THE LEGAL FRAMEWORK FOR CRIMINAL PROSECUTION OF THE PROHIBITION OF INCITEMENT AND INSTIGATION OF INEQUITY, HATRED AND INTOLERANCE IN THE REPUBLIC OF SERBIA

Vladimir Đurić, PhD[1]
Institute of Comparative Law, Belgrade, Serbia

Abstract: This paper explores the legal framework for criminal prosecution of the prohibition of incitement to and instigation of inequity, hatred and intolerance in the Republic of Serbia. The author provides an overview and analysis of the legal framework and points to the dilemmas and controversies that the criminal prosecution may be faced with in relation to the said prohibition. The conclusion is that the provisions regulating that prohibition do not have systemic quality and that the criminal prosecution of that prohibition consequently can have limited effects.

Keywords: inequity, hatred, intolerance, criminal prosecution

INTRODUCTION

The prohibition of incitement and instigation to hatred and intolerance, or hate speech as it is called in many legislations and scientific papers, provokes a number of theoretical and legal controversies. The most common dilemmas regarding hate speech are manifested when it comes to relationships, in fact conflicts, between freedom of speech and hate speech, as well as in the scope and range of its legal incrimination. In that sense, it is clear that, first of all, legislators can face the controversies and dilemmas that accompany this prohibition in its normative regulation. In comparative law, there are two approaches to the regulation of this prohibition. According to the first approach, the goal of prohibiting hate speech is to protect public order and it exists in the legislations of Great Britain, Israel and Australia, and a different approach finds the basic goal of such a prohibition in the protection of human dignity, which is the characteristic of the legislations of Canada, Denmark, France, FR Germany and

1 v.djuric@iup.rs

the Netherlands (Coliver, 1992: 363-366). The feature of the first approach is a more restrictive application of legal norms, while the characteristic of the second approach is the prescription of not only criminal, but also civil sanctions and more frequent application of the above mentioned in practice.

Courts may also face various controversies regarding the prohibition of inciting and provoking hatred and intolerance in resolving specific disputes related to it. This refers both to the constitutional courts that can deal with the issue of this prohibition in different forms within their jurisdiction and whose approach to this issue in comparative law is very far from any uniformity (Rosenfeld, 2003: 1523), and to criminal courts that often face the dilemmas arising from the legal incrimination of this prohibition.

The aim of this paper is to point out possible controversies and dilemmas that accompany the criminal law elaboration of this institute or, more precisely, which arise from its normative regulation in the Republic of Serbia.

THE CONSTITUTIONAL REGULATION OF THE PROHIBITION ON INSTIGATION AND INCITEMENT TO INEQUALITY, HATRED AND INTOLERANCE IN THE REPUBLIC OF SERBIA

The banning of provoking and inciting inequality, hatred and intolerance is one of the most important prohibitions provided by the Constitution of the Republic of Serbia (Official Gazette RS, 98/2006). It is normatively expressed in several provisions of the Constitution, which makes it the most frequently mentioned constitutional prohibition that affects the enjoyment and expression of many constitutional rights and freedoms.

Basically, the Constitution explicitly prescribes the prohibition of incitement to hatred and intolerance in Article 49. According to this Article, any provocation and incitement to racial, national, religious or other inequality, hatred and intolerance is prohibited and punishable. By linguistic interpretation of the presented constitutional provision, firstly it can be determined that it is not a prohibition, since closer regulation, in all its aspects, is left to the free assessment of the legislator, but the prohibition for which the Constitution explicitly prescribes *punishment*, which indicates its primary criminal, penal law, regulation and protection. The essence of the prohibited activities is *provocation* and *instigation*, which may indicate that the prohibition is violated both by the occurrence of a consequence, i.e. by the creation of hatred and intolerance as well as by the very acts that may lead to such a consequence. It is important to stress that the Constitution prohibits and orders the punishment of *every* activity that may have or lead to such consequences.

Inequality, hatred and intolerance, observed in the order listed by the constitution-maker, are not equally legally determined categories, but according to the presented provision of the Constitution, they are equally socially dangerous. Legally speaking, inequality has its clear meaning, while hatred and intolerance are categories that somewhat escape precise legal definition.

