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INCITEMENT TO HATRED. COMPARATIVE ANALYSIS OF LEGISLATIVE CONSOLIDATION AND PRACTICAL APPLICATION

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ABSTRACT

A very common rule in the criminal law of various countries is the liability for inciting hatred towards groups of people united by race, nationality, language, religion, political views, social status, or gender. Law enforcement officers often encounter difficulties in qualifying these acts. Incorrect application of criminal law may entail not only the violation of the rights of the accused but also damage to public debate. At the same time, failure to apply criminal law when necessary threatens the rights and legitimate interests of representatives of various social groups.

The research questions are how legislators in Lithuania, Poland, France and Germany establish criminal liability for incitement to hatred, how the provisions of the law are implemented in practice. The aim of the work is to enrich the scientific base on this issue and formulate recommendations for law enforcement officers and legislators. The main research methods are the formal-legal and comparative-legal methods. In conclusion, it can be highlighted that there are significant differences in the definition and application of the concept of "incitement to hatred" across jurisdictions and judicial bodies, which leads to conflicting judicial decisions and unresolved questions for law enforcement regarding protected groups and the distinction between incitement and legitimate criticism.

KEYWORDS

Incitement to hatred, criminal law, discrimination, hate speech, repression, incitement to violence.

INTRODUCTION

This research focuses on the **problem** of different approaches of selected EU jurisdictions to criminalizing incitement to hatred, which is **relevant** in view of the conflict between the protection of vulnerable groups and the fundamental right to freedom of speech, the incorrect application of which can suppress democratic debate, especially against the backdrop of rising radicalism. The **novelty** of the work lies in the comparative English-language analysis of the legislation and practice of several jurisdictions of continental Europe, which is a gap in the existing literature, as well as the need to constantly update research due to changes in laws and law enforcement. The **objectives** of the research are to identify similarities and differences in criminal law provisions and court decisions on cases of incitement to hatred, to understand their nature and to develop recommendations for legislators and law enforcement officers. **The aim** of this work is to provide a comprehensive comparative analysis of incitement to hatred legislation and its practical application across Lithuania, Poland, France, and Germany. This analysis seeks not only to enrich the scientific understanding of this complex legal area by identifying key similarities, differences, and emerging trends, but also to derive concrete practical recommendations for legislators and law enforcement officers in harmonizing approaches, improving legal clarity, and ensuring a balanced protection of human rights and freedom of expression across diverse European legal systems. The **research methods** used include general scientific (induction, deduction, synthesis, analysis, functional) and specially legal (comparative legal, formal legal). The use of comparative analysis in research facilitates the identification of common and distinct characteristics in the legislative framework and law enforcement practices of states, which enables a more comprehensive study of the issue under consideration, allows for the identification of the advantages and disadvantages of various approaches, and confirms or refutes the validity of the use of a particular form of legislative framework.

Similarities in law enforcement allow for the identification of common practices among selected EU states that are also members of the Council of Europe. At the same time, differences in law enforcement practices would indicate shortcomings in the countries' overall policies on the criminalization of hate speech.

These four jurisdictions were chosen because France and Germany are the largest countries and economies in the EU, making significant contributions to pan-European and global culture and science, including philosophy and jurisprudence. Poland is also one of the largest EU countries and the country of work of one of the authors of this article. Lithuania, in addition to being the country of another author, like Poland and, to some extent, Germany, has a totalitarian past, which undoubtedly leaves its mark on the current legal culture. Correctly establishing norms restricting freedom of expression is one of the challenges for countries that have undergone a period of transition from dictatorship to democracy. Furthermore, all of the above-mentioned countries face the challenges of mass migration, which is changing the ethnic makeup of the population and therefore raising questions about the relevance of norms restricting hate speech.

When discussing the criteria and methodology for selecting specific court decisions for analyzing law enforcement practice, the article uses the following criteria for analyzing specific decisions: 1) Frequency of references to them in other articles, scientific and journalistic, and other court decisions; 2) Availability of the original text of the decision; 3) The presence of a legal dispute in the cases, that is, priority is given to cases where the accused did not admit guilt; 4) Their indicativeness, that is, the presence of those features that are important for confirming or refuting the conclusions.

1. LITERATURE REVIEW

A review of the literature reveals that existing work is often limited to one jurisdiction or philosophical perspective without comparative analysis, leaving open key questions about the distinction between criticism and hate speech, the role of context and intent, and the definition of "hatred" and "social group", highlighting the need for this cross-jurisdictional analysis.

Incitement to hatred, which can be defined as speech that creates a risk of discrimination, hostility or violence against protected groups based on race, nationality, language, religion, gender, origin and other criteria, is a frequent topic of study by legal theorists and philosophers¹. Perhaps the best-known theoretical works on the prohibition of incitement to hatred are the various works of theorists from common law countries. Among them are both supporters of criminalizing incitement to hatred² and opponents of this practice³.

¹ Katharine Gelber, "Hate Speech—Definitions & Empirical Evidence," *Constitutional Commentary* 32, No. 3 (2017): 562–65 // <https://scholarship.law.umn.edu/concomm/559>; United Nations Office of the High Commissioner for Human Rights (OHCHR), *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*, (October 5, 2012): 3–5 // https://www.ohchr.org/Documents/Issues/Opinion/Seminars/Rabat_draft_outcome.pdf

² Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012), 35–38; Catharine A. MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993), 71; Kimberlé Crenshaw, "Reaffirming Racism: The Faulty Logic of Colorblindness, Remedy and Diversity," in *The Power of Talking Back: Critical Race Theory and the Politics of Resistance*, ed. Patricia Hill Collins and Sirma Bilge (New York: Routledge, 2013), 130.

³ Floyd Abrams, *Speaking Freely: Trials of the First Amendment* (New York: Viking, 2005), 112–15; Alan M. Dershowitz, *The Case Against the New Censorship: Protecting Free Speech from Big Tech, Progressives, and Universities* (New York: Hot Books, 2021), 45; Nadine Strossen, *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (New York: New York University Press, 1996), 78–80.

When speaking about continental European researchers, they typically focus on applied research into the legislation of individual jurisdictions⁴ or the practice of the ECHR⁵. The topic of comparing the approaches of EU jurisdictions that we are considering was previously addressed to some extent by Judit Bayer and Petra Bard, who came to the conclusion that the German model for regulating the prohibition of incitement to hatred is stricter than the approach of Eastern European countries⁶.

Researchers from common law countries have also studied the legislative consolidation and practical application of the rules prohibiting incitement to hatred in EU countries, including the comparative legal aspect⁷. In his work, Tourkochoriti, comparing the various approaches of both Europe, in particular France, as more rigid, and the United States, as more liberal, comes to the conclusion that there are different models due to the different historical backgrounds of the states, the differences between the common law system and the civil law system.

Scholar Uladzislau Belavusau examined the specific example of Eastern European countries, including Poland, highlighting the concept of "militant democracy" for countries that have transitioned from communist regimes to democracy. He also emphasized the visible influence of the American narrative on freedom of speech in law enforcement and legislative codification in these countries⁸.

Among more theoretically oriented works, it's worth noting the joint work by Daniel Siter, Jan Stajanko, and Luka Martin Tomažič⁹, who examine the criminalization of incitement to hatred from the perspective of two concepts of freedom: positive freedom, freedom of expression, and negative freedom, freedom from state interference in free speech. The authors conclude that there has been a shift toward a positive understanding of freedom in the national and supranational laws of European countries regarding the criminalization of incitement to hatred.

Finally, Anne-Marie Le Pourhiet's views are quite original for the continental legal system. She is a critic of the criminalization of incitement to hatred, which, in her opinion, has a chilling effect on democracy, harms public debate on important issues, and is used to marginalize dissent¹⁰.

2. LITHUANIA

This article provides a comparative analysis of hate speech legislation across Lithuania, Poland, Germany, and France. Such a comparison is pertinent because hate speech presents a complex challenge throughout Europe, demanding a delicate balance between safeguarding freedom of expression and protecting individuals and groups from

⁴ Wolfgang Mitsch, "Der unmögliche Zustand des § 130 StGB," *Kriminalpolitische Zeitschrift* 1, No. 3 (2018): 165 // <https://kripoz.de/wp-content/uploads/2018/07/mitsch-der-unmoegliche-zustand-des-130-stgb-1.pdf>

⁵ Thomas Hochmann, "La haine n'est pas une opinion," *Revue des droits de l'homme* No. 8 (2015) // <https://journals.openedition.org/revdh/1135>

⁶ Judit Bayer, Petra Bárd, "Hate speech and hate crime in the EU and the evaluation of online content regulation approaches," *European Parliamentary Research Service* (2020).

