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FEATURES OF THE APPLICATION OF CRIMINAL RESPONSIBILITY FOR HATE CRIMES AND INCENTIVES OF HATE

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Annotation. *The article will focus on the analysis of case law on homophobic and transphobic hate crimes and hate speech. In order to more widely reveal the concepts of incitement to hatred and hate crimes, their regulation and the issue of applying criminal liability, it is important to analyze the legal regulation and court practice of these acts. The research problem lies in the practical difficulties encountered in qualifying homophobic and transphobic hate crimes and applying criminal liability for them. The relevance of the topic is based on the need to more thoroughly discuss the legal aspects of homophobic and transphobic hate crimes and their motivating factors. It is observed that insufficient judicial practice in analyzing homophobic and transphobic hate crimes can lead to a complex qualification and investigation of these criminal acts. Research object: The application of criminal liability for hate crimes and the issues of incitement in the practice of Lithuanian courts. Research goal: To reveal the legal aspects of homophobic and transphobic hate crimes and their motivating factors. Research objectives:1) Discuss the problems and causes of applying criminal liability for hate speech inciting hatred;2) Reveal the problems and causes of applying criminal liability for hate crimes. Research methods: The method of scientific literature analysis, the method of legal acts analysis, systematization, and summarization. The complex classification of criminal acts motivated by homophobia and transphobia and the low number of cases of this nature lead to inadequate analysis of the application and explanation of hate crimes in legal regulation. One of the main challenges for law enforcement institutions facing crimes motivated by homophobia and transphobia is the proper classification of these criminal acts and the identification of the motive of hatred. Regarding criminal acts motivated by homophobia and transphobia, Lithuania's judicial practice is not extensive, leading to problems in revealing the content of all hate crimes as individual criminal acts and elucidating them.*

Keywords: *criminal responsibility, criminal liability, hate crimes, hate speech, incentives of hate.*

Introduction

The perpetration and incitement of crimes and incitement based on homophobia and transphobia create tension within society, causing harm not only to the direct victims and groups but also affecting societal understanding and the promotion of tolerance. A proper understanding, study, and prevention of hate crimes and their incitement based on homophobia and transphobia are crucial for both the Lithuanian state, institutions working in the field of human rights, and the country's international image.

Despite Lithuania incorporating the Council of the European Union's Framework Decision on combating discrimination into national law in 2009, which targets specific groups and establishes penalties for hate crimes and incitement in the Criminal Code of the Republic of Lithuania, these actions remain a pressing issue for vulnerable groups (Labanauskas, 2019). Recent research (Bilewiczas et al., 2016) indicates that a significant portion of individuals affected by hate crimes based on homophobia or transphobia do not report these incidents to

law enforcement agencies, making it impossible to reveal the true statistics of hate incidents. The fact that hate crimes and hate speech are relatively common phenomena is also indicated by the considerable amount of recent research aimed at determining the scope and reasons why affected individuals do not seek help. Additionally, there is available literature and methodological material specifically designed for law enforcement officers (Bilewiczas et al., 2016), addressing specific aspects of working with individuals affected by hate crimes or hate speech based on sexual orientation or gender identity. The purpose of this literature is to ensure effective work within law enforcement institutions when investigating hate incidents, their prevention, as well as to prevent inappropriate behavior by officers toward affected individuals, which leads to a lack of trust in law enforcement institutions. Furthermore, the Lithuanian Human Rights Center conducted a project "Promotion of Effective Response to Hate Crimes and Hate Speech" ("Promotion of Effective Response to Hate Crimes and Hate Speech," Human Rights Monitoring Institute), aimed at strengthening the ability of law enforcement institutions to effectively respond to hate crimes and hate speech, fostering mutual trust between victims and officers, and reducing the latent nature of such actions.

Taking into account that incidents of homophobic and transphobic hatred are not always reported, and the negative attitude of officials towards those affected during these incidents implies that Lithuania's judicial practice in the context of homophobic and transphobic hate crimes is not abundant and is still evolving. Considering that incidents of homophobic and transphobic hatred are not always reported, and the negative attitude of officials towards those affected during these incidents implies that Lithuania's judicial practice in the context of homophobic and transphobic hate crimes is not abundant and is still evolving. For these reasons, there are challenges in distinguishing the boundaries between hate speech and freedom of expression. Additionally, there is no unified judicial practice for examining homophobic and transphobic hate crimes as independent criminal acts or specifying criteria qualifying them as criminal actions. The research problem lies in the practical difficulties encountered in qualifying homophobic and transphobic hate crimes and applying criminal liability for them.

The relevance of the topic is based on the need to more thoroughly discuss the legal aspects of homophobic and transphobic hate crimes and their motivating factors. It is observed that insufficient judicial practice in analyzing homophobic and transphobic hate crimes can lead to a complex qualification and investigation of these criminal acts.

Research object: The application of criminal liability for hate crimes and the issues of incitement in the practice of Lithuanian courts.

Research goal: To reveal the legal aspects of homophobic and transphobic hate crimes and their motivating factors.

Research objectives:

1. Discuss the problems and causes of applying criminal liability for hate speech inciting hatred.
2. Reveal the problems and causes of applying criminal liability for hate crimes.

Research methods: The method of scientific literature analysis, the method of legal acts analysis, systematization, and summarization.

