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Historical and Legal Study of the National Equality Protection in the Russian Legislation

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Abstract

Background/Objectives: The article analyzes the criminal law of the Soviet period in the field of citizens' rights protection regarding ethnic and racial discrimination and considers the international norms implementation in modern law. **Methods/Statistical Analysis:** The research is based on the dialectical method of studying the processes of socio-legal phenomena. The main subject of the study is a philosophical understanding of the social nature of crimes, as a phenomenon depending on the society evolution, influencing the development of criminal law theory, criminology and constitutional law. The authors have also used specific scientific research. **Methods:** logical-semantic, historical, legal, system-structural, comparative law, sociological and mathematical modeling methods. **Findings:** As a result of the research, it has been found that there is no official interpretation of legislative norms at the level of the Supreme Court, some legal concepts contained in the text of the regulations are vague and ambiguous, which hinders the development of a uniform practice of application, making it possible to qualify some actions from a subjective point of view. A conclusion has also been formulated about the insufficient effectiveness of the reliable legal protection mechanism enshrined in the USSR Constitution of equality of rights and freedoms of man and citizen, depending on the given circumstances. **Application/Improvements:** The significance of the study is determined by the breadth of its application, namely by the use of its results in legislative, educational and propaganda activities.

Keywords: Ethnic Tensions, National Revival of the Peoples

1. Introduction

The problem of responsibility for incitement of national, racial or religious hatred was underdeveloped in the Soviet period. In the Soviet Union, the political, social and economic inequalities of all nations and nationalities were considered completely eliminated. It was assumed that only a limited number of people were involved in crimes related to the national origin discrimination. Criminal law provided for liability for acts of violation of national equality, equality of rights and freedoms of human and citizen. At the same time, the country was characterized by a process of national revival of the peoples, which coincided with a high level of social tension in society, resulting in the pronounced nationalist and separatist orientation of Armenian SSR and Azerbaijan SSR. All this led to the exacerbation of inter-ethnic relations on the territory of these republics, which in turn led to an increase in crimes encroaching on the national equality.

However, the absence of official interpretation of the said legislative norms at the appropriate level, some unclear and ambiguous legal concepts and definitions contained in the text of the criminal law providing for responsibility for the crime in question, did not allowed

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to develop a common practice of their application, leaving open the possibility to qualify certain nationalistic manifestations from the subjective point of view. These factors were aggravated by the imperfection of legislation on liability for national origin discrimination, the extreme complexity of the issues related to the cases and materials in this category, lack of sufficient knowledge, experience and practice of the law enforcement officials, and the weakness of their scientific and methodological support in this field.

The Soviet Union declared that all people were equal, regardless of nation, gender, race and religion. This state consisted of the union republics. RSFSR represented an association of small ethnic groups, more powerful than separated ethnic groups, and therefore capable to repel all infringement upon freedom and independence of the peoples being its members. As long as there is no national equality, a state can provoke animosity to itself. The situation is different when there are equal rights for all ethnic groups. In this case, all the nations are equal, no one is deprived of rights, and there is no reason for enmity, striving to get separated from the state. Whether it is about the native language or traditions, or even the laws, all nationalities are equal and enjoy full rights. Each ethnos has to decide itself issues concerning its own interests. If such a right is given to each nationality, none of them will blame the state for its problems. Then there will be no need for legislation against incitement of national, racial or religious hatred.

In reality, the Russian Federation Constitution defines Russia as a legal, democratic, federal and multinational state. Legislative enshrinement of the equality of citizens regardless of race, religion and national origin is of fundamental importance. In a state governed by the rule of law, the national factor shall be reflected at all levels of public life. No priority shall be given to one ethnos over another one, as it will inevitably lead to different tensions, which in turn can lead to crimes. In politics of our country, the satisfaction of interests of the whole state by sacrificing ethnic interests dominated for a long time. The attempt to establish a national state led to an aggravation of the ethnic problem, and was followed by a manifestation of extreme dissatisfaction of the representatives of certain nationalities.

The development of human society inevitably entails social, territorial and national contradictions.

According to sociologist at Yale University (USA), Wallerstein[1], the main task that we must set to ourselves and to their own conscience is a struggle against the three main types of inequality in the world: gender inequality, class inequality, and inequality of races/nationalities/religions.

