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HATE CRIMES: EVALUATION OF LITHUANIAN COURTS' DECISIONS IN THE LIGHT OF THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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ABSTRACT

In this article, the authors analyse the practice of the Lithuanian national courts and the European Court of Human Rights in hate crime cases, provide insights into the synergy between the decisions made by these courts, and suggest further improvement actions. This research shows that proving the circumstances surrounding various forms of hatred is quite complex, often lacking a more comprehensive, in-depth definition of the totality of circumstances by taking account of the need for special knowledge, the identification of guilt, and the system and intensity of actions. There is often a divide between criminal liability and the possibility of other countermeasures, especially when examining cases related to hate speech. Court decisions draw attention to the fact that it is necessary to consider the totality of the data collected, not individual data or individual fragments of circumstances. Among other things, the decisions emphasize the *ultima ratio* principle: whether criminal liability is an adequate measure in cases of hate speech. The topical issues examined in the article draw attention to the collection of significant data and the organization of investigations of these crimes, issues relating to proof and the emerging practice of the European Court of Human Rights and the Supreme Court of the Republic of Lithuania in this category of cases, highlighting the two main problematic aspects: first, the determination of the totality of objective and subjective features and second, the fact of identifying a real threat.

KEYWORDS

Hate Crime, Hate Speech, Lithuanian Courts' Practice, European Court of Human Rights' Practice

INTRODUCTION

The provisions of the Charter of Fundamental Rights of the European Union (hereinafter referred to as "EU") state that discrimination is prohibited; therefore, EU Member States are obliged to combat crimes committed due to racism, xenophobia, religious intolerance or disability, sexual orientation, or gender identity.¹ To achieve peace, the peoples of Europe must cooperate and seek common synergistic actions and measures that promote the protection of the most important values. As stated by the representatives of the European Union Agency for Fundamental Rights, the Member States are called on to take an active and clear role to overcome the growing prejudice against individuals or certain groups of individuals.² The fight against hatred is therefore based on public policy principles, a common approach, and action. It stands to reason that the Member States, having a unifying common interest, must take all possible steps to combat this phenomenon in several active directions.³ One of the most important tasks for law enforcement authorities of the Member States is to deal with complex rising challenges. First, law enforcement authorities must understand the content of offensive comments and their impact.⁴

Practical issues involved in organizing the investigation of criminal offences are the task of the pre-trial investigation institutions of each Member State. Optimization of the study of such acts and the implications of good practice models makes it possible to achieve more effective results. Therefore, improvements in the organization of the investigation and active prevention actions are essential⁵ for pre-trial investigation institutions in Lithuania. In recent years, the analysis of issues relating to the identification and investigation of cases of hatred has highlighted the

¹ *Charter of Fundamental Rights of the European Union*, Official Journal of the European Union (2016/C 202/02), art. 21.

² European Union Agency for Fundamental Rights, "Pranešimas spaudai" (Press release) (June 21, 2018) // https://fra.europa.eu/sites/default/files/fra_uploads/pr-2018-hate-crime-recording_lt.pdf.

³ In the report, such directions were established: EU Member States should ensure that any case of alleged hate crime is effectively recorded; EU Member States should make further efforts systematically to collect and regularly to publish detailed anonymized data pertaining to hate crime; to gain a better insight into hate crime victimization in their states, national authorities should design and carry out crime victimization surveys that include hate crime-specific questions; EU Member States should set up frameworks of systematic cooperation between law-enforcement agencies and relevant civil society organizations; EU Member States should ensure that victims of hate crime can report to the police without fearing that police officers share the discriminatory attitudes of offenders (European Union Agency for Fundamental Rights, *Hate Crime Recording and Data Collection Practice across the EU* (Luxembourg: Publications Office of the European Union, 2018) // https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-hate-crime-recording_en.pdf).

⁴ European Union Agency for Fundamental Rights, "Neapykantos nusikaltimai Europos Sąjungoje" (Hate Crimes in the European Union) (March 20, 2014) // https://fra.europa.eu/sites/default/files/fra-factsheet_hatecrime_lt_final.pdf.

⁵ Prosecutor General's Office, "Prokuratūroje diskutuota apie neapykantos nusikaltimų tyrimą" (The Prosecutor's Office Discussed the Investigation of Hate Crimes) (July 15, 2019) // <https://www.prokuraturos.lt/lt/naujienos/prokuraturos-aktualijos/prokuraturoje-diskutuota-apie-neapykantos-nusikaltimu-tyrima/6526>.

need to strengthen the competence of police officers in responding to criminal offences, organizing their investigation and prevention.⁶

To this end, constructive models of good pre-trial practice have developed, based on the provisions of the European Court of Human Rights (hereinafter referred to as "ECtHR") and national case law. An example of good practice is a training methodology developed in 2020 in cooperation with the country's law enforcement authorities and non-governmental organizations, in which, for the first time, the most relevant practical aspects of response to cases of hate, their pre-trial investigation, judicial practice, and prevention were systematized.⁷ The authors of this article completely agree that there is a need to strengthen the competence of responsible entities in identifying cases of hate, collecting data relevant to the investigation, and understanding and assessing the nature and significance of the data. General responsibilities and coordination actions of the Member States, economic progress and innovation, the need for public security, the public's need for law enforcement, the criminalization of new criminal offences, the need for special knowledge in the investigation of criminal offences, advancing technological processes, changing social environments, migration processes, and many other factors and emerging circumstances influence new challenges to review/update existing methodologies for the investigation of criminal offences and to develop new methodologies and research algorithms as required. Therefore, it is natural to respond to the needs of modern practice and to construct in a scientific-applied format a conceptual educational, not fragmentary, tool that includes the identification of and response to cases of hate and the application of judicial practice.

Thus, it is obvious and understandable that in the last five years, extensive attention has gone to the peculiarities of the investigation of individual criminal offences in Lithuania;⁸ however, it should be emphasized that in each case, the investigation of different types of criminal offences is conditioned by the nature of such criminal offences, their uniqueness and novelty, the peculiarities of the investigation, emerging judicial practice, and the influence of decisions of international courts on decisions of national courts. In particular, the results of research on cases of hate in recent years have shown the need to explore individual issues in more detail. In the last four years, as many as six solid applied research

⁶ Žaneta Navickienė and Kristina Miliūnė, "Pareigūnų veiksmai neapykantos atvejais ir prevencinė veikla užkardant neapykantos nusikaltimus" (Actions of Officials in the Cases of Hate Crimes and Their Preventive Activity) (2020): 7 // <https://repository.mruni.eu/bitstream/handle/007/16269/53828352.pdf?sequence=1&isAllowed=y>.

