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THE INSTIGATION OF HATRED: QUESTIONS OF LEGAL EVALUATION AND PROCEDURAL ISSUES

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Abstract. Considering the infringements upon the principle of equality caused by hate crimes, as well as the negative impact of such crimes not only on their victims but also on other persons within the same group of vulnerable people, the authors of this paper analyse hate speech as a criminally punishable act. The analysis of this issue is of essential importance as hate speech manifests on the internet, often via comments made online, a worrying issue as hate speech is therefore often tolerated. This article raises the question of the delimitation of hate speech from hate crime; the authors present an analytical overview of national and international case law, providing an insight into the process of distinguishing hate speech from a person's right to exercise their freedom of self-expression. A separate section covers the challenges that law enforcement authorities face when investigating incidents of hate speech online, where criminal activities often trespass the borders of a single state and their investigation requires tools of international cooperation to receive or transfer electronic evidence.

Keywords: criminal procedure; criminal law; hate crime; hate speech; e-evidence

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1. Introduction

Criminal acts motivated by hate violate, in particular, the principle of equality of persons, which is considered a fundamental constitutional value. This type of crime and the reasons behind it (homophobia, xenophobia, racism, discrimination, etc.) are greatly divisive in society. Historically, the groups that are the target of hatred have most often already been subjected to some form of discrimination (for instance according to their race, skin colour, religion, sexuality, etc.). Therefore, the protection of their rights and the delivery of justice are vital in preventing divisions and hostility between different groups in society, which can escalate into active discrimination or even physical violence (European Union Agency for Fundamental Rights, 2012). Criminal acts of this type are often referred to as 'a message for action'. The victims of such criminal acts and other people associated with the same

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groups receive a 'clear message' that they are undesirable and not welcome in the society, and therefore feel unsafe. Thus, such acts cause not only the primary victimisation of the victim, but also the indirect victimisation of individuals belonging to the same groups.

For this reason, democratic countries unanimously agree that, firstly, there must be clear criteria for identifying such criminal acts and, secondly, clear law enforcement practices must be developed in line with international standards, according to which perpetrators must be held legally liable for hatred-motivated acts that breach the law. Thirdly, clear criteria must be established in case law to distinguish between hate crimes and the exercise of freedom (right) of expression. This requires scientific foundations, with clarity in the definitions of such criteria.

Finally, hate speech, as a form of hate-motivated crime, is most often committed online, and often extends beyond the borders of a single state. Therefore, law enforcement authorities face the challenge of collecting data (evidence) relevant to the investigation of a criminal offence; they make use of legal aid mechanisms based on the principles of international cooperation.

Considering the fact that instigations of hatred are mainly committed on the internet, alongside commercial web pages, the question of the negative and positive responsibility of specific businesses and commercial companies must be raised. This is a far-reaching issue, as on 10 June 2009 the Estonian Supreme Court (*Vjatsheslav Leedo v. AS Delfi*) emphasized the responsibility of the Delfi Estonia internet portal for tolerating such comments. The Court also stated that if e-comments are full of slander, vulgar, humiliating, or threatening, then the administrator must take all possible actions to remove them. In this case, the European Court of Human Rights (ECtHR) was also mindful, in this context, of the importance of the wishes of internet users not to disclose their identity in exercising their freedom of expression. At the same time, the spread of the internet and the possibility—or for some purposes the danger—that, once made public, information will remain public and circulate forever, calls for caution. The ease of disclosure and substantial volume of information on the internet means that it is a difficult task to detect defamatory statements and remove them. This is true for an internet news portal operator, as in the present case, but this is an even more onerous task for a potentially wronged person, who would be less likely to possess the resources required for the continual monitoring of the internet. The Court considered the latter element an important factor in balancing the rights and interests at stake. A number of other elements were also relevant, in particular: the insulting and threatening nature of the comments, the fact that the comments were posted in reaction to an article published by the applicant company in its professionally-managed news portal run on a commercial basis; the insufficiency of the measures taken by the applicant company to avoid damage being caused to other parties' reputations and to ensure a realistic possibility that the authors of the comments will be held liable; and the moderate sanction imposed on the applicant company. Based on these elements, the Court considered that, in the present case, the domestic courts' finding that the applicant company was liable for the defamatory comments posted by readers on its internet news portal was a justified and proportionate restriction on the applicant company's right to freedom of expression. There has, accordingly, been no violation of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention, ECHR; *DELFI AS v. Estonia*, 2013).

Incidentally, by way of example, in 2017 the Parliament of the Federal Republic of Germany also made the step of enacting the law to fight the instigation of hatred on social media. According to this law, social media companies must remove any comments that instigate hatred within a period of 24 hours. The sanctions for being passive in this regard can reach up to €20 million. This country should be seen as the pioneer in providing financial sanctions for social media companies (Normantaitė, 2017).

Despite these considerations clearly demonstrating the relevance of hate-motivated crimes, Lithuanian legal theory has studied the matter only sporadically. A somewhat more detailed analysis of related aspects is presented in a number of papers by V. Čigrin (2013), I. Balsiūnaitė (2016), or I. Isokaitė (2015). The most recent papers in

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this area are the guidelines drawn up by D. Murauskienė (2019) on the application of criminal responsibility for hate speech and hate crimes, or the methodological aid for in-service training produced by Ž. Navickienė and K. Miliūnė (2020). Issues of the social and legal assessment of hate crimes and hate speech have been addressed in a number of publications by non-governmental organizations (e.g., Bitiukova, 2013; Normantaitė, 2017, etc.).

