

## Research Article

## DUAL SANCTIONING OF HATE CRIMES AND HATE SPEECH AS PART OF EXTREMISM IN THE SLOVAK REPUBLIC: CONCEPTUAL, LEGISLATIVE AND PRACTICAL ISSUES

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### ABSTRACT

**Background:** *Extremism poses a cross-border social problem, lacking a universally accepted definition. In principle, so-called hate crimes are specific types of criminal offences that cut across all types of extremism. We can even talk about their conceptual overlap. A special category of hate crimes is represented by so-called verbal attacks, known as hate speech, which are considered an abuse of freedom of expression from an international perspective as well as in jurisprudence of the European Court on Human Rights. As a result of such a perception, their criminal sanction comes into consideration. In accordance with the principle of subsidiarity of criminal law repression, another method of sanctioning hate crimes and hate speech is also possible, namely by administrative law. The existence of “multiple legal regulations” on extremism as delict caused a dual sanctioning system of extremism. It leads to application problems in legal practice, for example, an unclear understanding of offences from criminal and administrative perspectives or even the weak possibility of investigating such acts by State power. The main objective of the contribution is to point out the dual legal regulation (criminal and administrative) of the sanctioning of extremism, in particular its special category – hate crimes and hate speech.*

*Moreover, the objective of the contribution is to assess its unclear issues in legal understanding and to identify specific application problems caused by its dual system (criminal and administrative). Special attention is focused on applicable sanctions in both the criminal law area and administrative law areas. At the end, suggestions on how to solve indicated problems are introduced.*

**Methods:** *The primary sources used for the elaboration of the contribution are scholarly sources (books, studies, scientific papers, etc.), legislative instruments (national and international legislation) and case law (of Slovak national courts and the European Court of Human Rights and the Court of Justice of the European Union). The authors use traditional methods of legal scientific (jurisprudential) research – general scientific methods and special methods of legal science (jurisprudence).*

*The general scientific methods used in the paper are predominantly logical methods, namely, the method of analysis, the method of synthesis, the method of analogy, and the descriptive method. The descriptive method has been used to familiarise the reader with the current legal regulation of extremism. The method of analysis has been used regarding relevant legal provisions and case-laws of courts. The method of synthesis has also been used. The special methods of legal science used here predominantly include methods belonging to a group of interpretative methods, namely, the teleological method, the systematic method and the comparative method. The teleological method has been used to explain the purpose of legislative instruments. The systematic method has been used to classify the relevant applicable law. The comparative method has been used to examine the relationship between legislative perspectives – criminal and administrative.*

**Results and Conclusions:** *Regarding extremism offences committed in the Slovak Republic, in specific cases, the decision making whether the committed offence is criminal or of an administrative nature depends on the attitude of the person who committed it. In the Slovak Republic, legislative amendments are intended to address the area of extremism offences, but they have not been introduced as final. A new legal regulation of the administrative offences of extremism is envisaged in terms of their definition. A new sanctioning policy of extremism administrative offences by juvenile offenders is also expected. Moreover, the application of probation in case of offences committed by juvenile delinquents in the area of extremism is recommended and preferred. It would highlight the importance of restorative justice, including its strengthening. Probation would allow the court, when sanctioning extremism in the criminal law area, to create a so-called tailor-made sanction, which would strengthen the individualisation of the sanction, the educational purpose of the sanction and the achievement of both the purpose of the sanction and the purpose of the Criminal Code, which is to protect society from criminal offences and their perpetrators. Even the Constitutional Court of the Slovak Republic partially examined the modification of the elements of criminal offences of extremism.*

## 1 INTRODUCTION

Illegal behaviour in the sense of a *criminal offence* is generally considered socially dangerous, harmful and unacceptable behaviour. This also applies to extremist crimes. Extremism is considered as a societal problem – in the Slovak Republic and in other democratic and legal states.

For example, the term *extremism* is used within the European Union (hereinafter the "EU").<sup>1</sup> As regards the territory outside the EU, the term *hate crimes* is used. Hate crimes are specific types of crimes occurring across all types of extremism.<sup>2</sup>

In several documents and recommendations of international organisations of which the Slovak Republic is a member, the term *hate crimes* is commonly used.<sup>3</sup> Currently, there are several definitions of hate crimes, but they share certain common features. A hate crime shall meet the characteristics of a criminal offence according to the legal system of the given State. It shall be a crime in which the perpetrator has chosen the object of the attack (which can be an individual, a group of people or property) based on real or perceived affiliation or relationship to one of the so-called protected characteristics. On the other hand, the term hate crime is not defined in the Slovak Penal Code No. 300/2005 Coll.<sup>4</sup> However, *hate crimes* conceptually overlap with *extremism crimes*.

