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## THE CRIMINAL LAW MECHANISM OF HATE CRIME RESPONSE AND COUTERACTION

The European Commission against Racism and Intolerance (ECRI) of the Council of Europe in its third Report on Ukraine noted that Ukraine has been taking institutional and normative steps towards preventing and fighting against racial discrimination, particularly ratified Protocol No. 12 to the European Convention on Human Rights that on 27 March 2006 which provides for a general prohibition of discrimination. ECRI also acknowledged that in recent years, Ukraine has made progress in a number of the fields covered in its second report. For example, in March 2007, the State Committee for Nationalities and Religion became fully operational, receiving asylum applications and combating racism and racial discrimination among other tasks. In addition, the Office of the Ombudsman has conducted a monitoring program on the situation of minority groups in Ukraine. However, ECRI stated that despite the legislative efforts on combating hate crime the problem of racially motivated violence and other various forms of racism manifestation remains stringent[1].

The current Criminal Code of Ukraine contains one particular prohibiting anti-discrimination norm (besides prohibition of genocide and certain elements of crimes against humanity) – Article 161 «Violating equality of citizens depending on their ethnicity or nationality or on their attitude to religion». The article defines such criminal conduct as wilful actions aimed at national, racial or religious enmity and hatred, humiliation of national honour and dignity, or the insult of people's feelings in respect to their religious convictions, race, ethnicity, colour of skin or language and also any direct or indirect restriction of rights, or granting direct or indirect privileges to people based on race, colour of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics[2]. Besides the special prohibiting norm, the General part of the Criminal Code of Ukraine contains Article 67 (3) which defines the commission of any offence based on racial, national or religious enmity and hostility as one of the general circumstances aggravating the punishment[3].

Responding to calls upon strengthening criminal legislation against racially motivated crimes the Ukrainian Parliament has adopted the Law of Ukraine on Amendment of the Criminal Code of Ukraine with Respect to the Responsibility for the Commission of Crimes Based on Racial, National or Religious Intolerance. The Law provides amending parts 2 of the following articles with the racial, national or religious hatred as a specific qualifying element: Article 121 – Intended grievous

[1] European Commission against Racism and Intolerance (ECRI). Third report on Ukraine. Adopted on 29 June 2007. – Strasbourg, 12 February 2008.

[2] Кримінальний кодекс України // Відомості Верховної Ради України. – 2001. – № 25. – Ст. 161.

[3] Там само. – Ст. 67, ч.1 п. 3.

bodily injury; Article 122 – Intended bodily injury of medium gravity; Article 126 – Battery and torture; Article 127 – Torture; Article 129 – Threat to kill; Article 300 – Importation, development or distribution of works that propagandize violence and cruelty. It also reformulates Art.161 (replaces «citizens» with «people» and adds race, ethnicity, colour of skin and language as subject of feelings insult), and aggravates the penalty.

Two different views exist with respect to this Law among scientists. The first view supports such an approach of amending the violence related articles with the racial hatred as concrete qualification factor under part 2. It could allow courts applying heavier (adequate) sanctions established for offences qualified under the second part of the articles. The other view, denying this Law, suggests that applying article 67 of the Criminal Code of Ukraine (racial hatred as an aggravating circumstance) is enough with respect to offences not covered by the disposition of the Article 161, which, nevertheless, should be revised, particularly its sanction (the previous version of the article 161 provided that the sentence for the discriminating actions accompanied with violence, deception or threats, and also committed by an official, or committed by an organized group of persons, or where they caused death of people or other grave consequences shall be imprisonment for a term of only two to five years, now up to ten years). However, the wide range of penalties could become a subject of abuse. Moreover, violent conduct could remain rarely and inadequately punishable because the term «violence» mentioned in article 161 is too vague for courts interpretation, as opposed to specification of a concrete injury prohibited by the abovementioned articles[1].

Commentators often refer to unclear definitions, inapplicable criteria of corpus delicti (elements of crime), including vague sense of «aiming» in actus reus and difficulties in practical proving racial intent in mens rea established by article 161. Also, due to formal judicial approach to norm interpretation the phrase «actions..., when they caused death of people» instead «one or more people» may result in requiring additional inadequate qualification features for this article to be applied[2].

The existence itself and the growth of hate crime in Ukraine may be considered a criminological phenomenon due to unnatural for Ukraine historical, social, traditional, and psychological roots of hate crime, especially based on racial abhorrence. Racial «natural» segregation and, consequently, hatred and discrimination, which have become a social scourge in countries with colonization history, had never been a distinctive feature of the Ukrainian society. It is not a specific policy achievement, but rather a historical implication. Slavery («holopstvo») existing during the Kievan Rus' times, was based on strict social stratification and was different from the one widespread in other countries where forcibly transported peoples with a different skin colour were perceived as inanimate servants. The

[1] Науково-практичний коментар Кримінального кодексу України / за ред. М.І. Мельника, М.І. Хавронюка. – 5-те вид., перероб. та доп. – К.: Юрид. думка, 2008. – 1216 с. – С. 286.

