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Key words: intellectual property, copyright, computer software, legal protection, legal liability.

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O. Starchuk, O. Yatsyniak

Concept of Discrimination in Family Law of Ukraine: Problems of Definition

The article is devoted to the theoretical and legal aspects of the concept of discrimination and its prohibition under the national legislation of Ukraine and international standards in this area. It concerns the analysis of the main approaches to the definition of discrimination and revealed its essence; conclusions and specific proposals for amendments and additions to the legislation under which the prohibition of discrimination are provided by members of family relationships have been highlighted.

Key words: equality, discrimination, international standards, family law.

Presentation of the scientific problem. Members of family relations may not have the privileges or restrictions based on race, skin color, sex, political, religious and other beliefs, ethnic or social origin, material status, place of residence, language and other characteristics that is an implementation of the constitutional principle of citizen's prohibition of discrimination.

Prohibition of discrimination is the fundamental guiding idea of protecting the man's and citizen's rights and freedoms, as is the implementation of the principle of equal rights and opportunities in all spheres of public life and textually fixed by international standards such as: the Universal Declaration of Human Rights; ILO Declaration on Fundamental Principles and Rights at Work; International Covenant on Economic, Social and Cultural Rights; The International Covenant on Civil and Political Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child; Convention on the rights of persons with disabilities; International Convention for the Protection of All Migrant Workers and Members of Their Families; ILO conventions and recommendations: Discrimination (Employment and Occupation) ILO Convention № 111, Convention № 156 concerning Equal Occupation and Equal Treatment for Man and Woman Workers: Workers with Family Responsibilities, Convention №100 Equal Pay for Equal Work and Work of Equal Value and so on.

The purpose of the article is to study the theoretical legal aspects of the definition of discrimination and legislative providing of its prohibition and develop proposals on this basis aimed at improvement of the legal regulation of personal non-property and property relations and they are entitled to equal rights to members of family legal relationships.

To achieve this goal it is necessary to solve the following problem:

- to define conceptual approaches to the definition of discrimination, find out and analyze its essence;
- to analyze the rules of international and European legislation concerning prohibition of discrimination in all spheres, including family relations;
- to describe special norms of national legislation reflecting international and European standards of prohibition of discrimination;

– to formulate own conclusions and specific proposals concerning family law changes and amendments to ensure equal rights of family relationships.

Analysis of research and publications. Significant contribution to the study of the concept of discrimination and its prohibition in family relations has made famous contemporary scientists: E.M. Abramova, M.M. Averbchenko, Y.V. Bayhusheva, L.M. Baranova, V.I. Borisova, I.V. Zhylinkova, A.L. Mazin, O. Mykolyuk, N.G. Prisyekina, O.M. Yaroshenko and others.

Comprehensive researches on theoretical and legal aspects of definition of discrimination concept and its family law prohibition has not been carried out yet. This problem is extremely urgent and requires a comprehensive research as it is fundamental for ensuring the constitutional principle of equality of citizens before the law and justice and prohibition of discrimination of man and citizen but equality makes any discrimination impossible.

Main content and justification of the research results. Discrimination (from the Latin word – *discriminatio* – difference) means restriction or interdiction of rights in all spheres of society: industrial, socio-economic, political, spiritual and housing relations.

Discrimination is a violation of human rights, the prohibition of which is provided by a number of international instruments in the field of human rights.

International Covenant on Civil and Political Rights 1966 Discrimination considers as any distinction, exclusion, restriction or preference based on race, color, language, religion, political or other opinion, national or social origin, property status, birth or other status, and which is intended to or as a consequence of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal opportunities, rights and freedoms of all [1].

Considering that in accordance with Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women in 1979, States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- the same rights to enter into marriage;
- the same rights freely to choose a spouse and to enter into marriage only with their free and full consent;
- the same rights and responsibilities during marriage and at its dissolution;
- the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of children shall be paramount;
- the same right to decide freely and responsibly on the number and spacing and to have access to the information, education and means to enable them to exercise these rights;
- the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children or similar institution where these concepts exist in national legislation; in all cases the interests of children shall be paramount;
- the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- the same rights for both spouses in respect of the ownership, acquisition, management, enjoyment and disposition of property, whether free of charge or for a valuable consideration [2].