Hate motives are at the core of the hate crime concept, which was created a few decades ago in the USA. The core of this approach is the emphasis on harming an individual or a group showing a certain difference as a victim of prejudice. Initially, this approach was focused on violent attacks against ethnic and religious minorities (including anti-Semitic attacks), but it was gradually extended to other victimisation factors, such as sexual orientation, disability, age, political orientation, social status, etc. The attacked person is defined by his group characteristic – either (s)he cannot change it (race, age), or it is not fair to demand this change (religious belief). The concept of hate crime is used in different connotations – as a scientific, legal or statistical term. A special category is represented by verbal attacks (so-called hate speech), often carried out through social networks in recent years. Hate crimes can be understood as a certain subset of extremist-motivated criminal activity.<sup>5</sup>

The concept of hate speech is not defined in the national legislation of the Slovak Republic and is not perceived uniformly within the EU. The European Parliament broadly perceives hate speech as a term that is used inclusively according to its everyday meaning, as well as to distinguish the legal category of criminal hate speech or, more specifically, incitement to

1 Peter Polák, 'Extrémizmus a možnosti jeho kontroly podľa legislatívy Európskej Únie' v Miroslava Vráblová (ed), *Trestnoprávne a kriminologické možnosti eliminácie extrémizmu* (Leges 2019) 273.

2 Lenka Letková, *Trestné činy extrémizmu: z pohľadu štatistiky a rozhodovacej praxe od roku 2017* (CH Beck 2023) 16.

3 For example, Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other part [2023] OJ L 2862/1; Communication from the European Commission to the European Parliament and the Council: A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime COM(2021) 777 final (9 December 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0777>> accessed 15 September 2023.

4 Zákon Slovenskej Republiky č 300/2005 Zz z 20 mája 2005 'Trestný Zákon' <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/300/>> accessed 15 September 2023.

5 Jakub Holas, 'Extrémizmus, hate crime, nebo obojí?' v Miroslava Vráblová (ed), *Trestnoprávne a kriminologické možnosti eliminácie extrémizmu* (Leges 2019) 56.

hatred.<sup>6</sup> Within the Slovak Republic, it is possible to understand hate speech as a certain expression based on prejudices, such as belonging to a race, nation, nationality, skin colour, ethnic group, family origin or religious belief, with the purpose of harming protected interests under the Criminal Code.<sup>7</sup>

In early 2022, the European Commission proposed the inclusion of hate speech and hate crimes in the list of so European crimes by amending Article 83(1) of the Treaty on the Functioning of the European Union. This move aims to address these offences as they pose threats to fundamental democratic pillars.<sup>8</sup> Consequently, hateful speech and crimes committed out of hatred will thus be an area of criminal activity according to 83(1) of the Treaty on the Functioning of the EU.<sup>9</sup> These are part of the so-called European criminal offences, wherein the European Parliament and the Council of the EU, through directives, establish minimum rules regarding the definition of the facts of criminal offences and sanctions.<sup>10</sup>

## 2 CONCEPTUAL AND LEGAL ISSUES OF EXTREMISM IN THE SLOVAK REPUBLIC: FINDING THE BORDERS OF ALLOWED SPEECH

The basic document defining the priorities of the Slovak Republic in the area of preventing and combating radicalisation and extremism is the document entitled *Concept of Combating Radicalisation and Extremism until 2024*<sup>11</sup> (hereinafter the "Concept"). In the Slovak legal order, the concept of extremism is not legally defined. The definition of extremism is provided by the Concept. According to the Concept, extremism refers to expressions and actions based on the positions of an ideology extremely extreme towards the principles of the democratic rule of law, which directly or in a certain time horizon, through deliberate verbal or physical actions, have a destructive effect on the existing democratic system and its basic attributes in order to promote their own ideological goals. In addition, the concept also lists the characteristic features of extremism, which include an attack on the system of fundamental rights and freedoms, an attempt to limit and suppress the exercise of fundamental rights and freedoms for certain groups of the population defined by their real or perceived belonging to a certain race, nation, nationality, ethnic group or for their real or perceived origin, skin colour, gender, sexual orientation or religion.

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6 Letková (n 2) 16.

7 Ivan Smieško, *Internet a trestné činy extrémizmu* (Aleš Čeněk 2017) 48.

8 Letková (n 2) 17.

9 Treaty on the Functioning of the European Union (consolidated version) [2016] OJ C 202/47.

10 See, Communication from the European Commission to the European Parliament and the Council (n 3) ann.

11 Uznesenie vlády Slovenskej Republiky č 22/2021 z 13 januára 2021 'Konceptia boja proti radikalizácii a extrémizmu do roku 2024' <<https://rokovania.gov.sk/RVL/Material/25631/1>> accessed 20 November 2023.

The Concept addresses the conceptual and systemic aspects of extremism. Legal issues of extremism are regulated by specific legal norms. With the accession of the Slovak Republic to the EU, the *Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*<sup>12</sup> (hereinafter referred to as the "Framework Decision") required the Slovak Republic to prosecute criminal acts of extremism. The framework decision defines which intentional acts should be considered criminal. As regards the Slovak national legal system, in the case of extremism, it presents two levels of sanctioning for perpetrators of extremism – first, administrative liability under the *Administrative Offences Act No. 372/1990 Coll.*<sup>13</sup> and, second, criminal liability under the *Criminal Code No. 300/2005 Coll.*<sup>14</sup> This duality results primarily from the subsidiary status of criminal law in relation to other legal branches in the legal order of the Slovak Republic.

