

Problems of Introducing a Differentiated Approach to "Old" and "New" Minorities in Ukraine

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Abstract

The relevance of the article is due to the reform of the legislative framework on national minorities in Ukraine, which is conditioned by European integration. The purpose of the article is to reveal the problems of identifying persons belonging to "old" minorities in Ukraine and discrimination against "new" minorities. In the course of the research, the author used the dialectical method, logical methods of analysis, synthesis, abstraction, comparative research method, forecasting method, and formal legal method. The author analyzes the provisions of the old inclusive Law of Ukraine "On National Minorities in Ukraine", the new exclusive Law of Ukraine "On National Minorities (Communities) of Ukraine", and some international treaties of Ukraine. The author identifies the problems related to the consolidation of the feature of traditional residence on the territory of Ukraine. The author analyzes the legal status of "new" minorities. It is concluded that the adoption of the new Law of Ukraine "On National Minorities (Communities) of Ukraine" has led to the introduction of a differentiated approach to "old" and "new" minorities in Ukraine, but the shortcomings of this Law make it impossible to determine which national minorities belong to the "old" ones. It is emphasized that the "new" minorities have been discriminated against due to the deprivation of their legal status as national minorities (communities) of Ukraine and equalization with the majority. Recommendations are made to address the identified shortcomings by removing from the concept of "national minority (community) of Ukraine" the feature of traditional residence on the territory of Ukraine and defining precise and clear features of settlements where persons belonging to national minorities (communities) traditionally reside or where they constitute a significant part of the population.

Keywords: human rights; minority rights; ethnic diversity; legal certainty; discrimination.

Проблеми запровадження диференційованого підходу до «старих» і «нових» меншин в Україні

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Анотація

Актуальність дослідження зумовлено проведенням в Україні комплексної реформи законодавчої бази щодо національних меншин у зв'язку з європейською інтеграцією. Мета статті полягає в розкритті проблем визначення осіб, які належать до «старих» меншин в Україні, та дискримінації «нових» меншин. Під час проведення наукового дослідження застосовано діалектичний метод, логічні методи аналізу, синтезу, абстрагування, порівняльний метод, метод прогнозування, а також формально-юридичний метод. Досліджено положення старого Закону України «Про національні меншини в Україні», що мали інклюзивний характер, нового Закону України «Про національні меншини (спільноти) України», які мають ексклюзивний характер, та міжнародних договорів, що визначають стандарти, відповідно до яких має бути приведено законодавство України. Виявлено проблеми правового регулювання відносин за участю осіб, які належать до національних меншин (спільнот), пов'язані із закріпленням ознаки традиційного проживання на території України. Проаналізовано правовий статус «нових» меншин згідно з оновленим законодавством. На підставі результатів проведеного дослідження зроблено висновки, що прийняття нового Закону України «Про національні меншини (спільноти) України» привело до запровадження в Україні диференційованого підходу до «старих» і «нових» меншин, однак недоліки цього Закону унеможливають з'ясування того, які саме національні меншини в Україні належать до «старих». Наголошено, що «нові» меншини зазнали дискримінації з огляду на позбавлення їх правового статусу національних меншин (спільнот) України та зрівняння за обсягом прав із більшістю. Надано рекомендації щодо усунення виявлених недоліків шляхом вилучення з поняття «національна меншина (спільнота) України» ознаки традиційного проживання на території України та визначення точних і чітких ознак населених пунктів, у яких традиційно проживають особи, що належать до національних меншин (спільнот), або в яких вони становлять значну частину населення.

Ключові слова: права людини; права меншин; етнічне розмаїття; юридична визначеність; дискримінація.

Introduction

Today, one can observe contrast processes in the field of national minorities in the world [1]. On the one hand, there is social exclusion as a process by which individuals or groups are denied the opportunity to participate, whether they want

to or not, in key activities of the society in which they live. Persons belonging to national minorities are among the most marginalized in the European and Eurasian space, and in some countries they do not have national minority status, which in itself contributes to their exclusion [2]. On the other hand, migration processes have significantly changed the socio-demographic composition of Western European cities. In many of them, the former ethnic majority has become a numerical minority [3]. For this reason, modern nation states have the proclivity to sacrifice minorities in the High Altar of nation building, to securitize cultural communities, and to conflate Ethnos with Demos [4].

The impact of these processes on minority rights in Ukraine is also significant. After all, Ukraine is a large European ethnoculturally diverse state [5]. According to the 2001 All-Ukrainian Population Census, almost eleven million people belonging to over one hundred and thirty national minorities lived in Ukraine [6].

