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PROTECTION OF VULNERABLE PEOPLE AND GROUPS: PHILOSOPHY AND INTERPRETATION PRACTICE FOR UKRAINIAN COURTS AND ARBITRATIONS

Abstract. ***Purpose.*** The research deals with historical and legal issues for the improvement of human rights protection system. Among them, the most challenging issues touch upon vulnerable people and groups. First of all, the relevance of the subject of research and some problems have been identified. Problems have acquired an international and trans-cultural character in modern jurisprudence. In particular, recent works devoted to the problems of legal protection of vulnerable persons are outlined. ***Research methods.*** From a methodological point of view, this study represents a system of methods that will form the basis for the development of a new legal interpretation theory. The possibilities of these methods have demonstrated an example of hermeneutic reconstruction and etymological analysis of the related basic terms and concepts. ***Results.*** This analysis allows us to make a preliminary conclusion that words, which mean such category of people as: outsiders, marginalized and alienated individuals, excluded groups and persons, an outlaw, form the core of the terminology relating to the vulnerable groups issue. Legal and doctrinal definitions and classifications of vulnerable persons in international instruments and scientific works were compared. The conceptual framework for the system of the vulnerable people and groups protection was specified. A separate system of international legal protection of the rights of vulnerable persons is not available yet. Therefore, the general procedure of international and national legal protection of human rights applies to them. The need to apply discretion of the subjects of human rights and the jurisdictional bodies that protect these rights should be taken into account. It is noted that discretion is necessary to combat the abuse of subjective rights, which is most specific for the protection of vulnerable persons. ***Conclusions.*** The most important conclusion is that the foundation of international and local systems for the protection of the vulnerable persons' rights is the case law of the European Court and national courts. Therefore, a key role in this process belongs to interpretation on the basis of the discretion of subjects for such rights.

Key words: human rights, vulnerable people and groups, case-law, protection of vulnerable persons, abuse, discretion.

1. Introduction

The Universal Declaration of Human Rights (UDHR) was proclaimed by the United Nations General Assembly in Paris on the 10th December 1948 (General Assembly resolution 217 A) as a common standard for all peoples and all nations. Thus, this milestone document affirms in its first article that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (United Nations, n.d.).

However, the effectiveness of the principles of freedom and equality is significantly limited by practical inequalities. A negative message about the future of the global order is a lamentable fact, that is, the formation of specific sectors of the population called vulnerable people and groups.

Protection of vulnerable people is both a problem for underdeveloped countries and the international community. Despite efforts and socially important goals of the European Union (EU) and the United States to reduce or eliminate disparities for the well-being of the people, significant risk factors continue in the vulnerable populations of those countries.

The core of human vulnerability is the low level of moral and material stability, which is generally called *poverty*.

At the same time, poverty is defined, commonly presented, as a condition of being unable to obtain or provide a standard level of life for themselves and families. It exists in every country in varying degrees and is unlikely to disappear anytime soon. The United States is considered the world's richest country, and 34 million of its residents are living in poverty (Debt.com, 2021).

It is a challenge not only to some, but to all, and this issue should be addressed by both national and global policies. For the above reasons, this problem has acquired an international and trans-cultural character in modern jurisprudence.

Studies by domestic authors are mong recent works devoted to the problems of legal protection of vulnerable persons: Yuri Belousov, Zlata Shvets, Viktor Semenyuk, Viktor Chuprunov, Sergei Shvets. Scientific articles by Alexandra Timmer and Lourdes Peroni (Timmer & Peroni, 2013) are noteworthy, as well as a systematic study by Yussef Al Tamimi (Al Tamimi, 2015). The most important works about the ECHR's interpretation are the publications by David John Harris, Michael O'Boyle, Colin Warbrick (Harris et al, 2009, pp. 5-21), Jukka Viljanen (Viljanen, 2008).

However, there is a clear lack of works clarifying the legal nature of vulnerable persons and, the most importantly, their general typology, which is designed to ensure a reliable qualification of the relevant persons.

Accordingly, there is a need to scrutinize and investigate this subject from new methodological points in order to re-examine a range of classical philosophical disputes, involving such doctrines as legal positivism, natural law, and legal interpretivism.

