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THE CHALLENGES IN APPLICATION OF CRIMINAL LIABILITY FOR THE SPREAD OF HATE SPEECH

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Abstract. *An ever-increasing proportion of cases of hate speech appear in virtual space, especially in light of today's current events, such as the difference of opinion on the prevention of a past pandemic, the issue of homosexuals in the country or the ongoing war in neighbouring countries, as a result of which not only discussions take place in the virtual environment, but also various statements that can be considered hate speech can often be found. In addition, the case law of the European Court of Human Rights (the ECHR), on some issues, requires corrections of the imperfections of the Lithuanian legal regulation, introducing a different and often even opposite approach to the regulation of criminal responsibility for spreading hate speech and its application in Lithuania. As a result, it is necessary to constantly assess and monitor whether Lithuania's position on criminal liability for spreading hate speech still meets international standards and what are the latest problems encountered when applying this criminal liability. Therefore, the purpose of the research is to analyse the peculiarities and problems of the Lithuanian legal regulation of criminal liability for spreading of the hate speech and its application in case law in the context of the case law of the ECHR. So, the tasks of the research are based on two main area of this analysis, i.e. the challenges in Lithuanian criminal law of qualifying the spread of hate speech as a criminal offense, the challenges arising in Lithuanian case law regarding the assessment of dangerousness, incriminating criminal liability for spreading hate speech, and together these issues are evaluated in the context of the case law of the ECHR. The article uses research methods such as systematic analysis, document analysis, the deduction analysis, comparative analysis and generalization methods. The analysis of this article substantiated the difficulties that arise not only in classifying the dissemination of hate speech as a criminal act, especially in assessing the evaluation of the content of hate speech and the incrimination of the qualifying features of publicity, but also significant challenges in the case law of Lithuanian courts, when the assessment of the dangerousness of the criminal offense for spreading hate speech is based on four essential criteria, however, they are often given different evaluative weight, or even one or the other is not evaluated at all or is evaluated contrary to even the international case law of the ECHR.*

Keywords: *hate speech, criminal liability, hate crimes, seriousness of crime.*

Introduction

Criminal liability for spreading hate speech has existed in Lithuanian criminal law since the introduction of the new criminal code. However, the provisions of Article 170 of the Criminal Code of the Republic of Lithuania intended for this purpose did not solve essentially all significant problems related to the application of such criminal liability during the entire period of more than twenty years of existence, which is substantiated by the ever-increasing case law of higher courts in this area, explaining the problems of applying such criminal liability. Moreover, the case law formed by the European Court of Human Rights on some issues requires corrections of the imperfections of the Lithuanian legal regulation, introducing a different and often, even opposite approach to the regulation of criminal liability for spreading hate speech and its application in Lithuania. As a result, it is necessary to constantly assess and monitor whether Lithuania's position on criminal liability for spreading hate speech, not only regulation, but also the rapidly developing case law, still meets the international standards

formed by the European Court of Human Rights and what are the latest problems encountered when applying this criminal liability.

In addition, this topic is becoming more and more relevant as the Internet expands dramatically and more and more parts of life move to a digital environment, which is not only more accessible to various individuals, but also provides a perfect medium for hate speech. As a result, an ever-increasing number of cases of hate speech appear in cyberspace, especially in light of today's current issues, such as differences of opinion over past pandemic prevention, the issue of homosexuals in the country, or ongoing war in neighbouring countries, as a result of which not only discussions take place in the virtual environment, but also various statements that can be considered hate speech can often be found. This topic is also relevant, because often cases of hate speech are not reported to law enforcement authorities, and when they are reported, pre-trial investigations are not always initiated, because in order to answer significant questions related to the application of such criminal liability, it is necessary to carry out an extensive analysis of the case law, which is ambiguous on certain issues. This justifies the relevance of the criminalization process in this area and the need to reassess it. Especially, since the hate speech as a criminal act is not widely studied in the scientific literature, the majority of scientific research is devoted to discussing hate crimes, and the research conducted is not relevant in the context of the increasing number of the case law. It should be noted, that only the provisions of Paragraphs 2-3 of Article 170 of the Criminal Code of the Republic of Lithuania and the practice of their application will be analysed in more detail, because these legal provisions provide criminal liability for spreading of the hate speech.