⁷ *Ibid.*

⁸ For example, recommendations for the investigations on trafficking in human beings were approved (*On the Approval of the Recommendations for the Identification of Victims of Trafficking in Human Beings, Pre-Trial Investigation and Interinstitutional Cooperation*, Prosecutor General of the Republic of Lithuania, Minister of the Interior of the Republic of Lithuania, Minister of Social Security and Labour of the Republic of Lithuania, Order No. I-327/1V-1015/A1-758, TAR (2015, no. 20631)).

studies have been carried out in the field of hate crimes and hate speech.⁹ The results of these research studies have revealed that, in addition to various problems, different judicial practice prevails in this category of cases. It is therefore entirely reasonable that the results of these research studies receive due attention from researchers and serve as the basis for further detailed analysis of individual topical issues in the field.

During the analysis of the main problems Lithuania faced in relation to the fight against hate crimes, several of these problems were identified. It has been increasingly noted that the fight against hatred, which “manifests itself in different forms in different spheres of life, among a variety of different groups of people, and in different situations,”¹⁰ is a topical issue in every nation. Due to the global nature of this negative phenomenon, it is problematic to control it, and all countries face this problem, including Lithuania. For this reason, it is important to take synergistic actions, i.e., to apply good international practices at national levels. In addition, the global nature of this negative phenomenon shows that the phenomenon is not fragmented, and its spread suggests¹¹ that it is a global concern, which means the concern of each nation and society.

The fight against hatred requires sending a message to the public that cases of hatred will not be tolerated. Court decisions show that those who have committed hate crimes are punished. However, to punish a person for acts of hatred, everyone, both officials and society, must perceive this phenomenon as a whole. A holistic understanding of the phenomenon of hatred is important in that it makes it possible to identify a case of hatred, assess the primary available relevant data and the possible forms of and motives for hatred, and then demonstrate targeted research

⁹ Human Rights Monitoring Institute, “Atsakas į neapykantos nusikaltimus: Situacijos Lietuvoje apžvalga (2017)” (Response to Hate Crimes: An Overview of the Situation in Lithuania) (December 2017) // <http://hrmi.lt/atsakas-i-neapykantos-nusikaltimus-situacijos-lietuvoje-apzvalga-2017/>; Irena Bihariová, ed., “Tackling Hate Crime and Hate Speech in Europe” (2018) // https://hrmi.lt/wp-content/uploads/2018/11/Tackling-Hate-Crime-and-Hate-Speech-in-Europe_EN.pdf; Žaneta Navickienė and Vilius Velička, “Baudžiamosios atsakomybės už neapykantos nusikaltimus ir neapykantą kurstančias kalbas taikymo atvejų analizės ataskaita” (Report on the Analysis of Cases when Imposing Criminal Liability for Hate Crimes and Hate Speech) (2019) // https://vrm.lrv.lt/uploads/vrm/documents/files/LT_versija/Viesasis_saugumas/Neapykantos_nusikaltimu_tyrimas_Ataskaita_2019.pdf; Human Rights Monitoring Institute and Lithuanian Center for Human Rights, “Bendradarbiavimas su neapykantos nusikaltimų pažeidžiamomis bendruomenėmis” (Cooperation with Communities Vulnerable to Hate Crime) (2020) // https://vrm.lrv.lt/uploads/vrm/documents/files/LT_versija/Viesasis_saugumas/Praktinis%20vadovas_LT.pdf; Monika Guliakaitė, Goda Jurevičiūtė, Birutė Sabatauskaitė, Agnė Pakšytė, Jūratė Juškaitė, and Vilius Velička, “Neapykantos nusikaltimai ir neapykantos kalba: Situacijos Lietuvoje apžvalga” (Hate Crimes and Hate Speech: Overview of the Situation in Lithuania) (2020) // <https://lt.efhr.eu/wp-content/uploads/2020/12/NEAPYKANTOS-NUSIKALTIMAI-IR-NEAPYKANTOS-KALBA-SITUACIJOS-LIETUVOJE-AP%20C5%BDVALGA.pdf>; Žaneta Navickienė and Kristina Miliūnė, *supra* note 6.

¹⁰ Žaneta Navickienė and Vilius Velička, *supra* note 8.

¹¹ European Union Agency for Fundamental Rights, “FRA Brief: Crimes Motivated by Hatred and Prejudice in the EU” (2013) // https://fra.europa.eu/sites/default/files/fra-brief_hatecrime_en.pdf; European Union Agency for Fundamental Rights, *supra* note 3.

actions, focusing on the identification of the totality of the objective and subjective features.

It should be noted that legal instruments alone are insufficient to solve problems. What is important is to develop the attitude of society itself towards the diversity of nationalities, races, ages, etc., and the tolerance of society towards this diversity. Other measures—communicative, organizational, and political—are also relevant. However, the lack of uniform judicial practice in cases in this category¹² allows the authors of this article to present this issue in more detail at the scientific level. Thus, this article focuses on one of the above-mentioned legal instruments—the discourse on the formation of a uniform judicial practice for hate crimes.

The rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms, their observance, and the decisions of the ECtHR interpreting these provisions have had a very valuable positive impact on the entire Lithuanian legal system. The development of such judicial practice has ensured that certain challenges have been addressed at national level. One such challenge is the fight against hate crimes. In this category of cases, different judicial practice, in which different aspects of data collection and assessment of evidence prevail, has been observed,¹³ which indicates the need for a detailed expert assessment of the issue. It is obvious that the practice of the Supreme Court of Lithuania (hereinafter referred to as "SCL") in this category of cases is still quite new;¹⁴ it is still developing, and it is not abundant, which leads to different arguments in different court decisions. In addition, another important fact is the large number of pre-trial cases that have been closed,¹⁵ as well as the frequent acquittals. This suggests that at the stages of data collection and assessment of evidence, there is still a lack of common practice guidelines for collecting and evaluating the data needed to investigate hate crimes and make judicial decisions in courts.

The aim of this article is to analyse the topical issues of the practice of Lithuanian courts in hate crime and hate speech cases and the compliance of this practice with the practice of ECtHR. To achieve this aim, the following tasks have

¹² Žaneta Navickienė and Vilius Velička, *supra* note 8.

¹³ This conclusion was made after the analysis of the 35 decisions made by Lithuanian courts in 2010–2018 (see *ibid.*).

¹⁴ The legal regulation of hate crimes has changed several times, with several changes made in 2009. In 2017, amendments to Articles 169, 170 and 170-1 of the Criminal Code of the Republic of Lithuania entered into force, extending the list of crimes involving racial, discriminatory or xenophobic grounds. Criminal liability was established for discrimination on the grounds of age and disability, as well as incitement to discriminate or incitement to hatred against these groups (see *Law Amending and Supplementing Articles 170, 191, 192 of the Criminal Code of the Republic of Lithuania and Supplementing the Code with Article 170-1*, Official Gazette (2009, no. 87-3663); *Law Amending Articles 169, 170 and 170-1 of the Criminal Code of the Republic of Lithuania*, TAR (2017, no. 8026)).

