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INTRODUCTION OF 'CRIME OF DENIAL' IN THE LITHUANIAN CRIMINAL LAW AND FIRST INSTANCES OF ITS APPLICATION

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Abstract. *The present article analyses the so-called 'crime of denial' recently established in Article 170² of the Lithuanian Criminal Code. It describes how this crime was introduced in the Lithuanian Law, and the reasons for its present form and challenges. The crime has been applied in two instances (Stankeras case and Paleckis case). The author discusses these two instances of application, critically reviews the arguments of the Prosecutor's Office and of the court of first instance and shows that at least in the first cases of application of this crime, its objectives and particularities are misunderstood.*

Keywords: *Lithuanian Criminal Law, Soviet regime crimes, Nazi crimes, international criminal law, equal legal treatment of totalitarian regime crimes, Denial of Holocaust, Crime of Denial.*

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Introduction

The so-called 'crime of denial' or the crime that provides for the criminal prosecution for public endorsement, denial or gross minimisation of certain historical facts, is established in Article 170[2] of the Criminal Code of the Republic of Lithuania.[1] It is a newly introduced crime, mainly because of the EU initiative to approximate by Framework Decision Member States' criminal law in certain fields where Union action is needed. The aim of this article is twofold. First, to describe the origin of the crime of denial, how it has come into the Lithuanian legal system, the form it has taken, how and why it differs from the crime in the EU Framework Decision. Second, two current attempts to apply the crime (or the two failures to apply the crime) show interesting trends and certain misunderstanding of the crime. However, this article has no aim to analyse the controversial general concept of crime of denial; it takes it as a legal fact in the current criminal law. The actuality of the topic might be proved on the grounds that the introduction of the crime of denial caused a controversial public reaction (e.g. it was introduced only by second attempt); the first two cases, especially *Paleckis* case, draw substantial attention of the media and are interesting both from the point of view of national criminal law and international criminal law. The methods applied are historical, analytical, meta-analysis, and the analysis of the case-law.

1. The Crime of Denial and its Introduction into the Lithuanian Legal System

When talking about the most heinous crimes committed in the history of the mankind, such as genocide, war crimes and crimes against humanity, it is hard to withstand the chill. Sometimes it is even impossible to believe in what you have read. No surprise that even the victims to-be did not believed in the stories told by survivors. It is a well-known story that during the Nazi occupation in Vilnius ghetto there were survivors that escaped from killing field in Paneriai, but their fellows in the ghetto did not believe their horrible stories[2]. Today, the shocking reality of crimes committed by Nazi in Germany, Soviet Union, Former Yugoslavia, Rwanda, etc. is researched and written down. There are ample documents, witness records, decisions of international and national courts, etc.

Nazi crimes committed before and during the Second World War shocked the European conscience. It was understood that these crimes were not ordinary ones, but based on very sophisticated system of criminal policy, when crimes became a part of state policy accepted by the majority of the society. It started only as ideas, but soon it resulted in mass-murder technologies that have never been seen before. Taking into

1 For the full definition of the crime see bellow.

2 For the history of Vilnius Ghetto see Kruk, H. *The Last Days of the Jerusalem of Lithuania: Chronicles from the Vilna Ghetto and the Camps, 1939-1944.* YIVO Institute for Jewish Research, Yale University Press, 2002.

account the power of malevolent ideas in its history, the post-war Europe always had to strike a difficult balance between the freedom of speech (freedom of expression) and its limitations. One of such most far-reaching limitation of freedom of expression is the so-called 'crime of denial'. Definitions of such crimes intend to fight distortion or negation of certain historic facts.

The current phenomena of crime of denial generally started with the outlawing of Holocaust denial in the early nineties, though the very concept of prohibition of certain history versions goes much deeper both in law and history. No surprise, that it was first of all introduced in such states as Austria, Germany and France due to easily understandable historical reasons, the analysis of which is not the object of the present article[3].

It is normal that society uses criminal law to outlaw activity that threatens its values; different society criminalises different activities. However, the very notion that someone might be held criminally responsible simply for denial of something is very controversial. For example, even for the criminal suspect, it is legal to deny his crime and not to testify against himself. It is generally agreed that criminal law interferes to counter and to avenge the deeds, not words or opinions. Of course, the threat to murder a person or to incite racial hate will nevertheless be criminal, but probably no one will be held liable for a threat to start smuggling. In principle, in the case of crime of denial we even might have no call for any action or a threat. It may only be a doubt expressed on some historical fact or circumstances. It is a truly controversial issue and it seems to come quite close to such crimes as blasphemy or atheism in the religious legal systems. And by reason of such origin it raises a question of its relationship with the freedom of expression, and many other questions. At the time of writing this article the Constitutional Court of France has cancelled the new law on denial of genocide of Armenians committed by the Ottoman Empire during the First World War, by ruling that it infringed the freedom of expression[4].

Freedom of speech (or freedom of expression) is a fundamental right, embedded both in national constitutions and international law, including the European Convention of Human Rights and Fundamental Freedoms (hereinafter – the ECHR). However, under the ECHR, this right is not absolute. Article 10(2) provides that the law may prescribe formalities, conditions, restrictions or penalties that are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of

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3 More about history of Holocaust denial and various aspects of its outlawing see: Fronza, E. The Punishment of Negationism: The Difficult Dialogue Between Law and Memory. *Vermont Law Review*. 2006, 30: 609−627; Teachout, P. R. Making Holocaust Denial a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience Essay: International Law. *Vermont Law Review*. 2006, 30: 655−693.

