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Agendas of Non-discrimination on Ethnic Grounds in the Post-Soviet Space: The Cases of Russia and Ukraine

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Abstract

The article analyses discursive and practical activities by governmental and non-governmental actors in Russia and Ukraine aimed at the conceptualization and promotion of human equality on ethnic grounds as non-discrimination. The author aims at analyzing the reasons why anti-discrimination instruments are in low demand vis-à-vis concerns about ethnic xenophobia and conflicts. The author argues that the given societies have limited incentives and institutional capabilities for the creation and effective application of anti-discrimination mechanisms. The ruling elites have no reason to regard ethnic inequalities as a challenge; civil society activists and ordinary claimants might not treat non-discrimination as an efficient remedy; and there is no commonly accepted image of injustice in inter-group relations. Moreover, the marginality of anti-discrimination agenda in the post-Soviet space begs questions about the said mechanisms' universal applicability, since the latter require pre-conditions that are not guaranteed.

Keywords: equality, discrimination, ethnicity, post-Soviet countries, anti-discrimination law.

1. Introduction

Expressions like ‘human equality’ persist in all international human rights instruments and national legislative frameworks. The character, scale and consequences of related problems and responses to them vary and thus deserve a region-specific analysis. This article addresses the so-called post-Soviet space which can be defined as all former constituent republics of the USSR except for the Baltic States, which are not the Soviet Union’s successor states under international law. Most post-Soviet countries have an ethnically diverse population; many have experienced violent ethnic conflict and have a record of ethnicity-based exclusionary and discriminatory practices. The post-Soviet space is also of special interest for other reasons. Social equality in general and, in particular, on ethnic grounds was a key element in official rhetoric throughout the period of communist rule, and nationalities policy for decades was aimed at the equalization of social conditions for different ethnicities as well as the suppression of ethnic hostilities. Therefore, equality agendas that have been developed over decades in a specific way must not be alien to the elites and common citizenry of post-Soviet countries.

The questions addressed below are about how and by whom issues of equality are raised and handled in the region as an agenda of (non)discrimination. The term ‘agenda’ is understood in a narrow sense as discursive and practical activities aimed at the conceptualization and promotion of human equality on ethnic grounds. Equality can be approached from different perspectives, and this article concerns one of the major frames for the conceptual and institutional organization of equality protection and promotion; that is, the prevention and elimination of discrimination.

The article rests on two case-studies and concerns Russia and Ukraine, thereby facilitating comprehension of the major features of equality agendas in the aftermath of the Soviet Union’s breakdown. Russia and Ukraine are the biggest successor states of the USSR in terms of population size, and they have a relatively large proportion of ethnic minorities. Russia has an authoritarian and increasingly repressive regime, while Ukraine is a pluralist (albeit unconsolidated) democracy. While Russia is gradually reducing its cooperation with international and European organizations and denouncing its international obligations, Ukraine is striving to confirm its pro-European choice in the framework of an Association Agreement and through institutional reforms aimed at rapprochement with the EU, including the development of an anti-discrimination framework.

The study is of a multi-disciplinary character; it strives to combine a normative analysis of the respective domestic constitutional and legal provisions of the countries in question with policy analysis of initiatives and actions of public and private actors that deal with ethnic issues. The study addresses the identification and consideration of the major modes of problematizing the issues of ethnic discrimination, related institutional settings, and policy patterns. The empirical basis of the study is the author’s analysis of legal norms, case-law, official statements, and documents of civil society organizations from the year 2000 onwards in Russia and Ukraine. The start of the 21st century was a clear landmark in terms of the anti-discrimination agenda in

Europe and worldwide. The 2000 EU Equality Directives¹ and preparations for the World Conference against Racism (2001) mobilized civil society organizations and provided an impetus for professional discussions in the countries in question.

Discriminatory practices and claims of discrimination as such are not scrutinized in this article. It is assumed here that there are legitimate reasons for concern about inequalities on ethnic grounds in both countries, and the issue addressed here are those activities aimed at the amelioration of the situation. There is routine discrimination in the labor market, education and housing against stigmatized groups: basically Roma and people originating from the Caucasus, Central Asia and other countries of Asia and Africa. A specific problem is the ethnic profiling practiced by law-enforcement (see CRI(2019)2, paras. 92–97). In Russia after 2000 the state authorities resorted several times to persecution campaigns against certain groups at the national and regional level (such as Georgians, the Meskhetian Turks, Tadjiks and Chechens) (Compliance, 2008).

2. Methodological remarks

In theory, there can be many ways to conceptualize equality in general and equality on ethnic grounds in particular. A variety of answers may be given to the questions who may be compared with whom, according to what criteria certain kinds of treatment or social asymmetries are assessed as illegitimate, and what goals and pro-equality measures are deemed acceptable (Fredman, 2002: 7–15; Nikolaidis, 2015: 9–49). One of the dominant approaches employed and proliferated worldwide rests on the notion of discrimination.

One can barely talk about a comprehensive and consistent doctrine of non-discrimination; rather, there is a frame with an evolving content. ‘Frame’ is understood here as a ‘scattered conceptualization’ (Entman, 1993: 51), or a way to contextualize certain social phenomena and to define their primary characteristics in public communication (Benford and Snow, 2000). The fundamental premise can be denoted as the justicization of inequality; in other words, the basis is judging and overcoming social inequalities by legal means. The framework includes several basic theoretical postulates and respective practical approaches (Bell, 2009; Ellis and Watson, 2005):

- (1) Direct discrimination; i.e. unequal treatment of individuals on certain grounds in a similar position without justification must be prohibited.
- (2) Indirect discrimination; i.e. equal treatment of people in different positions which causes a respectively worse outcome for a certain category of individuals and which is devoid of reasonable justification must be outlawed and stopped by legal means.
- (3) Public authorities must prevent, stop and eradicate discriminatory practices by both public and private persons in public life.

¹ Council Directive 2000/43/EC of 29 June, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November, 2000 establishing a general framework for equal treatment in employment and occupation.

(4) Victims of discrimination must be entitled to contest the latter by legal means, to get redress and compensation.

