

From the Declaration to the accurate Recognition of Minority Rights: World Experience and Realities in Post-Soviet Countries

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The article deals with different approaches to sexual minorities, both of legislative nature and of their public perception in different world countries. Enshrining equal human rights and freedoms in laws is a sign of society's democratisation and the level of civil society's maturity. Therefore, educating people about the tolerant attitude towards representatives of different sexual orientation is an important task for post-Soviet countries, including Ukraine. Based on Western Europe and the USA's experience, mechanisms for protecting the minority rights in post-Soviet countries are distinguished, which requires the adoption of appropriate laws and society's tolerant attitude.

Keywords: sex, gender, minorities, sexual minorities, discrimination, tolerance

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Introduction

According to available data, 7.8 billion people lived on Earth at the end of 2020. It is worth talking about humanity not only in quantitative terms but taking into consideration its qualitative composition. All people are different: Europeans, Americans, Chinese, rich and poor, Democrats, Republicans, Communists, globalists, anti-globalists, vegetarians, believers, atheists, heterosexuals, homosexuals, etc. We can continue this list for a long time, but all this suggests that people are different, and each of these billions, millions, thousands, hundreds, and tens are trying to assert their identity, uniqueness, comparing and contrasting themselves with others. Based on the above, the main goal for both the state and the world is to develop mechanisms to ensure every person and citizen's rights and freedoms. The first and necessary step in this direction was taken by the U.N. General Assembly in the middle of the twentieth century, namely on December 10, 1948, when the Universal Declaration of Human Rights was adopted (Universal, 1948; Latkovskaya, 2014). It is an international program document in protecting human rights and freedoms for most world countries. Adopting this document made it possible to create common standards in the international relations system regarding human rights and freedoms.

The results

The basic text of the Declaration of Human Rights is known to be divided into four main groups. The first group declares such human rights as the right to life, liberty, inviolability, and the prohibition of slavery. The second one deals with human rights in civil and political society. The third group regulates spiritual, political, and public freedoms, for example, freedom of religion. The fourth one includes social, economic, and cultural rights. In addition to rights and freedoms, the Declaration contains the interpretation of human responsibilities to society, which prohibits a person from abusing the rights that are detrimental to the U.N.'s goal. The basic principle for determining human rights and freedoms is the individual's dignity. Dignity is understood as "one of the defining features of a person as a personality; the degree of assertion a personality beginning in a person" (Nesterenko, 2002). Namely, it is the appropriate self-esteem and self-control level that enables the personality to get aware of the line between allowed and forbidden things. Article 1 of the Declaration proclaims that dignity is a man's inalienable property. It is inherent in "all family members from their birth and determines that their rights and freedoms are equal and they should treat each other in a spirit of brotherhood" (Universal, 1948: article 1). The content of the Declaration's articles was clarified, developed, and implemented in national legislation. For instance, today, the content and permissible restrictions of rights and freedoms contained in the Declaration have become universally recognised norms in the constitutions of more than 200 countries.

In modern society, the issue of protecting the rights of the population's certain categories, which are often called minorities, is especially acute. In modern literature, attention is mainly paid to ethnic minorities. Thus, this category is interpreted as "a group of citizens that is numerically much smaller in relation to the state's population and does not occupy a dominant position. The members of this community have ethnic, religious or linguistic differences from the rest of the population and show a solitary desire to preserve their cultural identity and group integrity" (Tishkov, 2010). Most scientific literature sources classify minorities into such groups as racial, ethnic (national), religious, economic, sexual, gender, age groups, and so on. It is also emphasized that minorities are always "a state and a feeling of humiliating status"

(Tishkov, 2010). However, we consider it appropriate to interpret *minorities as groups of people who are different from the rest of the population and strive to assert their identity and social status*. In other words, at the present development stage of social relations, minorities have the necessary means and mechanisms for their assertion and recognition of their existence with other society members who represent the so-called majority. Today, the issue of minorities' rights and freedoms being equal is open, and the most dangerous thing, in our opinion, is the rejection and hostility towards sexual minorities. Some countries around the world still consider homosexuality to be a crime for which you can be sentenced to life imprisonment, in Uganda in particular, as well as to the death penalty in Iran, Yemen, Saudi Arabia, Sudan, Somali, Brunei, and in some other countries. The representatives of these minorities are often discriminated against by public authorities, which directly violates the fundamental principle of the value and equality of all people's rights, regardless of their gender and sexual orientation.