In modern conditions, when the international integration is quite multifaceted, the consideration of the issues related to legal protection of ethnic and religious relations would be incomplete without the study of international law, taking into account the international and foreign experience. The basis of the stability of any democratic state today is the guarantee of protection of human rights and freedoms.

Attention shall be drawn to the fact that the international legal instruments only set out the rights and freedoms of human and citizen, and create general provisions of liability for their violation, while individual states, on the basis of their national characteristics have a right to adopt their own regulations.

The theoretical basis comprises the works of Russian and foreign scientists: Bastrykin[2], Luneev, Kudryavtsev and Naumov[3], Kozachenko[4], Kovalev[5], Rarog[6], Wallerstein[1], Müllerson[7], Piper[8], Schnyder[9].

2. Results

Results of the analysis of the Russian criminal legislation have shown that the ideas of the equality of nations and nationalities and their right to self-determination and sovereignty were for the first time proclaimed in a Decree of the Second All-Russian Congress of Soviets "On Peace", Declaration of the Rights of the Peoples of Russia, Constitution of the RSFSR of 1918. These ideas formed the basis for the penal and legal protection of national and racial equality of citizens. The Bolsheviks program contained the provision regulating the right of citizens to receive education in their native language and to express themselves in their native language at meetings. The program formulated the right to self-determination for all nations forming part of the state. This was fixed for the first time in the RSFSR Criminal Code in 1922, which contained the rules providing for punishment for encroachment upon the interethnic relations. This provision is included in the section of responsibility for crimes against administrative order. As is known, there was no separate section dedicated to especially dangerous crimes against administrative order in RSFSR Criminal Code of 1922. The first article of this section, Art. 74 of the Criminal Code of the RSFSR of 1922 did not considered

national peace and equality of citizens as the target of crime. Art. 74 of the RSFSR Criminal Code interpreted the crime against administrative order as any act intended to infringement of the proper functioning of subordinate agencies of administration or the national economy bodies, associated with the resistance or disobedience to the laws of the Soviet regime, with obstruction of the activities of its bodies and other actions that caused a weakening of power and authority of the government. Art. 83 of the RSFSR Criminal Code of 1922 provided for only one form of incitement of national enmity and hatred: propaganda and call to action. The second part of this article provides a qualifying form of propaganda and call to action. Part 2 of Art. 83 of the RSFSR Criminal Code of 1922 stipulates the following: if the propaganda and call to action take place during the war and are aimed to the non-performance by the citizens of their military or war-related responsibilities and duties, the penalty may be increased up to the death penalty. Excitation of national enmity and hatred by means of printed propaganda and call to action, through the production and distribution of literary works, there were no provisions for other types of crimes against administrative order. In Art. 84 of the RSFSR Criminal Code of 1922 it was stipulated that the production and possession for the distributive purpose of literary works calling for criminal actions covered by Art. 75-81 of the Criminal Code had to be punished by imprisonment for not less than 6 months.

The similar rule on liability for inciting national enmity and hatred was contained in Art. 59 of the Criminal Code of the RSFSR of 1926. If we compare the 1926 RSFSR Criminal Code and the 1922 Criminal Code of the RSFSR, they look similar to each other.

The provision about the state crimes adopted in 1927 expanded the scope of liability for inciting ethnic enmity and hatred and classified this action as a crime especially dangerous for the USSR. The Art. 21 of the Regulation stipulated the following: propaganda or call to action aimed at the incitement of national or religious hatred or enmity, as well as the distribution or manufacture and storage of the literature of the same nature, entailed a prison sentence of up to two years.

The same actions committed in a military situation or during mass disorders were punished by imprisonment for not less than two years, with confiscation of all or a part of the property and sanction strengthening in particularly aggravating circumstances, up to the supreme measure of social defense: shooting, with confiscation of property. All of this shows the difference between the content of Art. 21 of the Regulation and Art. 83 of the Criminal Code of the RSFSR of 1922, consisting namely in the fact that Article. 21 of the Regulation provides for two types of crimes: simple and aggravated. Article 21 of the Regulation differs from the Art. 83 of the RSFSR Criminal Code of 1922 not only in terms of the way the crime commission (call to action and propaganda), as provided for in Art. 83 of the RSFSR Criminal Code of 1922, but also in terms of manufacturing, storage and distribution of literary works which may cause the ethnic enmity and hatred. This type of excitation of national enmity and hatred was not specified in the RSFSR Criminal Code of 1922. The sanction for an aggravated form of excitation of national enmity and hatred in accordance with Art. 21 of the Regulation was quite severe, at the same time in case of a simple form of this crime the penalty was reduced to 2 years, while under Art. 83 of the RSFSR Criminal Code of 1922 the penalty was not less than 1 year of imprisonment.