[2] Хавронюк М.І. Довідник з особливої частини Криминального кодексу України. – К.: Істина, 2004. – С. 167.

populations living here, on the Ukrainian territory, have never experienced the thought that white means power and «humanity», while black or other colours mean slave and «inferior» as opposed to other places in the world where this was transmitted throughout generations. Segregation and discrimination here was a natural process, perverting the human perception of good and bad, and challenging equal treatment of people[1]. Grounds for subconscious and conscious differentiation of people based on skin colour included the lack of scientific knowledge on race equality, fear of unknown and hardly perceptible things, religious conservatism, etc.[2] Understanding the primary in-depth reasons of distinction could help in eliminating modern forms of discrimination and certain affirmative action reverse effects[3].

Despite the obvious hypocrisy of the Soviet utopian ideology of total «equality» one should nevertheless accept the effects of internationalism propaganda, which was part of the state official ideological policy. However, cruel and inhuman communist repressions half of century later have impacted a tendency that extreme «nationalism», traditionally prohibited in the USSR, became the embodiment of anti-communist ideology, and, therefore, has substituted the healthy patriotic evolvement of Ukrainian multinational and traditionally tolerant society.

Ukraine therefore does not have an integral, developed and systematic antidiscrimination law which would ensure a conceptual legal framework of xenophobia and racism counteraction. Based on experience of developed countries, and taking into account the extreme formalism of Ukrainian legal system, it may be rational to adopt a specific anti-discrimination law which would define the terms «xenophobia», «racism», «racial discrimination». In this regards it could be useful to consider the United Nations Model Law for guidance – Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial (Discrimination Third Decade to Combat Racism and Racial Discrimination (1993-2003)[4].

One could notice that statistical numbers of racially motivated crime perpetration and investigation provided by different institutions vary from tens to hundreds. It is certainly not recklessness of law-enforcement agencies responsible for data analysis; the problem resides in unclear criteria of hate crimes determination. There are several counting criteria: the number of cases initiated according to the special anti-discrimination Article 161 of the Criminal Code of Ukraine and special «anti-hatred» parts 2 of several articles; the total number of crimes committed against

[1] See: Ian F. Haney Lopez. The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice / Harvard Civil Rights–Civil Liberties Law Review. – No. 29. – 1994.

[2] Див. позицію Підкомісії з попередження дискримінації та захисту меншин Комісії з міжнародного права ООН / Yearbook of the International Law Commission. E/CN.4/873, para. 29. – 1966 – Vol. II.

[3] See: Samuel Leiter, William M. Leiter. Affirmative Action in Antidiscrimination Law and Policy. – SUNY Press (New York). – 2002.

[4] UN Office of the High Commissioner for Human Rights, Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination, 1996, HR/PUB/96/2, available at: http://www.unhcr.org/refworld/docid/46ceb4db2.html [accessed 10 March 2010].

foreigners (the number, though, includes criminal offences committed with no racial hatred motive); applied provisions on aggravating circumstances, including racial motive, are not explicitly referred in the court's sentencing decision, thus only those institutions who have direct access to criminal case materials are able to consider the number of the corresponding norm application by the court. Another problem is the inconsistent or incorrect qualification of offences in question (qualifying them as hooliganism, for instance) or unwillingness of a victim to complain to law-enforcement body.

Therefore, today it is impossible to present real numbers or dynamics of hate crime in Ukraine. Only improved legislation and institutional criminal framework, adequate data collection and analysis may facilitate profound understanding of hate crime fundamental reasons and tendencies, and therefore lead to its better prevention and effective criminal prosecution.

The first and one of the most crucial steps would be the adoption of an adequate implementation policy of the European anti-discrimination law and, particularly, the criminal anti-discrimination law, i.e. a system of legal prohibitions, norms criminalizing the most extreme and socially dangerous manifestations of racial discrimination and xenophobia – hate crimes. The hate crime has to be prevented and punished by the state as part of the erga omnes obligation to prevent and punish all forms of racial discrimination according to the Convention of Elimination of All Forms of Racial Discrimination[1]. Obligations taken by Ukraine after the ratification in 2006 of the Additional Protocol to the Convention On Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems imply immediate action on criminalization of the relevant criminal conduct and other legislative efforts to ensure the protocol's implementation and further application[2].

Besides direct fulfilment of taken international obligations, it is Ukraine's moral responsibility to address the growing racism and xenophobia problem using a positive experience of the European Union in establishing a conceptual system of criminal definitions, prevention and punishment approaches with respect to racially motivated crime. Specifically, it is important to use the recently adopted 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. The Decision states that «Racism and xenophobia constitute a threat against groups of persons which are the target of such behaviour. It is necessary to define a common criminal law approach in the European Union to this phenomenon in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences»[3].

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1 United Nations, Treaty Series, vol. 660, p. 240–266; see also: Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5); Ian Brownlie. Principles of Public International Law, 5th Edition. – Oxford University Press, 2002.