However, some countries are tolerant of sexual minorities, recognise and ensure their rights and freedoms, for example, Austria, Australia, Argentina, the Netherlands, Portugal, Denmark, France, Germany, Great Britain (except Northern Ireland), Finland, the USA and others. These countries can be certain samples for legislative and institutional improvements of the mechanisms to protect the rights and freedoms of the people belonging to the relevant minorities. According to N. Nazaruk, the ombudsman institution for protecting sexual minorities' rights needs to be introduced as an independent state body in the countries with a low level of tolerance. The author thinks that it is the ombudsman who "ensures adequate protection for the rights of the LGBT communities, monitors discrimination and takes measures against homophobic movements" (Nazaruk, 2017). Unfortunately, there are often examples of homophobia globally, and true equality is still far away. The USA and Canada have the best-established conditions for ensuring the rights and freedoms of LGBT communities.

One of the steps to ensure the rights and freedoms of sexual minorities was introducing the procedure on how to legalise homosexual relations in some American and European countries after World War II. The determinants of these processes appeared to be the arguments of psychologists and sexologists, namely S. Freud, A. Kinsley, F. Klein, W. Johnson and others, who stood for the equal rights of sexual minorities and proved that homosexuality is not a disease or a perversion but another sexual orientation that has necessarily the right to exist. In the modern scientific literature, sexual orientation is defined as "a natural property of a human personality implying orientation of a person's psycho-emotional sphere, his or her erotic (sensual) attraction and sexual needs exclusively or almost exclusively on representatives of the opposite gender (heterosexuality), exclusively or almost exclusively on representatives of his or her gender (homosexuality) or on representatives of both genders (bisexuality)" (Khodakivsky, 2014). The terms "gender" and "sex" are used as synonyms in this definition. However, there is a significant difference between them.

Summarising the various approaches to interpreting gender, we can conclude that gender is a genetic (natural, biological) feature that differentiates between individuals, as rule men and women, and enables them to procreate. We used the phrase "as a rule" in this definition because modern research in the biology field makes it possible to talk not only about two sexes. In her article "The Five Sexes: Why Male and female are not enough?" the American professor of biology, Anne Fausto-Sterling, claims that from a biological point of view, there are a lot of variations from a male to a female, depending on which complex of sexual characteristics prevails. Therefore, according to the author, we can talk about the five sexes. "The first sex is those who possess female genitalia, females; the second sex is those who have male genitalia

or males; the third sex is those who have mixed (both) genitalia, hermaphrodites (the “herms”); the fourth one is those who possess female genitalia but with some male characteristics, the female pseudohermaphrodites (the “ferms”); the fifth sex is those who possess male genitalia but with some female characteristics, the male pseudohermaphrodites (the “merms”)) (Fausto-Sterling, 1993).

Therefore, sex is still connected with the human organism’s characteristics, genetically determined. It is unlike gender. “Gender is a concept used to denote the socio-cultural form of sexes’ existence: male and female do not act as natural definitions but as socio-cultural phenomena” (Gomilko, 2002). That is, gender is a social significance of sex conditioned by cultural and historical features of human existence. In modern scientific literature, it is emphasised that gender is a multidimensional structure. “Gender contains four levels or dimensions: the first one is sex; the second one is sexuality; the third one is sex-role identity, and the fourth one is gender role” (Ivanchenko, 2007). This structure is variable. “Gender contains two options — a man and a woman. Sexual orientation provides four options, and gender identity provides four variants. The gender intersection of different levels gives 128 combinations, so we can talk about 128 gender variants” (Ivanchenko, 2007).

Therefore, it should be noted that the World Health Organization considers all four types of sexual orientation normative, and they are not any kind of deviation, disease, or behavioral disorder. The International Classification of Diseases states that “sexual orientation itself cannot be considered as deviation” (International, 1998).

This definition made it possible to intensify the process of recognising same-sex marriages, which are often called “registered partnerships” in the scientific literature. This definition made it possible to intensify the process of recognising same-sex marriages, which are often called “registered partnerships” in the scientific literature. Denmark was the first country to allow the registration of such marriages (1989). Such couples were granted the following rights related to marriage: the right to inherit, to get alimony, etc. This practice was implemented in some other countries, in particular, “Norway (1993), Sweden (1994), Iceland and Greenland (1996), the Netherlands (1998) and Finland (2001)” (Likestillings, 2020). Germany has used the same practice since 2001, but such couples were restricted in their rights until 2007. Namely, they did not have tax benefits and could not adopt children.

