

INTERNATIONAL INSTITUTIONAL, POLITICAL AND LEGAL MECHANISMS OF THE NATIONAL MINORITIES RIGHTS PROTECTION IN UKRAINE

МІЖНАРОДНІ ІНСТИТУЦІЙНІ ТА ПОЛІТИКО-ПРАВОВІ МЕХАНІЗМИ ЗАХИСТУ ПРАВ НАЦІОНАЛЬНИХ МЕНШИН В УКРАЇНІ

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The international and domestic legal framework for the protection of the national minorities rights in Ukraine is studied. It is shown that in the international legal framework special attention is paid to the substantiation of the legal status of the concept of "national minorities". Peculiarities of legislative protection of the national minorities rights in Ukraine in social, cultural, linguistic spheres are analyzed.

Keywords: nation state, national policy, national minorities, ethnic minorities, ethnic groups, indigenous peoples.

Досліджується міжнародна та вітчизняна нормативно – правова база захисту прав національних меншин в Україні. Показано, що у міжнародній законодавчій базі особлива увага звертається на обґрунтування правового статусу поняття «національна меншина». Проаналізовано особливості законодавчого захисту прав національних меншин України у соціальній, культурній, мовній сферах.

Ключові слова: національна держава, національна політика, національні меншини, етнічні меншини, етнічні групи, корінні народи.

(стаття друкується мовою оригіналу)

The study of the ethno-national structure of Ukrainian society involves first of all determining the content of its basic categories. We are talking primarily about the categories «national minority», «ethnic minority», «ethnic group», «ethnic community», «ethno-national group». As a rule, these concepts are used by scholars and politicians in their works, defining different categories of the population that belong to national minorities. Each individual state, taking into account its own historical and political realities, gives its definitions to the subjects of ethno-national policy, develops its own approach to the realization of their rights. There is no unity on the content of ethno-political terms among domestic researchers. And although nothing fundamentally new has been proposed in the field of theoretical ethnology, the very fact of active discussion on the problems of ethnicity shows that this or that point of view cannot be considered final, even if it is recognized by most researchers today.

According to the United Nations and UNESCO documents, a nation-state is one in which the titular people make up 67% of the country's population. According to the 2001 All-Ukrainian Census, in Ukraine, in addition to 37.6 million (77.8%) Ukrainians, there are representatives of another 15 ethnic communities. These are Russians - 8.3 million (17.3%), Belarusians - 275.8 thousand (0.6%), Moldovans - 258.6 thousand (0.5%), Bulgarians - 204.6 thousand (0.4%), Hungarians - 156.6 thousand (0.3%), Romanians - 151 thousand (0.3%), Poles - 144.1 thousand (0.3%). [24, p. 114]. By January 1, 2000, 256 thousand repatriates from among the Crimean Tatars came to the Crimea for permanent residence (27% of them were concentrated in cities, and 73% in villages, forming three hundred new settlements and neighborhoods in cities) [17, p. 345-346].

Along with the titular Ukrainian nation, civil society in Ukraine is made up of 135 nationalities representatives. The rest 0.1 – 0.2% are small ethnic communities: Jews – 103.6 thousand, Armenians - 99 thousand, Greeks – 91.5 thousand, Azerbaijanis – 45.2 thousand, Germans – 33.3 thousand, Gagauz – 31.9 thousand. More than 36 representatives of different ethnic groups in Ukraine, numbering from one to 10 thousand and living mostly scattered in the cities of Ukraine, belong Koreans, Uzbeks, Mordovians, Latvians, Tajiks, Bashkirs, etc. Nowhere in Ukraine do they live compactly and are Soviet-era migrants who have been sent to work and have mixed marriages. To these 135 representatives of the peoples still belong 79 communities, which number from 3 to a hundred: Aleutians - 6 people, Itelmen - 18 people, Udegei - 42 people, Tuvans - 43 people, Mansi - 43, Toflari - 18 people, dolgani - 26, yukagiri - 12 people etc. But they cannot be considered national minorities given the recent settlement and small numbers [3].

