

Approaches to the definition of national minorities and ethnic groups and their legal position in the Slovak Republic

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Abstract

The issue of national minorities and ethnic groups is the subject of debates and discussions, often in connection with their legal status in individual states. In the majority of cases, both the national minority and the ethnic group are not distinguished in both legal documents and professional literature. We believe that the reason may be the ambiguity and complexity of the definition of the two terms. However, the need for at least partial definition is reinforced in some cases by a different approach to legal protection and the status of these groups and minorities. The primary aim of our contribution is to point out different approaches to the definition of national minorities and ethnic groups at international and national level. We use scientific methods of analysis, synthesis, induction, deduction and comparison.

Keywords: ethnic groups, national minorities, citizenship, discrimination, human rights

Introduction

It is possible to say that the position of national minorities and ethnic groups in the majority society of individual states has been the subject of discussions, or polemics of the professional as well as lay public since the establishment of the so-called „the third generation of human rights“ (or even before their creation), which are characterized by solidarity, cross-border and effective implementation of the necessary cooperation of actors at all levels - the state and individuals. Given the evidently different development of individual states, the application of the rights of national minorities and ethnic groups is inconsistent, sometimes ambiguous and unclear. The definition of a national minority and ethnic group, which is often ambiguous in individual countries, all the more at the international level, can be described as the no less problem of the professional public. The primary aim of our contribution is to point out different approaches to the definition of national minorities and ethnic groups at international and national level, which is closely related to the actual position of these minorities and groups in society. In this case, the issue of discrimination, sometimes overgrown into extremist proceedings and speeches against ethnic groups and national minorities in the Slovak Republic and in the neighbouring countries of the European Union, can also be described as a contemporary issue.

1. Legal bases for international, European and national human rights protection in relation to the status of national minorities and ethnic groups

The status of national minorities and ethnic groups can be identified primarily by analyzing relevant international documents. The United Nations has long been a key human rights organization, including in relation to the rights of national minorities and ethnic groups. At the European level in the area of protection of rights, the so-called European Court of Human Rights as an institution of the Council of Europe comes to the fore. Last but not least, the European Union also expresses the interest of more uniform protection of human rights at European level, especially in the Charter of Fundamental Rights of the European Union.

At international level, as the key documents regulating the issue of national minorities and ethnic groups, the International Convention on the Elimination of All Forms of Racial Discrimination and other human rights issues, in particular the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on economic, social and cultural rights, should be considered.

The aforementioned documents have been adopted at the United Nations level, but documents relating to national minorities and ethnic groups can also be identified at the Council of Europe level. These include in particular the following documents:

- Framework Convention for the Protection of National Minorities (Notice of the Ministry of Foreign Affairs of the Slovak Republic No. 160/1998 Coll.), (Hereinafter referred to as "Framework Convention for the Protection of National Minorities"),
- European Charter for Regional or Minority Languages (Notice of the Ministry of Foreign Affairs of the Slovak Republic No. 588/2001 Coll.), (Hereinafter referred to as "European Charter for Regional or Minority Languages"),
- European Social Charter (Notice of the Ministry of Foreign Affairs of the Slovak Republic No. 329/1998 Coll.), (Hereinafter referred to as "European Social Charter"),
- Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols no. 3, 5 and 8 (Notice of the Federal Ministry of Foreign Affairs No. 209/1992 Coll.), (Hereinafter referred to as "European Convention for the Protection of Human Rights").

In relation to the status of minorities and the European Convention for the Protection of National Minorities, Article 6 of the Convention, which emphasizes the need to maintain tolerance, respect and intercultural dialogue, is crucial. According to Art. 6 par. 2 of the European Convention for the Protection of National Minorities, the Parties undertake to take appropriate measures to protect persons who could be endangered or discriminated against, subject to hostility or violence for their ethnic, cultural, linguistic or religious identity.

Naturally, the individual Member States of the European Union are also committed to the protection of human rights, either by ratifying treaties which are part of primary EU law, or by adopting national legal acts protecting human rights, including national minorities and ethnic groups.

In addition, human rights issues related to national minorities and ethnic groups, the elimination of discrimination and extremism are also dealt with by the European Union institutions, headed by the European Commission (hereinafter referred to as the "EC"), as the initiative institution, where it is also possible to find documents regulating the aforementioned protection of national minorities and ethnic groups against extremist manifestations and acts.