With respect to the issue of procedural evidence that arises in investigating hate speech acts online, specifically regarding obtaining or transferring evidence in cross-border cases, a number of papers by Lithuanian scholars are of note, for instance the publications of Jurka (2019) and Jurka and Zajančkauskienė (2016). The issue has been examined to a much greater extent in papers by foreign scholars (Stefan & González Fuster, 2018; Smuha, 2018; Tinoco-Pastrana, 2020; and others).

Incitement to hatred [authors' note: the terms *incitement to hatred* and *hate speech* are used synonymously in the present paper], the consequences thereof, the severity of the criminal acts, and the scarcity of studies in this area prompted the authors to address the most important issues related to both legal evaluation and procedural evidence-related matters (objective). These issues include: the concept of hate speech; the criteria for the delineation of hate speech from hate crimes and exercising the freedom of self-expression; and the legal procedures for obtaining and transferring e-evidence to other states for the purpose of cross-border investigations of incitements to hatred online (tasks). For the purpose of the present paper, issues of hate crimes are analysed only to the extent necessary to define and interpret the concept of incitement to hatred.

A number of empirical data collection methods, such as analysis of research papers and legal instruments (the decisions and rulings of national and international courts), were used for the purpose of drawing up the present paper. This paper analyses select decisions of various national and international courts – critical cases that best illustrate the issues raised in the study. The selected data was processed using the most common theoretical research methods, such as systemic analysis, induction, and comparative analysis.

2. The concept of hate speech and its distinction from hate crimes

Hate is a general term for motivated crime that includes both hate crimes and hate speech (Murauskienė, 2019). Initially, Recommendation No. R (97) 20 of the Committee of Ministers of the Council of Europe to Member States on 'hate speech', adopted on 30 October 1997, introduced the term *hate speech*. It was defined 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 (Council of Europe, 1997).

Hate speech also includes intolerance expressed by aggressive nationalism and ethnocentrism, or by discrimination and hostility against minorities, migrants, and people of immigrant origin (Council of Europe, 1997).

The term *hate crime* was used for the first time in Europe at the 2003 meeting of the Council of Ministers in Maastricht, hosted by the Organization for Security and Cooperation in Europe (OSCE). The meeting laid the foundations for the development of the concept of hate crimes, including all forms of racist, xenophobic violence and anti-Semitism (Organization for Security and Co-operation in Europe, 2003).

For a long time, Lithuania's approach was that *hate crimes* is a general term that also includes hate speech. It could be assumed that this approach was, to a certain extent, shaped by the definition of hate crime presented in the Recommendation of the Prosecutor General of the Republic of Lithuania 'On the organization, management and conduct of pre-trial investigations into criminal offences committed on racial, nationalist, xenophobic, homophobic or other discriminatory grounds' (hereinafter – Recommendations of the Prosecutor General, 2009). According to the Recommendations,

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> all criminal acts committed against persons, society, property, if they are motivated by negative, preconceived or stereotyped negative attitudes of the offender (culprit) regarding the racial, ethnic, national origin, religion, gender, sexual orientation of a particular individual or group of people, age, social status, disability, beliefs or views, generally fall into the specific category of criminal offences – hate crimes (para. 14).
>
> Hate crimes (criminal acts) – are not only incitement against individuals or groups of individuals that are associated with a specific group as defined in criminal legislation, or individuals or groups of individuals reasonably or unreasonably associated with such groups, incitement of hatred, contempt or other humiliation against them, mental or physical violence against them, but also crimes against the property of such groups of people or their members, manifested in vandalism, various attacks against the centres of a certain group of people (community), houses of prayer, etc. (para.15).

Apparently, according to the Recommendation of the Prosecutor General, hate speech is considered to be one of these types of hate crimes.

This approach was not entirely consistent with the attempts of the international community and certain scholars to make a distinction between the two criminal acts. For example, the OSCE Office for Democratic Institutions and Human Rights (hereinafter – ODIHR) takes the position that the incitement of hate is not included in the definition of hate crimes. According to the ODIHR, a hate crime consists of two key elements: (i) contrary-to-law actions; and (ii) a motive for hatred. Since, apart from the motive of hate, the incitement to crime consists of a language element only which, by itself, is not recognised to constitute a criminal act, incidents of this kind are not recognised as hate crimes. On the other hand, the Organisation claims that inciting physical violence or threatening people because of their racial, ethnic, or other affiliation is still a hate crime (OSCE OHDIR, 2009). Indirectly, this opinion was endorsed by the International Association of Prosecutors (IAP). In its recommendations, the IAP claimed that prosecutors needed to understand the distinction between the two different types of criminal acts – hate crimes and hate speech. The IAP holds that even in countries in which hate crimes are not criminalised, attributing hate speech to hate crimes must be avoided due to the different level of dangerousness and nature of the two categories of acts (International Association of Prosecutors, 2014).

Representatives of the European Commission have expressed the position that hate crimes and hate speech are not identical acts, and therefore the protection of victims of each act has its peculiarities (European Commission, 2019).

