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## THE RIGHT TO EDUCATION AND POSITIVE DISCRIMINATION: A CONSTITUTIONAL AND LEGAL ANALYSIS

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**Karapetian A.R. The right to education and positive discrimination: a constitutional and legal analysis.**

The article reveals the peculiarities of the constitutional and legal consolidation of positive discrimination in the field of education in foreign countries and in Ukraine. It is established that: 1) positive discrimination in the field of higher education is prohibited in the United Kingdom, Germany, Sweden, and Slovakia; 2) positive discrimination based on race in university admissions is prohibited in the USA; 3) positive discrimination is allowed and applied: in Canada to representatives of the indigenous population (indigenous peoples) when entering a university and when receiving special scholarships; in Bulgaria - only for one ethnic community – Gypsies when entering a university, in Hungary – for socially disadvantaged citizens and the ethnic community of Gypsies when entering a university, in Macedonia – for national minorities when entering a university; in Finland for applicants who speak Swedish when entering certain educational programs; in China - to representatives of ethnic minorities, in India - to representatives of classes and castes that, according to the Constitution of India, are disadvantaged; in New Zealand – to representatives of the indigenous Maori people and other Polynesians when entering higher education institutions and providing scholarships, in Sri Lanka - to applicants from areas with poor access to education, in Brazil – to representatives of racial and ethnic communities, people with low incomes and disabled people; 4) in Japan, in accordance with national legislation, it is forbidden to apply positive discrimination on the basis of gender, ethnicity, social origin (but not citizenship) when entering a university, but in practice there is a policy of granting preferential treatment when entering a university to representatives of the Burakumin national minority; 5) The French Constitution of 1958 prohibits discrimination on the basis of race, religion or sex, French legislation that develops provisions of the French Constitution prohibits direct and indirect discrimination in education based on race or ethnic origin, but allows positive discrimination in education that is based on signs of «belonging to a certain district of the city».

In Ukraine, positive discrimination in the field of education when entering universities and receiving scholarships for representatives of indigenous peoples of Ukraine is not provided for by national legislation.

**Key words:** human rights, the right to education, discrimination, the principle of equality, positive discrimination, the constitution, constitutional and legal regulation.

**Карпетян А.Р. Право на освіту та позитивна дискримінація: конституційно-правовий аналіз.**

В статті виявлено особливості конституційно-правового закріплення позитивної дискримінації в сфері освіти в зарубіжних країнах та в Україні. Встановлено, що: 1) позитивна дискримінація в сфері вищої освіти заборонена в Сполученому Королівстві, ФРН, Швеції, Словаччині; 2) позитивна дискримінація за ознакою раси при вступі в університет заборонена в США; 3) позитивна дискримінація дозволена та застосовується: в Канаді до представників корінного населення (корінних народів) при вступі в університет та при отриманні особливих стипендій; в Болгарії – тільки для однієї етнічної спільноти - циган при вступі в університет, в Угорщині – для соціально знедолених громадян та етнічної спільноти циган при вступі в університет, в Македонії – до національних меншин при вступі в університет; в Фінляндії для абітурієнтів, які розмовляють шведською мовою при вступі на певні освітні програми; в Китаї – до представників етнічних меншин, в Індії – до

представників класів і каст, які відповідно до Конституції Індії є ущемленими; в Новій Зеландії – до представників корінного народу маорі та іншим полинезійцям при вступі до вищих навчальних закладів і надання стипендій, на Шрі-Ланці – до абітурієнтів з районів з поганим доступом до освіти, в Бразилії – для представників расових і етнічних спільнот, людей з низькими доходами і інвалідів; 4) в Японії відповідно до національного законодавства при вступі в університет заборонено застосовувати позитивну дискримінацію за ознакою статі, етнічної приналежності, соціального походження (але не громадянства), однак на практиці існує політика надання пільгового режиму при вступі в університеті представникам національної меншини буракумін, 5) Конституція Франції 1958 року забороняє проведення відмінностей за расовою, релігійною чи статевою ознакою, законодавство Франції, яке розвиває положення Конституції Франції, забороняє пряму і непрямую дискримінацію в сфері освіти за ознакою раси чи етнічного походження, але дозволяє позитивну дискримінацію в сфері освіти, яка заснована на ознаці «приналежність до певного району міста».

В Україні позитивна дискримінація в сфері освіти при вступі в університети, отриманні стипендій для представників корінних народів України не передбачена національним законодавством.

**Ключові слова:** права людини, право на освіту, дискримінація, принцип рівності, позитивна дискримінація, конституція, конституційно-правове регулювання.