The origins of the legal regulation of minority rights in Ukraine date back to the adoption of the constituent documents of the Ukrainian state. Thus, the Declaration of State Sovereignty of Ukraine of 1990 outlined the general principles of the future state ethnic policy of Ukraine, which were later detailed in another act – the Declaration of the Rights of Nationalities of Ukraine of 1991. In 1992, the Law of Ukraine "On National Minorities in Ukraine" was adopted, the provisions of which were primarily declarative but enshrined many special rights of national minorities. Ensuring the rights of national minorities was also one of the issues of the constitutional process in the mid-1990s and reflected in the provisions of the 1996 Constitution of Ukraine. Thus, the act of the highest legal force in Ukraine enshrined basic guarantees of the rights of national minorities.

However, for more than thirty years, Ukraine has been searching for an optimal model for developing the cultural, linguistic, and religious identity of national minorities and ways to integrate them into Ukrainian society on the basis of equality and justice. Scholars note the long-standing absence in Ukraine of effective ethnic policy strategies and programs to ensure the stability of the ethnopolitical sphere [7].

According to experts, the Law of Ukraine "On National Minorities in Ukraine" of 1992 is long outdated: its provisions did not meet the challenges faced by Ukraine today, did not take into account many ethnopolitical nuances associated with the emergence of a large number of new national minorities [8; 9]. International organizations considered it too general and did not provide adequate guarantees for the protection of minorities [10]. The need to improve the legislation on national minorities has been long overdue. Hence, the European

Union and international organizations had high expectations from Ukraine to reform national legislation in this area [11].

On February 28, 2022, five days after the start of Russia's large-scale aggression, Ukraine applied for membership in the European Union. In June 2022, the European Commission published its opinion on Ukraine's application for membership in the European Union, according to which it recommended that Ukraine be granted candidate status for membership in the European Union, provided that Ukraine takes specific steps, in particular, finalise the reform of the legal framework for national minorities currently under preparation as recommended by the Venice Commission, and adopt immediate and effective implementation mechanisms [12]. Subsequently, at the end of June, the European Council decided to grant Ukraine the status of a candidate country for accession to the European Union. However, further decisions of the European Council on further steps depend on fulfilling the conditions specified in the opinion of the European Commission on Ukraine's application for membership in the European Union [13]. Thus, reforming the system of legislation on national minorities in Ukraine became one of the conditions for Ukraine's accession to the European Union.

Given the importance of the European integration issue, in November 2022, a group of Ukrainian MPs submitted to the parliament of Ukraine the draft Law of Ukraine "On National Minorities (Communities) of Ukraine" (Reg. No. 8224). A lot of work was done on this draft law, including on-site consultations with national minorities of Ukraine, joint developments with the Council of Europe and the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe. On December 13, 2022, this bill was adopted as a whole.

One of the main innovations of the Law of Ukraine "On National Minorities (Communities) of Ukraine" is highlighting national minorities traditionally living in Ukraine. However, has Ukraine succeeded in implementing a differentiated approach to "old" and "new" minorities that meets the best European practices and the legitimate expectations of all stakeholders? The answer to this question requires an analysis of the provisions of this Law.

Materials and Methods

The study aims to reveal the problem of the inability to determine which persons belong to national minorities (communities) of Ukraine traditionally residing on the territory of Ukraine and the problem of discrimination against "new" minorities that have arisen after the adoption of the new Law of Ukraine "On National Minorities (Communities) of Ukraine". Given this goal, the objectives

of the study are to describe the problems of ensuring the rights of "old" minorities in Ukraine, to characterize the situation of "new" minorities, to identify the reasons that led to such consequences, and to make proposals for eliminating the identified shortcomings, taking into account international experience. In addition, given the fact that until 2022, the "old" minorities in Ukraine were not highlighted, as well as the latest trends in the field of minority rights, the task is to predict the development of legislation in the field of national minorities in terms of distinguishing national minorities (communities) traditionally living in Ukraine.