Criminal offences of extremism are closely connected to freedom of speech. The European Court of Human Rights (hereinafter the "ECHR"), seated in Strasbourg (France), stated in its case law that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle, it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance, provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued (case of *Erbakan v. Turkey*, judgment of 6 July 2006, § 56).<sup>15</sup> Indeed, it is necessary in democratic societies to punish expressions based on intolerance, inciting and supporting or justifying hatred. Expressive hate speech is not protected through freedom of expression through the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter the "Convention").<sup>16</sup> Hate speech can be understood as public written, verbal (oral), graphic (drawing), audio (recording) and audiovisual (film, video) expression that incites, spreads, promotes, and justifies hatred towards individuals or to groups of persons for their gender, nationality, language, religion, race, ethnicity, skin colour, origin, sexual orientation.<sup>17</sup>

The Internet provides space for exercising freedom of expression. In addition to spreading hate speech, the extremist scene uses the Internet to create and spread misleading information (disinformation), fake news or conspiracy theories. Extremist groups try to

12 Council Framework Decision 2008/913/JHA of 28 November 2008 'On combating Certain forms and Expressions of Racism and Xenophobia by Means of Criminal Law' [2008] OJ L 328/55.

13 Zákon Slovenskej Republiky č 372/1990 Zb z 28 augusta 1990 'O priestupkoch' <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1990/372/>> accessed 15 September 2023.

14 Zákon Slovenskej Republiky č 300/2005 Zz (n 4).

15 *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006) <<https://hudoc.echr.coe.int/?i=001-76232>> accessed 15 September 2023.

16 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention on Human Rights) <<https://www.echr.coe.int/european-convention-on-human-rights>> accessed 15 September 2023.

17 Tomáš Strémy a Lucia Kurilovská, *Trestný zákon: Komentár, II: Zväzok* (Wolters Kluwer 2022)1355.

influence the public through social networks, leisure sports and interest clubs (for example, martial arts groups and music groups). Hate speech in the Slovak Republic spreads mainly through the Internet, as follows from valid criminal decisions, especially through the Facebook social network.<sup>18</sup>

According to Article 26(2) of the Constitution of the Slovak Republic,<sup>19</sup> everyone has the right to express their opinions in words, in writing, in print, in pictures or in any other way, and the right to freely seek, receive and spread ideas and information regardless of state borders. It should be noted that the forms of freedom of speech are demonstratively listed. Freedom of expression can also be expressed implicitly, for example, by silence, photography, animation, signs, cyphers, symbols, melodies, sounds, the use of sound and visual recordings, the transmission of sound and images by broadcasting, computer network transmission, data carriers, storages. It can also be symbolic expressions such as clothing, hairstyle, tattoos, presentation of signs, numbers, gestures, and facial expressions. Any form of expression of freedom enjoys constitutional protection, but it is not absolute protection.

On the other hand, freedom of speech can be limited if the conditions set by the Constitution are met. According to Article 26(4) of the Constitution, freedom of expression can be limited by law if it concerns measures in a democratic society necessary to protect the rights and freedoms of others, the security of the state, public order, and the protection of public health and morals. The possibility of limiting freedom of expression is inevitable.

Moreover, the Constitution also enshrines other human rights and freedoms that may conflict with the right to freedom of expression, such as the right to privacy and the right to protect a good reputation. Every person's freedom of speech ends where the right of another begins and cannot be abused to interfere with the rights of other persons. The Constitutional Court of the Slovak Republic pointed out that all fundamental rights and freedoms are protected only to the extent and extent that the exercise of one right or freedom does not lead to an unreasonable restriction or even denial of another right or freedom (Finding of the Constitutional Court of the Slovak Republic of 27 February 1997, Ref. No. PL. ÚS 7/96).<sup>20</sup>

Article 10(2) of the Convention sets out the reasons for restricting freedom of expression because its exercise also includes duties and responsibilities. The Convention regulates more grounds for restricting freedom of expression than the Constitution. Neither the Constitution nor the Convention provides the state with unlimited scope for discretion in favour of which State-proclaimed public interest the State restricts freedom of expression. Such discretion of the State is carried out under the supervision of judicial authorities. As

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18 See case-law of Slovak national courts. *Slov-Lex: Legislative and Information Portal* <<https://www.slov-lex.sk/vseobecne-sudy-sr>> accessed 15 September 2023.

19 Ústava Slovenskej Republiky č 460/1992 Zb z 1 septembra 1992 <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/>> accessed 15 September 2023.