The most recent research publications also take the view that the relationship between hate crime and hate speech cannot be viewed as a relationship between the whole and its part. On the contrary, these are two different categories of criminal acts for a number of reasons. Firstly, in cases of hate crimes a motive of hate is only one element in the composition of the act, whose presence or absence does not eliminate the dangerousness of the criminal act itself. Therefore, the practical activity of law enforcement institutions normally does not address the issue of whether a specific hate crime is dangerous (i.e. complies with the *ultima ratio* principle). In the case of hate speech, the hate of the offender and their prejudiced views are an essential component in applying criminal responsibility, because in the absence of the motive of hate a speech in itself is not a criminal act; quite the contrary, it is a value enshrined in the Constitution. Secondly, in the case of hate speech, when addressing the issue of criminal responsibility law enforcement officials normally face the issue of striking the right balance between two fundamental principles, i.e. equality and freedom of expression. Attempts to balance the two principles have led to the building of a concept of the gravity of a criminal act; this concept guides law enforcers in deciding whether the incitement to hatred has gone beyond the limits of the freedom of self-expression to the extent of justifying the imposition of strictest liability. The same circumstance also accounts for the third difference between the two criminal acts – the peculiarity of providing evidence. In the case of a hate crime, the

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primary task is to prove the key criminal act, while hatred is referred to only as a subjective attribute. Meanwhile, in the case of hate speech, the primary task is to prove that the perpetrator's prejudice, bias, or hatred has gone beyond the limits of freedom of expression. This is a subjective attribute, however, that raises a number of challenges in practical application (Murauskienė, 2019).

On 30 March 2020, the aforementioned Recommendations of the Prosecutor General were replaced by a new version of the recommendations 'The Methodological Recommendations for Peculiarities of Organisation And Management of Pre-Trial Investigation of Hate Crimes and Crimes Related to Hate Speech'. The new recommendations reflect the positions that have been expressed by the international community and advocated for in more recent research papers. The new version of the recommendations takes the approach that all criminal acts committed against a person, society, or property, to the extent that they are motivated by the negative, prejudiced, or stereotyped stance of the offender (culprit), or stereotypes regarding the racial, ethnic, or national origin or citizenship of a particular individual or group of people, their religion, sex, sexual orientation, age, social status, disability, beliefs, or views, are to be divided into hate crimes and criminal offences (hereinafter – hate crimes), or hate speech (Prosecutor General's Office of the Republic of Lithuania, 2020).

In conclusion, hate crimes and hate speech are two different categories of criminal acts, and the principal criteria for demarcation between the two are the peculiarities of the attributes, the peculiarities of proving that a criminal act has been committed, and the peculiarities of proving the presence of hate as a motive – a subjective element. In the case of hate crimes, a motive for hatred is a subjective attribute, failing proof of which the criminal act is nevertheless considered grave and criminally punishable; besides, the motive of hate in this case can be incriminated as a circumstance aggravating the offender's responsibility. In the case of hate speech, unless the motivation of hate is established, speech as such is not considered to constitute a crime in the legal sense, and can be considered only to represent an inappropriate, incorrect, or unethical exercise of freedom of expression that does not incur the most severe, i.e. criminal, responsibility. Lastly, the two actions are different both in terms of their definition and, respectively, their legal regulation.

Hate crime constitutes all criminal offences motivated by hatred, bias, and/or prejudice against a group of persons distinguished by the attributes of age, sex, sexual orientation, disability, race, nationality, language, origin, social status, religion, belief, or opinions (Prosecutor General's Office of the Republic of Lithuania, 2020).

In Lithuania, the legal regulation of hatred-motivated crimes is based on the Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law passed in 2008 by the European Council (hereinafter – Framework Decision; Murauskienė, 2019). Lithuania transposed the provisions of the Framework Decision on the criminalisation of hatred crimes in three ways by defining: the individual criminal acts; the motive of hate as an attribute qualifying the act; and hate as a circumstance aggravating responsibility.

Hate speech is the public dissemination (verbally, in writing or otherwise) of information (ideas, opinions, known misrepresentations) that mocks, despises, hates, incites to discriminate, or provokes to exercise physical violence against a group of people or a person belonging to the group on the grounds of gender, sexual orientation, race, nationality, language, descent, social status, religion, belief, or opinion (Prosecutor General's Office of the Republic of Lithuania, 2020).

Characteristically, such acts are committed using linguistic means, i.e. verbally or in writing by expressing certain statements or words using different symbols (signs and other objects) of an inflammatory or discriminatory nature (Prosecutor General's Office of the Republic of Lithuania, 2020). The definition uses the phrase 'in any expression', suggesting that the means are not necessarily words, but could also be video recordings, or any other

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action or content – for example, a computer game showing people of a specific nationality being killed, or a meeting convened against a certain sexuality, etc. In Lithuania, the most common form of disseminating hate speech is by writing comments in the public space (for instance, comments on social media, such as Facebook, Instagram, etc.).

Hate speech is associated with incitement to hatred in the sense that it provokes hostility against certain people. The incitement of hatred against specific national, ethnic, or religious groups of people, or persons of a specific race, is normally manifested by the humiliation of personal dignity. For that purpose, misleading fabrications are often disseminated that include distorted or biased data about race, the history of an ethnic group or nation, their culture, traditions, psychological structure, faith, ideas, events, monuments, and documents that constitute national or religious values. These fabrications can pollute and offend an ethnic or denominational group or some of its members by distributing data concealing mockery, disgust, or contempt towards such individuals. This kind of information adversely affects not only a certain group of persons, but also the wider society with a prevailing atmosphere of insecurity; it triggers a desire to defend one's interests against allegedly strange and dangerous immigrants (Balsiūnaitė, 2016).

The responsibility for any actions inciting hatred is provided in Chapter XXV of the Criminal Code (hereafter – CC): 'Crimes and misdemeanours against a person's equal right and freedom of conscience'. The objects of the relevant Chapter of the CC are the rights and equality of groups of individuals and their members, irrespective of their gender, sexual orientation, race, nationality, descent, social status, religion, convictions, or views. In other words, the protection of the objects of such criminal acts allows the person to belong to a certain minority or another vulnerable societal group, and freely act in the society without being afraid of the adverse consequences potentially arising as a result. Additional objects are the security of the society, human life, health, and dignity.

