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COMBATING HATE SPEECH: EXPERIENCE OF THE COUNCIL OF EUROPE

БОРОТЬБА З МОВОЮ ВОРОЖНЕЧІ: ДОСВІД РАДИ ЄВРОПИ

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Hate speech is not a new thing at all and totalitarian systems have always been able to use it as a tool. It is one of the cornerstones of states that draw their strength from opposition to enemies and the fuel for the messengers who walk the road to genocide. – Sofi Oksanen (Keynote at the 2020 Helsinki Ethics)

The article provides an analysis of approaches to the definition of *hate speech*. The author notes that in Ukrainian academic circles and law, there are two translations of the English term *hate speech* – "мова ненависті" and "мова ворожнечі". The first version is a direct equivalent of the English term that describes the specifics of negative attitudes and destructive emotions that can be caused by such statements (hatred, disgust, dislike). Whereas the second option emphasizes the consequences that such statements can lead to, namely, relations and actions based on ill will and hatred, which can lead to direct conflicts.

Notably, the European Convention on Human Rights is one of the fundamental international treaties, however, the term *hate speech* is not used in the its text of the Convention; rather, it is defined by the European Court of Human Rights in its judgments and introduced into use in the countries party to the Convention.

It is highlighted that those same judgments of the European Court of Human Rights establish the views on the prohibition of hate speech, the conditions for applying the relevant provisions of the Convention, and the ways to distinguish between freedom of expression and hate speech. An analysis of the relevant ECHR rulings shows that cases on prosecution for hate speech are mostly considered under Article 10 of the Convention in conjunction with Article 17. The author analyzes the ECHR case law with the above article and establishes its close connection with Article 17 of the ECHR, which prohibits the abuse of rights. In the aspect under study, this refers to the abuse of freedom of expression. When searching for relevant precedents in the ECHR practice, it is actually necessary to start with the opposite: examples of hate speech and convictions for it can be found in cases where the Court finds no violation of the Convention's Article 10 Freedom of Expression and considers the application of Article 17 Prohibition of Abuse of Rights.

Research on hate speech reveals that the Council of Europe has adopted human rights standards, while the European Court of Human Rights has considered several cases on hate speech establishing case law in this area that is valid for all member states; various bodies of the Council of Europe have adopted recommendations and guidelines to help countries combat hate speech and support its victims, it defined the concept of hate speech as early as 1997, it continuously monitors the problems of racism, xenophobia, anti-Semitism, intolerance and discrimination in the member states through the work of monitors like the European Commission against Racism and Intolerance (ECRI). European Commission's General Policy Recommendation No. 15 on Combating Hate Speech (adopted on December 8, 2015), which defines hate speech, is analyzed. The introduction of the Code of conduct on countering illegal hate speech online in May 2016, together with four major IT companies (Facebook, Microsoft, Twitter and YouTube) is outlined.

The author suggests that it is not only international means of combating and counteracting hate speech that matter. Of key importance at the national level remains the development of effective strategies to counter hate speech, taking into account national expressions of hate speech, the mentality of the respective nation and the specific legal regulation on the procedure for bringing individuals to justice for statements, defamation, insult, discrimination and other acts.

Notably, the most important thing, in our opinion, is to stipulate in the criminal law the elements of crimes related to hate speech. In conclusion, the article suggests ways of addressing the issue of harmonization of national legislation on criminalization of hate speech in Ukraine with international standards.

Key words: hate speech, European Commission against Racism and Intolerance, European Court of Human Rights, Council of Europe.

У статті проаналізовано підходи до визначення поняття «мова ворожнечі». Автор відзначає, що у національному праві та науці зустрічається два варіанти перекладу англомовного терміну «hate speech»: мова ненависті та мова ворожнечі. Перший варіант («мова ненависті») є прямим еквівалентом англійського терміну, який визначає особливості негативного ставлення та деструктивних емоцій, що можуть бути викликані подібними висловлюваннями. Тоді як у другому варіанті – «мова ворожнечі» – підкреслюються наслідки, до яких можуть призводити такі висловлювання, а саме відносини й дії, засновані на недоброзичливості й ненависті, що можуть призвести до безпосередніх конфліктів.

Відзначено, що одним із основоположних міжнародних договорів є Європейська конвенція з прав людини, однак, такі терміни як «мова ворожнечі» або «мова ненависті» не вживаються в тексті Конвенції, але Європейський суд з прав людини, у своїх рішеннях формулює ці терміни і вводить їх до обігу в країнах-учасницях Конвенції.