In this context, it is possible to identify in particular the following three legal acts regulating the issue of national minorities and ethnic groups:

- Charter of Fundamental Rights of the European Union; 2012 / C 326/02, 26.12.2012
- Council Framework Decision 2008/913 / JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law; OJ L 328/55, 06.12.2008,
- Council Directive 2000/43 / EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; OJ L 180/22, 19.07.2000.

At national level in the Slovak Republic, the issue of protection of national minorities and ethnic groups can be found primarily in the Constitution of the Slovak Republic (No. 460/1992 Coll., as amended) (hereinafter referred to as the "Constitution of the Slovak Republic"), in the fourth section of the second title „Rights of national minorities and ethnic groups“.

According to Art. 33 of the Constitution of the Slovak Republic membership of any national minority or ethnic group shall not be prejudicial to anyone. The Constitution of the Slovak Republic further in Art. 34, par. 1 grants members of national minorities, respectively ethnic groups rights and freedoms. In this sense, the Constitution of the Slovak Republic guarantees citizens a universal development, including the right to develop their own culture, to communicate in their mother tongue, as well as to freely associate and establish educational or cultural institutions. Pursuant to the Constitution of the Slovak Republic, further details will be laid down in a specific law.

In this context, it is possible to speak eg. on Act no. 184/1999 Coll. on the use of languages of national minorities, as amended, respectively on Act no. 365/2004 Coll. Act on Equal Treatment in Certain Areas and on Protection Against Discrimination and on Amendments to Certain Acts, as amended (the Anti-Discrimination Act).

In addition to the right to acquire the state language, the Slovak Constitution also guarantees other rights. According to Art. 34, par. 2 of the Constitution of the Slovak Republic, citizens are guaranteed the right to education in their language, the right to use their language in the communication with officials and the right to participate in the solution of matters concerning national minorities and ethnic groups.

However, when regulating the issue of the status of members of national minorities and ethnic groups in the Slovak Republic, the Constitution also considers the protection of the rest of the population. According to Art. 34, par. 3 of the Constitution of the Slovak Republic exercising the rights of citizens belonging to national minorities and ethnic groups guaranteed in this Constitution must not lead to a threat to the sovereignty and territorial integrity of the Slovak Republic and to discrimination against its other population.

In terms of the constitutional regulation of the rights of national minorities in the Slovak Republic, according to Orosz, it is possible to speak of a long-term high standard in comparison with other European states. *"However, it is desirable to strictly separate this statement from the assessment of the factual situation while respecting these rights at different stages of our modern history."* (Orosz, 2004, p. 55)

In this respect, Chovanec criticizes the abuse of the topic of national minorities by political parties. According to him, there was great political pressure from the Hungarian political parties in the 1990s to gain territorial autonomy without relying on any international document that would allow such a possibility (Chovanec 1999).

However, according to Pan, Pfeil and Videsott, still only a portion of the national minorities in Europe enjoy sufficient legal protection and more than four fifths of the minorities do not think of revising existing international borders. *"This could change rapidly, however, if for lack of minority protection they were exposed to incessant and existence-threatening discrimination. In that event, increasing separatism and border revisionism are the foreseeable results. The case of Kosovo is an example of this. Other cases which are not directly comparable to Kosovo but are still impressive are the independence referendums or public opinion polls of 2014 in Scotland, Catalonia, and Ukraine."* (Pan, Pfeil and Videsott, 2018, pp. 8-9)

A detailed analysis of the legal status of ethnic groups and national minorities exceeds the scope of the paper, so we are further focused on the content of these two terms.

2. Is it possible to identify the differential characters of ethnic groups and national minorities? Why is it helpful to distinguish them?

In the majority of cases, the national minority and the ethnic group are not distinguished in both legal documents and professional literature. We believe that the reason may be the ambiguity and complexity of the definition of the two terms. However, the need for at least

partial definition is reinforced in some cases by a different approach to legal protection and the status of these groups and minorities. It is possible to say that without a clearer definition of these groups, their legal status, including the exercise of individual rights and obligations, is considerably more difficult, even though the Constitution of the Slovak Republic recognizes them in Art. 33 and 34 granting them equal rights.¹

As Palúš states in this case, neither the Constitution of the Slovak Republic nor the laws in force define the content of these terms, nor do they distinguish their members. With regard to the concept of a national minority, it is possible to refer to the freely formulated definition of Council of Europe Recommendation No. 1201 (1993). According to this document, a national minority can be characterized, inter alia, by the fact that they are citizens with a permanent residency in the country who retain and still wish to retain their characteristic religious, ethnic or linguistic characteristics, and not a majority society. In the Slovak Republic, membership of a national minority is a manifestation of the subjective will of a particular person (Palúš 2016).