¹⁵ Between 2016 and 2019 in Lithuania, 146 pre-trial investigations were initiated regarding Article 170 of the Criminal Code of the Republic of Lithuania (as the most numerous crime in this group), of which as many as 66 investigations were terminated and only 24 cases went to court (Information Technology and Communications Department of the Ministry of Interior of the Republic of Lithuania, *Register of Criminal Offenses, 2019*).

been set: to examine the concept of hate crimes, to evaluate the practice of Lithuanian national courts and the ECtHR in the field of hate crimes regarding the identification of a real threat as a precondition for criminal liability, and to evaluate the practice of Lithuanian national courts and the ECtHR in the field of hate crimes regarding the identification of the totality of objective and subjective features.

1. THE DILEMMA OF THE CONCEPT OF HATE CRIMES

To examine the judicial practice in hate crime cases, it is important first to understand which acts prohibited by law are hate crimes. Even though hatred as a phenomenon has acquired a global character, it is important to note that there is still no unified concept of these acts.

Various authors have examined the social, legal, economic, and linguistic nature of hatred, defining cases of hate crime and highlighting the different features inherent in these acts.¹⁶ Some authors have pointed out that, although there is no internationally recognized common definition of hate crimes, it is common practice to recognize such acts according to the concept formulated by the Organization for Security and Co-operation in Europe (hereinafter referred to as "OSCE"): hate crimes are criminal offences committed on the basis of hatred.¹⁷ However, such a definition is too broad and vague.

As regards hatred, it should be noted that different concepts are used as synonyms in different sources: hate speech and hate crime. So, in this case, the question arises whether hate crimes include hate speech. Hate crime is a broader concept and should therefore include hate speech. However, there is still no consensus on this issue. For example, some researchers treat hate speech and hate crime as separate categories.¹⁸

D. Murauskienė points out that the term *hate speech* was used before the term *hate crimes*. At the European level, the term hate speech was first used as early as 1997 in the Recommendation on Hate Speech, No. R (97) 20, adopted by the Committee of Ministers of the Council of Europe, and the term hate crimes was first used in Europe in 2003 at the meeting of the Ministerial Council organized by the OSCE in Maastricht.¹⁹ This meeting laid the foundations for the development of the

¹⁶ Indrė Isokaitė, "Ekonominio nuosmukio poveikis neapykantos veikų tendencijoms" (The Impact of the Economic Downturn on Hate Crime Trends), *Teisė* 94 (2015): 191; Viačeslav Čigrin, "Neapykantos nusikaltimai: Aktualijos ir tendencijos" (Hate Crimes: Current Issues and Trends), *Visuomenės Saugumas ir Viešoji Tvarka* 9 (2013): 77.

¹⁷ Indrė Isokaitė, *supra* note 16.

¹⁸ Neil Chakraborti, *The Routledge International Handbook on Hate Crime* (London: Routledge, 2014), 14.

¹⁹ Dovilė Murauskienė, "Rekomendacijos dėl baudžiamosios atsakomybės už neapykantos nusikaltimus ir neapykantą kurstančias kalbas taikymo" (Recommendations on the Application of Criminal Liability for Hate Crimes and Hate Speech) (2019): 6 // https://vrm.lrv.lt/uploads/vrm/documents/files/LT_versija/Viesasis_saugumas/Rekomendacijos%20d%204%97l%20baud%20C5%BEiamosios%20atsakomyb%C4%97s%20taikymo.pdf.

concept of hate crimes.²⁰ The term hate speech was described "as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."²¹ Hate speech, according to I. Bihariová, is hateful verbal statements against other people because of their racial, national, or ethnic origin, religious beliefs, or sexual orientation.²² These acts are usually committed through linguistic means, where individuals express hatred in writing or orally towards persons of a particular social group. This means, in principle, an unlawful act, a hate crime committed by using linguistic elements.

It should be noted that different countries regulate liability for hate crimes in different ways, which is related to the diversity of hate crimes and the attitude to freedom of expression and its boundaries taken by different countries. All this determines the interpretation of the concept of hate crimes. A more detailed examination of the concept of hate crimes presented by the OSCE, which defines hate crimes as criminal offences motivated by bias or prejudice towards particular groups of people, reveals the main features (criteria) of such crimes: first, such acts must be prohibited by criminal law; second, the motive for the offence must be bias.²³ Hate crimes are criminal offences committed on the basis of "preconceived negative opinions, stereotypical assumptions, intolerance or hatred directed to a particular group that shares a common characteristic, such as race, ethnicity, language, religion, nationality, sexual orientation, sex or any other fundamental characteristic."²⁴

The Criminal Code of the Republic of Lithuania (hereinafter referred to as "CC RL")²⁵ does not contain a single article providing for criminal liability for hate crimes. It is, however, provided for in several articles related to hatred. Unlawful acts of this nature are provided for in the following articles of the CC RL: Article 99, Article 100, Article 169, Article 170, Article 170 (1), Article 170 (2), Article 171, Article 312 (2). It should also be noted that in some articles of the CC RL, acts committed on the basis of hatred, when the offender seeks to express hatred towards a group of persons or a person belonging thereto on grounds of age, sex, sexual orientation, disability, race, nationality, language, descent, social status, beliefs, convictions, or

²⁰ *Ibid.*

²¹ Council of Europe Committee of Ministers, *Recommendation to Member States No. R 97 (20) on hate speech* (1997).

²² Irena Bihariová, *supra* note 9.

²³ Organization for Security and Co-Operation in Europe, Office for Democratic Institutions and Human Rights, "What is Hate Crime" // <https://hatecrime.osce.org/what-hate-crime>.

²⁴ *Ibid.*

²⁵ *Criminal Code of the Republic of Lithuania*, Official Gazette (2000, no. 89-2741).

views, are seen as a qualifying feature: CC RL Article 129 (2)(13), Article 135 (2)(13), Article 138 (2)(13). In addition, Article 60 (1)(12) of the CC RL provides for an aggravating circumstance if “the act has been committed in order to express hatred towards a group of persons or a person belonging thereto on grounds of age, sex, sexual orientation, disability, race, nationality, language, descent, social status, religion, convictions or views.”²⁶

The recommendations of the Prosecutor General of the Republic of Lithuania state that “hate crimes include all criminal offences motivated by hatred, bias and/or prejudice against a group of persons, distinguished by the characteristics of age, sex, sexual orientation, disability, race, nationality, language, descent, social status, religion, convictions, or views.”²⁷ Thus, this concept suggests that hate crimes consist of two main elements: an act contrary to law (specific actions) and hatred, bias, and/or prejudice. As stated in the recommendations:

Hate speech is the public dissemination (oral, written or in other form) of information (ideas, opinions, incorrect factual assumptions), which is used to mock, despise, incite hatred, discrimination, violence, physical threat against a group of persons or a person belonging thereto on grounds of age, sex, sexual orientation, disability, race, nationality, language, descent, social status, religion, convictions, or views.²⁸

Thus, in the case of hate speech, the prejudice, hatred, and/or biased attitudes of the perpetrator play an essential role in the application of criminal liability, since in the absence of this motive, speech itself does not constitute a criminal offence.