The object of the research – the Lithuanian legal regulation of criminal liability for spreading hate speech and its application in judicial practice.

The aim of the research – to analyse the peculiarities and problems of Lithuanian legal regulation of criminal liability for spreading hate speech and its application in case law in the context of the case law of the European Court of Human Rights.

The tasks of the research:

1) to analyse the challenges in Lithuanian criminal law of qualifying the spreading of hate speech as a criminal offense;

2) to identify and examine the challenges arising in the practice of Lithuanian courts regarding the assessment of dangerousness, incriminating criminal liability for spreading hate speech;

3) to assess the situation of criminal liability for spreading hate speech in the context of the case law of the European Court of Human Rights.

Methodology of the research: depending on the topic, goals and objectives of the scientific article, the following research methods are used: the document analysis method is used in detailing the analysed issues in legal regulation and case law; the systematic analysis and comparative analysis methods are used when comparing legal provisions and case law as well as Lithuanian regulation and European Court of Human Rights case law; the deduction analysis method made it possible to define specific problems arising in legal practice from the general requirements, while the generalization method helps to systematize the entire analysis and to provide structured conclusions.

Abbreviations in the research:

1. the CC – the Criminal Code of the Republic of Lithuania;
2. the Court of Cassation – the Supreme Court of Lithuania, Criminal division;
3. the ECHR – The European Court of Human Rights.

Challenges to the qualification of hate speech as a criminal act

Challenges of assessing the objective side of spreading of hate speech as a criminal act

It is important to start with that fact that the Paragraphs 2-3 of Article 170 of the CC are the only provisions in Lithuanian criminal law that provides criminal liability for spreading of the hate speech and define such act as a criminal act. The Paragraph 2 of Article 170 of the CC provides criminal liability for those, who publicly mocked, disparaged, incited hatred or incited discrimination against a group of people or a person belonging to it because of age, gender, sexual orientation, disability, race, colour, nationality, language, origin, ethnic origin, social status, faith, beliefs or opinions, for that, such person is subject to a fine or restriction of freedom, or arrest, or imprisonment for up to 2 years. Meanwhile, Paragraph 3 of Article 170 of the CC criminalizes cases when, a person has publicly incited violence, physical violence against a group of people or a person belonging to it because of age, sex, sexual orientation, disability, race, colour, nationality, language, origin, ethnic origin, social status, faith, beliefs or opinions, or funded or otherwise materially supported such activities, for which such a person is punished by a fine or restriction of liberty, or arrest, or deprivation of liberty for up to 3 years.

Although when incriminating the criminal acts enshrined in Paragraphs 2-3 of Article 170 of the CC, it is necessary to determine the totality of objective and subjective qualifying features. Only due to the assessment of certain qualifying features of the objective side, certain difficulties and discussions arise, and one of them is the way of committing this act, i.e. the act must be done in public, by some public statement. This means that mockery, contempt, incitement to hatred, incitement to discrimination, violence or physical confrontation with a group of people or a person belonging to it, must be done in public, on the grounds specified in the CC. For statements of this public nature, it is immaterial whether the response from the audience is immediate or not, as for example in a "live" event (ECRI General Policy Recommendation, 2016). Hate crimes of a discriminatory nature are usually committed in public places or in a public information dissemination space, including electronic or virtual space and may also be committed in a private space or other non-public place (Methodological Recommendations, 2020). However, it should be noted that the qualifying feature of publicity in the context of these acts is understood somewhat more narrowly than in the case of violation of public order, whereas when it comes to hate crimes - publicity needs to be a little wider, i.e. not only the theoretical possibility that someone will read or hear hate speech, but it must actually be made public and a certain group of people must be able to get acquainted with that information publicly (Guliakaitė, Jurevičiūtė, 2021). This is substantiated by consistent case law, which states that when qualifying acts under Paragraph 2-3 of Article 170 of the CC, it is necessary to establish that public statements of an offensive, derogatory, discriminatory nature, as well as calls to violence, were directed at a certain undefined circle of readers or listeners to directly bias them against a certain a group of people or a person belonging to it on discriminatory grounds (the Court of Cassation rulings in criminal cases No. 2K-91-976/2018, No. 2K-206-693/2017 etc.). As a result, case law aims to consistently maintain a position regarding this qualifying feature and even in opposite situations, when using obscene words, in the absence of other outsiders around who could have heard these statements or formed a certain impression about the victims due to them. This leads to the non-application of criminal liability (Vilnius Regional Court ruling in criminal case No. 1A-416-885/2022). Thus, publicly uttered statements of a discriminatory, offensive or derogatory origin or incitement to active physical acts of a violent nature, must be accessible to an undefined circle of readers or listeners, and for this, it is not enough to have a theoretical possibility that this may happen.