However, Ferenčuhová adds in this case that both the European States and the Council of Europe pointed out the impossibility of consensus, which, despite the ratification of the document, led only to its recommendation character and prevented the definition of a national minority from being incorporated into the Framework Convention for the Protection of National Minorities (Ferenčuhová 2004). Somorová adds that the most problematic areas of the definition of a national minority in this case were the lack of agreement on the requirement of a certain numerical ratio that would clearly establish non - dominance in society, or the requirement that the existence of a minority should be tied to citizenship. The criterion of long-term existing minorities in the national territory, which could be discriminatory in relation to incoming immigrant groups also proved to be problematic. Questions were also raised by the condition of the minority's efforts to preserve different characteristics – the form of expression of which was not clearly established (Somorová 2004).

Despite the lack of legal distinction between the two terms in the Slovak Republic, it can be assumed, with a certain amount of inaccuracy, that the term ethnic group is presumed to be a group that meets the above mentioned definition of national minority, but historically it is not clear that they belong to a particular state or nation. However, such an assumption is not absolute.

A broader approach to the definition of national minorities is also taken by Pap: national minorities *“are groups that, based on their claims for collective rights, bypass the anti-discriminatory logic and seek recognition of cultural and political rights, particularly autonomy*

¹ In practice, the position and exercise of the rights of the Roma minority appear particularly problematic. In the diapazon of the Slovak Republic and Central Europe, discussions about its nationality are currently taking place. This issue is briefly discussed at the end of this section.

or the toleration of various cultural practices that differ from the majority's, which often require formal exceptions from generally applicable norms and regulations. In this case, we are dealing with claims for preferential treatment." (Pap, 2015, p. 35)

Konečný also offers an interesting approach to differentiation between ethnic group and national minority. He agrees, that it can be stated that the definition and clear distinction between a national minority and an ethnic group is not unambiguous and universally accepted. However, as he points out in this sense, "ethnicity" can also be understood as an ethnic community at the pre-national stage of its development (Konečný 2000).

It is precisely the identification of nationality that is crucial in this case. According to Marušíak, Halász and Gniazdowski, who refer to the German historian Friedrich Meinecke, it is possible to identify the dichotomy between the nation-state and the cultural-nation. While in the first case the unifying element is the power of common history and constitution, in the second case there are shared cultural features (language, traditions, relationships, or spirituality). Several other authors followed this differentiation. It should be noted that, according to Meinecke, nationalism is a process, not a fixed position. The issue of the right of nations to self-determination as a natural right now needs to be given due attention (Marušíak, Halász and Gniazdowski 2015).

Similarly, Průcha, referring to the "Great Sociological Dictionary of 1996", defines several criteria by which a nation can be identified and categorized into three types. Criteria of culture, which include standard language, common religion, resp. common historical experience, criteria of political existence according to which nations have their own state, or at least a certain autonomous status and psychological criteria according to which individuals (entities of the nation) share a common awareness of their membership of a nation. It also draws attention to the fact that it is possible to speak of a nation in political and ethnic terms. Like Palúš, he says that belonging to a nation is not only a question of objective signs but also a subjective attitude of each individual (Průcha 2010).

It is therefore clear that, according to these definitions, in the absence of nationality criteria, it is possible to speak of an ethnic group, not a national minority. At the same time, it is clear that an ethnic group is, by its very nature, a broader term, since membership of a nation does not exclude other characteristics of ethnicity, but otherwise it is not true, as not every ethnic group can be considered an autonomous nation. According to several authors, it should also be stressed out that the nation as such, and hence the members of a national minority, may initially be members of several ethnic groups.

However, the issue of the definition of a national minority is further complicated by the fact that it is possible to speak of at least two types. According to Waldenberg, the first type of national minority is that part of a nation that has its own state outside of the state in which it

resides. However, a minority that does not have its own state can also be considered a national minority (Waldenberg 2003).

On the contrary, it is precisely the membership of the state where the members of the minority live that seems key to differentiation. According to Hašanová, while an ethnic group is rather a general term, the national minority ties to belonging to the particular country in which it lives, while trying to maintain its uniqueness (Hašanová 2015).

