



**MINISTRY OF  
FOREIGN AFFAIRS  
OF DENMARK**



# **Roadmap for Anti-Discrimination Legislation in Ukraine**

## **Summary**

**Fedorovych Irena. Roadmap for Anti-Discrimination Legislation in Ukraine.  
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As of 2023, Ukraine has fairly developed anti-discrimination legislation, which partially meets EU minimum standards and other obligations under international law. Yet according to comments from UN Committee, ECRI and other Council of Europe bodies and EU Commission, there is a space for developments and progression to meet ECRI Recommendations on hate speech and hate crimes and EU Directives, both on equality and hate crimes investigation. The following points summaries major gaps in Ukrainian legation and are followed by roadmap to address these gaps using potential of the civil society precious work, synergy of international bodies recommendations and good will of the governmental bodies, who can potentially lead the process.

# Major gaps in current anti-discrimination framework

## 1. The issues are related to the gaps in the Law of Ukraine “On Principles of Prevention and Counteraction of Discrimination in Ukraine”

- 1.1** Despite the large and open list of protected grounds, the current version of the Law does not mention sexual orientation and gender identity. These two protected grounds were later added only to the Labour Code of Ukraine (2015) and the Law of Ukraine “On Population Employment” (2022). The Law also lacks the grounds “IDP status” and “HIV-positive status” (available separately in relevant Laws), “state of health” (not mentioned at all in the national legislation). The unification of the list of protected grounds throughout Ukrainian legislation is a goal yet to achieve.
- 1.2** The law does not contain a definition of all forms of discrimination – there is a lack of mention of multiple discrimination and discrimination by association. The definition of “refusal of reasonable accommodation” is also missing, only the Law of Ukraine “On the Basics of Social Protection of Persons with Disabilities” contains a reference to the fact that the term “reasonable accommodation” is used in the sense given in the UN Convention on the Rights of Persons with Disabilities. There is currently no clear understanding of how relevant stakeholders should understand the principles of reasonable accommodation and the actual criteria of reasonableness in order to be able to apply it in practice.
- 1.3** Despite the indication that liability for discrimination can be “civil, administrative or criminal” – the Basic Law or other legal acts do not create the possibility of administrative responsibility for discrimination in any form, and do not entrust any of the central executive authorities with the power to impose fines for discrimination. Such responsibility is provided only in a few narrow areas, for example, according to the Law of Ukraine “On Advertising”. However, due to wartime restrictions, some of the central executive’s inspection and control powers have been temporarily suspended, including those relating to inspections of discriminatory advertising, for example.

- 1.4** Criminal responsibility for discrimination is an issue that needs a separate solution. Currently, the Article 161 of the Criminal Code of Ukraine contains several types of offences that can be related to issues of discrimination (“direct or indirect restriction of rights or establishment of direct or indirect privileges of citizens on the basis of race, skin colour, political, religious and other beliefs, gender, disability, ethnic and social origin, property status, place of residence, on linguistic or other grounds”), as well as issues of spreading hate speech (“intentional actions aimed at inciting national, regional, racial or religious enmity and hatred, at humiliating national honour and dignity, or insulting the feelings of citizens in connection with their religious beliefs”), and committing a hate crime (“the same actions, combined with violence, deception or threats, as well as committed by an official” and “actions provided for by parts one or second of this article, which were committed by an organized group of persons or caused grave consequences”).