The methodological basis of the research consists of general methods of scientific literature analysis and analysis of legal acts, along with summarization techniques. Through these methods, the practical application of criminal liability for homophobic and transphobic hate crimes is uncovered and summarized. The method of data summarization and systematization is applied to present the scope of such cases in court, highlighting the issues related to criminalizing and legally regulating the prosecution of hate crimes and their incitement.

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Hate speech: issues of criminal liability

The article discusses the absence of a specific article in the Lithuanian Criminal Code addressing the application of liability for hate speech in Lithuanian legislation. It suggests that this behavior is encompassed by incitement to hatred, considered an assault on fundamental values of the rule of law – equality of individuals and freedom of conscience. Therefore, the prohibition of acts related to incitement to hatred in Lithuania directly arises from the Lithuanian Constitution, criminal law, and adopted international obligations which Lithuania is obliged to adhere to (Murauskienė, 2019). Speech inciting hatred, as a separate criminal act, is qualified under Article 170 of the Lithuanian Criminal Code.

The 2020 methodological recommendations of the Prosecutor General of Lithuania provided a comprehensive definition of hate speech and its characteristics. In this legal act, hate speech is defined as "the public dissemination (verbally, in writing, or in another form) of information (ideas, opinions, knowingly false facts) aimed at ridicule, denigration, incitement of hatred, incitement to discriminate, to commit violence, or to physically confront a group of people or individuals belonging to it based on age, gender, sexual orientation, disability, race, nationality, origin, language, social status, belief, conviction, or views." It is important to note that in cases of hate speech, an essential peculiarity in applying criminal liability is the perpetrator's preconceived bias, hatred, and/or biased attitudes. In the absence of these motives, the language used by the perpetrator cannot be considered a criminal act. According to point 16.2 of these recommendations, such actions are often carried out using linguistic means, specifically through written or spoken expressions containing certain statements or discriminatory symbols.

Analyzing the case law concerning incitement to hatred, it's observable that a unified and comprehensive judicial practice is still in the process of formation. "A study conducted by the Human Rights Monitoring Institute in 2017 indicates that national courts, when qualifying an act as a hate crime or incitement and determining the application of criminal liability as ultima ratio, take into account criteria such as (i) context, (ii) the reality of incitement, (iii) the conclusion of a specialist." (Guliakaitė et al., 2023). The application of these criteria by national courts in cases of incitement to hatred raises certain issues in deciding the application of criminal liability. Due to the lack of uniform judicial practice, according to Normantaitė (2017), these criteria are often assessed differently, attributed varying significance, and sometimes not considered or evaluated contrary to established practice during the judicial process.

One criterion followed by courts in cases of homophobic or transphobic incitement to hatred is the determination of the real threat and danger to values protected by the law. In judicial practice, it is established that in recognizing or not recognizing certain public statements as incitement against a particular group of people or individuals belonging to it, it is important to establish the potential threat of incitement to hatred and discrimination against a specific group of individuals based on their sexual orientation, or direct incitement to violence against them. According to the court's standpoint, "for criminal liability under Article 170(2) and (3) of the Lithuanian Criminal Code, it is not enough to have only an insulting and denigrating public statement if it does not contain specific direct or indirect incitement to hatred and discrimination, incitement to use violence or physically confront a particular group of people, which could pose a real threat to the dignity and equality of a person" (Guliakaitė, 2020).

One such example is a decision made by the Lithuanian Supreme Court (further referred to as LAT) in the case 2K-86-648/2016 concerning a comment written in 2013, "Let's give them hell to these f*ggots." The LAT had to assess whether this comment was meant to ridicule,

incite hatred, and discriminate against a group of people based on their sexual orientation. This comment was written after an article about "Violation of gay rights - a rally at the Russian embassy." The court of first instance recognized that the defendant, with this comment, violated Article 170(2) of the Lithuanian Criminal Code, i.e., publicly ridiculed, denigrated, and incited discrimination against a group of people based on sexual orientation, and under Article 170(3), incited violence and physical confrontation against this group of people based on sexual orientation. The court of first instance convicted the defendant V.G. for these actions. However, the appellate court acquitted V.G., stating that V.G.'s actions did not match the characteristics of criminal acts specified in Article 170(2) and (3) of the Lithuanian Criminal Code. The court also noted that the mere use of uncensored words or negative statements in any comment without specific and direct statements inciting hatred, denigrating, or discriminating against individuals based on their sexual orientation, or directly encouraging violence against them, is not recognized as a criminal act. Although the court acknowledged that the comment written by V.G. was inappropriate, it held that such a comment in content and danger did not meet the criteria set out in Article 170(2) and (3) of the Lithuanian Criminal Code. According to the LAT's assessment, the context of the comment under consideration is not so tense as to justify the application of criminal liability as ultima ratio. Even though the panel of judges acknowledged that the comment in question is negative and directed against homosexual individuals and that the author of the comment exceeded the limits of freedom of expression, V.G.'s statement could not violate the equality and dignity of homosexual individuals within the scope of Article 170 of the Criminal Code, nor incite violence or discrimination against them. Evaluating the conciseness of the comment, the words used, and the non-specific nature of the comment, LAT upheld the decision of the appellate court, acquitting V.G. according to the criminal acts specified in Article 170(2) and (3) of the Lithuanian Criminal Code.