Акцентовано увагу, що саме в рішеннях Європейського суду з прав людини і формуються позиції щодо заборони мови ворожнечі, умов застосування відповідних положень ЄКПЛ, а також способів розмежування свободи вираження поглядів від мови ворожнечі. Аналіз відповідних рішень ЄСПЛ свідчить, що справи щодо відповідальності за мову ворожнечі здебільшого розглядаються за ст. 10 ЄКПЛ у сукупності із ст. 17. Проаналізовано практику ЄСПЛ, із розглядуваною вище статтею і встановлено її тісний зв'язок ст. 17 ЄКПЛ, яка визначає заборону зловживання правами. В досліджуваному аспекті, мова йде про зловживання свободою вираження поглядів. Здійснюючи пошук відповідних прецедентів в практиці ЄСПЛ, фактично необхідно йти від зворотного: приклади прояву мови ворожнечі і засудження за неї буде у випадках, коли Суд встановить відсутність порушення ст. 10 ЄКПЛ «Свобода вираження поглядів» і буде розглядатися питання застосування ст. 17 ЄКПЛ «Заборона зловживання правами».

Досліджено, що стосовно мови ворожнечі Рада Європи ухвалила стандарти прав людини, а Європейський суд з прав людини розглянув декілька справ щодо мови ворожнечі, створивши в цьому напрямку судову практику, яка є чинною для всіх держав-членів; різні органи Ради Європи ухвалили рекомендації та керівні принципи на допомогу країнам в боротьбі з мовою ворожнечі та в підтримці її жертв; вона ухвалила визначення поняття «мова ворожнечі» вже в 1997 році; здійснює постійний моніторинг проблем расизму, ксенофобії, антисемітизму, нетерпимості та дискримінації в державах-членах за допомогою роботи Європейської комісії проти расизму і нетерпимості (ЄКРН). Проаналізовано Загальнополітичну рекомендацію Європейської комісії № 15: протидія мові ворожнечі (ухвалена

8 грудня 2015 р.), яка визначає мову ворожнечі. Відзначено укладення Кодексу поведінки щодо протидії незаконному висловленню ненависті (оригінальна назва – The Code of conduct on countering illegal hate speech online) у травні 2016 р. разом із чотирма великими IT-компаніями (Facebook, Microsoft, Twitter і YouTube).

Автор відзначає, що не тільки міжнародні засоби боротьби і протидії із мовою ворожнечі мають значення. На національному рівні ключовим залишається розробка ефективних стратегій протидії мові ворожнечі враховуючи національні прояви мови ворожнечі, ментальність відповідної нації і особливості правової регламентації порядку притягнення до відповідальності за висловлювання, наклеп, образу, дискримінацію та інші прояви.

Підкреслимо, що, на нашу думку, вбачається за найважливіше визначення в кримінальному законодавстві складів правопорушень, які стосуються мови ворожнечі. У підсумку, стаття пропонує шляхи боротьби, що стосується відповідності національного законодавства щодо визначення кримінальної відповідальності за прояви мови ворожнечі в Україні, міжнародним стандартам, ЄКРН у своєму останньому звіті за результатами моніторингу України дійшла до висновків, що з моменту ухвалення четвертої доповіді ЄКРН по Україні було досягнуто прогресу в низці сфер:

Ключові слова: мова ворожнечі, мова ненависті, Європейської комісії проти расизму і нетерпимості, Європейський суд з прав людини, Рада Європи.

Problem Statement. In Ukrainian academic circles and law, there are two translations of the English term *hate speech* – «мова ненависті» and «мова ворожнечі». The first version is a direct equivalent of the English term that describes the specifics of negative attitudes and destructive emotions that can be caused by such statements (hatred, disgust, dislike). Whereas the second option emphasizes the consequences that such statements can lead to, namely, relations and actions based on ill will and hatred, which can lead to direct conflicts. Thus, we can conclude that both terms used in the Ukrainian legal doctrine, despite minor stylistic and semantic differences, are synonymous and equivalent [1].

According to the dictionary, "*ворожнеча* (enmity) is a relationship and actions between persons motivated by hatred, ill will, or hostility". "*Ненависть* (Hatred) is a feeling of great aversion, animosity toward someone or something, dislike, hostility, enmity"[1]. The philological definition of these words indicates that they are synonymous concepts and can be used in place of each other. Internationally, the term *hate speech* is generally accepted [2].

Hate speech poses a huge danger to the unity of a democratic society, to the protection of human rights and to the rule of law. Hate speech should be countered to protect individuals and groups of people, not certain beliefs, ideologies or religions. It is unacceptable to use hate speech restrictions to disenfranchise minorities and suppress criticism of official policies, political opposition or religious beliefs [3].