Last but not least, it is worth mentioning a simplified approach to the differentiation of ethnic groups and national minorities according to Kumanová, who associates the granting of rights in the legal system with the recognition of an ethnic group as a national minority. "*A national minority or nationality is the designation of such ethnic groups that are granted certain rights by the majority nation with whom they live in a common state*". (Kumanová, 1998, p. 44) In this case of a higher quality position of an ethnic group, their ethnicity manifests itself not only as an ethnic subculture, but also in the work of professional artists that are part of their national culture. Ethnicity, language in its dialect forms and ethnic consciousness are among the most important aspects of ethnicity (Kumanová 1998).

It is clear that it is possible to identify different approaches to the definition of national minorities and ethnic groups in the Slovak Republic, the more difficult it is to find consensus by experts from different Member States of the European Union. In this context, the European Parliament "*recalls that within existing international standards every Member State has a right to define persons belonging to national minorities*". (European Parliament, 2018, p. 6)

Is the Roma minority an ethnic group or a national minority?

In the long term, the approach to the Roma population appears non-uniformed not only in the differentiation of ethnic group and national minority. This appears as problematic not only in the Slovak Republic, but also in other European states. The frequently used phrase 'Roma ethnicity' could indicate the lack of nationality. We believe that the naming of the Roma ethnic group as an ethnic group is not coincidental and results from the ambiguity of the existence of the Roma nation. Nevertheless, we believe that in this case it is necessary to speak of a national minority in terms of their legal status (in the Slovak Republic). As a significant milestone, it is possible to mark the adoption of Government Resolution no.153/1991, known as the so-called "Principles of Government Policy on Roma". According to this resolution, it is necessary to recognize the ethnic identity of the Roma and thus to recognize Roma as a nationality in current terminology, thereby ensuring their political and legal equality (Annex to Government Resolution No. 153/1991, Principles of Government Policy of the Slovak Republic towards Roma). The legal status of the Roma minority can also be derived from the current laws governing the status of national minorities in the Slovak Republic. E.g. according to § 1 par. 2 of Act no. 184/1999 Coll. on the Use of Languages of

National Minorities, as amended, the language of a national minority for the purposes of this Act is, inter alia, the Roma language.

Despite the legislation, its practical implementation is problematic. This may be due to both the unwillingness of the majority society and the refusal of official membership of the Roma minority by its members.

Conclusion – How to define a national minority and an ethnic group?

We believe that the Council of Europe's Recommendation No. 1201 of 1993 may continue to be considered as the most acceptable definition, in spite of its "just" recommendation nature. According to this Recommendation, a national minority is a minority residing in the territory of a State and its citizens are nationals, maintain long-lasting, strong and permanent relations with that State, exhibit cultural, religious, linguistic or ethnic characteristics, are sufficiently representative, although they are a minority in the majority society and are motivated by the desire to preserve their common identity and its characteristics together (Recommendation 1201 (1993)).

We also think that a suitable example for the legal order of the Slovak Republic could be *de lege ferenda*, Czech law no. 273/2001 Coll. on the Rights of Members of National Minorities and on Amendments to Certain Acts, as amended, which in § 2 defines the term national minority. If such a definition would be accepted in the legal order of the Slovak Republic, the wording could be as follows: *"A national minority is a community of citizens of the Slovak Republic living in the territory of the present Slovak Republic who differ from other citizens, at the same time, they express their desire to be considered a national minority in order to work together to preserve and develop their own identity, language and culture, and to express and protect the interests of their communities, which have historically formed."*

We believe that individuals belonging to an ethnic group in the Slovak Republic can be considered as individuals who meet the criteria relevant to ethnicity, but from a historical perspective their nationality is either not clear, or they are not citizens of the Slovak Republic.

However, according to the opinion of the Venice Commission, a more dynamic tendency to extend minority protection to non-citizens has developed over the recent past. *"The Commission recalls that the traditional position in international law is to include citizenship among the objective elements of the definition of national minorities. In the Commission's opinion, the choice of limiting the application *ratione personae* of specific minority protection to citizens only is, from the strictly legal point of view, defensible. States are nevertheless free, and encouraged, to extend it to other individuals, notably non-citizens."* (European Commission for Democracy through Law (Venice Commission), 2018, p. 6)

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