(5) Since victims of discrimination are usually in a weaker social position than the alleged perpetrators, the standards of proof must be lowered, and the burden of proof shifted from the claimant to the defendant.

(6) For overcoming discriminatory practices and their outcomes, public authorities may undertake special measures, including those that place former victims of discrimination or their descendants in a more favorable position.

Post-WWII international human rights instruments provide only a very general and vague framework (Winant, 2006). The conceptual and practical guidelines for non-discrimination have been elaborated at the domestic level, primarily in the US, and they largely reflect the background situation, challenges and institutional designs of this country. This approach has been expanding to international organizations and other parts of the world.

An important stage in this proliferation was the acceptance of the core ideas and techniques by the European Union and their transposition first to *acquis communautaire* and then to the domestic legislations of member and candidate states (Bell, 2009; Ellis and Watson, 2005; Schiek and Chege, 2008). The 2000 Equality Directives have been transposed into the national legislations of all member and candidate states; the EU has leverage (its Neighbourhood Policy including Association Agreements) regarding transplanting the mechanisms to the Union's eastern neighbors. The Council of Europe also contributes to this process (for more, see McCrudden and Kountouros, 2007; Nikolaidis, 2015).

Techniques and institutional solutions in individual countries designed for tackling inequalities vary, and include the definition of discriminatory grounds; the objectives of anti-discriminatory measures (the prevention of discriminatory treatment, the provision of equality of opportunities or redress of past injustices); their scope; the degree of state intervention; the forms of perpetrators' liability; the attitude towards intention to commit discriminatory acts; and the scope and forms of positive action. General global trends are the placement of focus on substantive equality (equality of opportunities or outcomes) instead of formal equality (equal treatment); lowering of the standards of proof and the shift of the burden of proof to the defendant; and general acceptance of state interventionism and social engineering as necessary conditions for reversing the production of social discrepancies.

A problem is that the notion of discrimination has procedural and material dimensions. Discrimination serves as a system of presumptions and indicators that allows for the resolution of a dispute about fair or unfair treatment by legal means. Along with this, discrimination is often regarded as a conception for modeling certain social relationships; respectively, it prompts simplistic explanations of social asymmetries as outcomes of certain kinds of treatment linked to certain ascriptive characteristics of the treated individuals or social entities. Meanwhile, social stratification is caused by numerous factors, and the correlations between social disparities and ethnic or racial categorizations cannot be easily and effectively comprehended and tackled. The uneven distribution of social capital and the freedom of choice that people enjoy in their interactions cannot be totally overcome or eliminated either by individual complaints or state intervention. The anti-

discriminatory frame generates an important output, which is an ideology that seeks to interpret all disparities and asymmetric interactions between people belonging to different racial or ethnic categories as overall relations of subjugation between 'dominant' and 'subordinate' groups (Bonilla-Silva, 2006; Feagin and Hernan, 1995; Winant, 2006).

In the post-Soviet space there is another frame of equality on ethnic grounds that was generated by Soviet rule also within a modernist approach to nationhood and ethnic diversity. The Soviet approach is also not a comprehensive doctrine, and unlike non-discrimination, it was never fully and consistently embedded either in constitutional and legal provisions nor the programmatic documents of the ruling communist party. Party declarations, official ideological commentaries and the real practices of government demonstrate the contours and content of this approach. It rested on the idea of state social engineering pursued for building communism and thus for creating a manageable and modernized society that shared a common supra-ethnic 'Soviet' identity (Connor, 1984: 214–216).

The promotion of equality on ethnic grounds was necessary, first, for overcoming past distrust of non-Russian peoples towards the Russian majority, and thus for securing minorities' loyalty towards Soviet rule. Second, the equality of social conditions for different regions and peoples was a prerequisite for the modernization and economic development of the country, as well as for forming a loyal population with common cultural habits and skills (Martin, 2001: 1–177). In sum, the real equality policies comprised a limited and inconsistent symbolic recognition of ethnicities' equality and the policies of socio-economic and cultural transformations aimed, *inter alia*, at the equalization of different ethnicities' social parameters. Among the tools of governance were the fight against incitement of hatred or enmity partly through criminal law, and the suppression of all unauthorized activities on ethnic grounds by a variety of means.

One can note that both frames – both anti-discriminatory and Soviet – had much in common. They combine recognition of individual and group dimensions of equality; they lead to the recognition of structural inequalities as a problem; and they ultimately require state action. However, their translation into practice requires certain preconditions that do not necessarily exist. For the anti-discriminatory frame, these are the availability of active claimants ready to contest unfair treatment by legal means; competent and effective judiciary and/or independent anti-discriminatory bodies; and the government's ability and capacity to pursue policies aimed at overcoming disparities. The 'Soviet' approach needs only the latter – the resources and political will for social engineering.

In theory, the anti-discrimination normative framework, as the experience of individual countries shows, can generate three kinds of practices that constitute the anti-discrimination agenda. Two belong to the domain of so-called 'instrumental,' and one to the domain of 'symbolic' politics; in brief, the difference between the two categories is that the first one generates a direct 'resource' effect, while the latter has an 'interpretative' one (Schneider and Ingram, 2008: 207). The first practice is the readiness of public institutions to acknowledge the problem of discrimination and to tackle it through interventions by legal, administrative and judicial means. The second one is the mobilization of law, or the readiness of people who consider themselves the victims to contest *en masse* the alleged violation of equality as discrimination through

legal mechanisms. The third one is the recognition of inequality as a problem that permeates the entire society and that can be interpreted as the complex relationships between the ‘dominant’ and ‘subjugated’ ethnic or racial groups. In other words, ethnic categories are deemed social entities and the correlations between ethnic divisions and access to social resources as a kind of class struggle. The question about the acceptance of the anti-discrimination agenda in a given society can be decomposed into separate questions about the existence of the three kinds of practices listed above. While the first one relates to top-down state action, the second one (mobilization of law) concerns bottom-up activities; the third one is about the discursive patterns that stimulate and legitimize the first two kinds of practices and that can be developed on both a bottom-up and top-down basis.