**Formulation of the problem.** Higher education is determined by the totality of systematized knowledge, abilities and practical skills, ways of thinking, professional, worldview and civic qualities, moral and ethical values, other competences acquired in a higher education institution (scientific institution) in the relevant field of knowledge according to a certain qualification at the levels of higher education, which are higher in complexity than the level of complete general secondary education [1].

It is well known: there is factual inequality and legal inequality. The international, European and national law of the member states of the Council of Europe on the prohibition and prevention of discrimination comes from the recognition that the law must take into account the differences between people because there are so-called “vulnerable groups” in society at any time), who, due to reasons of a social or physiological nature, are objectively in a less favorable position than other members of society, feel a greater risk of poverty or social isolation. The field of education was no exception. In particular, positive discrimination in the field of education during admission to universities was introduced in the USA. After the full-scale invasion of Russia on the territory of Ukraine in 2022, many citizens of Ukraine left for the EU. The problem of ensuring the right to education of displaced persons arose because the education system of the EU member states was not designed for such a large number of displaced persons from Ukraine, in particular, children. Both in academic circles and in practice, the discussion on the issue of positive discrimination was intensified. In addition, Ukraine is integrating with the EU and should improve its national legislation so that it complies with EU law. In this process, the experience of implementing EU norms by EU member states is important for Ukraine.

The state of development of this problem. In the science of constitutional law, the issue of ensuring the right to education was investigated by prof. Lyudmyla Deshko [2; 3; 4; 5], Yuriy Bysaga [6; 7; 8; 9] and other scientists. The issue of the state's obligation to ensure the right to education was investigated in the scientific works of Svitlana Gretska [10] and others. The issue of legal regulation of the right to education in the field of medicine was indirectly investigated in the works of V. Volkov [11; 12; 13], S. Buletsa [14] and other scientists. An in-depth study of the legal status of positive discrimination, as well as various related programs, their pros and cons, is carried out in a scientific work by Marc Bossuy, written for the Subcommission for the Promotion and Protection of Human Rights at the UN Commission on Human Rights [15]. At the same time, the issues of constitutional and legal regulation of the right to education and positive discrimination in the context of its provision to displaced persons, as well as in the context of the integration of Ukraine and the EU, have not been comprehensively investigated. Moreover, this issue was not investigated even after the decision of the Supreme Court of the United States, which found positive discrimination unconstitutional in the admission of applicants to universities in the United States.

**The purpose of this article** is to reveal the peculiarities of the constitutional and legal consolidation of positive discrimination in the field of education in foreign countries and in Ukraine.

**Presenting main material.** The 60s of the 20th century were marked by the anti-colonial processes and policies of democratic states and the corresponding actions of the states for its implementation to eliminate the imbalance between the opportunities of different categories of persons to exercise equal rights due to

established stereotypes, practices or traditions that have developed in society. Such actions were used to fulfill the function of legal compensation to certain categories of persons with the aim of eliminating the consequences of social inequality as soon as possible.

For example, in the 1960s, the United States began to use affirmative action to combat discrimination against the country's black population. In France, a number of measures were taken against migrants from former French colonies, in Australia – against the indigenous population, in India – against representatives of underprivileged castes, in some countries – against religious groups, minorities, etc. These actions were also used in the field of education, which is the basis for human development and ensuring a dignified life. Affirmative action was designed to offset centuries of discrimination in education by so-called “dominant groups.” Time passed and with the development of social relations, information technologies, which contributed to greater and greater availability of knowledge, the question arose: should positive discrimination be limited in time? Does it not contradict the state constitution? Is the purpose for which positive discrimination is applied really achieved?

Positive discrimination is prohibited in the United Kingdom. There is no system of quotas or preferences in the field of education. On the other hand, in the USA, positive discrimination has been used for decades in the field of higher education. In 2003, the issue of affirmative action in university admissions was considered by the US Supreme Court. In particular, it was about whether such positive discrimination complies with the US Constitution. On June 29, 2023, the US Supreme Court banned the use of race and ethnicity as a preference in university admissions. According to the AFP agency, this will narrow educational opportunities for African Americans and other minorities. But as Chief Justice John Roberts rightly noted in my opinion, “even if such actions were “well-intentioned,” they cannot continue “forever” and “unconstitutionally discriminate” against others... A student should be treated based on his experience as an individual, not on the basis of race ... universities have the right to consider an applicant's background, but not to make decisions primarily based on the applicant's race” [15]. Thus, positive discrimination in the field of education cannot exist forever. It must be established for a certain period.