The study reveals some problems Ukrainian experts faced in drafting bylaws necessary to implement the Law of Ukraine "On National Minorities (Communities) of Ukraine" adopted in 2022. Given this, the study's empirical material is primarily the positive law of Ukraine, namely legislation on national minorities. As of now, this system of national legislation consists of the Constitution of Ukraine, the Law of Ukraine "On National Minorities (Communities) of Ukraine", some other laws that contain some provisions on minority rights and bylaws, as well as international treaties of Ukraine, which include, *inter alia*, the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the International Covenant on Civil and Political Rights of 1966, the European Charter for Regional or Minority Languages of 1992, the Framework Convention for the Protection of National Minorities of 1995 (hereinafter – the Framework Convention) and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005. Given European integration processes, special attention is paid to the Framework Convention and the European Charter for Regional or Minority Languages.

In Ukraine, legal studies of the problems of ensuring the rights of national minorities were once conducted by Myroslav Almashi, Iryna Almashi, Oleksandr Bykov, Yaroslav Lazur, Vsevolod Mytsyk, Leonid Riaboshapko, Yevheniy Tkachenko, Yuriy Voloshchyn. However, despite the relevance of ensuring minority rights, Ukraine has no modern legal literature (textbooks, monographs, scientific publications) on this topic, especially on dividing minorities into "old" and "new" ones. Therefore, the theoretical basis of this study is mainly made up of scientific publications by foreign experts, which focus on the study of the problem of distinguishing between the rights of "old" and "new" minorities, namely Thomas Benedikter, Bill Bowring, Andrea Carla, Katharina Crepaz, Jörn Dosch, Asbjørn Eide, Kristin Henrard, Dimitry Kochenov, Rianne Letschert, Tove Malloy, Roberta Medda-Windischer, Alexandra Tomaselli, Fernand de Varennes.

At the same time, the issue of ensuring minority rights is studied in depth in Ukraine in other specialties, such as political science, public administration, and management. Therefore, to substantiate some of the conclusions in this paper, the results of scientific research in other specialties are used, in particular of Viktor Voinalovich, Viktor Yelenskyi, Victor Kotygorenko, Volodymyr Kulyk, Olena Malynovska, Mai Panchuk.

In conducting this study, various scientific methods are used. The dialectical method is used to substantiate the basis for the division of minorities into "old" and "new", the criteria for their differentiation, as well as the interrelation of certain phenomena and processes. Conclusions about the problems with the differentiated approach to "old" and "new" minorities and the reasons that led to them are made based on logical analysis, synthesis, and abstraction methods. The quality of reproduction in Ukrainian law of the differentiated approach to "old" and "new" minorities provided for by the Framework Convention is checked using the comparative research method. Forecasting the development of national legislation in the future requires using the forecasting method. The formal legal method is used to study the structure and relationships between individual legislative provisions.

Results and Discussion

At the international level, there is no unified, generally accepted definition of the concept of "national minority", despite numerous attempts to formulate it. Therefore, the content of this concept is specified at the national level.

This situation has its advantages and disadvantages. The absence of a unified definition of the concept of national minority gives states some freedom to adapt international guarantees of minority rights to their specific needs and, in some cases, allows them to extend these guarantees to "new" minorities [14]. At the same time, the absence of a unified definition means that there is no generally accepted minimum standard for the protection of minority rights, which leads to the introduction of a variety of approaches: from a very rigorous egalitarian model that prohibits differential treatment to measures aimed at ensuring a high level of adaptation of the majority to the needs of minorities [14].

The most commonly used definition of a minority is the one formulated by Francesco Capotorti in his "Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities". According to this definition, the characteristics of a national minority are as follows: 1) it is a group of people; 2) it has stable ethnic, cultural, linguistic, and religious characteristics; 3) it differs sharply from the rest of the population due to these characteristics; 4) it is numerically smaller than the rest of the population; 5) it is not in a dominant

position to the rest of the population; 6) its members are citizens of the state of residence; 7) members of this group at least implicitly express a solidarity desire to preserve their ethnic, cultural, linguistic, religious characteristics [15].

In international law and the law of some foreign countries, national minorities are sometimes divided into two types by their origin: 1) "old", or as they are also called "traditional", "historical", "autochthonous" minorities; 2) "new" or "migrant" minorities [16]. "Old" minorities consist of people who lived or whose ancestors lived in the country or a part of it before the state became independent or before the borders were drawn as they are now [17]. These are communities whose members have lived with the majority in a particular territory for a long time but have a different language, culture, and religion [18]. Most often, they become minorities as a result of redrawing state borders and transferring the territory of their settlement from the sovereignty of one state to the sovereignty of another, forced mass displacement of the population, slavery; or they are ethnic groups that for various reasons have not gained their statehood [19].