Article 170(1) of the CC provides for criminal responsibility for a person who, seeking to disseminate, has produced, acquired, sent, transported, or retained items that mocked, despised, hated, or incited to discriminate against a group of people or a person belonging to it on the grounds of age, gender, sexual orientation, disability, race, nationality, language, beliefs, or views, or which incites violence or the violent physical treatment of such a group of people or a person belonging to it, or was proliferating such items. Para. 2 of the Article has, in practice, been applied much more often, and provides for criminal responsibility to a person who publicly incites violence or the physical violent treatment of a group of persons or a person belonging thereto on the grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions, or views. Thus, the intended act can be manifested in one or several alternative actions: (a) ridiculing a particular group or a person belonging to it; (b) stigmatising them; (c) inciting hatred against them; and (d) inciting discrimination against them.

The ECtHR has ruled regarding the criminalisation of such verbal assaults by stating that incitement to hatred does not necessarily require incitement to commit a certain violent or other such criminal act. Attempts to insult, ridicule, or slander certain sections or groups of the population are sufficient for public authorities to prioritise the fight against racist statements in respect of irresponsible freedom of expression, which violates the dignity and even security of these sections or groups (*Feret v. Belgium*, 2009; *Cumpana and Mazare v. Romania*, 2004).

Article 170(3) of the CC provides for the criminal responsibility of a person who was publicly inciting violence or calling for the violent treatment of a group of people or a person belonging to such a group because of their age, sex, sexual orientation, disability, race, nationality, descent, social status, beliefs, religion, or views, or who financed or otherwise supported such an activity. Incitement to violence or physical violent treatment involves a direct or indirect encouragement to use physical or mental violence (kill, injure, etc.; Judgment of Vilnius Regional Court of 24 May 2016 in Criminal Case No. 1A-35-209-2016).

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When qualifying acts according to Article 170 (2 and 3) of the CC, *publicity* as a method of committing the act is a mandatory attribute of a criminal activity (Judgment of the Supreme Court of Lithuania of 1 March 2018 in Criminal Case No. 2K-91-976/2018). On the other hand, the attribute of publicity in the context of such acts is a narrower concept than in the case of a violation of public order, in which case a public place is considered to be any place that can be accessed by other persons. In the case of the actions being analysed, it is necessary to establish that any of the public discriminatory or insulting statements or invitations to violence of the offender were intended to directly affect specific readers or listeners – i.e. to incite them against a group of persons or a person belonging to the group on the basis of sex, sexual orientation, race, nationality, language, descent, social status, religion, belief, or views – and to provoke hatred, to seek to build contemptuous and discriminatory opinions, or to encourage the use of physical or mental violence against such a demographic.

According to Article 170^2 (1) of the CC, criminal responsibility is provided to a person who publicly condones, denies, or grossly trivialises the crimes of genocide, war crimes, or other crimes against humanity recognised under the legal acts of the Republic of Lithuania or the European Union, or the caselaw of the courts of the Republic of Lithuania or international courts, where this is accomplished in a manner which is threatening, abusive, insulting, or which disturbs the public order. Additionally, criminal responsibility is provided to a person who publicly condones, denies, or grossly trivialises: the aggression perpetrated by the USSR or Nazi Germany against the Republic of Lithuania; the crimes of genocide, war crimes, or other crimes against humanity committed by the USSR or Nazi Germany in the territory of the Republic of Lithuania or against the inhabitants of the Republic of Lithuania; other grave or serious crimes committed during 1990–1991 against the Republic of Lithuania by the persons perpetrating or participating in the perpetration of aggression against the Republic of Lithuania; or grave crimes against the inhabitants of the Republic of Lithuania, where this is accomplished in a manner which is threatening, abusive, insulting, or which disturbs the public order.

The case law of the Supreme Court noted that according to Article 170^2 of the CC, criminal responsibility is applied not only for denial or gross belittling of the crimes referred to in the disposition, but also for denying or grossly trivialising the aggression of the USSR and Nazi Germany against the Republic of Lithuania, or the endorsement of such facts (Judgment of the Supreme Court of Lithuania of 22 January 2013 in Criminal Case No. 2K-7-102/2013).

Regarding the criminalisation of such actions, the ECtHR has held that a 'remark directed against the Convention's underlying values' is removed from the protection of Article 10 by Article 17 of the ECHR (*Perinçek v. Switzerland*, 2015). Such a case may be related to the denial or justification of international crimes (*Garaudy v. France*, 2003; *Witzsch v. Germany* [No. 2], 2005). However, Article 17 is, as recently confirmed by the ECtHR, only applicable on an exceptional basis and in extreme cases when it is (directly) clear from the outset that the right to freedom of expression was used for purposes contrary to the values of the Convention (*Perinçek v. Switzerland*, 2015).

Denying, tolerating, or trivialising genocide, war crimes, or crimes against humanity is one of the types of incitement of hatred. Denial of the holocaust is a specific racial category of self-expression, consisting of two key aspects: (i) denial or minimisation of crimes against humanity; and (ii) incitement of hatred against the Jewish community. Furthermore, denial of clearly established historical facts such as those of the Holocaust may not be considered to constitute historical research seeking historical truth. The actual object in this case was to rehabilitate the Nazi regime and accuse the victims of falsifying history. Disputing the existence of crimes against humanity was, therefore, one of the most severe forms of racial defamation and of incitement of hatred towards Jews (*Garaudy v. France*, 2003).

