated the principle of a child's upbringing continuity referred to in Article 20 para. 3 Convention on the Rights of the Child. Such a radical change of a child's upbringing environment undoubtedly leads to the disturbance and damage in the sphere of his or her identity.⁶² However, the assessment of the influence of adoption on the development of a child's awareness should be made with reference to the circumstances of a particular case. The risk of breaking the undisturbed continuity of a child's awareness development is certainly not going to take place in case of adoption in their early age. Thus, the above-presented actual state is an extraordinary situation. As the European Court of Human Rights noticed, to tell the truth, upbringing by a homosexual has influence on moral and psychical development of a child, mainly on his or her identity but it cannot be definitely stated that the influence is negative.⁶³

6. CONCLUSIONS

Adoption unquestionably aims to create an optimal upbringing environment for children in need. For this reason, it is not possible to develop the "right" to adoption from the right to found a family or the right to protect private and family life. Thus, determination of the circle of persons entitled to apply for adoption remains within national authorities' competence, however, regulations they enact cannot be discriminatory. The compliance with the ban on discrimination in access to adoption should also take place in the field of law application.

In the light of the present case law of the European Court of Human Rights, difference in treatment based on sexual orientation is justified only in a situation when there are especially weighty reasons. As far as admissibility of adoption by homosexuals

⁶⁰ J.E. Doek, *A Commentary on the United Nations Convention on the Rights of the Child. Articles 8–9*, Boston 2006, p. 10.

⁶¹ T. Sokołowski, *supra* n. 9, p. 105.

⁶² *Ibid.*, p. 108. The author does not provide the reference number of the quoted judgment.

⁶³ *Fretté v. France*, *supra* n. 28, para. 42.

is concerned, a child's best interest can be such a reason provided that there is a risk that a child's upbringing by homosexuals might have negative influence on his or her development. Such an approach dominates Polish legal literature at present. On the other hand, the opinion that parents' sexual orientation does not constitute a threat for a child's appropriate functioning dominates the views of scientific circles. Refusal to give authorisation of adoption based solely on the prospective adoptive parent's homosexual orientation constitutes the infringement of the principle of equal treatment in a situation when national law admits the possibility of applying for adoption by a single person.

The exclusion of homosexuals from the persons entitled to apply for adoption would not constitute discriminatory treatment in case the national legislator, recognising only heterosexual marriages, limited the possibility of adoption to married couples. It is due to the fact that a marriage gives spouses a special status and the rights resulting from this status may be exclusive in nature, i.e. only spouses can have those rights. Therefore, as in the light of the present-day international legal standards the authorities are not obliged to legalise same-sex marriages, the situation of persons in a heterosexual marriage would be incomparable with that of persons in other relationships, regardless of their personal composition and legal recognition.

BIBLIOGRAPHY

- Adams J., Light R., *Scientific Consensus, the Law, and Same Sex Parenting Outcomes*, Social Science Research 53 (2015).
- American Psychological Association, *Sexual Orientation, Parents, & Children*, 2004, <https://www.apa.org/about/policy/parenting.aspx> (accessed 18.12.2018).
- Banaszkiewicz B., *Małżeństwo jako związek kobiety i mężczyzny. O niektórych implikacjach Artykułu 18 Konstytucji RP*, Kwartalnik Prawa Prywatnego issue 3, 2013.
- Carroll A., Mendos L.R., *State-Sponsored Homophobia 2017: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, International Lesbian, Gay, Bisexual, Trans and Intersex Association, <https://ilga.org/state-sponsored-homophobia-report>, (accessed 30.04.2018).
- Centrum Badania Opinii Społecznej, *Komunikat z badań nr 174/2017, Stosunek do osób o orientacji homoseksualnej i związków partnerskich*, December 2017, https://www.cbos.pl/SPISKOM.POL/2017/K_174_17.PDF (accessed 18.12.2018).
- Doek J.E., *A Commentary on the United Nations Convention on the Rights of the Child. Articles 8–9*, Boston 2006.
- Dzieci dla gejów*, interview of Tomasz Stawiszyński with Professor Bogdan Wojciszke, Newsweek.pl, 21 June 2011, <https://www.newsweek.pl/polska/dzieci-dla-gejow/6bnt5e4> (accessed 18.12.2018).
- Gajda J., „Adopcja” przez pary homoseksualne. *Aspekty prawne*, [in:] M. Andrzejewski (ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013.
- Garlicki L., *Omówienie art. 12 Europejskiej Konwencji Praw Człowieka*, [in:] L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, Vol. 1, *Komentarz do art. 1–18*, Warszawa 2010.
- Grabewarter Ch., *European Convention on Human Rights. Commentary*, München 2014.
- Holewińska-Łapińska E., [in:] T. Smyczyński (ed.), *System prawa prywatnego. Prawo rodzinne i opiekuńcze*, Vol. 12, Warszawa 2011.