It should be noted that for a long time the communist authorities of the USSR tried to dissolve the Ukrainian nation by representatives of other national communities, especially the Russians. Official Soviet propaganda actively exploited definitions such as «the peoples of Ukraine», «Soviet Ukraine is a multinational republic», «Ukraine is the homeland of the Soviet peoples» etc. The purpose and meaning of the dissemination of such formulas is obvious - to question the right of the Ukrainian people to their independence and nation-building. Therefore, according to domestic researchers, today in the process of consolidation of the Ukrainian nation a key role should be played by ethno-national factors (relations between ethnic entities titular nation - national minorities - indigenous peoples), as well as relations within a particular ethnic group that reflect socio - historical and political – economic conditions of its life, ethnic status, traditions, norms, priorities and values [4, p. 318 - 319].

The content of the concept of «national minority» is specified in international legal instruments, in particular in United Nations Working Document E / 74/72/25/1996 W31 «Definition of Minorities» (1996), which addresses this legal category in connection with other related concepts. Article 1: «Minority means a group of people who permanently reside in

the territory of a state, that is a numerical minority in relation to the rest of the population of that state and constitutes less than half of its population, have national, ethnic, religious, linguistic and other related characteristics, culture, traditions, etc., which differs from the corresponding characteristics of the rest of the population, and which shows a desire to preserve the existence and identity of such a group. Also in Art. 5 of this document states that minorities do not include: a) indigenous peoples; b) groups of persons who are considered as peoples and, accordingly, have the right to self-determination; c) groups of persons who have the above-mentioned characteristics and clearly do not aspire to their identity; d) groups of persons who have the above characteristics, but are so small that there is no objective possibility to establish a special regime to protect them [32, p. 48]. There is also a caveat (Article 6) that when there are doubts that groups do not seek to preserve their identity, there is a presumption that they do, and therefore each group is given the most favorable treatment conditions.

The most common and successful is the definition of «national minority», authored by a member of the UN Subcommittee on Human Rights F. Capotorti. He believes that a national minority: 1) is a group of the population that differs from the main group of the population by its ethnic origin, or by its nationality, or by its language, or by its religion; 2) its number is inferior to the main group of the population; 3) does not occupy a dominant position in the country; 4) demonstrates a desire to preserve their identity and their culture, traditions, religion or language; 5) does not consist of recent migrants or refugees; 6) has deep roots in the country of residence (usually citizens of this country) [4, p. 307]. It should be noted that discussions on the issue of defining the concept of «national minority» in the UN Special Sub - Commission have been conducted for more than 40 years without any positive result. This was influenced by the policies of the governments of a number of countries that were not interested in granting any special rights to national groups in their territory. They interpreted this as a threat to the integrity of the state. Only at its 24th session the Subcommittee adopted a resolution appointing a Special Rapporteur, F. Rapotorti. 46 countries sent their information to the Subcommittee, taking into account the work of UN special bodies. Based on them, the 30th session considered the final report of the Subcommittee, which was published in 1979 [14, p. 27; 34].

The definition of a «national minority» is generally based on subjective and objective criteria. The objective ones obviously include: numerical minority, period of residence in the state and citizenship, stable ethnic characteristics (ethnic, linguistic, religious, cultural features, minority consolidation), non-dominant position, lack of own statehood in the territory of residence. A pragmatic desire to maintain the status quo (preservation of existing characteristics) pertains to the subjective ones. Until now, in Ukraine there was an opinion that the «national minority» is certain groups of the population in the state, linguistically and culturally different from the titular nation, which have their own past and seek to exist as a national community.

Three main types of national minorities were outlined: 1) the whole nation is within one state (Bretons, Lusaitians); 2) the people are divided between two or more states (Catalans, Basques, Kurds); 3) a national minority is a part of the people that has its own state (Poles, Germans, Hungarians, etc.). The main feature of the national minority was the presence of their own statehood outside the country of residence [9, p. 432].