2. The methodological framework for assessing legal interpretation practice of human rights

From a methodological point of view, this study represents a system of methods which will form the basis for the development of a new legal interpretation theory. The foundation of such a theory is a "triune" system of methodology.

1. The system of general methods is directly formed on the basis of: philosophical hermeneutics, the philosophy of common sense, and the doctrine of European legal interpretivism.

Legal interpretivism, which is positioned as a "middle" way, seeks to reconcile the mechanics of the "quantitative" approach of legal positivism and the metaphysical speculation of the "qualitative" natural law approach.

At the same time, the philosophy of interpretivism gives holistic methods for clear priority. This is primarily manifested in the significance to take into account the clarification not of the "letter" but of the "spirit" of the law fact when evaluating the results of each act of interpretation.

The specificity of legal interpretivism is that the main subjective criterion is not the common sense of the abstract average person, but the common sense of the main subjects of law enforcement, especially for judges and arbitrators. Thus, the key to clarification of the essence of legal interpretation is its highest form – judicial and arbitration discretion.

"The courts are the capitals of law's empire, and judges are its princes, but not its seers and prophets. It falls to philosophers, if they are willing, to work out law's ambitions for itself, the purer from law within and beyond the law we have" (Dworkin, 1986, p. 407).

2. Special methodology is presented as a systemic unity of dogmatic, comparative and hermeneutic methods of law science. The third method is leading and involves the use of three main techniques: paradigmatic reconstruction, discretion and modeling.

Special attention should be given to construction as a useful compilation of hermeneutic techniques. It is usually conveyed in the following meaning: "the act of a lawyer or

court in interpreting and giving meaning to a statute or the language of a document... when there is some ambiguity or question about its meaning. In constitutional law, there is a distinction between liberal construction (broad construction) and strict construction (narrow construction). Liberal construction adds modern and societal meanings to the language, while strict construction adheres closely to the original language and intent without interpretation" (Law.com, n.d.).

3. The logical-linguistic and sociological methods for the meaningful study of documents and content analysis are the most productive among the applied methods. The choice of these methods is stipulated by the requirement to develop a terminological system of interpretive law as a logical-conceptual framework of theoretical construction, built on the basis of the hermeneutic method.

For these reasons, the possibilities of these methods demonstrate an example of hermeneutic reconstruction and etymological analysis of the related basic terms and concepts.

3. A historical reconstruction of the vulnerable people concept

The analytical techniques, historic reconstruction and etymological analysis have been proved to be the most effective for the paradigmatic reconstruction of the concept of vulnerable people.

Over the period of the empirical research, the data from *Online Etymology Dictionary* (around 30 words) were analysed (Online Etymology Dictionary, n.d).

All the received data were distributed into three groups of words.

Notions denoting an overview of vulnerability, first and foremost, have been interpreted. Twelve words came under the first category: *fool, wretch, refuse, harlot, truant, waif, ribald, gad, knave, varlet, misfit, and abject.*

The second group comprises notions representing social isolation and exclusion. It included the following words: *outcast, pariah, ronin, Ishmael, izgoi, exile, ejection, relegate, diaspora*.

The third group is composed of the words denoting the *legal consequence* of the vulnerable state: *outlaw, friendless, bandit, furtive, fugitive, rogue, picaroon*.

Emphasizung universal vulnerability, the work introduces the reimagining of the notion and typology of the vulnerable people and groups in human rights law. All the aforementioned facts lead to the following conclusions:

This analysis allows us to make a preliminary conclusion that words, which mean such category of people as: outsiders, marginalized and alienated individuals, excluded groups and persons an outlaw, form the core of the terminology relating to the vulnerable groups issue.

Instruments of human rights usually set out additional guarantees for persons belonging to the vulnerable people and groups.

It should be noted that the usable instruments of international law exist, but on the occasion, individuals, their communities and national institutions ignore them for their own ends.

Better socialization of vulnerable people can eliminate a major cause of vulnerability– marginalization and alienation of these persons.

4. Legal definition of "vulnerable people and groups": experience and problems

This historical reconstruction is the base of modeling (construction) an orderly terminology used to understand the essence and legal nature of vulnerability state.