In both national and international scientific framework, hate crimes have been approached from various aspects. First, the general issues of this concept have been examined—aspects of its origin and presentation in an interdisciplinary (ethical, philosophical) analysis.²⁹ In addition, some of the debatable questions have been noted, e.g., whether there is a general need for a common concept of hate crimes. At the same time, the need to identify the characteristics of the content of such a concept and its optimality (too broad an approach may include other social groups, and too narrow an approach may hinder the assessment of cases of hatred) has been highlighted.³⁰ Finally, the concept itself and its content have been analysed. Hate crime can also be revealed by actualizing the status of victims—in cases of hate

²⁶ *Ibid.*

²⁷ *Methodological Recommendations on the Peculiarities of the Conduct, Organization and Management of a Pre-Trial Investigation of Hate Crimes and Hate Speech*, Prosecutor General of the Republic of Lithuania, TAR (2020, no. 17.9-4265), 14.

²⁸ *Ibid.*, 16.

²⁹ Thomas Brudholm, “What is Hate?”: 66–67; in: Robert J. Sternberg, ed., *Perspectives on Hate: How it Originates, Develops, Manifests, and Spreads* (Washington: American Psychological Association, 2020).

³⁰ Thomas Brudholm, “Conceptualizing Hatred Globally”: 50; in: Jennifer Schweppe and Mark Austin Walters, eds., *The Globalization of Hate—Internationalizing Hate Crime?* (Oxford: Oxford University Press, 2016).

crimes, they are not random victims, but chosen according to certain characteristics that the victims themselves cannot change.³¹

After examining in detail the concepts of hatred, bias, prejudice, discrimination, Nathan Hall defined a hate crime as a criminal offence against a person, property, business or group of society motivated by the offender's negative attitude towards the victim's race, religion, ethnicity or national origin, sexual orientation, sex or disability.³²

The uniqueness of hate crimes can be explained by the fact that acts of this nature can take many forms, such as physical violence (causing physical injury to a person), mental violence (bullying, intimidation, persecution, terrorization), property damage, insults, humiliation, verbal nicknaming or written nicknaming in e-mails or messages, and incitement to hatred. However, any criminal offence committed on the basis of hatred, whatever its form, is united by the fact that there is a motive of discrimination in it. One of the important steps in identifying such a motive of discrimination is the identification of indicators of discriminatory attitudes³³ at the initial stage of the assessment of the act.³⁴

The conclusion to be drawn from the foregoing is that a hate crime is a criminal offence prohibited and defined by criminal law, committed against a person or a group of persons with discriminatory motives, seeking to express hatred against a person on the basis of his/her race, nationality, sex, age, sexual orientation, disability, language, descent, social status, religion, convictions, or activities or duties performed.

2. ISSUES RELATED TO THE IDENTIFICATION OF A REAL THREAT (APPLICATION OF ULTIMA RATIO)

The ECtHR practice states that criminal sanctions for inciting violence against other people can only be applied as an *ultima ratio* measure.³⁵ At the same time, the ECtHR notes that in cases where acts constituting serious crimes are directed against the physical or mental integrity of a person, only effective criminal law mechanisms

³¹ Brian Levin, "Hate Crimes: Worse by Definition," *Journal of Contemporary Criminal Justice* 15, no. 1 (1999): 12.

³² Thomas Mathiesen, "Prison on Trial: A Critical Assessment": 75; as cited in: Viačeslav Čigrin, "Neapykantos nusikaltimai: Aktualijos ir tendencijos" (Hate Crimes: Current Issues and Trends), *Visuomenės Saugumas ir Viešoji Tvarka* 9 (2013).

³³ It is objective facts, circumstances, or patterns relating to the offense or acts that, alone or in combination with other facts and circumstances, show that the offender's conduct was wholly or partly motivated by any form of discrimination or discriminatory views (auth.).

³⁴ Organization for Security and Co-Operation in Europe, Office for Democratic Institutions and Human Rights, "Categorizing and Investigating Hate Crimes in Ukraine: A Practical Guide" (May 2019): 33 // https://www.osce.org/files/f/documents/c/7/419891_0.pdf.

³⁵ *Beizaras and Levickas v. Lithuania*, European Court of Human Rights (2020, application no. 41288/15).

can provide adequate protection and act as a deterrent.³⁶ The ECtHR also recognizes that direct verbal attacks and physical threats based on discriminatory attitudes are subject to criminal law measures.³⁷ When assessing the synergy and harmonization between the decisions of the ECtHR and the national courts of the country, the *ultima ratio* aspect should first be mentioned. Accordingly, the Constitutional Court of the Republic of Lithuania has repeatedly emphasized that “in an attempt to prevent unlawful acts, it is not always expedient to recognize such acts as crime and apply the strictest measure—criminal punishment.”³⁸ “Therefore, whenever it is necessary to recognize an act as a crime or as other violation of law, it is very important to assess what results may be achieved by other means (administrative, disciplinary, civil sanctions, or measures of public influence, etc.) which are not linked with the application of criminal penalties.”³⁹

Although criminal offences committed on the basis of hatred can be qualified according to different articles of the CC RL, the dilemma of the identification of a real threat is most often faced in cases concerning Article 170 of the CC RL. In the practice of pre-trial investigation and courts, it is emphasized that despite the fact that the composition of the crime provided for in Article 170 of the CC RL is formal, when assessing subjective and objective features, a non-specific expression or attitude of a person is not sufficient.⁴⁰ Therefore, there are cases in which the courts acknowledge that the authors of the comments have exercised their freedom of expression improperly, but that such statements are not dangerous, i.e., such statements may not pose a real threat to the values protected by the criminal law in question (they may not violate the dignity and equality of a group of individuals, the community).⁴¹ For an act to be considered criminal, it must be extreme, and the discriminatory nature of the act must be obvious.⁴²

The SCL, like the Constitutional Court of the Republic of Lithuania, has repeatedly emphasized that criminal liability in a democratic society must be perceived as a last resort measure (*ultima ratio*) to defend protected legal interests and values in cases where the same objectives cannot be achieved by milder measures.⁴³ Therefore, when deciding on the issue of criminal liability for hate crimes in accordance with Article 170 of the CC RL, pre-trial investigation institutions should

³⁶ *Identoba and Others v. Georgia*, European Court of Human Rights (2015, application no. 73235/12).