Finally, the consequence of this constitutional prohibition does not have to be embodied only in racial, national and religious, but also *in every other* inequality, hatred and intolerance. Since the object of racial, national and religious hatred and intolerance are primarily, but not necessarily and exclusively, *groups* that share certain racial, national and religious characteristics, it is clear that the basis of the *second* is inequality, hatred and intolerance, which refers both to culture, gender, sexual orientation, etc. as well as to vulnerable social groups determined by those characteristics.

A systematic interpretation of the provisions of the Constitution leads to the conclusion that, according to Article 202, paragraph 4 of the Constitution, deviation from that prohibition is not allowed even during the state of emergency or war, which, according to some authors, classifies it as an absolutely protected right (Pajvančić, 2009: 66). In fact, this is not an absolutely protected right, but equality and tolerance are absolutely protected and are some of the basic values of the constitutional order of the Republic of Serbia. Such a conclusion is indicated not only by the absolute protection that those values enjoy, but also by the constitutional solutions regarding the obligations of the state to encourage understanding, appreciation and respect for differences by measures in education, culture and public informing (Article 48) as well as to encourage the spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect, understanding and cooperation in the field of education, culture and informing (Article 81). Also, the constitutional provisions according to which inciting and instigating racial, national and religious inequality, hatred and intolerance, in various ways, is the prescribed basis for banning religious communities (Article 44, paragraph 3), for preventing dissemination of information and ideas through the media (Article 50, paragraph 3) and for prohibiting various types of associations (Article 55, paragraph 4) lead to the conclusion that equality and tolerance are some of the basic values of the constitutional order of the Republic of Serbia.

Bearing in mind the constitutional regulation of the prohibition of inciting and encouraging racial, national, religious and other inequality, hatred and intolerance, it could be concluded that in the Republic of Serbia this prohibition has primarily the function to protect public order. However, the above mentioned constitutional provisions are not devoid of certain open issues, especially in the context of the criminal law regulation of this prohibition.

In principle, the first of the open issues regarding the constitutional prohibition of inciting and encouraging racial, national, religious and other inequality, hatred and intolerance stems from the differences between the normative regulation of the prohibition in the Constitution and relevant international acts. Namely, the constitutional regulation of this prohibition contained in Article 49 and its linguistic interpretation contradict to some extent the international legal framework for the prohibition of hate speech with regard to the consequences that such activities cause and that are required for their prohibition. Namely, Article 20, Paragraph 2 of the International Covenant on Civil and Political Rights requires Member States to prohibit any advocacy of national, racial or religious hatred *that constitutes instigation to discrimination, hatred or violence*. Thus, unlike the Constitution, the International Covenant on Civil and Political Rights stipulates that the consequence of hate speech must be reflected in incitement to discrimination, hatred or violence.[2] A slightly different definition is contained in the International Convention on the Elimination of All Forms of Racial Discrimination, which in Article 4 (a) requires all parties to criminalize *all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all the acts of violence or incitement to such acts against any race*, or group of persons of another color or ethnic origin as well as providing any assistance to racist activities, including its financing. Thus, the Convention, unlike the Covenant, requires the prohibition of those activities, whose consequences are not reflected in discrimination and violence, but also in dissemination of all ideas based on racial superiority (Mendel, 2010: 9).[3]

Keeping in mind the differences that exist in the stated definitions and especially the differences between the content of that prohibition and the consequences required by the Constitution of Serbia

2 Also, the UN Human Rights Committee in its General comment no. 11 explicitly specifies that this is a ban on advocacy, regardless of whether the advocacy has internal or external goals (Human Rights Committee, 1983).
3 By the way, the Committee on the Elimination of Racial Discrimination is of the opinion that the presented article of the Convention includes four types of activities: 1) dissemination of ideas based on racial superiority or hatred, 2) incitement to racial hatred, 3) acts of violence and 4) incitement to such acts (Committee on the Elimination of Racial Discrimination, 1993).

and the International Covenant on Civil and Political Rights, it is important to stress that according to international law, what states are *required* to prohibit in order to ensure equality is not necessarily identical to that what they are *allowed* to ban in order to meet that goal (Mendel, 2010: 2), and that the clear point of international bodies monitoring the implementation of international human rights treaties is that, in case the states require a higher degree of prohibition, they cannot invoke the provisions of international treaties to justify non-compliance with obligations under domestic law.