- Kamiński I.C., *Omówienie artykułu 9 Karty Praw Podstawowych UE*, [in:] A. Wróbel, *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, Warszawa 2013.
- Królak T., *Prof. Andrzej Zoll: homoseksualiści zawalczą o prawo do adopcji*, interview, <https://wiadomosci.onet.pl/kraj/prof-andrzej-zoll-homoseksualisci-zawalcza-o-prawo-do-adopcji/ks38h> (accessed 7.05.2018).
- Kuługa Ł., *Glosa do wyroku Europejskiego Trybunału Praw Człowieka z dnia 22 stycznia 2007 r. w sprawie E.B. przeciwko Francji (nr skargi 43546/02)*, *Przegląd Sejmowy* 6(89), 2008, p. 255.
- Nowicki M.A., *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2010.
- Odpowiedź podsekretarza stanu w Ministerstwie Pracy i Polityki Społecznej – z upoważnienia ministra – na interpelację nr 20167 w sprawie przysposobienia dziecka*, <http://www.sejm.gov.pl/sejm7.nsf/InterpelacjaTresc.xsp?key=32CD30D4> (accessed 4.05.2018).
- Ordem dos Psicólogos Portugueses, *Relatório de Evidência Científica Psicológica sobre Relações Familiares e Desenvolvimento Infantil nas Famílias Homoparentais*, https://www.ordemdopsicologos.pt/ficheiros/documentos/relataorio_de_evidancia_cientifica_psicologica_sobre_as_relaes_familiares_e_o_desenvolvimento_infantil_nas_familias.pdf (accessed 18.12.2018).
- Osajda K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające KRO*, Vol. 5, Warszawa 2017 (Legalis).
- Petrażycki L., *Wstęp do nauki polityki prawa*, Warszawa 1968.
- Pietrzykowski K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2018 (5th edn, Legalis).
- Pietrzykowski T., *Etyczne problemy prawa. Zarys wykładu*, Katowice 2005.
- Psychological Society of Ireland, *Psychological Society of Ireland President Warns of the Detrimental Emotional Consequences the Marriage Equality Debate may Have*, 2015, <http://archive.is/ck2xu> (accessed 18.12.2018).
- Newton D.E., *Same-Sex Marriages. A Reference Handbook*, Santa Barbara 2010.
- Schulz A.N., *O współczesnych dylematach tworzenia międzynarodowych standardów Rady Europy dotyczących relacji pomiędzy rodzicami i dziećmi*, *Acta Iuris Stetinensis, Zeszyty Naukowe Uniwersytetu Szczecińskiego* No. 821, 2014.
- Smyczyński T., *Małżeństwo – konkubinaty – związki partnerskie*, [in:] M. Andrzejewski (ed.), *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013, p. 75.
- Sokołowski T., *Dobro dziecka wobec rzekomego prawa do adopcji*, [in:] M. Andrzejewski, *Związki partnerskie. Debata na temat projektowanych zmian prawnych*, Toruń 2013.
- Śledzińska-Simon A., *Adopcja dzieci przez osoby homoseksualne*, [in:] R. Wieruszewski, M. Wyrzykowski, *Orientacja seksualna i tożsamość płciowa. Aspekty prawne i społeczne*, Warszawa 2009.
- Ukleja M., *Rodziny z wyboru. Homoseksualny związek jako współczesna alternatywa rodziny – analiza zjawiska*, *Acta Universitatis Lodzianensis. Folia Sociologica* No. 51, 2014.
- Wieruszewski R., *Zasady Yogyakarta – geneza i znaczenie*, [in:] K. Remin (ed.), *Zasady stosowania międzynarodowego prawa praw człowieka w stosunku do orientacji seksualnej oraz tożsamości płciowej*, Warszawa 2009, <http://docplayer.pl/403153-Zasady-yogyakarta-zasady-stosowania-miedzynarodowego-prawa-praw-czlowieka-w-stosunku-do-orientacji-seksualnej-oraz-tozsamosci-plciowej.html> (accessed 5.05.2018).
- Wiśniewski L., *Zdanie odrębne*, [in:] R. Wieruszewski, M. Wyrzykowski (eds), *Orientacja seksualna i tożsamość płciowa. Aspekty prawne i społeczne*, Warszawa 2009.
- World Association for Sexual Health, *Position Statement: Co-Adoption of Children by Same Sex Couples*, 2013, <http://www.worldsexology.org/position-statement-co-adoption-of-children-by-same-sex-couples/> (accessed 18.12.2018).