Considering that in accordance with Article 1 of the International Bill of Human Rights the concept of discrimination against women as a distinction in treatment on the basis of sex that intentionally or unintentionally harmful to women, prevents the society to recognize the rights of women both in the private and public sector, and prevents women use their recognized human rights and fundamental freedoms.

European Court of Human Rights indicates that discrimination is the difference of treatment that has no objective and reasonable justification.

Specifying the international prohibition of discrimination in the family field on the national level is fixed in article 21 of the Constitution of Ukraine [3] p. 5, 6 Article 7 The Family Code of Ukraine [4] accordance with a member of family relations has no any privileges or restrictions based on race, color, sex, political, religious and other convictions, ethnic and social origin, material status, place of residence, language and etc.

To realize constitutional norms in all spheres of society (economic, cultural, social and political), including family life and specify international standards to prohibit discrimination aims to provide the Law of Ukraine «On ensuring equal rights and opportunities for women and men». The purpose of this law is to ensure equality and parity of women and men in all spheres of vital activity of society by way of legal enforcement of equal rights and opportunities of women and men elimination of discrimination on grounds of gender and implementation of special provisional measures aimed at eliminating the disbalance between the

opportunities women and men to exercise equal rights granted to them by the Constitution and laws of Ukraine [5].

Recognizing that in accordance with Article 1 of the law, discrimination on grounds of gender refers to the actions or inaction, which signify any distinction, exception or privilege on grounds of gender, provided that they aim to restrict the human rights and freedoms of women and men or make it impossible to recognize, use or exercise them on an equal footing.

Article 1 of the Law of Ukraine «On Principles of Prevention and Combating Discrimination in Ukraine» discrimination is the situation in which a person and / or a group of persons base on their features as race, color of skin, political, religious and other beliefs, sex, age, disability, ethnic or social origin citizenship, family and property status, place of residence, language or other features which existed, exist or may exist either really or imaginary, precluding the recognition and exercise of human and citizen's right and freedoms according to this Law except for cases when the restriction has legitimate, reasonably substantiated objective means of attainment of which are appropriate and necessary [6].

However, not all decisions, actions or inaction aimed at limiting or privilege in respect of the person and / or group of people for various reasons is discrimination, because Article 6 (3) of the Law of Ukraine «On Principles of Prevention and Combating Discrimination in Ukraine» provided legal facts aren't considered discrimination, namely activities that do not limit the rights and freedoms of others and do not create obstacles to their implementation and do not provide unjustified advantages persons and / or groups of individuals on their specific characteristics in relation to their positive actions, such as: special protection by the state of certain categories of persons in need of such protection; measures aimed at preserving the identity of specific individuals if such measures are necessary; benefits and compensation to certain categories of persons in the cases provided by law; establishing social guarantees to certain categories of citizens; special requirements stipulated by law, to implement the rights of the individuals [6].

According to Art. 6 of the Law of Ukraine «On ensuring equal rights and opportunities for women and men» shall not be deemed as discrimination on grounds of gender: special protection of women at the time of pregnancy, delivery and breast feeding of child; compulsory military service for men, provided for by the law; difference in retirement age for men and women provided for by the law; special requirements in respect of labor protection of women and men relative to their protection of their reproductive health; positive action (Article 6) [5].

In 1992, the Committee on the Elimination of Discrimination against Women has officially extended the prohibition of discrimination and interpreted it as a violence perpetrated against women by the fact that she – a woman, or a violence that makes women undue influence that involves actions that cause damage or suffering physical, mental or sexual nature, the threat of such acts, coercion and other forms of restriction of freedom.

According to the Law of Ukraine «On Prevention of Domestic Violence» that domestic violence – is any intentional acts of physical, sexual, psychological or economic nature one family member against another family member if the actions violate constitutional rights and freedoms of a family member as a person and citizen and inflict moral damage, damage his physical or mental health [7].

Violence in Ukrainian dictionary is the use of physical force to someone; compulsion, screaming, coercion; use of force to achieve something; coercive influence on someone, something [8, p. 303]; action with the use of physical or psychological force against someone, coercion, compulsion, screaming [9, p. 551].

In dictionary by Dal' violence is a restrictive effect, abusive, illegal and arbitrary [10, p. 496].

In the Great Law Encyclopaedia violence is a physical or mental effects of one person to another, that violates constitutionally guaranteed citizens' right to security of person [11, p. 346]; intentional physical or mental effects of one person to another, against her will, causing that person physical, moral, property damage or contain a threat of causing damage with criminal purpose. Such influence on person is committed under certain deliberate actions [12, p. 501].