Regarding the consequences of violation of that prohibition, but also the activities that lead to it, there is an open question of how they should be interpreted and determined. Inequality is a legal term that has its relatively clear meaning. On the other hand, another open question is the way in which the terms "hatred" and "intolerance" should be understood, especially in the context of *incitement.* In general, the answer to the question of what is understood by the term "incitement" is extremely complex in international law, so it is not surprising that the UN High Commissioner for Human Rights has expressed concern that the term does not have a clear definition in international law (United Nations High Commissioner for Human Rights, 2008: par. 24). Also, since hatred, according to the opinion of international treaty bodies, is more a state of mind rather than an act, which as such is classified as an opinion (Mendel, 2010: 9) (and this may be all the more related to intolerance), and the prohibition of incitement to a certain state of mind, or opinion can be quite controversial. Since the Constitution prescribes not only the prohibition, but also the punishment of instigation and incitement to racial, national, religious or other inequality, hatred and intolerance, the question may be asked whether the consequences of violation of the prohibition, but also the activities leading to them, should be interpreted and determined in accordance with the criminal law definition of those terms. However, it seems that simply applying the criminal law understanding of certain terms that describe the consequences of the prohibition, but also the activities that lead to them, is not sustainable in entirety. Namely, the constitutional notion of instigation cannot be paralleled in all respects with the criminal law notion of instigation since according to the criminal law concept instigation is always committed *in relation to a specific criminal offence*, and the instigator must be aware of the causal link between the act of instigation and the decision to commit a criminal offence as well as of all *the essential features of that act* (Stojanović, 2006: 245) and hatred and intolerance, of course, are not criminal offences in themselves. The constitutional notion of instigation might be related to the notion of propaganda. Propaganda consists of presenting or spreading certain facts (false or true) or ideas in order to influence other people, so that they accept those ideas and, possibly, take certain actions necessary to achieve propaganda goals, but which can also be criminal in their character. If propaganda also contains agitation (invitation) to commit criminal acts, then it gets closer to the criminal law notion of instigation. But it also differs from it since instigation is directed at a certain crime, which is not the case with propaganda (Jovičić, 2006:228). Of course, even in this context, it is clear that hatred and intolerance, in themselves, are not criminal offences (Lazarević, 2006: 783).[4] In international law, incitement has been considered in the context of causality by some contracting authorities although it is pointed out in the relevant comments that there cannot be any equality between incitement to a particular act and the cause of such an act, so the most important standard for assessing whether certain statements incite hatred is the context in which they are uttered, and hatred inevitably encounters some kind of "tangible manifestation" (Mendel, 2010: 6-9). Also the notion of "provocation", at least in the domestic criminal law literature has not been deprived of certain dilemmas, especially regarding the question of whether provocation could be indirectly done by "manifestation" (Ćirić, 2008: 153). However, by that we already approach the issue of criminal elaboration of the constitutional prohibition of incitement and instigation to racial, national, religious and other hatred and intolerance.

4 In the comments of the domestic criminal legislation, it is pointed out that hatred is a mental state which negatively values the object of hatred, while intolerance means a state of mistrust, a feeling of intolerance and repulsion (Lazarević, 2006:783)

