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Identifying and understanding the concept of hate crime in criminal law - the jurisprudence of the European Court of Human Rights

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Abstract. The continuous development of society has led to the birth of conflicts between the human beings who share it. Therefore, the many human characters and the continuous existence of differences of any kind between the individuals of a society led to the birth of the concept of hate crime. The internal motive of this criminal activity is given by the motive of the deed, which is the one on which the feeling of hatred takes shape in the mind of the author of the deed. Close by, we will draw defining lines of the perpetrator's way of thinking before the implementation of the illegal activity, as well as the steps that the competent bodies take in the criminal investigation.

1. Introduction

The members of a society develop continuously with the irreversible passage of time, which leads to the birth of conflicting states between them. For a good survival of self-pride, each person tends to compare himself to another or to think that he differentiates himself from someone on discriminatory grounds.

Thus, this paper aims to draw defining lines of the concept of hate crimes or so-called hate crimes. Hate crimes are those violent manifestations of discrimination against certain persons that have a double impact: Both on the direct victim of the act of aggression and on the social group of which he is a member. This type of crime affects the foundation of stability in society, creating cracks in human relationships, in our own mental development, and also in public safety and order. Therefore, reducing such a phenomenon is particularly important, to the same extent, for the safety of the vulnerable person, as well as for the proper development of a healthy society.

2. General notion of hate crime

Hate crime is based *on the notion of hate*. Hate crimes are identified when the perpetrator commits them because he has certain prejudices about one or more of the elements related to race, ethnicity, nationality, language, religion, etc. gender, sexual orientation, political opinion or membership, wealth, social origin, age, disability of the victim, etc.

The Commission of such a crime is based on the existence of a mobile device, which leads to the retention of an aggravating circumstance to the individualization of the punishment.

For example, the Criminal Code provides for a series of criminal acts having the same common motive related to discrimination such as: Incitement to hatred or discrimination, preventing the exercise of religious freedom or abuse of office on discriminatory grounds. Also, a number of other facts of the same specific character are regulated in Emergency Ordinance no. 31 of 13 March 2002 on the prohibition of organizations, symbols and facts of a fascist, Legionary character, racist or xenophobic and promoting the cult of persons guilty of genocide and war crimes.

2.1. Structure of hate crime

Hate crimes always have two indispensable elements: *A criminal offense committed with a motive based on prejudice*, as stated above. The first element refers to the existence of an act which constitutes a crime. According to Article 15 of the Criminal Code, which is marginal entitled *the essential features of the offense*, in order to be in the constituency of a criminal offense, it must be found in an act provided for by the criminal law, to be committed with guilt, unjustified and also imputable to the person who committed it. Thus, this element presupposes the basic crime in the case of this complex phenomenon called hate crimes.

At the same time, the act provided by the criminal law must be committed with a certain motive, a prejudice. This is what sets this crime apart from others. The perpetrator of an anti-social act, in carrying out his illegal activity, chooses his victim on the basis of discriminatory criteria such as race, language, ethnicity, citizenship or other similar factors that this individual has with other members of a group. Let's imagine a simple example of how we identify this type of discriminatory behavior. In a high school in the heart of Transylvania, a fire broke out. Initially, the criminal investigation bodies considered that the negligence of the heating pipes was the reason for this tragedy.

However, after the research carried out, it was found that this educational space is predominantly Hungarian high school students. The perpetrators were caught and admitted that they had resorted to this gesture to rid their commune of this breed. Therefore, even if the basic crime is the attempt at a qualified murder, this girl is classified as a hate crime.

2.1.1. The effect that these crimes have on society

Hate crimes are distinguished from other crimes by the fact that the perpetrator of the criminal offense is based on the execution of his criminal activity by sending a message to the person attacked or to the group to which he belongs. It is like an alarm signal. Therefore, there are a number of consequences found at the level of society.

In a first idea, this category of crimes violates the principle of equality between members of society. The rule of equality is also laid down in the Universal Declaration of Human Rights (UDHR). Article 1 of this international document states¹ that all human beings are free and equal in dignity and rights from birth. Also, if we refer to the current Civil Code², the rights of the child are recognized from the conception, but only if the child is born alive.

On the other hand, committing such an act has a much stronger impact on the victim. It is induced a sense of fear and a permanent vulnerability, because it presents a characteristic that it cannot change.