20 Nález č PL ÚS 7/96 (Ústavného súdu Slovenskej Republiky, 27 februára 1997) <<https://www.slov-lex.sk/judikaty/-/spisova-znacka/PL%252E%2B%25C3%259A%2B7%252F96>> accessed 15 September 2023.

noted by the Constitutional Court of the Slovak Republic, this supervision includes whether the specified restriction of freedom of expression was legal, legitimate and necessary. The supervision covers both the area of legislation and its application in practice, primarily through the courts (Finding of the Constitutional Court of the Slovak Republic of 11 November 2015, Ref. No. II. ÚS 184/2015).<sup>21</sup>

### 3 CRIMINAL LAW ASPECTS OF EXTREMISM

As regards the national law of the Slovak Republic, all *criminal offences of extremism* are defined in the Criminal Code No. 300/2005 Coll.<sup>22</sup> Moreover, key terms *extremist group* and *extremist material* are defined. According to Article 140a of the Criminal Code, the *criminal offences of extremism* are enumerated: founding, supporting and promoting a movement aimed at suppressing fundamental rights and freedoms; expressing sympathy for a movement aimed at suppressing fundamental rights and freedoms; producing extremist material; disseminating of extremist material; possession of extremist material; denying and approving the Holocaust, criminal offences of political regimes and against humanity; defamation of race, nation and belief; inciting of national, racial and ethnic hatred; apartheid and discrimination against a group of persons; and any crime committed for a special motive according to Article(e) of the Criminal Code.

Criminal offences of extremism are generally aimed at protecting society, society's values or fundamental rights and freedoms from extremism. The perpetrator of an extremist criminal offence can be a criminally responsible natural person (a sane person from the age of 14) but also a legal person (for example, an association or business company). All criminal offences of extremism are considered as so-called intentional offences. They differ from each other in the so-called objective aspect of the offence. They represent different types of acts and behaviours aimed at attacking or restricting fundamental rights and freedoms.

Hate crimes are criminal offences committed with a motive of bias. It is this motive that distinguishes hate crimes from other criminal offences. A hate crime is not one specific crime; it can be intimidation, threats, damage to property, bodily harm, murder or another criminal offence.<sup>23</sup> The Slovak Criminal Code does not define a hate crime, but Article(e) regulates so-called special motive. This includes all criminal acts motivated by hatred against a group of persons or an individual because of their real or perceived belonging to a race, nation, nationality, ethnic group, their real or perceived origin, skin colour, gender, sexual orientation, political belief or religion.

21 Nález č II ÚS 184/2015 (Ústavného súdu Slovenskej Republiky, 11 novembra 2015) <[https://www.ustavnysud.sk/docDownload/b0440df6-9c09-435d-b3d0-f6c0ca99de69/%C4%8D.%2036%20-%20II.%20%C3%9A%20184\\_2015.pdf](https://www.ustavnysud.sk/docDownload/b0440df6-9c09-435d-b3d0-f6c0ca99de69/%C4%8D.%2036%20-%20II.%20%C3%9A%20184_2015.pdf)> accessed 15 September 2023.

22 Zákon Slovenskej Republiky č 300/2005 Zz (n 4).

23 OSCE, *Hate Crime Laws: A Practical Guide* (2nd edn, ODIHR 2022) <<https://www.osce.org/odihr/523940>> accessed 13 July 2023.

The Framework Decision 2008/913/JHA established the obligation for the Member States of the European Union, including the Slovak Republic, to introduce the liability of legal persons for the acts mentioned therein and to propose sanctions for legal persons. The Slovak Republic fulfilled this obligation by the Act No. 91/2001 Coll. on Criminal Liability of Legal Persons,<sup>24</sup> which came into force on 1 July 2016. A legal person can be prosecuted as a perpetrator of a criminal offence for exhaustively defined criminal offences. To determine the extent of criminalisation of a legal entity, the so-called minimal model was introduced, i. e., limited criminal liability.<sup>25</sup> All crimes of extremism are also included in the catalogue of criminal offences of legal entities.

A legal person can be criminally responsible as well for verbal hate crimes – so-called hate speech. Criminal punishment for extremist crimes comes into consideration, namely expressing sympathy for a movement aimed at suppressing fundamental rights and freedoms; denying and approving the Holocaust, criminal offences of political regimes and against humanity; defamation of race, nation and belief; inciting of national, racial and ethnic hatred.

#### 4 ADMINISTRATIVE LAW ASPECTS OF EXTREMISM

The Administrative Offences Act included administrative offences of extremism, which came into effect on 1 February 2014. These offences are regulated in Article 47a of the Act as four separate extremism offences.<sup>26</sup>

While the Criminal Code is based on a formal understanding of the criminal offence (an exception to the formal understanding is a so-called material correction), the Administrative Offences Act is based on the principle of a material understanding of delicts (Finding of the Constitutional Court of the Slovak Republic of 9 January 2019, Ref. No. PL. ÚS 5 /2017-117)<sup>27</sup>.

The objective of the legal regulation of administrative offences of extremism was to catch those expressions which, within the framework of the criminal proceedings, would have ended with the rejection or the stopping of the criminal prosecution with reference to a material correction. They mean such illegal acts, the seriousness of which would not be sufficient to fulfil the factual essence of one of the criminal offences of extremism. From a

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24 Zákon Slovenskej Republiky č 91/2016 Zz z 13 novembra 2015 'O trestnej zodpovednosti právnických osôb a o zmene a doplnení niektorých zákonov' <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2016/91/>> accessed 15 September 2023.

25 Jaroslav Ivor, Peter Polák a Jozef Záhora, *Trestné právo hmotné*, I: *Všeobecná časť* (2 vyd, Wolters Kluwer 2021) 504.