In Canada, in most universities, there is a system in which representatives of the indigenous population (indigenous peoples) are subject to lower admission requirements. There are also indigenous peoples in Ukraine (Crimean Tatars, Krymchaks, Karaites), but positive discrimination is not applied to them when entering universities. According to Clause 4 of Art. 6 of the Law of Ukraine “On the Indigenous Peoples of Ukraine” “the state policy in the field of education and the state information policy are based on the principle of respect for the identity of the indigenous peoples of Ukraine, their integrity as distinctive ethnic communities and their national symbols” [16].

According to Canadian legislation, representatives of the indigenous population of Canada have the right to receive special scholarships. On the other hand, such special scholarships for representatives of indigenous peoples of Ukraine are not provided in Ukraine.

In the EU - an integration union - according to the Treaty on the European Union “The Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities” (Article 2) [17]. According to Art. 3 of the Treaty on the European Union “it (the EU) respects the richness of its cultural and linguistic diversity and takes care of the preservation and development of the European cultural heritage.” The norms of the EU Charter on Fundamental Rights prohibit discrimination based on gender, race, skin color, ethnic or social origin, genetic traits, language, religion or beliefs, and respect for cultural, religious and linguistic diversity is proclaimed (Article 6, Article 22) [18].

According to the Agreement on the functioning of the Union, “when defining and implementing its policies and activities, the Union strives to fight against any discrimination based on gender, race or ethnic origin, religion.” In addition to the regulatory and legal mechanism, an organizational and legal mechanism for combating discrimination, including in the field of education, has been created in the EU. In Art. 19 and Art. 20 of the Treaty states that the Council of the EU is given the relevant powers for this.

According to Art. 165 of the Agreement “The Union promotes the development of quality education, encouraging the cooperation of member states, supporting and supplementing their activities, while fully respecting the responsibility of member states for the content of the teaching process and for the organization of the education system, as well as their cultural and linguistic diversity” [17].

In 1995, the Council of Europe adopted the Framework Convention on the Protection of National Minorities. This regional international document on human rights prohibits the policy of assimilation and

discrimination, in particular with regard to the educational policy of the member states of the Council of Europe. Experts have repeatedly noted that “States that have ratified this Convention are responsible for taking concrete measures to implement it. It is important to note that the document recognizes the right of minorities to learn their native language or to be educated in it (Article 14.2) [19]. The Convention also stipulates that the state must provide national minorities with textbooks and teachers as part of ensuring the right to education. However, the lack of real mechanisms of sanctions against those member states that violate or do not fulfill the terms of the Convention makes it more like a declaration of good intentions. Although violations are recorded in the reports submitted to the Advisory Committee, created to supervise the implementation of the principles of the document, this supervisory body does not have the ability to exert a real influence on the policy of the participating states” [19].

Thus, despite its strengths and weaknesses, the Convention does not prohibit positive discrimination in the field of education. According to Clause 3 of Art. 12 of the Convention prohibits negative discrimination against national minorities “Parties undertake to create equal opportunities for access to education at all levels for persons belonging to national minorities.” Therefore, the Convention imposes on the state, which is a party to it, the obligation to create equal opportunities for the access of representatives of national minorities to education at all levels.

In Slovakia, in October 2005, the Constitutional Court ruled that positive discrimination “which grants privileges to members of racial and ethnic minorities” contradicts the Constitution. In Bulgaria, positive discrimination exists only for Gypsies, and in Macedonia, national minorities, mostly Albanians, are assigned quotas for admission to state universities.

Swedish legislation prohibits positive discrimination, considering it as one of the forms of discrimination.

Article 3 of the Basic Law of the Federal Republic of Germany guarantees equal rights for all [20].

In Finland, there are quotas for Swedish-speaking applicants for admission to certain educational programs (including legal and medical educational programs). The goal pursued by the state when implementing such a policy is to obtain professionals who speak Swedish, which is a guarantee of the rights of Swedish-speaking Finns.

The 1958 French constitution prohibits discrimination based on race, religion or sex [21]. Law No. 2008-496 enshrined the provisions of Directive 2000/43/EU: direct and indirect discrimination based on racial and ethnic origin is prohibited in France. However, since the 1980s, positive discrimination in the field of education has been operating in France, which is not based on “race”, “religion”, “gender”, but on “belonging to a certain district of the city”. The content of such positive discrimination boils down to the fact that schools established in areas of the city designated as “priority educational zones” are better financed than others. Graduates of these schools (schools that are designated as “priority educational zones”) receive privileges when entering some higher education institutions in France. It goes without saying that such positive discrimination, which exists in practice in France, is contrary to EU law.

Italy’s educational policy has been guided by the concept of intercultural education since 1994. Its legal basis is ministerial memorandum No. 73 “Intercultural dialogue and democratic coexistence: planning school participation.” The key element of the organizational and legal mechanism (institutional) implementation of the concept of intercultural education is the regional governments, which are empowered in the field of education and culture (Article 117 of the Italian Constitution [22]). In practice, the implementation of this concept results in the settlement of inter-ethnic tensions with the help of educational policy.