ADOPTION BY HOMOSEXUALS IN THE LIGHT OF MODERN STANDARDS OF HUMAN RIGHTS PROTECTION

Summary

The objective of the paper is to examine the issue of admissibility of adoption by homosexuals from the perspective of relevant human rights. In this context, it is crucial to establish whether a refusal to give permission to adopt a child solely on the grounds of an applicant's sexual orientation would constitute a breach of the principle of non-discrimination where the legal system provides for the possibility of applying for adoption by an unmarried individual. Different treatment of homosexual persons with regard to access to adoption is perceived by many scholars as justified considering the principle of the best interest of a child. It seems, however, that this justification lacks sufficient support in scientific research into the influence of upbringing by homosexual persons on the child's development. Taking into account the European Court of Human Rights case law, it must be recognised that homosexual orientation should not be regarded as a condition that by itself rules out the possibility of adoption, at least in case where a legal system admits such a possibility with regard to single individuals. On the other hand, the legal capacity to adopt a child can be derived neither from the right to respect for one's private and family life nor from the right to found a family.

Keywords: adoption, ban on discrimination on grounds of sexual orientation, child's best interest, right to found a family

ADOPCJA PRZEZ OSOBY O ORIENTACJI HOMOSEKSUALNEJ W ŚWIETLE WSPÓŁCZESNYCH STANDARDÓW OCHRONY PRAW CZŁOWIEKA

Streszczenie

Celem niniejszego opracowania jest analiza kwestii dopuszczalności adopcji dzieci przez osoby homoseksualne z perspektywy poszczególnych praw człowieka. W tym kontekście szczególnie istotną kwestią jest ustalenie, czy w sytuacji, gdy prawo przewiduje możliwość przysposobienia przez osobę samotną, odmowa zgody na adopcję wyłącznie ze względu na orientację homoseksualną stanowi naruszenie zakazu dyskryminacji. Odmienne traktowanie tej kategorii osób w dostępie do adopcji bywa uzasadniane ze względu na konieczność realizacji zasady dobra dziecka. Wydaje się jednak, że uzasadnienie to nie ma wystarczającego oparcia w wynikach badań na temat wpływu wychowania przez osoby homoseksualne na rozwój dziecka. Uwzględniając aktualne orzecznictwo Europejskiego Trybunału Praw Człowieka należy uznać, że orientacja homoseksualna osoby ubiegającej się o adopcję nie powinna być traktowana *per se* jako przesłanka wyłączająca możliwość adopcji przynajmniej w przypadku, gdy prawo krajowe dopuszcza możliwość przysposobienia przez osoby samotne. Nie jest natomiast możliwe wyprowadzenie prawa do adopcji z prawa do założenia rodziny, czy też z prawa do poszanowania życia prywatnego i rodzinnego.

