Conclusions of the summary report on the courts' jurisprudence in criminal offences violating certain fundamental rights

In 2015 the President of the Curia set up a jurisprudence-analysing working group for examining the courts' jurisprudence in criminal offences violating certain fundamental rights. From the wide range of fundamental rights the jurisprudence-analysing working group focused on the right to freedom of expression, the right to dignity (and the general prohibition of negative discrimination) and the relationship of these rights. The working group has started from the assumption that although the right to freedom of expression enjoys enhanced constitutional protection, it is not an absolute right therefore it can be subjected to restrictions that are proportionate and necessary in a democratic society. The exercise of this right may be limited by the rights to dignity, honour and reputation. Therefore the analysis focused only on offences falling in the category of hate crime.

The domestic regulation on hate crime uses and has used a mixed solution: the Criminal Code orders to punish violence committed against a member of a community and incitement to hatred against a community as *sui generis* offences. Moreover, the commission of certain criminal offences – e.g. murder, causing bodily harm, violating personal liberty, libel, slander – for villainous reasons, including racist or other hate motives, constitutes an aggravating circumstance giving rise to the imposition of a more severe punishment. Under the courts' sentencing practice, the commission of an offence for villainous reasons, including racist or other hate motives is and has been evaluated as an aggravating circumstance even if such commission is not a statutory aggravating circumstance in the criminal provision governing the offence.

The analysis has primarily focused on the offences of violence against a member of a community and incitement to hatred against a community.

The issues under examination were approached in a comprehensive manner. The international legal background, including EU law and the relevant legal instruments of foreign states, of the fundamental rights-related criminal regulation – which formed the main subject-matter of the analysis – were identified and examined. The effects of these legal instruments on the domestic regulation – which had been shaped by historical legal traditions and the practice of the Constitutional Court as well – were also mapped. The relevant practice of the Supreme Court and the Curia were summarised in the light of this background and lower instance court practice was also examined.

In a fairly great part of the analysed cases hate-motivated offences were committed against ethnic Hungarians. Formerly the courts' practice was uncertain about whether these criminal provisions aimed at protecting only minorities or also majority groups. These uncertainties in the application of law by the courts were later eliminated by a Curia decision stating that the aim of these criminal provisions was to ensure that no person is assaulted or suffer injury on account of his belonging to another ethnicity, hence persons belonging to the majority ethnicity may also be aggrieved parties in hate-motivated attacks. A decision having such content was published by the Curia as a *decision on principle*, and the courts seem to follow this interpretation. The issue whether such enhanced criminal protection is, in addition to the protection provided against disorderly conduct, applicable to all kinds of groups arose in the context of threats and attacks suffered by members and ex-members of the New Hungarian Guard Movement (*Új Magyar Gárda Mozgalom)* on account of their membership in the Movement, an organisation meanwhile dissolved under a final court decision. On the issue a

Supreme Court Opinion was adopted which has served as a guideline for the courts ever since. Namely, the Supreme Court held that members of an organisation operating on the basis of a system of ideas shall only be entitled to enhanced criminal protection where in its operation the organisation respects the principles laid down in the constitution and complies with its statutory framework. Members of a movement created against a national, ethnic, racial, religious or other group and clearly violating the law shall obviously not enjoy enhanced criminal protection, since in the contrary case the principle of the unity of the legal order would be seriously violated.

From the category of hate crime, courts most frequently hear cases of violence against a member of the community. In establishing the commission of this offence, the essential issue – and the main source of error in the adjudication of the case – is whether the given person's belonging to a community can be established, since this circumstance differentiates this offence from other offences (e.g. from disorderly conduct). The jurisprudence-analysis has revealed that the investigations carried out in such cases often fail to uncover the facts and circumstances proving hate or prejudice as a motive, albeit such uncovering would make it easier for the courts to decide on the issue of hate as a motive. Therefore the courts generally could only infer the existence or absence of hate as a motive from the perpetrator's statements, the emotional content of those statements, the perpetrator's conduct accompanying his statements and the nature of the perpetrator's relationship with the aggrieved party by examining whether in the given situation (e.g. in a conflict of drunk persons) the offensive and exclusionist statements that had been uttered had gone beyond usual swearing and cursing. The courts hearing such cases normally examined whether a passion-driven conduct resulted from a cause. Where the conduct did not originate from a cause or conflict and was not a revenge to a conduct of the person belonging to the protectable group, the courts generally characterised the conduct as violence against a member of a community in case the legal elements of this offence were fulfilled. In characterising such a conduct, the courts normally did not pay attention to such precedents of the conduct which had been unrelated to the attacked person or the person affected by the conduct.

As to the effective criminal law treatment of hate speech through establishing the commission of the offence of incitement against a community, in the past two and a half decades there have been constant debates about this provision and this is the most frequently discussed offense at present, too. Some critiques hold that the criminalisation of this conduct curtails the right to freedom of expression to an excessive extent, whereas other critiques say that the criminalisation of the conduct is not suitable to effectively combat hate speech, which actually destroys the democratic community of the citizens. Legislative attempts allowing for the criminalisation of hate speech in a wider scope were consistently annulled by the Constitutional Court on the basis of the principle of *ultima ratio*.

The practice of the Supreme Court and of the Curia has been consistent ever since the 1990s. Under the jurisprudence of these courts, incitement to hatred can only be established where the perpetrator's statements – made orally, in writing or in any other manner – primarily appeal to mass emotions and not to the sense and rationality of people. In this interpretation, incitement to hatred is an emotional preparation to violence, which inherently entails the risk of violating the individual rights of a great number of persons belonging to a given community or group. From the endangering character of the offence it follows that for the establishment of the offence the existence of a presumed risk does not suffice; a situation giving rise to the occurrence or potential occurrence of a concrete injury as a result of the incitement of other persons to active, working hatred is required to exist.

The jurisprudence-analysing working group has established that as a result of the use of the term *incitement* by the courts in the sense presented above – which is in conformity with the Constitutional Court's decisions – the scope of conducts punishable as hate speech is more restricted than the scope of conducts specified in Council Framework Decision 2008/913/JHA. From the Framework Decision the insufficiency of an abstract form of risk cannot be inferred in respect of conducts amounting to incitement. The low number of indictments for incitement against a community is, to a large extent, attributable to the above restrictive interpretation of *incitement* as a conduct requiring active hatred. The investigation authorities were normally more daring to characterise a conduct as incitement in case the perpetrator remained unknown and the proceedings were discontinued or suspended. Only a very limited part of the proceedings instituted on account of incitement against a community has reached the court level.

A correct evaluation of hate crime sentencing practice could only be given in a limited scope because, in the great majority of cases, cumulative sentences were imposed for such offences: in most cases a felony of violence against a member of a community (or a felony or misdemeanour of disorderly conduct, which replaced the original charge) and another offence of similar gravity (normally causing bodily injury) were evaluated as cumulative offences *(concursus delictorum)*, and the respective punishment ratios could not be established.