As worded in Art. 21 of the Regulation of the state crimes, this article was transferred to the criminal codes of the Union republics. In the RSFSR Criminal Code of 1926, it was listed with number 597 in the section "Crimes Against the Administrative Order that are Especially Dangerous to the USSR". Clarifying issues regarding its application, the Plenum of the Supreme Court in the decision of 21 March 1930 drew the attention of courts to the fact that the excitation of national hatred was used by the class enemy in his own interests, and this is a type of class struggle. The emphasis was laid at the Plenum on the harmfulness and inadmissibility of political qualification as per Art. 597 of the Criminal Code of personal offences of individuals belonging to national minorities which did not have a counter-revolutionary character and took place in an atmosphere that excluded the possibility to recognize the act as a politically charged one. In another judgment of 16 April 1931, the Plenum pointed out that acts of violence and humiliation of the national minorities directed against the life and freedom of the workers and in fact deprived them of the rights granted to them by the revolution, were not covered by Art. 597 of the Criminal Code, and became already counter-revolutionary crimes in accordance with Art. 58 of the Criminal Code.

In addition to this, the Art. 597 of the Criminal Code of the RSFSR contained a rule providing for punishment for tribalism. According to Art. 201 organizers and

masterminds of the attacks on the individual, family, clan or tribe, home or habitat, committed with the participation of a large number of relatives or tribesmen based on hereditary feud or tribal hatred were punished by imprisonment for a term not exceeding one year.

This rule remained unchanged until 1958. The law of 1958 on criminal responsibility for crimes against the state formulated the components of the violation of national and racial equality as follows: propaganda or call to action for the purpose of incitement to racial or national hatred or enmity, as well as direct or indirect limitation of rights or establishment of direct or indirect advantages to citizens based on their race or national origin. This crime carried a punishment by imprisonment for a term of six months to three years or an exile for a term of two to five years.

These components were included in the Criminal Code of the RSFSR in 1960. The Art. 74 of the RSFSR Criminal Code was amended by the Law of the Russian Federation dated October 20, 1992. Amended Art. 74 of the Criminal Code of the RSFSR stipulated the following: Part 1 of Art. 74 of the Criminal Code of the RSFSR; deliberate actions aimed at inciting national, racial or religious enmity or discord, humiliating the national honor and dignity, propaganda of exclusivity or priority of citizens based on religion, nationality or race, as well as direct or indirect limitation of rights or establishment of direct or indirect privileges for citizens based on their race, ethnicity or religion shall be punished by imprisonment for a term not exceeding three years or a fine of up to sixteen times the minimum monthly wage.

Part 2 of Art. 74 of the Criminal Code provided for liability for the actions stipulated in the part 1 of this article, but associated with violence, deception or threats, as well as committed by an official. For these actions, the analyzed the criminal law provided for punishment by imprisonment for a term not exceeding five years or a fine up to twenty-five times the minimum monthly wage.

Part 3 of this article established a more severe punishment by imprisonment for a term up to 10 years for crimes committed by a group of persons, or for crimes which caused death of people or other serious consequences.

Revision of Art. 74 of the RSFSR Criminal Code was quite justified and resulting from a sharp aggravation of international conflicts.

3. Discussion

The main task of the state internal national policy was to harmonize the interests of all the peoples, ethnic groups and national minorities living in the country and to provide a legal and material basis of their development, as well as to unite all the peoples living in the Russian Federation, based on the principles of voluntary, equal and mutually beneficial alliance and cooperation.