In contrast, "new" minorities arrived in the country after the state gained independence or defined its modern borders [17]. "New" minorities are groups composed of individuals who have decided to leave their homeland and emigrate to another country, usually for economic and sometimes political reasons [18]. Thus, new minorities consist of immigrants, refugees, and their descendants who live in a country other than their country of origin for a more extended time than just a transitional period [19].

The division of minorities into "old" and "new" is provided for in some international treaties, in particular the 1995 Framework Convention for the Protection of National Minorities (hereinafter referred to as the Framework Convention). At the national level, such a division exists, for example, in the Republic of Poland, the Slovak Republic, Hungary, the Federal Republic of Germany, Sweden, and Norway.

Highlighting "old" minorities in Ukraine

In Ukraine, the preamble to the Constitution of Ukraine states that the Ukrainian people are composed of citizens of Ukraine of all nationalities [20]. Ukraine guarantees the free development, use, and protection of all languages of national minorities of Ukraine (Article 10(3)). The state promotes the development of the ethnic, cultural, linguistic, and religious identity of all national minorities of Ukraine (Article 11). Citizens belonging to national minorities are guaranteed by law the right to education in their native language or to study their native language in state and municipal educational institutions or through national cultural societies (Article 53(5)). Only the laws of Ukraine determine the rights of national minorities (Article 92(1), point (3)).

These constitutional provisions have been developed in various legislative acts, in particular in the Law of Ukraine "On National Minorities (Communities) of Ukraine" (hereinafter – the Law), which entered into force on July 1, 2023, and became the new core of the legislation of Ukraine in the field of national minorities (communities). In this regard, the old Law of Ukraine "On National Minorities in Ukraine" became invalid.

The new Law was supposed to bring the relevant area of Ukrainian national legislation in line with international human rights standards. Ukraine's national minorities expected that the Law would expand the range of their rights and define effective mechanisms for their realization. The majority expected that the Law would open the way for Ukraine to join the European Union. Furthermore, the international community expected Ukraine to implement the best European practices and high international standards of human rights protection.

One of the most important innovations of the Law is the highlighting of "old" minorities. Until recently, Ukrainian national legislation did not distinguish between "old" and "new" minorities. According to Article 3 of the old Law of Ukraine "On National Minorities in Ukraine", national minorities included groups of Ukrainian citizens who were not Ukrainians by nationality and showed a sense of national identity and community among themselves [21]. Thus, the concept of the "national minority of Ukraine" included "old" and "new" minorities.

However, as Viktor Kotygorenko and Mai Panchuk note, the concept of the "national minority of Ukraine" needed to be changed to ensure its greater conformity with the ethno-demographic dynamics of Ukrainian society and the recommendations of international organizations [22]. The fact is that the Law of Ukraine "On National Minorities in Ukraine" was adopted in 1992 when migration processes in Ukraine did not lead to changes in the ethnic structure of the population due to the massive emergence of "new" minorities whose culture, language, and religion differ significantly from traditional minorities. Recently, the tendency for "new" minorities to emerge in Ukraine has become more pronounced and will only intensify [22]. Therefore, at the national level, there is a need to distinguish national minorities with long-standing ties with Ukrainians as the titular, state-forming nation that constitutes most of Ukraine's population.

It seems that the adoption of the Law was mainly a reaction to this development of migration processes, and it embodies the desire to recognize those national minorities that traditionally live in modern Ukraine.

The "old" minorities in Ukraine were highlighted by including in the definition of "national minority (community) of Ukraine" the requirement of traditional

living in Ukraine. Thus, under Article 1(1) of the Law, a national minority (community) of Ukraine is a stable group of citizens of Ukraine who are not ethnic Ukrainians, traditionally live in Ukraine within its internationally recognized borders, are united by common ethnic, cultural, historical, linguistic and/or religious characteristics, are aware of their belonging to it, and express a desire to preserve and develop their linguistic, cultural, and religious identity [23].

Uncertainty regarding "old" minorities

The first experience of applying the Law, related to the development of draft bylaws necessary for its implementation, has already shown that there are specific problems with the requirement of traditional living in Ukraine. One such problem is identifying which national minorities traditionally live in Ukraine.

The Law does not contain a list of national minorities (communities) of Ukraine that are considered to have traditionally lived in Ukraine. At the same time, the law of many foreign countries that distinguish "old" minorities mandatorily defines a closed list of minorities that are considered "old". Most of the above foreign states have done so, although there are exceptions, such as the Republic of Croatia.