26 Zákon Slovenskej Republiky č 372/1990 Zb (n 13).

27 Nález č PL ÚS 5/2017-117 (Ústavného súdu Slovenskej Republiky, 9 januára 2019) <[https://www.ustavnysud.sk/docDownload/f935300e-7cf7-4e51-8750-93a445ce4520/%C4%8D.%201%20-%20PL.%20%C3%9A%205\\_2017.pdf](https://www.ustavnysud.sk/docDownload/f935300e-7cf7-4e51-8750-93a445ce4520/%C4%8D.%201%20-%20PL.%20%C3%9A%205_2017.pdf)> accessed 15 September 2023.



public interest perspective, in suppressing manifestations of extremism, it is important that even these less severe forms of illegal behaviour are sanctioned (in criminal proceedings). In this way, expressions falling under hate crimes or hate speech (but not all) can be affected in administrative law through the administrative body.<sup>28</sup>

On the other hand, it should be noted that the administrative offences of extremism exclude historical and period clothing used at cultural events, modelling competitions, and educational exhibitions, the purpose of which is not to support opinions or ideologies, the content of which is the suppression of basic human rights and freedoms.

## 5 PRACTICAL PROBLEMS OF PUNISHMENT OF HATE CRIMES AND HATE SPEECH RELATED TO SUBSIDIARITY OF CRIMINAL LAW

Criminal law in the Slovak Republic is built on the *principle of subsidiarity*, which positions criminal law as considered a “last resort” and, at the same time, represents the State's most stringent legal measure. The subsidiarity of criminal repression is also manifested in relation to the application of the so-called material correction, where the assessment and punishment of the act are shifted from criminal law to administrative law, particularly for minor or minor gravity offences for juvenile offenders.

Ideally, if a misdemeanour falls within the category of a criminal offence (i.e. an offence of the first level of gravity), it should have a corresponding equivalent in administrative law as a misdemeanour or other administrative delict. However, the practical problem arises when a misdemeanour as a category of criminal offence under criminal law does not have its equivalent in administrative law as an administrative delict, narrower than a misdemeanour. This problem also concerns criminal offences of extremism. Not every extremist criminal offence has its equivalent at the level of administrative law as an administrative offence of extremism.

On the analysis of the current legal regulation of offences of extremism according to the Criminal Code and administrative offences of extremism according to the Administrative Offences Act can be observed that offence according to § 47a(1)(a) of the Administrative Offences Act is of a subsidiary nature to the criminal offence of *expressing of sympathy for a movement aimed at suppressing fundamental rights and freedoms* according to Article 422 of the Criminal Code (classified under hate speech) or to the criminal offence of *disseminating of extremist material* according to Article 422b of the Criminal Code.

Further, as noted by the Regional Court in Trenčín (court in the Slovak Republic), the administrative offence of extremism, according to Article 47a(1)(b) of the Administrative Offences Act, is subsidiary to the criminal offence of *defamation of race, nation and belief*

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28 Peter Potásch a ine, *Zákon o priestupkoch: Veľký komentár* (Eurokódex 2016) 164.

according to Article 423 of the Criminal Code (Resolution of the Regional Court in Trenčín of 11 October 2018, Ref. No. 2To/21/2018)<sup>29</sup>.

Furthermore, the criminal offence of supporting and promoting a movement aimed at suppressing fundamental rights and freedoms stipulated by Article 421 of the Criminal Code does not correspond to any administrative offence of extremism. This criminal offence is a misdemeanour. In the case of misdemeanours, law enforcement authorities and courts shall apply a material correction.

All other cases of extremist expressions, including those that can be classified under hate crimes and hate speech and which are misdemeanours, remain without any sanction from the State in case of material correction. This means that hate crimes and hate speech that do not reach the necessary seriousness for criminal sanctioning, even if they fulfil the formal elements of the criminal offence, cannot be sanctioned under current legislation.

The legislator's intention in introducing the administrative offences of extremism was to intercept those proceedings which, within the framework of the criminal proceedings, would have been terminated by the rejection of the criminal complaint or its termination with reference to a material correction. This intention of the legislator was clearly not fulfilled. Except for two criminal offences of extremism (production of extremist material and apartheid and discrimination against a group of persons), all other criminal offences of extremism are essentially misdemeanours. However, the legal regulation of administrative offences of extremism does not correspond to all criminal offences of extremism, which means excluding their subsidiarity. If subsidiarity is excluded, subsidiary disability at the level of administrative law is also excluded. Any changes to the legal regulation of extremism in the Criminal Code must necessarily be followed by changes to the legal regulation of extremism in the Administrative Offences Act due to the preservation of subsidiarity and continuous sanctioning.