Special attention should be paid to the assessment of national, ethnic, religious status, their contradictions in the sphere of interethnic and religious relations of the late twentieth and early twenty-first centuries, given by both domestic and foreign scientists. The master's and doctoral theses are defended on these issues; scientists, society and the population are interested in all issues concerning the explanation of the processes, taking into account the sociological and psychological characteristics, starting from the outbreak of crimes related to ethnic, religious, inter-ethnic relations to their investigation and legal decisions in each case.

Despite the increased attention to this matter, a long time it did not receive proper attention due to the unwillingness to give publicity to the fact of existence of these manifestations in a multinational state. Such crimes are often latent, are often not registered by law enforcement agencies by subjective reasons, or they are registered as disorderly behavior or offenses. There is an idea in the legal consciousness of any person that if a country has a law regulating any activity, it is enough for the consideration of an activity in this field of social relations as legal, and that the state has enough leverages to exercise control over the parties in this field of public relations. At the same time, it should not be forgotten that the existence of any law in the community does not mean that this law is properly applied and is efficacious. In order for the law to be efficacious, it must be supported by guarantees, including social, economic, and financial ones.

Particular attention should be paid to compliance of local authorities with the ethnic and religious equality legislation. One body is not able to work effectively in this direction, the effort of various agencies is needed; this entails the creation of an effective system of forecasting and prevention of possible ethnic and religious conflicts.

With the beginning of perestroika, the first signs of a new, even more controversial and politically criminogenic era and at the same time, new forms of political crime began to appear in the Soviet Union. The denouncement of the practice of political repression, the establishment of a multiparty system and rehabilitation of victims of state terror were accompanied by their recurrence in the new and modified forms[10]. If we analyze the history, in the year 1986 in Alma-Ata, in 1987 in Vilnius and in 1988 in Baku, the republican authorities tried in many ways to suppress the nationalist manifestations aimed at secession from the USSR.

The collapse of the Soviet Union gave a new impetus to the development of the liberated consciousness of the people, which was sometimes directed in the wrong direction. The lack of clear priorities in the internal social policy in the country allowed citizens making independent decisions sometimes failing to meet the requirements regarding the development and building of a democratic state.

Intensification of nationalist, separatist and extremist movements in the republics led to a sharp aggravation of the national issue. National and political forces striving for power and ownership cleverly used the spontaneous discontent of the people. Therefore, the first manifestations of democracy, market economy and sovereignty were dissolved in the mass actions of politicized nationalist, separatist, adventurous, extremist, criminal and corrupted forces. As of March 1991, there were 76 blazed territorial and ethnic conflicts recorded in the USSR, 80 disputes were at the stage of latency[11].

In modern conditions, when the international integration is quite multifaceted, the consideration of the legal protection of ethnic and religious relations would be incomplete without the study of international law and without taking into account the international and foreign experience. The basis of the stability of any democratic state today is formed by the safeguarded human rights and freedoms.

Attention shall be drawn to the fact that the international legal instruments only set out the rights and freedoms of man and citizen, and create general provisions of liability for their violation, when the individual states, on the basis of their national characteristics have a right to adopt their own laws and regulations.

There is a notion of so-called "positive discrimination"[7] in the international law. Some states provide in certain areas special rights only to a certain group of people in need just to bring it at the level of other groups[7].

Race is often a very significant cause for discrimination. The persecution of people because of their race too often causes the movement of refugees in all parts of the world. For example, in 1972 the Uganda citizens of Asian origin were persecuted and deported[12]. In the same year, a large number of the Hutu citizens of Burundi were killed, and many of them fled to neighboring countries[13]. The combination of mass acts of genocide in Rwanda in 1994 and the successful military resistance caused internal and external movements of many thousands of both Hutu and Tutsi citizens[14]. After 1975, thousands of Vietnamese people of Chinese ethnic origin were forced, along with many others, to seek protection in the countries of Southeast Asia.[9] Similarly, in South Africa under the apartheid regime, the legalized discrimination and the related policy of repression contributed to the mass exodus of refugees[15].

There were cases when people were persecuted because of their religion. In 1685, thousands of Huguenots fled from France to England and Prussia after the abolition of the Edict of Nantes opened the gate for massacres and repression. The end of the XIX century is known by the extirpation of Christian Armenians in the Ottoman Empire and the Jewish pogroms in Russia. Our age also made its contribution to the history of discrimination based on religion. So Jehovah's Witnesses[16] were persecuted in Africa, Muslims in Burma[8], ahmants in various Islamic countries[17], bahants in Iran[18].