The Law also does not define criteria based on which it is possible to unambiguously and predictably establish which national minorities have traditionally lived in Ukraine. In the law of foreign countries, where the division of "old" and "new" minorities is introduced, criteria are usually defined to determine which minorities are "old" and can claim additional special rights. Sometimes such criteria are enshrined alongside an exhaustive list of "old" minorities. As a rule, the main criterion is the residence time on the state's territory. For example, this time is one hundred years in the Republic of Poland and Hungary.

In addition, the Law contains other concepts that require traditional living: "settlements in which persons belonging to national minorities (communities) traditionally reside" (Article 10(7–9)), "areas in which persons belonging to national minorities (communities) traditionally reside" (Article 10(10)), "places of traditional residence of national minorities (communities)" (Article 19(2), paragraph three). However, the Law does not define the content of any of them, although the traditional residence in a settlement of persons belonging to national minorities (communities) of Ukraine is a fact establishing the legal status. After all, only in such places: 1) inscriptions of official names on the signboards of local self-government bodies and municipal enterprises may be duplicated in the language of the respective national minority (Article 10(7));

2) general information (announcements, public offers to conclude a contract, signs, pointers, signboards, notices, inscriptions, other publicly posted textual, visual and audio information distributed to an unlimited number of persons) is duplicated in the language of the respective national minority (Article 10(8)); 3) election campaign materials may be duplicated in the language of a national minority (Article 10(9)); 4) the language of a national minority is used in providing topographic information, communication with the authorities, and emergency assistance under certain circumstances (Article 10(10)); 5) centers of national minorities (communities) of Ukraine may be established, except for regional centers (Article 19(2)).

Thus, the shortcomings of some provisions of the Law caused legal uncertainty regarding "old" minorities.

Discrimination against "new" minorities

Another problem related to the consolidation of the requirement of traditional living in Ukraine is discrimination against "new" minorities.

It should be noted that "new" minorities are also minorities. They, like "old" minorities, meet all the generally accepted characteristics of minorities and are justifiably entitled to a separate legal status. At the same time, "old" and "new" minorities are in different situations. They have different needs and interests. The primary need of "old" minorities is to protect and develop their identity. At the same time, for immigrants, the critical need is access to socio-economic rights and integration into the social institutions of the host country [18]. Therefore, immigrants are usually ready for quick integration and even some assimilation as they consciously decide to emigrate to another country. "Old" minorities, on the other hand, did not choose to become minorities; therefore, these communities tend to resist integration more strongly and demonstrate a strong desire to have autonomy in the use of their language, to practice their religion freely, and to enjoy their culture [17; 24; 25].

"Old" and "new" minorities also differ in how the majority treats them. The titular nation is usually wary of all national minorities, particularly of expanding their rights, as minorities are often considered a threat to the homogeneity of the nation-state [26; 27]. However, "new" minorities are more often suspected of disloyalty and unfriendliness than "old" ones. The so-called "visible" minorities, *i.e.*, anthropologically different ones that can be easily identified as "other", are more likely to face negative attitudes [14; 26].

Given the above, both "old" and "new" minorities are granted special status for objective reasons, but it should not be the same. "New" and "old" minorities

should have some common special rights, while "old" minorities should be granted additional special rights. In the case of Ukraine, it should be emphasized that "new" minorities are also granted a special status. They are not granted special rights for long-term residence in a particular territory [24].

In addition, there is a close semiotic connection between these concepts: from the point of view of logic, the concept of "old" minorities is relative, *i.e.*, it has no independent meaning. Its meaning becomes apparent only concerning another, in this case, the opposite concept – "new" minorities.

As noted earlier, the Constitution of Ukraine guarantees the development of the identity of all national minorities of Ukraine without exception. Singling out of national minorities traditionally living in Ukraine was logically supposed to lead to the definition of a separate legal status for "new" minorities and the introduction of a differentiated approach.

The Law defines a large number of special rights for national minorities:

- 1) the right to a name taking into account the customs of the national minority;
- 2) the right to form public associations of national minorities;
- 3) the right to organize and hold public events in their native language;
- 4) the right to form their media;
- 5) to publish in their native language without restrictions established by the legislation of Ukraine on the protection of the state language;
- 6) to have their specialized bookstores, which are not subject to restrictions established by the legislation of Ukraine on the protection of the state language;
- 7) the right to use the language of the national minority in the provision of emergency services.

However, only "old" minorities are subjects of these rights in Ukraine.