## 2.

### **The issues related to hate speech within current Criminal Code of Ukraine**

- 2.1** In addition to the criminalisation of discrimination, the CCU also criminalises such a phenomenon as hate speech – “intentional actions aimed at inciting national, regional, racial or religious enmity and hatred, humiliating national honour and dignity, or insulting the feelings of citizens in connection with their religious beliefs”. According to the practice of the ECHR, hate speech cases are considered primarily in the context of the alleged violation of the right to freedom of speech (Article 10), violation of equality (Article 14) and issues of abuse of rights (Article 17). For the court, it is important as a matter of balance between freedom of speech and, accordingly, the possibility of a person to freely express his thoughts and beliefs, and the issue of protecting the rights of other people from possible interference with their dignity and protection from the dissemination of such expressions that incite discrimination and/or spread enmity or hatred. The Court also draws attention to the fact that States must be careful when dealing with the scope of the crime of hate speech and the corresponding duty to avoid excessive intervention under the guise of combating “hate speech”, especially when it comes to criticism of the authorities or their policies.
- 2.2** [The General Policy Recommendation No. 15](#) also mentions the need for a cautious approach to the prohibition of hate speech – the European Commission against Racism and Intolerance has repeatedly drawn Ukraine’s attention to the shortcomings of the current legislation. In particular, the latest conclusion for 2020 states that, despite the fact that in 2019 Ukraine made changes to Article 161 of the Criminal Code, they did not concern the addition of protected features that are missing there (sexual orientation and gender identity – SOGI), nor its content. In addition, the ECRI draws the attention of the state that despite the open list of signs in this article and the appeal of the victims, there are no proceedings for inciting enmity on the grounds of SOGI.

**2.3** Concluding report in 2017, the ECRI drew the state's attention to the fact that it is more appropriate to fight discrimination with the help of civil and administrative law and recommended amendments to Article 161 of the Criminal Code. In [General Policy Recommendation No. 7](#), the ECRI recommends that member states of the Council of Europe criminalise only such types of hate speech as:

18. *The law should penalise the following acts when committed intentionally:*

- a) *public incitement to violence, hatred or discrimination,*
- b) *public insults and defamation or*
- c) *threats*

*against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;*

- d) *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 grounds of their race, colour, language, religion, nationality, or national or ethnic origin;*
- e) *the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;*
- f) *the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e);*
- g) *the creation or the leadership of a group which promotes racism; support for such a group ; and participation in its activities with the intention of contributing to the offences covered by paragraph 18 a), b), c), d), e) and f);*
- h) *racial discrimination in the exercise of one's public office or occupation.*

19. *The law should penalise genocide.*

### 3.

## **The issues are related to other gaps of the current Criminal Code of Ukraine – hate crimes**

**3.1** Issues of establishing responsibility for hate crimes are regulated by articles of the Criminal Code of Ukraine (see above). Apart from Article 161, all other articles that mention the motive of intolerance as an aggravating punishment contain a limited list of protected grounds. For example, Article 67, Clause 3 – committing a criminal offence on the basis of racial, national, religious enmity or discord or on the basis of gender. Similar wording is contained in Articles 115, 121, 122, 126, 127 and 129 – definition of aggravating circumstances in the second part – committed for reasons of racial, national or religious intolerance. All other protected signs were absent in the CCU. They are mentioned only in Article 161 in part two “the same actions, combined with violence, deception or threats, as well as

committed by an official, -”, however, the practice of applying Article 161 to punish hate crimes shows the inability of investigative bodies to work with an open list of protected grounds and the non-use of several articles for combined prosecution, which makes it impossible, for example, to punish for committing intentional grievous or moderate bodily harm on the basis of homophobia or another grounds that is not included in the list “on the basis of racial, national, religious enmity or discord or on the basis of gender”.