⁷ Ionna Tourkochoriti, "Should Hate Speech Be Protected: Group Defamation, Party Bans, Holocaust Denial and the Divide Between France, Europe and the United States," *Columbia Human Rights Law Review* 45, No. 3 (2014): 560–65.

⁸ Uladzislau Belavusau, "Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant? (Czech Republic, Hungary and Poland)," *Israel Law Review* 47(1) (2014): 27–61.

⁹ Jure Stajanko, David Siter, Luka M. Tomažič, "Discrimination, Freedom of Expression and Two Concepts of Liberty: Assessing European Legislation Criminalizing Hate Speech," *Hungarian Journal of Legal Studies* 65, No. 1 (2024): 5–8.

¹⁰ Anne-Marie Le Pourhiet, "La prolifération des délits d'opinion en droit pénal français," *Les Petites Affiches* No. 40 (February 25, 2015).

discrimination, hostility, and violence – principles central to European Union values. Examining different national approaches reveals the varied strategies employed within the EU framework to tackle this pervasive issue. The selection of Lithuania, Poland, Germany and France offers a compelling cross-section of European experience, allowing for a nuanced understanding of how different democratic societies in the EU interpret and apply rules against hate speech. This comparative analysis is of particular value for the Republic of Lithuania, as it allows for the identification of both universal challenges in combating hate speech and successful approaches or formulations that could be adapted to improve the clarity and effectiveness of the application of Article 170 of the Criminal Code of the Republic of Lithuania. The aim of such a comparative study is not just a description, but also to develop concrete proposals for improving the legislation and law enforcement practice in Lithuania, while avoiding excessive criminalization and maintaining a balance with the principles of freedom of speech.

Thus, Article 170 of the Criminal Code of the Republic of Lithuania (LR BK), No. VIII-1968, 2000 (Further in the text Lithuanian Criminal Code) prohibits incitement against any national, racial, ethnic, religious, or other group of people, which means insulting, ridiculing, inciting hatred, or calling for discrimination against a group of persons or a person who belongs to this group on the basis of gender, sexual orientation, race, nationality, language, origin, social status, faith, beliefs, or opinions. These actions can be verbal, written, or using the media. However, publicity is a mandatory element. Part two of this article, separately prohibits calls for violence against the same groups and people as a more socially dangerous act. Thus, from the text of the article one can already conclude that violence is not a mandatory element of the composition for prosecution under Part One of Article 170. The concept of discrimination is specified in the previous article, Article 169, so discrimination includes actions aimed at preventing a group of people or a person belonging to it on the basis of characteristics identical to Article 170 from participating on equal terms with others in political, economic, social, cultural, labor, or other activities or limiting the rights and freedoms of such a group of people or a person belonging to it. The Lithuanian legislator classifies incitement to hatred as a crime against personal equality and freedom of conscience.

The first thing that needs to be determined when assessing these articles is the formal composition of the crime, i.e. criminal liability occurs regardless of the occurrence or non-occurrence of socially dangerous consequences. A mandatory element is the direct intent of the act, i.e., when qualifying under Part 1 of the article, the subject of the statements must have understood and wanted to incite hatred, insult, ridicule of social groups. When qualifying under Part 2, it is necessary to consider whether the subject of the speech, addressing an indefinite circle of addressees, wanted to directly or indirectly encourage, with the help of his statements, the use of violence (murder, injury) against social groups¹¹.

By assessing whether the actions of a person contained elements of a crime established by parts 1 and 2 of Article 170 of the Lithuanian Criminal Code, the court considers the opinion of a linguistic expert who assesses the presence of derogatory, offensive features, linguistic methods of incitement, and causing hostility in the author's statement. However, assessing only the expert's opinion, that is, assessing only the content of the speech, is not enough. The context, which includes the author's

¹¹ Supreme Court of Lithuania, *Cassation Ruling in Criminal Case*, No. 2K-86-648/2016 and No. 2K-206-693/2017.

explanation, his social characteristics, and the reason for the statement are also assessed¹².

Speaking about the content of the statement, for qualification under Article 170 of the Lithuanian Criminal Code, the court evaluates, among other things, the volume of the statement, how detailed it is, since the shorter the statement, the more ambiguous interpretations are allowed. The form in which the verbs are used in the statement is assessed, so for classification as incitement to violence, the imperative form of the verb is most often used.

When assessing the content of a statement, it is also necessary to establish whether it is directed against a social group, or against a specific phenomenon, specific people without linking them to a social group. For example, in one of its decisions, the Kaunas District Court acquitted the defendant of inciting hatred against persons distinguished by their belonging to the Polish nation. The court found that the comment on the website was directed against such a phenomenon as football hooliganism, or at least against football fans, who, from the court's point of view, were not distinguished as a separate social group. Even though the criticized football hooligans came from Poland and were presumably Poles, the comment did not contain any direct reference to the Polish ethnicity of the fans. Such a connection was only presumed, so the court interpreted this doubt in favor of the defendant¹³.

One of the facts that the court is obliged to assess is the degree of public danger of the act. According to the decision of the Constitutional Court, if the court, considering all factors, has an objective opportunity not to apply measures of criminal coercion, without harm to socially significant interests, then the court must refrain from passing a guilty verdict¹⁴. Thus, when assessing online statements, Lithuanian courts have repeatedly, recognizing statements as unethical and violating moral standards, concluded that the act does not pose a sufficient public danger to qualify them as crimes¹⁵. However, as Judge Aurelijus Gutauskas states, the problem is that there is no administrative punishment for inciting hatred in Lithuania, which is why the only measure that seems milder than criminal conviction is an appeal to a civil court or to the standards of journalistic ethics, to the administrators of Internet resources¹⁶.

Lithuanian courts, in cases of comments on social networks, also evaluate the material in relation to which the statement was made. Thus, in the decision of 18.02.2015, Klaipėda District Court did not find elements of a crime in the comments made regarding a photo of two kissing men. The court concluded that, despite the unethical nature of the comments made, the photo was posted with the intention of causing irritation and shocking people with different views. The court also justified its decision by the protection and enshrinement of the values of the traditional family in the Constitution of Lithuania. This case subsequently became the subject of consideration by the ECHR¹⁷.

¹² Supreme Court of Lithuania, *Cassation Ruling in Criminal Case*, No. 2K-58-489/2024.

¹³ Kaunas District Court, *Case No. 1A-831-319-2013*, Lithuania, 2013.

¹⁴ Constitutional Court of the Republic of Lithuania, *Decision of November 13, 1997 and Decision of November 10, 2005*.

¹⁵ Supreme Court of Lithuania, *Cassation Ruling in Criminal Case*, No. 2K-677/2012 and No. 2K-206-693/2016.

¹⁶ Aurelijus Gutauskas, "Application of Administrative Liability Would Help Combat Hate Speech in the Online Space," *Lietuvos teismai* (2022) // <https://www.teismai.lt/lt/teisejas-aurelijus-gutauskas-administracines-atsakomybes-taikymas-padetu-kovoti-su-neapykantos-kalba-internetineje-erdveje/10036>

¹⁷ *Beizaras and Levickas v. Lithuania*, Petition No. 41288/15, European Court of Human Rights (January 14, 2020) // <https://hudoc.echr.coe.int/eng?i=001-200344>

Researchers from common law countries have also studied the legislative consolidation and practical application of the rules prohibiting incitement to hatred in EU countries, including the comparative legal aspect.

3. GERMANY

Germany was the first country to clearly establish criminal liability for incitement to hatred on political and social grounds. Thus, the Law for the Protection of the German Republic of 1922, passed in response to the assassination of Foreign Minister Rathenau, established punishment for incitement to violence based on political views¹⁸. Nowadays in the German Criminal Code (Strafgesetzbuch – StGB), as amended and promulgated on 15 May 1871 (Further in the text German Criminal Code), incitement to hatred is punishable under Article 130. This article was also one of the first in the world to prohibit incitement to hatred because of race, nationality, or religion. According to the disposition of the article, the objective element of the crime is incitement of hatred, a call for violent or arbitrary measures, or an infringement on the dignity of others by insulting, maliciously contemptuous or slandering a certain group, part of the population or an individual because of their belonging to a certain group or part of the population. The qualifying features of the crime are the distribution of content with the help of which the above-mentioned actions are committed against minors, as well as the commission of actions in accordance with the “rules of National Socialism”.