The introduction of such attributes in the disposition of the Articles of the Special Part of the CC providing for criminal responsibility for hate speech, as well as collision between the principle of equality and the right to self-

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expression when assessing the content and the gravity of the statements, make the legal assessment of hate crimes in judicial practice quite a challenge. Crimes of hate speech are committed by trespassing the limits of the freedom of self-expression, therefore it is extremely difficult to determine at which point a person is still properly exercising their right and where it turns into hate speech that is dangerous from the viewpoint of criminal law. In this context, it is essential to properly define the criteria for distinguishing freedom of expression from hate speech crimes, i.e. to determine the point at which freedom of expression ends and the equality of persons begins. Therefore, the following section of the paper will provide an analysis of the key trends in national and international case law on the exercise of the separation of freedom of expression from speech inciting hatred.

3. Hate speech and the right to self-expression

Hate speech, as a form of violation of the right to equality, is directly linked to trespassing the limits of freedom of expression. In a general sense, in both national and international legislation freedom of expression is defined as the right to freely express one's opinions, thoughts, and beliefs, and to freely collect, receive, and communicate such information and ideas. Exercising freedom of expression also presumes an obligation to avoid, as far as possible, expressions that are gratuitously offensive to others and thus are an infringement on their rights (*Gündüz v. Turkey*, 2003).

According to the Constitution of the Republic of Lithuania, the freedom to express one's beliefs and disseminate information also means that the legislator must put in place legal regulation such that any incitement to national, racial, or social hatred, violence, discrimination, slander, or disinformation seeking to attempt to substantially deny relevant constitutional values be prosecuted as a criminal offence, and be held legally liable as a criminal act (Ruling of the Constitutional Court of the Republic of Lithuania of 8 July 2005).

According to the ECHR, everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority, regardless of frontiers (Article 10). The judgments of the ECtHR highlight that this freedom applies not only to 'information' and 'freedoms' that that are accepted favourably, but also to those that are insulting, shocking, or disturbing. On the other hand, the freedom of expression is not absolute, and the trespassing of its limits that is related to the incitement of hatred may and has to be punishable according to criminal law. When assessing the legality of restriction of the freedom of expression, the ECtHR considers the following three criteria: (i) whether the restriction is prescribed by law; (II) whether the restriction has been put in place seeking a legitimate objective; and (III) whether the restriction is necessary in a democratic society. The ECtHR interprets the restrictions in a narrow sense of the word, while the law is interpreted broadly (Macovei, 2004).

The application of criminal responsibility for incitement to hatred is consistent with the permissible restrictions on the freedom of expression because: (i) it is prescribed in criminal law; (ii) it has the legitimate aim of protecting vulnerable groups against incitement to hatred, and is put in place with a view to defending the values enshrined in the Convention such as tolerance, social peace, etc. (*Norwood v. The United Kingdom*, 2004); and iii) the case law has established clear criteria for assessing whether a restriction on freedom of expression is necessary in a particular case. In national case law, these criteria are assessed from the perspective of the concept of the gravity of a criminal act *(*Judgment of the Supreme Court of Lithuania of 1 March 2016 in Criminal Case No. 2K-86-648/2016). The gravity of a criminal offence of hate speech makes it possible to pursue a reasonable application of criminal law measures without exceeding the guidelines put in place according to the *ultima ratio* doctrine, according to which criminal responsibility must apply only in the cases of the most severe and grave violations of the law. Those criteria are discussed below.

The context. One of the most important aspects considered by the courts is the social, historic, political, and other context in which hate speech was made. The ECtHR has held that the more tense the background, the more

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dangerous the hate speech, making the application of the strictest liability justifiable (*Perinçek v. Switzerland*, 2015). For instance, when hate speech crimes are committed by certain individuals of radical views, on occasions of celebrations important for marginal groups, or by posting online comments about certain events that are specifically important for the society, it is highly likely that the requirements for language legitimacy have been violated.

The importance of the context has been also emphasised in Lithuanian case law. For example, by exonerating an accused individual who was inciting hatred against the LGBT community via their comments on a news portal, the Supreme Court of Lithuania held that 'the overall social background and the overall context of the commentary considered in the Case are not that tense that would justify any more stringent restrictions upon the exercise of the freedom of expression, and the application of criminal liability as an ultima ratio measure' *(*Judgment of the Supreme Court of Lithuania of 1 March 2016 in Criminal Case No. 2K-86-648/2016).

The statement dissemination method. The method of disseminating statements can significantly increase, or on the contrary mitigate, their gravity. The ECHR has previously held that, in light of its accessibility and its capacity to store and communicate vast amounts of information, the internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. The anonymity of internet users can facilitate the free flow of ideas and information. At the same time, the ease, scope, and speed of the dissemination of information on the internet, and the persistence of the information once disclosed, may considerably aggravate the effects of unlawful speech on the internet compared with traditional media (*DELFI AS v. Estonia*, 2013).

Following the case law of the ECtHR, Lithuanian courts adopted a very clear rule, according to which trespassing the limits of freedom of expression using the internet or other means of dissemination shall in all cases be considered more dangerous due to the scale and persistent nature (survival) of the information thus disseminated (Judgement of the Vilnius Regional court of 24 March 2016 in Criminal Case No. 1A-335-209-2016).

For instance, 'The ease, scope, and speed of the dissemination of information on the internet, and the persistence of the information once disclosed, may considerably aggravate the effects of unlawful speech on the internet compared to traditional media. Dissemination of such information on the internet increases the gravity of such acts' (Judgment of Vilnius Regional Court of 24 May 2016 in Criminal Case No. 1A-335-209-2016). 'Furthermore, any commentaries inciting violence or hatred on the internet, the posting of which may be promoted by the anonymity of the internet users, and which due to the peculiarity of the internet can be read by a huge number of people, are considered dangerous and criminally punishable, and in particular when such commentaries are posted in relation to articles on the most popular websites (one of those is www.15min.lt)' (Ruling of the Supreme Court of Lithuania of 1 March 2016 in the Criminal Case No. 2K-86-648/2016).