- 3.2** National and international stakeholders also draw attention to the fact that most hate crimes in Ukraine are not properly investigated precisely because of the difficulty of proving the motive of intolerance or prejudice. Besides, the current Criminal Code does not contain an interpretation of the terms “hate” and “intolerance”, making it difficult to determine the subjective side of the crime committed due to intolerance.
- 3.3** The OSCE draws attention to the fact that “In most cases, it is not necessary to prove the motive of the crime. Because motive is a complex issue, and because there are limits to the categories of evidence that can be used to prove motive, hate crimes require somewhat different approaches from police, prosecutors, and judges than when investigating or prosecuting other crimes.”
- 3.4** International law provides fairly detailed guidance on how states should develop national norms to ensure the effective prosecution and punishment of hate crimes. The UN Convention on the Elimination of All Forms of Racial Discrimination requires states to enact laws punishing crimes based on racism. [The European Union Framework Decision on Racist and Xenophobic Crime](#) and the [EU Victims of Crime Directive](#) apply to all EU member states or aspiring EU members. The aforementioned Framework Decision of 2008 seeks a common criminal law position on hate crimes, including severe punishment for prejudice crimes, which Ukraine currently lacks.
- 3.5** The Framework Decision of the Council of the European Union 2008/913/JHA of 28 November 2008 requires states to apply a minimum standard, namely to take the measures necessary to ensure that such intentional conduct is punished:
- (a) *publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;*
  - (b) *the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;*
  - (c) *publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;*
  - (d) *publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.*



- 3.6** In addition, Framework Decision 2008/913/JHA draws the attention of States to the fact that they may choose to impose penalties only for conduct that is either carried out in a manner likely to disturb public order or that is threatening, offensive or offensive – thus underscoring the importance of taking into account the proportionality of the method of punishment to the severity of the committed crime.
- 3.7** It is important to emphasise the need for the possibility of aggravating the punishment.
- 3.8** Clause 11 of the Preamble to the Framework Decision draws attention to the fact that effective national legislation must include the possibility of investigating and prosecuting hate crime accusations without private prosecution.
- 3.9** The actions of legal entities are also excluded from the field of national law, while the minimum standard of the EU states that legal entities should also bear responsibility for inciting hostilities.

## 4.

### **Issues related to the effectiveness of data collection and prevention of discrimination, hate speech and hate crime**

- 4.1** Many of the obligations mentioned above contain a general requirement for member states of international agreements to effectively collect data on discrimination and use the analysis of this data to develop policies to prevent discrimination, hate speech and hate crimes. In the analysis “[Data collection system on hate crimes, hate speech and discrimination in Ukraine: recommendations for improvement and application of a common approach and situational analysis](#)”, experts of the Council of Europe draw attention to the fact that:
- Data from civil society organizations and data from state authorities regarding cases of discrimination, hate speech and hate crimes differ greatly (in terms of quantity and quality);
  - Only a few state authorities have the authority to collect data, there is no obligation and authority to exchange data and work on their aggregate analysis, including for the development of effective policies and measures to counter all manifestations of discrimination;
  - Disagreements between different provisions of anti-discrimination law, dispersal of powers between different state authorities, and lack of legal certainty in certain issues are also a factor in the lack of unified data.
- 4.2** Ukraine still needs to establish criteria and systems for thorough data collection on all cases of discrimination, as well as mechanisms for data exchange and their generalized analysis between various state authorities and self-regulatory bodies.



# Conclusion

In view of the above-mentioned EU minimum standards, the national law of Ukraine needs significant changes to resolve problematic issues:

- expanding the list of protected grounds including specific mention of SOGI throughout the legislation,
- clear legislative consolidation of the definition of the concept of “reasonable accommodation” and the development of its principles and criteria for delineating the limits of “reasonableness”,
- developing a system for collecting and analysing disaggregated data on all cases of discrimination in various spheres of social life and conducting regular measurements of the response to discrimination and the level of prejudice in society,
- clear legal certainty of the terms “enmity, intolerance or hatred” and the composition of separate crimes in the Criminal Code of Ukraine,
- removing from the Criminal Code responsibility for discrimination not related to extreme forms of hate speech and introducing administrative responsibility for manifestations of discrimination not related to violence,
- introducing a separate punishment for inciting hatred and/or incitement (hate speech) and hate crimes,
- including the expansion of the list of aggravating circumstances in the Criminal Code of Ukraine to its proportionality with the list of protected features,
- the possibility of investigating a crime without a statement from the victims,
- possibilities of prosecution for crimes of legal entities,
- inclusion of issues of the motive of intolerance for crimes of genocide, crimes against humanity and war crimes by harmonizing national law with international criminal law, including the ratification of the [Rome Statute](#).