According to the preamble of the Law, paragraph eight, this Law defines the peculiarities of social relations to ensure the exercise of rights and freedoms by persons belonging to national minorities (communities) of Ukraine. According to Article 3(3), the state guarantees persons belonging to national minorities (communities) the protection of their rights, freedoms, and legally protected interests under the law. However, "national minorities (communities) of Ukraine" covers only "old" minorities.

Only five rights defined by the Law belong to all citizens of Ukraine: 1) the right to equal civil, political, social, economic, cultural, and linguistic rights and freedoms as defined by the Constitution of Ukraine (Article 5(1)); 2) the right to freely decide whether to be considered as belonging to an "old" minority or several "old" minorities at the same time (Article 6(1)); 3) the right to freedom

to recognize one's membership, to refuse or change one's membership in an "old" minority (Article 6(2)); 4) the right to restore their national surname, name, patronymic (Article 6(3)); 5) the right to request simultaneous or consecutive translation of the accompanying entertainment into the State language no later than 48 hours before the start of a cultural, artistic, entertainment, or entertainment event to be held in the language of the "old" minority (Article 10(10)). All other rights defined by the Law belong exclusively to "old" minorities.

"New" minorities do not have the legal status of national minorities (communities) of Ukraine under the Law, depriving them of all the special rights of national minorities mentioned above.

Three articles of the Framework Convention condition the rights provided for by them on "traditional" ties. According to the Article 10(2) of the Framework Convention in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities [28]. Under the Article 11(3) in areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour, in the framework of their legal system, including, where appropriate, agreements with other States, and taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications [28]. As for the Article 14(2) in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language [28].

When drafting the Law, its authors tried to follow the Framework Convention and/or borrow from the experience of foreign countries that have introduced a differentiated approach to "old" and "new" minorities. This is indirectly evidenced by the provisions of Article 10(7–10) of the Law, which define the language rights of persons belonging to national minorities (communities) of Ukraine and traditionally residing in settlements or constituting the majority of the population there.

At the same time, the chaotic accumulation of legal facts in the hypotheses of the legal norms contained in Articles 1(1), 10(7–10) of the Law has led to the

emergence of legal compositions with "traditional double living": the subjects of the relevant rights are persons who traditionally live in Ukraine and, in addition, traditionally reside in a particular settlement. However, according to the position of the Advisory Committee on the Framework Convention for the Protection of National Minorities, the length of residency in the country is not to be considered a determining factor for the applicability of the Framework Convention as a whole [29]. Therefore, the "doubling of the traditional living" requirement is nonsense, as the requirement of traditional living in Ukraine is meaningless in this case.

If it were not for this criterion, Article 10(7–10) of the Law would apply only to national minorities (communities) traditionally residing in settlements, and the rest of the Law would apply to all minorities of Ukraine, "old" and "new". Although the rights under Article 10(7–10) of the Law do not correspond to those provided for in Articles 10(2), 11(3), and 14(2) of the Framework Convention, this approach of the Law has common features with the Framework Convention.

Thus, Ukraine has failed to introduce a differentiated approach to "old" and "new" minorities, as envisaged by the Framework Convention and implemented in some European countries.

This raises the question of the legal status of "new" minorities in Ukraine. The Law does not define the legal status of "new" minorities. There are no other acts in the national legislation of Ukraine that regulate relations involving "new" minorities. Moreover, there is no particular term for "new" minorities in the legislation, as if they do not exist in Ukraine.

There is no hope for Ukraine's international treaties. Neither the Framework Convention nor the European Charter for Regional or Minority Languages contains a definition of a minority. They apply at the national level only to minorities under national law. According to the Law, only "old" minorities are considered national minorities in Ukraine. Therefore, these international legal acts will not apply to the "new" minorities in Ukraine, as they are no longer recognized as national minorities.

So, it seems that the "new" minorities in Ukraine now have the same rights as the majority, *i.e.*, ethnic Ukrainians. However, the position of the majority and minority is objectively different; therefore, the attitude towards them cannot be the same.

In the case of *Tourkiki Enosi Xanthis and Others v. Greece*, the European Court of Human Rights held that the existence of different minorities and cultures in

a country is a historical fact that a democratic society must not only accept but also protect and support in accordance with the principles of international law [30]. According to *Pichkur v. Ukraine*, discrimination means treating persons differently in relatively similar situations without objective and reasonable justification. A difference in treatment is discriminatory if it lacks an objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship between the means used and the aim pursued [31]. Extrapolating these conclusions to the situation around "old" and "new" minorities in Ukraine, one can argue that "new" minorities are being discriminated against.