3. Top-down approach

This section concerns law-making, implementation practices and policy measures. The basics in Russia and Ukraine look alike. The constitutions contain general provisions on equality using an open-ended list of grounds. Both countries are parties to the major relevant international – universal and European – human rights instruments. Sectoral legislation contains general provisions about equality before the law and even the prohibition of discrimination. In both countries, discrimination is criminalized; however, the respective provisions are not enforced.

3.1 Russia

Article 19, part 1 of the 1993 Constitution provides that ‘all people shall be equal before the law and court’, while Article 19, part 2 guarantees the equality of rights and freedoms of man and prohibits limitations of human rights on social, racial, national, linguistic, or religious grounds.

A number of sectoral laws also contain equal rights provisions and prohibit discrimination; however, no piece of legislation contains a definition of discrimination and distinguishes between direct and indirect discrimination as well as other forms of the latter. The legislation contains no other relevant definitions (such as the subject, burden, and standards of proof) and no adequate procedural provisions. Consequently, civil jurisprudence about discrimination exists, but it is ineffective, limited in scope and unrelated to ethnicity or language (Osipov, 2012: 103–104; Smirnova, 2008: 90–121; Valtseva, 2018).

Article 136 of the Criminal Code establishes liability for discrimination and defines the latter as ‘violation of rights, liberties, and legitimate interests’ using an open-ended list of grounds. Only a few cases had been commenced under this provision until 2011, and none related to ethnic discrimination. According to the official statistics, no criminal cases have been commenced over the last few years (Ovsyannikov, 2019). Since 2011, only organized discrimination by an official has been a criminal offence, while private discrimination constitutes an administrative misdemeanor (Art. 5.62 of the Code of Administrative Violations). Twenty-four cases

were commenced under this article and finalized throughout 2017, and fourteen in the first six months of 2018; reportedly, all concerned discriminatory advertisements.²

One specific feature of Russia's approach is the existence of a special law, the Act 'On Countering Extremist Activities', adopted in 2002. It offers a broad approach to defining 'extremism' and 'extremist activities' (both terms are used as full synonyms); the notion is introduced not by definition but by a list of manifestations that range from terrorism to intolerant statements. The notion of 'extremism' since July 2006 has also included discrimination, as this is defined in Article 136 of the Criminal Code; however, this provision of the anti-extremist law remains inactive. Anti-extremist legislation is extensively enforced, but it does not in fact concern cases of non-violent discrimination (Osipov, 2012: 119-120; Verkhovski, 2018: 18-55).

Some cases invoking Article 19 of the Constitution have been considered by the Constitutional Court. None involved race or ethnicity; a few of them concerned inequality on the grounds of language. The most significant ones concerned the use of state languages in the republics within Russia along with Russian (Prina, 2016: 84-87). In 2004, the Constitutional Court upheld the compulsory teaching of the republican state languages along with Russian but made a reservation that the said teaching should not be detrimental to the equal opportunities of pupils.³ Later on, in 2009, the Supreme Court for the same reason declined a claim for permission to pass the 'uniform state examination' (school graduation tests) in languages other than Russian.⁴

The Strategy of the State Nationalities Policy of the Russian Federation until 2025⁵ – the major official doctrinal document in the area of ethnic relations – contains numerous references to equality and non-discrimination. The promotion of equality on a variety of grounds is referred to among the goals (item 17) and equal rights along with the prevention of discrimination among the principles of the state nationalities policy (item 19) in both versions of the document. The provision of equal rights and the prevention of discrimination in the functioning of public bodies drifted from the objectives (item 21) to the main directions of the state nationalities policy in the course

² According to statistical data from the Juridical Department under the Supreme Court of the Russian Federation; see No. 1-AP 'Svodnye statisticheskiye svedeniya o deyatel'nosti federal'nykh sudov obshey yurisdiktsii i mirovykh sudey za 2017 god. Otchet o rabote sudov obshey yurisdiktsii po rassmotreniyu del ob administrativnykh pravonarusheniyah' (Joint statistical data about the activities of the federal courts of general jurisdiction and magistrate courts for 2017. A report about the work of courts of general jurisdiction on the consideration of cases on administrative violations), available at: <http://www.cdep.ru/index.php?id=79&item=4476>; No. 1-AP 'Svodnye statisticheskiye svedeniya o deyatel'nosti federal'nykh sudov obshey yurisdiktsii i mirovykh sudey za pervoye polugodiye 2018 goda. Otchet o rabote sudov obshey yurisdiktsii po rassmotreniyu del ob administrativnykh pravonarusheniyah' (Joint statistical data about the activities of the federal courts of general jurisdiction and magistrate courts for the first half of 2018. A report about the work of courts of general jurisdiction on the consideration of cases on administrative violations), available at: <http://www.cdep.ru/index.php?id=79&item=4758>.

³ Constitutional Court Judgment No. 16-P of 16.11.2004; available at: <http://doc.ksrf.ru/decision/KSRFDecision30404.pdf> (in Russian).

⁴ Supreme Court Judgment No. GKPI09-317 of 21.04.2009; available at: http://vsrf.ru/stor_pdf.php?id=261508 (in Russian).

⁵ Adopted by Presidential Decree No. 1666 of 19.12.2012; updated by Presidential Decree No. 703 of 06.12.2018.

of the strategy's update in 2018. However, the Strategy does not specify the mechanisms and public bodies in charge of anti-discrimination measures; the only indicator mentioned in the version from 2018 is the percentage of people who in surveys acknowledge no discrimination against themselves (item 34). The Strategy is a document of programmatic character and is not directly enforceable. Russian Government Order No. 2985-R from 28 December, 2018 'On the plan for realization of the Strategy of State Nationalities Policy in 2019–2021' as well as earlier similar plans envisage only the monitoring of individual complaints and mass-media publications about violations of equality on a variety of grounds and assign this monitoring to the Federal Agency of Nationalities Affairs. The Agency has no special unit for equality issues and has publicized no information about its activities concerning non-discrimination.

In theory, public prosecutors and executive authorities responsible for the supervision of consumer protection, housing, labor relations and advertising can take measures against discriminatory treatment, but the former interfere in only a few exceptional cases usually concerning discriminatory commercials. Officials as a rule do not speak out about the issue of discrimination and inequality in public. Finally, there are no programs for the promotion of equal opportunities.