At the same time, it is necessary to take into account the means by which hateful statements are expressed. The criminal acts under consideration can be committed in various places, but the most favourable place for this is the internet space, as can be seen from the abundant case law on this issue. While online hate speech is considered public, it is important to note that private conversations are not considered public, given the individual's right to privacy, and should not be viewed as hate speech (Bayer, Bard, 2020). In this case, the Internet, where hate speech is most commonly spread, fully meets this criterion of publicity. Spreading hate speech on the Internet in itself cannot be considered a sufficient act, without evaluating whether the place of dissemination of information can be considered public, having the opportunity to get acquainted with an indefinite circle of readers, or whether it was only a private message in a closed circle of like-minded people. As a result, there are situations, where a comment based on hate speech is written on a public political "Facebook" account, the following audience of which is not against homosexual persons, but on the contrary - supports them - this was the basis for not applying criminal liability (Šiauliai Regional Court judgment in criminal case No. 1A-94-519/202).

Also, in order to incriminate hate speech, not the most complicated feature of the objective side, is the appropriate assessment of the content of hate speech. At this point, it is necessary to note that in the opinion of the ECHR, incitement to hatred does not necessarily require an incitement to commit a certain violent or other criminal act, but an attack on persons committed by insulting, ridiculing or defaming certain sections of the population and groups is sufficient (ECHR decision in case No. 15615/07). Also, in the practice of the Court of Cassation, it is noted that the clarification of the meaning of the statements (communication act) becomes extremely important, because, in qualifying the act according to Paragraphs 2-3 of Article 170 of the CC, it is sufficient to determine whether this criminal act was aimed at mocking, disparaging, promoting hatred or discrimination against specific persons group defined in this standard (the Court of Cassation ruling in criminal case No. 2K-206-693/2017). Thus, the Court of Cassation emphasizes that the most important indicator, is the assessment of the content of the language itself and thus the meaning of the content of the language is highlighted, which is a certain sequence of thoughts of the subject of the criminal act, a reflection of this thinking process. However, the ECHR needs to assess both the manner in which the statements are made and whether they may directly or indirectly lead to the occurrence of harmful effects (ECHR decision in case No. 64569/09). This complicates the evaluation of the content of the hate speech itself, since it is important to evaluate not only from a formal point of view, but also more broadly, taking into account the context of such a case, and in more detail, looking for clearly unexpressed, but implied incentives for the harmful effects of hate speech.

Linguistics specialists play a significant role in solving this question, conducting a study that requires special knowledge and providing certain assessments based on the knowledge of linguistics, a study conducted by a journalist or a language specialist whose purpose is, if necessary, to help the court correctly understand the comment in the linguistic sense, to limit the dissemination of information from opinion, etc. (the Court of Cassation ruling in criminal case No. 2K-293-788/2018). However, as a general rule of criminal procedure, they cannot decide questions of law, although such specialized knowledge is widely relied upon in this category of criminal cases, and taking into account the fact that the court itself often directly assesses the content of hate speech - various problematic situations arise. As a result, in case law, one can find controversial cases where the court's position contradicts the assessments of persons with special knowledge, as stated in the criminal case No. 1A-618-348/2022 of Kaunas Regional Court, that although the conclusion presented by the Journalists' Ethics Inspector's

Office assessed a person's specific statement only as an informational act of communication, which aims to clarify one's understanding of homosexuals, to spread this information widely, to express one's opinion. The court, however, noted that mockery or insults in themselves can be independent non-inciting communicative acts. Therefore, the fact that the comment was not intended to encourage other persons to take violent actions, does not remove the person from criminal liability and such an act is considered a case of hate speech. Thus, it justifies a complex solution to this issue in order to properly determine the content of hate speech, and as can be seen, only a formal assessment based on special knowledge is not enough, but a detailed and flexible assessment of the content of hate speech is necessary.