The aim of this article is to study the issue of combating hate speech based on the experience of the Council of Europe.

Research results. At the outset, it is important to note that the European Convention on Human Rights (hereinafter referred to as the Convention) is one of the fundamental international treaties. Although the term *hate speech* is not used in the text of the Convention, it is defined by the European Court of Human Rights in its judgments and introduced into use in the countries party to the Convention. Those same judgments of the European Court of Human Rights (hereinafter – the ECHR) establish the views on the prohibition of hate speech, the conditions for applying the relevant provisions of the Convention, and the ways to distinguish between freedom of expression and hate speech.

An analysis of the relevant ECHR rulings shows that cases on prosecution for hate speech are mostly considered under Article 10 of the Convention in conjunction with Article 17.

In particular, Article 10 of the Convention defines the concept of *freedom of expression*, the components of this freedom and the conditions for restrictions on the exercise of this freedom. At the same time, paragraph two stipulates that this freedom is not absolute and may be limited as the exercise of such freedom is associated with duties and responsibilities. Freedom of expression may be subject to conditions, restrictions or penalties prescribed by law and necessary in a democratic society "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for the prevention of the disclosure of confidential information, or for upholding the authority and impartiality of the judiciary" [4]. The quoted provisions actually enshrine the conditions of restriction and accountability for the expression of views that are the basis for crimes or offenses, violate the rights of others or concern the court and its authority.

Researchers suggest structurally dividing Article 10 of the Convention into two parts. The first part defines the freedoms protected by the Convention, and the second part establishes an exhaustive list of restrictions (including threats to national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals) that allow the state to legitimately interfere with and restrict the exercise of this right [5].

As the ECHR practice shows, Article 17 of the Convention is closely related to the above article, which prohibits the abuse of rights. In this study, we are referring to the abuse of freedom of expression. Thus, Art. 17 states that "nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention" [6].

When searching for relevant precedents in the ECHR practice, it is actually necessary to start with the opposite: examples of hate speech and convictions for it can be found in cases where the Court finds no violation of the Convention's Article 10 Freedom of Expression and considers the application of Article 17 Prohibition of Abuse of Rights.

In addition to the ECHR, the judicial body of the Council of Europe, the latter is worth mentioning in and of itself, as its activities are also aimed at combating hate speech to a certain extent. It promotes common and democratic principles based on the Convention and other human rights conventions and instruments. Regarding hate speech, while the European Court of Human Rights has considered several cases on hate speech establishing case law in this area that is valid for all member states, the Council of Europe has adopted human rights standards, its various committees have adopted recommendations and guidelines to help countries combat hate speech and support its victims, it defined the concept of hate speech as early as 1997, it continuously monitors the problems of racism, xenophobia, anti-Semitism, intolerance and discrimination in the member states through the work of monitors like the European Commission against Racism and Intolerance (ECRI), etc. [7]

The Council's No Hate Speech Movement, organized to combat statements that incite hostility and hatred towards individuals or groups, is also worth mentioning.

The Council of Europe has also approved the Additional Protocol to the Convention on Cybercrime, which criminalizes acts of a racist and xenophobic nature committed through computer systems. The Protocol was adopted on January 28, 2003, and ratified by Ukraine on July 21, 2006 [8].

In addition to the efforts of the Council of Europe, we would like to mention the European Commission's General

[1] Новий словник української мови: у 4 т. Київ: Аконіт, 2000. Т. 1 / укладачі: В. В. Яременко, О. М. Сліпушко. С. 520, С. 853.

Policy Recommendation No. 15 on Combating Hate Speech (adopted on December 8, 2015) (abbreviated as the European Commission against Racism and Intolerance – ECRI). It defines hate speech as "the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status" [9].

In addition to the adoption of this Recommendation and the Additional Protocol, the European Commission initiated the Code of Conduct on countering illegal hate speech online in May 2016, together with four major IT companies (Facebook, Microsoft, Twitter and YouTube), in an effort to respond to the spread of racist and xenophobic hate speech on the Internet. The goal of the Code is to make sure that requests for content removal are dealt with quickly. When companies receive a request to remove content from their online platform that is deemed to convey hate speech, they review the request for compliance with their community rules and policies and, where appropriate, national laws transposing EU anti-racism and anti-xenophobia legislation. The companies are committed to reviewing most of these requests in less than 24 hours and removing the content, if necessary, while respecting the fundamental principle of freedom of speech. To date, eight companies have committed to the Code, namely Facebook, YouTube, Twitter, Microsoft, Instagram, Dailymotion, Snapchat [10].

