Exchange of views with the European Committee on Crime Problems

Agora Building, Room G03, Wednesday 29 November 2017 11am

Speaking points for Christian Åhlund, ECRI's Chair

I would like to thank all of you and your Committee's Secretary for this invitation to an exchange of views on combating hate speech, in particular with use of criminal sanctions.

This exchange gives me the opportunity to present to you ECRI General Policy Recommendation (GPR) No. 15. It is a document which contains a number of guidelines addressed to member States of the Council of Europe on how to tackle hate speech and it is based on ECRI country monitoring findings. In particular in its on-going 5th monitoring cycle, ECRI has looked into measures how to deal with intolerant and inflammatory discourse targeting vulnerable groups and which kind of expression that should be criminalised.

However before doing that, I think it would be useful to share with you **a few points relating more generally to the use of criminal legislation to combat racism and racial discrimination**, including hate speech.

ECRI believes that national criminal legislation against racism and racial discrimination is necessary to combat these phenomena effectively, but we are aware that legal means alone are not sufficient to combat racism and racial discrimination.

Our findings and recommendations on this issue are formulated mainly in our **General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination.**

(Integrated approach) All appropriate legislation to combat racism and racial discrimination should include provisions in all branches of the law, i.e. constitutional, civil, administrative and criminal law. Only such approach will enable member States to address these problems in a manner which is exhaustive and satisfactory, in particular from the point of view of the victim. Anti-discrimination legislation could be concentrated into a single special act or laid out in the different areas of national legislation (civil law, administrative law and penal law).

(Minimum standard) The legal measures necessary to combat racism and racial discrimination at national level are recommended by ECRI in the form of **key components** which should be contained in the national legislation of member States. This approach make the measures ECRI recommends compatible with different legal systems, be they common law or civil law or mixed. These key

components represent only a minimum standard; this means that they are compatible with legal provisions providing a higher level of protection.

(Point of view of the victim.) In the field of combating racism and racial discrimination, civil and administrative law often provides for flexible legal means, which may facilitate the victims' access to justice. Therefore ECRI recommends that member States adopt a set of coherent civil and administrative law provisions. However in certain cases, ECRI additionally recommends the adoption of criminal law provisions, in order to add to the dissuasive effect and to underline the awareness of society of the seriousness of racism and racial discrimination. Criminal legislation also serves to emphasize the responsibility of the state of providing effective legal recourse and protection for the victims.

The same victim's approach is adopted when ECRI recommends that the law should provide the complainant with protection against retaliation and harassment. And such protection should not only be limited to the complainant, but should be also extended to those who provide evidence, information or other assistance in connection with the complaint and the subsequent legal procedure.

As an illustration, ECRI has recommended in its country monitoring[1] the introduction of what we call a **"Firewall"[2]** whereby undocumented migrants should be able to complain about hate crime, including hate speech, without risking being reported to the migration authorities and facing immediate expulsion. (This "firewall" concept has been made a major issue in ECRI´s GPR No 16 on how to protect the rights of irregular migrants.)

GPR No. 7 recommends that a number of activities should be criminal offences: These activities include the public incitement to violence, hatred or discrimination against a person or a grouping of persons on the ground, inter alia, of their "race", colour, national/ethnic origin, citizenship, religion or language[3]

Of course it is a matter for the criminal law of each member State as to how such responsibility is to be imposed for the above-mentioned activities. In particular, it might sometimes be possible to rely on provisions of more general character rather than ones specifically concerned with racism and racial discrimination. However, it is crucial that there actually be a provision or provisions enabling

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[1] ECRI 4th report on Poland , paragraph 22.

[2] ECRI GPR No. 16 on safeguarding irregularly present migrants from discrimination, rec. No. 3

[3] The other conducts are:

- public insults and defamation against such a person or grouping; threats against the same target; the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the ground, inter alia, of their "race", colour, national/ethnic origin, citizenship, religion or language; and
- the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes.

responsibility to be imposed for each of the different elements of what constitutes criminal offence for the purpose of GPR 7.

Another recurrent recommendation by ECRI is that the racist motivation of the perpetrator of an ordinary crime should constitute an aggravating circumstance,[4] or what is commonly known as a hate crime.

As I mentioned in the beginning, more recently ECRI has focussed its monitoring on the issue of **hate speech,** including in which situations criminal sanctions ought to be imposed for the use of hate speech.

The definition of hate speech adopted by ECRI in its GPR No. 15 is not restricted to expressions used in public. However, criminalization of hate speech in a public context requires striking a delicate balance between protecting the rights of the victims on the one hand, and respecting the right to freedom of expression, on the other. An expression should be considered to have been used in public where it occurred in any physical place or through any electronic form of communication to which the general public has access.

GPR 15 highlights t**he danger of criminal offences concerned with the use of hate speech being misused through prosecutions that target criticism of official policies**, political opposition or religious beliefs.[5] The unacceptability of such use should be evident from the requirements for the imposition of criminal responsibility. In order to underline this point, ECRI recommends including in the relevant laws an explicit stipulation that the offences are not applicable to such criticism, opposition or beliefs.

Furthermore, as ECRI also points out in GPR 15, the concern about hate speech prohibitions possibly being used against those whom they are intended to protect, also calls for the development of guidelines for law enforcement officials and prosecutors.

I would like to conclude this presentation by emphasising that ECRI is of the view that the use of criminal sanctions – although important - should not be the first choice of the action to combat the use of hate speech. This position reflects not only the importance of respecting the rights to freedom of expression and association but also a more practical view that addressing the conditions conducive to the use of hate speech and countering such use, are in the long run much more likely to prove effective.

In line with this approach the GPR acknowledges that in many instances, the most appropriate and effective approach to tackling hate speech can be self-regulation by public and private institutions, media and the Internet industry, such

[4] ECRI 5th reports on Estonia, France and Germany, paragraphs 10.
[5] ECRI 5th report on Turkey, paragraph 45.

as the adoption of **codes of conduct** accompanied by sanctions for non-compliance.

Other recommendations by ECRI´s GPR No. 15, in order to reduce and control hate speech are: the deletion of hate speech from websites; disclosing the identity of those who engage in hate speech; and the obligation of media to publish acknowledgments that something they ran constitutes hate speech.

And so is withdrawing all financial and other state support from political parties or other groups using hate speech, and eventually prohibiting or dissolving such groups.

In this document, ECRI also stresses the importance of **education and counter-speech** in fighting the misconceptions and misinformation that form the basis of hate speech. Similarly, the GPR recommends states to support programmes to both help members to leave groups that produce hate speech and to repudiate such speech.

In order to protect, assist and empower victims, States should also provide practical support to those targeted by hate speech: they should be made aware of their rights, receive legal and psychological assistance, be encouraged to report the use of hate speech and to bring proceedings to court.

I think I will stop here with my presentation. I hope that my points can stimulate a discussion on hate speech with a view to identify common areas between ECRI and the European Committee on Crime Problems, so to strengthen synergies and cooperation on this area.