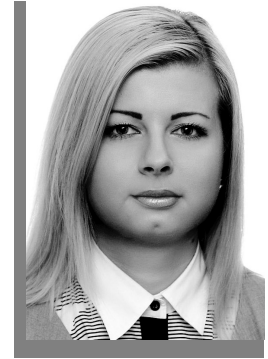


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**T. Anakina**, PhD, Associate Professor of the International Law Department of Yaroslav Mudryi National Law University



UDC 341.231.14

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## **LEGAL REGULATION OF RIGHTS OF SOME VULNERABLE GROUPS UNDER THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: EXPERIENCE FOR UKRAINE**

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The Basic Law of Ukraine solemnly proclaims, that «the human being, his or her life and health, honour and dignity, inviolability and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State» (art. 3). This provision defines the philosophy of the state in the field of human rights and determines general social vector in relations between the state and a person. Though the Constitution of Ukraine is nearly 20-years in force, numerous drawbacks in insuring of rights and freedoms became brightly visible and in many cases got the form of system

violations<sup>1</sup>. One of the reasons of non-fulfillment or improper fulfillment of the constitutional obligation of the state to insure human rights and freedoms is connected with legal gaps in the Basic Law of the state. We reckon, in the process of constitutional reform, which is necessary for the European integration of Ukraine, it is extremely important to take into consideration particularities of legal regulation of human rights and freedoms in the European Union, as its membership is the core priority of foreign policy of our state<sup>2</sup>.

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<sup>1</sup> Щорічна доповідь Уповноваженого Верховної Ради України з прав людини про стан додержання та захисту прав і свобод людини і громадянина в Україні. – К.: Права людини, 2015. – 552 с.

<sup>2</sup> Про засади внутрішньої і зовнішньої політики України: Закон України від 01.07.2010 № 2411-VI // Відом. Верхов. Ради України. – 2010. – №40. – Ст. 527.

The Charter of the Fundamental Rights of the European Union of 07.12.2000<sup>1</sup> (hereinafter – the Charter) is the basic and the key legal act dealing with ensuring human rights and freedoms. Since the Lisbon Treaty came into force, the Charter became legally binding as the part of the EU primary law, being at the same level with the founding treaties. It systematize all the rights and freedoms on the EU level which are binding for all «institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers (part 1 of art. 51 of the Charter).

Furthermore, being the unique legal act as for the mode of systematization of rights and freedoms (they are divided into groups not by the generation of human rights as it relevant to international treaties, but the values of the EU), the Charter provides the highest standards of these rights. For instance, article 35 guaranties «a high level of human health protection», article 37 – «a high level of environmental protection», article 38 – «a high level of consumer protection». It is absolutely clear, Ukraine should implement these standards in the future.

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<sup>1</sup> Charter of Fundamental Rights of the European Union of 07.12.2000 [Електронний ресурс]. – Режим доступу: [http://europa.eu/eu-law/decision-making/treaties/pdf/consolidated\\_versions\\_of\\_the\\_treaty\\_on\\_european\\_union\\_2012/consolidated\\_versions\\_of\\_the\\_treaty\\_on\\_european\\_union\\_2012\\_en.pdf](http://europa.eu/eu-law/decision-making/treaties/pdf/consolidated_versions_of_the_treaty_on_european_union_2012/consolidated_versions_of_the_treaty_on_european_union_2012_en.pdf)

But taking into consideration modern political events, their reception should not give a desirable effect in the nearest future. At the same time we may guess, that in the absence of proper economic support of the state these legal provisions should remain no more than declarative (as numerous provisions of the Ukrainian Constitution (especially in art. 47 (right to housing), art. 48 (right to a standard of living sufficient for oneself) etc.).

At the same time, there are several articles in the Charter important to be provided and guaranteed even in the current situation. Thus, a strong emphasis in the specified EU Founding Act made towards ensuring the rights of vulnerable groups who need extra protection for various reasons. The philosophy of the Union is quite simple: the level of society should be determined because of the attitude of the society towards people who need special protection, not to be discriminated within the society. In most EU Member States (Austria, Estonia, Lithuania, Poland, Romania, Slovenia, Croatia etc.) the rights of vulnerable people also got a special attachment at the highest constitutional level, often reproducing the relevant provisions of the Charter or developing its standards.

The essence of these special rights is not to grant additional rights to certain individuals and legal means to ensure the conditions in which all would equally enjoy universal rights and freedoms. The concept of «positive discrimination» is related to the special human rights, which is used as a temporary legal measure aimed at accelerating the achieve-

ment of equality of people in society *de facto*. With these conditions, it is considered justified and appears to be legally established temporary, unequal, differentiated standards and privileges to protect those who are discriminated<sup>1</sup>.