Another example of the application (non-application) of criminal liability for comments in the public space is the Lithuanian Supreme Court's 2012 assessment of the comment *"[...] those in these comments who support the jump of those homos, are themselves such deviants and mental patients. Here, comments are written by participants of this deviant bunch. It's shameful for the organizers and participants of this disgraceful spectacle. There is such a word as PERVERT, describing a person unable to control their senses. So, before our eyes - perverts. And not just any, but a special kind of perverts - they're DEVIANTS. They urgently needed to be gathered and taken to a psychiatric hospital. Their place is THERE,"* incited hatred, constituted mockery, and discrimination against individuals based on sexual orientation. The lower and appellate courts convicted J.J., the author of the comment, under Article 170(2) of the Lithuanian Criminal Code. The convicted individual claimed she did not intend to mock homosexual individuals; her comment was directed at those supporting such individuals' actions but not identifying themselves as homosexuals. She also claimed that homosexual individuals, by publicly behaving amorally and inappropriately at such events, violated public order and morality, and she intended to shame these individuals but did not aim to incite hatred. In this case, the Supreme Court noted that the lower courts did not consider the context in which the convicted person's comment was made and did not assess all the relevant circumstances that are essential in qualifying a criminal act under Article 170(2) of the Lithuanian Criminal Code. The key arguments highlighted by the Supreme Court included that the event mentioned in the case was unsanctioned and took place near the Lithuanian Parliament, implying the appellate court's position that the convicted person's comment about an illegal event was a "natural civic stance." In addition to this argument, the Supreme Court pointed out that the unsanctioned event arranged by the participants should be considered as eccentric behavior that could provoke individuals with different opinions to spread their negative views about the event participants.

The Supreme Court also emphasized that freedom of expression is inseparable from the obligation to respect the traditions and views of others; therefore, the event participants, using their freedoms, should have anticipated that this event could elicit negative reactions in society.

The Supreme Court mentioned that J.J.'s comment about the public event organized by homosexual individuals is improper and exceeds the boundaries of freedom of expression but, in terms of its degree of danger, does not match the criteria set forth in Article 170(2) of the Criminal Code, i.e., actively inciting actions against homosexual individuals, mocking, inciting hatred, or discrimination. Nevertheless, although the comment is unethical and improper, the mere use of the words deviant and pervert in the statement is not sufficient grounds for criminal liability under Article 170(2) of the Criminal Code. For these reasons, the Supreme Court annulled the decisions of the lower courts and terminated the case.

Additionally, the Supreme Court highlighted that criminal responsibility in a democratic society should be applied only as an extreme measure (ultima ratio) in cases where legal values cannot be ensured by milder means.[1] In the case of assessing criminal cases in jurisprudence, the composition of which is formal, two important criteria are the nature and degree of danger. The nature of danger is influenced by the damage caused, and in determining the degree of danger, factors such as the method of committing the act, guilt, motives, and objectives play a significant role. Based on this, it can be assumed that identifying and assessing consequences are essential in establishing the danger of the entire criminal act. The absence of consequences as an essential element in the composition of a criminal act does not mean that acts with a formal composition do not cause dangerous consequences and that they do not need to be examined in the case.

The lower instance courts, when assessing whether public inappropriate statements and comments against homosexual individuals due to their sexual orientation can be grounds for criminal liability, also refer to LAT (Lithuanian Court of Appeal) practice. The Panevėžys District Court, in the case No. 1A-845-366-2011, examined a comment publicly posted on the website www.lrytas.lt under an article titled "Fired from the university, gays sued the rector." The comment read, "I think he acted correctly; if you are one, be silent and hide. I wouldn't want him teaching my children; it's contagious." This comment incited hatred toward a group of homosexual individuals due to their sexual orientation. Both the first instance and the appeals courts acquitted the author, A. K., of the mentioned comment. The appeals court noted that in determining the application of criminal liability under Article 170 of the Lithuanian Criminal Code (Lithuanian CC), the subjective aspect is highly significant because this offense can only be committed deliberately. It is also important for the perpetrator to realize that their public comments incite discrimination and hatred against homosexual individuals due to their sexual orientation. In the case under consideration, according to the court's assessment, the accused did not aim to incite hatred or prompt others to discriminate against homosexual individuals but simply expressed their position regarding a factual occurrence (as the comment was made on an article providing information about a person dismissed from their job due to their sexual orientation). Such a concise expression of position, which does not contain any instigation to discriminate or incite hatred against homosexual individuals, cannot be a basis for criminal liability. Summarizing the aforementioned comments, the appeals court upheld the acquittal since no action was taken that demonstrated the elements of the criminal act specified in Article 170 of the Lithuanian Criminal Code.

[1] "Lithuania's Supreme Court Ruling on October 20, 2011, in Criminal Case No. 2K-P-267/2011" E-courts practice, accessed 2023, November 12th ., https://eteismai.lt/byla/250008244080120/2K-P-267/2011

In the practice of handling criminal cases, those that are formally constituted, two criteria are crucial: the nature and degree of dangerousness. The nature of dangerousness is influenced by the harm caused, and in determining the degree of dangerousness, essential factors such as the manner of action, guilt, motives, and objectives are significant. Based on this, it is conceivable that establishing and assessing consequences is essential in determining the dangerousness of the entire criminal act.