In addition to the greater sanction of the article (part one provides for up to 5 years of imprisonment), it is immediately striking that, unlike the Lithuanian Criminal Code, both calls for violence and other components of hate speech, insults, malicious contempt, and slander are included in one legal norm, and therefore they are given the same social danger. In general, the actions included in the crime are quite more extensive than in the Lithuanian Criminal Code. The method of committing the act also varies. While the Lithuanian Criminal Code states that the actions are committed orally, in writing, including using the media, the first part of Article 130 of the German Criminal Code says nothing about the method of committing the crime. The second part of the article specifies as a qualifying feature the method of committing the crime, namely dissemination of content, making it available for public viewing, offering it or providing it to others, making it available, as well as its production, receipt, delivery, storage, obligation to import or export for the purpose of distribution. From this wording, one can conclude that only storage and production of content for the purpose of public distribution, and not for personal purposes, constitutes the objective side of the crime. The concept of content is given in another, Article 11 of the Criminal Code and includes what is “contained in written form, on audio or image media, in data storage, images or other embodiments, or transmitted regardless of storage using information or communication technologies.”

An important element is also such a feature as the possibility of these actions to violate public order. This feature determines that in the German Criminal Code, Article 130 is classified as a crime against public order, whereas in Lithuania, incitement to hatred is classified as a crime against personal equality and freedom of conscience. Thus, the object of the crime is clearly public order. Some German lawyers also include

¹⁸ An earlier norm can be called the Resolution of the Council of People’s Commissars of the RSFSR “On the fight against anti-Semitism and Jewish pogroms” of 1918, however, it was of a general nature, and although it was applied in criminal law, it did not establish a clear punishability of certain acts.

human dignity as an object of criminal assault¹⁹, as well as the life, health and freedom of potential victims of discrimination²⁰. From the meaning of the words it is also possible to single out as an object of the rights of minors, which echoes the goal of protecting minors, as grounds for restricting freedom of speech. In addition, the courts also include in the concept of the object of the crime "public peace"²¹.

In the German legal system, this type of crime is called a "suitability offense." The existence of criminal liability in such cases "does not allow an abstractly dangerous act in itself to be sufficient to commit a crime, but additionally requires that it be suitable for creating a threat... In this case, there is no need to determine the occurrence of a specific danger. However, the judge is obliged to verify whether the relevant act is dangerous from a general point of view"²². This rather complex definition of the German court can be reformulated as an understanding of the elements of a crime as formal, that is, a description or, even more so, the occurrence of a specific socially dangerous consequence is not required to bring a person to criminal liability.

At the same time, incitement to hatred in Germany (as well as in Lithuania) is an article of public prosecution, that is, to initiate a case, a statement from the victim is not required, nor is his presence in general.

German practice has a broad assessment of which groups are protected by Article 130. Even though the article itself, unlike Lithuanian law, does not indicate the characteristics by which the groups are distinguished, this definition must be sought in the document to which the article refers, namely in section 6, paragraph 1 of the International Criminal Code. So, in the sense of this article, we are talking about a "national, racial, religious or ethnic group". At first glance, it may seem that this article does not apply to groups of people identified by gender, sexual orientation, political views and other characteristics. However, German court practice includes a person's gender, political views and sexual orientation in the category of "part of the population", which means "a community of people who differ from the rest of the population in external or internal characteristics and are no longer subject to individual control". Both social groups and population groups must have similar characteristics that distinguish this group, having a political, national, ethnic, racial, religious, ideological, social, economic, professional or other nature²³. For example, the Supreme Court of Germany confirmed that such a "part of the population" includes communists, who have a few similar ideological characteristics that distinguish them from the rest of the population. However, in another case, the court refused to include "antifa" in such a group, since, in the court's opinion, "antifa" only had a common goal, and in addition to that, people classified as "antifa" had too many different characteristics²⁴. In this case, the direct object of a criminal attack is not only a community of people, but also specific individuals, if the attack is committed due to the belonging of these individuals to a certain social group or part of the population²⁵.

¹⁹ Harald Ostendorf (ed.), *NomosKommentar Strafgesetzbuch*, 5th ed. (Baden-Baden: Nomos, 2017).

²⁰ Karsten Altenhain, commentary on §130 StGB, in *Strafgesetzbuch: Kommentar*, ed. Harald Ostendorf, 5th ed. (Baden-Baden: Nomos, 2017).

²¹ *Bundesverfassungsgericht (BVerfG)*, Beschluss [Decision] of June 22, 2018, Az. 1 BvR 673/18 (Germany).

²² *Bundesgerichtshof (BGH)*, Urteil des 1. Strafsenats [Judgment of the 1st Criminal Senate] of December 12, 2000, Az. 1 StR 184/00 (Germany).

²³ *Bundesgerichtshof (BGH)*, Beschluss des 3. Strafsenats [Decision of the 3rd Criminal Senate] of April 14, 2015, Az. 3 StR 602/14 (Germany).

²⁴ *Bundesgerichtshof (BGH)*, Beschluss des 3. Strafsenats [Decision of the 3rd Criminal Senate] of July 28, 2008, Az. 3 StR 149/08 (Germany).

²⁵ *OLG Stuttgart*, Urteil vom 19. Mai 2009, Az. 2 Ss 1014/09 (Germany, 2009).

The debatable question is whether Article 130 applies only to minorities? According to the German Supreme Court, the group or part of the population that is the target of the criminal attack must be “outwardly recognizable from the mass of the domestic population.” According to this principle, women in particular were classified as a protected group²⁶.

The court considered that in this case it did not matter that woman constituted a statistical majority. However, the question arises as to whether Article 130 can be applied in the case of incitement to hatred towards Germans in general? There are different opinions among scientists²⁷, but there is also a practical case. In 2017, a Turkish immigrant posted messages online calling Germans a “race of mongrels” and a “clan of dogs.” Despite public outrage, the Hamburg prosecutor’s office dropped the criminal case²⁸. The position of the prosecutor’s office was that the object of incitement to hatred could not be “all Germans” since such a necessary feature as “the presence of characteristics that make this group outwardly recognizable from the rest of the population” was missing. However, it can be assumed that the reason for this decision was the different interpretation of the term “Germans” by the prosecutor’s office, society and, possibly, the accused. It is likely that the prosecution considered all German citizens to be Germans, at a time when the public had come to accept the concept of Germans ethnically, and in that case it is likely that ethnic Germans have characteristics that distinguish them outwardly from the rest of the German population.

German courts have defined the concept of “incitement to hatred”. Thus, according to the position of the courts, “Incitement to hatred is an intensified form of arousal to an emotionally heightened hostile attitude, directed at the feelings of the aroused person, going beyond the limits of simple rejection and contempt”²⁹. Thus, the characteristics of incitement to hatred include, firstly, a heightened emotional, negative attitude, exceeding the usually acceptable contempt, and secondly, a focus on a third party in order to evoke similar feelings in him. Another action falling under the objective aspect of the crime includes “calls for violent or arbitrary measures”. In this case, again, it requires that the statement be directed at other people in order to evoke in them the idea of the need to adopt “discriminatory actions that contradict the elementary commandments of humanity.” The court specifically classifies such actions as deprivation of liberty, forced expulsion, pogroms, or organizing hunts for foreigners³⁰. At the same time, the calls must be clearly read by an outside audience as violent, which is manifested either in the call itself or based on the context. For example, the slogan “Foreigners out” does not in itself say whether foreigners should leave on their own or whether they should be arbitrarily and forcibly deported³¹.

The second paragraph of the first part of Article 130 establishes the humiliation of human dignity through insult, malicious contempt or slander as a prohibited act. An insult is defined as “a particularly offensive form of disrespect”³². Insults can take the form of either a factual statement or a value judgment. “Contempt is understood to mean any statement, even a purely evaluative one, by which someone is portrayed as

²⁶ *OLG Köln*, Urteil vom 9. Juni 2020, Az. III-1 RVs 77/20 (Germany, 2020).