4 French genocide law: President Sarkozy orders new draft [interactive]. [accessed on 05-03-2012]. <http://www.bbc.co.uk/news/world-17196119>.

the judiciary[5]. Therefore, in the European legal tradition this right is more limited than, e.g. in the United States.

The introduction of a crime of denial into the national legal systems of the European States was soon tested by the European Court of Human Rights (hereinafter - ECtHR). In a number of cases[6] ECtHR found no contradiction with the freedom of expression by outlawing such practices. Moreover, in *Lehideux and Isorni v. France* the Court stated that "*negation or revision of clearly established facts, such as the Holocaust, would be removed from the protection of Article 10* (Freedom of expression – J.Ž) *by Article 17* (abuse of rights – J.Ž.)" This was reiterated in *Witzsch v. Germany*, therefore the principal position of the ECtHR was clear: such limitations upon the freedom of expression are based on the values of democratic society.

Another turn in the field of development of the crime of denial was the adoption of the EU Council framework decision for combating racism and xenophobia by means of criminal law (2008/913/JHA[7]) (hereinafter – the Framework Decision) that had an aim to approximate EU Member States' criminal laws on the matter. The background for this decision dated back to 1996 when the Council of the European Union adopted the Joint action/96/443/JHA concerning action to combat racism and xenophobia[8], however, it took a decade to develop it into Framework Decision though the work had already started in 2001.

In its Article 1, the Framework Decision provided for criminalisation of certain grave forms of criminal conduct committed for a racist or xenophobic purpose, such as public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin; public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia; and also - for public condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group[9]. Therefore, by the Framework Decision, the crime of denial entered the legal domain of the European Union with the obligation for the Member States to criminalise it.

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5 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221.

6 *See Remer v. Germany*, no. 25096/94, Commission decision of 6 September 1995; *Nachtmann v. Austria*, no. 36773/97, Commission decision of 9 September 1998; *Lehideux and Isorni v. France*, No. 24662/94, Judgment (Merits and just satisfaction) 23/09/1998; *Witzsch v. Germany* (dec.), no. 41448/98, 20 April 1999; *Garaudy v. France*, application no.65831/01, inadmissibility decision of 7 July 2003.

7 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328/55 2008/12/06.

8 Joint action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia, Official Journal L 185 of 24.07.1996.

9 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328/55 2008/12/06.

However, the Framework Decision dealt not only with the particular case of Holocaust denial (the most 'popular' instance of denial and negation), but in more broad and general terms. Therefore, it was an important ground for another initiative.

The new members of the European Union that joined the Union in 2004 had a different historical experience in comparison with the old EU members that knew only the terrors of Nazism. It came from the Soviet Union's occupation and/or oppression that lasted for half a century even when Nazism was trampled[10]. From the very re-establishment of their sovereignty and independence from the USSR, Central and Eastern European states started initiatives for the international recognition of criminality of soviet regime and its crimes. It evolved into the movement for equal legal treatment[11] of crimes of totalitarian regimes that culminated in the Prague declaration of 2008 'On European Conscience and Communism' where the signatories – famous European politicians and activists - called for a just recognition of criminal communism legacy in Europe[12].

The process of adopting the Framework Decision also witnessed these initiatives. From the very beginning, the Framework Decision was drafted with the intent to cover only crimes based on race, colour, religion, descent or national or ethnic origin and historical crimes of Nazism. During the Framework Decision deliberation process in 2007, some Member States (including Lithuania) proposed to include into the Framework Decision a clause on equal legal treatment of crimes of Nazism and Stalinism (communism)[13]. This proposal received limited support and was reflected mainly in the declaration attached to the minutes of the Council meeting that adopted the Framework Decision. In the declaration, the Council expressed that it deplored the crimes of all totalitarian regimes, it also invited the Commission to 'examine and to report to the Council within two years after the entry into force of the Framework Decision, whether an additional instrument is needed, to cover publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes directed against a group of persons defined by reference to criteria other than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions'. It also provided that the Commission will organise hearings on crimes of totalitarian regime issues[14].

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10 An extremely valuable study of Eastern and Central Europe and its people's fate under those two murder regimes is presented in Snyder, T. *Bloodlands: Europe Between Hitler and Stalin*. New York: Basic Books, 2010.

11 I use the term 'equal legal treatment' in order to make a clear distinction between the 'equalisation' of the crimes of totalitarian regimes that is illogical due to the different ideological and technical aspects of the Nazi and Soviet crimes and the regime of legal treatment that must be the same in a way that Soviet crimes have to be evaluated according to the same principles as any international crime.

12 Prague Declaration on European Conscience and Communism [interactive]. [accessed on 05-03-2012]. <http://www.victimsofcommunism.org/media/article.php?article=3849>.

13 Council of The European Union. Proposal for a Council Framework Decision on combating racism and xenophobia [interactive]. [accessed on 05-03-2012]. <http://register.consilium.europa.eu/pdf/en/07/st08/st08544.en07.pdf>.