Television, while considering potentially hate-inciting speech, also assesses the systematic nature of these speeches. When qualifying actions under Article 170 of the Lithuanian Criminal Code, it is necessary to determine whether public disparaging, insulting, or discriminatory statements are not accidental but systematic, repeated over time. Discriminatory, insulting, and disparaging statements "...must be directed at a certain undefined circle of readers or listeners" (Guliakaitė, 2020).

In 2019, the Marijampolė District Court convicted D. M. under Article 170, paragraphs 2 and 3, for posting comments on the "Facebook" social network that openly mocked, incited hatred, and incited discrimination against a group of people based on their sexual orientation. The accused posted derogatory and discriminatory comments aimed at homosexual individuals, such as "Payment for a destroyed (derogatory term referring to a person based on their sexual orientation) - a goat or a ram at your discretion," "On the scaffold with them," "They should have needles inserted under their nails and into their eyes, at a minimum," "The optimal punishment is skinning the entire body, almost all of it," etc., openly inciting hatred and inciting discrimination. In his social media account, D. M. also shared a link to a group in which people hostile to homosexual individuals were invited, and he wrote derogatory comments in this group, such as "Join this group and its posts, gather an army against (derogatory term referring to a group of people based on sexual orientation)," which expressed an urge to take discriminatory action, inciting violence and physically confront homosexual individuals, spreading hatred against them. In this group, there was also a public discussion about the "Baltic Pride" march in which individuals expressed public outrage and hostility toward these marches. D. M. participated in this discussion and made comments spreading hatred against homosexual individuals and inciting others to discriminate against them, encouraging them to take action against them. He also shared two pictures in the group that were clearly directed against homosexual individuals.

The court found that the content of D. M.'s comments in the public sphere, the expressions used in them, and the quantity of comments and his active and long-term participation in the group, specifically created to discriminate against homosexual individuals, confirmed that he openly mocked, insulted, and incited discrimination against a group of people based on their sexual orientation. These actions were classified under Article 170, paragraph 2, of the Lithuanian Criminal Code. The court also pointed out that the content, number, and duration of the accused's comments for quite some time indicated that his actions were not accidental but deliberate. This showed his intention to ridicule, insult, and incite hatred and discrimination and encourage violence. In this case, the systematic actions inciting discrimination, public mockery, and hatred, and a clearly expressed incitement to commit physical violence against this group of people based on sexual orientation were explicitly incriminating. Therefore, the actions of D. M. were qualified under both Article 170, paragraphs 2 and 3, of the Lithuanian Criminal Code. For these reasons, the court found D. M. guilty under these provisions.

This case reveals the systemic aspect, which is an essential criterion in applying criminal liability for hate-inciting speech. While the accused claimed to have posted the mentioned comments only because they support traditional family values and did not take any active actions, the court noted that the accused acted deliberately in this case, aiming to openly mock,

ridicule homosexual individuals, incite hatred and discrimination against them, and incite violence. As he wrote such comments systematically, engaged in various discussions negatively targeting homosexual individuals for an extended period, his incitement to commit violence was directed at a certain undefined circle of individuals, namely to provoke hostility against homosexual individuals, instill hatred towards them, create a derogatory, discriminatory attitude, and encourage the use of physical violence against them. The court also pointed out that these offenses have a formal composition and are considered complete from the moment they are committed, and the occurrence of consequences is not essential. Therefore, the fact that the convicted did not take active actions but only incited hatred is not a reason to exempt him from criminal liability.

Although the sign of systematicity is an important criterion in determining the issue of criminal liability for incitement to hatred, it is also observed in the national court practice of the Republic of Lithuania that in many cases, criminal cases related to homophobic or transphobic hatred are concluded by a penalty order, as the defendants fully admit their guilt. Considering that the defendants publicly admitted to insulting and denigrating a group of people based on their sexual orientation, there is a lack of detailed statements in judicial practice regarding the application of this law. In the case No. 1-2540-311/2014, the Kaunas District Court sentenced R.P. on August 27, 2014, under Article 170, Part 2 of the Criminal Code of the Republic of Lithuania for writing a comment in a public space following an article titled "*Seksualinės mažumos drąsina vilniečius: tikrai bus linksma*" ("Sexual minorities encourage residents of Vilnius: it will be fun"), stating "better not go to the streets, queers. There will be a lot of blood." The convicted person fully admitted his guilt, showed that homosexual individuals are unacceptable to him, does not consider them as people, and believes their place is in a psychiatric hospital. He also understands that his written comment is offensive and derogatory. In this case, the court recognized R.P. as guilty, taking into account his own and witness statements. Summarizing the discussed court practice, Guliakaitė et al. (2023) highlight criteria that courts follow when assessing potentially hate-inciting speech:

- The principle of ultima ratio, which means that criminal responsibility in a democratic society should only be applied as a last resort when the goals cannot be ensured by milder means. Currently, in judicial practice, the position is forming that one unethical, concise comment does not pose such a threat to the values protected by the law to warrant criminal responsibility.
- Determining systematicity. Since courts, following the ultima ratio principle, state that one unethical comment cannot incur criminal responsibility, it is important to determine if there are signs of systematic behavior in the actions. The incitement of hatred, whether direct or indirect, is important for the rise of criminal responsibility.
- Establishing real threats and dangerousness is crucial when recognizing certain public statements inciting against homosexual, transgender, or transsexual individuals. It is essential to determine the real possibility of threats arising from these statements. The absence of consequences as a necessary feature in the composition of a criminal act does not mean that criminal acts, whose composition is formal, do not pose dangerous consequences and do not need investigation. In the established court practice, the real threat to the values protected by the law is an important criterion in assessing the application of criminal responsibility. However, considering that the formal composition of the act does not require consequences, it could be considered that the criterion for assessing hate speech's compliance with Article 170 of the Criminal Code of Lithuania is problematic.