Currently, a legislative loophole causes impunity for perpetrators whose actions, initially suspected as criminal offences, are later deemed administrative offences by law enforcement authorities or the court. This kind of case involved the unlawful behaviour of a 14-year-old offender initially suspected of committing a criminal offence. However, after further clarification, the law enforcement authorities concluded that in the given case, it was not a criminal offence but an act that could be assessed as an administrative offence. In such cases, the person is not responsible under administrative law.<sup>30</sup>

In the context of prosecuting extremist expressions, including hateful expressions of juvenile offenders, a practical issue arises concerning the application of material corrective measures. We view these measures as crucial due to their potential to leave extremist

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29 Prípad č 2To/21/2018 (Krajský súd Trenčín, 11. októbra 2018) <<https://obcan.justice.sk/content/public/item/4609f1be-c532-4574-bbc9-17f44facde51>> accessed 15 September 2023.

30 Explanatory report on the draft law amending the Criminal Code No. 300/2005 Coll.

expression unaffected. This problem is related to the *age* of the person, which is a condition for the emergence of legal liability.

Under current laws, criminal liability for extremist expression arises upon reaching the age of 14,<sup>31</sup> while administrative legal responsibility for extremist expression arises upon reaching the age of 15.<sup>32</sup> Consequently, a juvenile person over the age of 14 but under the age of 15 can commit an extremist (hate) crime. The law enforcement authorities or the court, after assessing the seriousness, shall apply the so-called material correction. Assessment and punishment of the act shall be moved from the area of criminal law to the area of administrative law.

However, from an administrative law perspective, a person committing the offence is an *ineligible subject of law*. Age is a special ground that leads to the postponement of a case due to lack of age. Consequently, the offender's actions remain entirely unaffected. Such a situation does not produce any relevant effects in prevention but also in repression. Harmonisation of the age of criminal perspective and administrative perspective regarding responsibility could "remove" the current special kind of "criminal immunity for offenders aged 14-15".

In the conditions of the Slovak Republic, the proposed legislative amendments concerning the area of administrative offences and conditions of its liability have yet to be successful so far. As regards administrative offences, a new legal regulation of extremism offences is expected and a proposal to lower the age threshold for administrative law liability. We consider it necessary to lower the age of administrative law liability for offences of extremism to the level of age as a condition of criminal law liability. This alignment would ensure the continuity of prosecution of extremist expressions, including acts falling under hate crimes and hate speech.

If the so-called material correction were applied, the criminal law sanctioning would be transferred to administrative law. This adjustment would resolve age-related issues in proceedings and prevent postponements. Extremist expressions that, from a criminal law perspective, would not be serious enough to sanction would be sanctioned, aligning with the original intent of introducing administrative regulation against extremism offences. This approach would make subsidiary sanctioning possible and maintain the efficiency of proceedings without disruption.

According to the registered statistics of extremist criminal offences committed in the Slovak Republic, it follows that young people have a high share of committing such offences, with more than half of the perpetrators falling into the category of juveniles. Likewise, research shows that the majority of extremists, members and supporters of extremist movements are

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31 Zákon Slovenskej Republiky č 300/2005 Zz (n 4) art 22(1).

32 Zákon Slovenskej Republiky č 372/1990 Zb (n 13) art 5(1).

young people often located on the margins of society. Factors such as loss of employment and family background may contribute to their alienation.

The most at-risk group is the youth, who, due to their age, tend to seek a radical solution to society's mistakes and shortcomings; young people are comfortable with a black-and-white vision of the world, especially the concentration of the problem in simple slogans or the search for an enemy who is responsible for everything.<sup>33</sup>

In general, the material correction can also be applied to criminal offences of extremism of legal entities. In practice, a problem arises with the legal sanction of a legal entity. Administrative offences are a category of administrative delicts that can only be committed by a natural person. Indeed, from a legal perspective, extremism administrative offences can only be committed by a natural person.

Legal entities can be sanctioned under administrative law but for other categories of administrative offences, such as so-called administrative offences of legal entities or administrative offences, regardless of culpability. Another problem arises when a legal entity commits an extremist criminal offence (hateful and verbal). In such cases, law enforcement authorities or the court, after assessing the seriousness, may opt to apply a so-called material correction, shifting the assessment and sanctioning of the act from criminal law to the area of administrative law. However, from an administrative law perspective, the legal entity would be considered an ineligible subject of law, potentially leading to the postponement of the case. Such a situation does not produce any relevant effects in prevention as well as in repression.

In legal practice occur odd situations. For example, according to the Decision of the Regional Court in Trenčín of 11 October 2018, Ref. No. 2To/21/2018,<sup>34</sup> the legal practice attempts to refer the case under discussion to administrative proceedings if it is not possible to prove the intentional form of culpability of the act within the framework of criminal proceedings. In terms of culpability, the offence is based on negligence. Illegal conduct would be finally discussed and sanctioned, but only at the level of subsidiary – less serious – as regards the severity of the sanction and its consequences.

## 6 SANCTIONING OF HATE CRIMES AND HATE SPEECH

From the Slovak criminal law perspective, the sanction shall be proportional to the seriousness of the criminal offence. It shall be individualised and differentiated with regard to the nature of the committed offence.<sup>35</sup> The law obliges the court to take into account the

33 Miroslava Vráblová, 'Sankcionovanie páchatelov extrémistických trestných činov' v Miroslava Vráblová (ed), *Trestnoprávne a kriminologické možnosti eliminácie extrémizmu* (Leges 2019) 370.