Personality of the author of the statements. In each case, when considering the limits and restrictions on freedom of expression, in addition to the context and content of the speech the ECtHR assesses the personality of the author (whether they are popular, well known, a politician, a blogger, etc.)

While freedom of expression is important for everybody, it is especially so for an elected representative of the people: they represent the electorate and defend their interests. However, the Court has previously reiterated that it is crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. The impact of racist and xenophobic discourse has been magnified in an electoral context, in which arguments naturally become more forceful (*Feret v. Belgium*, 2009).

It should be noted that in this respect the case law of Lithuania does not fully correlate with the position of the ECtHR. In one case, when responding to the arguments of a convict that they should not be prosecuted under Article 170 (1) of the CC for proclamations opposing joining the European Union, NATO, and the euro zone, the

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Court of Appeals stated that, had they been a politician, their responsibility would have been smaller: 'This objection to Lithuania's integration into the EU, NATO, and the introduction of the euro would still be understandable if Ž.R. were a member of a political party, participated in elections to the Seimas or municipal councils, and in a politically correct form expressed criticism of the current situation in Lithuania' (Judgment of 26 February 2018 of the Klaipėda Regional Court in Criminal Case No. 1-11-361/2018). It may be concluded that, in the judgements of national courts, politicians can enjoy broader limits to their self-expression, which does not fully match the case law of the ECtHR (e.g., see *Feret v. Belgium*, 2009).

As has been mentioned earlier regarding the peculiarities of the case law in Lithuania in applying criminal responsibility for incitement to hatred, the main criterion referred to by the courts is the severity of the act. This criterion covers the other sub-criteria already formulated in the case law of the ECtHR. Furthermore, apart from the criteria referred to earlier, the courts identify other criteria defining the gravity of an act, such as the systematic nature of exceeding the limits of freedom of expression and the probability of actual consequences of such acts.

When providing reasoning for the latter consideration, in most cases the courts limit themselves to stating an actual threat to protected values, without specifying the indications. For instance:

> When recognising or refusing to recognise whether certain public statements constitute incitement against any nation, or a national, racial, ethnic, religious or another group of people, it is necessary to establish the validity of the threat they may pose to the values protected by criminal law. This presupposes that a conclusion statement of an offensive, derogatory nature is not sufficient to give rise to criminal responsibility under Article 170 (2) of the CC. To become criminally punishable, the statements must contain a specific direct or indirect incitement to hatred or discrimination, which could cause direct actual threat to the object protected by criminal law. The evidence in the present case allowed a conclusion that these circumstances were established, and the judicial decisions provided sufficient arguments that the actions of V.L. were not occasional or random, but V.L. was acting systematically by publishing extensive texts and making public comments, fully understanding the danger of their actions and seeking to provoke a negative public attitude towards Jewish people, homosexuals, and conservative and liberal parties, and was mocking and despising them (Judgment of 13 March 2018 of the Supreme Court of Lithuania in Criminal Case No. 2K-91-976/2018).

An analysis of the case law of national courts allows for the conclusion that the intensity of illegal actions, which is often manifested by the number of comments posted, the duration of the illegal actions, and their intensity show not only the danger of a specific person's actions, but also the purposefulness of their intent:

> It should be noted that the severity of V.Ž.'s actions is further exacerbated by the consistent and persistent nature of their actions (they were convicted for posting 13 entries online), the extended duration of such activity (the posts published in the period from 30 July 2012 until 12 February 2014), making purposeful statements against the community of believers, and seeking to mock and despise them (Judgment of 8 July 2016 of Klaipėda Regional Court in Criminal Case No. 1A-209-361/2016).
>
> Besides, there was only one short and rather unethical statement in the public online space in respect of which the subjective features of the act, i.e. a direct specific intent of the acquitted person to incite internet users reading their comments against homosexuals, to promote hatred or discrimination against them. (Ruling of 10 January 2019 of the Kaunas Regional Court in Criminal Case 1A-131-579/2019).
>
> The courts have provided extensive arguments regarding the intent of R.P., in its Ruling the Court of Appeals, specifically drawing attention to certain introductions that the convict was using when signing their commentaries, such as 'to Russian suckers', 'Russian Fascists' that clearly demonstrate their desire to publicly mock, despise, discriminate, call to violence, etc. Furthermore, as was mentioned earlier, R.P. had

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written as many as 15 commentaries online, which proves that their actions were not random or accidental, but were rather premeditated and deliberate (Judgment of 3 October 2017 of the Supreme Court of Lithuania in Criminal Case No. 2K-206-693/2017).

In the long term, a rule was established in Lithuanian case law according to which one isolated comment on the internet exceeding the limits of the freedom of expression should not be subject to the most stringent form of liability (Judgment of 10 January 2019 of Kaunas Regional Court in Criminal Case No. 1A-131-579/2019).