14 Žr. 14904/01 DROIPEN 105 COM(2001) 664 final [interactive]. [accessed on 05-03-2012]. <http://register.consilium.europa.eu/pdf/en/08/st16/st16351-re01.en08.pdf>.

The hearings took place in Brussels in April 2008, with more than 100 experts from national ministries of justice, politicians, and historians present. However, the results of the hearings did not turn into something coherent[15] and it became clear that EU would not proceed forward with the issue in the near future[16]. The time to go on with the implementation of the Framework Decision (the deadline was 28 November 2010) was also running fast. Therefore, in Lithuania it was decided to draft the amendments of the Lithuanian Criminal Code, but to reflect on making an object of the crime of denial not only Nazi crimes and other crimes directly provided in the Framework Decision, but also the Soviet crimes. The draft amendments of the Code were drafted in 2009 more or less according to the wording of the Framework Decision[17].

Interestingly, the first proposal to amend the Code in 2009 was unsuccessful. The amendments caused a heated discussion in the Parliament and in public. The main doubts expressed were related to the problem of freedom of speech and even freedom of thought and belief. The proposal was dropped, despite the arguments that such crimes had to be introduced because of the Framework Decision[18].

In 2010, a second attempt to introduce those crimes in the Criminal Code succeeded, even though the discussions continued. For example, historians expressed caution that criminalisation of such conduct might interfere with academic freedom to research freely controversial events in the history of Lithuania[19]. However, the definition of crimes was redrafted, taking into account the previous discussion and by placing a lot of safeguards. This definition was adopted[20] and has remained until now.

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15 European hearing on crimes committed by totalitarian regimes [interactive]. [accessed on 05-03-2012]. <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/230&type=HTML&aged=0&language=EN&guiLanguage=en>.

16 Nevertheless, some steps were taken in 2010 by the Commission that prepared a Report from the Commission to the European Parliament and to the Council. The memory of the crimes committed by totalitarian regimes in Europe, Brussels, 22.12.2010 COM(2010) 783 final [interactive]. [accessed on 05-03-2012]. <http://ec.europa.eu/commission_2010-2014/reding/pdf/com(2010)_873_1_en_act_part1_v61.pdf>, in 2011 It was followed by (9 and 10 June 2011) Council conclusions on the memory of the crimes committed by totalitarian regimes in Europe, 3096th Justice and Home Affairs Council meeting, Luxembourg, 9 and 10 June 2011 [interactive]. [accessed on 05-03-2012]. <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/122521.pdf>, but it nevertheless foresees no changes of approximation of criminal legislation.

17 Baudžiamojo kodekso papildymo 170(2) ir 284(1) straipsniais ir priedo papildymo įstatymo projektas (Nr. XIP-1062 Data: 2009-09-10) Baudžiamojo kodekso papildymo 170(2) ir 284(1) straipsniais ir priedo papildymo įstatymo projektas (Nr. XIP-1062 Data: 2009-09-10) [Draft Law inserting Articles 170(2) and 284(1) in and supplementing Annex to the Criminal Code] [interactive]. [accessed on 05-03-2012]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=352279&p_query=&p_tr2=2>.

18 Už SSRS ir nacių agresijos neigimą bausmių nebus Už SSRS ir nacių agresijos neigimą bausmių nebus [No Sanctions for the Denial of Soviet Union and Nazi Aggression] [interactive]. [accessed on 05-03-2012]. <http://www.balsas.lt/naujiena/222397/uz-ssrs-ir-naciu-agresijos-neigima-bausmiu-nebus/1>.

19 Lietuvos Respublikos Seimo teisės ir teisėtvarkos komitetas. Pagrindinio komiteto išvados dėl Lietuvos Respublikos baudžiamojo kodekso papildymo 170^2 ir 284^1 straipsniais įstatymo projekto (XIP-1062) 2010 m. balandžio 14 d. [Committee on Legal Affairs. Conclusions of the Main Committee regarding the Draft Law inserting Articles 170(2) and 284(1) in the Criminal Code].

20 Baudžiamojo kodekso 95 straipsnio pakeitimo bei papildymo, Kodekso papildymo 170(2) straipsniu ir Kodekso priedo papildymo įstatymas [Law amending and supplementing Article 95 of the Criminal Code, inserting Article 170(2) in and supplementing Annex to the Code]. *Official Gazette.* 2010, No. 75-3792.

Article 170[2] Public endorsement of international crimes, public endorsement of crimes committed by USSR or Nazi Germany against the Lithuanian Republic or its residents, denying or grossly diminishing such crimes.

1. He or she who publicly endorses the crime of genocide and other crimes of humanity or war crimes, established by the Lithuanian Republic laws, acts of the European Union, final (effective) decisions of the Lithuanian courts or decisions by international courts, denies or grossly diminishes such crimes, if it was committed in a threatening, abusive or insulting manner or resulted in disturbance of public order; also if he or she publicly endorses the aggression of USSR or Nazi Germany against Lithuania as well as genocide crime or other crimes against humanity and war crimes committed by USSR or Nazi Germany in the territory of the Republic of Lithuania or against the residents of the Republic of Lithuania, or endorses the serious or grave crimes, committed in 1990-1991, denies or grossly diminishes them, if it was committed in a threatening, abusive or insulting manner or resulted in disturbance of public order,
   – is punishable by a fine, restriction of freedom, or arrest, or imprisonment up to 2 years.
2. A legal person may also be held responsible for such activity[21].