International law traditionally recognizes as vulnerable people children, women, the elderly, the sick, including those with long-term physical or mental disability (disabled), representatives of various kinds of minorities, refugees, foreigners and other persons who temporarily need extra protection. Of course, it is impossible to fully consider the particular protection of all these groups for the EU Charter of Fundamental Rights in the same article, so we will focus on the study of the regulation of the rights of children, the elderly and people with long-term physical or mental disabilities that are most numerous in society. Unfortunately, the Fundamental Law of Ukraine 1996, which is the legal basis for the rights and freedoms of human and citizen in our country, does not contain adequate legal provisions to safeguard the rights of such persons. Thus, the study of specific legal regulation of rights of groups of persons defined by EU Charter in the context of constitutional reform in Ukraine is the purpose of this article.

It is important to note that currently the domestic doctrine of International law virtually has no comprehensive works devoted to the outlined problems. At the EU level the rights of vulnerable groups of persons considered mainly

within the general research of legal status of a person or certain aspects of functioning of the EU. This is the work of N. Vasylieva, A. Holovko, M. Gnатовskyi, S. Dobrianskyi, M. Mykiiievych, V. Muraviov, O. Tragniuk etc. At the same time, the issue of protecting the rights of certain vulnerable groups in the International law have become more careful in securing scientific research M. Buromenskyi, O. Vinhlovskya, A. Honcharenko, D. Kytsenko, A. Kotliar, V. Mytsyk, N. Plakhotniuk, A. Poiedynok, K. Chykhmar and others.

Let us study the regulation on the rights of each of these groups in the EU Charter compared to the Fundamental Law of Ukraine. It is well known that the EU set pretty high standards for the protection of children's rights. Expressing the general approach of the European Union to ensure the rights of children at the event dedicated to the 20th anniversary of the UN Convention on the Rights of the Child 1989<sup>2</sup> the EU Commissioner for Justice, Freedom and Security Jacques Barrot emphasized that the EU was not only trying to adhere strictly to the provisions of the said international contract, but also to develop policies and legislation «to protect children and allow them to develop their full potential so that they become a force to be counted with in the future»<sup>3</sup>.

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<sup>2</sup> Конвенція ООН про права людини від 20.11.1989 р. // Зібрання чинних міжнародних договорів України. – 1990 р. – № 1. – Ст. 205.

<sup>3</sup> ЄС відзначає 20-ту річницю захисту прав дитини та дивиться у майбутнє (20/11/2009) [Електронний ресурс]. – Режим доступу: [http://eeas.europa.eu/delegations/ukraine/press\\_corner/all\\_news/news/2009/2009\\_11\\_25\\_1\\_uk.htm](http://eeas.europa.eu/delegations/ukraine/press_corner/all_news/news/2009/2009_11_25_1_uk.htm)

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<sup>1</sup> Міжнародне право: навч. посіб. / за ред. М. В. Буроменського. – К.: Юрінком Інтер, 2005. – С. 192–193.

Article 52 of the Constitution of Ukraine, which is directly devoted to children's rights, establish only the principle of equality of children regardless of origin or birth, prohibition of child abuse or exploitation, and defines the obligations of the state to ensure the protection of orphans and support charities for children. From the other hand, the Charter contains wider obligations to the child displaying these provisions. Thus, in its art. 24 states that «(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration...». As seen, the EU Charter establishes a number of obligations, which is very important to ensure adequate protection of children's rights in society for their harmonious development, so they should be fixed in the Constitution of our country. It is important to note that at the constitutional level of some EU member states the right of children received more guarantees that are substantial. Thus pt. 1 of art. XVI of the Constitution of Hungary 18.04.2011<sup>1</sup> states, that «every child shall have the right to the protection and care required for his or her proper physical, mental and

moral development». There is a provision at art. 72 of the Constitution of the Republic of Poland 20.04.1997<sup>2</sup> that says «(1) The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense... (3) Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child». The pt. 5a of art. 14 of the Constitution of the Federal Republic of Austria of 1930 (amended 2014)<sup>3</sup> states that children and youth should be provided with «intellectual, mental and physical development to let them become healthy, self-confident, happy, performance-oriented, dutiful, talented and creative humans capable to take over responsibility for themselves, fellow human beings, environment and following generations, oriented in social, religious and moral values». Consequently, these rules are quite progressive and appropriate to modern development of guaranteeing of children's rights in the EU, while, that is quite interesting, a special component of this right is highlighted – the right to moral development and education in the spirit of social, religious and

<sup>1</sup> Constitution of Hungary of 18.04.2011 [Электронный ресурс]. – Режим доступа: [https://www.constituteproject.org/constitution/Hungary\\_2011.pdf](https://www.constituteproject.org/constitution/Hungary_2011.pdf)

<sup>2</sup> Constitution of the Republic of Poland of 02.04.1997 [Электронный ресурс]. – Режим доступа: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>

<sup>3</sup> Federal Constitutional Law of Austria of 1930 (amended 2014) [Электронный ресурс]. – Режим доступа: <http://www.legislationline.org/documents/section/constitutions>

moral values. In our view, such a legal status should be taken into account in the process of modernization of Ukraine's Constitution.