²⁷ Wolfgang Mitsch, “Der unmögliche Zustand des § 130 StGB,” *Kriminalpolitische Zeitschrift* (2018).

²⁸ Martin Holtz, “Deutsche als “Köterrasse” beschimpft: Warum die Staatsanwaltschaft keine Volksverhetzung sieht,” *Der Spiegel* (January 28, 2021).

²⁹ *OLG Brandenburg*, Urteil vom 28. November 2001, Az. 1 Ss 52/01, *NJW* 2002 (Germany, 2001).

³⁰ *BGH*, Beschluss des 3. Strafsenats vom 28. Juli 2016, Az. 3 StR 149/16 (Germany, 2016).

³¹ *BGH*, Urteil des 3. Strafsenats vom 14. März 1984, Az. 3 StR 36/84 (Germany, 1984).

³² *BGH*, Urteil des 1. Strafsenats vom 12. Dezember 2000, Az. 1 StR 184/00 (Germany, 2000).

unworthy or unworthy of the respect of citizens”³³. Slander, in turn, involves “the assertion or dissemination of a fact, made or disseminated contrary to someone’s knowledge, which may damage the credibility and reputation of the relevant group”³⁴. In many decisions, German courts and lawyers distinguish between each of the actions enshrined in Article 130³⁵. However, this is mainly theoretical in nature, since all the actions specified in Article 130 have the same sanction. Analyzing the practice and legislative consolidation, one sees that the German legislator tried to prohibit certain forms of expression in a sufficiently comprehensive manner. Thus, recalling what was stated above, incitement to hatred is understood as a negative assessment “going beyond contempt”. However, contempt for social groups is also prohibited and has the same sanction. Thus, any factual statement capable of infringing on the dignity of social groups or part of the population, according to German law, obviously falls under both insult and slander.

For a more precise analysis, one should also turn to what is understood by “an attack on human dignity”. By this, the Supreme Court of the Federal Republic of Germany means a hostile action aimed at violating the principle of equality of people, presenting a person as inferior, denying his right to life in society. At the same time, the court points out that in this case, not only the individual rights of a person are infringed, but also his dignity as a representative of a certain social group or part of the population, which distinguishes the acts falling under Article 130 of the Criminal Code from simple slander falling under Article 187 of the Criminal Code³⁶.

In this case, the assessment of ambiguous expressions is important. According to the position of German courts, in the case of expressions with ambiguous meaning, possible non-criminal interpretations must be excluded if there are clear and compelling reasons. For example, when assessing the election poster “Migration kills”, the Federal Court considered that this expression could have different interpretations and there were no compelling reasons to accept exclusively the interpretation that the phrase refers specifically to migrants as a social group, and not a phenomenon³⁷. However, in another case, the court, evaluating different interpretations and accepting that a non-criminal interpretation could also take place, still upheld the guilty verdict. Thus, the issue was about election posters with the inscription “Hang up some greenery”. According to the court’s position, “greenery” could mean both the color of the posters themselves and the party to which the posters belonged, as well as the Green Party, which is a political opponent of the Third Way Party, to which the authors of the posters belonged³⁸.

It is also worth mentioning the second part of this article. As stated above, this part prohibits actions in relation to content that causes the actions specified in part one of the article. According to the court’s position, simple distribution, production, storage for the purpose of distributing content is sufficient, without considering any comments from a person regarding it. Distribution means that content becomes available to a larger, uncontrollable group of people³⁹. To make accessible, in turn, means to provide

³³ BGH, Urteil des 3. Strafsenats vom 27. Juli 2017, Az. 3 StR 172/17 (Germany, 2017).

³⁴ BGH, Urteil des 3. Strafsenats vom 3. April 2008, Az. 3 StR 394/07, HRRS 2008, Nr. 458.

³⁵ Dieter Sternberg-Lieben and Uwe Schittenhelm, *Schönke/Schröder Strafgesetzbuch* (2019).

³⁶ BGH, Urteil des 3. Strafsenats vom 27. Juli 2017, Az. 3 StR 172/17 (Germany, 2017).

³⁷ BVerwG, Urteil des 6. Senats vom 26. April 2023, Az. 6 C 8.21 (Germany, 2023).

³⁸ BayObLG, Beschluss vom 19. Oktober 2023, Az. 207 StRR 325/23 (Germany, 2023).

³⁹ BVerfG, Beschluss vom 9. November 2011, Az. 1 BvR 461/08 (Germany, 2011).

someone with the opportunity to gain knowledge about the content of a written work through sensory perception.

Speaking about the subjective side of the crime, German law, unlike Lithuanian law, allows for a person to be held liable in the presence of not only direct intent, but also so-called conditional intent (indirect intent). That is, it is not necessary for a person to desire the occurrence of socially dangerous consequences, the incitement of hatred in third parties, or their commission of violent, arbitrary actions. It is enough for a person to be aware of the possibility of such consequences and to be indifferent to them⁴⁰. This approach seems quite harsh in comparison with the criminal law of other states.

In general, assessing German criminal law regarding incitement to hatred, it can be said that it is characterized by a prohibitive method, the legislator sought to exclude, in his opinion, socially dangerous statements with various terms, regardless of whether they are capable of causing violence, represent factual or value judgments, made with direct or indirect intent. Despite this, German law on incitement to hatred is characterized by a large number of judicial practice, which very thoroughly reveals the main provisions of Article 130.

Taking into account the peculiarities of German doctrine and case law, such as the interpretation of 'incitement to hatred' as 'an intensified form of arousing an emotionally heightened hostile attitude', it seems appropriate to analyse the possibility of applying similar approaches to increase the clarity and uniformity of the application of Article 170 of the Criminal Code of the Republic of Lithuania.

4. FRANCE

A special feature of the French Criminal Law is that, in addition to the French Penal Code, it is also regulated by other sources of law. Thus, incitement to hatred and enmity is prosecuted both under the criminal code and under the Freedom of the Press Act of 1881. The main difference between the articles is the method of committing the crime. Thus, the French Penal Code 1994 (Article R625-7) establishes liability for non-public actions, which makes the French Criminal Code stricter than the Lithuanian or German ones. The Freedom of the Press Act specifies a fairly broad range of methods for committing the crime, namely inciting discrimination, hatred or violence against a person or group of people on the basis of their origin or belonging or non-belonging to a particular ethnic group, nation, race, religion, sexual orientation, sex, gender identity, disability by means of speeches, shouts or threats made in public places or meetings, or by means of writings, printed materials, drawings, engravings, paintings, emblems, images or any other written, oral or graphic media sold or distributed, offered for sale or displayed in public places or at meetings, or by means of posters or placards displayed for public viewing, or by means of any means of communication with the public by electronic means (Sections 23-24). The qualifying feature is the commission of these acts by a civil servant.

The definition of discriminatory actions is given in Article 225-1 of the French Penal Code. Thus, discrimination is understood as "any distinction made between individuals on the basis of their origin, sex, marital status, pregnancy, appearance, a particular vulnerability resulting from their economic situation, whether obvious or known

⁴⁰ Holger Matt, Jörg Renzikowski (eds.), *Strafgesetzbuch: Kommentar*, 2nd ed. (Munich: C. H. Beck, 2020).

to its author, their surname, their place of residence, their state of health, their loss of autonomy, their disability, their genetic characteristics, their morals, their sexual orientation, their gender identity, their age, their political views, their trade union activity, their ability to express themselves in a language other than French, their belonging or non-belonging, real or supposed, to an ethnic group, a nation, a so-called race or a particular religion.”

What is important to highlight from the formulation of this norm is the allocation of such objects of encroachment as “groups of persons because of their belonging or non-belonging to a certain ethnic group.” Such formulation of the disposition allows, for example, to hold a person liable for inciting hatred towards “non-French people.” Despite the fact that this is a fairly large group of people, obviously not united in a social group, French legislation has taken care to prohibit statements aimed at people who do not belong to a particular group. In addition, it is worth paying attention to the innovation of 2012, which included in protected groups not only people united by gender, but also people united by “gender identity”.

Speaking about the French Penal Code, incitement to hatred was attributed to the chapter on crimes against human dignity, that is, the French legislator qualified this crime differently than the German or Lithuanian ones.