In spite of its apparent simplicity, defining the concept of vulnerable people and groups is the extremely difficult problem.

Thus, at the level of official projects, it declares although the word "vulnerable" is now widely used in various spheres of life, the exact definition of this concept remains unattainable (Miles, n.d., p. 13).

It is regrettable that some scientific researchers support the assessment of such situation (Al Tamimi, 2015).

Therefore, it is helpful to take advantage of such a working definition: Vulnerable persons are called "particular groups who, for various reasons, are weak and vulnerable or have traditionally been victims of violations and consequently require special protection for the equal and effective enjoyment of their human rights" (Icelandic Human Rights Centre, n.d.).

We recognize that this definition, though valuable, would need further elaboration, clarification and development, including validation and piloting through alternative interpretation.

It is necessary to take into account attempts for the formal definition of vulnerable persons in international instruments.

In particular, there is Article 3 (f) of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, which provides the following legal definition:

"f) "vulnerable person" means a person who, by reason of an impairment or insufficiency of his or her personal faculties, is not able to support him or herself" (Hague Conference on Private International Law, 2007).

At the same time, notion "interpretation" is close to the concept of "translation". An international legal discourse demonstrates that these terms are often used in parallel and, sometimes,

interchangeably. Therefore, there are diverse questions to be raised about the concepts.

We also acknowledge the importance of a culture of translation as an element of "accident" prevention during the legal interpretation.

The fact is that the Ukrainian word "urazlyvyi" is difficult to translate into English (there is a so-called undefined translatability) and, as linguists say, is a word with a "linguospecific semantic component".

A fundamental distinction should be made between ukr. *urazlyvyi* (eng. Vulnerable) and the concepts ukr. v*razlyvyi* (eng. Susceptible) with ukr. urazhenyi (eng. affected, amazed, disbarred). These words are mistaken for synonyms due to the usual alternation of the corresponding letters. It is the circumstance that must be taken into account when interpreting the text of the legal content.

Only ignoring this guideline can explain the unfortunate inaccuracy of the English translation for the relevant part of the Criminal Code of Ukraine (CCU) in Legislationline.org, the online human rights legal database (2002) (OSCE, n.d.).

Thus, in the text of Art. 149, 258-1 and 303 CCU, "urazlyvyi stan osoby" is translated as "vulnerable state of a person".

However, in note 2 to Art. 149 of the Criminal Code, a slightly different term "a susceptible state of a person" is used. Conversely, this judgment should be interpreted as a "sensitive human condition".

As a result, our foreign colleagues in the process of international legal cooperation must be warned about this inaccuracy every time.

It is difficult to explain why the legislative body, the Verkhovna Rada of Ukraine, does not always agree on the meaning of the same terms in different areas of legislation.

For example, the drafters of the Law of Ukraine as of April 9, 2015 № 329-VIII "About the natural gas market" use a certain term in Art. 16 regardless of the relevant articles of the Criminal Code. The English version of this term is represented in the unofficial translation of this Law not as sensitive or susceptible, but as vulnerable consumers (Naftogaz of Ukraine, 2016).

The use of the adjective "vulnerable" in relation to the noun "consumer" raises reasonable doubts. Thus, the mental unity of the current legislation is ruthlessly destroyed.

The Verkhovna Rada cunningly avoids this problem and uses technical tricks. The legislator does not provide an authentic interpretation of this concept in the Law, and in Part 1 of Art. 16, refers to the fact that the criteria for classifying consumers as "vulnerable" are set by the Cabinet of Ministers of Ukraine.

5. Basic approaches to the classification of vulnerable people and groups

Vulnerable persons and groups are usually classified as: women and girls, children, refugees, stateless persons, national minorities, migrant workers, disabled persons, elderly persons, HIV positive persons and AIDS victims, lesbian, gay and transgender people, and other vulnerable segments of the civilian population. They are increasingly becoming the direct targets of violence, discrimination, persecution, intolerance and exploitation.

Vulnerable populations, within the United States, typically include such categories of persons: (1) the economically disadvantaged; (2) racial and ethnic minorities; (3) the uninsured; (4) low-income children; (5) the elderly; (6) those with human immunodeficiency virus (HIV); (7) those with other chronic health conditions, including severe mental illness (Robert Wood Johnson Foundation, 2001).