The rights of the elderly and people with long-term physical/mental disability (disabled) are also not regulated by the Basic Law. In particular, art. 46 of the Constitution of Ukraine guarantees only the right to social protection, while the Charter contains a broader commitment of the EU and its Member States to ensure a significant range of rights of such persons. In particular, art. 25 of the Charter guaranteed that «The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life». Article 26 of the Charter directly dedicated to the integration of physically or mentally disabled people: «The Union recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community». These rules actually reflected in the Constitutions of many Member States. Thus the art. 52 of the Constitution of the Republic of Slovenia 23.11.1991 (amended 2013)<sup>1</sup> proclaims «physically or mentally handicapped children and other severely disabled persons have the right to education and training for an active life in society».

An important guarantee of the rights of vulnerable people is the norm of the

art. 21 of the Charter, under which «any discrimination based on any ground such as... disability, age...». There is the relevant discrimination grounds at the art. 24 of the Constitution of Ukraine not explicitly mentioned in view of the fact that it contains a non-exhaustive list of grounds. However, we believe that there would be necessary to supplement this list with the above-mentioned provisions of the Charter. In addition, the rule that in order to achieve actual equality in society for vulnerable persons may be granted additional protection that is not a manifestation of violation of the right to equality should be to fixed in the art. 24 of the Basic Law of Ukraine. In this regard, it is appropriate to give examples of the EU Member States. In particular, at the art. 7 of the Constitution of the Federal Republic of Austria of 1930 (amended 2014), devoted to the provisions on discrimination, emphasizes that «no one shall be discriminated against because of his disability. The Republic (Federation, provinces and municipalities) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of everyday life». There is a provision at the art. XV of the Constitution of Hungary 18.04.2011 which is also dedicated to the general principles of non-discrimination, given that the state «shall adopt special measures to protect children, women, the elderly and persons living with disabilities». Interesting is also the fact that almost simultaneously with the accession to the EU (15.06.2004) because of the provisions of the Charter art. 14 of the Constitution of the Republic of Slovenia

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<sup>1</sup> Constitution of Slovenia of 23.11.1991 (amended 2013) [Електронний ресурс]. – Режим доступу: <http://www.us-rs.si/media/constitution.pdf>

11.23.1991 («equality before the law») was amended with rule on non-discrimination because of physical or mental incapacity. This approach to protection of the rights of the elderly and the disabled from discrimination and their maximum integration into the social life is reflected in international instruments. In particular, according to the United Nations Principles for Older Persons, defined in General Assembly Resolution № 46/91 of 16.12.1991<sup>1</sup> and the Proclamation on Ageing № 47/5, adopted by the UN General Assembly on 16.10.1992<sup>2</sup>, the global goal is proclaimed the need to make a full life of older people. According to the art. 4 of the UN Convention on the Rights of Persons with Disabilities of 13.12.2006<sup>3</sup>, which was entered into force for Ukraine 06.03.2010, our state has taken an obligation «to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability». However, we can state with regret that these international commitments practically not properly implemented in our country.

<sup>1</sup> Принципи ООН стосовно літніх людей: Резолюція Генеральної Асамблеї ООН № 46/91 від 16.12.1991 р. [Електронний ресурс]. – Режим доступу: [http://zakon4.rada.gov.ua/laws/show/995\\_314](http://zakon4.rada.gov.ua/laws/show/995_314)

<sup>2</sup> Декларація з проблем старіння № 47/5: прийнята Генеральною Асамблеєю ООН 16.10.1992 р. [Електронний ресурс]. – Режим доступу: [http://zakon.rada.gov.ua/laws/show/995\\_510](http://zakon.rada.gov.ua/laws/show/995_510)

<sup>3</sup> Конвенція ООН про права інвалідів від 13.12.2006 р. // Офіц. вісн. України. – 2010. – № 17. – Ст. 3496.

An important part of the mechanism of protection of rights and freedoms of persons, including those belonging to vulnerable groups, is the right to judicial protection. The first two parts of the art. 55 of the Constitution of Ukraine determined that «(1) humans' and citizens' rights and freedoms are protected by the court. (2) Everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers». In many international regulations on human rights, the right to judicial protection is formulated more broadly and defined by specific criteria and standards. It is based on two fundamental principles: the rule of law and administration of justice, which guarantee the right to a fair trial<sup>4</sup>. In primary EU law, these principles has found clear regulatory fixation. Thus, under the art. 2 of of the Treaty on the European Union 1992<sup>5</sup> the rule of law is proclaimed as one of the fundamental values, and the art. 47 of the Charter guarantee the right to an effective remedy and a fair trial. In particular, the Charter states that «everyone whose rights and freedoms guaranteed by the law of the Union are violated has the

<sup>4</sup> Конституція України. Науково-практичний коментар / редкол.: В. Я. Тацій (голова редкол.), О. В. Петришин (відп. секретар), Ю. Г. Барабаш та ін.; Нац. акад. прав. Наук України. – 2-е вид., переробл. і допов. – Х.: Право, 2012. – С. 410.