Słowa kluczowe: adopcja, zakaz dyskryminacji ze względu na orientację seksualną, dobro dziecka, prawo do założenia rodziny

ADOPCIÓN POR PERSONAS HOMOSEXUALES A LA LUZ DE ESTÁNDARES ACTUALES DE PROTECCIÓN DE DERECHOS HUMANOS

Resumen

El artículo analiza la admisibilidad de adopción de niños por personas homosexuales desde la perspectiva de derechos humanos en concreto. En este marco es muy importante determinar si en el caso cuando la ley prevea la posibilidad de adoptar por una persona sin pareja, la denegación de adopción únicamente debido a la homosexualidad constituirá la infracción de prohibición de discriminación. El tratamiento diferente de esta categoría de personas para acceder a la adopción se justifica por la necesidad de ejecución del principio del bien de niño. Sin embargo, parece que este fundamento no tiene apoyo suficiente en los resultados de estudios sobre la influencia de educación por personas homosexuales al desarrollo del niño. Tomando en cuenta la jurisprudencia actual del Tribunal Europeo de Derechos Humanos hay que estimar que la homosexualidad de la persona que solicita adopción no debería considerarse *per se* como requisito que excluye la posibilidad de adoptar, por lo menos en caso cuando la legislación nacional admita la posibilidad de adoptar por las personas sin pareja. No es posible deducir el derecho a la adopción del derecho de constituir una familia, o bien del derecho a respetar la vida privada y familiar.

Palabras claves: adopción, prohibición de discriminación debido a orientación sexual, bien del niño, derecho a constituir una familia

УСЫНОВЛЕНИЕ ДЕТЕЙ ЛИЦАМИ ГОМОСЕКСУАЛЬНОЙ ОРИЕНТАЦИИ В СВЕТЕ СОВРЕМЕННЫХ НОРМ В ОБЛАСТИ ЗАЩИТЫ ПРАВ ЧЕЛОВЕКА

Резюме

Целью данной работы является анализ допустимости усыновления детей лицами гомосексуальной ориентации с точки зрения индивидуальных прав человека. В этом контексте особенно важно установить, является ли отказ в усыновлении ребенка одиноким лицом (при условии, что закон предусматривает возможность такого усыновления) исключительно по причине его гомосексуальной ориентации нарушением запрета на дискриминацию. Особый подход к этой категории лиц в вопросе усыновлении иногда обосновывают необходимостью соблюсти принцип наилучшего обеспечения интересов ребенка. Представляется, однако, что такое обоснование недостаточно подкреплено результатами исследований того, как воспитание лицами гомосексуальной ориентации влияет на развитие ребенка. С учетом существующих решений Европейского суда по правам человека следует признать, что гомосексуальная ориентация претендента на усыновление ребенка сама по себе не может рассматриваться в качестве причины для отказа в усыновлении, по крайней мере, в тех случаях, когда национальное законодательство допускает усыновление одинокими лицами. В то же самое время, право на усыновление не может следовать из права на создание семьи или из права на неприкосновенность частной и семейной жизни.

Ключевые слова: усыновление, запрет дискриминации по признаку сексуальной ориентации, интересы ребенка, право на создание семьи

ADOPTION DURCH HOMOSEXUELLE UNTER BERÜCKSICHTIGUNG DER AKTUELLEN STANDARDS FÜR DEN SCHUTZ DER MENSCHENRECHTE

Zusammenfassung

Ziel dieser Arbeit ist die Analyse der Zulässigkeit der Adoption von Kindern durch Homosexuelle unter dem Gesichtspunkt der individuellen Menschenrechte. In diesem Zusammenhang ist es insbesondere wichtig zu prüfen, ob die Verweigerung der Adoption allein aufgrund der homosexuellen Ausrichtung einer Person in der Situation, wenn die Möglichkeit der Annahme an Kindes statt durch eine alleinstehende Person gesetzlich vorgesehen ist, einen Verstoß gegen das Diskriminierungsverbot darstellt. Eine Ungleichbehandlung dieser Personengruppe beim Zugang zur Adoption kann, aufgrund der Notwendigkeit gerechtfertigt sein, dass dem Grundsatz des Kindeswohls Rechnung zu tragen ist. Es scheint jedoch, dass diese Rechtfertigung durch die Ergebnisse der Studien zu den Auswirkungen der Erziehung durch Homosexuelle auf die Entwicklung eines Kindes nicht hinreichend belegt ist. Unter Berücksichtigung der aktuellen einschlägigen Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte ist davon auszugehen, dass die homosexuelle Ausrichtung eines Adoptionsantragstellers nicht *per se* als Voraussetzung angesehen werden kann, die die Möglichkeit einer Annahme an Kindes statt ausschließt, zumindest dann nicht, wenn das nationale Recht eine Adoption durch alleinstehende Person zulässt. Aus dem Recht, eine Familie zu gründen oder dem Grundrecht auf Achtung des Privat- und Familienlebens lässt sich jedoch kein Recht auf Adoption ableiten.

