

## КОНСТИТУЦІЙНЕ ТА МУНІЦИПАЛЬНЕ ПРАВО

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of the National University 'Odessa Law Academy'*CHILDREN'S RIGHTS AS CONSTITUTIONAL PRINCIPLE RATHER  
THAN SERVICE DELIVERY OBJECTIVE

*The problem, including the connection with the important doctrinal and practical tasks.* Constitutional jurisprudence about the rights of children has undergone radical reformation in the last decade in the EU. Instead of simply seeing children as just another faction of society, lawmakers increasingly recognize that the constitution must provide children with special constitutional rights and protections. As the Ukrainian Parliament Commissioner for Human Rights notes in every annual report, "human rights begin with the rights of children" [1]. Yet, Ukraine's 1996 constitution – and the values enshrined in the legislation that follows the principles in that constitution – does not acknowledge those special rights. Like the pre-2010 constitutive document of the European Union before the Treaty of the Functioning of the European Union, Ukraine's constitution treats children's rights as just another area of public service provision [2]. Like minorities or invalids, previous constitutional jurisprudence treated children should have their own special institutions and public services. What has changed? And what can the Ukraine learn from the EU's shift on the constitutional framing of children's rights?

In this paper, we argue – much as most Ukrainian scholars on this topic -- that Ukraine's constitution should reflect the new constitutional jurisprudence on children's rights, by defining specific constitutional rights for children and putting in place procedures which allow children to actually assert those rights by themselves.

*The last publications in the field* belong to such authors like I. Voloshina, Y. Gubal, O. Kudryavtseva, N. Filipetskaya, O. Butko, N. Krestovskaya and others. But these authors don't pay a lot of attention to the EU standards, mostly they concentrate their attention at the world-wide standards.

*The article's aim* is to look at the children's rights as constitutional principle rather than service delivery objective.

*The main material.* Ukraine follows much the same approach as other countries in defining and protecting children's rights. Ukraine's constitution gives direct effect to all the relevant international

instruments and agreements concerning children's rights which the government has adopted/ratified. Some of these include the 1989 Convention on the Rights of the Child (and the two optional protocols), the 4 related UN conventions (on cybercrime, child abduction, international enforcement of child support orders, and anti-trafficking). Ukraine has also signed 5 related European conventions, 2 Hague Conference agreements and 1 CIS level agreement. Ukraine's parliament adopted the Law 'On Child Protection' in 2001 to adopt measures aimed at implementing these agreements.

Local commentators lament Ukraine's refusal to adopt two more child-related conventions. First, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should help the children of legal and illegal migrant workers, as well as their underage children. Second, On May 18, 2007, the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse should protect children against sex tourism and sexual exploitation. These observers also note that Ukraine has failed to adopt these conventions in their inability to enforce the principles outlined in these conventions. Mrs. Karpachova, for example, reviews Ukraine's various policies, including recent action plans aimed at protecting children's rights. She finds most of this work lacking – pointing to a gap between adoption and implementation of these constitutionally-endorsed principles.

The Law of Ukraine 'On Child Protection' defines "child – a person under 18 years of age (age) unless under the law applicable to it, it does not acquire the rights of an adult before." Yet, the current approach focuses far too heavily on the letter rather than the spirit of the law – treating the protection of children's rights more like a public service rather than a fundamental part of all government activity.

Ukraine's Constitution provides numerous indirect and/or summary references to the government's duty to protect children's rights. Ukraine's constitutional "Prime Directive" (or main principle which guides all others) notes that "The human be-

ing, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value." Clearly, life and health apply directly to children, as "human beings", as do inviolability and security. Unsurprisingly, the government has taken far fewer steps to protect children's "honour and dignity," as even academics have a hard time defining these principles and describing programmes/laws which might bring this honour and dignity to Ukraine's children in practice.

The theoretical/conceptual problems arise from the legal status of children. Article 3 further stipulates that, "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 (Ukraine's Constitution, article 3). Yet, the constitution does not describe until later specifically which humans have rights – and what those rights are. Article 21 however, guarantees that "all people are free and equal in their dignity and rights." In order to qualify for equal protection, Ukrainian law must define children as "people." If children are people, then they qualify for the same rights as others. Yet, the Constitution provides no definition of a child. Worse yet, the subsidiary Law of Ukraine 'On Child Protection', specifically defines a child as "child – a person under 18 years of age, unless under the law applicable to it, it does not acquire the rights of an adult before" [3]. In other words, the law excludes children from the rights other adults have under Ukraine's constitution. In practice, the government may give them rights by tradition. Yet, formal constitutionalist approach to rights would have difficulty assessing what rights children have under Ukraine's constitutional jurisprudence (if any).