France demonstrates a positive example of a tolerant attitude towards people, honor, and dignity, regardless of their sexual orientation. For instance, any discrimination due to homosexual orientation has been banned there since 1985. “The same-sex couples can get married and adopt children there since 2013” (Nazaruk, 2017).

The same tolerant approach to the representatives of sexual minorities can be found in Belgium. There is such a concept as a “pact of civil solidarity” enshrined in civil law in this country. This is an appropriate agreement that could be concluded by people of different sex as well as the same sex. Its main goal is to regulate different family relationships.

The Netherlands is another world country known as one the most loyal ones to the representatives of sexual minorities. It was the first country in the world, namely in 2001, to give the same rights at marriage both to same-sex couples and to heterosexual ones.

Norway is another example of a tolerant attitude to sexual minorities. The state has the law “About Marriage,” which has been in force since 2009 and gives same-sex couples the right to get married. “They can adopt each other’s children, and lesbians have the right to artificial insemination” (Likestillings, 2020). It is also worth mentioning that Norway has an anti-discrimination ombudsman responsible for defending people’s rights regardless of their

sex, sexual orientation, ethnic and gender identity, religion, etc. A noteworthy fact is that in Norway, homosexuality is not an issue of discussion or public interest. It is an individual's private matter, and society accepts each person as they are without condemnation or hostility to their choice or life position.

Sweden demonstrates a positive experience in regulating attitudes towards people of different sexual orientations. Same-sex public organisations were legalised there in the middle of the twentieth century. For a long time, there has also been a Commissioner for Human Rights in the workplace. He was responsible for monitoring any signs of discrimination and providing protection against any homophobic sentiments. This post existed from 1999 until 2009, and then the functions of homosexual rights defenders were transferred to the jurisdiction of the Ombudsman for Equality. "The ombudsman for anti-discrimination protection dealt with claims demanding compensation for damages caused by the oppression of the sexual minorities' rights. The Commissioner received more than 320 complaints within ten years of his activity" (Nazaruk, 2017).

The United States of America has also introduced the post of ombudsman for sexual minorities' rights. It is the first country in the world that, in 2015, introduced the post of the Special Envoy for the Human Rights of LGBT Communities. The first Special Envoy was a famous diplomat Randy W. Berry. He is responsible for implementing U.S. Government initiatives to reduce violence and discrimination against lesbians, gays, bisexuals and transgenders worldwide.

The American Psychological Association has conducted a number of studies on possible negative consequences for children being raised in homosexual families and has concluded that "children brought up by gay or lesbian parents do not suffer any disadvantages compared to those who are raised by heterosexual parents" (Nazaruk, 2017). The practical proof of these conclusions is Finland PM Sanna Marin's case. Lesbian parents brought her up, but she herself has a heterosexual family and is raising a daughter. In the USA, same-sex marriages have been legalised in all states by the Supreme Court since 2015.

In the former Soviet Union, same-sex relationships were banned. Homosexuality was identified with debauchery and considered to be a mental disease. There also was a criminal liability for it involving long-term imprisonment. In 1991, both Ukraine and Russia abolished that law in order to protect human rights and privacy.

In such countries as Estonia, Latvia and Lithuania, the process of asserting and implementing the rights of homosexuals is still ongoing. Certain public organisations are trying to attract attention to sexual minorities' problems. For example, the State Centre for Human Rights in Latvia is one of the organisations defending gay and lesbian rights. This organisation monitors, records, and reports on any discrimination in the country related to sexual orientation.