Over the last few years there has been only one legislative initiative that concerned ethnic discrimination; this was an amendment to the Labor Code that outlawed private advertisements of discriminatory character concerning recruitment.⁶

3.2 Ukraine

The 1996 Constitution declares the equality of all people in their dignity and rights (Article 21) and guarantees equal fundamental rights and freedoms as well as the equality of citizens before the law irrespective of their 'race, color of skin, political, religious and other affiliations, gender, ethnic and social origin, wealth, place of residence, linguistic and other characteristics' (Article 24). Most codes and numerous laws stipulate the principle of non-discrimination and contain a ban on the violation of equality of rights and/or the prohibition of discrimination.

Article 161 of the Criminal Code of Ukraine addresses the violation of equality based on race, ethnicity or attitude to religion. However, like the old Soviet criminal codes it combines in one provision the liability for the incitement of 'national, racial or religious feud and hatred' and 'direct or indirect restriction of rights or granting direct or indirect preferences to citizens.' Regarding this, there are no complete and accurate statistics; according to different sources, article 161 is applied rarely in general, and never with regard to discrimination. According to the data obtained by the Advisory Committee on the Framework Convention on National Minorities, the number of prosecutions rose from two in 2012 to 79 in 2015, while the number of convictions in which a hate motive was proven reached two in 2014 and three in 2015 (ACFC/OP/IV(2017)002, 2018: item 85). The annual report of the Ukrainian Ombudsperson for 2017 reports that about 95 criminal cases involving the motive of hate were opened throughout the year, but only four were submitted to courts (Tshorichna, 2018: 517–518).

⁶ Federal Act No. 162-FZ of 02.07.2013.

Ukraine is different from most post-Soviet countries including Russia because it has a comprehensive law against discrimination. Act No.5207-VI 'On the Principles of Preventing and Combating Discrimination in Ukraine' was adopted on 6 September, 2012 and significantly amended by Act No.1263-VII of 13 May 2014. Adoption of the anti-discriminatory law was a requirement of the EU in the course of drafting the Visa Liberalisation Agreement (EU-Ukraine, 2010); similar conditions were also defined for Moldova and Georgia which also sought visa-free entry into the Schengen area for their citizens and association with the EU. Moldova and Ukraine adopted laws against discrimination in 2012 and Georgia in 2014. All three laws follow the EU model of anti-discriminatory legislation.

In particular, the Ukrainian law prohibits direct and indirect discrimination on an open-ended list of grounds which includes race, skin color, ethnic and social origin; defines the scope of this prohibition and exempting positive measures; and defines the competences and obligations of public bodies in the area of prevention and elimination of discrimination. An important novelty was the shift in the burden of proof to the defendant in the 2014 amendments to the Anti-Discrimination Act and to the Civil Procedural Code. Individuals can bring complaints regarding discrimination before courts, administrative bodies and the independent equality body, and respectively claim redress. The law does not outline the procedure for redressing pecuniary or non-pecuniary damage.

The independent equality body and in fact the only public body implementing the law is the Parliamentary Commissioner for Human Rights (Ombudsperson). The Commissioner is authorized to overview the general implementation of anti-discrimination law, provide expert conclusions, take legal action in cases of discrimination in order to safeguard the public interest, and consider individual complaints. However, decisions from the Ombudsperson about individual complaints are not obligatory.

In the year 2013, the Secretariat of the Commissioner received 2,051 petitions related to discrimination; of these, four complaints concerned race and color of skin; 42 ethnic or national origin, and 17 belonging to national minorities; 91 complaints were about the use of languages, including five specifically related to the use of the Ukrainian language (Tshorichna, 2014: 375). Further, the number of petitions decreased, so that in 2014 the Secretariat of the Commissioner received and examined 496 complaints about discrimination and the violation of rights of national or religious minorities; 49 associated with race and ethnicity, and 57 language (Tshorichna, 2015: 272-273). In 2017, there were 373 complaints related to discrimination and minority issues; 37 of them concerned race and ethnicity, and seven language (Tshorichna, 2018: 510, 532). In 2018, out of 616 complaints 43 were about skin color or ethnic origin; the report for 2018 contains no data about language (Tshorichna, 2019: 100, 104-105). The content of most cases involving ethnicity or language is not disclosed; most pertain to access to service, and none had public repercussions.

The only governmental program that can be deemed a positive or special measure is the 'Strategy for Protection and Integration of Roma National Minority into Ukrainian Society till 2020' adopted by Presidential Decree No.201/2013 of 8 April 2013. The Program basically aims to facilitate cultural activities and informational campaigns and does not concern discrimination *per se*. Moreover, it

has been criticized by international institutions (the ODIHR) and civil society organizations as ineffective and non-transparent (ODIHR, 2014: 5).

4. Bottom-up approach

This section addresses the activities of civil societies in both countries. The anti-discrimination framework can be workable if there are people who take legal action or bring complaints in the pursuit of their interests related to the safeguarding of equality. Organized civil society can facilitate such motions and also formulate public needs and promote the public interest with regard to equality issues.

4.1 Russia

There are no statistics concerning individual legal actions or other motions (such as complaints about discrimination to administrative bodies, public prosecution or ombudspersons). The official judicial database⁷ shows that over recent years individual plaintiffs have increasingly often employed the term ‘discrimination’ in claims concerning employment and labor relations, given that the Labour Code interprets discrimination very broadly as any distinction unrelated to the person’s working skills. Anecdotal evidence from human rights organizations reveals that the number of cases actually involving treatment based on certain ascriptive characteristics or group belonging is low (less than 10 complaints per year throughout the country). Almost all concern discrimination on grounds other than ethnicity (usually gender, trade union activism, sexual orientation, or religion), and in almost all cases courts have dismissed such claims of discrimination (Valtseva, 2018).