³⁷ *Ibid.*

³⁸ *Ruling of the Constitutional Court of the Republic of Lithuania of November 13, 1997, Case no. 4/97*, Official Gazette (1997, no. 104-2644); *Ruling of the Constitutional Court of the Republic of Lithuania of November 10, 2005, Case no. 01/04*, Official Gazette (2005, no. 134-4819).

³⁹ *Ibid.*

⁴⁰ *State v V.G.*, Kaunas Regional Court (2015, no. 1A-481-317/2015).

⁴¹ *State v V.G.*, Supreme Court of the Republic of Lithuania (2016, no. 2K-86-648/2016).

⁴² *State v V.G.*, *supra* note 41; *State v J.J.*, Supreme Court of the Republic of Lithuania (2012, no. 2K-677/2012).

⁴³ *State v A.P.*, Supreme Court of the Republic of Lithuania (2011, no. 2K-P-267/2011); *State v A.P.*, Supreme Court of the Republic of Lithuania (2011, no. 2K-262/2011); *State v J.J.*, *supra* note 42.

assess how specifically the value protected by law is threatened or, in other words, what actions pose this threat. According to the courts, it is necessary to assess on a case-by-case basis whether the person's actions lead to dangerousness for which he/she should be held criminally liable.⁴⁴ If the act is of a one-off nature, the courts tend not to criminalize such cases.⁴⁵ When assessing the dangerousness of an act, the courts note that:

The dangerousness of an act is characterized by the nature and degree of dangerousness. The nature of dangerousness is considered as a qualitative characteristic of a criminal offence, whereas a degree of dangerousness expresses a quantitative characteristic of the crime. This means that the nature of dangerousness indicates the content of dangerousness and the degree of dangerousness indicates the level of that dangerousness. The degree of dangerousness is determined by many factors, including the manner, motives, aims, and other circumstances of the criminal offence.⁴⁶

Therefore, when considering statements on the Internet as hate crimes, it is not sufficient to state that such statements are contrary to morality or merely words of a negative or despicable tone, but it is important to determine whether such statements can actually incite violence against a particular group of people.⁴⁷ The courts base their decisions on the provisions of the Law on the Provision of Information to the Public,⁴⁸ emphasizing that "the opinion may be based on facts or substantiated arguments and is usually subjective and, therefore, it is not subject to the criteria of truth and accuracy; however, it must be expressed in good faith and ethically, without deliberately concealing and distorting the facts and data."⁴⁹ For this reason, in the opinion of the courts, "various expressions in their dangerousness do not correspond to the features of a criminal offence and may more testify to the immature attitude of the author of such expressions, to the misuse of freedom of expression, but not to the intention to violate the legal interest protected by the disposition of Article 170(2) of the CC RL."⁵⁰

Therefore, "incorrect statements that go beyond the ethical implementation of one's constitutional information and freedom of expression"⁵¹ do not constitute

⁴⁴ *State v R.P.*, Panevėžys Regional Court (2017, no. 1A-33-491/2017).

⁴⁵ In one of the cases, the court stated that "a one-time online comment is considered unethical, immoral, incorrect, goes beyond the ethical realization of freedom of expression, and is therefore negative and contemptuous, but does not comply with established elements of criminal offenses in the Article 170 part 2 of the Criminal Code" (*European Foundation of Human Rights*, Ruling of the Vilnius Regional Court (2015, no. 1S-1377-487/2015)).

⁴⁶ *State v J.Š.*, Supreme Court of the Republic of Lithuania (2012, no. 2K-7-76/2012).

⁴⁷ *State v A.M.*, Mažeikiai Region District Court (2015, no. 1-110-721/2015).

⁴⁸ *Law Amending the Law on Public Information of the Republic of Lithuania*, Official Gazette (2006, no. 82-3254).

⁴⁹ *State v A.M.*, *supra* note 47.

⁵⁰ *European Foundation of Human Rights*, *supra* note 45.

⁵¹ *State v A.M.*, *supra* note 47.

criminal offences with regard to their dangerousness. Individuals have the right to react negatively to published information, which is considered to be an expression of a personal civic position.⁵² The judicial practice shows that it is necessary to identify all the objective features of a criminal offence, as it is not sufficient to state that a person's statements are negative.⁵³

When assessing the dangerousness of acts of hatred, it is also necessary to assess not so much the nature of the negative speech as the content of the words contained therein. The SCL states that in such cases, it is necessary to take into account "the laconic nature of the comment and the words used in it rather than a specific nature of the comment (the author's negative attitude is not motivated in detail, such motivation is used to prejudice others against the respective group; no specific negative presentation of the group is given, violence is only discussed in the abstract, using phraseologies, etc.)."⁵⁴ If the assessment of the content leads to the conclusion that the statement does not contain elements characteristic of a real threat, such an act shall not be considered criminal. When assessing the reality of the threat "it is not necessary to identify the specific person against whom the statements are made; it is sufficient to identify the group of persons against whom the statements are directed."⁵⁵ It should be noted that as in every criminal offence, the identification of one feature of a criminal offence does not yet necessarily mean that the criminal offence has been committed; if the subjective and objective features of the acts have not been identified, the actions of the accused cannot be recognized as criminal.⁵⁶

The assessment of the decisions of the Lithuanian courts in the field of hate crimes has revealed that when recognizing the act as criminal, the motives associated with the real threat prevail, i.e., if it can be inferred from the statements that the threat is real, then the act is considered dangerous and gives rise to criminal liability. However, the position of the ECtHR is stricter. In the case of *Beizaras and Levickas v*

⁵² The court stated that "the negative reaction of the accused to the demands of a group of persons to amend the laws of Lithuania and to write their names in non-Lithuanian characters was a natural personal civic position expressed by this communication act." *State v A.M.*, *supra* note 47. In another case, the court stated that "the statement of the V.G. published on the Internet 'Give to the fur such scratched assholes' should be considered as incorrect, overtaking the ethical realization of constitutional information and freedom of opinion, especially with regard to the appellant's status (he is a priest), but in terms of the expressed content and degree of danger, it does not satisfy the elements of the criminal offenses established in Paragraphs 2 and 3 of the Article 170 of the Criminal Code—incitement by active actions against homosexual persons, mocking, despise, promote hate, discrimination, violence or physical violent treatment" (*State v V.G.*, *supra* note 40).