Thus, outlining the positive experience and complete rejection of sexual minorities in the world, it is worth paying attention to the situation in Ukraine. Are there any real guarantees to protect the rights of LGBT-Community in our country? This question cannot be answered unequivocally, as sexual minorities have suffered negative treatment for a long time, especially in the 1990s. "In 2007, the deputies tried to restrict LGBT-Communities' freedom to express thought and equated publications on those issues with pornographic materials" (Nazaruk, 2017). Both the state and the society have covered up this problem for a long time because it was considered ill-timed as there were more urgent problems such as economic, political and social ones. However, in our opinion, silence is not the way out of the situation. If we treat it like that, the appropriate time may not come at all, since a country, a society and an individual

at each stage of their development face more and more new challenges that are necessary to be solved. Every person is a value for both the state and the society, so it is necessary to create conditions for a personality's formation and development, whomever this personality is. Therefore, Ukraine has certain guarantees to observe the principle of equality and non-discrimination. It is provided by the norms of the Constitution of Ukraine and some laws such as *the Law of Ukraine on Ensuring Equal Rights and Opportunities of Women and Men* and *the Law of Ukraine on the Principles of Prevention and Combating Discrimination in Ukraine*, etc. In addition, a number of amendments to the Labour Code were adopted in 2015, namely, the prohibition of any discrimination on the ground of sex and gender.

Gender reassignment surgeries have been allowed in Ukraine since 1996, but there are still a lot of "remnants of the past" in this field, as the final decision is made by the medical-psychological commission rather than by the person who has decided to change the sex. It should be noted that the Basic Law of Ukraine still does not mention sexual orientation or gender identity. However, some provisions emphasise basic human rights regardless of the person's "political, religious and other beliefs" or contain such a general statement as "other characteristics." Some attempts to legalise civil partnership have been made since 2015. In particular, the Cabinet of Ministers of Ukraine proposed the National Strategy program in the field of human rights until 2020.

The European division of the International organisation ILGA conducted a study in 49 European countries to find out how the equality of the rights of the LGBT-Communities' representatives is observed. Ukraine took the lowest place in the ranking. Many researchers explain this attitude as the phantom of "the communist orthodox psychology of the Soviet Union's totalitarian political regime" (Nazaruk, 2017). However, for thirty years, Ukraine has been an independent state integrating into the European Community. Yet, ensuring the rights of the sexual minorities remains a problem for our country. This is due to the fact that there is no clear definition of sexual orientation in the Ukrainian legislation. M. Khodakivskyi notes, "Ukrainian legislation contains neither the definition of the sexual orientation nor of the gender identity, which makes it difficult to apply these notions in the context of discrimination" (Khodakivsky, 2014). However, these two concepts are contained in the documents ratified by Ukraine in connection with its integration into the European Community. Europe, in its turn, has experience in solving such issues. In our opinion, Ukraine should not exclusively copy the legislative acts of other countries, when ratifying international documents and creating relevant national legislation. It is necessary to clearly define such concepts as *gender identity* and *sexual orientation*. It could be done by involving the scholars who are experts in this field in creating the relevant laws and explaining to the society how necessary it is to discuss the other forms of sexual orientation (it is often called "non-traditional") as well as to be tolerant to this otherness that is recognised as the norm in a number of other countries. Only in 2015, the appropriate additions and refinements were made in the provisions related to the citizens' equal labour rights, namely concerning gender identity and sexual orientation. Those changes took place only in the framework of labour legislation and, unfortunately, were not further developed in other law areas and enshrined in regulations.

Thus, as practice shows, in Ukraine, all the acquisitions to ensuring the rights and freedoms of sexual minorities are mostly declarative and do not have sufficient legal support to be implemented. It is still difficult for our country to give an example of sexual minorities' representation in politics, civil service and other areas. Some representatives of the cultural and artistic industries have dared to openly declare their sexual orientation to society, but they

are isolated cases. Instead, in European countries, representatives of the sexual minorities work and exercise their rights in all areas.

Conclusions

Human rights recognition and protection are the consequence of the relevant state policy. Enshrining equal human rights and freedoms in laws is a sign of society's democratisation and the level of civil society's maturity. Therefore, educating people about the tolerant attitude towards representatives of different sexual orientation is an important task for post-Soviet countries, including Ukraine. It is a considerable amount of work because the Ukrainian society, mostly the older generation, does not want such a conversation or is not ready for it. Similarly, the issue of preventing discrimination against LGB-communities should not be politicised. Indeed, many political figures use this issue to get electoral support in the political struggle, manipulating the rather conservative views of the Ukrainian society. Therefore, taking into consideration that the Ukrainian society is going through the transitional stage in implementing international law concerning protection of the rights of sexual minorities and prevent any discrimination on the grounds of sexual orientation and gender identity, the Verkhovna Rada (the Ukrainian Parliament) should establish a special post of the ombudsman for sexual minorities' rights and freedoms.

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