We know these as Ukraine's prime directives, as the constitution clearly describes them as the highest social value, and later as the main duty of the state. Thus, children's rights programmes should have priority over other programmes.

Lets look at some articles of the Ukrainian Constitution:

Article 1: Ukraine is "sovereign and independent, democratic, social, law-based state;

Article 24: Citizens have equal constitutional rights and freedoms and are equal before the law. There shall be no privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics.

Equality of the rights of women and men is ensured: by providing women with opportunities equal to those of men, in public and political, and cultural activity, in obtaining education and in professional training, in work and its remuneration; by special measures for the protection of work and health of

women; by establishing pension privileges, by creating conditions that allow women to combine work and motherhood; by legal protection, material and moral support of motherhood and childhood, including the provision of paid leaves and other privileges to pregnant women and mothers;

Article 51: Parents are obliged to support their children until they attain the age of majority. Adult children are obliged to care for their parents who are incapable of work.

The family, childhood, motherhood and fatherhood are under the protection of the State;

Article 52: Children are equal in their rights regardless of their origin and whether they are born in or out of wedlock.

Any violence against a child, or his or her exploitation, shall be prosecuted by law.

The maintenance and upbringing of orphans and children deprived of parental care is entrusted to the State. The State encourages and supports charitable activity in regard to children;

Article 92: 6) the fundamentals of social protection, the forms and types of pension provision; the principles of the regulation of labour and employment, marriage, family, the protection of childhood, motherhood and fatherhood; upbringing, education, culture and health care; ecological safety [3].

After the deep comparative analysis it becomes obvious, that in Ukraine, according to the Constitution, children's rights more than about service delivery – but assertion of rights. As it was noted in one of the precedents, "While children undeniably benefit from the Charter, most notably in its protection of their rights to life and to the security of their person, they are unable to assert these rights, and our society accordingly presumes that parents will exercise their freedom of choice in a manner that does not offend the rights of their children" [4].

It is also very urgent to Ukraine to create an ombudsman for children – and their own ability to denounce rights violations. It should work with the Parliament – just like an 'ordinary' Ombudsman, that protects human rights in general. Like it is mentioned in the 'Ukraine: Children's Rights in the Universal Periodic Review (Second Cycle)', paragraph 26: 'It should be noted that the Children's Ombudsman is not a fully autonomous children's rights institution in the sense of United Nations international standards. The Constitution does not, however, provide for the establishment of specialized bodies in addition to those already envisaged in its provisions. Nevertheless, the Ombudsman of Ukraine, who, in accordance with the Act on the Parliamentary Human Rights Commissioner, exercises parliamentary oversight over the observance of children's rights under the Constitution, has appointed a delegate with responsibility for issues relating to the rights of children' [5].

The current Ukrainian approach to the children's rights doesn't go along very well with the 'New EU Approach to the Constitutional Framework Governing Children's' Rights'. This basically mainstreams children's' rights and privileges in all parts/chapters of EU law are as follows: they are consolidated in 94-page document and systematized into 21 categories:

- key enlargement documents (Copenhagen criteria adopted by the European Council in Copenhagen on 21-22 June 1993; Communication from the Commission (COM(2015) 611 final) to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU Enlargement Strategy);
- Europe 2020;
- freedom of movements for the workers;
- right for establishment and freedom to provide services;
- informal society and media;
- agriculture and rural development;
- food safety, veterinary and phytosanitary policy;
- transport policy;
- statistics;
- social policy and employment;
- enterprise and industrial policy;
- regional policy and coordination of structural instruments;
- judiciary and fundamental rights;
- justice, freedom and security;
- science and research;
- education and culture;
- environment;
- consumer and health protection;
- external relations;
- foreign, security and defense policy;
- European Court of Justice's Law.

The document was consolidated for the last time at November, 2016, and has the title 'EU *acquis* and policy documents on the rights of the child' [6].