Based on the analysis of the gaps and concluding observations a Roadmap was put together to draw the government attention to the steps needed to amend major gaps in current Ukrainian anti-discrimination legislation.

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<b>1.1</b>	conduct current legislation gaps, taking into account the standards of not only the EU, but also the Council of Europe and the OSCE, in particular, take into account the provisions of this document	Ministry of Justice of Ukraine, Ombudsman (with consent), Ministry of Internal Affairs, other Central Executive Bodies and CSOs
<b>1.2</b>	prepare a list of necessary comprehensive changes, paying attention not only to the implementation of one or more framework documents of the EU and/ or the Council of Europe, but also to the general harmonization of national law (cross-sectoral), to take into account all current EU Directives and documents of the Council of Europe regarding issues of discrimination towards various groups and all areas of social life	Ministry of Justice of Ukraine, Ombudsman (with consent), Ministry of Internal Affairs, other Central Executive Bodies and CSOs
<b>1.3</b>	prepare a list of pre-developed draft laws aimed at a partial solution to the above-mentioned problems, from those previously submitted to the Verkhovna Rada of Ukraine, conduct their analysis with a focus on the reasons why they were not voted on, take them into account when developing subsequent draft laws (for example, draft laws No. 4881 , No. 5488, No. 7290, No. 0931, No. 3369-IX, No. 4598-1, No. 5344-Д and others)	Parliament Committee on human rights and CSOs
<b>1.4</b>	develop draft laws that are needed to address existing gaps (taking into account that amendments are needed in various regulatory documents, as well as taking into account the previous unsuccessful experience of developing large complex draft laws, it may be appropriate to consider the preparation of separate draft laws focusing on narrow issues, but keeping at the same time the agreed changes proposed, which some current initiatives currently lack)	MPs or the Cabinet of Ministers
<b>1.5</b>	conduct public hearing of proposed amendments, consult with CSOs and if needed to introduce changes to the draft laws	MPs or the Cabinet of Ministers

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<b>1.6</b>	register draft laws in the Parliament and vote	<b>MPs or the Cabinet of Ministers</b>
<b>1.7</b>	conduct an analysis of current approaches to collecting information on cases of discrimination, complaints channels, exchange of information between various stakeholders, etc., to identify gaps in current disaggregated data collection and analysis	<b>CSOs and Ombudsman</b> (upon agreement)
<b>1.8</b>	together with CSOs, develop and implement changes to the collection and analysis of disaggregated statistical information on cases of discrimination, hate speech and hate crimes in Ukraine, publish an annual report based on the results of such collection and analysis, with the possibility of attracting technical assistance from international partners	<b>Central Executives Bodies and Ombudsman</b> (upon agreement), <b>CSOs</b>
<b>1.9</b>	to develop regulations on the procedure for conducting mandatory anti-discrimination examination of normative legal acts by executive authorities	<b>Ministry of Justice of Ukraine, Ombudsman</b> (upon agreement) and <b>CSOs</b>
<b>1.10</b>	development of changes to criminal law to bring it in line with international standards should be linked to the ratification of the Rome Statute	<b>Ministry of Justice of Ukraine and CSOs</b>
<b>1.10</b>	after changes to the legislation, together with the public sector, develop measures to implement the EU Directive on the rights of crime victims and support programs for victims of hate speech and hate crimes	<b>The Ministry of Justice, the National Police of Ukraine and Ombudsman</b> (upon agreement), <b>Central Executives Bodies and CSOs</b>
<b>1.11</b>	a good opportunity to receive technical assistance for the organisation of the data collection process in accordance with EU standards will be Ukraine's application to join the European Union Agency for Fundamental Rights (FRA) as an associate member, an opportunity that opens up for Ukraine with the start of candidate negotiations with the EU	<b>Office of the Vice Prime Minister for European Integration</b>

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