34 Prípád č 2To/21/2018 (n 29).

35 Ingrid Mencerová a ine, *Trestné právo hmotné: Všeobecná časť* (2 vyd, Heuréka 2015) 292.

individual characteristics of each individual criminal offence. This is an expression of the principle of judicial individualisation of sanctioning.<sup>36</sup>

The possibility of sanctioning verbal expressions by criminal law is in line with the case law of the European Court of Human Rights. In certain circumstances, this Court admits criminal responsibility for abuse of freedom of expression. A criminal sanction is considered only if the State does not have the possibility to apply a milder sanction. According to the European Court of Human Rights, States must be restrained when using criminal sanctions in these cases; they only have a wider scope to interfere with freedom of expression in cases of incitement to violence.<sup>37</sup>

An important requirement is the adequacy of the sanction. The most severe sanction is considered to be a criminal sanction, the consequence of which is the greatest interference with human rights. A criminal sanction should be considered as a subsidiary means in the sense of the *ultima ratio* principle. As pointed out by the European Court of Human Rights, the assessment of the proportionality of the interference with the protected interests depends on whether the State authorities could have resorted to means other than criminal sanctions, such as civil and disciplinary remedies (Judgment of the European Court of Human Rights of 23 September 1998 – *Lehideux and Isorni v. France*, Application No. 24662/94)<sup>38</sup>.

If the State authorities have concluded that no other means suffice, instead of criminal sanctions, non-criminal sanctions should be applied, particularly when resorting to a prison sentence.<sup>39</sup> Imprisonment is a universal sanction in the Slovak Republic; it can be imposed for all crimes. Therefore, a prison sentence can be imposed for an extremist criminal offence (verbal and hateful). However, imprisonment is a so-called last resort in sanctioning juvenile offenders. For juvenile offenders, the so-called unconditional prison sentence is the last option to sanction a juvenile offender. Other sanctions are preferred, drawing from administrative legislation, where financial penalties can be logically considered. According to the Criminal Code, a financial penalty can be imposed on a juvenile as an alternative punishment instead of imprisonment, contingent upon their employment or financial circumstances supporting such penalties.

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36 Stanislav Mihálik a Filip Vincent, 'Zásady ukladania trestov a ich vplyv na aplikačnú' v Lukáš Michalov, Sergej Romža a Simona Ferenčíková (eds) *Privatizácia výkonu trestu odňatia slobody, sci-fi alebo jediná možnosť?: IV Košické dni trestného práva* (Univerzita Pavla Jozefa Šafárika 2020) 307.

37 Peter Hanák, 'Kriminalizácia žurnalistiky: Trestne stíhaní novinári na Slovensku v európskej perspektíve' (2016) 5(2) Mediální studia 250.

38 *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998) <<https://hudoc.echr.coe.int/fre?i=002-6795>> accessed 14 July 2023.

39 Juraj Sopoliga, 'Trestnoprávna zodpovednosť za šírenie nepravdivých informácií' *Právne listy* (Bratislava, 15 December 2021) <<http://www.pravnelisty.sk/clanky/a1036-trestnopravna-zodpovednost-za-sirenje-nepravdivych-informacii>> accessed 14 July 2023.

In the context of registered sanctions imposed for extremist crimes in Slovakia, prison sentences with conditional suspension dominate, along with other punishments such as confiscation of property. Non-conditional imprisonment, the most severe type of punishment, is rarely imposed by the court in exceptional cases for committed criminal offences of extremism. *Letková* analysed 152 decisions of the Specialised Criminal Court, which became final in the period 2017-2022. Her analysis shows that plea agreements are common (79%, i.e. 115 cases), with non-conditional imprisonment imposed in only 9 cases. The most frequently imposed sentences were a suspended prison sentence of 2 years, a suspended sentence of 6 months and a suspended prison sentence of 3 years. As far as the alternative sanctions are concerned, a financial penalty was most often imposed. The penalty of banning participation in public events was imposed less often. In a negligible number of cases, protective treatment (anti-alcohol and anti-drug addiction) was also imposed in addition to the punishment.<sup>40</sup>

Manifestations of extremism, according to the Administrative Offences Act, are sanctioned by a fine – up to EUR 1000. When such a fine is imposed, the decision of the administrative body also includes a request to eliminate the illegal situation – within 60 days. The fine can be imposed repeatedly until the illegal situation is eliminated. To compare, since 2017, more than 70% of financial penalties imposed for criminal offences of extremism were lower than EUR 1000. The criminal sanction, by its intensity of intervention in the offender's property sphere, actually corresponds to the intensity of the administrative sanction's intervention in the offender's property sphere. There is no difference in the intensity of the penalty. Paradoxically, the opposite situation also occurs when the administrative sanction is more severe than the criminal sanction.