In addition, in case law, you can find more procedural decisions, when the obvious content of hate speech, for various reasons, was evaluated in the opposite way. One such case is the assessment of the Vilnius Regional Court in criminal case No. 1A-452-898/2019, where it was assessed that the slogan "Lithuania for Lithuanians" itself was not regarded as hate speech, although, in the author's opinion, such a statement contains a sufficiently obvious basis for national discrimination, which is widespread in Lithuanian society as well. However, it was only after considering the context of this verbal act of physical violence that it was recognized as meeting the definition of a hate crime. In another case No. 1A-94-519/2023 of Šiauliai Regional Court, doubts can also be seen regarding the appropriate assessment of the content of hate speech. After concluding that the content of a particular comment is against morals, negative, derogatory in nature, but it was still considered a random and reckless action. Taking into account its content, i.e. it was assessed that the comment is laconic, non-specific in nature, the grammatical form of the word “destroy” used in the comment is not the imperative mood of the verb, it is not motivated in detail. In another criminal case of the Vilnius Regional Court No. 1A-416-885/2022, the situation of the current social space in Lithuania was taken into account and the lexicon of a person's uncensored nature was assessed as an attempt not to offend persons of another sexual orientation, but as a substitute for swear words. Such cases of assessment of the content of hate speech submitted by the courts raise reasonable doubts, because in the case of obvious hate speech, the competent court evaluated its content in the opposite way for various reasons, without properly and rationally justifying it, which is completely contradicted by the previous evaluations.

All this just proves that the evaluation of the content of possible hate speech itself is a subjective matter, depending on the consciousness of the evaluator, and even in the case of obvious hate speech, this may not necessarily mean the application of criminal liability.

Challenges of assessing the subjective side of spreading of hate speech as a criminal act

Considerable difficulties are faced with the assessment of the subjective side of the criminal act established in Paragraph 2-3 of Article 170 of the CC, since it is a composite set of elements, where it is not enough to establish intent. However, other elements of the subjective side must also be justified. The easiest element of the subjective side of this criminal act is the determination of direct intent, whereas the offender must understand that by making public statements he publicly mocks, denigrates, incites hatred, incites discrimination against a group of people or a person belonging to it, or incites public violence or physical assault against them, and intends to do so (the Court of Cassation ruling in criminal case No. 2K-86-648/2016). Therefore, indirect incitement of hatred or reckless incitement of hatred is impossible, because the main criterion to be determined in cases of this nature is prejudice, which must be deep within the offender and only certain circumstances call forth that expression of prejudice, i.e. that said hate speech, given the favourable conditions.

Another important aspect, when qualifying acts according to Paragraph 2-3 of Article 170 of the CC, is a necessity to establish that such public statements of the perpetrator, as well as calls to violence, were intended to directly influence a certain undefined circle of readers or listeners, that is, to set them against a certain group of people or belonging to it, or a person belonging to it because of their gender, sexual orientation, race, nationality, language, origin, social status, faith, beliefs or opinions, incite hatred, form a contemptuous, discriminatory attitude towards them or encourage the use of physical or mental violence against them (the Court of Cassation ruling in criminal case No. 2K-86-648/2016). As a result, in this case, it can be said that this is the goal of the perpetrator. Through his expressed hostility in words, writings, and various gestures, the perpetrator must seek to incite other persons (an undefined circle of persons) to hate, discriminate, to commit violence or physical confrontation against a group of persons described by the aforementioned characteristics or a person belonging to that group. This is the second element of the subjective side of the criminal act, which must be proven, which not only complicates the process of proving such a criminal act, but also its assessment.