CRIMINAL PROHIBITION OF PROVOKING AND INCITING HATRED AND INTOLERANCE

As pointed out, the punishabilty of violating the prohibition prescribed in Article 49 of the Constitution primarily refers to criminal protection. The Criminal Code (Official Gazette RS, 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019) provides for two criminal offences that correspond to the aforementioned constitutional prohibition and that sanction the violation of equality (Article 128 of the Criminal Code) and the prohibition of inciting national, racial and religious hatred and intolerance (Article 317 of the Criminal Code). Article 128, paragraph 1 of the Criminal Code stipulates the imprisonment of up to three years for whoever, due to national or ethnic affiliation or absence of such affiliation or difference in political or other conviction, disability, sex, language, sexual orientation, education, social status, social origin, property status or other personal characteristic, denies or restricts the right of man and citizen guaranteed by the Constitution, laws or other legislation or general acts or ratified international treaties or pursuant to such difference grants another privileges or benefits. Article 317, paragraph 1 of the Criminal Code stipulates that whoever instigates or exacerbates national, racial or religious hatred or intolerance among the peoples and ethnic communities living in Serbia shall be punished by imprisonment of six months to five years. Paragraph 2 of the same Article stipulates that the offender shall be punished by imprisonment of one to eight years if the act is committed by coercion, maltreatment, compromising security, exposure to derision of national, ethnic or religious symbols, damage to other persons, goods, desecration of monuments, memorials or graves, while paragraph 3 stipulates more severe prison sentences if the offence is committed by abuse of position or authority, or if these offences result in riots, violence or other grave consequences to co-existence of peoples, national minorities or ethnic groups living in Serbia.

While it is clear, on the one hand, that the normative regulation of the criminal offence of violation of equality fully complies with the constitutional requirements prescribed in Article 49 of the Constitution and its systematic interpretation regarding *the prohibition of inciting inequality*, because it sanctions all forms of violation of equality on prohibited grounds of discrimination,[5] on the other hand it is not clear whether incitement to such a violation is also criminally sanctioned, unless the constitutional notion of "incitement" could be equated with the criminal notion of "instigation", which is, as we have already pointed out, a special dilemma.

The criminal offence of prohibition of instigation to national, racial and religious hatred and intolerance under Article 317 of the Criminal Code does not correspond in all respects to the requirements of Article 49 of the Constitution. First of all, it incriminates incitement and instigation to exclusively national, racial and religious hatred and intolerance, while the Constitution in Article 49 explicitly refers to other hatred and intolerance which should also be punishable. Also, the criminal offence is reduced only to the hatred and intolerance *that exist among the peoples and ethnic communities living in Serbia.* In other words, if it concerns peoples or ethnic communities that do not live in Serbia, despite the existence of an act of execution, the criminal offence does not exist (Stojanović, 2020: 969). Finally, but perhaps most importantly, the mention of "peoples and ethnic communities living in Serbia" in the legal description of that criminal offence does not correspond to the relevant constitutional and legal provisions that deal with the status of various national and ethnic communities in Serbia and minority rights. Namely, according to the relevant provisions of the Constitution, as well as to the legal definition of the term *national minority* contained in the Law on Protection of Rights and Freedoms

5 National or ethnic affiliation, race or religion or due to absence of that affiliation or due to differences in political or other beliefs, gender, disability, sexual orientation, gender identity, language, education, social status, social origin, property status or other personal characteristics

of National Minorities (Official Gazette FRY,11/2002, Official Gazette SM, 1/2003, Official Gazette RS, 72/2009, 97/2013, 47/2018), only the Serbs have the status of ethnic people in the Republic of Serbia while all other groups of citizens, numerically sufficiently representative and, although representing a minority of the population, having a long and strong bond with the territory of the state, characterized by special features specified in the Law and whose members care about maintaining their collective identity, are considered national minorities. Starting from the above remark, and in the context of the legal definition of the criminal offence of inciting national, racial and religious hatred and intolerance, it follows that, for example, different ethnic communities of migrants "living" in Serbia that do not have the officially recognized status of a national minority could be the passive subject of this offence, but not other ethnic communities that do not "live" in Serbia, which was certainly not the intention of the constitution-maker who prescribed the punishment of incitement to such hatred or intolerance.[6]