At the same time, it is not only international means of combating and counteracting hate speech that matter. Of key importance at the national level remains the development of effective strategies to counter hate speech, taking into account national expressions of hate speech, the mentality of the respective nation and the specific legal regulation on the procedure for bringing individuals to justice for statements, defamation, insult, discrimination and other acts.

ECRI recommends that governments of Member States, inter alia, "take appropriate and effective action against the use, in a public context, of hate speech which is intended or can be reasonably expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected"; ensure that the offenses are clearly defined and the need for criminal sanctions is taken into account; ensure that the scope of these offenses is defined in a way that allows them to be applied in line with technological development, etc.[11]

The most important thing, in our opinion, is to stipulate in the criminal law the elements of crimes related to hate speech that are consistent with the current development of digital technologies. In view of the digitalization processes that have swept across the globe, the distancing of people from each other due to the pandemic, and the digitization of all forms of social life, we believe that the criminalization of hate speech should, among other things, apply to online aggression.

With regard to the compliance of Ukrainian legislation on criminalization of hate speech with international standards, in its latest report on Ukraine, ECRI concludes that since the adoption of the fourth ECRI report on Ukraine on December 9, 2011, progress has been made in a number of areas:

– the Law of Ukraine on the Principles of Preventing and Combating Discrimination in Ukraine was adopted in 2013, largely in line with the ECRI's General Policy Recommendation No. 7;

– provisions prohibiting discrimination on the basis of sexual orientation and gender identity in the workplace were added to the Labor Code in 2015;

– powers to prevent and combat discrimination were granted to the Ukrainian Parliament Commissioner for Human Rights;

– the National Police in Kyiv designated a hate crime contact point to monitor hate crime incidents;

– posters were produced to encourage reporting of hate crimes. In 2015, the National Human Rights Strategy was approved, where equality and non-discrimination in guaranteeing human rights and freedoms is defined as one of six core principles [12].

The report also mentions the ongoing armed conflict on the territory of Ukraine and a significant number of citizens who were granted the status of internally displaced persons. The Commission notes the high degree of solidarity towards internally displaced persons and that Ukrainian society is largely sympathetic and supportive [13].

Thus ends the list of achievements and the ECRI proceeds to identify the areas of concern that need to be addressed:

– the Criminal Code of Ukraine does not criminalize incitement to hatred based on homophobia/transphobia, and the Law of Ukraine on Principles of Prevention and Combating Discrimination in Ukraine does not mention sexual orientation or gender identity;

– specific provisions on hate crimes motivated by racist views (hate speech and hate violence) are rarely applied and conviction rates are low;

– the ECRI recommends amending the Criminal Code to include the following elements: incitement to discrimination and violence; defamation; public expression for racist purposes of an ideology that asserts the superiority or denigration of a group of persons; publicly denying, minimizing, justifying or condoning crimes of genocide, crimes against humanity or war crimes; creating or leading a group that promotes racism, supporting such a group or participating in its activities; and accountability of legal entities [14].

Conclusions and results. Despite the fact that a little more than 5 years have passed since the publication of the referenced Recommendations, all of them remain relevant and need to be implemented by Ukraine as a country that has been granted the status of an EU candidate. In our opinion, these provisions are also important in terms of harmonizing Ukrainian and EU legislation. It is difficult to deny the claim that Ukraine's European aspirations imply harmonization of national legislation with European law, therefore, steps should be taken to eliminate the legal regulatory shortcomings identified by the ECRI as soon as possible.

It is believed that there will be no difficulties in harmonizing Ukrainian and EU legislation due to the amendments to the Criminal Code of Ukraine and other regulations, as they will be adopted as soon as possible. Under martial law, the Verkhovna Rada of Ukraine has already demonstrated its ability to work in "turbo mode", when the beginning of the full-scale invasion spurred the lawmaking process, including adoption of amendments to the Criminal Code of Ukraine.

To summarize, the state's goal in preventing hate speech should be to find a balance between enforceable regulatory restrictions on freedom of expression and freedom of speech (so that such expression does not take the form of hate speech) on one side and respect for the rights of everyone to be free from discrimination, defamation, and racism on the other, as well as to significantly reduce the spread of this phenomenon. In our opinion, these points can be summarized as follows: the state must find and establish a balance between freedom of expression and the rights of individuals, criminalize acts that constitute hate speech, and ensure the implementation of effective mechanisms for bringing perpetrators to justice.

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