This definition looks rather complex if not to say clumsy. It is easier to understand by breaking it into sub-parts, because the definition contains both generalities and particularities. In fact, the definition addresses only one type of crime: public endorsement (the Framework Decision uses the term "condoning"), denial or gross minimisation of certain historical facts. It also provides that endorsement, denial or gross minimisation shall be effected in a particular way: publicly and in a threatening, offensive or insulting manner, or it results in disturbance of public order (such a possibility of limitation was also provided in Article 1(2) of the Framework Decision). In principle, these numerous features are safeguards introduced in order to strike sufficient balance with the freedom of expression. As mentioned above, there were many discussions and some fears during the adoption that the introduction of this crime might impair not only the freedom of speech, but also academic liberty, especially when dealing with the historic facts that might be interpreted in various ways. The best example of such interpretations could be the labelling of Soviet crimes committed in Lithuania (especially massive arrests and deportations to Siberia and GULAG slave labour camps) as 'Soviet genocide' that is a more or less officially accepted position. On the other hand, national, ethnic, racial or religious grounds were only secondary with regard to the actions of the USSR, first of all it was political persecutions, and therefore it much more corresponds with the crimes against humanity than genocide[22]. Definitely, it would be absurd to outlaw such discussions and the current state of discussions clearly shows that the cautions were ill-grounded.

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21 Unofficial translation by the author.

22 See Žilinskas, J. Broadening the Concept of Genocide in Lithuania's Criminal Law and the Principle Nullum Crimen Sine Lege. *Jurisprudencija*. 2009, 4(118): 333−348.

The particularities of the definition include the historical and legal facts: international crimes established by various sources of international law (such as the Charter of International Military Tribunal and its jurisprudence, the Statute of International Criminal Court, etc.), EU law as well as Lithuanian Law and the jurisprudence of the Lithuanian courts. It also includes specific events of special importance to Lithuania: Soviet occupation and Nazi occupation, as well as USSR actions against Lithuania's struggle for independence in 1991. Those events are only partially reflected in international jurisprudence and the Baltic States occupation in 1940 is continuously denied (previously by USSR, nowadays by Russian Federation). Nevertheless, the doctrine on this issue and the case-law of the European Court of Human Rights is constantly expanding[23].

The introduction of USSR crimes in the definition was not only met by the traditional outrage from Russia. It was also criticised by some Jewish authors and organisations[24] that saw this decision as another wit in the Nazism and Communism crimes equalization process that, according to them, diminished the gravity of Nazism crimes. Nevertheless, the amendments of the Criminal Code came into force on 26 June 2010.

2. The First of the Instances of Application and its Problems

From the entry into force of the amendments there were two instances of application of the crime. The first case concerned the article by Petras Stankeras (hereinafter – *Stankeras* case), dealt in pre-trial stage by the Prosecutor's Office and the second one, regarding the public statements of Algirdas Paleckis and party 'Frontas', that was decided by the regional court (it has been appealed against and the process is ongoing) (hereinafter – *Paleckis* case). These two instances are discussed below in more detail[25].

Stankeras case concerned a scandalous article. It was published in a respected national weekly magazine 'Veidas' on the 65th anniversary of the International Military Tribunal in Nuremberg and was entitled 'Nuremberg War Crimes Tribunal – the Greatest Legal Farce in the History'[26]. Despite the title, the article was not written by lawyers, but by the historian Dr. Petras Stankeras. The article mostly reiterated the well-known harsh critic of Nuremberg (International Military) tribunal trials as a victor's justice tool, emphasized the lack of its legality (alleged *ex post* application of the law), the application of double standards towards crimes of the Nazis and crimes of the Allies,

23 For the analysis of ECtHR jurisprudence on this issue *see*: Milašiūtė, V. History of the communist regime in the European Court Of Human Rights cases. *Baltic yearbook of international law*. 2009, 9: 47–68.

24 Red-Brown Bill with Two Years of Jailtime for Disagreeing with Government's Position is Signed into Law [interactive]. [accessed on 05-03-2012]. <http://defendinghistory.com/red-brown-bill-with-two-years-of-jailtime-for-disagreeing-with-governments-position-is-signed-into-law/843>.

25 Unfortunately, because of the continuing proceedings in *Paleckis* case and the protection of pre-trial material in *Stankeras* case, the author of the article had to rely on press releases and details of the cases reported in the media, therefore some innacuracies might be present.

26 Stankeras, P. Niurnbergo karo nusikaltimų tribunolas – didžiausias juridinis farsas istorijoje [Nuremberg War Crimes Tribunal – the Greatest Legal Farce in the History]. *Veidas*. 2010, 45.

and had a general compassionate feeling towards the defendants. However, the sentence stating that '*In Nuremberg also the legend was born about the 6 million allegedly killed Jews*' and the statement that followed it, namely that no one found written evidence that Hitler ordered the 'Final Decision', caused the real concern. Some time after publication of the article, public reaction appeared. It was followed shortly by the letter of a number of foreign ambassadors (United Kingdom, Estonia, the Netherlands, Norway, France, Finland, Sweden, Poland) to the Lithuanian Government, deploring such an article and expressing concerns that such an article might amount to the denial of Holocaust[27].

