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RIGHT TO EDUCATION OF CHILDREN WITH DISABILITIES: INTERNATIONAL LEGAL EXPERIENCE

The article deals with the problem of the right to education of children with disabilities. The major international documents recognizing the right of children with disabilities to education were analyzed. Separately, the article analyzed examples of countries whose educational systems are more improved for children with disabilities (England, Germany, etc.). In each of the investigated countries the legal framework was analyzed considering experience of the above mentioned problems resolution, which enabled author to provide conclusions about shortcomings in Ukrainian legislation. The main directions and recommendations on improvement of legislation in the field of education were presented. Specifically, the recommendations were provided for changes in educational process for teaching of "special children".

Key words: special children, disabilities, international law, children, children with special features.

Statement of the problem and its connection with important scientific and practical tasks. Right to education is one of the most important subjective rights of a personality. Being an inseparable element of the human rights system and society life in general, it accompanies evolution of individuals and nations, ensures humanity perfection. Right to education enables access to results of civilization development, involves person to the level of culture reached by society, educates respect to the general human values, composes national culture, and contributes to social progress. Among the wide range of subjects of the right to education there are persons with special legal status. Some of such subjects are individuals with disabilities or children with development derivations. Specifics in legal regulation of their status in education are determined by a necessity to formalize guarantees of the right to education and to eliminate the situation where such persons may be factually excluded from the educational system and social life.

It must be admitted that for modern judicial literature the matters related to the right to education are not new ones, but enough researched and elucidated. Namely, V. Kopeychikov, O. Malko, M. Vitruk in their works disclosed a legal base and content of constitutional right to education; K. Bolunka, V. Pogorilko – have studied certain aspects of subjective right to education; O. Karelina – focused on introduction of distanced learning for students with functional health disabilities. T. Skorik, V. Bondar, A. Kolupaeva – deal with problems of inclusive education; V. Zhuravsky, I. Ziaziun – devoted their works to the problems of integration for people (children) with special needs in all spheres of life.

The problems of legal status of children with disabilities in education have not been yet a subject to comprehensive study in modern Ukrainian legal science. Usually, such issues are referred to social security law, within the limits of which the matters of disabled persons' social protection are considered. Legal mechanism of accessibility of education for this category of children is not completely determined and even existing legal norms have to be improved.

Key outcomes of the research. Elaboration of legal norms on children rights is performed since the Declaration of children's rights 1959¹. The last act is the UN Convention on the rights of persons with disabilities², adopted at the end of 2006 and still not enforced, has reflected a gradual change of mankind view on the problem of equality and nondiscrimination of persons with disabilities in education.

Principle of rights equality in education area and determination of its meaningful features may be found in various international legal acts by two directions: on the one hand, it is a fixation of the each one's

¹ Декларація прав дитини 1959, проголошена резолюцією 1386 (XIV) Генеральної Асамблеї ООН. <<http://www.un.org/russian/document/declarat/childdec.htm>>.

² Конвенція ООН про права інвалідів 2006. Прийнята резолюцією 61/106 Генеральної Асамблеї ООН. <<http://www.un.org/russian/disabilities/convention/disabilitiesconv.pdf>>.

right to education and, on the other hand, these are supplementary guarantees of equality and non-discrimination of persons with disabilities in access to education.

A number of general acts provide rules devoted to recognition of the right to education, its social importance and value for person, equality of rights in education. General declaration on human rights stipulates the right of each person to education: it determines that education shall be directed to the full development of the human personality (the Article 26). International Covenant on Economic, Social and Cultural Rights¹ determines that education shall be directed to the full development of the human personality and the sense of its dignity (the Article 13).

UN Convention on the rights of the child 1989² provides for member-states recognition of the right of mentally or physically disabled children to full and decent life including the right to assistance in efficient access to educational services. The Articles 28, 29 of the Convention confirms the right of the child to education which shall be realized on the basis of equal possibilities ensured by Convention member-states by its accessibility to all children and measures on encouragement of regular attendance at schools and reduction of drop-out rates. Education of children shall be aimed at development of the child's personality, talents and mental and physical abilities to their fullest potential, as well as preparation of a child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of men and women. Moreover, the member-states of the Convention recognize the right to full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community (the Article 23).

A group of legal acts devoted to the rights of persons with disabilities contains regulations aimed at non-discrimination of mentioned persons, specifically in education area, fixation of the principle of accessibility to education. Declaration on the rights of mentally retarded persons declares along with the right to proper medical care and physical therapy also the right to such education, training, rehabilitation and guidance as will enable them to develop their ability and maximum potential. Declaration on the rights of disabled persons calls on recognition that the rights shall be granted to all disabled persons without any exception whatsoever and without distinction or discrimination, including the right to education, vocational training and placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the processes of their social integration. Yet in 1982 the UN General Assembly according to its Resolution has adopted the World Action Program on disabled persons which purpose was assistance in adoption of efficient activities for implementation of tasks on equality and full participation of disabled persons in social life and development. 1983-1991 years were proclaimed by the United Nations Organization as Decade of disabled persons.