In the United Kingdom and other Commonwealth countries, it is now proposed to show a separate sub-category: people infected with coronavirus COVID-19 and most of them at the risk of getting seriously ill. They are known as *clinically extremely vulnerable* (NHS, 2021).

The identification of the different types of vulnerable people on the basis of separate criteria was the most realistic and effective way to clarify the nature of this social group. The following classification criteria are established:

1. The classification of vulnerable people based on personal characteristics is the most widespread: (a) by gender: women and girls; (b) by age: children and elderly persons.

2. On the grounds of citizenship or belonging to a certain local community. Such groups consist of the category of persons restricted in their freedom of movement and related rights to work and asylum: foreign citizens and stateless persons, migrant workers, refugees, internally displaced persons, illegal migrants, homeless persons (persons with no fixed abode) or people without a fixed address, street sleepers.

3. On ethnic grounds: minority indigenous peoples, other races / specie, different racial groups, national minorities and ethnic minority group.

4. On the basis of religion: representatives of religious minorities, separate groups of the population united by the faith non-traditional for the majority of the population (minority faith-based groups) and separate religious communities (different religious congregations). Nowadays, in comparison with Antiquity and the Middle Ages, active atheists are quite vulnerable to this feature.

5. By the state of health: disabled persons, HIV positive persons and AIDS victims, mentally ill.

6. By sexual orientation: lesbians, gays, bisexuals, transgender people and other persons who can be classified as LGBT-communities.

7. On political grounds: opposition figures (opponents), lustrated persons, separatists or secessionists, extremists, anarchists, dissidents, deportees, etc.

8. On the basis of criminal law: representatives of the criminal world (criminals), including recidivists, detainees or detained persons, prisoners, war prisoners or prisoners-of-war, probationers, probation parolees, persons with a criminal record or persons with previous convictions, etc.

The position of some judges is considered to be appropriate, which additionally distinguishes the following categories of vulnerable persons and groups: 1) persons who find themselves in a difficult financial situation (have low incomes due to unemployment, a lack of a breadwinner, physical disabilities, low level of professional training, etc.); 2) spouses who have serious conflicts in the family; 3) incomplete and disadvantaged families in which the child is raised by only one parent, or in which there are serious conflicts; 4) children who have problems related to their socialization and schooling, as well as their families; 5) people who are in a state of stress due to events that traumatize their psyche (retirement, death of a loved one, etc.).

The presented classification is not complete and final. This is not an exhaustive list of persons for the requirement of particular protection, as many other groups suffering from discrimination and oppression have not been discussed in this part.

6. The conceptual framework for the protection system of vulnerable people and groups protection

A separate system of international legal protection of the vulnerable people's rights does not yet exist. Therefore, the general procedure applies to them for the international and national legal protection of human rights.

Thus, in the modern world, there is a universal holistic system of international legal protection of human rights.

The main sources for understanding the concept of international legal protection are so-called universal human rights instruments, which primarily comprise the following:

1. The International Bill of Human Rights, which includes:

The Universal Declaration of Human Rights (UDHR), adopted by a resolution of the UN General Assembly on December 10, 1948, as well as two pacts adopted by resolutions of the UN General Assembly on December 16, 1966, namely: The International Covenant on Civil and Political Rights of 1966 and its two optional protocols;

The International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 and its Optional Protocol.

2. In addition to the Bill of Human Rights, several other conventions are singled out, which together form the Core of International Human Rights Instruments, including:

The United Nations Convention on the Elimination of All Forms of Racial Discrimination (ICERD), was adopted in 1965 and it entered into force in 1969;

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which entered into force in 1981;

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted in 1984 and entered into force. in force in 1987;

The United Nations Convention on the Rights of the Child (CRC) was adopted in 1989 and it entered into force in 1990;

The United Nations International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) was adopted in 1990 and it entered into force in 2003;

The United Nations International Convention for the Protection of All Persons from Enforced Disappearance (CED) was adopted in 2006 and it entered into force in 2010;

United Nations Convention on the Rights of Persons with Disabilities (CRPD) was adopted in 2006 and it entered into force on 3 May 2008.