Moreover, by the time when the article was published, Mr. Stankeras was working in the Ministry of the Interior. However, after the ambassadors' letter he was asked to resign immediately and did that, though later on he tried to prove unsuccessfully in court that his resignation was illegal. The author as well as the weekly magazine 'Veidas' explained that the scandalous phrase was merely an editing mistake, and the word 'allegedly' had to be situated before the phrase '6 million'. I.e. the author did not question the fact of the events but the exact number of victims that might be even larger. The author himself also declared that he did not intend to deny Holocaust, to the contrary, he spoke a lot about the Holocaust in his previous publications. Later on it was found that the scandalous phrase and the article were partly written by translating into the Lithuanian the Russian translation of Ernst Zündel anti-semitic work[28]. Nevertheless, under the request of a NGO Žmogaus teisių centras (Human Rights Center) and Lietuvos žydų bendruomenė (Lithuanian Jewish Community) the Prosecutor's Office started a pre-trial procedure. Stankeras was questioned, as well as the persons representing the NGOs. The article was also given for the expertise of historians.[29] However, taking into account not only the article but also the general position of the author drawn from other publications and his personal stand during the investigation, the pre-trial investigation was closed by claiming that no constituent elements of the crime was found and that Stankeras had no intent to deny Holocaust[30].

Another case involving application of Article 170^2 was the case of Algirdas Paleckis. It was related to the events of 13 January 1991, when the Soviet army, the KGB and the Special Forces stormed the Lithuanian TV tower and the Lithuanian TV and radio office. During the assault, 14 civilians were killed, 400 were injured[31]. It was

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27 Ikiteisminis tyrimas dėl Petro Stankero nutrauktas neradus nusikaltimo požymių [Pre-Trial Investigation concerning Petras Stankeras was terminated because no evidence of the crime was found] [interactive]. [accessed on 05-03-2012]. <http://www.15min.lt/naujiena/aktualu/lietuva/ikiteisminis-tyrimas-del-petro-stankero-nutrauktas-neradus-nusikaltimo-pozymiu-56-140277#ixzz1oWxc0oVq>.

28 P. Stankeras – ne tik mistifikatorius, bet ir plagiatorius? [P.Stankeras – not only a mystificator, but also a plagiarist?] [interactive]. [accessed on 05-03-2012]. <http://pilietis.delfi.lt/voxpopuli/pstankeras-ne-tik-mistifikatorius-bet-ir-plagiatorius.d?id=39331559>.

29 Tyrimas dėl Stankero straipsnio paklydo tarp prokurorų ir etikos sargų [Investigation on the Article of Stankeras has been lost among Prosecutors and Guardians of Ethics]. <http://www.alfa.lt/straipsnis/10523193/Tyrimas.del.Stankero.straipsnio.paklydo.tarp.prokuroru.ir.etikos.sargu=2011-02-07_14-26/>.

30 *Ibid*.

31 For more on the events of January 13th and their classification *see* Žalimas, D. The Soviet Aggression against Lithuania in January 1991: International Legal Aspects. *Baltic Yearbook of International Law*. 2006, 6: 293−343.

one of the last and bloodiest attempts of the Soviet Union to confront by brutal force the restoration of Lithuania's independence declared in 1990. Soon after the events, the Soviet media and officials reported that they used only empty ammunition and civilian victims were killed by the Lithuanian fighters who put snipers on the roofs of houses nearby or brought to the scene cadavers of people who have died in the car accidents (because many victims died under the tanks). Even now this insolent version of events is often circulated in the Russian media[32]. Algirdas Paleckis, a political activist and a chairman of the extreme left-wing party 'Frontas' was talking in a radio talk-show about the assault of the TV tower on 13 January 1991 by stating that '*and now it is becoming clear that they were firing at their own*[33]', in principle, reiterating the Russian version.

The pre-trial investigation was started on the initiative of another participant of the radio talk show, the member of Seimas (Parliament of Lithuania) Kęstutis Masiulis. In contrast to *Stankeras* case, this time the pre-trial procedure continued to the court. Moreover, the case was initiated not only against Paleckis as a person, but also against his party 'Frontas' (which supported that version of events) as a legal person. In contrast to the position of Stankeras claiming that he did not intend to deny the Holocaust, Paleckis wholeheartedly followed his position, claiming that there were witnesses that could support his version of events and presented to the court the writings and texts where such version was described. Finally, the court acquitted Paleckis (though the judgment is currently under appeal) and stated that Paleckis had no intent to deny Soviet aggression in 1991 either to insult the victims, what was required by the constituent elements of the crime. In the court's view, his words, based on different sources presented to the court should be regarded as the voicing of another person's opinion, moreover, the words '*it is becoming clear*' mean that it is not the defendant's personal opinion and for him it is not a clear or final opinion. The court also found that Paleckis did not mention in his statement anything about USSR aggression, therefore he could not be held responsible for what he had not said[34].