French law, like German law, does not distinguish between incitement to hatred and discrimination and incitement to violence. At the same time, as the Criminal Chamber of the Court of Cassation points out, to hold a person liable under Section 24 of the Freedom of the Press Act and Article R625-7 of the Penal Code, incitement to discrimination, hatred and violence may be either overt or covert.

The classification of hate speech under French law is complicated by the fact that, in addition to the aforementioned Section 24 of the Freedom of the Press Act, this law also establishes liability for defamation of a person or group of persons united by the same characteristics (Section 32), as well as for insulting them (Section 33). In the case of slander, everything is quite clear: according to French law, it is any statement or imputation of a fact that harms the honor or dignity of the person or organization to whom this fact is attributed. Accordingly, defamatory, untrue information about any social group or person in connection with his/her belonging to a social group falls under Section 32 of the Freedom of the Press Act. As stated above, French law defines the concept of “discrimination” relatively clearly. The concept of violence itself also does not cause difficulties in perception. However, the question arises: how to distinguish “incitement to hatred” from “insult on the grounds of belonging to a certain group”?

The Freedom of the Press Act defines as insult “Any outrageous statement, contempt that does not contain an imputation of any fact.” French courts do not provide a clear distinction as to when a person is liable for inciting hatred and when for insulting someone on grounds of race, nationality, or other grounds. There are cases where a person is simultaneously charged with inciting hatred on the basis of belonging to a religion and insulting on religious grounds⁴¹.

Analyzing judicial practice, it can be assumed that in the case of incitement to hatred, one of the qualifying features is the motive of individuals to provoke a negative reaction towards a social group in outsiders^{42,43}. At the same time, the elements of the

⁴¹ *Zemmour v. France*, Application No. 63539/19, European Court of Human Rights, December 20, 2022.

⁴² *Cour de cassation*, Chambre criminelle, 3 décembre 1991, Bull. crim. 1991 n° 458, Pourvoi n° 90-86.763 (France, 1991).

⁴³ *Cour de cassation*, Chambre criminelle, 12 septembre 2000, Pourvoi n° 98-88.201, Inédit (France, 2000).

crime of racial (religious, national, etc.) insult do not imply the criminal's goal of provoking any reaction from third parties. The Criminal Chamber of the Court of Cassation recognized that it is permissible to prosecute a person simultaneously for inciting hatred and for insulting since belonging to a particular social group, that is, there is an ideal combination of crimes⁴⁴. The question arises whether it is possible to change the face of only incitement to hatred without imputation of insult and if so, on what grounds? Now, French Judicial practice and scholars have not given a clear answer to this question.

The French experience, particularly in its emphasis on incitement to discrimination, may provide valuable lessons for improving the regulation of public expression falling under Article 170 of the Criminal Code of the Republic of Lithuania, in particular in the context of the dissemination of information through modern media."

5. POLAND

Hate speech is undoubtedly one of the modern pathologies existing in our social life. In Poland, hate crimes as well as hate speech can be seen in a very broad context. In the strict sense, hate crimes are regulated in Articles 119, 256, 257 of the Penal Code of the Republic of Poland 1997 (Further in the text Polish Penal Code) and directly contain in their element's references to discriminatory motivations of the perpetrator, and which are directed against enumerative indicated groups and persons belonging to minorities. On the other hand, hate crime in the largo sense, can be considered as any criminal offense committed with discriminatory motives, such as murder (Article 148 of the Polish Penal Code), robbery (Article 280 of the Polish Penal Code) or causing injury to health (Articles 156 and 157 of the Polish Penal Code), or crimes prosecuted by private prosecution such as insult – 216 of the Polish Penal Code, or violation of bodily integrity under Article 217 of the Polish Penal Code.

As indicated in the doctrine, a hate crime should consist of two parts: the first element is the recognition of the act in question as a crime, and the second is the requirement that the motive for the criminal act be prejudice. Prejudice is defined as an unfavorable (biased) assessment or unfavorable emotional reaction toward a particular group, its members and those perceived as belonging to that group.

It should be mentioned that Article 119 of the Polish Penal Code is punishable by imprisonment from 3 months to 5 years and is in Chapter XVI of the Polish Penal Code, entitled "Crimes against peace, humanity and war crimes"⁴⁵. On the other hand, an act under Article 256 of the Polish Penal Code is punishable by a fine, restriction of liberty or imprisonment for up to 2 years, and an act under Article 257 of the Polish Penal Code is punishable by imprisonment for up to 3 years, and is in Chapter XXXII of the Polish Penal Code, entitled "Offenses against Public Order"⁴⁶.

⁴⁴ *Cour de cassation* [Court of Cassation], Chambre criminelle [Criminal Chamber], 15 octobre 2019, Pourvoi n° 18-85.365, Inédit (France, 2019).

⁴⁵ Art. 119. § 1. Whoever uses violence or unlawful threats against a group of persons or an individual because of his national, ethnic, racial, political, religious affiliation or because of his irreligiosity, shall be punished by imprisonment from 3 months to 5 years.

⁴⁶ Art. 256. § 1. Whoever publicly propagates a Nazi, communist, fascist or other totalitarian system of state or incites to hatred on grounds of national, ethnic, racial, religious differences or on grounds of irreligiosity shall be subject to the penalty of deprivation of liberty for up to 3 years. § 1a. The same punishment shall be imposed on anyone who publicly promotes Nazi, communist, fascist ideology or ideology inciting the use of violence to influence political or social life. § 2. The penalty specified in § 1 shall be imposed on anyone who, for the purpose of dissemination, produces, perpetuates or imports, acquires, disposes of, offers, stores, possesses, presents, transports or transmits a print, recording or other object containing the content specified in § 1 or 1a, or which is a carrier of Nazi, communist, fascist or other totalitarian symbolism used in a manner intended to propagate the content specified in § 1 or 1a. § 3. A perpetrator

However, regarding the subjective side of the offense under Article 257 of the Polish Penal Code, the Warsaw Court of Appeals stated that

the offense under Article 257 of the Polish Penal Code can be committed only with direct intent because the perpetrator must both be aware of certain characteristics of the victim (race, nationality, religion or irreligiousness) and want to violate the victim's dignity precisely and primarily because of them. Indeed, the essence of the above-mentioned act does not consist in mere insult, but in showing the persons opposed by the perpetrator, characterized as "other," their inferiority and negating their right to equal treatment. After all, the *raison pénalisation* of criminalization is to combat intentional, intentional hostility with racist, nationalist or religious motives⁴⁷.

In addition, the Supreme Court, in its decision, defined the objects identifying the victim "Incitement to hatred"⁴⁸ on the grounds listed in Article 256 of the Criminal Code – including on the basis of national differences – boils down to this type of speech that arouses feelings of strong dislike, anger, disapproval, even hostility towards individual persons or entire social or religious groups, or because of the form of speech sustains and intensifies such negative attitudes and thus emphasizes the privilege, superiority of a particular nation, ethnic group, race or religion"⁴⁹.

Important standards for the protection of fundamental civil and human rights and freedoms are contained in the Constitution of the Republic of Poland 1997 (Further in the text Polish Constitution), which emphasizes inherent and inalienable human dignity as the source of human and civil liberties and rights. It is inviolable, and respecting and protecting it is the duty of public authority – Article 30 of the Basic Law. In addition, the Constitution introduces the principle of equality before the law and the prohibition of discrimination in political, social and economic life (Article 32). The Republic of Poland ensures Polish citizens belonging to national and ethnic minorities the freedom to maintain and develop their own language, preserve customs and traditions and develop their own culture. National and ethnic minorities have the right to establish their own educational, cultural and institutions for the protection of their religious identity, and to participate in the settlement of matters pertaining to their cultural identity (Article 35). Under the Basic Law, political parties and other organizations that refer in their programs to the totalitarian methods and practices of Nazism, fascism and communism, as well as those whose program or activities presuppose or permit racial and national hatred, the use of violence to gain power or influence state policy or provide for the secrecy of structures or membership are prohibited (Article 13). Moreover, Polish law criminalizes Article 55 of the Law on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation the act of publicly and against the facts denying crimes committed against persons of Polish nationality or

of a criminal act specified in § 2 shall not commit an offense if he or she has committed the act as part of an artistic, educational, collecting or scientific activity. § 4. If convicted of the offense specified in § 2, the court shall order forfeiture of the objects referred to in § 2, even if they are not the property of the perpetrator.