Moreover, an important feature of hate crimes is the subjective feature - the motive and incentives, which are defined as the purposeful, targeted and specific motivation of the act of a racist, homophobic, discriminatory nature (Methodological Recommendations, 2020). This means that certain internal incentives that encourage the perpetrator to express hate speech would be determined on the basis of the characteristics of the group or individuals belonging to that group. As a result, the victim itself does not necessarily have to belong to a group with characteristics defined in the criminal law. It is important, that the perpetrator's motive for committing unlawful acts was precisely the thought that a person belongs to that group, or perpetrator associated the victim with certain characteristics, or assigned to a corresponding group defined by certain characteristics. In this regard, in the case No. 25536/14, the ECHR noted that some victims of hate crimes are not selected because they have certain characteristics, but rather because of their association with another person who actually or allegedly has the characteristic in question and this connection may take the form of the victim's membership in an association with a certain group or the victim's actual or perceived connection to a member of a certain group. In such cases, even the perpetrator's wrongly perceived affiliation of the victim to a group of people characterized by certain characteristics does not remove criminal liability, because the perpetrator's goal and motives for illegal behaviour are usually aimed at a real violation of the natural rights and freedoms of a group of people or individual members of it defined by certain characteristics provided by law (Methodological Recommendations, 2020). As a result, the important motive of hatred, which caused such behaviour of the perpetrator, is not aimed at the person himself as such, but is caused precisely to the group, or a person belonging to that group with the previously mentioned characteristics.

Thus, assessing the subjective side of hate speech as a criminal offense is a complex process. It requires a complex assessment, due to the fact that the subjective side consists of as many as three elements that must be reliably proven in the case data, which complicates the application of criminal liability.

Challenges arising in case law regarding the assessment of the dangerousness of spreading of hate speech in criminal cases

One of the most common questions when assessing hate speech is - when does the criminal liability arise for this act in general, when does one or another hate-motivated hostile statement against a certain group or person belonging to that group, on the basis of age, gender, sexual orientation, disability, race, nationality, language, origin, social status, faith, beliefs or opinions, is considered so dangerous that it should be criminally liable. The problem is that the

criminal acts established in Paragraph 2-3 of Article 170 of the CC have a formal composition, i.e. the Paragraph 2 of Article 170 of the CC provides criminal liability for those, who publicly mocked, disparaged, incited hatred or incited discrimination against a group of people or a member of it because of age, gender, sexual orientation, disability, race, colour, nationality, language, origin, ethnic origin, social status, faith, beliefs or opinions, in the meantime, the paragraph 3 of Article 170 of the CC criminalizes cases when, a person has publicly incited violence, physical violence against a group of people or a person belonging to it because of age, sex, sexual orientation, disability, race, colour, nationality, language, origin, ethnic origin, social status, faith, beliefs or opinions, or funded or otherwise materially supported such activities. In this case, dangerousness is one of the criteria that determines whether criminal liability should be applied. Also, the Court of Cassation has stated that criminal liability in a democratic society must be perceived as an *ultima ratio* measure, used to protect protected legal goods and values in cases where the same goals cannot be achieved with milder measures (the Court of Cassation ruling in criminal case No. 2K-262/2011). Therefore, it is important to assess when hate speech should be criminalized and when it should not be an excessive use of state coercion. For this purpose, it is important not to formally evaluate this feature of the criminal act, but it is necessary to take a deeper look at the dangerousness criterion and properly justify it, since it is determined by many factors, such as the way of committing the criminal act, motives, goals and other circumstances.

After evaluating the case law formed by the ECHR and the case law of the Lithuanian courts, it is obvious that that criminal liability for spreading hate speech is determined based on certain criteria – in this case, the systematicity of illegal actions is relevant, indicating both intent and dangerousness, the personality of the author of the comment, the way and context of information dissemination. However, these criteria, as noted in the legal doctrine, cause certain problems in cases of this category, because in the absence of uniform case law, they are sometimes given different weight and there are even cases, when the court does not evaluate them at all or evaluates them contrary to the previously developed case law (Guliakaitė, Jurevičiūtė, 2021). This is substantiated by the following analysis of case law.

A way to spread hate speech

In a more detailed assessment of the above-mentioned criteria defining the dangerousness of the act in question, one of the above-mentioned circumstances is discussed - the method of disseminating information, which has come from the case law of the ECHR, i.e. in case No. 64569/09, the ECHR elaborated on the content of this criterion, noting that anonymity on the Internet can promote the free flow of ideas and information, also taking into account the ease, volume and speed of information dissemination on the Internet and the sustainability of information once made public, which can significantly amplify the effects of illegal speech online compared to traditional media. In another case No. 41288/15, the ECHR provided an even more detailed assessment and justification of this issue, noting that the Internet in Lithuania is a serious medium in which hatred against sexual minorities is incited. Consequently, the mere posting of comments on the "Facebook" social network is a sufficient basis for establishing a violation. This criterion is also discussed in the case law of Lithuanian courts, where it is noted that the simplicity, volume and speed of information dissemination on the Internet and the persistence (permanent nature) of information, once disclosed, can make the impact of illegal speech on the Internet much more difficult than in the case of traditional media, which increases the danger of the act (Vilnius Regional Court judgment in criminal case No. 1A-335-209/2016). However, in the case law of the Court of Cassation, on this basis, one