Navickienė and Velička (2019) emphasize the totality of objective and subjective characteristics of criminal behavior. When dealing with issues of criminal liability in cases of

incitement to hatred, courts note the necessity of establishing the totality of objective and subjective features. When evaluating whether a specific public statement or comment possesses signs of incitement to homophobia or transphobia, as well as whether the action corresponds to the composition of an offense against the law, it's crucial to evaluate not only individual features of criminal conduct but the whole set of objective features. In their practice, courts identify such objective features as the nature and content of statements, the intensity of the social context, the intensity of actions, the environment in which the actions were performed, the reaction of the environment to the actions, and the situation in which the actions were taken. Subjective features identified by the courts include intentionality and direction, the objectives and motives of the statements aimed at a specific social group or individual (Navickienė and Velička, 2019).

These criteria, commonly used in judicial practice, are often relied upon by law enforcement institutions when investigating cases of incitement to hatred against the LGBTQ+ community and making decisions regarding the initiation of pre-trial investigations. As mentioned earlier, actual statistics of incitement to hatred don't fully reflect the number of reported incidents because individuals often avoid reporting these actions to law enforcement agencies. Additionally, the actual number of cases of incitement to hatred, which law enforcement officials don't perceive as significantly dangerous enough to warrant criminal liability, is unknown. Even when reports of incitement to hatred trigger pre-trial investigations, these investigations are frequently refused or, if initiated, often discontinued during pre-trial proceedings due to insufficient data to support the incitement, implying that incitement to hatred doesn't result in criminal liability. For instance, according to official data from the Department of Informatics and Communications under the Ministry of the Interior, there were 28 recorded cases of incitement to hatred under Article 170 of the Lithuanian Criminal Code in 2019, but only 3 cases reached the court (Guliakaitė et al., 2023), and it's noteworthy that this statistic only refers to pre-trial investigations initiated; the refusal to initiate pre-trial investigations regarding incitement to hatred is not recorded.

Refusals to initiate pre-trial investigations for incitement to hatred are often justified based on the mentioned judicial practice criteria. When deciding not to commence a pre-trial investigation, the ultima ratio criterion is evaluated, and it's assessed whether the statements that prompted recourse to law enforcement institutions pose a level of danger that, when assessed against the principles of reasonableness, proportionality, justice, and other legal principles, justifies applying criminal responsibility—the ultima ratio measure—towards the authors of the statements. Additionally, the element of systematic behavior is assessed, and the refusal to initiate pre-trial investigations for incitement to hatred (in the case of a single comment or statement) is usually motivated by the opinion that a single comment or statement should not be construed as incitement to discriminate, insult, mock, or instigate hatred. Often, even without systematic behavior in the actions of the accused, pre-trial investigations regarding their actions are refused. Law enforcement institutions also rely on the absence of a real threat and dangerousness. When refusing to initiate pre-trial investigations without establishing a real threat and danger, it is considered that incitement to hatred doesn't suffice to impose criminal liability based solely on a public statement of a mocking or insulting nature, when it doesn't contain explicit incitement to hatred or discrimination that could lead to a real threat to the object protected by the criminal law.

When declining to start pre-trial investigations, law enforcement officials often rely on the judicial practice shaped by the Criminal Case Law Division and are guided by the criteria it forms. With this practice in mind, after gathering information on an incitement to hatred case, investigators often anticipate that the case will not end successfully and won't reach court, meaning that when officers don't see signs of a criminal offense in the behavior, or, based on

existing judicial practice, they anticipate that individuals won't be found guilty in court. According to representatives of the Police Department, the investigation of such cases is considered "a waste of resources" (Normantaitė, ...).

Although Lithuanian judicial practice for applying criminal liability for incitement to hatred is based on the mentioned criteria and often leads to the refusal to initiate pre-trial investigations or their discontinuation based on the available information using those criteria, this stance is criticized by the ECtHR. One such instance is the ECtHR case of Beizaras and Levickas v. Lithuania, where it was established that after the applicants, a gay couple, posted a shared photo on the social network Facebook, announcing the start of their relationship, numerous disparaging, degrading, discriminatory, and inciting comments encouraging physical violence and dealing with them were received, such as "Fa*gots on the scaffold," "Monsters!!!!!! Both in the gas chambers," "Because you are fa*gots, and children see such deviants, Hitler could have burned not only Jews," and the like. Due to these comments, both applicants submitted a written request to LGL, to which they belong, in their name, to report to the General Prosecutor's Office about the incitement to hatred comments following their published photo and to initiate a pre-trial investigation for incitement to hatred. According to the applicants, the mentioned comments were not only degrading and inciting discrimination but also encouraged violence and physical confrontation. Additionally, these comments intimidated all homosexual individuals in general, as they expressed hatred not only towards the gay couple in the photo but towards all homosexual individuals. However, the regional prosecutor in Klaipėda decided to refuse to initiate a pre-trial investigation for incitement to hatred under Articles 2 and 3 of Article 170 of the Lithuanian Criminal Code, arguing that different individuals wrote the comments, and there was no sign of systematic behavior, with each comment needing to be assessed individually. The prosecutor also noted that for the comments to be evaluated as an active effort to incite hatred against homosexual individuals, the criterion of systematic behavior was important. The prosecutor also emphasized that the written comments lacked objective elements as provided for in Articles 2 and 3 of Article 170 of the Criminal Code, and there were no subjective elements; the authors of the comments just expressed their opinions. The prosecutor also relied on the practice formed by the Criminal Case Law Division that one unethical statement does not trigger criminal liability, and therefore, the incitement to hatred in these comments was of an unethical nature, but it shouldn't lead to criminal responsibility, thus deciding to refuse to start a pre-trial investigation.