On contrary, the Special report of the Ukrainian parliamentary commissioner for human rights 'State of Observance and Protection of the Rights of the Child in Ukraine' claims: 'The Ombudsman's monitoring suggests that, despite implementation of the key provisions of the international documents, the Ukrainian children's rights law remains in essence fairly declarative. Some of the children's rights are particularly difficult to secure, namely the right to a home, access of gifted youth to higher education, high-quality health services, etc. These negative trends have only been aggravated by the latest financial and economic crises [1, p.13]. This report also proclaims: "The Commissioner is of the opinion that the formalistic approach of public officials and law-enforcement officers inevitably leads to blatant violations of children's rights. The effective protec-

tion of children in Ukraine totally depends on the responsible approach of public officials and their willingness to ensure protection of children's rights" [1, p. 9]. This underlines the importance of installing the institution of the Parliamentary Children's Ombudsman in Ukraine.

One can see a lot of perspectives in changing the Ukrainian Constitution in the manner the EU law uses now, when it comes about children. For example, the Charter of Fundamental Rights of the European Union claims in Article 24:

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.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests [7].

As far as Ukraine hasn't ratified the Charter of Fundamental Rights of the European Union, it is advisable to reflect such an attitude in the Constitution of Ukraine 1996.

*Conclusion.* The author thinks that the best conclusion comes from citing the Special report of the Ukrainian parliamentary commissioner for human rights 'State of Observance and Protection of the Rights of the Child in Ukraine': 'A top priority objective of the Ukrainian Parliament Commissioner for Human Rights is to promote implementation of International and European standards on the protection of the rights and freedoms of the child in the national legislation. Yet, the Commissioner has no Constitutional status' [1]. The changes in this field, as well as the changes in the Constitution of Ukraine 1996 are seen the perspectives for the Ukrainian juvenile legislation development. Some of the Ukrainian scientists recommends the similar actions [8].

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### Summary

**Kitajka O. V. Children's Rights as Constitutional Principle Rather than Service Delivery Objective. – Article.**

The author notes the need to bring Ukrainian juvenile law in accordance with the EU juvenile standards. The author underlines that, unlike Ukraine, the EU Member States departed from the terms of the rights of the child as a phenomenon that requires the provision of public services. The author analyzes the current Constitution of Ukraine 1996, offering to bring it into line with the EU Charter of Fundamental Rights, securing the children's rights feasibility, and recommends to implement the position of Ombudsman on children's rights in the Parliament of Ukraine. These will be the first step towards recognition of children's rights in Ukraine as a constitutional principle rather than service delivery objective.

*Key words:* child rights, constitutional principle, constitution, constitutionalism, Ombudsman, juvenile EU standards.

### Анотація

**Китайка О. В. Дотримання прав дитини як конституційний принцип, а не як мета державного обслуговування. – Стаття.**

Автор констатує необхідність приведення ювенального законодавства України у відповідність до ювенальних стандартів Європейського Союзу, завдяки яким держави-члени Європейського Союзу відійшли від погляду на права дитини як на такі, підтримання яких у належному стані вимагає державного обслуговування. Автор аналізує чинну Конституцію України 1996 р., пропонуючи привести її у відповідність до Хартії фундаментальних прав Європейського Союзу у частині закріплення прав дітей, а також обґрунтовує доцільність запровадження посади Омбудсману з прав дітей при Парламенті України. Ці кроки стануть першими на шляху визнання дотримання прав дитини в Україні конституційним принципом.

*Ключові слова:* права дитини, конституційний принцип, конституція, конституціоналізм, омбудсман, ювенальні стандарти ЄС.

### Аннотация

**Китайка О. В. Соблюдение прав ребенка как конституционный принцип, а не как цель государственного обслуживания. – Статья.**

Автор отмечает необходимость приведения ювенального законодательства Украины в соответствие с ювенальными стандартами Европейского Союза, благодаря которым государства-члены Европейского Союза отошли от взгляда на права ребенка как на явление, которое требует государственного обслуживания. Автор анализирует действующую Конституцию Украины 1996 г., предлагая привести ее в соответствие с Хартией фундаментальных прав ЕС в части закрепления прав детей, а также обосновывает целесообразность введения поста Омбудсмана по правам детей при Парламенте Украины. Эти шаги станут первыми на пути признания соблюдения прав ребенка в Украине конституционным принципом.

*Ключевые слова:* права ребенка, конституционный принцип, конституция, конституционализм, омбудсман, ювенальные стандарты ЕС.