In Hungary, a model of positive discrimination and segregation of ethnic minorities is used. It is enshrined in the National Program for the Improvement of Education for Socially Disadvantaged Citizens, especially for Gypsies. At the same time, Hungarian legislation clearly defines autochthonous ethnic minorities. The criteria applied in Hungary for identifying a minority as an autochthonous ethnic minority are as follows: 1) residence on the territory of Hungary for a certain period of time (at least one hundred years); 2) special culture; 3) special language. The specificity is that only if a minority meets these three criteria in total, then it is identified as an autochthonous ethnic minority, and, accordingly, positive discrimination in the field of education is applied to the representatives of this minority. Unlike Hungary, in Ukraine, such positive discrimination is not applied to minorities.

In China, the “policy of preferences” is being implemented, according to which the state obliged universities to give preference to those applicants who belong to ethnic minorities when enrolling applicants. In Indian law, positive discrimination in the field of education applies to classes and castes that

are disadvantaged under the Constitution of India. This positive discrimination in the field of education consists in the fact that in all concerned public and private educational institutions (with the exception of religious educational institutions and educational institutions for persons who do not speak the official language), seats are reserved for economically and educationally backward classes and castes. In Japan, in accordance with national legislation, it is prohibited to apply positive discrimination on the basis of gender, ethnicity, social origin (but not citizenship) when entering a university. However, in practice, there is a policy of granting preferential treatment to representatives of the Burakumin national minority when entering the university.

Positive discrimination in higher education institutions exists in New Zealand: representatives of the indigenous Maori people and other Polynesians are given preference in higher education institutions and scholarships.

Affirmative action in university admissions has existed in Sri Lanka since 1971 against students from areas with poor access to education. These are the areas and population groups of Sri Lanka that were subjected to targeted discrimination by the British colonialists for two hundred years.

Some Brazilian universities (federal and regional) have created a system of “better admission” (quotas) for racial and ethnic minorities (blacks and indigenous Brazilians), people with low incomes and the disabled.

It is not by chance that the Constitution of Ukraine recognizes the main duty of the state to assert and ensure human rights and freedoms. Article 24 of the Constitution of Ukraine guarantees the equality of citizens in constitutional rights and freedoms and excludes the possibility of establishing any privileges or restrictions on certain grounds [23]. According to S. Pogrebnyak, the content of this article actually prohibits discrimination as one of the most obvious violations of the principle of equality [24]. Other scientists are also paying attention to this [25: 26].

According to the legal position of the Constitutional Court of Ukraine, this principle is not absolute and only defines the general rule of inadmissibility of establishing privileges or restrictions on social or personal grounds. This allows us to draw a conclusion not only about the right, but also about the state’s duty under certain circumstances to take measures to support socially vulnerable people.

**Conclusions.** The peculiarities of the constitutional and legal consolidation of positive discrimination in the field of education in foreign countries and in Ukraine are established: 1) positive discrimination in the field of higher education is prohibited in the United Kingdom, Germany, Sweden, and Slovakia; 2) positive discrimination based on race in university admissions is prohibited in the USA; 3) positive discrimination is allowed and applied: in Canada to representatives of the indigenous population (indigenous peoples) when entering a university and when receiving special scholarships; in Bulgaria – only for one ethnic community – Gypsies when entering a university, in Hungary – for socially disadvantaged citizens and the ethnic community of Gypsies when entering a university, in Macedonia – for national minorities when entering a university; in Finland for applicants who speak Swedish when entering certain educational programs; in China – to representatives of ethnic minorities, in India – to representatives of classes and castes that, according to the Constitution of India, are disadvantaged; in New Zealand – to representatives of the indigenous Maori people and other Polynesians when entering higher education institutions and providing scholarships, in Sri Lanka – to applicants from areas with poor access to education, in Brazil – to representatives of racial and ethnic communities, people with low incomes and disabled people; 4) in Japan, in accordance with national legislation, it is prohibited to apply positive discrimination on the basis of gender, ethnicity, social origin (but not citizenship) when entering a university, but in practice there is a policy of granting preferential treatment when entering a university to representatives of the Burakumin national minority; 5) The French Constitution of 1958 prohibits discrimination on the basis of race, religion or sex, French legislation, which develops the provisions of the French Constitution, prohibits direct and indirect discrimination in the field of education on the basis of race or ethnic origin, but allows positive discrimination in the field of education, which based on the sign of “belonging to a certain district of the city”.

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