Schlüsselwörter: Adoption, Verbot der Diskriminierung aus Gründen der sexuellen Ausrichtung, Kindeswohl, Recht, eine Familie zu gründen

ADOPTION PAR DES PERSONNES HOMOSEXUELLES À LA LUMIÈRE DES NORMES CONTEMPORAINES DES DROITS DE L'HOMME

Résumé

Le but de cette étude est d'analyser la question de l'admissibilité de l'adoption des enfants par des personnes homosexuelles du point de vue des droits de l'homme individuels. Dans ce contexte, il est particulièrement important de déterminer si, lorsque la loi prévoit la possibilité d'adoption par une seule personne, le refus d'admettre l'adoption uniquement sur la base de l'orientation homosexuelle constitue une violation de l'interdiction de la discrimination. Un traitement différent de cette catégorie de personnes lors de l'accès à l'adoption peut être justifié par la nécessité de mettre en œuvre le principe du bien de l'enfant. Cependant, il semble que cette justification ne soit pas suffisamment étayée par les résultats d'études sur l'impact de l'éducation de l'enfant par des personnes homosexuelles sur son développement. Compte tenu de la jurisprudence actuelle de la Cour européenne des droits de l'homme, il convient de considérer que l'orientation homosexuelle du demandeur d'adoption ne doit pas être considérée en soi comme une condition excluant la possibilité d'adoption, du moins lorsque la législation nationale autorise l'adoption par une seule personne. Cependant, le droit d'adopter ne peut pas découler du droit de fonder une famille ou du droit au respect de la vie privée et familiale.

Mots-clés: adoption, interdiction de discrimination fondée sur l'orientation sexuelle, bien de l'enfant, droit de fonder une famille

L'ADOZIONE DA PARTE DI PERSONE CON ORIENTAMENTO OMOSESSUALE ALLA LUCE DEGLI STANDARD CONTEMPORANEI DI TUTELA DEI DIRITTI DELL'UOMO

Sintesi

L'obiettivo del presente elaborato è l'analisi della questione dell'ammissibilità dell'adozione di bambini da parte di persone omosessuali, nella prospettiva dei singoli diritti dell'uomo. In tale contesto la questione particolarmente essenziale è stabilire se nelle situazioni in cui la legge permette la possibilità di adozione da parte di una persona sola, il diniego all'adozione esclusivamente a motivo dell'orientamento omosessuale costituisca una violazione del divieto di discriminazione. Un diverso trattamento di questa categoria di persone nell'accesso all'adozione viene talvolta giustificato a motivo della necessità di realizzare il principio del bene del bambino. Sembrerebbe tuttavia che tale giustificazione non trovi sufficiente sostegno nei risultati degli studi sull'effetto dell'educazione da parte di persone omosessuali sullo sviluppo del bambino. Considerando l'attuale giurisprudenza della Corte europea dei diritti dell'uomo bisogna riconoscere che l'orientamento omosessuale della persona che desidera adottare non deve essere considerato di per se come una condizione che escluda la possibilità di adozione, perlomeno nel caso in cui il diritto nazionale ammette la possibilità di adozione da parte di persone sole. Non è possibile estrapolare il diritto all'adozione dal diritto di creare una famiglia o dal diritto al rispetto alla vita privata e familiare.

Parole chiave: adozione, divieto di discriminazione a motivo dell'orientamento sessuale, bene del bambino, diritto a creare una famiglia

Cytuj jako:

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