Together with this Core, the rest of the international humanitarian conventions create the whole array of international human rights instruments.

The European system of human rights protection is formed by the regional international conventions of the Council of Europe. According to the latest data from the Treaty Office of the Council of Europe, there were 225 international treaties of the Council of Europe. (Council of Europe, n.d.).

As everyone knows, the basic one is the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which was opened for signature on November 4, 1950, and entered into force on September 3, 1953.

The European Court of Human Rights = Cour européenne des droits de l'homme (ECtHR) was established to provide proce-

dural supranational support for the implementation of this European Convention.

The ECtHR is competent to issue more than ten types of decisions (Court's judicial formations), of which three types are the main ones: (1) inadmissibility decision, (2) decision on inadmissibility or admissibility; (3) judgment.

Thus, the main source of legal interpretation was formed in the field of human rights protection in the law of the Council of Europe. This is the case law of the ECtHR, which includes the following acts:

interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms;

interpretation of a previously issued resolution at the request of the Committee of Ministers of the Council of Europe;

with some reservations, the case law of the ECtHR includes advisory opinions on the interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms on matters not related to cases.

7. The discretionary nature of the protection of vulnerable persons and counteraction to abuse of their rights: a problem statement

There is no dispute that any international human rights instruments implemented by the authorities should be rooted in domestic law.

However, there must be safeguard in the domestic legal system to secure against arbitrary interference from the State. The ECtHR points out that the law should be phrased in a way that is reasonably understandable for that are affected by it. Any law phrased in a way that opens for discretionary assessments should ensure that "...the scope of the discretion and the manner of its exercise are indicated with sufficient clarity..." to ensure the individuals protection against arbitrary interference (Olsson v. Sweden (No.1), 1988, para.61, Margareta and Roger Andersson v. Sweden, 1992, para.75) (Trond, 2019, p. 69).

Such a legal remedy, which provides variability and a certain freedom of action, is the discretion of the subjects of human rights and jurisdictions that protect these rights. In other words, it is «the freedom to decide what should be done in a particular situation» (Lexico.com, n.d.).

Modern researchers of human rights protection note that in this area "discretion is used in many forms every day. ... Within the ECtHR discretion is exercised by all decision-making bodies of the Court. In short, discretion is exercised at all bureaucratic levels. In the legal sphere, judicial discretion is an important part of the decision-making. Discretion enables legal rules to be interpreted and, therefore, makes the rules applicable to the different merits of each case" (Trond, 2019, p. 20-21).

In particular, judges in child welfare systems are granted discretion in making decisions about family structures, which are characterized in the literature as immensely difficult. However, these sources require interpretation and are open to contrasting views (Juhasz, 2020, p. 8).

It is important to note that discretion is needed to combat the abuse of objective law and subjective rights, which is the most specific to protecting vulnerable people.

Unlike other areas of law, the qualification of certain persons as vulnerable is absolutely insufficient for the application of international legal instruments and acts of national legislation. It is critical to identify the fact of abuse of the rights of some persons in a vulnerable situation. Such qualification cannot be carried out on the basis of legal norms, which are also abused in these cases. Consequently, there is an urgent need for discretion.

In terms of legal protection of the vulnerable people's rights, various authors have described the difficulties in accurately predicting future abuse "because of the complexity of the causal influences on the individual" (Mitchell, 2009, p. 88-89).

Therefore, abuse is the "root and nerve of the whole proceeding" in the protection of vulnerable persons (Holmes, 2018, p. 19-44).

However, the need for its detection is exacerbated by the fact that the "multiplicative" impact of combinations of factors increases the risk of harm to vulnerable people (Juhasz, 2020, p. 1).

8. Conclusions

These conclusions are not the last word on the subject. It only allows synthesizeing thoughts, which have been mentioned in the paper, to demonstrate the importance of this ideas, and propelling a reader to a new view of the subject.

Conaequently, the following reduction is proposed:

1. It is expedient to distinguish in principle the concepts: (1) "Vulnerable People and Groups", (2) "Vulnerable Persons", (3) "Vulnerable position of a certain person" or "The Person in a Vulnerable Situation). Thus, it is possible to define vulnerability as the position of a certain person in the appropriate state under certain circumstances (in a vulnerable situation).