Art. 9 of the European Convention on Human Rights recognizes the freedom to change religion or belief. It should be noted that there is a difference between the freedom to worship and the right to convert people to a certain religion.

On May 25, 1993 the European Court of Human Rights upon consideration of the case convicted a member of the Jehovah's Witnesses sect for "proselytism". Art. 9 (2) of the European Convention allows restriction not against freedom of conscience or belief as such, but against the freedom to express religious or other beliefs. The Court concluded that in the area where there are several religions the restrictions of that freedom may be necessary to reconcile the interests of different groups and to ensure that everyone's beliefs are respected (al. 33). Distinction should be made between the "Christian beliefs of a man and inappropriate proselytism" (al. 48),

although the impugned measure pursued a legitimate aim (protection of the rights and freedoms of others: al. 44, in those circumstances, the conviction was obviously not justified by urgent social need and was not proportional to that purpose (al. 49))[19].

Possible combination of different reasons for persecution is contained in the criteria of membership of a particular social group.

Social factors are considered unlawful distinction that can lead to illegal or oppressive treatment. The criteria for determining social minorities shall be the following: minorities are subordinate segments of complex public entities; minorities have physical or cultural characteristics that are poorly respected by dominant segments of society; minorities are groups of people united by common features, difficulties that accompany the life of this group and by self-identity; belonging to a minority is passed on from generation to generation and can affect the next generation, even in the absence of explicit cultural or physical characteristics; people that are members of a minority, marry each other voluntarily or out of necessity[20].

International instruments prohibiting discrimination provide a list of grounds based on which the distinction between people is unacceptable. As it can be seen, this list is not exhaustive. Thus, the Covenant on Civil and Political Rights[21] obliges states to secure all the rights enshrined in it, without any distinction based on race, color, sex, language or other status. What other status may it be? It can be probably any kind of status, sometimes not reasonable and objective. This may be exemplified by Communication No. 196/1985[22], the decision on which was issued by the Human Rights Committee in April 1989.

The provisions of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[23] protect the identity of the above-mentioned social groups. However, in this case there is no evidence of the mentioned actions and the very concepts are formulated by listing the acts of behavior. The only exception is Part 1 of Art. 1 of the Convention on the Elimination of All Forms of Racial Discrimination, which defines the racial discrimination. In particular, it is understood as "any distinction, exclusion, restriction or preference based on race, color, family, national or ethnic origin which has the purpose or lead to abolishment or denial of the recognition, enjoyment or exercise on equal terms of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

Bastrykin[24] believes that it is necessary to exclude from the Constitution of the Russian Federation provisions ordering to consider the international law regulations an integral part of the legal system of Russia. He proposes to amend article 15 of the Constitution, calling the priority of international law over the Constitution of the Russian Federation a legislative diversion. This position of the Constitutional Court fully corresponds to such developed in legal terms countries as Germany, UK, Italy, USA and others. Disagreement with the interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms and decisions of the European Court of Human Rights takes place in the practice of the European states as well. The most exemplary in this respect is the practice of the Federal Constitutional Court of Germany. It is based on the legal position elaborated by this court, which is reflected in its decisions of October 11, 1985, October 14, 2004 and July 13, 2010. The same approach was used by the Constitutional Court of the Italian Republic having not agreed with the conclusions of the European Court of Human Rights.

In a judgment of November 19, 2012 the Italian court pointed out that the respect of international obligations should not cause the lowering of the level of protection of rights already existing in the domestic system of justice. On the contrary, it could and should be an effective tool for expanding this protection. The priority of constitutional norms is also specified in the decision of the Constitutional Court of the Italian Republic dated October 22, 2014. It states that in case of conflict with the basic constitutional principles of Italian law, the decision of an international court renders impossible any interpretation in the context of Article 10 of the Constitution of the Italian Republic which under normal conditions provides automatic reception of international law in the national legal system. Recognizing the importance of the Convention for the Protection of Human Rights and judgments of the European Court of Justice for Human Rights based on it, The Constitutional Court of the Republic of Austria in its decision of October 14, 1987 also came to the conclusion about the impossibility of the application of the Convention provisions as interpreted by the European Court of Human Rights, contrary to the rules of national constitutional law. The Supreme Court