⁵³ For example, the Supreme Court of the Republic of Lithuania stated that "the indicated words have a negative and contemptuous tone in the Lithuanian language, but only due to their use in the written comment, in the absence of specific and direct statements inciting hatred or discriminating against this group of persons, in the actions of the person were unreasonably established attributes of the objectives of Article 170 Paragraph 2 of the Criminal Code" (*State v J.J.*, *supra* note 42).

⁵⁴ *State v V.G.*, *supra* note 41.

⁵⁵ *State v V.Ž.*, Klaipėda Regional Court (2016, no. 1A-209-361/2016).

⁵⁶ *State v L.K., V.K.*, Kaunas District Court (2016, no. 1-384-240/2016).

Lithuania,⁵⁷ ECtHR found that the applicants had posted on a Facebook page a photograph of two men kissing. This photograph could be viewed not only by the applicants' Facebook friends, but also by the general public. The applicants' photograph received many comments, but Lithuanian law enforcement authorities did not initiate a pre-trial investigation.

The content of the comments was apparently related to hatred: "Because you're faggots, and children can see photos such as these, it's not only the Jews that Hitler should have burned," "Scum!!!!!!," "Into the gas chamber with the pair of them," "Into the bonfire with those faggots...," "Hey fags—I'll buy you a free honeymoon trip to the crematorium," "Fucking faggots—burn in hell, garbage."⁵⁸ When assessing the comments from the position of the reality of the threat, ambiguous conclusions can be drawn, i.e., on the one hand, it can be argued that the words used do not pose a real threat, since it is unrealistic to "burn in hell" or use a "gas chamber"; on the other hand, judging by the aggression contained in the comments, it can be assumed that the authors of the comments can realize their aggression, but not necessarily in the form or manner in which it was expressed. In finding violations of the European Convention of Human rights, the ECtHR noted that "if comments such as those uttered in their case did not amount to inciting not only hatred but even violence on the basis of the applicants' sexual orientation, then it is hard to conceive what statements would."⁵⁹ In this way, it may be concluded that if the content of statements, by its very nature, incites hatred and violence, the issue of recognizing such acts as criminal must be addressed.

Incitement to hatred, in terms of the reality of the threat, does not necessarily have to be expressed directly,⁶⁰ calling for violence or other criminal offences. Public authorities must prioritize the combat against racist statements⁶¹ when attacks on individuals are committed by insulting, mocking, or slandering specific groups of the population. The ECtHR found that even though the statements such as "homosexuality is a sexual perversion, which contributes to the degradation of public morals," "homosexuality has been one of the main causes of the spread of HIV and AIDS," and "homosexuals promote pedophilia" do not directly incite the public to take aggressive, degrading, or discriminatory actions against homosexuals, they raise serious suspicions that such statements were intended to achieve precisely such

⁵⁷ *Beizaras and Levickas v. Lithuania*, *supra* note 35.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Vejdeland and Others v. Sweden*, European Court of Human Rights (2012, application no. 1813/07).

⁶¹ Supreme Administrative Court of Lithuania, "Europos Žmogaus Teisių Teismo sprendimų apžvalga (2012 m. sausio 1 d. – liepos 31 d.)" (Overview of the Judgments of the European Court of Human Rights (January 1, 2012 – July 31, 2012)) (2012): 75 // https://www.lvat.lt/data/public/uploads/2018/01/ezt_t_apzvalga_2012_01-07.pdf.

purposes.⁶² Thus, the practice of the ECtHR⁶³ suggests that incitement to hatred does not necessarily have to be expressed as a call to commit a violent or other criminal offence.

In summary, it can be concluded that national judicial practice in this category of cases has not yet been fully refined and developed. This is especially true in cases of hate speech. Although the ECtHR emphasizes the need for an effective criminal law mechanism in this category of cases, by highlighting in general the peculiarities of the social and political context in which the statements are made, the scope of that context, the manner in which the statements are made, and other circumstances, it confers to the national courts a sufficiently wide discretion to assess cases of hate speech on a very individual basis. It is therefore clear that it is up to the Member States themselves to take national interpretative instruments and other measures to detail the situation as clearly as possible when collecting data and assessing evidence in the court. In the absence of additional detailed explanations, a looser interpretation of the data and the situations in which such acts occurred may be observed in this case. It is therefore not surprising that Lithuanian courts are too tolerant of acts of hatred.

It should be noted that when assessing acts of hatred, criminal liability should be applied not only to such actions, which suggest the existence of a real dangerousness, but also to acts which, by their nature, suggest a person's aggression, which may not be realized in such a way or form that is reflected in the person's statements or when the public is incited to engage in such acts by assessing the content of the person's statements. The reality of the threat in such cases must be assessed not only in terms of whether it is realistic to realize the statements made, but also in terms of whether the content of the statements incite aggression. On the other hand, there is already a growing awareness of the application of administrative liability for hate speech in cases in which a person's statements do not reflect the reality of the threat and, thus, are not subject to criminal liability.⁶⁴ In the case of such statements, it is necessary to draw the line between criminal and administrative liability clearly. In this case, not only would the ECtHR's proposals to use national instruments be more clearly implemented, but it would also allow a categorization of

⁶² *Vejdeland and Others v. Sweden*, *supra* note 60.

⁶³ *Féret v. Belgium*, European Court of Human Rights (2009, application no. 15615/07); *Cumpana and Mazare v. Romania*, European Court of Human Rights (2003, application no. 33348/96).

⁶⁴ Arūnas Paulauskas, "Policijos vizija, sprendžiant neapykantos nusikaltimų problemą" (Police Vision in Tackling Hate Crimes), International conference "Siekiant efektyvaus atsako į neapykantos nusikaltimus ir neapykantos kalbą" (Seeking an Effective Response to Hate Crimes and Hate Speech) (December 2020) // https://www.youtube.com/watch?v=ewMwsxYEd0o&ab_channel=Nacionalinis%20EMogausteisi%20forumas.

the nature of negative statements (now, by emphasizing the principle of *ultima ratio* in acquittals, a person remains completely unpunished).

3. CRITERIA FOR RECOGNISING AN ACT AS A HATE CRIME

Not every act whose content involves discrimination, hatred against a person due to his/her race, nationality, sex, age, sexual orientation, disability, language, descent, social status, religion, convictions, activities, or duties performed can be considered a hate crime. In the case of *Beizaras and Levickas v Lithuania*,⁶⁵ the ECtHR drew attention to how the Lithuanian courts have assessed the systematic nature of the acts. The ECtHR pointed out that the Lithuanian judicial practice is not uniform in this regard, as the courts sometimes consider the fact that the accused has written many discriminatory comments an important circumstance and find him/her guilty of the crime; however, in other cases, one discriminatory comment is sufficient to prosecute the person.⁶⁶ However, it is not only the reality of the threat or the systematic nature of the actions that leads to the recognition of an act as a crime. Therefore, it is expedient to evaluate the decisions of the Lithuanian courts by establishing criteria for determining the act committed as a hate crime, which will allow us to assess the position expressed by the ECtHR with regard to Lithuania.