This rule was partially rebutted by the judgment of the ECtHR in *Beizaras and Levickas v. Lithuania* at the beginning of 2020, which was extremely significant for Lithuania, in which the Court concluded that Lithuania had breached as many as three Articles of the Convention (13, 14, and 35). The case concerned a situation where two homosexual men posted a picture of them kissing to their Facebook page, and received countless negative comments including those calling for physical violence against them. The pre-trial investigation authorities, as well as the courts hearing the appeals, concluded, among other arguments, that in order for a person to be prosecuted under Article 170 of the CC, their actions must be of a systematic nature. Having assessed the whole situation and the arguments presented by the national courts, the ECtHR concluded that even a single hateful comment by the Appellant on the Facebook page, especially containing calls to 'kill' homosexuals, should be taken seriously. This is even further confirmed by the fact that the picture immediately 'went viral', and received more than 800 comments. The Court held, *inter alia*, that the case concerned open calls and encouragement to attack the physical and mental integrity of the appellants (in this respect see Decision of 7 May 2019 in *Panayotova and others v. Bulgaria*, paras. 58 and 59, with other references), against which only efficient criminal-law mechanisms can ensure adequate protection (see para. 111 of the Decision). This protection is provided in Article 170 of the CC and must be enforced in such cases.

Relatively little time has elapsed since the ECtHR passed the judgment, so no significant changes in case law have yet been observed. However, there is no doubt that this judgment and the motives presented in it will correct one of the characteristics of hate speech that has been so far relied upon, i.e. its systematicity.

4. Proving online hate speech by means of electronic evidence: key legal instruments for receiving (transmitting) it in cross-border cases

The report of the European Commission against Racism and Intolerance on Lithuania indicated that 'In Lithuania, hatred is often incited in cyberspace through online comments, blogs, social networks, and other fora' (European Commission against Racism and Intolerance, 2016). Therefore, investigations into hate crimes often require rapid access to electronic data in order to be able to initiate criminal prosecution and/or identify offenders.

Online services can be provided from any country in the world. Furthermore, the information (data) 'that users generate by means of new ICTs is, however, typically under the control of private companies which are often established in another jurisdiction and/or store data outside the investigating country' (Robinson, 2018). Therefore, when investigating criminal acts regarding incitement to hatred in cyberspace, national law enforcement institutions increasingly encounter cross-border situations, where electronic data (evidence) must be received from/transferred to other EU Member States or third countries.

In Lithuania, in order to initiate a pre-trial investigation and/or identify the suspected offender any investigation into incitement of hatred in cyberspace often requires the identification of the data regarding the subscriber (Navickienė & Miliūnė, 2020). The data on the subscriber is, in most cases, required in cross-border cases throughout the EU (Sippel & Melo, 2019).

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When electronic data (evidence) or electronic service providers are located in another country, the parties can rely upon a number of pre-existing legal cooperation mechanisms for the transmission and recognition of evidence. The EU-wide instruments regulating this area are the mutual recognition mechanisms, now based upon the European Investigation Order Directive; mutual legal assistance (MLA) mechanisms (Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters COM/2018/225 final – 2018/0108 (COD)) are used in relation to third countries (hereafter – the Commission's proposal).

Although there are only a few EU legal instruments in the field of the transfer and recognition of evidence, the European Investigation Order (hereafter – EIO) is currently considered to be the most widely used instrument, optimally bringing closer the idea of the unimpeded recognition before a national court of any evidence collected abroad and transferred to another state (Jurka, 2019).

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (hereinafter – the EIO Directive) was adopted, seeking to develop a system of mutual recognition of investigative measures designed to collect all evidence, including electronic. For the purpose of enforcement of the investigative measure, the EIO Directive provides for different rules according to the type of electronic evidence. Firstly, regarding the data and the IP addresses of the subscriber (point e of Article 10(2), Article 11(1) of the EIO Directive). Secondly, regarding the previous flow data (*ex tunc*), depending on whether or not the historical traffic data was assessed in the Member State as coercive. In case the data is assessed as non-coercive, the same rules as those regarding the data subscriber can be applied. In opposite cases, i.e. where investigative measures are considered coercive, the general EIO procedures apply. Thirdly, regarding the data collected in real time, continuously, and over a certain period time (Article 28 of the EIO Directive). Fourthly, regarding the interception of telecommunications (Articles 30 and 31 of the EIO Directive). The EIO Directive also provides for the storage of electronic evidence, i.e. it puts in place provisional measures: 'The issuing authority may issue an EIO in order to take any measure with a view to provisionally preventing the destruction, transformation, removal, transfer, or disposal of an item that may be used as evidence' (Article 32(1) (Sippel & Melo, 2019).

Another important legal instrument is the Convention on Cybercrime of the Council of Europe (2001; hereinafter – the Budapest Convention). Cooperation according to the EIO Directive and the Budapest Convention in the area of electronic crime and electronic data (evidence) represents the so-called minimum level (Sipper & Melo, 2019). The most important provisions of the Budapest Convention in relation to the collection or transfer of electronic evidence are those on production order (Article 18), mutual assistance regarding provisional measures (Articles 29–30), and mutual assistance regarding investigations (Articles 31–34). The Budapest Convention requires parties to establish evidence provision orders for the receipt of computer data from service providers located in their territory, and subscriber data from service providers offering services in their territory. The proposal from the Commission also provides for an evidence storage order that is issued in cases when it is reasonably believed that computer data is subject to serious risk of loss or amendment.

In summary, it may be concluded that both the EIO Directive and the Budapest Convention have established a convenient system to obtain electronic evidence (Tosza, 2020; Maillart, 2019). However, not all states have joined the legal cooperation instruments discussed above, and therefore certain service providers do not fall within their scope. The EU has taken a number of legal initiatives to address the issue of obtaining and storing electronic evidence held, whether locally or by service providers established in another jurisdiction. On 17 April 2018, the European Commission published two proposals: 1) Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters COM/2018/225 final – 2018/0108 (COD) (European Commission, 2018b); and 2) Proposal for a Directive of the

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European Parliament and the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings COM/2018/226 final – 2018/0107 (COD) (European Commission, 2018a).