2 Офіц. вісник України. – 2006. – № 31. – С. 29.

3 Рамкове рішення Ради. 2008/913/ПВД від 28 листопада 2008 р.

The institutionalism of racism in the Ukrainian society, consistent tendency of xenophobia and hate crime growth must be accepted by the Ukrainian policy makers, legislators and politicians as being a stringent problem[1]. Relevant countermeasures are inadequate and cannot oppose the threat of growing hatred motivated violence and general xenophobic attitude of a part of the society, specifically among minors. Criminal justice should become effective in its mission of crime prevention and prosecution, particularly, with respect to racially motivated criminal conduct. In order to succeed in this direction, the Ukrainian legislators have to provide criminal justice and law enforcement systems with an integral and working system of legal norms, by implementing the existing international legal obligations and progressive experience of the European Union and foreign countries. However, it is crucial to avoid the erroneous practice of explicit copying of international provisions into the domestic law. Implemented norms must be adapted to the specifics of the legal system of Ukraine and thus become applicable.

Wrong treatment of hate crime and discrimination problems by domestic policy makers may result in their expansion. Improving the criminal justice effectiveness in combating racism and xenophobia will depend on the good faith used in establishing a domestically specific and systematized framework of criminal legal norms prohibiting and punishing hate crimes, and in forming the institutional base of their appropriate application. Legal theory, formalization of norms application and statistics analysis are interrelated in our national law system and therefore, for best results, the Ukrainian scientists should develop their own legal concept of the «hate crime» phenomenon, define the terms and criteria for data collection, and ultimately provide the practitioners with an adequate criminological analysis. Isolated legislative efforts and countermeasures often reasonably imposed by NGOs and international organizations, are ineffective and insufficient without a systematic approach in creating the antidiscrimination framework encompassing legal, law-enforcement, social, ideological and political efforts.

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[1] См.: Гилинский Я.И. Криминология: Теория, история, эмпирическая реальность, социальный контроль. – СПб. : Питер, 2002. – С. 33; Его же. Девиантология: Социология преступности, наркотизма, проституции, самоубийств и других «отклонений». – СПб.: Юрид. центр Пресс, 2004.

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## *Анотація*

***Дрьоміна-Волок Н.В.*** **Кримінально-правовий механізм боротьби проти расизму.** – Стаття.

Європейська комісія проти расизму та нетерпимості Ради Європи (ЄКРН) у своїй третій доповіді 2008 р. щодо України відзначила, що, незважаючи на зусилля української влади з протидії злочинності на расовому ґрунті, зокрема ратифікацію міжнародних угод та прийняття Закону України про внесення змін до Кримінального кодексу України щодо відповідальності за злочини з мотивів расової, національної чи релігійної нетерпимості, проблема расового насильства та інших форм расової дискримінації залишається актуальною. У статті розглядаються кримінально-правові засоби протидії злочинам на ґрунті ненависті та аналізуються причини та наслідки неефективності існуючого механізму боротьби з цим кримінальним феноменом. Зазначається, що злочини на ґрунті ненависті та інституціалізація расизму є історично непритаманними українському соціуму. Робиться висновок, що для вдосконалення механізму запобігання та боротьби з будь-якими формами расової дискримінації необхідно на основі соціопсихологічного, історичного, політичного аналізу розробити комплексний підхід до викоренення цього явища, який би враховував існуючі недоліки української кримінально-правової антидискримінаційної системи, позитивний досвід зарубіжних країн і міжнародні стандарти.

***Ключові слова:*** расизм, протидія злочинам, антидискримінаційна система, міжнародні стандарти, расова та релігійна нетерпимість.

## *Summary*

***Natalia Dryomina-Voloc.*** **The criminal law mechanism of hate crime response and couteraction.** – Article.

The European commission against racism and intolerance of the Council of Europe in the third report of 2008 concerning Ukraine has noticed that, despite effort of the Ukrainian power from criminality counteraction on a racial ground, in particular ratification of the international agreements and an adoption of law of Ukraine about modification of the Criminal code of Ukraine of responsibility for crimes from motives of racial, national or religious intolerance, the problem of racial violence and other forms of a racial discrimination remains actual. In this article the author analyzed criminal-legal means of counteraction to crimes on a ground of hatred are considered and causes and effects of an inefficiency of the existing mechanism of struggle against this criminal phenomenon. It is noticed that crimes on a ground of hatred racism are not inherent historically in the Ukrainian society. The conclusion is that improvement of the mechanism of the prevention and struggle against any forms of a racial discrimination is necessary on a basis becomes sotsial and psychological, historical, political analysis to develop the complex approach to eradication of this phenomenon which would consider existing lacks of the Ukrainian criminal-legal antidiscrimination system, positive experience of foreign countries and the international standards.

***Key words:*** racism, fighting with crime, anti-discrimination system, international standards, racial and religious intolerance.