Therefore, we have two quite different cases with the same result, despite of the fact that in *Stankeras* case the defendant rejected his words, claimed that he was misunderstood, and in *Paleckis* case the defendant defended his own words as grounded and truthful. What is really interesting (and disappointing) that none of the institutions that dealt with the cases paid attention to the argument with regard to the freedom of expression, all the more to the balancing of freedom of expression with the protection of democratic values. It seems that there were no thorough considerations with regard to the criteria embedded in the crime definitions, namely that the denial must be committed in a threatening, offensive or insulting manner. E.g. in *Paleckis* case the court simply

32 See Litva, janvar 1991-vo: Svoji streliali v svoikh? [Lithuania, January 1991: they were firing at their own] [interactive]. [accessed 05-03-2012]. <http://svpressa.ru/society/article/36914/>; O janvarskikh cobytijakh 1991 goda v Vilniuse [About Events of January 1991 in Vilnius] [interactive]. [accessed on 05-03-2012]. <http://www.newsland.ru/news/detail/id/464115/>.

33 Teismas išteisino A.Paleckį [The court acquitted A.Paleckis] [interactive]. [accessed on 05-03-2012]. <http://vilniaus1.teismas.lt/Naujienos/10>.

34 *Ibid.*

stated that because it was not Paleckis' personal opinion, it cannot be stated that it was insulting towards the victims and relatives of the January 13 events. Such reasoning sounds very strange, because it leads to continuation that if someone insults another person by expressing someone else's opinion, the insulter will bear no responsibility. To my point of view, in the case of crime of denial the voicing of opinion of others makes no difference for arguing because the affirmative voicing of denialist opinion (and not discussion on it) nevertheless is a denial of some event as a crime. Mr. Paleckis' attempts to cast a doubt on the January 13 events, though it was a common knowledge (in Lithuania) that the qualification of the January 13 events as criminal was tested in the European Court of Human Rights case of *Kuolelis and others v. Lithuania*[35]. For example, if someone uses Holocaust revisionist works as a source of their inspiration, it would definitely not shield a person from responsibility, otherwise a crime of denial would be dead letter *ab initio*. The considerations of the court that Mr. Paleckis did not mention directly in his speech the words USSR or its policy and therefore he could not be held liable for denial is also flawed, because the case-proven version of the events clearly concerns the use of armed violence by the troops that were part of the USSR institutions, the acts of which resulted in murder of civilians. I.e. if one says that it is not the deeds of the USSR forces, the guilt is transferred on another party of the events and then USSR forces are cleared of the documented and case-proven guilt. As far as it possible to understand from public announcements, in *Stankeras* case the main argument also was a mere establishment of a personal attitude of the defendant towards the phenomena of the Holocaust. Such a narrow approach in both cases poses a question that the Lithuanian court and the Prosecutor's Office treats the crime of denial as any other ordinary crime, which is, according to my personal point of view, not the right approach.

In fact, the first two instances of application (if these cases are to be treated as precedents in the future) clearly show two points. First, it is very easy for the defendant to avoid responsibility for a crime of denial (in contrast to the simple hate speech crimes, where one sentence, such as an internet comment is sufficient for criminal sanction) by shielding himself under 'opinion' or retracting his words, because both the prosecution and the court set the level of proof of intent as very high and contextual. It is not surprising in such an approach, because both cases were initiated with regard to the interpretation of the few lines that, according to our view, makes the establishment of the genuine intent of the defendant impossible[36]. It leads to the second point, namely that the concept of a crime of denial as well as its constituent elements as now phrased is not appropriate for evaluating such one-liners that are too close to a routine 'war of words' and hate speech (e.g. comments in the internet). In my point of view, this crime has to

35 *Kuolelis, Bartoševičius and Burokevičius v. Lithuania*, dec., Applications nos. 74357/01, 26764/02 and 27434/02, 19 February 2008.

36 For example, few months after the termination of Stankeras pre-trial procedure, he was spotted as a witness at the wedding of the most infamous Lithuanian pro-Nazi personality Mindaugas Murza who is a leader of a far-right unregistered nationalistic party and has been sentenced a number of times for anti-Semitic actions. Does it put a different light on the personality of Mr. Stankeras in the context of his case?

be reserved for more serious and more clear-cut instances of denial (like the case of infamous British historian David Irving) and to act as a norm of *ultima ratio* character.

Conclusions

Crime of denial has always been a matter of great controversy. Such controversy includes not only the possible collision of the concept with the freedom of expression but also the historic facts chosen as an object of protection by the crime of denial. The EU Member States with different historic experience (including Lithuania) availed of this opportunity for another step in the desired equal legal treatment of totalitarian regime crimes, by including crimes committed by the USSR in the scope of the crime of denial. Nevertheless, the first two instances of application of this crime in Lithuania were a failure for two reasons. First, the literal or narrow-minded approach to the crime, e.g. where the voicing of denialist opinion (*Paleckis* case) or the retraction from the words (*Stankeras* case) was treated as insufficient to prove the fact of denial; second, the very chosen instances of the cases seem to be inappropriate for the crime of the kind, in particular taking into account the burden of proof required for the intent. Nevertheless, it is too early to come to too strict conclusions as to the future of the crime of denial in the Lithuanian legal system, however the first instances show the narrow approach, misunderstanding of the purpose of the crime purpose and confusion of arguments.

References

14904/01 DROIPEN 105 COM(2001) 664 final [interactive]. [accessed on 05-03-2012]. <http://register.consilium.europa.eu/pdf/en/08/st16/st16351-re01.en08.pdf>.