of Great Britain and Northern Ireland in its decision of October 16, 2013 specified the unacceptability for the British legal system of conclusions and interpretations of the Convention for the Protection of Human Rights and Fundamental Freedoms contained in the judgment of the European Court of Human Rights dated October 6, 2005 regarding the problem of the electoral rights of prisoners. According to its legal position, the decisions of the European Court on the Human Rights were not to be considered binding. As a general rule, they only had to be "taken into account". Implementation of these decisions was recognized as possible only in the event that they would not be in contradiction with the fundamental substantive and procedural rules of national law. It must be emphasized that in all these cases it is not about the contradiction between the Convention for the Protection of Human Rights and Fundamental Freedoms and the national constitutions, but about the conflict of interpretations of the Convention provisions given by the European Court in a particular case and the provisions of national constitutions[24].

All these years, the supremacy of international law was so absolutized that the question of its revision was raised neither in the national legislative activity, nor in science, which must a priori put everything in doubt.

Meanwhile, in foreign countries, this question has never been decided unambiguously. If we turn to the theoretical aspect of the problem, we will see the existence of diametrically opposed opinions. For example, proponents of the primacy of national law (A. Zorn, B. Danevskii, Kaufman et al.), the founder of which is traditionally considered to be Hegel, recognized an unconditional and absolute sovereignty of the state, and the rules of international law being in contradiction with it were considered null and void. The followers of the opposite opinion (G. Kelsen, H. Lauterpacht, J. Rousseau, F. Jessup, G. Scelle) proceeded from the complete subordination of national law to international law. They greatly underestimated or even denied the importance of the sovereignty of the state. It was assumed that in the process of gradual limitation of the independence of states the last-named would get united and eventually would turn into a single supranational entity. Later, these ideas formed the basis for the unification of Europe at the end of XX century. Based on these ideas, the American scientists after World War II have substantiated the theory of complete rejection from the state sovereignty and the creation of the world state and international law. According to its founders M. MacDougall and M. Reisman, a world state will pursue a dual objective: formation of universal law to ensure human rights and suppression of attempts to create a totalitarian state[24].

4. Conclusions

The criminal legislation of Russia until 1922 did not provide for responsibility for incitement of national hatred and enmity as for particularly dangerous crimes against administrative order.

Analysis of the RSFSR Criminal Code of 1922 allows us to conclude that this law provided for responsibility for incitement of national hatred and enmity considering it a simple form of the crimes committed by means of propaganda and call to action, and punished such acts by imprisonment for not less than one year. Broadness of sanctions is probably explained by the unwillingness to segregate qualified types of crimes in a specific article or part.

In the era of the Soviet Union, there was a common belief that the country was completely free from the political, social and economic inequalities of all nations and ethnic groups. Crimes encroaching on national equality were exceptionally rare. The practice of this kind of cases is characterized by premature and groundless public evaluation of the circumstances of the crime and its alleged participants. This is consistent with the maximum transparency of cases of this category. Such publicity presupposes a fast proceedings and complete information on production results.

It should be objectively admitted that for a long time there was no legislation base that would provide an effective guarantee of social justice and sovereignty.

As a consequence, it can be stated that the national legislative processes are not sufficient for the neutralization of these complex social processes occurring in the sphere of interethnic and religious relations. At the local level, legislative bodies shall amend the regulations as per the situation in their territories in a timely manner.

It is not possible to achieve consent in the field of inter-ethnic, religious and ethnic relations only by means of laws and regulations. We can say that a law is efficacious only if there are the organizational, political, moral and financial conditions for its implementation, and the activity is coordinative.

Now is the time when we need a different way to look at the issues of prevention of this kind of manifestations. Leaving these long-time processes without response and their underestimation leads to the long and painful inter-ethnic and religious conflicts.

To summarize, we can conclude that the automatic implementation of the rules does not lead to the solution of problematic issues. The practice of individual states which have been accumulated over the years, says that national particularities, cultures and traditions must be taken into account, and in some cases, the norms of national legislation shall have priority if they ensure the sovereignty of the state and protect the rights of citizens.

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