In a third argument, the effect of such behavior by the aggressor may have transposition among the community to which the victim belongs. Members of such a community can live with the idea of being possible victims in the future.

¹ <https://legislatie.just.ro/Public/DetaliiDocumentAfis/22751>

² Article 36, sentence I, Civil Code;

2.1.2. *The case-law of the European Court of Human Rights in relation to hate crimes*

In order to be able to identify the way of thinking of the perpetrator of the illicit act, the existence of a premeditation in carrying out the illicit activity, the implementation of the preparatory acts and the course of the anti-social act, we will refer to the case of the M.C. and A.C. v. Romania.

The basis of this case is an application (number 12060/12) which is brought against Romania under Article 34 of the Convention for the Protection of Human Rights and Fundamental freedoms. Thus, by application, any natural person, non-governmental organization or group of individuals who consider themselves victims of any violation by one of the Parties to this Convention of a protected and guaranteed right may refer the matter to the Court.

In the present case, the applicants M.C. and A.C., members of the LGBTI community, brought the case before the Court on the ground that the investigation into the ill-treatment motivated by discrimination against the community to which they belong was not useful.

In fact, on June 3, 2006, the applicants participated, along with others, in the annual gay March in Bucharest, organized by the NGO ACCEPT, which aims to support the LGBTI community. The March carried out had the support of the police, in order to ensure protection from the competent state bodies. At the end of the March, under the guidance of what the organizers of the March wrote in the leaflets with recommendations, including not to wear clothes that would distinguish their sexual orientation, the applicants and 4 other people who participated in the activity headed for the subway.

After they got into the subway, they were attacked by a group of six young men and a woman. The scene took place in public, by applying blows to the head and face, adding also blows with the feet. Also, during this attack, they used *the phrase Poponars continuously, go to the Netherlands!* Just after the attack, which lasted about 2 minutes, as the attackers were leaving the car, they hit the first applicant again. Z.E., a photographer who was also on the March, took some photos of the attack, which displeased the attackers and was assaulted by them.

The conduct of the criminal investigation begins with the filing of a criminal complaint by the two applicants and a representative of ACCEPT on the night of 3 to 4 June 2006, immediately after the illicit act took place. They reaffirmed that they did not bear any distinctive marks that would reveal the idea that they were returning from the gay March. They also claimed that the attackers had noticed them during the March (because they did not wear masks or anything to cover their face) and subsequently followed them, with the direct intention of harming them. They also told the competent authorities of the offensive remarks that were supported by the attackers throughout the attack.

The attitude of the police officers was one of indifference and advised them to refrain from filing a complaint, as they would meet, when confronted with the attackers, in court. A day later, photographer Z.E. brought to the police a series of photographs of the act of aggression in which the attackers had a visible face. Following his statements, one of the attackers could be identified. The first applicant was also able to identify, on the basis of 15 photos, another 2 aggressors. However, over the course of one year, the applicants sent letters, including to the Ministry of Internal Affairs, concerning the non-receipt of a reply and the lack of an effective investigation in question. In April 2007, the applicants were notified of the move of the case from Section 25 Bucharest to the Metro Police Service.

In the same day, police submitted a request to the Romanian Intelligence Service (SRI) to confirm or inform that the SRI officer *who had been identified among the attackers* was on an official mission that night.

On 24 May 2007, the SRI requested clarifications on the nature of the request. It was not until September 2007 that the police were able to obtain a statement from the RSA, who declared that he was outside the service constituency on that date and provided data on another person in the group of attackers. However, the actions taken by the competent bodies in deciding the case of identifying the other persons have remained unsuccessful. On June 12, 2007, the Metro Police Service received a list of 45 names and identification data of persons who had been fined for their attitude of opposition to the work being carried out.

One of the suspects was allegedly a supporter of the Steaua football club. As a result, investigators participated in 29 football matches between September 16, 2007 and December 13, 2009, in an attempt

to identify him. On February 12, May 14, August 4 and December 7, 2010 and March 10, 2011, investigators attempted to identify suspects in the metro stations.

Between June 12, 2007 and July 6, 2011, the prosecutor extended the deadline for completing the investigation 8 times, at the request of the investigators, but without any results. On 10 June 2011, the police authorities declared that, in their opinion, the investigation had to be closed and the prosecution had been requested not to start the criminal investigation in question. All complaints of the applicants were rejected.