Art. 257. Whoever publicly insults a group of people or an individual person because of his national, ethnic, racial, religious affiliation or because of his irreligiousness, or for such reasons violates the bodily integrity of another person, shall be subject to the penalty of deprivation of liberty for up to 3 years.

⁴⁷ *Court of Appeals in Warsaw*, Judgment of 20 April 2015, file ref. II AKa 26/15. Poland, 2015.

⁴⁸ On February 25, 2014. The Constitutional Court stated that although the cited phrase "incites to hatred" is imprecise, it is made concrete by the normative context in which it occurs. The Court said that it must have a public character - then it is prohibited. In addition, it is intentional in nature from action and can only be committed with direct intent, (file reference SK 65/12).

⁴⁹ *Polish Supreme Court*, Decision of 5 February 2007, file ref. IV KK 406/06. Poland, 2007.

Polish citizens of other nationalities and certain legal goods are further protected under the regulations of the Civil Code of the Republic of Poland 1964. A person whose personal good is threatened by someone else's action may demand that this action be stopped, unless it is not unlawful.

Review of the above legal regulations entitles to conclude that state authorities have a wide range of tools to combat hate crimes and guarantees of equal treatment, e.g. the guarantees of freedom of speech, views arising from the Polish Constitution – Article 54, or the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by Poland (European Convention on Human Rights, 1950)⁵⁰. Both legal acts guarantee the freedom of expression, and normative expression of the respect of personal property such as dignity or good name. On constitutional grounds, the indicated dualism of legal protection, which can, with the abuse of freedom of expression, lead to a conflict of legal norms, with possible civil and criminal law liability, is expressed in the content of Articles 30 and 54 of the Constitution of the Republic of Poland.

Correspondingly, Article 30 expresses the protection of inherent and inalienable human dignity, which constitutes human and civil liberties and rights.

On the other hand, Article 54 of the Constitution ensures everyone's freedom to express his or her views and to obtain and disseminate information.

In turn, Article 31⁵¹ of the Basic Law contains guarantees of legal protection both in terms of protection against hate speech, but also possible unfettered expression of opinions⁵².

Undoubtedly, hate speech violates many legal norms, but in assessing each case it is necessary to determine the form of speech that spreads, incites, promotes or justifies racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance (Council of Europe, Committee of Ministers, 1997)⁵³, so no freedom, including freedom of expression, is absolute: for it encounters limits in the form of the obligation to respect the dignity and legitimate freedom of others.

The similarity of approaches between Polish and Lithuanian legislation, as well as similar challenges in law enforcement practice (e.g. regarding 'publicity' or criteria for assessing an act), make the Polish experience particularly relevant for studying ways to improve the effectiveness of the application of Article 170 of the Criminal Code of the Republic of Lithuania and ensure clarity of classification.

6. ANALYSE COMPARATIVE

For a more visual comparison, it makes sense to present the differences and similarities in the presented jurisdictions in the form of several tables.

⁵⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms*, signed November 4, 1950, Council of Europe.

⁵¹ Art. 31.1. Human freedom is subject to legal protection. (2) Everyone is obliged to respect the freedoms and rights of others. No one shall be forced to do what the law does not require him to do. (3) Restrictions on the exercise of constitutional freedoms and rights may be established only by law and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. Such restrictions must not violate the essence of freedoms and rights.

⁵² More on this subject is contained in the ECHR judgment of 27.05.2003. *Skalka v. Poland* (application no. 43425/98), where the tribunal found that although the hate speech directed by the prisoner to the court exceeded the permissible limits, the punishment applied by the court was severe and inadequate to the circumstances under which the offense occurred.

⁵³ *Council of Europe, Committee of Ministers, Recommendation No. R (97) 20 on "Hate Speech,"* adopted October 30, 1997.

Table 7.1. Core offence elements and thresholds

Jurisdiction	Main provision(s)	Protected target	Core conduct (actus reus)	Publicity / public-order threshold	Typical mens rea requirement
Lithuania	CC Art. 170	Groups/persons defined by nationality, race/ethnicity, religion and other grounds (broad list in practice)	Public mocking/despising; incitement to hatred and discrimination (incl. online comments)	Publicity is a constitutive element; courts emphasise context and "public danger" assessment	Intent inferred from linguistic form (imperative vs descriptive), context, dissemination and target
Germany	StGB §130	"Segments of the population" and groups defined by national, racial, religious or ethnic characteristics (broad, context-dependent)	Inciting hatred / calling for violent or arbitrary measures; or assaulting human dignity by insulting/defaming	Must be capable of disturbing the public peace (central threshold)	Intent; courts examine suitability to disturb public peace and the dehumanising quality of the statement
France	Press Act 1881 (Arts. 23–24); CC R625-7 (non-public)	Persons/groups protected by nationality, religion, ethnicity and also sex, sexual orientation, disability etc.	Public provocation to discrimination/hatred/violence; non-public provocation as a contravention	Formal split between public and non-public settings; public dissemination triggers criminal offence and higher sanctions	Intent derived from content and communicative setting; courts distinguish insult/defamation from provocation
Poland	PC Arts. 119, 256, 257	Groups/persons defined by national/ethnic/racial/religious affiliation (and lack of religion); Art. 119 also political affiliation	Violence/threats (Art. 119); publicly inciting hatred (Art. 256); publicly insulting a group/person (Art. 257)	Publicity is explicit in Arts. 256–257; Art. 119 focuses on violence/threats and their incitement	Case law often requires direct intent for Art. 257; Art. 256 focuses on incitement to hatred

Table 7.1 summarises the core elements of the main hate-speech/incitement offences. The key comparative variables are the legal threshold (e.g., “public peace” in Germany), the publicity requirement, and whether the offence is structured primarily as an equality-based (anti-discrimination) norm or as a public-order norm.

A recurrent comparative difficulty is defining “who can be a victim” and how courts operationalise the protected-group criterion. Table 7.2 compares the scope of protected characteristics and highlights the main interpretative controversies (e.g., majority groups, open vs closed lists).

Table 7.2. Protected characteristics and the scope of victimhood

Jurisdiction	Protected characteristics (headline)	Open/closed list	Majority groups covered?
Lithuania	Broad (“any ... or other group”), incl. convictions/views in practice	Open (practice-driven)	Not formally excluded; emphasis on equality rationale
Germany	“Segments of the population”; national/racial/religious/ethnic groups	Open (case-law driven)	Debated; can include non-minority groups depending on social identity
France	Enumerated discriminatory grounds (origin, religion, sex, sexual orientation, disability, etc.)	More enumerated	Not minority-limited
Poland	Enumerated: national/ethnic/racial/religious; lack of religion; political affiliation in Art. 119	Closed/enumerate	Not minority-limited (formal)

Across jurisdictions, the decisive factor is rarely the abstract statutory wording alone. Courts rely on recurring evidentiary indicators (linguistic form, context, audience reach, and likelihood of harm) to draw the line between protected expression and punishable incitement. Table 7.3 systematises these indicators.

Table 7.3. Practical indicators used by courts when assessing incitement

Jurisdiction	Core judicial threshold	Key indicators in practice	Frequent grounds for acquittal / dismissal
Lithuania	Publicity + assessment of public danger	Imperative vs descriptive wording; intensity of hostility; context & target; reach and repetition; foreseeable harm	Ambiguity in meaning; lack of intent; threshold of danger not met
Germany	Suitability to disturb public peace + attack on human dignity	Dehumanisation; calls for arbitrary measures; broader societal resonance; contextual sensitivity (including historical factors)	Public-peace potential not established; statement framed as satire/opinion; not group-directed
France	Provocation element + public dissemination	Directness of incitement; discriminatory ground; medium and public accessibility; communicative setting	Re-qualification as insult/defamation; private setting; insufficient provocation
Poland	Publicity + (often) direct intent (notably for Art. 257)	Explicit encouragement; animus; contextual reading of political/ideological speech; repetition	Direct intent not proven; conduct interpreted as descriptive/political rather than inciting

Summarizing the similarities and differences, the following features can be highlighted:

(1) The object of protection differs. Germany's model is strongly public-order oriented (public peace) and uses human dignity as a doctrinal anchor. Lithuania and Poland frame the offence closer to equality and protection of group members. France combines anti-discrimination aims with a media-law structure centred on "provocation".