The European Commission Against Racism and Intolerance (ECRI) was informed by the Russian Ombudsman’s office that the Ombudsman had received around 200 complaints related to discrimination on all grounds in 2013–2017 (27 in 2017) (CRI(2019)2, para. 12); however, this testimony is not supported by other sources, and there is no information about the content and outcomes of these disputes. The bottom-up mobilization of law more often manifests itself in sporadic complaints (or denunciations) submitted to the public prosecutor about discriminatory commercials or media publications; however, there are neither statistics nor estimations of the number of such motions.

Another indication is the difficulties that public interest NGOs encounter when they want to engage in strategic litigation against discrimination on any possible grounds. Respectively, individuals seek support for action against discrimination from human rights organizations in exceptional cases. On the surface, the problem is that potential claimants regard such problems as insignificant, resolve them informally, or seek to defend their violated rights (for example, desiring protection from illegal criminal persecution) when the contestation of discrimination appears to be inadequate.

⁷ *Gosudarstvennaya Avtomatizirovannaya Sistema Rossiiskoy Federatsii ‘Pravosudiye’* (The State Automated System of the Russian Federation ‘Justice’); available at <https://bsr.sudrf.ru>. The system contains descriptions of individual cases and does not allow for disaggregation by types of claim.

There are numerous ethnicity-based organizations across Russia, only a few of which refer in their charters or programmatic statements to the protection and promotion of equality among their goals. The charters of leading ethnicity-based organizations contain references to the protection of the rights of persons belonging to the respective groups, but not to the fight against discrimination or for equality. Such provision is lacking even in the charter of the Federal National Cultural Autonomy of Roma – the leading Russian Roma NGO.⁸ The Charter of the Federal Jewish National Cultural Autonomy refers to the promotion of tolerance and inter-ethnic dialogue.⁹ There are very few organizations of labor migrants, and the only salient one – the Federation of Migrants, a government-orchestrated NGO – also does not have such a provision in its documents.¹⁰

There are virtually no examples of ethnic organizations' motions for equality and against discrimination except for several specific cases. First, the multi-ethnic republics of North Caucasus (Kabardino-Balkaria, Karachaevo-Cherkessia and Dagestan) have informal power-sharing agreements, and their alleged violation repeatedly invokes protest. For example, the Congress of the Karachai People – a civil society organization that stands for the representation of ethnic Karachais that represent 41 per cent of the population in the Karachaevo-Cherkessian Republic (KCR) – in June 2018 issued statements and petitions and claimed the alleged violation of ethnic proportionality in administrative appointments (Kongress, 2018).

Another case involves the individual and collective protests against the compulsory teaching of state languages other than Russian in the republics of Russia. One of the key arguments of individual claimants and initiative groups in Tatarstan was that this teaching was done at the expense of other school subjects and provided pupils in the republic with a poorer quality education and was thus discriminatory. As mentioned above, this argument was partly endorsed in 2004 by the Constitutional Court of the Russian Federation and in 2009 by the Supreme Court. From a broader perspective, safeguarding formal equality is increasingly used by the state as justification for dismantling minority protection or special measures (Prina, 2016).

Some non-ethnic human rights organizations which defend vulnerable groups or pursue public interests related to fundamental rights have addressed the issue of discrimination, including its ethnic component. This job has been done by small professional organizations to a large extent inspired by the opportunity to be part of an international movement against discrimination and to obtain foreign funding (for an overview see Osipov, 2012: 111–112). Leading NGOs such as the Human Rights Centre 'Memorial' (Moscow), the Anti-Discrimination Centre 'Memorial' (Saint Petersburg) and the Moscow Helsinki Group in the early 2000s had separate programs or projects about ethnic discrimination. The Moscow-based Centre for Social and Labor Rights addresses discrimination on various grounds in employment and occupation.¹¹ All attempts to select promising individual complaints and to launch strategic litigation actually failed because the number of potential applicants was few, most required protection from ethnic violence, and most cases were lost for formal

⁸ <http://цыганероссии.рф>.

⁹ <http://фенка.рф/ustav-fenka/>.

¹⁰ <http://www.fmr-online.ru/history/>.

¹¹ <http://trudprava.ru/main/discrimin>.

reasons. The non-governmental association ‘Lawyers for Constitutional Rights and Freedoms’ (JURIX) in 2003–2011 had an educational program and, together with Open Society Institute, conducted research on ethnic profiling practices by the police in Moscow (Open Society Institute, 2006). A coalition against racial discrimination was also established under the aegis of the Moscow-based Centre for the Development of Democracy and Human Rights in 2000, and resumed in 2003. The coalition attracted a low level of public interest and failed to involve ethnic NGOs in its activities. Increasing pressure on independent civil society organizations after 2011 led to the closure of JURIX and the relocation of the Anti-Discrimination Centre ‘Memorial’ from Russia; the other organizations, under pressure and obliged to register themselves as ‘foreign agents,’ have had to change their priorities and basically abandon the theme of ethnic discrimination.

4.2 Ukraine

Ukraine has more opportunities for civil society activity, having relatively advanced anti-discrimination legal and institutional frameworks and a lack of state pressure on human rights activists (or at least a much lower degree of such pressure than in Russia). An important indicator of bottom-up initiatives is the number of people that apply to the Ombudsperson. As mentioned above, complaints about discrimination on ethnic or linguistic grounds constitute no more than 12 per cent of the total number, but the amount has oscillated and has generally not grown over the years. However, the number of such complaints is much higher than in Russia.

In other respects, the situation is largely not different from the Russian one. Minority organizations in Ukraine also neglect the issue of equality and discrimination in their founding documents and statements. Exceptions are also few, and most are related to the demands of some organizations that represent the Russian-speaking population for linguistic Ukrainization to be stopped, and ideally to grant the Russian language official status. After 2014, when the war against Russia and the separatist enclaves also backed by Russia broke out, the claims and other politicized activities of Russian minority organizations almost ceased (Equal Rights Trust, 2015: 158–159). Minority organizations usually express their concerns and demands in terms of minority rights without resorting to the language of equality. An important recent case was the adoption of the new Education Act in September 2017¹² which drastically restricted the use of minority languages in the school system and thus brought the issue of equality back to the table. Most minority organizations maintained their silence, but some (mostly Hungarian ones) assessed the law as undermining the equal access of minorities to education (see, for instance, Transcarpathian, 2018). The government also justified the language provision by highlighting the need to secure the equality of opportunities for school graduates (Ministry of Foreign Affairs, 2017). However, these statements have not led to any meaningful discussions among policy-makers and experts.