can also find such assessments that raise doubts about their compliance with the case law of the ECHR. For example, in criminal case No. 2K-86-648/2016, where the Court of Cassation, although found that the content of a specific comment is negative, derogatory, directed against a group of homosexual people, however, it was still decided that such a speech could not cause a real threat to violate the equality and dignity of the group of homosexual people, as well as realistically incite portal readers to do violence against this group of people, judging by the brevity of the specific comment, the words used in it, the non-specific nature of the comment. Such reasons of the court are debatable in view of the already mentioned ECHR decision in case No. 41288/15, where such a position of the courts of the Republic of Lithuania was very strictly evaluated. Legal doctrine also questions such assessments by the Court of Cassation and notes that, based on the same case law of the ECHR, a comment of this type, which was made public, is likely enough to be recognized as inciting hatred towards sexual minorities, as it was aimed at the use of physical violence, it does not matter that such coercion was not actually used and was not systematic (Mizaras, 2020). In this case, in the decision of the Court of Cassation in question, although the comment was not published on a social network, it was published on a popular news portal that is accessible to an undefined circle of individuals. Nevertheless, suitable cases to be evaluated by this criterion can be found in other cases, such as criminal case No. 1A-618-348/2022 of Kaunas Regional Court, where the fact that the hate speech comment was written publicly - on a popular website, under an article discussing a topical and widely discussed topic in society - the LGBT march that took place, was specifically assessed, therefore, precisely because of its speed, it undoubtedly increases the danger of the act, and can cause long-term negative consequences.

Although the case law of the ECHR regarding the method of disseminating information is consistent, but in the case law of Lithuanian courts, one can find contradictory assessments of this criterion.

The personality of the perpetrator

Another aspect that is widely evaluated in case law when criminalizing the spread of hate speech, and which is also based on the case law of the ECHR - the personality of the author of the comment. The general trend is that the more prominent the person, the larger the readership the commenter has, the more his words and opinions reach a larger circle of readers or listeners and the more persuasive the words become. Also relevant in this matter is the statements of politicians, since in case No. 15615/07, ECHR made the position clear, that politicians, because their words are more persuasive, especially during elections, have a larger circle of listeners and followers, and therefore politicians are subject to a stricter liability for spreading hate speech than those who do not have such a circle of readers or listeners. However, in the case law of Lithuanian courts, one can find cases where the meaning and evaluation of this criterion is rejected, such as in the judgment of the Klaipėda Regional Court in criminal case No. 1A-209-361/2016. It was noted that the criminal act in question can be committed by both a public and non-public person, and its dangerousness is not associated with the subject of the criminal act, but with the way it was committed (the information must be made public) and with the content of the disseminated information. In this case, one cannot agree with such a position of the court, since the subject of the criminal act is also of great importance, i.e. the extent to which the comment can be made public, taking into account the personality of the author of the comment, especially since the case law of the ECHR takes the opposite position. Moreover, in another criminal case No. 1-11-361/2018 of the same court, the court even expressed the opposite position on this issue, where the assessment of the perpetrator's personality is also

presented in the opposite direction of the practice of the ECtHR, noting that disapproval of Lithuania's position on important political issues would still be understandable if he were a member of a political party, participated in elections and expressed criticism of Lithuania's current situation in a politically correct form. In this case, the court takes into account the subject's status in society, and it was the lack of political status that was assessed as the basis for criminal liability, making a completely unfounded conclusion that hate speech can be legitimately spread by state politicians. This only shows that in the case law of the Republic of Lithuania, the influence of personality assessment on the degree of dangerousness is currently not uniform and is still developing.