(2) Publicity works as a gate-keeper in all four jurisdictions, but in different forms. Germany relies on the broader "capable of disturbing the public peace" test. France formalises a public/non-public split with distinct sanctions. Lithuania and Poland treat publicity as a constitutive element while leaving the harm threshold largely to judicial evaluation.

(3) Mens rea becomes decisive where statutory wording is broad. The Polish requirement of direct intent (especially for Art. 257) limits over-criminalisation but can impede enforcement. Lithuanian practice compensates by relying heavily on linguistic expertise and contextual indicators to evidence intent.

(4) Similar factual patterns are often re-qualified into neighbouring speech offences (provocation vs insult/defamation). France institutionalises this distinction explicitly; Germany and Lithuania often reach comparable outcomes through threshold reasoning or re-qualification.

(5) Open-textured concepts ("segments of the population", "other group", "hatred") increase flexibility but reduce predictability. This increases the importance of transparent judicial reasoning, consistent prosecutorial guidance, and an explicit proportionality analysis.

CONCLUSION

This analysis reveals both common challenges in balancing freedom of expression and the protection of vulnerable groups, as well as diverse national approaches shaped by historical, doctrinal, and systemic factors. The identified similarities and differences allow for the formulation of targeted theoretical conclusions and specific practical recommendations.

Theoretical results

Divergent conceptual foundations and thresholds: The jurisdictions employ markedly different doctrinal anchors for criminalisation. Germany centres its prohibition on the disturbance of "public peace" and assaults on human dignity (§ 130 StGB), requiring that statements be objectively suitable to endanger public order. In contrast, Lithuania classifies the offence as a crime against equality and freedom of conscience (Art. 170 CC), emphasising direct intent and contextual assessment of public danger without a formal "public peace" requirement. France structures its regime around provocation to discrimination, hatred, or violence, with a unique public/non-public distinction (Press Act 1881 Arts. 23–24 vs. Penal Code Art. R625-7). Poland separates incitement (Art. 256 PC) from public insult (Art. 257 PC) and violence/threats (Art. 119 PC), often demanding direct intent, particularly for Art. 257.

Variable scope of protected characteristics

Lithuania and Germany operate open-textured definitions ("any ... or other group" and "segments of the population", respectively), allowing courts to extend protection

flexibly (e.g., German case law including communists but excluding “antifa”; Lithuanian practice covering sexual orientation). France and Poland use more enumerated lists, though French law explicitly protects non-belonging to a group (e.g., “non-French”). None formally limits protection to minorities, but practical controversies arise (e.g., Hamburg prosecutor’s refusal to apply § 130 StGB to insults against “all Germans”).

Distinguishing criticism from incitement

All jurisdictions struggle with this boundary, relying on contextual indicators rather than statutory wording alone. Lithuanian courts frequently acquit when statements target phenomena rather than groups (Kaunas District Court 1A-831-319-2013) or when public danger is insufficient. German courts require dehumanising quality and suitability to disturb public peace, sometimes rejecting criminal interpretations of ambiguous slogans (“Migration kills”). French practice distinguishes provocation (aimed at third-party reaction) from mere insult, while Polish courts insist on direct intent to negate equality.

These findings confirm that open-textured norms enhance adaptability but reduce legal certainty, leading to inconsistent outcomes across and within jurisdictions.

Practical results and recommendations

For legislators:

- 1) Raise the issue of decriminalizing incitement to hatred, or at least removing acts that pose a lesser social danger from criminal law to administrative law. It is proposed to establish that if the act is committed for the first time by an individual (i.e., not by a group), then such acts of incitement to hatred could be prohibited by the Code of Administrative Offenses. The absence of calls for violence or the absence of an act committed by an individual without abusing their official position could also be used as criteria for decriminalization.
- 2) Clarify key concepts through statutory amendment or explanatory notes. Lithuania could adopt Germany’s judicial definition of “incitement to hatred” as “an intensified arousal of emotionally heightened hostile attitude exceeding ordinary contempt” to guide qualification and reduce reliance on ambiguous linguistic expertise.
- 3) The transition to a closed list of protected groups is intended to prevent overly broad interpretation and abuse of this provision, which could manifest itself, in particular, in the criminalization of critical statements towards government officials.

For law enforcement agencies and judges:

- 1) Develop binding methodological guidelines incorporating comparative best practices:
 - Require systematic assessment of the German “suitability to disturb public peace” criterion alongside Lithuanian contextual factors (author’s explanation, statement volume, verb form, audience reach).
 - Mandate explicit proportionality reasoning, weighing public danger against freedom of expression, as Lithuanian courts already do when declining criminal measures.

- Distinguish provocation from insult/defamation more consistently, drawing on French case law that examines whether the statement seeks to elicit third-party hostility.
- 2) Enhance prosecutorial discretion with evidence-based thresholds: dismiss cases where non-criminal interpretations are plausible (German approach to ambiguous slogans) or where direct intent is absent (Polish requirement for Art. 257).
- 3) Promote cross-jurisdictional training and exchange programmes to standardise evaluation of online speech, particularly regarding publicity and foreseeable harm.

Implementation of these targeted measures—derived directly from the comparative tables and case analysis—would increase predictability, reduce contradictory decisions, and better safeguard both vulnerable groups and democratic debate. Ultimately, the study demonstrates that while complete harmonisation may be unrealistic given historical differences, selective adoption of proven judicial tools and liability gradation offers a practical path toward more effective and proportionate regulation of incitement to hatred across European jurisdictions.

Thus, a comparative analysis of the legislation and practice of various countries is not an end in itself, but serves as a powerful tool for identifying best practices, filling gaps in legal regulation and forming scientifically based recommendations that contribute to more effective protection of citizens' rights and maintaining public debate.

BIBLIOGRAPHY

Books

1. Abrams, Floyd. *Speaking Freely: Trials of the First Amendment*. New York: Simon & Schuster, 2005.
2. Altenhain, Karsten. Commentary on §130 StGB. In *Strafgesetzbuch: Kommentar*, edited by Harald Ostendorf, 5th ed. Baden-Baden: Nomos, 2017.
3. Cahen, Marie-Isabelle. *Incitement to Racial Hatred (Incitation à la Haine Raciale)*. 2022.
4. Crenshaw, Kimberlé. "Reaffirming Racism: The Faulty Logic of Colorblindness, Remedy and Diversity." In *The Power of Talking Back* (2013).
5. Dershowitz, Alan. *The Case Against the New Censorship: Protecting Free Speech from Big Tech, Progressives, and Universities*. New York: Skyhorse, 2021.
6. Kühl, Kristian. *Strafgesetzbuch, Kommentar*. 26th ed. (2007).
7. MacKinnon, Catharine. *Only Words*. Cambridge, MA: Harvard University Press, 1993.
8. Matt, Holger, Jörg Renzikowski (eds.). *Strafgesetzbuch: Kommentar*. 2nd ed. Munich: C. H. Beck, 2020.
9. Ostendorf, Harald (ed.). *NomosKommentar Strafgesetzbuch*. 5th ed. Baden-Baden: Nomos, 2017.
10. Sternberg-Lieben, Dieter, Uwe Schittenhelm. *Schönke/Schröder Strafgesetzbuch*. 2019.
11. Strossen, Nadine. *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties*. New York: New York University Press, 1996.