For example, an act displaying characteristics of extremism, especially if aggressive in nature and linked to event participation, may also be considered an offence of *spectator violence*. The penalty for an offence is a fine from EUR 300 to 6000. If it is a risky event, the sanction for the offence is a fine from EUR 500 to 10000 and a restrictive measure – a ban on participation in the public event for up to 5 years.<sup>41</sup>

The sanctioning of legal persons for hate speech is questionable. The court can only impose such a penalty and in such an amount as determined by law. The Act No. 91/2016 Coll. on Criminal Liability of Legal Persons, logically, does not include imprisonment as a possible sanction for legal persons. Therefore, it is necessary to look for another alternative to punishment.

Drawing inspiration from administrative law legislation, financial penalties can be applied to legal persons for hate speech as an alternative to imprisonment. The conditions for imposing a monetary penalty are the same for natural persons and legal persons; the only

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40 *Letková* (n 2) 119-25.

41 Zákon Slovenskej Republiky č 372/1990 Zb (n 13) art 47a.

exception is the amount of the penalty, which is significantly higher for legal persons – from EUR 1500 to EUR 1 600 000.

A financial penalty shall not be an intensive intervention in fundamental rights and freedoms but an intensive intervention in the property sphere of a legal entity. Thus, the principle of restorative justice can be fully manifested when punishing legal entities for hate speech. However, it is also possible to consider the sanction of prohibition of activity if the legal conditions for imposing this type of sanction are met. It should be noted, as pointed out by *Mulák*, that during the last two decades, it has been possible to register continuous debates about relations of retributive and restorative justice, whose central issue can be understood as the nature of a conflict arising as a consequence of commitment of a criminal offence.<sup>42</sup> In each case, public criminal proceedings should be guaranteed.<sup>43</sup>

## 7 CONCLUSIONS AND RECOMMENDATIONS

According to the current Slovak national legislation and the application practice of law enforcement authorities, courts and administrative authorities, it is unclear which types of speech – content or form – shall be sanctioned. In specific cases, the decision-making on whether the committed offence (act) is of a criminal nature or of an administrative nature, in the case of extremism offences, depends on the attitude of the person who committed it. Such a situation cannot be considered consistent with the principle of legal certainty.<sup>44</sup> Since the majority of legally binding decisions, including sanctions imposed, in matters of extremism end with an agreement on guilt and punishment (criminal law measure), the reasoning of the court cannot be found as the justification of the decision.

In the Slovak Republic, legislative amendments are intended to address the area of extremism offences. Still, they have yet to be introduced as final at this time of writing. A new legal regulation of the administrative offences of extremism is envisaged in terms of their definition. A new sanctioning policy of extremism administrative offences by juvenile offenders is also expected. In line with the case law of the European Court of Human Rights, the use of the institution of probation seems to be a very effective approach.

The application of probation (probation programs) for offences committed by juvenile delinquents in the area of extremism is recommended and preferred. Probation would highlight the importance of restorative justice, including its strengthening. It would allow

42 Jiří Mulák, 'Possibilities of Introduction of Subsidiary Prosecution in Czech Criminal Proceedings' (2018) 8(3) *The Lawyer Quarterly* 307.

43 Jiří Mulák, 'The Principle of the Public of Criminal Proceedings as an Attribute of the Right to a Fair Trial' (2018) 11(3) *The Lawyer Quarterly* 518.

44 Matúš Kováč, Stanislav Mihálik a Filip Vincent, 'Niektoré aspekty protixtrémistickej novely a jej dosahy na aplikačnú prax' v Miroslava Vráblová (ed), *Trestnoprávne a kriminologické možnosti eliminácie extrémizmu* (Leges 2019) 170-1.

the court, when sanctioning extremism in the criminal law area, to create a so-called tailor-made sanction, which would strengthen the individualisation of the sanction, the educational purpose of the sanction and the achievement of both the purpose of the sanction and the purpose of the Criminal Code, which is to protect society from criminal offences and their perpetrators. In a broader context, probation can prevent criminal activity and thus reduce recidivism, albeit not entirely but at some level.

Even the Constitutional Court of the Slovak Republic partially examined the modification of the elements of criminal offences of extremism. It stated that it perceives a positive effort by the legislator to regulate hate speech, but the legislator should, in the future, put more emphasis on conceptual work in amending the Criminal Code and should reflect more restraint in criminal law repression.

According to the Constitutional Court, hate speech in the future could be regulated through private lawsuits for the protection of personality or linking the relevant facts of criminal offences to the criterion of violence or violation of public order (Finding of the Constitutional Court of the Slovak Republic of 9 January 2019, Ref. No. PL. ÚS 5/2017-117).<sup>45</sup> We consider this approach as well presented.

At the same time, it is necessary to add that the conceptual work on legislative amendments of the Criminal Code should also be focused on guaranteeing continuity with the administrative law approach, which also represents regulation outside of the criminal law area. All cases of extremist expressions, including those that can be classified under hate crimes and hate speech, would be legally affected by the State in the case of a material correction application. Even hate crimes and hate speech that do not reach the necessary seriousness for criminal sanctioning, even if they fulfil the formal elements of a criminal offence, would be sanctioned outside the area of criminal law.

In our opinion, the existing applicable sanctions, both for individuals and for legal persons, are sufficient and do not necessitate the introduction of new types of sanctions.

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<sup>45</sup> Nález č PL ÚS 5/2017-117 (n 27).



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