LGL, having appealed the prosecutor's decision to refuse to initiate a pre-trial investigation, the Klaipėda District Court rejected LGL's appeal, siding with the prosecutor's opinion that the mentioned comments were merely of an unethical nature. The court also pointed out that the claimant, by posting the photo, should have considered the social context and the fact that the majority of society supports traditional family values, thus foreseeing that such a photo would cause dissatisfaction and hostility. Although LGL appealed this court decision, the Klaipėda Regional Court once again dismissed the appeal with a non-appealable ruling, supporting the arguments of the prosecutor and the district court.

As Lithuanian authorities refused to initiate a pre-trial investigation into incitement to hatred based on discriminatory comments about the claimants' sexual orientation, the claimants petitioned the European Court of Human Rights (ECtHR), stating that the refusal of the authorities to start a pre-trial investigation deprived them of the ability to seek legal redress.

In the 2020 ECtHR decision in this case, violations of Article 14 of the European Convention on Human Rights, applied together with Articles 8 and 13, were established. The ECtHR indicated that Lithuanian authorities took no legal measures, thus not providing effective domestic legal remedies for the claimants to defend their right to a private life, which

was violated due to discrimination based on sexual orientation. When evaluating whether the mentioned comments constituted an offense under Article 170 of the Lithuanian Criminal Code, the ECtHR disagreed with the views of the prosecutor and the domestic courts, who deemed the authors of the comments as behaving unethically, but this amoral behavior did not cross the threshold required by Articles 2 and 3 of Article 170 of the Criminal Code. The ECtHR also noted that if such comments, written after the claimants' photo, did not incite not only hatred but also violence due to sexual orientation, it was difficult to imagine what comments and statements could incite.

Regarding the criteria used by Lithuanian law enforcement institutions in incitement to hatred cases, the ECtHR also disagreed that the comments were not systematic and were written by different individuals. The ECtHR agreed with the claimants' opinion that the number of such comments (there were 31) could be a determining factor in the seriousness of the offense. Additionally, the ECtHR highlighted that the comments were posted on the social network Facebook, and the internet plays a significant role in expanding the public's ability to read news and disseminate information, making discriminatory comments publicly accessible to everyone. Speaking of the criminal process as the ultima ratio measure, the ECtHR pointed out that the case involved open calls for attacks on the physical and mental integrity of the claimants, which should be safeguarded by criminal law.

Summarizing the 2020 ECtHR decision in the case of Beizaras and Levickas v. Lithuania, the following standards for the application of Article 170 of the Lithuanian Criminal Code in hate crimes against the LGBTQ+ community are formulated:

- Homophobic comments inciting hatred and explicit calls for physical violence against homosexual individuals stem from an intolerant attitude towards this community. Thus, direct threats and remarks mocking or derogating sexual minorities necessitate the application of criminal law measures.
- To apply criminal law measures, even a single incendiary comment on the internet suffices, especially if it implies that certain individuals should be killed or discusses ways to murder them. Moreover, the escalation to criminal responsibility does not require systematicity, but the number of hate-inciting comments can influence the gravity of the offense.
- Hate-inciting comments are made in the public sphere, constituting one of the necessary elements of the composition of Article 170 of the Lithuanian Criminal Code.
- By downplaying the dangerous nature of hate-inciting comments, authorities are tolerating them, which equates to endorsing homophobic hate crimes. To avoid such a stance, criminal law like ultima ratio should be applied as a last resort in hate incitement cases.

Despite the criticism articulated by the ECtHR, Lithuania relies on existing judicial practice, suggesting that individual comments rarely attract criminal responsibility, particularly when the comments explicitly call for violence or discrimination against a specific group, in this case, homosexual individuals. While directly inciting violence is an excessive criterion defining hate incitement, subtly expressed hate can cause significant harm to vulnerable social groups affected by hate crimes.

Hate crimes: issues of criminal responsibility

The features of the qualification and investigation of hate crimes, as well as hate speech as separate criminal acts, are revealed by the legal regulation and judicial practice in Lithuania, albeit the latter is not abundant. One of the main challenges for law enforcement institutions when dealing with crimes motivated by homophobia and transphobia is the proper classification of these criminal acts and the identification of the motive of hatred. Regarding the judicial

practice concerning criminal acts motivated by homophobia and transphobia, Lithuania's practice is not extensive, leading to issues in revealing the content of all hate crimes as individual criminal acts and elucidating them.