The Explanatory Memorandum of the Commission's proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters indicates that 'by introducing European Production Orders and European Preservation Orders, the proposal makes it easier to secure and gather electronic evidence for criminal proceedings stored or held by service providers in another jurisdiction'. The new instrument will not replace the EIO for obtaining electronic evidence but provides an additional tool for authorities. There may be situations, for example when several investigative measures need to be carried out in the executing Member State, where the EIO may be the preferred choice for public authorities. Creating a new instrument for electronic evidence is a better alternative than amending the EIO Directive because of the specific challenges inherent in obtaining electronic evidence, which do not affect the other investigative measures covered by the EIO Directive (European Commission, 2018b).

The following types of service providers fall under the scope of the Regulation: providers of electronic communications services; providers of information society services for which the storage of data is a defining component of the service provided to the user, including social networks to the extent that they do not qualify as electronic communications services; online marketplaces facilitating transactions between their users (such as consumers or businesses) and other hosting service providers; and providers of internet domain name and numbering services. The scope of the Regulation covers providers of electronic communications services as defined in the Directive establishing the European Electronic Communications Code. Traditional telecommunication services, consumers, and businesses increasingly rely on new internet-based services enabling inter-personal communications such as Voice over IP, instant messaging, and e-mail services, instead of traditional communications services. Therefore, the draft Regulation should apply to the following services in connection with the social networks, for example, Twitter, Facebook, and Instagram; instant messaging service providers facilitating content exchange, such as WhatsApp, FB Messenger, Telegram, Viber, and Skype (Jurka, 2019).

Both types of orders will only be able to be used in criminal proceedings starting with a pre-trial investigation and ending with a court decision or other ruling. The Commission Proposal envisages that both Orders can only be used in criminal proceedings from the initial pre-trial investigative phase until the closure of the proceedings by judgment or other decision. The Orders to produce subscriber and access data can be issued for any criminal offence, whilst the Order for producing transactional or content data may only be issued for criminal offences punishable in the issuing State by a custodial sentence of a maximum of at least three years, or for specific crimes which are referred to in the proposal and where there is a specific link to electronic tools and offences covered by Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

In summary, it may be concluded that the two legislative initiatives create, in essence, the principle of direct communication arising from the principle of mutual recognition applied in EU criminal jurisdiction. Different from the cases covered by EIO, the judicial institution issuing European Production Orders and European Preservation Orders will transfer the orders and the accompanying certificates directly to service providers or their designated legal representatives, and not to the competent law enforcement authority of the other Member State where the service provider is established. The measures are designed and put in place in order to facilitate international cooperation processes in criminal cases (Jurka, 2019).

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In summarising the legal perspective on the transfer of electronic evidence in cross-border cases, it should be noted, however, that it still causes discussions both regarding the future application and regarding legal compliance with the principles of law (Stefan & González Fuster, 2018; Smuha, 2018; Jurka, 2019; Tinoco-Pastrana, 2020). In particular, this is because

> 'this approach effectively leads to the privatisation of mutual trust in Europe's area of criminal justice, which raises the second concern regarding the protection of fundamental rights. The Commission's proposal on e-evidence marks a fundamental shift in the scheme of co-operation in EU criminal matters, from a system of co-operation and communication between public (and mainly judicial) authorities, to a system of co-operation and communication between public authorities in the issuing state and private companies. The proposed system places undue responsibility on private providers to safeguard fundamental rights. Private providers do not enjoy equality with public authorities in terms of co-operation; this is evident by the very fact that they are subject to sanctions if they infringe their obligations under the Regulation' (Mitsilegas, 2018).

Conclusions

Criminal acts motivated by hatred are divided into hate crimes and hate speech that are manifested as information disseminated in any form (oral, written, action, etc.) targeting the most vulnerable groups in society; promoting hatred, discrimination, or bias against them; inciting ridicule, contempt, or discrimination; or exercising violence against such persons.

Hate crimes and hate speech are two different categories of criminal act, and the principal criteria for demarcation between the two are the peculiarities of their attributes and the peculiarities of proving the criminal act, which relates to proving the presence of the motive of hate as a subjective feature. In the case of hate crimes, the motive of hate is a subjective attribute, absent proof of which a criminal act is nevertheless considered grave and criminally punishable; besides, the motive of hate can in this case be incriminated as a circumstance aggravating the offender's liability. In the case of hate speech, unless the motive of hate is established the act is not considered to constitute a crime in the legal sense of the word, and can be considered to represent only an inappropriate, incorrect, or unethical exercise of freedom of expression that does not incur the most severe, i.e. criminal, responsibility.

When dealing with cases related to hate-speech, in seeking criminal responsibility for incitement to hatred courts face the problem of demarcating hate speech from a person's right to exercise their freedom of expression. When assessing whether a specific action that could have been undertaken to incite hatred should be criminally prosecuted, national and international courts take into account a number of aspects, such as the overall environment in which the information was spread, the author of the statements, the information dissemination method, the intensity (systemic nature) of the actions being considered, the resulting consequences, or the theoretical probability of such consequences appearing.

In Lithuania, most acts of hate incitement are committed online. Therefore, law enforcement authorities often need to receive or transfer electronic data (evidence) to or from other countries. Despite some practical challenges related to their implementation, the existing instruments for judicial cooperation under the EIO Directive and the Budapest Convention are considered highly functional platforms. However, not all states have joined these legal cooperation instruments, and therefore certain service providers do not fall within their scope of application. The proposal for Regulation on European Production Orders and European Preservation Orders can be considered an appropriate solution to this problem, despite concerns regarding the required innovations in the interaction between the public (law enforcement and judicial authorities) and the private sector according to the regulatory proposals.

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