Baudžiamojo kodekso 95 straipsnio pakeitimo bei papildymo, Kodekso papildymo 170(2) straipsniu ir Kodekso priedo papildymo įstatymas [Law amending and supplementing Article 95 of the Criminal Code, inserting Article 170(2) in and supplementing Annex to the Code]. *Official Gazette.* 2010, No. 75-3792.

Baudžiamojo kodekso papildymo 170(2) ir 284(1) straipsniais ir priedo papildymo įstatymo projektas (Nr. XIP-1062 Data: 2009-09-10) [Draft Law inserting Articles 170(2) and 284(1) in and supplementing Annex to the Criminal Code] [interactive]. [accessed on 05-03-2012]. <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=352279&p_query=&p_tr2=2>.

Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221.

Council conclusions on the memory of the crimes committed by totalitarian regimes in Europe 3096th Justice and Home Affairs Council meeting, Luxembourg, 9 and 10 June 2011 [interactive]. [accessed on 05-03-2012]. <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/122521.pdf>.

Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328/55 2008/12/06.

Council of the European Union. Proposal for a Council Framework Decision on combating racism and xenophobia [interactive]. [accessed on 05-03-2012]. <http://register.consilium.europa.eu/pdf/en/07/st08/st08544.en07.pdf>.

European hearing on crimes committed by totalitarian regimes [interactive]. [accessed on 05-03-2012]. <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/230&type=HTML&aged=0&language=EN&guiLanguage=en>.

French genocide law: President Sarkozy orders new draft [interactive]. [accessed on 05-03-2012]. <http://www.bbc.co.uk/news/world-17196119>.

Report from the Commission to the European Parliament and to the Council. The memory of the crimes committed by totalitarian regimes in Europe, Brussels, 22.12.2010 COM(2010) 783 final [interactive]. [accessed on05-03-2012]. <http://ec.europa.eu/commission_2010-2014/reding/pdf/com(2010)_873_1_en_act_part1_v61.pdf>.

Fronza, E. The Punishment of Negationism: The Difficult Dialogue Between Law and Memory. *Vermont Law Review*. 2006, 30: 609−627.

Garaudy v. France, application no. 65831/01, inadmissibility decision of 7 July 2003.

Ikiteisminis tyrimas dėl Petro Stankero nutrauktas neradus nusikaltimo požymių [Pre-Trial Investigation on Petras Stankeras was terminated because no evidence of the crime was found] [interactive]. [accessed on 05-03-2012]. <http://www.15min.lt/naujiena/aktualu/lietuva/ikiteisminis-tyrimas-del-petro-stankero-nutrauktas-neradus-nusikaltimo-pozymiu-56-140277#ixzz1oWxc0oVq>.

Joint action/96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia, Official Journal L 185 of 24.07.1996.

Kruk, H. *The Last Days of the Jerusalem of Lithuania: Chronicles from the Vilna Ghetto and the Camps, 1939-1944*. YIVO Institute for Jewish Research, Yale University Press, 2002.

Kuolelis, Bartoševičius and Burokevičius v. Lithuania, dec., Applications nos. 74357/01, 26764/02 and 27434/02, 19 February 2008.

Lehideux and Isorni v. France, No. 24662/94, Judgment (Merits and just satisfaction) 23 September 1998.

Lietuvos Respublikos Seimo teisės ir teisėtvarkos komitetas. Pagrindinio komiteto išvados dėl Lietuvos Respublikos baudžiamojo kodekso papildymo 170^2 ir 284^1 straipsniais įstatymo projekto (XIP-1062) 2010 m. balandžio 14 d. [Committee on Legal Affairs. Conclusions of the Main Committee regarding the Draft Law inserting Articles 170(2) and 284(1) in the Criminal Code].

Litva, janvar 1991-vo: Svoji streliali v svoikh? [Lithuania, January 1991: they were firing at their own] [interactive]. [accessed 05-03-2012]. <http://svpressa.ru/society/article/36914/>.

Milašiūtė, V. History of the communist regime in the European Court of Human Rights cases. *Baltic yearbook of international law*. 2009, 9.

Nachtmann v. Austria, no. 36773/97, Commission Decision of 9 September 1998.

O janvarskikh cobytijakh 1991 goda v Vilniuse [About the Events of January 1991 in Vilnius] [interactive]. [accessed on 05-03-2012]. <http://www.newsland.ru/news/detail/id/464115/>.

P.Stankeras – ne tik mistifikatorius, bet ir plagiatorius? [P.Stankeras – not only a mystificator, but also a plagiarist?] [interactive]. [accessed on 05-03-2012]. <http://pilietis.delfi.lt/voxpopuli/pstankeras- ne-tik-mistifikatorius-bet-ir-plagiatorius.d?id=39331559>.

Prague Declaration on European Conscience and Communism [interactive]. [accessed on 05-03-2012]. <http://www.victimsofcommunism.org/media/article.php?article=3849>.

Red-Brown Bill with Two Years of Jail time for Disagreeing with Government's Position is

Signed into Law [interactive]. [accessed on 05-03-2012]. <http://defendinghistory.com/red-brown-bill-with-two-years-of-jailtime-for-disagreeing-with-governments-position-is-signed-into-law/843>.