As mentioned, hate crimes are regulated by the Criminal Code of the Republic of Lithuania (LR BK) and can manifest themselves in three ways: as separate criminal acts, as an aggravating circumstance, and as a qualifying feature of criminal activity. The motive of hatred often doesn't inherently meet the criteria for a separate criminal act; therefore, in some cases, the motive of hatred might be considered an aggravating circumstance when there is no legal norm defining hatred as a qualifying feature or might be a qualifying feature when the law defines it as such.

Speaking of the motive of hatred, as one of the most critical elements of a hate crime, it is important to mention that the 2020 General Prosecutor's recommendations stated that "[...] even if the perpetrator mistakenly perceives the victim's affiliation with certain characteristics of a defined group, this does not absolve criminal liability because the perpetrator's aims and motives for illegal behavior are usually related and directed towards a group or its individual members defined by certain characteristics, thereby violating the natural rights and freedoms of that group." This means that the danger of crimes committed out of hatred stemming from homophobic or transphobic discrimination does not decrease or disappear, even if the perpetrator mistakenly perceives the victim's affiliation with a group of homosexuals, transgender, or transsexual individuals. LGL also supports the statement that the primary motive of the offender for hate crimes in cases of homophobic and transphobic hate crimes is the motive against these groups or individuals belonging to them, as stated in their practical guide aimed at encouraging reports of homophobic and transphobic crimes. The guide specifically mentions, "[...] the most important thing is the motives of the person committing the criminal act, not the sexual orientation and (or) gender identity of the victim."[2]

In the author's opinion, accurate identification of hate crimes motivated by homophobia and transphobia and focusing on the specifics of these criminal acts should be considered a prerequisite for effective and high-quality examination and investigation of hate crimes. It is worth noting that in cases of hate crimes motivated by homophobia and transphobia, not only the victims of the crime suffer but also the communities to which the affected individuals belong. "The direct impact on communities, as well as the vulnerability of these communities and the increased risk of becoming targets of hate crimes, should be considered one of the signs of hate crimes." (Guliakaitė et al., 2023)

Discussing the judicial practice concerning cases of hate crimes motivated by homophobia and transphobia, it's notable that this practice is not extensive. The complex classification of these criminal acts and the low number of cases of this nature lead to inadequate analysis of the application and explanation of hate crimes. Analyzing the existing judicial practice shows problems in the qualification of hate crimes and the importance of the motive of hatred.

When hate speech is accompanied by other criminal acts, it is often qualified as coinciding with another criminal act, for example, a breach of public order according to Article 284 of the Criminal Code of the Republic of Lithuania. One of such examples is the ruling of the Vilnius Regional Court on June 8, 2016, where a person was sentenced under Article 284 of the Criminal Code for an incident during a concert. In the view of the audience, this individual approached a singing artist and intentionally threw two eggs, hitting the performer in the face,

[2] "National LGBT Rights Organization, Recognize and Report: A Brief Practical Guide on Homophobic, Biphobic, and Transphobic Hate Crimes", 2018, LGL, accessed on November 12, 2023 https://www.lgl.lt/naujienos/isleistas-praktinis-vadovas-apie-lgbt-neapykantos-nusikaltimus/

causing minor health impairments and demonstrating audacious behavior in a public place, aggressive conduct, showing disrespect to the surroundings and the public, and disrupting the seriousness and order of society. The person was also convicted under Article 170, Part 2 of the Criminal Code for publicly stating, "Fa*gots won't perform in Aukštadvarys."[3] Through these actions, the convicted individual publicly ridiculed and disparaged the artist R. K. because of his sexual orientation. In this case, the appellate court assessed the behavior precisely as a hate crime because the convicted individual "used the word 'pederasts,' which, given the context of the established circumstances in the case, undoubtedly shows that the convicted person expresses a negative, disrespectful attitude towards the victim because of his sexual orientation." Having examined the circumstances established in the case, the court concluded that the convicted individual understood that by publicly engaging in these actions, he was deriding and ridiculing the victim because of his sexual orientation. As the convicted individual not only publicly expressed negative and discriminatory statements about the victim's sexual orientation but also engaged in derogatory and offensive actions in a public place, the court deemed it a basis to acknowledge that the committed actions correspond to both the subjective and objective criteria stipulated in Article 284 and Part 2 of Article 170 of the Criminal Code.

A similar case is revealed in the Vilnius District Court's ruling on June 14, 2022, in criminal case No. 1A-234-898-2022, which reviewed the appeal of the convicted A. K. against the Vilnius Regional Court's judgment on January 25, 2022, where he was convicted for a breach of public order under Article 284 of the Criminal Code of the Republic of Lithuania and incitement against homosexual individuals under Part 2 of Article 170 of the Criminal Code. In the criminal case, the person was convicted for publicly mocking and disparaging T. K. due to his sexual orientation in a public place in the presence of other people. The convicted individual, in the case under review by the courts, during the incident, through active actions in a public place, openly ridiculed and discriminated against a person belonging to a group due to their sexual orientation, publicly called the victim a "fa*got," and also stated that "fag*ots need to be beaten," which the court interpreted as incitement and instigation of violence against homosexual individuals. After the insulting and discriminatory expressions, the convicted individual also used physical violence against the victim by delivering three blows to the face. Assessing the circumstances established in the case, the court established that the circumstances of the commission of the actions indicate that by his remarks, the convicted individual sought to demean and degrade homosexual individuals through his comments, mocking the victim T. K. and the witness A. R. for their sexual orientation. This also indicates that the defendant, by publicly using vulgar language and similar instigations, resorted to physical violence against the victim, aimed to ridicule the victim due to his sexual orientation, and acted with direct malice. In this context, it is also noteworthy that the convicted individual's actions did not only consist of insulting statements inciting hate but also the use of physical violence essentially operating in line with the instigations that posed a real threat to the equal status of the person belonging to the group of homosexual individuals and his dignity as a member of the community. Summing up all circumstances, the court concluded that the actions of the convicted individual corresponded to the composition of crimes as stipulated in Article 170, Part 2, and Article 284 of the Criminal Code, and therefore, the court of the first instance rightly classified these actions as a case of concurrence of offenses.