2. Clarification of the general characteristics of all three concepts through the in-depth meaningful development of the basic concept of "vulnerability" allows us to consider this conceptual triad as: (1) common vulnerabil-

ity of the group; (2) potential vulnerability of the person; (3) personal / articular vulnerability of the person.

3. Human rights are protected as natural and legal rights at the national and international levels. However, it should be borne in mind that it is not the human rights objects that are protected, but the people themselves from being violated in their natural and legal rights to these objects. Such an understanding should help to protect all people everywhere from severe political, legal, and social abuses (Nickel et al., 2013).

4. Based on the fact that the foundation of international and local systems of protection of the rights of vulnerable persons is the case law of the European Court and national courts, a key role in this process belongs to litigation. Therefore, an interpretation based on the discretion of the subjects of such rights is crucial for understanding the need for judicial protection.

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ЗАХИСТ УРАЗЛИВИХ ОСІБ ТА ГРУП: ФІЛОСОФСЬКА Й ІНТЕРПРЕТАЦІЙНА ПРАКТИКА ДЛЯ УКРАЇНСЬКИХ СУДІВ ТА АРБІТРАЖІВ

Анотація. ***Мета.*** У статті автор досліджує актуальні питання захисту прав уразливих осіб, здебільшого герменевтичні, а саме визначення базових понять та їх класифікацію. Актуальність порушеної проблематики зумовлена прикрим фактом формування певних верств населення, які вважаються уразливими особами та групами. Ця проблема в сучасній юриспруденції набула міжнародного і транскультурного характеру. Є необхідність ретельного вивчення цього предмета, причому з нових методологічних позицій, для переосмислення низки класичних філософських спорів, що торкаються таких доктрин, як правовий позитивізм, природне право та інтерпретивізм. ***Методи дослідження.*** Правовий інтерпретивізм є ядром застосовуваної методології. Він позиціонується як «серединний» шлях і намагається примирити механіку «кількісного» підходу юридичного позитивізму та метафізичну умоглядність «якісного» підходу філософії природного права. Аналітичні методи, історична реконструкція та етимологічний аналіз виявилися найбільш ефективними для парадигматичної реконструкції поняття уразливих осіб. ***Результати.*** За час емпіричного дослідження проаналізовано дані етимологічного інтернет-словника (близько 30 слів). Цей аналіз дає змогу зробити попередній висновок про те, що слова, які позначають такі категорії людей, як аутсайдери, маргінальні й відчужені особи, виключені групи та особи поза законом, становлять ядро термінології, що стосується проблеми уразливих груп. Визначення різних типів уразливих осіб на основі окремих критеріїв виявилося найбільш реалістичним та ефективним способом з'ясування природи цієї соціальної групи. Виявлено, що окремої системи міжнародно-правового захисту прав уражених осіб поки що немає. Тому щодо них застосовується загальний порядок міжнародного й національного правового захисту прав людини. Варто враховувати необхідність застосування

дискреції суб'єктів прав людини та юрисдикційних органів, які ці права захищають. Зазначається, що дискреція необхідна для боротьби зі зловживанням суб'єктивними правами, що є найбільш специфічним для захисту уразливих осіб. ***Висновки.*** На відміну від інших галузей права, у праві прав людини кваліфікації певних осіб як уразливих абсолютно не досить для застосування міжнародних правових інструментів та актів національного законодавства. Необхідно встановити факт зловживання правами певних осіб, що потрапили в уразливу ситуацію. Така кваліфікація не може здійснюватися на основі правових норм, якими в цих випадках також зловживають. Саме тому виникає гостра потреба в дискреції. Тому логічним є висновок про те, що зловживання – це «корінь і нерв усього процесу» у сфері захисту уразливих осіб. Необхідність його виявлення посилюється тим фактом, що «мультиплікативний» вплив комбінацій різних факторів збільшує ризик заподіяння шкоди уразливим особам.

Ключові слова: права людини, уразливі особи та групи, прецедентне право, захист уразливих осіб, зловживання правом, дискреція.

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