There are some other dilemmas regarding the constitutional prohibition of incitement and instigation to racial, national, religious or other inequality, hatred and intolerance and the criminal offence of prohibition of incitement to national, racial and religious hatred and intolerance specified in Article 317 of the Criminal Code. Namely, Article 54a of the Criminal Code stipulates that if the criminal offence was committed out of hatred due to race or religion, national or ethnic origin, gender, sexual orientation or gender identity of another person the court will take it as an aggravating circumstance, *unless it is prescribed as a criminal offence.* Regarding that, the following question can arise: what is the connection between the criminal offence of prohibition of instigation to national, racial and religious hatred and intolerance and the aggravating circumstance that the offence was committed out of hatred due to certain affiliation. The relevant comments emphasize that the ratio of the provision of Article 54a is in providing stronger criminal protection to certain social groups (Stojanović, 2020: 278), but, on the other hand, it is also stated that the hatred referred to in this provision of the Criminal Code entered the legal description of the act from Article 317 of the Criminal Code as its central element (Stojanović, 2020: 279). In this sense, although it could be inferred from the linguistic interpretation that hatred as an incentive to committing the criminal offence of instigation to national, racial and religious hatred and intolerance should be treated as an aggravating circumstance, the relevant comments point out that, while imposing the sentence, the prohibition of double assessment should be applied in the case if a criminal offence, specified in Article 317 of the Criminal Code, was done out of hatred. Such an attitude is based on the interpretation according to which the act from Article 317 of the Criminal Code is protected by a good group, while the provision specified in Article 54a of the Criminal Code aims at increased criminal protection of the individual as a member of a group (Stojanović, 2020: 279). In any case, it seems that the existence of both provisions – the one specified in Article 317 of the Criminal Code and the other one stated in Article 54a may lead to significant confusion.

To make the matter even more systemically unclear, Article 344a of the Criminal Code stipulates that the criminal offence of violent behavior at a sports event or public gathering, among other things, may be committed by behavior or slogans that provoke national, racial, religious, or *some other hatred or intolerance* whereby other hatred or intolerance is incriminated, but *only such as implies some discriminatory basis* and *only as a result of violence or physical confrontation with the participants*. On the other hand, Article 174 of the Criminal Code prescribes the criminal offence of violation of reputation due to racial, religious, national, but *also other affiliation*, which consists of public exposure to the public humiliation of *a person or a group* due to such an affiliation!

6 In this context, although partially correct, the remark contained in some relevant comments of the Criminal Code that the notion of *people* should be interpreted broadly in order to include national minorities, seems insufficient, since the legal description does not refer to national minorities, and that, given that a national minority is "always part of a people who do not live in their home country" (although this may not necessarily be the case), provoking and inciting hatred or intolerance towards the national minority seems to involve the people whose part the national minority is (Stojanović, 2020:969).The problem with the legal definition of this act is contained, however, in the fact that inciting and instigating hatred or intolerance towards the native people of certain national minorities from Serbia could remain outside the framework of legal incrimination!

Bearing in mind the presented dilemmas and the lack of systemic quality of the solutions contained in the Criminal Code, the question arises as to whether the criminal elaboration of the constitutional order of prohibition from Article 49 of the Constitution is in all respects appropriate, more precisely whether it is appropriate to raise the issue of the constitutionality of legal provisions. Moreover, if the constitutional prohibition of incitement and instigation to inequality, hatred and intolerance has the function to protect the objective order, as indeed it does, then the question arises as to whether the Constitutional Court should *ex officio* initiate proceedings to review the constitutionality of the disputed provisions of the Criminal Code.[7]

But this question is not only raised in relation to the Criminal Code. For example, the Law on Rehabilitation (Official Gazette RS, 92/2011) stipulates that *by law*, persons whose rights and freedoms have been violated until the day this Law came into force, and who have been punished by a court or administrative decision, among other things, for a criminal offence specified in Article 2 of Law on Prohibition of Instigation to National, Racial and Religious Hatred and Discord (Official Gazette SFRY, 36/45 and Official Gazette of the Federal People's Republic of Yugoslavia, No. 56/46) shall be rehabilitated, if the act has been done only by writing. If the prohibition on instigation to national, racial and religious hatred is one of the most important prohibitions in the Constitution of the Republic of Serbia, then it is not clear why the legislator deviated from it in the Law on Rehabilitation, regardless of the fact that he reduced rehabilitation only to persons who have committed criminal offences by the act of writing and there is an open question whether the Constitutional Court of Serbia should cancel such a provision. In a broader sense, it is clear that the Law on Rehabilitation extends to a period when the rule of law, and consequently human rights and freedoms were not fully guaranteed. On the other hand, the question arises as to why the legislator would include something that is punishable even in the current concept of liberal democratic constitutionality under the correction of human rights violations.