Analyzing these cases reveals that in addressing cases of this nature, the issue arises regarding the qualification of hate crimes and breaches of public order. Nevertheless,

[3]"The Vilnius Regional Court Ruling on June 8, 2016, in Criminal Case No. 1A-35-562/2016", E-courts practice, accessed 2023, November 12th., https://eteismai.lt/byla/7838190278471/1A-35-562/2016

considering the actions committed by the convicted individuals – that is, physical assaults and their circumstances of execution, as well as the motivation behind these assaults, which is homophobic hate, it appears that the court views them as two offenses: a violation of Article 284 of the Criminal Code and an ideal convergence of Article 170 of the Criminal Code.

In qualifying hate crimes and distinguishing them from hate speech, which is regulated simultaneously under Article 170 of the Criminal Code, the courts evaluate statements of a discriminatory nature and simultaneously committed physical assaults. While often a single discriminatory statement is not assessed as a criminal act, hate speech in the context of physical assaults is considered an expression of hate and is evaluated as a hate crime. Although courts often raise the question of whether such cases (such as public order breaches) should not be considered as a crime with an aggravating circumstance, the courts note that in these situations, the object is particularly crucial – that is, the individual's equality that is encroached upon by committing criminal acts, allowing hate speech to be considered an independent criminal act.

As seen from the judicial practice, sometimes the courts evaluate hate motivation as a separate criminal act. However, there are no cases where homophobic or transphobic hate motivation would be considered as an aggravating factor according to Article 60, Part 1, page 12 of the Criminal Code. For example, after analyzing the Kaunas Regional Court's ruling of December 7, 2015, in case No. PK-1822-146/2015, where the defendant was found guilty under Article 140, Part 1, for causing bodily harm or minor health impairment, it was not taken into account that he could have committed the criminal act due to homophobic hate. In the mentioned case, the victim indicated that the defendant asked if he was gay and when the victim did not deny this fact, the defendant started using the words "you, fa*got" and began to physically assault the victim, hitting him multiple times in various parts of the body. Considering the circumstances of the violence (upon the defendant, J. M., learning about the victim's sexual orientation), the victim, A. Z., stated that the violence was specifically directed against him due to hate when he confessed about his sexual orientation. Moreover, before hitting, the defendant, J. M., used words against the victim such as "fag*ot." The victim's assertion that the defendant held a hostile attitude toward homosexual individuals is also confirmed by his public comments inciting homophobia and hatred on discussions on the "Facebook" social network, specifically, the defendant called homosexual individuals "gay sissies." According to the victim's statement, considering these circumstances, it can be concluded that the physical violence used against him was specifically because of his sexual orientation, which should be considered an aggravating circumstance under Article 60, Part 1, page 12 of the Criminal Code. However, the Kaunas Regional Court did not take into account these circumstances and did not recognize the hate motivation as an aggravating circumstance of the defendant's liability.

Summarizing the discussed judicial practice, it is evident that in Lithuania, judicial practice regarding the assessment of hate crimes motivated by homophobia or transphobia is very limited, thus leading to challenges in revealing the content of all hate crimes as separate criminal acts and clarifying them. One of the main challenges for law enforcement institutions faced with crimes motivated by homophobic or transphobic hate is the appropriate qualification of these criminal acts and the identification of hate motivation. Although the Criminal Code of the Republic of Lithuania specifies hate motivation as an aggravating circumstance (Article 60, Part 1, Paragraph 12) and as a qualifying criterion for criminal acts (Article 135, Part 2, page 13; Article 138, Part 2, page 13; and Article 129, Part 2, page13), these legal norms are not applied in practice.

Conclusions

The national courts, when qualifying actions as hate crimes or incitement and deciding on criminal liability as the application of ultima ratio, take into account criteria such as context, the realism of incitement, and the motive of hatred. However, the criteria applied by national courts in hate crime cases pose certain problems in determining the application of criminal liability. Due to the lack of unified judicial practice, these criteria are often interpreted differently, given varying importance, and sometimes these criteria are not assessed during the judicial process or assessed in opposition to the previously established practice.

The complex classification of criminal acts motivated by homophobia and transphobia and the low number of cases of this nature lead to inadequate analysis of the application and explanation of hate crimes in legal regulation. One of the main challenges for law enforcement institutions facing crimes motivated by homophobia and transphobia is the proper classification of these criminal acts and the identification of the motive of hatred. Regarding criminal acts motivated by homophobia and transphobia, Lithuania's judicial practice is not extensive, leading to problems in revealing the content of all hate crimes as individual criminal acts and elucidating them.

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