The Declaration on the Elimination of Violence against Women was adopted by the United Nation General Assembly (resolution 48/104). It describes the actions that should be taken by the states and international community to eradicate all forms of violence against women both in public and in private life [13].

Article 3 Declaration on the Elimination of Violence against Women provides that women are entitled equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other fields. These rights include, in particular: the right to be free from all forms of discrimination.

In legal doctrine N.G. Prisyekina notes that the term «discrimination» is used in all languages: «discrimination» – in French, «discrimination» – in English, «discriminierung» – in German, «discriminazione» – in Italian «discriminering» – in Swedish «discriminatsia» in Russian. The common root of all these words is: «discrner», «discrimen», «discriminare», which means «to divide, to separate, to select, to evaluate» [14, p. 16].

In international law, the author found 12 types directly prohibited discrimination under 12 grounds (race, color, sex, religion, political opinion, nationality, social background, family responsibilities, marital status, participation in trade unions and other associations of citizens, age, disability) [14, p. 18]. We believe that this list of reasons is endless and requires amendment.

E.M. Abramova, M.M. Averchenko, Y.V. Bayhusheva note that the ban of restricting of the rights of individuals in marriage and family relations on social, racial, national, linguistic or religious features means that all subjects of family law are equal legally according to general rule. Thus, nobody can be limited or violated in family right because of low social status, atypical for this region race, nationality or religion [15].

The authors of the textbook of the Family Law of Ukraine edited by C.I. Borisova, I.V. Zhylinkova indicate that husband and wife have equal rights and duties in family relations and marriage.

However, we agree with the authors that the equality rights of participants in family relations does not mean uniformity, taking into account men and women biological and gender features [16, p. 32-33].

O. Mykolyuk says that discrimination against women and men and their role in the family is the most controversial and inconsistent. Thus 44 % of respondents believe that women in Ukraine have fewer opportunities to work, and nearly half of those surveyed believe that women should return to their traditional roles (child, kitchen, church) [17].

Summary. After analyzing the concept of discrimination and its prohibition under international standards and legal doctrine, discrimination is a direct or indirect restrictions (distinction, differences, exclusion or preference) that are based on race, color, political, religious and other beliefs, language, gender, ethnic or social origin, age, health, disability, place of residence, property status, sexual orientation, criminal record and so on.

In order to ensure non-discrimination participants in family relationships it is necessary to provide by basic knowledge and skills that will enable them to protect the rights and legitimate interests in case of violation of anti-discrimination legislation.

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Старчук О., Яциняк О. Поняття дискримінації у сімейному праві України: проблеми визначення. У статті досліджено теоретико-правові аспекти поняття дискримінації та її заборони відповідно до національного законодавства України та міжнародних стандартів у цій сфері. Окрім цього, проаналізовано основні підходи до визначення поняття дискримінації та з'ясовано її сутність; сформульовано висновки й конкретні пропозиції щодо внесення змін і доповнень до законодавства, відповідно до якого забезпечується заборона дискримінації учасників сімейних правовідносин. Доцільно адаптувати національне законодавство до міжнародних стандартів з метою викорінення усіх форм дискримінації за допомогою забезпечення учасників сімейних правовідносин необхідними знаннями й навичками, які будуть необхідні їм для захисту прав і законних інтересів у випадку порушення антидискримінаційного законодавства.

Ключові слова: рівність, дискримінація, міжнародні стандарти, сімейне законодавство.

Старчук О., Яциняк О. Понятие дискриминации в семейном праве Украины: проблемы определения. В статье исследованы теоретико-правовые аспекты понятия дискриминации и ее запрета в соответствии с национальным законодательством Украины и международными стандартами в этой сфере. Кроме этого, проанализированы основные подходы к определению понятия дискриминации и выяснена ее сущность; сформулированы выводы и конкретные предложения по внесению изменений и дополнений в законодательство в соответствии с которым обеспечивается запрет дискриминации участников семейных правоотношений. Целесообразно адаптировать национальное законодательство с международными стандартами с целью искоренения всех форм дискриминации посредством обеспечения участников семейных правоотношений необходимыми знаниями и навыками, которые будут необходимы им для защиты прав и законных интересов в случае нарушения антидискриминационного законодательства.

Ключевые слова: равенство, дискриминация, международные стандарты, семейное законодательство.