Numerous NGOs are working against discrimination through counseling, monitoring and awareness-raising. All of the former are non-ethnic organizations;

¹² *Zakon Ukrainy* No. 2145-VIII ‘*Pro osvitu*’ (The Law of Ukraine ‘On Education’) of 5 September 2017.

most are highly professional, funded by European or American organizations, and oriented around international and European standards and guidelines. Since 2011, Ukraine has had an NGO Coalition Against Discrimination.¹³ This seeks to coordinate activities against discrimination on all grounds and comprises mostly non-ethnic human rights organizations.

5. Substitute and additional perspectives

The issues of discrimination and, even more broadly, of equal rights and opportunities, are being replaced by an adjacent topic – that is, aggression on ethnic grounds. The call to counteract xenophobia, hate speech and hate crime is strong both in Russia and Ukraine, and from authorities and the general public. This is not a surprise since manifestations of enmity are visible, and both countries have a record of mob violence. In both countries ethnic minority NGOs and experts dealing with ethnic relations are prioritizing the issues of xenophobia and putting forward the promotion of tolerance and intercultural dialogue as a remedy. The dynamics in the two countries are, however, different.

Russia has established an effective repressive machinery that has cracked down on all organized radical groups and persecutes all unauthorized activities resembling the fuelling of ethnic, religious or social tensions. The country has a package of ‘anti-extremist’ legislation that is grounded in the 2002 Anti-extremism Act (with subsequent amendments). The package includes several articles of the Criminal Code: Article 282 defines liability for the incitement of hatred or enmity and the abasement of dignity on an unlimited variety of grounds; other articles criminalize participation in ‘extremist’ organizations and appeals to ‘extremist’ activities. Moreover, the administrative legislation defines liability for the demonstration of Nazi symbols and establishes simple procedures for closing down or fining NGOs or media outlets; websites can be blocked without a court decision. This anti-extremist legislation is widely used to intimidate actual or potential opponents of the regime (CRI(2019)2, paras. 44–52; Verkhovsky, 2018: 38–92). Over the last few years, the number of criminal cases and sentences handed down for posts and reposts in social networking services that pose no threat to public order has steadily grown (Robinson, 2018). While in 2011, 82 people were found guilty, in 2014 the number had increased to 258, and in 2017 to 460. The number of those sentenced under part 2 of the same article (that establishes liability for the incitement of enmity involving violence) has decreased: in 2011 there were 35 people, in 2014 nine, and in 2017, one (Human Rights Council, 2018). Since 2011, media publications and internet posts that raise the issue of ethnic discrimination have increasingly been qualified as ‘extremism.’ For example, 30-year-old Lidiya Bainova, a Khakass activist from Abakan (the Republic of Khakassia in Eastern Siberia), was accused of appeals to extremist activities in July 2018 for publishing a post in which she emotionally wrote about the practices of daily xenophobia and discrimination against the Khakass people (Natsional'ny aktsent, 2018).

In December 2018, part 1 of Article 282 of the Criminal Code was redrafted, introducing administrative prejudice for the incitement of enmity. Criminal

¹³ <http://antidi.org.ua/>.

prosecution for the deeds previously falling within the scope of this article is now possible only after at least one administrative conviction under the new article (20.31) of the Code of Administrative Violations (which penalizes the same deeds) within the preceding calendar year. The amendments have significantly decreased the number of criminal cases under Art. 282 and led to the gradual revocation of previously commenced cases or reversals of convictions, including that of Bainova.

Although the excessive enforcement of ‘anti-extremist’ legislation is subject to growing criticism (Human Rights Council, 2018), NGOs and experts who deal with ethnic relations prioritize the issues of hate crime and xenophobia; almost all use the language of ‘counteraction to extremism’ and ‘intercultural dialogue.’ Ethnic NGOs in their public statements as a rule swear allegiance to the fight against ‘extremism’; a large part of the activity of ethnic NGOs, particularly that carried out using public money, aims at ‘intercultural dialogue’ or at least is rationalized as such.

As mentioned above, Article 161 of the Ukrainian Criminal Code which penalizes both violations of equality and incitement of hatred, is applied to a limited degree. The insufficient ability of the police to prosecute radical nationalist propaganda and vandalism is routinely criticized by minority NGOs, human rights organizations, and even the Ombudsperson (Alternative, 2016; Tshorichna, 2016: 153–155; 2018: 533–534; 2019: 105–107). Respectively, minority NGOs neglect issues of equality; their positive agenda is confined to cultural projects and the promotion of tolerance. Notably, Russia was in a similar situation before the mid-2000s when the state started using anti-extremist legislation as a convenient repressive device, first against radical nationalists and then against all potential opponents. Russia has been pioneering the use of anti-extremist legislation; several other post-Soviet countries (including Belarus, Moldova and Kazakhstan) have pieces of anti-extremism legislation that generally follow the Russian example (Verkhovsky, 2016: 63–72); however, they are not enforced as extensively as in Russia. Ukraine adopted an ‘anti-extremist’ package with major repressive potential in January 2014, but this was rescinded after the former president Yanukovich’s escape one month later.

Another issue that deserves attention is the third kind of practice within the anti-discrimination framework. This is discourse based on the interpretation of discrimination as structural disadvantage or the subjugation of certain vulnerable groups *vis-à-vis* others. Surprisingly enough, these considerations in favor of either minorities or the majority are marginal both in Russia and Ukraine. Generally, the idea of the majority’s vulnerability in the face of minorities which ‘enjoy unfair privileges’ persists in majority nationalist discourse in Eastern Europe (Brubaker, 2011). In Russia, only individual ideologies associated with Russian nationalism have occasionally tried to develop this argument (Delyagin, 2007), but these attempts have had no repercussions. Some Ukrainian nationalist ideologists argue in a similar way that state power has an ‘anti-national’ character, but these ideas have not evolved into consistent and detailed claims. A growing number of publicists are developing the idea of Ukrainians’ vulnerability and subjugation under a situation of Russian linguistic and cultural dominance (see, for instance, Ryabchuk, 2011; Yakimenko, 2017).