Systematicity of hate speech

Meanwhile, due to the other criterion - the systematicity of the written comments, it is obviously not evaluated in the same way in case law and it causes a lot of ambiguities, whereas in some court procedural decisions, a one-time action is sufficient, while in others a systematic action is required. In the legal doctrine, it is also noticeable that pre-trial investigations are often not started or terminated when a person has written one comment and in this way, the law enforcement authorities state that neither the person's intention nor greater danger has been established (Velička ir kt., 2021). The importance of this criterion is also noted in case law, since there are a number of case law in which the number of comments written in hate speech led to the application of criminal liability, noting that the degree of dangerousness of the person's actions is increased by the fact that he did this act continuously (convicted for publishing 13 records in the electronic space), for a long period of time, purposefully speaking against the community of believers, in order to mock and despise them (Klaipėda Regional Court ruling in criminal case No. 1A-209-361/2016). Also, in another criminal case, a person was convicted of 12 hostile statements on the basis of nationality on the Internet, therefore, according to the court, such actions cannot be considered as random and reckless (Judgment of Vilnius Regional Court in a criminal case No. 1A-335-209/2016). Such decisions made by the courts substantiate that when the courts determine dangerousness and decide on the application of criminal liability, it is easy to do so when a person does it continuously, tendentially and purposefully.

However, there are also contrary cases where the courts pass a guilty verdict for a single utterance of hate speech. This was also done by the Court of Cassation back in 2010, when a person was found guilty of spreading hate speech for uttering a single phrase “negre” (eng. negro), which the court recognized as mockery of a person because of his race (the Court of Cassation ruling in criminal case No. 2K-91/2010). Also, in the subsequent case law, such a position formed by the Court of Cassation was confirmed, which corresponds to the case law of the ECHR, when a single phrase in an online comment clearly expressed contempt for a group of people of a different sexual orientation, obviously humiliating and belittling them (Ruling of Klaipėda Regional Court in a criminal case No. 1A-411-107/2011). However, at the same time, in subsequent case law, one can find decisions made by such courts, when the opposite position is established. For example, in the ruling of the Kaunas District Court in criminal case No. 1A-131-579/2019, the court, passing the acquittal verdict, stated that it is not enough for criminal liability to arise from only one laconic unethical speech in the public internet space, as well as to establish a direct concrete intention to incite internet users against sexual minorities, promote hatred towards them. In another case, the content of the comment was found to be unethical, negative, derogatory in nature, but it was still seen as a random and reckless action (Šiauliai Regional Court judgment in criminal case No. 1A-94-519/2023). Such

a position of the court shows that when examining the case, great importance was attached to the number of written comments, and not to the evaluation of the content. However, it should be noted at this point, in the already mentioned ECHR case No. 41288/15, the ECHR takes a different position, stating that the dangerousness of hate speech should not be linked to the formal feature - systematicity, but to the content of the speech, nor should the feature of systematicity be used as the main criterion in the matter at hand. It is also noted in the recommendations of the General Prosecutor that even in the case of isolated illegal actions (comments), the act may attract criminal liability, taking into account the nature of such actions (comments), the reality of the threat to the values protected by the law, and the public reaction (Methodological Recommendations, 2020).

Thus, the case law of Lithuanian courts with regard to the systematicity criterion is inconsistent and multifaceted. Sometimes, a single statement is given a sufficient degree of dangerousness and criminal liability is applied and sometimes, the number of comments is taken into account, rather than the content of the expression itself. Such position of the Lithuanian courts should be viewed critically, especially when the courts associate intent and the seriousness of the crime with the number of comments and consider it as one of the most important circumstances determining the application of criminal liability, which does not correspond to the case law formed by the ECHR.