Some domestic researchers are wary of the term «minority», considering it offensive, instead using the term «national and ethnic group». In international documents, in particular, in the «Declaration on Prospects for Cooperation between Ukraine and the Republic of Georgia and Common Approaches to International Relations» (1995), the term «ethno-national minority» is used, although the meaning of «national minority» is retained. In addition, in the «Agreement on good neighborly relations and cooperation between Ukraine and Romania» Romanians living in Ukraine are recognized as a national minority [1, p. 4]. In the works of Ukrainian researchers, identification, replacement of the concept of «national minority» with «ethnic minority» or «ethnic community» is increasingly observed. This is due to the formation of a new scientific field in Ukraine - ethno-state studies, tolerant attitude towards representatives of all nationalities and setting such goals and objectives in the state ethno-national policy, which allow the titular ethnos to be not a subject but a full-fledged object of state policy. However, these concepts are not identical, as the concept of «ethnic minority» is much broader in meaning than «national minority».

Most modern domestic scholars characterize the concept of «national minority» by several criteria: 1) the condition of the ethnic minority as a whole structure is its interaction with other ethnic groups of the country of residence, in the process of which is filled with the formula «we – they»; 2) ethnic minority is a clearly defined status in the relations that are formed in a polyethnic society, where the basic formula is «majority – minority»; 3) an ethnic minority is a kind of community of people, which is based on their social origin, has common linguistic and cultural characteristics, psychological orientations and awareness of belonging to this community; 4) the boundaries of the term «ethnic minority» are determined by its relationship with the term «ethnic group» and «national group». Hence the conclusion that the «national minority» is a kind of «ethnic», with a clearly defined status in a polyethnic state and special administrative relations with it, and therefore - clear political goals, claims to a special status in the system of administrative - state relations [15, p. 27]. The main feature of the «ethnic minority» is the ability to self-reproduction, as evidenced by the natural growth in the group, the transmission to the next generation of ethnic consciousness, self-identification.

It is worth noting that in foreign and domestic science, along with the term «ethnic group» the term «national group» is often used. Usually these two concepts are used as synonyms. At the same time, a national group is considered to be a group of people who have broken away from the main mass of the ethnos that

created its state and formed its nation. Ethnic and national groups have more in common than different. It should be noted that the term «ethno-national group» was introduced into scientific circulation, which integrates these two concepts. Characteristic of ethno-national groups is that: first, in the countries of their residence, they usually do not have their own national statehood; secondly, they have their own history, but do not have their own historicity, ie they manifest themselves in the field of culture and are not active historical subjects; thirdly, and this should be emphasized, they behave mainly as interest groups, demanding a fair division of labor, better conditions for education and a voice in foreign policy-making. These features must be taken into account when developing and updating the state concept of ethno-national policy and its implementation [16, p. 45].

Various approaches to the interpretation of the concept of «national minority» are characterized not only by scientific schools, but also by the laws of different countries, international legal acts. Virtually all documents of international law do not contain a clear and unambiguous definition of the term «minority». This makes it much more difficult to use it in cases of legal application. The states of the European Union, especially Central and Eastern Europe, generally avoid the use of the term «peoples» in their legislation. Thus, the Slovenian Constitution uses the term «indigenous Italian and Hungarian ethnic communities». The concept of «Gypsy communities» is used separately [30]. The Hungarian Constitution uses the terms «national and ethnic minorities» [31]. The Republic of Croatia uses the terms «nation» and «minority» [7]. The Czech Republic, in turn, uses the term «national and ethnic minorities» [22]. The normative and legal meaning of these terms is specified in other legislative acts, as in recent years the question of whether a democratic state can afford such treatment of minorities, when their representatives would be given preference over other categories of citizens, has become relevant.