12. Waldron, Jeremy. *The Harm in Hate Speech*. Cambridge, MA: Harvard University Press, 2012.

Articles

1. Belavusau, Uladzislau (2014). *Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant? (Czech Republic, Hungary and Poland)*. *Israel Law Review* 47(1): 27–61.
2. Gelber, Katharine. "Hate Speech—Definitions & Empirical Evidence." *Constitutional Commentary* 32 (2017): 559–79 // <https://scholarship.law.umn.edu/con-comm/559>
3. Hochmann, Thomas. "La haine n'est pas une opinion." *Revue des droits de l'homme* No. 8 (2015) // <https://journals.openedition.org/revdh/1135>
4. Le Pourhiet, Anne-Marie. "La prolifération des délits d'opinion en droit pénal français." *Les Petites Affiches* No. 40 (February 25, 2015): 8.
5. Mitsch, Wolfgang. "Der unmögliche Zustand des § 130 StGB." *Kriminalpolitische Zeitschrift* (2018) // <https://kripoz.de/wp-content/uploads/2018/07/mitsch-der-unmoegliche-zustand-des-130-stgb-1.pdf>
6. Stajanko, Jure, David Siter, Luka M. Tomažič. "Discrimination, Freedom of Expression and Two Concepts of Liberty: Assessing European Legislation Criminalizing Hate Speech." *Hungarian Journal of Legal Studies* 65, No. 1 (2024): 1–22.
7. Tourkochoriti, Ionna. "Should Hate Speech Be Protected: Group Defamation, Party Bans, Holocaust Denial and the Divide Between France, Europe and the United States." *Columbia Human Rights Law Review* 45(3) (2014): 552–622.

Media Publications

1. Holtz, Martin. "Deutsche als "Köterrasse" beschimpft: Warum die Staatsanwaltschaft keine Volksverhetzung sieht." *Der Spiegel* (January 28, 2021). // <https://www.spiegel.de/panorama/justiz/hamburg-deutsche-als-koeterrasse-beschimpft-keine-volksverhetzung-a-1136813.html>

Reports and Toolkits

1. Bayer, Judit, Petra Bárd. *Hate speech and hate crime in the EU and the evaluation of online content regulation approaches*. *European Parliamentary Research Service* (2020).
2. Free Word Centre. "*Hate Speech*" *Explained: A Toolkit*. London: Free Word Centre, 2015 // <https://www.article19.org/data/files/medialibrary/38231/'Hate-Speech'-Explained---A-Toolkit-%282015-Edition%29.pdf>
3. Gutauskas, Aurelijus. "Application of Administrative Liability Would Help Combat Hate Speech in the Online Space." *Lietuvos teismai* (2022) // <https://www.teismai.lt/lt/teisejas-aurelijus-gutauskas-administracines-atsakomybes-taikymas-padetu-kovoti-su-neapykantos-kalba-internetineje-erdveje/10036>

LEGAL REFERENCES

International Conventions and Constitutions

1. *Convention for the Protection of Human Rights and Fundamental Freedoms*. Signed November 4, 1950. Council of Europe.
2. Constitution of the Republic of Poland (Konstytucja Rzeczypospolitej Polskiej). *Journal of Laws (Dziennik Ustaw)* No. 78, item 483 (1997).

3. *United Nations Office of the High Commissioner for Human Rights (OHCHR), Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence.* (October 5, 2012): 3–5 // https://www.ohchr.org/Documents/Issues/Opinion/Seminars/Rabat_draft_outcome.pdf

Codes and Statutes

- Civil Code of the Republic of Poland (Kodeks cywilny Rzeczypospolitej Polskiej).*
4. *Criminal Code of the Republic of Lithuania (Lietuvos Respublikos baudžiamasis kodeksas).* No. VIII-1968, 2000, Lithuania.
 5. French Penal Code (Code pénal français). *Journal Officiel de la République Française* (1994).
 6. German Criminal Code (Strafgesetzbuch, StGB). *Federal Law Gazette (Bundesgesetzblatt, BGBl. I)*, 1871, last amended 2023.
 7. Law of December 18, 1998, on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation. *Journal of Laws (Dziennik Ustaw)* item 1575 (2016).
 8. Penal Code of the Republic of Poland (Kodeks karny Rzeczypospolitej Polskiej). *Journal of Laws (Dziennik Ustaw)* No. 88, item 553 (1997).

European Court of Human Rights

1. *Beizaras and Levickas v. Lithuania*, Petition No. 41288/15. European Court of Human Rights, January 14, 2020 // <https://hudoc.echr.coe.int/eng?i=001-200344>
2. *Zemmour v. France*, Application No. 63539/19. European Court of Human Rights, December 20, 2022.

German Courts

1. *BayObLG*. Beschluss [Decision] of 19 October 2023, Az. 207 StRR 325/23. Germany, 2023.
2. *BGH*. Beschluss des 3. Strafsenats [Decision of the 3rd Criminal Senate] of 14 April 2015, Az. 3 StR 602/14. Germany, 2015.
3. *BGH*. Beschluss des 3. Strafsenats [Decision of the 3rd Criminal Senate] of 28 July 2016, Az. 3 StR 149/16. Germany, 2016.
4. *BGH*. Urteil des 3. Strafsenats [Judgment of the 3rd Criminal Senate] of 14 March 1984, Az. 3 StR 36/84. Germany, 1984.
5. *BGH*. Urteil des 3. Strafsenats [Judgment of the 3rd Criminal Senate] of 27 July 2017, Az. 3 StR 172/17. Germany, 2017.
6. *BGH*. Urteil des 1. Strafsenats [Judgment of the 1st Criminal Senate] of 12 December 2000, Az. 1 StR 184/00. Germany, 2000.
7. *BVerfG*. Beschluss [Decision] of 9 November 2011, Az. 1 BvR 461/08. Germany, 2011.
8. *BVerfG*. Beschluss [Decision] of 22 June 2018, Az. 1 BvR 673/18. Germany, 2018.
9. *BVerwG*. Urteil des 6. Senats [Judgment of the 6th Senate] of 26 April 2023, Az. 6 C 8.21. Germany, 2023.
10. *Bundesgerichtshof*. Urteil vom 3. April 2008, 3 StR 394/07. HRRS 2008 Nr. 458. Accessed July 27, 2025. <http://www.hrr-strafrecht.de/hrr/3/07/3-str-394-07.php>.
11. *OLG Brandenburg*. Urteil vom 28 November 2001, Az. 1 Ss 52/01, NJW 2002. Germany, 2001.

12. *OLG Köln*. Urteil vom 9 Juni 2020, Az. III-1 RVs 77/20. Germany, 2020.
13. *OLG Stuttgart*. Urteil vom 19 Mai 2009, Az. 2 Ss 1014/09. Germany, 2009.

French Courts

1. *Cour de cassation [Court of Cassation], Chambre criminelle [Criminal Chamber], 3 décembre 1991, Bull. crim. 1991 n° 458, Pourvoi n° 90-86.763*. France, 1991 // <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007067110>
2. *Cour de cassation [Court of Cassation], Chambre criminelle [Criminal Chamber], 12 septembre 2000, Pourvoi n° 98-88.201, Inédit*. France, 2000 // <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007584923/>
3. *Cour de cassation [Court of Cassation], Chambre criminelle, 15 octobre 2019, Pourvoi n° 18-85.365, Inédit*. France, 2019 // <https://www.legifrance.gouv.fr/juri/id/JURITEXT000039285274/>

Polish Courts

1. *Court of Appeals in Warsaw*. Judgment of 20 April 2015, file ref. II AKa 26/15. Poland, 2015.
2. *Polish Supreme Court*. Decision of 5 February 2007, file ref. IV KK 406/06. Poland, 2007.

Lithuanian Courts

1. *Cassation Ruling in Criminal Case, No. 2K-86-648/2016*. Supreme Court of Lithuania [Lietuvos Aukščiausiasis Teismas], 2016.
2. *Cassation Ruling in Criminal Case, No. 2K-206-693/2017*. Supreme Court of Lithuania [Lietuvos Aukščiausiasis Teismas], 2017.
3. *Cassation Ruling in Criminal Case, No. 2K-58-489/2024*. Supreme Court of Lithuania [Lietuvos Aukščiausiasis Teismas], 2024.
4. *Cassation Ruling in Criminal Case, No. 2K677/2012*. Supreme Court of Lithuania [Lietuvos Aukščiausiasis Teismas], 2012.
5. *Kauno apylinkės teismo byla 1A-831-319-2013 (Kaunas District Court Case 1A-831-319-2013)*. Lithuania, 2013.
6. *Lietuvos Respublikos Konstitucinio Teismo 1997 m. lapkričio 13 d. nutarimas (Decision of the Constitutional Court of the Republic of Lithuania of November 13, 1997)*. Lithuania, 1997.
7. *Lietuvos Respublikos Konstitucinio Teismo 2005 m. lapkričio 10 d. nutarimas (Decision of the Constitutional Court of the Republic of Lithuania of November 10, 2005)*. Lithuania, 2005.