The context of hate speech

Another relevant criterion in deciding on the application of criminal liability and assessing the seriousness of the criminal act in cases of this category - the context of hate speech. The importance of the context assessment criterion is emphasized in more than one case, when the ECHR assesses the dangerousness of speech, according to which, the more tense the context is in relation to individuals or a group of individuals in that country or area, the more likely it is that certain disseminated information will be recognized as spreading hatred (see ECHR cases No. 1813/07, No. 41288/15 and etc.). Meanwhile, the case law of Lithuanian courts on this issue is ambiguous. For example, in criminal case No. 1A-452-898/2019 of Vilnius Regional Court, it was assessed that the slogan “Lithuania for Lithuanians” itself would not be considered as hate speech, however, the context of this verbal act of physical violence was also assessed, which determined the decision to establish a case of hate crime. Meanwhile, in another case No. 1A-94-519/2023 of Šiauliai Regional Court, the opposite situation occurred, when exactly the context of hate speech decriminalized such a situation, i.e. although the content of a particular comment was judged to be against morality, negative, derogatory in nature, it was judged that such a comment was written on a public political “Facebook” account whose following audience is not anti-homosexual, but on the contrary, supportive of them. Such a position of the court raises certain doubts, because the mere fact that hate speech was directed at a group of persons, who were the basis of such hate speech, cannot be objectively justified and mean that such an act was not dangerous, and cannot automatically legalize the content of hate speech. As another questionable case of the decriminalization of the context of hate speech, one can mention the assessments of the Vilnius Regional Court in criminal case No. 1A-416-885/2022, when taking into account the current situation of the social space in Lithuania, a person's lexicon of an uncensored nature was assessed as an attempt not to offend persons of a different sexual orientation, but as a substitute for swear words. As a result, the mere fact that an obvious case of hate speech was expressed in an abstractly defined context of the current social space, without a detailed and rational justification, but only by implicitly defining it, cannot objectively justify the case of the use of hate speech. Doubtful arguments can also be

found even in the case law formulated by the Court of Cassation, i.e. in the ruling of the Court of Cassation in criminal case No. 2K-86-648/2016, certain contradictions can be seen even in the same procedural decision. In one part, the court states the importance of this criterion, noting that the topic of the rights of sexual minorities is relevant in Lithuania, it is surrounded by a certain social tension, the negative attitude of part of society towards sexual minorities, however, at the same time, the court undermined this criterion, noting that such a general social context and the specific context of the comment considered in the case are not so tense as to justify the application of criminal liability by itself. As a result, such a position of the court remains ambiguous and makes it even more difficult to apply criminal liability for spreading hate speech, whereas it is not enough to simply establish a tense context, which can be evaluated subjectively anyway, and it is also necessary to be closely related to the specific circumstances of the case of spreading hate speech, which can eliminate criminal liability.

Thus, when examining the case law, it was noticed that on the one hand, the aforementioned discussed cases substantiate the meaning of the context, establishing a case of hate speech, on the other hand, the reasoning and position of the courts on similar issues is not the same, has dubious justification and does not always meet international standards.

Conclusions

After analysing the objective side of the spreading of hate speech as a criminal act, it was found that that the most ambiguous evaluations can be found due to the evaluation of the content of hate speech itself, which is not only subjective, but also its evaluation is often belittled and deviates from the formulations of the real content due to the unjustified emphasis of other criteria. Likewise, the content of the qualifying feature of publicity in the context of these acts must be broader and realistically implemented.

Meanwhile, the assessment of the subjective side of the spreading of hate speech in the CC is significantly complicated due to the abundance of incriminating subjective qualifying features, when it is not enough to determine only the perpetrator's intention to commit such a crime, but it is also necessary to determine the perpetrator's corresponding criminal purpose, motives and incentives related to the spread of hate speech, which significantly complicates the process of proof itself.

The case law of Lithuanian courts in the context of spreading of hate speech is still developing and it is possible to find not only contradictory evaluations of cases of hate speech, but also significant deviations from international practice. Although the prevailing position in the case law of Lithuanian courts is that the assessment of the dangerousness of the criminal offense for spreading hate speech is based on essential criteria, such as the systematicity of illegal actions, the personality of the author of the comment, the method and context of information dissemination, however, the analysis substantiated that they are often given different evaluative weight and there are even cases when one or the other remains undervalued or is evaluated contrary to the previously developed case law, even the international case law of the ECHR.

After analysing the case law of Lithuanian courts, problematic areas were identified regarding the assessment of all the above-mentioned four criteria, when applying criminal liability for spreading hate speech. However, the ambiguous assessment of the criterion of systematicity raises more doubts, especially when one-time cases of hate speech are evaluated from a formal point of view, justifying obvious cases of hate speech. Another, even more questionable criterion of the context of hate speech, the content of which is too broad, and in the case law of Lithuanian courts, it was often not objectively and rationally justified. Such

subjective evaluations in case law not only unjustifiably legitimize obvious cases of hate speech, but also form case law contrary to international standards.

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