6. How much can one expect from the anti-discrimination agenda?

At first glance, the expression of Peter Rutland, ‘the presence of absence’ (Rutland, 2010), borrowed from Soviet bureaucratic jargon, matches this situation quite well. Those elements that fit the definitions of the anti-discrimination agenda are marginal in both countries, and the demand for non-discrimination has been stimulated by external actors. One may assume that the reasons for this must pertain both to the specific post-Soviet conditions and to the general applicability of anti-discrimination approaches.

In Russia, pieces of legislation pertinent to non-discrimination are virtually not employed, while legislative provisions and executive programs for the promotion of equality do not exist. There have been no new legislative and political initiatives in this area (except for the 2013 amendments prohibiting discriminatory advertisements). Prior to the crackdown on independent civil society organizations, there were projects related to non-discrimination and equality based on ethnic grounds. These were carried out by a few professional NGOs using money from Western donors and had a tenuous public effect.

For Ukraine, the major external factor is EU conditionality leverage. This was the reason for the adoption of the anti-discrimination law and for its subsequent implementation. The promoters of the equality agenda are the equality unit within the Ombudsperson’s office, involving limited staff, and several professional NGOs which are striving to use European legal and policy guidelines and are funded by Western donors. A limited number of complaints about ethnic discrimination are brought before the Ombudsperson and courts, and there are a number of civil society projects and initiatives. However, the issues of human equality are not at the top of public agendas, and ethnic discrimination appears to be a marginal issue even against this background. A sign of this is the non-involvement of ethnic activists in activities aimed at the protection of equality.

On the other hand, the public authorities in both countries as well as legal professionals and civil society activists are aware of the notion of discrimination, or this information is easily accessible whenever necessary. In both countries the term ‘discrimination’ is present in legislation, and to a limited extent in jurisprudence; ‘discrimination’ is referred to in the major doctrinal official document on ethnic policy in Russia, while Ukraine has a comprehensive act against discrimination. Civil society activists in both countries have been running awareness-raising and advocacy projects; the issue is discussed by legal professionals.

Ukraine has conditions more favorable for the development of an anti-discrimination agenda because it is a competitive democracy and can benefit from EU-led conditionality policy, while Russia has an authoritarian regime, suppresses independent civil society, and limits international cooperation. Nevertheless, the visibility and effect of an anti-discrimination agenda are comparable in both countries. Several dozen complaints about ethnic discrimination go through the Ombudsperson’s office and courts per year in Ukraine, while in Russia the available sources report that there are fewer individual motions that address the courts, executive authorities, public prosecution and the federal ombudsperson. Notably, ethnicity-based civil society organizations in both Russia and Ukraine basically neglect the anti-discrimination agenda. Both public authorities and civil society at large

prioritize other issues, such as the fight against hate speech and projects aimed at the promotion of ethnic tolerance.

One can say that the anti-discrimination agenda in Ukraine has occupied small niches of its own in the human rights movement and public ethnic policy, but in no domain does it generate a significant effect. Although Russia lacks the institutional settings available in Ukraine, the impact of the anti-discrimination agenda is comparable.

Do the post-Soviet countries differ from other parts of Europe because of their Soviet legacy? There are few traces of a Soviet legacy in the promotion of equality on ethnic grounds, and these manifest themselves in official rhetoric but not in the state's instrumental policies. Moreover, the difference between Russia and Ukraine, on the one hand, and Central-Eastern European countries, on the other, is not drastic. The former communist countries west of the post-Soviet space and the Baltic States have become EU members; therefore, they have a comprehensive anti-discrimination legal and institutional framework that includes independent equality bodies easily accessible to potential claimants. However, the number of individual complaints made on ethnic or racial grounds remains low and lags behind the number of complaints and suits presented on other grounds.

For example, in 2017 the Hungarian Equal Treatment Authority processed 1,423 submissions on all prohibited grounds; of these, the Authority found infringements in 33 cases, while only four were on the grounds of belonging to a national minority (Equal Treatment Authority, 2018: 11). The Slovak National Centre for Human Rights in 2017 investigated four cases of discrimination, of them in two established discrimination (both on the grounds of ethnicity or race) (Annual, 2018: 9). The Polish Commissioner for Human Rights in its annual report for 2017 referred to only one case of ethnic discrimination, which had been under investigation since 2015 (Summary, 2018: 18–19).

Other countries of continental Europe that have no communist experience generally demonstrate more significant outcomes. For example, in 2017 the Danish Board of Equal Treatment received 294 complaints, of which 44 were related to race and ethnic origin (CERD/C/DNK/22-24, 2019: para. 255). However, ethnicity-based organizations in Europe do not prioritize anti-discrimination goals and rarely resort to the respective legal instruments or launch anti-discrimination campaigns. Notably, the scale of anti-discrimination activities may be much larger in another social context. For example, the number of complaints on the grounds of race, national origin and skin color to only the federal Equal Employment Opportunities Commission in the US in 2017 constituted (respectively) 31,027, 9,438 and 2,833 (Charge Statistics, n.d.).

This situation may be deemed surprising if we regard the frame of anti-discrimination as universally applicable and instrumental in all national environments. If we discard this assumption, everything falls into place.

The ruling elite and civil society must invest in anti-discrimination mechanisms if they have a compelling interest in overcoming disparities or segregation patterns that threaten social stability and governmentality. For most countries in continental Europe, including Russia and Ukraine, this is not the case. The other incentive can be external pressure, such as the conditionality policy of the EU. The need for compliance with external standards, as the recent history of most EU member states and neighbors bound by conditionality – such as Ukraine – shows, might be sufficient

for adopting anti-discrimination legislation, but barely for its consistent implementation.

From another perspective, bottom-up action against discrimination may not always be the most effective process for an individual claimant seeking to resolve a certain dispute. Bringing a case against discrimination in court may be a complex and time-consuming undertaking; a complaint to an independent anti-discrimination body in Europe is highly likely to bring about no satisfactory outcome since such bodies often do not have enforceable powers (as in Ukraine).