It is worth noting that the European Commission for Democracy through Law (the Venice Commission), in its Opinion of June 12, 2023, No. CDL-AD(2023)021 "On the Law on National Minorities (Communities)" drew attention to the fact that the concept of "national minority (community) of Ukraine" differs from the previous concept of "national minority of Ukraine" in that it requires that members of national minorities "traditionally live in Ukraine". However, the Venice Commission did not mention the problems caused by this requirement. The Opinion only states that "during the online interviews, representatives of several national minorities expressed concerns that the expression is vague and risks being interpreted in an overly restrictive way" [10].

Problem resolutions

Ukraine needs to clearly distinguish between "old" and "new" minorities in order to solve the identified problems. This requires amendments to the Law. First, it is necessary to remove from the definition of "national minority (community) of Ukraine" the requirement of a traditional residence in Ukraine. This will make it possible to extend the Law to "new" minorities and thus overcome their discrimination.

Scholars' criticism of the idea of defining in the legislation an exhaustive list of national minorities that are recognized as traditionally living in a certain territory seems reasonable. Such an approach is considered voluntaristic since, having defined the list of "old" minorities peremptorily, the political authorities, which are changeable, can arbitrarily change it at any time [26]. Therefore, the idea of legislative consolidation of the list of national minorities (communities) traditionally living in Ukraine should be abandoned.

It is impossible to apply the Law to "new" minorities without amending its text. This could lead to legal uncertainty, which carries the risk of arbitrary and unfair restrictions and interference with the rights of "new" minorities. It would also raise the question of why the concept of "national minority (community)

of Ukraine" includes the requirement of a traditional residence in Ukraine if it means nothing. This will negate introducing a differentiated approach to "old" and "new" minorities in Ukraine.

Based on the analysis of the formal structure of the legal provisions of Article 10(7–10) and Article 19(2), paragraph three, as well as the logical relationship between them, it seems appropriate to unify the terminology of the Law by replacing the words "area" and "place" in Article 10(10) and Article 19(2), paragraph three, with the words "settlements", respectively. This proposal is based on the fact that the ability of national minorities to exercise the rights provided for in these provisions depends on the decisions of village, town, and city councils, *i.e.*, bodies representing the interests of territorial communities of settlements.

In order to ensure legal certainty, Article 10 of the Law should be supplemented with a note defining clear criteria for national minorities (communities) of Ukraine that traditionally live in settlements or constitute a significant part of their population. In this way, the limits of discretion of local councils in defining "old" minorities will be established, as well as guarantees of special minority rights. In addition, this will allow for future changes – narrowing or expanding – of the circle of such minorities based on known criteria and objective data.

The main criterion should be time, which considers the time of residence of a national minority in a particular territory. This criterion is the primary proof of a long-term relationship between the minority and the state-forming nation. At the same time, in order to ensure proportionality, the main criterion should be supplemented by others. Minorities can be divided into "old" and "new" according to many different criteria, not only by the time they have lived with the majority on the same territory. According to researchers, other factors are also important, such as socio-economic, political, and historical factors, the effects of past colonization or other forms of discrimination, and the settlement of minority members (compact or dispersed) [19].

Also, it would be appropriate to apply a quantitative criterion in Ukraine that considers the number of persons belonging to a minority living in a certain territory. After all, it would be disproportionate to require the authorities to spend large amounts of budgetary funds to ensure that persons belonging to national minorities (communities) of Ukraine can enjoy special rights in those settlements where their number is small. As noted in the "Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities", states should not be required to take special protection measures beyond a reasonable proportionality between the efforts made and their benefits [15].

The linkage to settlements itself constitutes the third criterion – territorial. This criterion considers the nature of the settlement of persons belonging to national minorities of Ukraine: compact or dispersed. The Law requires that the subjects of the relevant rights traditionally reside in the same village, town, or city (or constitute a significant part of its population) rather than in a district or region. This means that members of "old" minorities must reside in the same place to enjoy some of their language rights. In addition, other criteria may also be applied, for example, those related to the territories of modern Ukraine being part of the Russian Empire and the USSR.

This approach is in line with the position of the Advisory Committee on the Framework Convention for the Protection of National Minorities, which has consistently held that distinctions in the treatment of otherwise similar groups based solely on the length of their residency in the territory can be unjust [29]. Also, this approach is entirely consistent with the recommendations of the Venice Commission [10]. Time will tell whether the authorities will have the political will to make such changes to the Law and adequately implement a differentiated approach to "old" and "new" minorities.