Remer v. Germany, no. 25096/94, Commission decision of 6 September 1995.

Snyder, T. *Bloodlands: Europe Between Hitler and Stalin*. New York: Basic Books, 2010.

Stankeras, P. Niurnbergo karo nusikaltimų tribunolas – didžiausias juridinis farsas istorijoje [Nuremberg War Crimes Tribunal – the Greatest Legal Farce in the History]. *Veidas*. 2010, 45.

Teachout, P. R. Making Holocaust Denial a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience Essay: International Law. *Vermont Law Review*. 2006, 30: 655−693.

Teismas išteisino A.Paleckį [The court acquitted A.Paleckis] [interactive]. [accessed on 05-03-2012]. <http://vilniaus1.teismas.lt/Naujienos/10>.

Tyrimas dėl Stankero straipsnio paklydo tarp prokurorų ir etikos sargų [Investigation on the Article of Stankeras has been lost among Prosecutors and Guardians of Ethics]. <http://www.alfa.lt/straipsnis/ 10523193/Tyrimas.del.Stankero.straipsnio.paklydo.tarp. prokuroru.ir.etikos.sargu=2011-02-07_14-26/>.

Už SSRS ir nacių agresijos neigimą bausmių nebus [No Sanctions for the Denial of Soviet Union and Nazi Aggression] [interactive]. [accessed on 05-03-2012]. <http://www.balsas.lt/naujiena/222397/uz-ssrs-ir-naciu-agresijos-neigima-bausmiu-nebus/1>.

Witzsch v. Germany (dec.), no. 41448/98, 20 April 1999.

Žalimas, D. The Soviet Aggression against Lithuania in January 1991: International Legal Aspects. *Baltic Yearbook of International Law*. 2006, 6.

Žilinskas, J. Broadening the Concept of Genocide in Lithuania's Criminal Law and the Principle *Nullum Crimen Sine Lege*. *Jurisprudencija*. 2009, 4(118): 333−348.

„NEIGIMO NUSIKALTIMŲ" ATSIRADIMAS LIETUVOS BAUDŽIAMOJOJE TEISĖJE IR PIRMIEJI ŠIOS NORMOS TAIKYMO ATVEJAI

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Santrauka. *Straipsnyje analizuojami klausimai, susiję su vadinamųjų „neigimo nusikaltimų" (Lietuvos Respublikos baudžiamojo kodekso 170[2] straipsnis „Viešas pritarimas tarptautiniams nusikaltimams, SSRS ar nacistinės Vokietijos nusikaltimams Lietuvos Respublikai ar jos gyventojams, jų neigimas ar šiurkštus menkinimas") problemomis. Pirmiausia aptariama, kaip šios normos atsirado nacionalinėje teisėje, trumpai apžvelgiant neigimo nusikaltimų kilmę, Europos Sąjungos pagrindų sprendimo dėl kovos su rasizmu ir ksenofobija baudžiamosios teisės priemonėmis priėmimo aplinkybes, taip pat šio sprendimo panaudojimą siekiant lygaus teisinio totalitarinių režimų nusikaltimų vertinimo bei šio nusikaltimo apibrėžimas pagal Lietuvos baudžiamąją teisę. Antroje straipsnio dalyje aptariamos pirmosios dvi pagal šį straipsnį iškeltos vadinamosios Petro Stankero ir Algirdo Paleckio bylos. Pirmoji jų buvo nutraukta po ikiteisminio tyrimo, o antrojoje paskelbtas išteisinamasis nuospren-*

dis pirmosios instancijos teisme (šiuo metu apskųstas apeliacine tvarka). Analizuojant viešai prieinamą informaciją, atkreipiamas dėmesys, kad ir prokuratūra, ir teismas šias bylas vertino siaurai, neatsižvelgdamas į ypatingą neigimo nusikaltimų prigimtį; diskutuojama dėl teismo argumentacijos pagrįstumo (pvz., abejojama teismo teiginiu, kad neigimo nėra, jeigu yra remiamasi nuomone, kuri numato neigimą (Paleckio byla), ir aptariami kiti įvairūs probleminiai aspektai (*pvz., kaltinamųjų kaltės įrodymo*). *Taip pat keliamas klausimas, ar atvejai, kuriais mėginta pritaikyti šią Baudžiamojo kodekso normą, iš principo buvo tinkami šios ypatingos normos taikymui, kadangi pirmieji taikymo rezultatai leidžia teigti, kad panašiais atvejais nusikaltimas tampa faktiškai neįrodomas. Todėl šią normą vertėtų taikyti mažiau kontroversiškoms situacijoms, ypač atsižvelgiant į ypatingą jos kilmę. Pabrėžtina, kad šiame straipsnyje neanalizuojama fundamentali „neigimo nusikaltimų“ problema, t. y. jų santykis su nuomonės ir žodžio laisve, o esamas teisinis reguliavimas priimamas kaip teisinė tikrovė.*

Reikšminiai žodžiai: *Lietuvos baudžiamoji teisė, sovietinio režimo nusikaltimai, nacistiniai nusikaltimai, tarptautinė baudžiamoji teisė, vienodas totalitarinių režimų nusikaltimų teisinis vertinimas, neigimo nusikaltimas, Holokausto neigimas.*

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