When there is no commonly recognizable image of a victimized category that needs protective measures, and moreover, when the major stakeholders are not ready to accept the very idea of ethnic relations as intergroup domination and subjugation, the moral incentives for both state action from above and juridical activism from below will not be strong enough. On the contrary, the visibility of ethnic enmity and the experience of ethnic conflict push the issues of conflict prevention and violent radicalism to the forefront.

7. Conclusion

Both Russia and Ukraine are lacking conditions for the three kinds of recurrent and large-scale practices which constitute the anti-discrimination agenda: namely, state action, judicial activism, and the widely accepted discourse surrounding illegitimate intergroup subjugation. The ruling political and intellectual elites in both countries have no compelling interest in dismantling a 'color line' (like in the US) and integrating a segregated society because these issues do not pose a problem. 'Traditional' ethnic minorities are not basically suppressed and excluded (or such perceptions are not mainstreamed), and the issues of equality are regarded rather as the symbolic recognition or competition of public narratives than the oppression of individuals because of their ascriptive characteristics. In both countries, the state has no incentive nor resources for social engineering involving the equalization of social conditions. The state apparatus views the issues of immigration as problems of administrative control and integration in terms of immigrants' cultural and linguistic competences rather than of their rights and social opportunities (Karpenko, 2016). The agenda of security and the prevention of violence takes priority and is framed as 'countering extremism,' or 'the promotion of civic unity' overshadows and replaces equality and non-discrimination. The dominant reaction of the general public to sporadic news about individual cases of ethnic discrimination is confidence that private persons including landlords, employers and entrepreneurs have full and unlimited discretion in selecting customers or contracting counterparts.¹⁴

On the other side, anti-discrimination goals and mechanisms (in the shape promoted by the EU and other international actors) provide weak incentives and limited opportunities for individuals and civil society organizations. Action against discrimination is time-consuming and does not lead to results that can usually satisfy claimants. In part, this can be explained by the state of national legislation, the

¹⁴ A good illustration of this are the comments on a Facebook post of famous economist Andrei Movchan about a discriminatory commercial (May 19, 2018); see <https://bit.ly/2RJQilX> (in Russian).

executive and the judiciary (i.e., the lack of some legal institutions, the insufficient competences of judges and law-enforcement officials), and the doubtful effectiveness of the entire system in the eyes of ordinary people. It is easier for individuals to protect a certain violated right, or to resolve an issue informally, or to disengage, rather than to make a claim for the recognition of discrimination, and at best receive a tiny amount of compensation for moral damages (Valtseva, 2018).

However, these conditions are not unique to the post-Soviet states; they are present in most other post-Soviet countries, as the effectiveness of their anti-discrimination mechanisms demonstrates. The comparison between Russia and Ukraine is telling inasmuch as a democratic political regime does not play a crucial role in the development of anti-discrimination agenda: the outcomes in authoritarian Russia and democratic Ukraine are comparable, albeit Ukraine has achieved more. In both countries, the issues of discrimination are raised and addressed in practical terms but on rare occasions; thus, non-discrimination occupies its own niche, but it is far from playing any significant role in human rights advocacy and ethnic politics.

It turns out that both for the governments and civil society organizations, the major incentive and resource is external pressure, including moral and financial support from international institutions that are working on the issue of discrimination; when this support is cut off (as in Russia), domestic anti-discriminatory activities fade away.

Post-Soviet political and social systems can be characterized as neo-patrimonialist (Gel'man, 2016; Hale, 2007) in the sense that people pursue life strategies through working towards their inclusion into patronal relationship and clientele networks. The search for such inclusion and respective privileges is a more effective solution than picking fights about equality for ideological reasons through ineffective formal institutions. These considerations also apply to ethnicity-based civil society organizations that usually prioritize cultural projects and seek good relations with the public authorities of their host states. For these purposes, human rights activities may be counterproductive. Many minority NGOs are interested in operating a range of businesses with their kin-states, and their priority is to avoid all that can be detrimental to cross-border cooperation.

One can list other specific circumstances that negatively affect potential anti-discrimination initiatives. Among these are the lack of resources available for civil society organizations; the policies of repression, control and co-optation aimed at civil society in Russia (and other post-Soviet authoritarian regimes); as well as the 'nationalizing' policies (such as in Ukraine) that push the state of ethnic minorities to the margins of public attention. Besides these issues, post-Soviet societies generally elevate concerns about security and stability to the top; this is a reason why the 'fight against extremism' and 'inter-cultural dialogue' preclude concern about equality issues.

Spontaneous processes of social stratification are unlikely to be stopped or reversed by judicial or administrative means without deep state interference in market mechanisms and the curtailment of the freedom of contracts. Moreover, the anti-discrimination agenda might bring about such by-products as an anti-racist ideology, meaning the interpretation of statistical inequalities as inter-group relations of oppression and subjugation. A similar argument occasionally employed by majority nationalists is not yet being developed and still remains marginal in both Russia and

Ukraine. The post-Soviet countries are still staying free of this conflict-prone idea; in part because of the claims of Soviet ideologists that structural inequalities had been overcome long ago.

To sum up, an anti-discrimination framework requires too many societal prerequisites which are not always available. Anti-discrimination also needs strong ideological motivation; i.e., a common belief in structural inequalities and group subjugation that must be overcome; this presumption is not always obvious and taken for granted. However, the propositions made above are not written to deny the instrumental value of anti-discrimination law, which must have its own niche. On the contrary, a set of specific presumptions and procedural rules that are fine-tuned in accordance with the social context must serve as effective tools for resolving certain kinds of disputes about equality.

The question why the agenda of non-discrimination on ethnic grounds is non-existent or marginal in the post-Soviet space should be reformulated and split into several other ones. Is there in principle a coherent approach that is effectively applicable worldwide? Are there reasons to expect that there must always be domestic demand for ethnic equality? Shall such demands for justice on ethnocultural grounds be framed only as issues of racism and discrimination? The answers are unlikely to be positive.

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