European concepts of minorities are not universal, as the governments of the EU member states have the right to determine the fact of the presence or absence of national minorities in the legal sense, to establish their own characteristics. In Germany, for example, national minorities include groups of people who, in addition to their own identity based on linguistic and cultural differentiations from the majority of the population, are traditional residents of Germany and live in traditionally established regions. Thus, Germany does not recognize the existence of minorities other than national minorities and ethnic groups whose members have German citizenship. Similar provisions are contained in the national legislation of Switzerland, Poland and others [6; 21].

Among European states, one of the most successful legislation on the protection of the rights of national minorities is the legislation of Hungary. The Hungarian Constitution, adopted in 1989, proclaimed the right of minorities to preserve their own culture, language and religion. In 1993, a separate Law on the Rights of National Minorities and Ethnic Minorities was adopted, which regulates the cultural autonomy of national

and ethnic minorities and defines the very concept of a national minority as a national or ethnic group that has lived in the country for at least one hundred years. It is a minority in terms of the total population, whose members are Hungarian citizens who differ from the rest of the population in their language, culture, traditions and show a sense of community, which aims to preserve their values and protect the interests of their historically formed communities [20; 13, p. 64 - 65].

In the practice of Ukrainian legislation, the term «national minority» was first used in the Law «On National Minorities in Ukraine» of June 25, 1992. In Article 3 of this law, national minorities are defined as «groups of citizens who are not Ukrainians by nationality, self-awareness and commonality with each other» [26, p. 34]. This definition does not contain any clear criteria by which representatives of one or another ethnic group of Ukraine could be included in national minorities. It does not determine the temporal criteria of stay in the territory, nor a certain quantitative characteristic, nor the presence of its own historical homeland, and so on. In this regard, in Ukraine, in fact, minorities can quickly emerge due to naturalized immigrants. It is one thing when the number of Crimean Tatars, who are not immigrants but repatriates, has increased 5.3 times, and another situation with representatives of Caucasian nationalities. During the 90s of the twentieth century in Ukraine, with a general decrease in the total population, the number of Armenians increased 1.8 times, Georgians - by 45%, Azerbaijanis - by 22%. The increase in these and other groups was apparently due to people who were not historically associated with Ukraine.

The definition of this concept is also found in international legal instruments, namely in the «Treaty on Good Neighborly Relations between Ukraine and Romania», which was ratified by Law № 474/97 - VR of July 17, 1997. Yes, part 2, paragraph 2 Article 13 of the Treaty defines the Romanian national minority in Ukraine. It is noted that the minority should include «citizens of Ukraine, regardless of the regions where they live, and who, according to their free choice, belong to this minority, taking into account ethnic origin, language, culture or religion» [2]. The agreement with Romania clearly outlines the legal framework that the Ukrainian state and the Romanian national minority should be guided by. These are the 1994 Council of Europe Framework Convention for the Protection of National Minorities, the document of the OSCE Copenhagen Conference on the Human Dimension of 29 June 1990, the UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities (Resolution 47/135) of 18 December 1992, Recommendation 1201 of the Parliamentary Assembly of the Council of Europe on the Additional Protocol to the European Convention on Human Rights on the Rights of National Minorities of 1993, as regards the latter document, it is noted that these Recommendations do not affect collective rights or obligations. oblige Ukraine to grant the national minority the right to a special status of territorial autonomy based on ethnic criteria) [8; 11; 33].