Legal regulation of the children's rights (with development deviations) in education area in European countries took place in the second half of XX century, despite the system of special education started its formation in the first half of XX century. Along with the development of human rights theory after the Second World War, the rights of persons with disabilities, also in education area, were recognized and formalized at international level.

Especially actively the process of legal provision of the right to education for persons with deviations developed after introduction of general compulsory education which assisted in real finding of children needed special conditions of education and learning program.

Nowadays, in Federal Republic of Germany there are no separate legal acts on special education regardless presence and progress of the system of education for children with special educational needs, integrated and inclusive learning. The Federal government sees one of its tasks in ensuring equal opportunities in education for all social groups, providing of measures on state assistance to youth experiencing the lack of school education / or problems of social character (including young migrants as well). Particularly, The Federal Ministry of Education and Science (BMBF – Bundesministerium fuer Bildung und Forschung) drafted the program on support to vocational training for mentioned groups of youth with special demands in order to assist them in further employment³.

¹ Международный пакт об экономических, социальных и культурных правах от 19.12.1966. Ратифицирован Президиумом Верховного Совета СССР 18.09.1973 (1996). *Сборник важнейших документов по международному праву. Общая.* Москва: Ин-т междунар. права и экономики, 167-199.

² Конвенція ООН про права дитини. Прийнята 20 листопада 1989 р Ратифікована СРСР 13 червня 1990 р. (1996). *важнейших документов по международному праву. Общая.* Москва: Ин-т междунар. права и экономики, 188.

³ Equal opportunities in education. Opportunities for the Disadvantaged. <<http://www.bmbf.de/de/1021.php>>

Special educational demands in Germany are defined as a need in additional specific assistance in education, in absence of which the education and development cannot be a sufficient securing action¹. Student's educational capacities are evaluated by qualified teacher upon the request of student's parents, his legal representatives or himself in the age above 18 years old. Identification of special educational demands is carried out under consideration of tasks, requirements and support measure from the school side, as well as individual particularities, student's environment in school, expected results. Upon performed evaluation the teacher shall draft a personal study plan for 1-2 years.

In England in 1870 was adopted the Elementary Education Act, in 1893 – the Elementary Education (Blind and Deaf Children) Act², in 1899 – the Elementary education (Defective and Epileptic Children) Act³.

The Act refers to the epileptic children those who are not “idiots” or “imbecile”, but who are not able to attend ordinary public elementary school due to the severe epilepsy. The school authority shall provide facilities for enabling any parent, who is of opinion that his child is handicapped to present such child to the school authority to be examined, although he may not have been required so to do by that authority. If such possibility is not provided it is considered as violation of the Act. Examination of the child may be performed only by a duly qualified practitioner. At the same time, in case the school authority took a decision on child examination, his parent or caretaker may not refuse it. In case of refusal the parent shall be liable to a fine.

School authority provides for the education of such children in special classes at public elementary schools, by boarding out or by establishing schools for defective children. The Act empowers school authority to launch a special school, but it does not oblige them to admit a child to special class or school. When it is deemed necessary a school authority may provide guides or conveyances for children.

The state assigned financial support to the schools which obtained a corresponding permission (certificate) of Education Department. Herewith, the certain requirements were addressed to schools: the education process shall not be commercially oriented, annual expenses of schools shall be monitored and published, as well the school shall be a subject to revision by School Inspection of Her Majesty, etc. At the same time the Act enables Education Department to assign financial support from budget funds for the education of defective children and epileptics. Moreover, the parents also should contribute payments destined for children transportation, residing in boarding school and for expenses related with school attending (Articles 6-8).

According to the Elementary Education Act, the children in the age from 5 to 14 years old are liable to education at school, for mentally retarded children the age of education was extended for 2 years – from 7 to 16 years old.

In 1913 the British Parliament adopted the Mental Deficiency Act. The Act entered into legal force on the 1st of April 1914. It was aimed at further enhancement of feeble-minded and mentally retarded persons care, as well as amending of the Lunacy Acts.

The Act was a result of work of the Royal Commission on the Care and Control of the feeble-minded, which report has been published in July 1908⁴. The document was appreciated as the fullest and thoroughly elaborated official act on feeble-minded in the first quarter of XX century.

The Act defined a mental deficiency as delayed or incomplete mind development appeared before 18 years in the result of inherited reasons or illness and traumas. Four categories of mentally deficient were determined depending on character and degree of deficiency: “idiots”, “imbeciles”, “feeble-minded” and “moral defectives”. Only two last categories are capable to study, though for the feeble-minded it is possible just in the condition of special classes or schools. The Act allowed forced placement of feeble-minded in special institution if they were dangerous for people around. For execution of this Act in March 1914 were adopted instructions for institutions on data transfer for registration of such persons in the

¹ Офіційний портал Європейського агентства з розвитку в області спеціальних освітніх потреб.

<<http://www.europeanagency.org/country-information/germany/national-overview/identification-of-special-educational-needs>>

² Davey, H. (1981). *The Law Relating to the Mentally Defective (Historical foundations of forensic psychiatry and psychology)*. New York, 349.