Prospects for the differentiated approach to old and new minorities

As for the prospects of a differentiated approach to "old" and "new" minorities in Ukraine, it seems that the introduction of this approach is relevant exactly nowadays, as it meets the requirements of the present, satisfies the needs and interests of all stakeholders – Ukraine's national minorities and the majority.

However, this approach may be challenging to use in the future. Given the globalization and migration processes in Ukraine and the world, "new" minorities will eventually turn into "old" ones. According to the Strauss-Howe generational theory, a hundred years is only four generations. This is confirmed by the research results on the interests and needs of different generations of "new" minorities [14]. Because of this, in the future, public authorities will be forced to recognize an increasing number of minorities as "old" and to ensure that persons belonging to them can enjoy exclusive rights everywhere. The division of minorities into "old" and "new" will eventually lose meaning.

In addition, attention should be paid to the issue of securitization of national minorities [27; 32; 33]. On the one hand, increasing the number of "new" minorities in society may have negative consequences. Rianne Letschert warns that excessive ethnic diversity leads to the fragmentation of society and a decrease in the overall well-being of the entire population. Where different and sometimes opposite cultures, religions, and languages come into close contact, problems often arise with harmonizing different systems of human values,

i.e., interethnic conflicts [17]. On the other hand, one should be careful with expanding the circle of "old" minorities and increasing the scope of their rights. Scholars argue that among "old" minorities, the ideas of separatism are more widespread than among "new" ones [26]. This is partly because "old" minorities are more politically organized and have their institutions and financial and property resources.

Therefore, the latest trends in the legal regulation of relations involving national minorities tend to abandon the signs of permanence, time of residence in a certain territory, and the presence of citizenship of the host state in the concept of national minorities [26]. In addition, states are trying to direct their efforts to integrate "new" minorities into social structures as quickly as possible [34]. In this way, an inclusive approach is being introduced that combines "old" and "new" minorities [14]. It seems that the development of these trends over the coming decades will lead to a reduction in the number of criteria by which minorities are divided into "old" and "new" ones and eventually to the abandonment of this approach in favor of a fully inclusive one. Therefore, taking care of Ukraine's national interests and its development as a legal and democratic state, it seems that in the future, it will be necessary to remove from the concept of "national minority (community) of Ukraine" not only the requirement of a traditional residence in Ukraine but also the requirements of permanence and Ukrainian citizenship.

Conclusions

Applying the Law of Ukraine "On National Minorities (Communities) of Ukraine" has revealed specific problems. One of these problems is determining which national minorities (communities) traditionally live in Ukraine, as the Law does not directly define the list of such national minorities (communities) of Ukraine and does not set forth criteria to determine their list. Another problem is discrimination against "new" minorities. Since the concept of "national minority (community) of Ukraine" covers only "old" minorities, "new" minorities are not considered national minorities (communities) of Ukraine at all. The Law does not define a separate status for "new" minorities. This means that "new" minorities are deprived of special rights, and their status does not differ from that of the majority.

When drafting the Law, the legislator tried to follow the Framework Convention or borrow from the experience of foreign countries that have introduced a differentiated approach to "old" and "new" minorities. However, the shortcomings of the legislative technique make it impossible to achieve the desired result. Ukraine's European integration requires ensuring the rights of "new" minorities

following international standards. Therefore, the solution to the problems requires some amendments to the Law.

A differentiated approach to "old" and "new" minorities is relevant to introduce in Ukraine right now, as it takes into account the needs of the present, the interests of national minorities, "old" and "new", as well as the majority. However, in the future, the application of this approach may be hampered. The future lies in unifying approaches to "old" and "new" minorities. Given this, Ukraine should consider returning to an inclusive approach to national minorities.

Recommendations

The findings of this study can be used for further research on minority rights and related topics, for example, in the preparation of abstracts, writing scientific publications, monographs, and dissertation research. The results of this study can also contribute to the further development of Ukrainian legislation on national minorities, particularly in the development of draft laws amending the Law of Ukraine "On National Minorities (Communities) of Ukraine" and bylaws. In addition, this article may help solve problems that arise during the practical application of the Law of Ukraine "On National Minorities (Communities) of Ukraine". The conclusions drawn from this study can be used in teaching courses on constitutional law in higher education institutions.

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