This approach is fully in line with international law. One of the basic European documents in the field of protection of minority rights is the Framework Convention for the Protection of National Minorities, which Ukraine ratified after joining the Council of Europe in December 1997. It does not define the term «national minority». The Framework Convention clearly identifies three aspects: 1) respect for the territorial integrity and national sovereignty of the States Parties to the Convention; 2) the right of every person belonging to a national minority to decide freely whether or not to be considered as such, and that this decision or the exercise of rights in connection with it shall not prejudice such person; 3) parts of the state shall seek to achieve, in all spheres of economic, social, political and cultural life, full and genuine equality between persons belonging to national minorities and persons belonging to the majority of the population. The Convention and the Explanatory Report to it state that «a pluralistic and truly democratic society must not only respect the ethnic, linguistic and religious identity of every person belonging to a national minority, but also create appropriate conditions for the identification, preservation and development of that identity» [12, p. 103]. As the very title of the Convention implies, it is a framework document and contains mainly legal principles that states undertake to adhere to and the goals they must achieve. According to paragraph 11 of the Explanatory Report to the Framework Convention, its provisions will not be directly applicable. The States concerned have a certain opportunity to take into account the specific circumstances, to act at their own discretion in carrying out the tasks which they have undertaken to solve. The practical implementation of the principles of the Framework Convention will be carried out through national legislation and relevant public policy.

By ratifying this international legal instrument, Ukraine has in fact recognized international standards in the policy and legislation on national minorities. It should be noted that the legal status of national minorities includes not only rights but also responsibilities. Article 2 of the Law of Ukraine «On National Minorities in Ukraine» states that citizens of Ukraine of all nationalities are obliged to abide by the Constitution and laws of Ukraine, protect its state sovereignty and territorial integrity, respect language, culture, traditions, religious identity of the Ukrainian people and all national minorities. In addition, the Hague Recommendations on the Rights of National Minorities to Education (1996) in Art. 1 fix the obligation of national minorities to integrate into the wider society of the state through proper command of the state language [28, p. 136].

They state: first, that the right of persons belonging to national minorities to preserve their identity can be fully realized only when they are fluent in their mother tongue in the learning process. At the same time, persons belonging to national minorities are obliged to integrate into the wider society of the state through proper command of the state language. Secondly, the state language should be the subject of constant teaching, preferably by teachers who speak two languages and

know well the level of cultural and linguistic training of children. During this period it is necessary to constantly and gradually increase the number of subjects taught in the state language. The Hague Recommendations were fully taken into account by Ukraine in the preparation and adoption of the Laws «On Education» (September 5, 2017) and «On ensuring the functioning of the Ukrainian language as the state language» (April 25, 2019) [18; 19]. The adopted laws closed most of the «white spots» on the status of the Ukrainian language, but did not restrict the rights of national minorities.

The Oslo Recommendations on the Linguistic Rights of National Minorities and the Explanatory Note to (1998) propose to provide national minorities with the opportunity to integrate into all spheres of public life, but provided they have a good command of the languages of the countries in which they live [27, p. 152]. An important international document that has become part of Ukrainian legislation is the European Charter for Regional or Minority Languages, which Ukraine signed in Strasbourg in May 1996 and ratified on May 15, 2003 [30, p. 318]. Given the impossibility of ensuring compliance with the obligations arising from the Charter in respect of all (over 130) ethnic groups living in Ukraine and may be considered national minorities under current legislation, as well as due to the right (according to paragraph 1 of Art. 3 of the Charter) of each country to determine the languages to which it undertakes to apply the provisions of the Charter, it has been provisionally decided to determine a number of such languages. The European Charter itself contains the principles that define the concept of «regional or minority languages». These are languages that: 1) are traditionally used within a certain territory of a state by citizens of that state, forming a group that is smaller in number than the rest of the population of that state; 2) are a means of communication for a certain number of persons, which justifies the implementation of various protective and incentive measures provided for in this Charter. The Verkhovna Rada of Ukraine decided that the provisions of the Charter can be applied to the languages of 10 national minorities: Belarusian, Bulgarian, Gagauz, Greek, Jewish, Crimean Tatar, Moldavian, German, Polish, Russian, Romanian, Slovak and Hungarian [10, p. 318 - 344].