³ Elementary Education (Defective and Epileptic Children) Act. 9th August, 1899 (1981). Davey, H. *The Law Relating to the Mentally Defective (Historical foundations of forensic psychiatry and psychology)*. New York, 345.

⁴ The Law Relating to the Mentally Defective, 1913 (1981). Davey, H. *The Law Relating to the Mentally Defective (Historical foundations of forensic psychiatry and psychology)*. New York, 1.

Ministry of education and their displacement in care agency¹.

Hence, the legislation of Great Britain on education of children with disabilities has been enough developed yet in the beginning of XX century. Its purpose was not a provision of equal possibilities, but arrangement of social relations for the benefit of persons with disabilities and for security of the community.

Scandinavian countries, same as in England, refused from the usage of terms “mental deficient”, “imbecile” etc. and apply at both legislative level and practical activity the notion “special educational needs”.

The legislation of the Kingdom of Norway contains 5 acts which regulate relations in education area: the Act on Kindergartens², the Act on Elementary School and Secondary Education³, the Act on Private Free Schools⁴, the Act on Adult Education⁵ and the Act on Universities and Colleges⁶. Three of them foresee the regulations on education of citizens with disabilities. There is no separate legal act on special education in Norway. Regulations on the right to education in special circumstances, as well as the right of child with disabilities to attend kindergarten are included in the general act.

Article 9 of the Norway Act on Kindergartens stipulates that children with disabilities have a prior right to access to the childcare center, if as per specialists decision the presence in such educational institutions will be useful for a child. The decision of specialists is taken with the participation of persons who execute parental duties. Municipal authorities are obliged to facilitate accessibility of such institution for a child. A child may receive a special pedagogical assistance which is free for parents. Hence, the legal system of Norway is oriented on preferential joining of child to the ordinary environment where the majority of children study and educate.

The Act Relating to Primary and Secondary Education 1998, which is valid nowadays with some amendments and supplements, regulates some cases related to the rights of children with disabilities. So, children who communicate by sign language may educate on this language or with its help (Articles 2-6). The essence of education for them is determined by general rules. Children in the age of compulsory education (from 6 to 16 years) who require education in the sign language, have the right to education in this language. Decision on teaching in this language and learning of this language shall be taken by municipal authorities in education after expertise. Blind and visually impaired students have the right to be educated with application of Braille script and necessary technical assistance, including teaching on movement and orientation in school, as well as on the way to and from school (Articles 2-14). The students of secondary school of higher degree possess the same rights (Articles 3-9, 3-10).

Norway legislation same as legislation of other European countries formalizes the main rights and guarantees in education for children with disabilities. Norwegian acts provide special rules on children with special educational needs and do not contain the notion “a child with disabilities”.

Summarizing the above mentioned it is worth to admit that legal regulation of special education has its specifics in each state. The absence of separate legal act on special education is typical for European countries at present time. Existing educational system for children with disabilities is aimed at “inclusion” of students with special educational needs in ordinary educational system as much as it’s possible. It is typical for all mentioned countries that while defining of the notion “child with disabilities” a legislator slowly reject from humiliating terminology which underlines different types of limitations and defections, giving preference among them to the notion “children with special educational needs”.

Ukrainian legislation entrenches key guarantees for realization of the right to education for children and adolescents with disabilities (defections in development). At the same time, a number of children with disabilities do not receive education. One of the reasons of such situation is insufficient elaboration of the

¹ Regulations of the Board of Education under section 2 (2) of the Mental Deficiency Act, 1913. 24th of March, 1914 (1981). Davey, H. *The Law Relating to the Mentally Defective (Historical foundations of forensic psychiatry and psychology)*. New York, 456-459.

² *The Day Care Institutions Act of 5 May 1995 No. 19*. <<http://www.ub.uio.no/ujur/ulovdata/lov-19950505-019-eng.pdf>>.

³ *Act relating to Universities and Colleges of 12 May 1995 No. 22*. <<http://www.ub.uio.no/ujur/ulovdata/lov-19950512-022-eng.pdf>>.

⁴ Mork T.E. (2005). *Lov om frittstående skolar (friskolelova)*. Jungelhaandboka, 15.

⁵ *Act on Adult Education of 28 May 1976 No. 35*. <<http://www.ub.uio.no/ujur/ulovdata/lov-19760528-035-eng.pdf>>.

⁶ *Act relating to Universities and Colleges of 12 May 1995 No. 22*. <<http://www.ub.uio.no/ujur/ulovdata/lov-19950512-022-eng.pdf>>.

mechanism of legal formalization of the right to education in Ukrainian legislation.

One of the solutions for this problem may be an introduction in Ukrainian legislation of the notion “right to special education” meaning the possibility to obtain special educational services according to the law. Such right may be granted to those students who due to the health condition, physical and psychological development (not obligatory certified by handicapped status) faced challenges in mastering of educational programs elaborated in comply with state educational standard, in unadjusted conditions and require special educational services. Such services depend from the identification of specifics in education content, general procedure for estimation of students needs in special educational services, order for appeal of commission’s conclusion producing such estimation. And the most important, that ‘special children’ could feel themselves in educational institutions as ordinary students who are not differ from the others.

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