<sup>5</sup> Treaty on the European Union on 07.02.1992 [Електронний ресурс]. – Режим доступу: [http://europa.eu/eu-law/decision-making/treaties/pdf/consolidated\\_versions\\_of\\_the\\_treaty\\_on\\_european\\_union\\_2012/consolidated\\_versions\\_of\\_the\\_treaty\\_on\\_european\\_union\\_2012\\_en.pdf](http://europa.eu/eu-law/decision-making/treaties/pdf/consolidated_versions_of_the_treaty_on_european_union_2012/consolidated_versions_of_the_treaty_on_european_union_2012_en.pdf)

right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented...».

It is important to note that this approach is expressed in the practice of the European Court of Human Rights on the basis of art. 6 of the European Convention on Human Rights in 1950<sup>1</sup> (hereinafter – the ECHR), which in its turn is the basis of interpretation of the relevant rights under the EU Charter (pt. 3, art. 52 of the Charter). Moreover, the European Court of Human Rights in its case-law on art. 6 of the ECHR specifically states that the right to a fair trial also includes the right to proper execution of the judgment within a reasonable time (Buchholz v. Germany 1981, Baraona v. Portugal 1987<sup>2</sup> etc.). The above-mentioned legal position is crucial for a proper understanding of the right to a fair trial in Ukraine, because according to the statistics given by an authoritative international body, it is failure or improper execution of judgments is subject to the most frequent violations by the

State (about 33% of decisions taken against Ukraine<sup>3</sup>).

Thus, the formation of the current wording of art. 55 of the Constitution of Ukraine may lead to the restrictive interpretation of the meaning of the right to judicial protection that fully does not meet international legal acts on human rights and legal regulation of this right in the EU Charter of 2000. To avoid this in the process of modernization of the Constitution of Ukraine it is important to change the wording of the said article of the Basic Law subject to the provisions of art. 47 of the Charter, and the legal position of the European Court of Human Rights at the part of the proper implementation of the judgment within a reasonable time.

To summarize, we note that in the process of constitutional reform in the conditions of Ukraine's European integration it is important to take into account the peculiarities of the legal regulation of the rights and freedoms of vulnerable persons, especially children, the elderly and people with long-term physical and mental disabilities, as they defined in the Charter of Fundamental Rights of the European Union 2000, and in the Constitutions of the Member states. Particularly striking in this case is the approach of the Constitution of the Republic of Croatia 06.07.2010<sup>4</sup> where

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<sup>1</sup> Конвенція про захист прав людини і основоположних свобод від 04.11.1950 р. // Офіц. вісн. України. – 1998. – № 13. – Ст. 270.

<sup>2</sup> Де Сальвіа, М. Прецеденты Европейского суда по правам человека. Руководящие принципы судебной практики, относящейся к Европейской конвенции о защите прав человека и основных свобод: Судебная практика с 1960 по 2002 гг. / Де Сальвіа М. – Юрид. центр Пресс, 2004. – 1240 с.

<sup>3</sup> Violations by Article and by State 1959–2014 [Електронний ресурс]. – Режим доступу: [http://echr.coe.int/Documents/Stats\\_violation\\_1959\\_2014\\_ENG.pdf](http://echr.coe.int/Documents/Stats_violation_1959_2014_ENG.pdf)

<sup>4</sup> Constitution of the Republic of Croatia 06.07.2010 [Електронний ресурс]. – Режим доступу: <http://www.legislationline.org/documents/section/constitutions>

in the art. 65 is said, that «everyone shall have the duty to protect children and infirm persons». In our opinion, such an approach should be realized at the level of the Basic Law of Ukraine, which should reflect the major areas of constitutional human rights and freedoms, but today guarantees the rights of such persons improperly. Fixing the corresponding rights in Chapter II of the Basic Law of our country would be very desirable, because its rules are the basis of the current legislation and are binding in the

process of enforcement. In addition, in view of the pt. 3, art. 8 of the Constitution of Ukraine these rules should be regarded as having direct effect, which in its turn would provide right to judicial protection of their constitutional rights and freedoms to the relevant categories of persons directly under the Basic Law.

*Published: Український Часопис міжнародного права. – Спецвипуск «Міжнародне право і Конституція України». – 2015. – С. 41–46.*