Given that in the political and legal space of the polyethnic states of Europe there is a constant controversy about the status of national minorities and the realization of their rights, the problem of terminological definitions remains relevant in the future. Current legal documents of Ukraine ambiguously interpret the legal status of the subjects of Ukrainian society. They use the concepts: 1) «people», «ethnic groups», «national groups» - the Declaration of the Rights of Nationalities of Ukraine (November 1, 1991); 2) «national minorities» - the Law «On national minorities in Ukraine» (June 25, 1992); 3) «national minorities», «indigenous peoples» - the Constitution of Ukraine (1996). The concept of «indigenous peoples» was first used in Art. 11 of the Constitution of Ukraine [29, p. 120]. It recognizes that, in addition to the titular nation - the Ukrainians, «indigenous», there are other peoples and national minorities. The Ukrainian state

promotes the consolidation and development of the Ukrainian nation, its historical consciousness, traditions and culture, as well as the development of ethnic, cultural, linguistic, religious identity of all indigenous and national minorities. However, there is no definition of this concept in the legal documents of Ukraine.

In Ukrainian society, the concept of «indigenous people» is mainly interpreted as an indigenous ethnic community, whose ethnogenesis took place within the modern borders of Ukraine, is an ethnic minority in its population and has no state of its own outside the Ukrainian state. The use of the term «indigenous peoples» in the legal field of Ukraine, its inclusion in a number of articles of the Constitution is quite controversial in ethnopolitical practice. Thus, some researchers and politicians defend its use only in the understanding of the titular ethnic group, others involve 3-4 more peoples of southern Ukraine, others seek «indigenous national minorities», at their own discretion, interpreting Art. 11 of the Constitution. It is clear that many representatives of ethnic groups whose ancestors lived in Ukraine, including Romanians and Moldovans of Bukovina, Bulgarians and Gagauz of the Budzhak steppe, Russians of Slobozhanshchina and the South, Hungarians of Transcarpathia, Crimean Tatars, Karaites of Crimea, want to declare their indigenous status. International practice shows that the main feature for defining the concept of «indigenous peoples» is the absence of a homeland outside the country of residence. If the main feature of the concept of «indigenous people» to determine the absence of state education outside Ukraine, then this status can claim the Crimean Tatars, Karaites, Crimean Tatars, Gagauz.

An interpretation of the concept of «indigenous peoples» is found in the UN Indigenous and Tribal Peoples International Convention. In Art. 1.1, in particular, states that the Convention covers: 1) tribal peoples in independent countries, which differ in social, cultural and economic conditions of their existence from other sectors of society of their country and whose status fully or partially regulates their own customs and traditions or special laws and regulations; 2) peoples in independent countries who are descendants of those who inhabited the country or a certain geographical region to which such a country belongs at the time of conquest, colonization or establishment of modern state borders and who, regardless of their legal status, have retained some or all of their own economic, cultural, political institutions [25].

In the international legal documents, therefore, the term «indigenous peoples» is not considered from the view of the tradition of resettlement, but primarily as the presence of a primitive, requiring protection, a way of collective existence and management. Such interpretation does not yet give grounds to classify all existing national minorities as «indigenous peoples». Currently, an exception is made only for the Crimean Tatar people. On September 22, 2016, the Verkhovna Rada of Ukraine spoke in favor of granting the status of an indigenous people to the Crimean Tatars and prepared a draft law on the reform of the Autonomous Republic of Crimea into the Crimean Tatar Autonomous Republic [5]. However, the unresolved scientific elaboration

of this concept within the country, the contradictions in its use in world practice can potentially cause additional politicization due to the division of ethnic groups into «indigenous» and «non-indigenous».

Ukrainian legislation in the field of ethnopolitics generally meets the requirements of international norms and principles. Practically all issues related to national minorities are resolved by Ukraine in accordance with the current legislation - through consultations and through the activities of interstate joint commissions. The legislative field of Ukraine guarantees a wide choice of national minorities participation forms in the political process. The main task in the field of the state ethnopolitics today is the formation of such a field of ethnic civil society, in which all national minorities would be integrated as much as possible.

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