Having no support from the Romanian authorities, the applicants, as individuals, turned to the European Court of Human Rights (ECHR). They argued for violations of Articles 3, 8 and 14 of the European Convention on Human Rights and Article 1 of Protocol No. 12 to the Convention. They argued that the investigation into hate crimes against homosexuals was not effective. Therefore, the Court has departed from the provisions of Article 3 of the Convention, according to which torture is prohibited, *no one may be subjected to torture or to inhuman or degrading treatment or punishment*. This article is in direct correspondence with Article 8, which states *that everyone has the right to respect for his private and family life, his domicile and correspondence*.

Also, in its procedural aspect, between Article 3 and Article 14 of the present Convention identifying *the prohibition of torture* there is a relationship of dependence in the sense that criminalizing the prohibition of torture is a subdivision of the methods of discrimination. *The exercise of the rights and freedoms recognized by this Convention shall be ensured without distinction based, in particular, on sex, race, color, language, religion, political opinions or any other opinion, national or social origin, membership of a national minority, wealth, birth or any other situation*.

Torture, inhuman treatment and degrading treatment, each of them, have a certain intensity in the way the aggressor operates toward the victim. It is interesting to note that the Government also brought into question the inadmissibility of the existence of an effective investigation, which the Court observed. The applicants used all the remedies available to them and challenged the prosecutor's decision. The Court notes that while the case was being moved between various police stations, the applicants asked questions about the progress of the case.

The state guarantees³ individual freedoms and rights, and at the same time ensures the internal and external security of citizens through democratic institutions. Thus, in his work, he has two types of obligations: *Material* and *procedural*. Within the material measures we identify positive measures such as taking the necessary decisions and measures useful for a good conduct of the criminal investigation, but also negative measures, referring to the obligation to abstain the judicial bodies to bring insults or to have inappropriate behavior toward discriminated persons.

The procedural measures also include carrying out an effective investigation, so that it must cumulatively fulfill the following characteristics: *Complete, prompt, efficient, public, expeditious and independent*. An effective investigation is when, by the way it is conducted, it has the ability to lead to the discovery of the crime, the circumstances in which the crime was committed and to the identification and prosecution of the perpetrator. In our case, the perpetrators are not identified for their criminal liability.

The Court therefore unanimously decides that Article 3 and Article 14 of the Convention, interpreted in conjunction, have been infringed, with regard to the end of the application for the investigation of allegations of ill-treatment.

The existence of such attitudes can lead to violence with a high degree of danger, to degrading treatment. Thus, they may create a victim with feelings of fear, anguish and inferiority (*Ireland v. the United Kingdom, 18 January 1978, paragraph 167, Series A, number 25*) or humiliation or humiliation in his or her eyes (*Raninen v. Finland, 16 December 1997; Gutsanovi v. Bulgaria, no. 34,529/10*).

3. Conclusions

³<https://ro.wikipedia.org/wiki/Stat>

Every man is different from birth, and the constant development of society has led to the creation of a different and broad thinking on how to live his own life. Our lives are made up of decisions.

Through the topic we have addressed, we have drawn defining lines of the concept of hate crime, outlining what society tends to differentiate. Thus, on the basis of numerous criteria related to race, color, religion, sexual orientation or national or ethnic origin, members of society tend to bring to the forefront the notion of discrimination. A healthy society should overcome this fact, but the first step should be taken by the legal people themselves. They also have the duty to ensure a climate conducive to the progressive development of the human being. In the light of the case under consideration, we can identify the lack of interest of the criminal investigation bodies in opening and during the criminal investigation phase, since the applicants were homosexual persons.

The notion of hate crimes should be criminalized with greater interest on the part of the Romanian legislator, as there is a wide variety of crimes based on a well-determined mobile device that give rise to criminal activity. Criminalising and punishing it would restrict the number of perpetrators of such antisocial acts and provide greater protection for people who are at risk of becoming victims of such behavior.

References

- [1] <http://vicatis.eu/ro/infractiuni-motivate-de-ura/>
- [2] https://ro.wikipedia.org/wiki/Infrațiune_motivată_de_ură
- [3] <https://ro.wikipedia.org/wiki/Stat>
- [4] <https://legislatie.just.ro/Public/DetaliiDocumentAfis/22751>
- [5] Dan LUPAȘCU, *Criminal code*, Universul Juridic, Bucharest, 2021;