In the practice of courts, the attention is drawn to the number of statements made by a person, thus defining the nature of an act committed with a direct intent. A person:

By publishing wide-ranging texts and making public comments not by chance and not once, but systematically, acted in full awareness of the dangerousness of his act and with the aim of inciting a negative reaction of the public towards the Jewish nation, homosexual people as well as towards people belonging to the Conservative and Liberal parties and he mocked and despised these people.⁶⁷

It was established in the case that such comments published on the Internet⁶⁸ as "Jews rule the European Union and at the same time manipulate Lithuanian money" or "only V. Putin can actually stop faggots. He does that, and it is time for the Conservatives, along with the Liberals, to think about the name of a united party, for example, 'party of pedophiles, pederasts and perverts'" have to be seen as expressing public mockery, contempt, and incitement to hatred against groups of people on the basis of sexual orientation, national beliefs, and political beliefs.⁶⁹

⁶⁵ *Beizaras and Levickas v. Lithuania*, *supra* note 35.

⁶⁶ *Ibid.*

⁶⁷ *State v V.L.*, Supreme Court of the Republic of Lithuania (2018, no. 2K-91-976/2018).

⁶⁸ There were four comments in total (auth.)

⁶⁹ *State v V.L.*, *supra* note 67. Note: the text in quotation marks is authentically quoted from the court case. The same pattern is followed in this article below.

Although the comments made did not reflect the reality of the threat, in deciding whether the acts were criminal offences, the court took into consideration the number of comments, the obvious discriminatory nature of those comments, and the indirect incentive to restrict the rights and freedoms of a person or group of people in comparison with other people or groups of people prevailing in those comments.⁷⁰ The fact that the acts committed are repetitive shows not only a negative, but also a deliberate attitude of the person towards the object being commented.⁷¹

As mentioned above, after the decision of the ECtHR,⁷² Lithuanian national courts are obliged to consider not only the number of written comments of one person in all cases, but also the content of those comments. The criterion of systematic nature itself is not inappropriate, but it is the content of the written comment that is very important. According to the ECtHR, "even the publication of a single hateful comment on a social profile that expresses the threat 'to kill' should be taken seriously."⁷³

When analyzing the determination of intent in a person's acts, the determination of whether a person meant to incite hatred against a specific group of people has a significant impact on the criminalization of the act. When assessing a person's mental relationship with the act committed, it is important to analyze the testimonies given by the individuals to clarify the person's perception of the act committed. In one of the cases, the court found no evidence of a criminal offence, as the accused stated that "there was no such idea of creating a song against children. They wanted to create something like this because they saw a lot of foreigners doing something similar and so got a style of black humor."⁷⁴ At the time of the acquittal, the court considered that the accused had exercised their freedom of expression improperly, but that the song and the video-audio clip created for this song could not have threatened the values protected by the criminal law.⁷⁵

When proving a person's guilt, consisting of a direct specific intent, it must be determined whether the person had the intent to ridicule and/or despise another person due to his/her race, age, sex, sexual orientation, disability, nationality, language, descent, social status, religion, convictions, or views. Therefore, acts committed for purposes not mentioned above cannot be considered as criminal. In one of the cases in which the publicly available video was assessed, the court noted

⁷⁰ *Ibid.*

⁷¹ *State v R.P.*, Supreme Court of the Republic of Lithuania (2017, no. 2K-206-693/2017).

⁷² *Beizaras and Levickas v. Lithuania*, *supra* note 35.

⁷³ *Methodological Recommendations*, *supra* note 27, 79.

⁷⁴ *State v G.S., V.G. and M.G.*, Anykščiai Region District Court (2016, no. 1-3-266/2016).

⁷⁵ *Ibid.*

that “the content of the video under analysis is clearly humorous.”⁷⁶ The court also noted that:

The depicted situation is impossible in reality, the depicted actions do not and cannot determine the depicted consequences. Such content of the video undoubtedly reveals not the person’s desire to humiliate the persons of the respective nationality, their honor, and dignity, but rather testifies to the person’s immature attitude towards the phenomena occurring in society.⁷⁷

In this way, it can be concluded that the publication of a negative opinion or work, if it was not intended to express hatred, incitement to ridicule and despise, or incitement to discriminate, is not a criminal offense.

However, the position of the courts is not unanimous in this respect. In one of the cases, when considering the issue of the person’s intent, the court, even though the person had stated that he had not wished to offend anyone, identified the content of the statement itself as derogatory, which led to the criminalization of the act. The court stated that:

It is clear from the comment under analysis that the acts of the commentator were directed against the Russian people. When assessing the comment, it should also be taken into account that in his comment, V.S. presents circumstances that do not correspond to reality, which are not recognized as generally known facts (he says that Russians are “the most disgusting nation”), and thus expresses his contempt for the people of the Russian nation. The accused expresses his opinion in non-laconic sentences, uses many words that despise the Russian people, which indicates that his act is manifested in active actions; the words he uses, e.g., “dickhead,” “Russian not-fucked-enough fascists,” have clearly contemptuous connotations, which obviously humiliates and despises the people of the Russian nation.⁷⁸

When identifying the subjective features of a criminal offence, it is important to analyze the personality, perception, and understanding of the accused properly in relation to the specific thoughts he/she expresses. In this case, it is important to assess how a person, having certain education and having some life experience, understands the meaning of the words used and their content. In one of the cases, the court noted that a person, “having a secondary education, being mentally healthy ... had understood the meaning of his words and understood their consequences.”⁷⁹ In its decisions, the ECtHR also assesses the personality of the perpetrator.⁸⁰ In this respect, the ECtHR has formulated three basic rules: “on the statements of

⁷⁶ *State v M.C.C.*, Vilnius Regional Court (2015, no. 1S-157-628/2015).

⁷⁷ *Ibid.*

⁷⁸ *State v V.S.*, Panevėžys District Court (2016, no. 1-155-334/2016).

⁷⁹ *State v V.L.*, Klaipėda Regional Court (2017, no. 1A-151-360/2017).