CONCLUSION

The constitutional prohibition of incitement and instigation to inequality, hatred and intolerance specified in Article 49 of the Constitution protects the fundamental values of the constitutional order of the Republic of Serbia and its function is the protection of public order. Its definition in the text of the Constitution exceeds the standards of banning hate speech contained in certain international treaties. On the other hand, its normative elaboration in the Constitution itself, but also in certain laws, especially in the Criminal Code, does not have a systemic quality. Therefore, there are a number of dilemmas and controversies regarding this prohibition, which consequently means that criminal prosecution of its violation may have limited effects. Those are dilemmas regarding the issue of which provision is relevant to determine the existence of a violation of this prohibition; how the terms "provocation", "instigation", "hatred" and "intolerance" should be interpreted; who should be considered a passive subject of the criminal offence of prohibition of instigation to national, racial and religious hatred and intolerance; what should be the relationship between the incrimination of this crime and the aggravating circumstance that proves that any crime was committed out of hatred and, last but not least, the dilemma as to whether the Constitutional Court, since this prohibition has the function to protect public order, should ex officio initiate procedures to control the constitutionality of laws that do not implement it, or do not fully respect it.

7 This issue also refers, to some extent, to the possibility for the constitutional court to control the omission of the legislator (Đurić, 2013: 609-624), (Ustavni sud, 2011).

REFERENCES

1. Coliver, S. (1992). Hate Speech Laws: Do They Work? In: S. Coliver (Ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*, Essex, United Kingdom, University of Essex
2. Committee on the Elimination of Racial Discrimination, (1993). General Recommendation XV, Report of the Committee on the Elimination of Racial Discrimination, 2, UN Doc A/48/18
3. Ćirić, J. (2008). Sloboda govora i govor mržnje – krivičnopravna regulativa, In: Zbornik Usaglašavaje krivičnog zakonodavstva sa Ustavom Srbije, Beograd: Udruženje za krivično pravo Srbije
4. Đurić, V. (2013). Kontrola ustavnosti nečinjenja (propuštanja) zakonodavca, *Pravni život* IV/12, 609-624.
5. Human Rights Committee. (1983). General comment No. 11: Article 20, Downloaded June 6, 2020
6. http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf
7. Jovičić, J. (2006). Krivična odgovornost i kažnjivost podstrekača u našem krivičnom zakonodavstvu, In: S.Tabaroši (Ed.) *Razvoj pravnog sistema Srbije i harmonizacija sa pravom EU- prilozi projektu*, Beograd: Pravni fakultet Univerziteta u Beogradu
8. Lazarević, LJ. (2006). *Komentar Krivičnog zakonika Republike Srbije*, Beograd : Savremena administracija.
9. Mendel, T. (2010). Hate Speech Rules under International Law, 1-10, Downloaded June 6, 2020
10. http://www.law-democracy.org/
11. Pajvančić, M. (2009). *Komentar Ustava Republike Srbije*, Beograd: Konrad Adenauer Stiftung.
12. Rosenfeld, M. (2003). Hate Speech in Constitutional Jurisprudence: A Comparative Analysis. Cardozo Law Review, 24, 1523-1567
13. Stojanović, Z. (2006). *Krivično pravo – opšti deo*, Beograd: Pravna knjiga.
14. Stojanović, Z. (2020). *Komentar Krivičnog zakonika*, Beograd: Službeni glasnik.
15. United Nations High Commissioner for Human Rights (2008). Study compiling existing legislations and jurisprudence concerning defamation of and contempt for religions, UN Doc. A/HRC/9/25
16. Ustavni sud Srbije, Problem zakonodavnih pravnih praznina (propusta) u ustavnosudskoj praksi, Upitnik za 14. Kongres Konferencije evropskih ustavnih sudova (Questionnaire on the topic "Problems of Legislative Omission in Constitutional Jurisprudence" for the XIVth Congress of the Conference of European Constitutional Courts, May 22-29 2011), 1-29, Downloaded June 6, 2020
17. http://www.confeuconstco.org/reports/rep-xiv/report_Serbian_se.pdf