⁸⁰ *Féret v. Belgium*, *supra* note 63.

politicians; on the statements of celebrities, bloggers, etc.; on the author's professionalism in a field in which he/she may have exceeded the limits of freedom of expression."⁸¹

If acts of hatred are repeated, then a greater dangerousness of the act committed may be determined, while qualifying the act itself as a hate crime. In one of the cases, the court stated that:

The degree of dangerousness of V.Ž.'s actions was increased by the fact that he had committed this act constantly (he had been convicted of publishing 13 recordings on the Internet space), and for a long period of time (recordings had been published from July 30, 2012 to February 12, 2014), he had purposefully spoken against the community of believers, seeking to mock and despise them.⁸²

The number of comments makes it possible to substantiate the subjective side of the criminal offense, i.e., the fact that, when committing a criminal offence, a person acted with a direct intent; therefore, such a person cannot be considered to have erred or acted recklessly, unintentionally, and spontaneously.⁸³

It is not only the systematic nature of a crime that determines the recognition of a crime as a hate crime. The qualifying of an act can be determined both by the scope of the actions carried out and by the peculiarities of the dissemination of information. When assessing the scope of the criminal offences and criminalizing the acts, the court noted that:

O.T., with the aim to distribute leaflets in an individual company, ordered [the production of] 1000 [copies] of the leaflets "Fellow Countryman," in which the text spreads disdain and seeks to insult certain groups of people, and 1000 [copies] of the leaflet "Get rid of Euro," in which the text spreads hatred towards groups of people and seeks to despise and insult them.⁸⁴

In another case, the qualifying of the act was influenced by the availability of information to the public: "it must be stated that V.S.'s comment was public, accessible to a wide and diverse circle of the public, not just to one or several commentators who participated in the online discussion."⁸⁵

In its decision, the ECtHR refers to the specific features of the dissemination of information and points out that the availability of the Internet and the ability to transmit (disseminate) large amounts of information play an important role in society. The dissemination of such information on the Internet is widespread and may have a greater impact than traditional media.⁸⁶ In the case of *Féret v Belgium*, the

⁸¹ *Methodological Recommendations*, *supra* note 27, 80.

⁸² *State v V.Ž.*, *supra* note 55.

⁸³ *State v R.P.*, *supra* note 71; *State v V.L.*, *supra* note 79.

⁸⁴ *State v G.G.*, Klaipėda Regional Court (2018, no. 1-11-361/2018).

⁸⁵ *State v V.S.*, *supra* note 78.

⁸⁶ *Delfi v Estonia*, European Court of Human Rights (2015, application no. 64569/09)

ECtHR stated that the ways in which comments are disseminated are important when assessing acts. In this case, leaflets were distributed during a political campaign, and the court assessed that they were "aimed at reaching the largest possible electorate, i.e., the whole society."⁸⁷

The duration of the act committed by a person also affects the recognition of the act as a criminal offence. In one of the cases, it was stated that "the total length of the acquitted person's sentences does not exceed half a minute of his speech of 17 minutes."⁸⁸ Therefore, the court, in its assessment of the statements made, noted that a momentary statement lasting only a few seconds, when there is no "extraordinary confusion" cannot be considered a criminal offence.⁸⁹

Proving each criminal offence requires the identification of both subjective and objective features of the offence. The existence of one of the features is not sufficient to establish that the offense committed is criminal. There must be the totality of these features. Therefore, when assessing whether an act is a hate crime, all constituent elements of the criminal offense that show not only the dangerousness of the act, but also the incitement to hatred must be taken into account. The ECtHR has emphasized that the state has a duty to investigate all motives related to hatred.⁹⁰ Therefore, the mere fact that a person's conduct presents a negative opinion relating to another person's race, age, sex, sexual orientation, disability, nationality, language, descent, social status, religion, convictions, or views does not mean that a criminal offence has been committed.

In summary, it can be stated that the principle of *ultima ratio* is closely linked to the assessment of the totality of features describing a hate crime. Thus, when assessing acts of this nature, the decisions emphasize the necessary identification of the whole set of objective and subjective features. Although this is mandatory in all cases when investigating any type of criminal offence, in this case, the analysis of the practice of courts has shown that a unique set of criteria is being developed for the investigation and evaluation of such acts, which includes the systematicity of actions, motives, social or political context and its tension, etc. Thus, taking into account the analysed practice of Lithuanian courts and decisions of the ECtHR, it can be concluded that the decisions of Lithuanian courts related to the criminalization of acts of hatred are influenced by the totality of criteria.

This means that, when examining cases, courts also pay attention to other constituent elements of the criminal offence, which help to assess or recognize the act committed correctly as a hate crime, e.g., whether the act is discriminatory

⁸⁷ *Féret v. Belgium*, *supra* note 63.

⁸⁸ *State v R.P.*, *supra* note 44.

⁸⁹ *Ibid.*

⁹⁰ *Dovilė Murauskienė*, *supra* note 19.

and/or extreme and whether the statements made may actually incite violence or indirectly incite violence or other criminal activities; whether the person had the intent to mock and/or despise another person on the basis of his/her race, age, sex, sexual orientation, disability, nationality, language, descent, social status, religion, convictions, or views; how many times the statements were made; whether the person understood the meaning of the words used and their content. In this way, it can be reasonably argued that the criticism of Lithuania expressed by the ECtHR in one of the cases⁹¹ is unfounded, as it is not errors of law that lead to the heterogeneity of judicial practice, but differences in fact-finding in acts of hatred.

CONCLUSIONS AND RECOMMENDATIONS

A criminal offence prohibited and described by criminal law, committed against a person or a group of persons with discriminatory motives, seeking to express hatred against a person on the basis of his/her race, nationality, sex, age, sexual orientation, disability, language, descent, social status, religion, convictions, activities or duties performed is classified as a hate crime. Not just any act that is of negative character and expresses discriminatory motives can be considered as criminal. According to the practice of both Lithuanian courts and the ECtHR, criminal liability is a last resort measure (*ultima ratio*) used to protect values in cases where the same objectives cannot be achieved by milder measures. In assessing whether a person's act is a criminal offence, this act must be extreme, and the discriminatory nature of the act must be obvious. The issue of the divide between the criminal and administrative liability for hate speech has also emerged together with the proposal to categorize the nature of negative statements.

The analysis has revealed that the practice of Lithuanian courts differs from the decisions of the ECtHR in the field of hate crimes. The main problem identified is that Lithuanian courts are too tolerant of acts of hatred. It should be noted that the assessment of acts of hatred should take into account not only whether the person's statements contain aggression, but also whether the statements made can be seen as inciting aggression.

Although the ECtHR has stated that the assessment of hate crimes by Lithuanian courts is not uniform, the analysis carried out has revealed that Lithuanian courts do not single out one specific criterion that determines the recognition of an act as a criminal offence, i.e., both subjective and objective features of a criminal offence are identified. On the basis of court decisions, a new set of evaluative criteria is emerging, including the systematicity of actions, the tension of the social and

⁹¹ *Beizaras and Levickas v. Lithuania*, *supra* note 35.

political context, and motives of statements, etc. It must therefore be concluded that the differences in judicial practice are due more to questions of evidence assessment than to errors of law.

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