

# The Offense of Incitement to Violence, Hatred or Discrimination Provided in the Romanian Criminal Code

Nicoleta-Elena Hegheș

Researcher 2<sup>nd</sup> Degree at “Acad. Andrei Rădulescu” Legal Research Institute of Romanian Academy,  
Bucharest, Romania, [nicoleta.heghes@icj.ro](mailto:nicoleta.heghes@icj.ro)  
Professor, PhD, “Dimitrie Cantemir” Christian University of Bucharest, Romania, [nicoleta.heghes@ucdc.ro](mailto:nicoleta.heghes@ucdc.ro)

**ABSTRACT:** The offense of incitement to violence, hatred or discrimination is provided for in art. 369 of the Romanian Criminal Code. This offense consists in inciting the public, by any means, to violence, hatred or discrimination against a category of persons or against a person on the grounds that he or she is part of a certain category of persons defined on the basis of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, chronic non-contagious disease or HIV/AIDS infection, considered by the perpetrator as causes of a person’s inferiority in relation to others. This article was amended by Law no. 170 of June 3, 2022, for the amendment of art. 369 of Law no. 286/2009 regarding the Criminal Code. This amendment to the Criminal Code was imposed because in the old text, namely “Inciting the public, using any means, to hatred or discrimination against a category of individuals,” no discriminatory criteria were provided for the existence of the crime. Therefore, the act of incitement to hatred or discrimination could be based on a wide variety of criteria, such as sex, gender, sexual orientation, race, ethnicity, nationality, language, religion, opinion, political affiliation, beliefs, age, illness, disability, social origin, wealth etc., which can generate feelings of hatred and the desire to discriminate against a certain social category, but were not expressly listed. The commission of the offense is punished by no less than six months and no more than three years of imprisonment or by a fine. The change was carried out as a transposition into legislation of the Framework Decision 2008/913/JAI on combating certain forms and expressions of racism and xenophobia through Criminal Law. The focus of this study is to conduct a thorough analysis of this offense.

**KEYWORDS:** incitement, instigation, hatred, discrimination, violence, offense

## Introduction

Before the amendment of article 369 of the Romanian Criminal Code, it stipulated that only incitement to hatred and discrimination, by any means, against a category of persons are considered crimes.

In the current regulation of the Romanian Criminal Code, the legislator considered that the term *incitement* is much broader than that of *instigation*.

According to the New Explanatory Dictionary of the Romanian language, inciting means “intentionally bringing to a state of agitation, urging hostile actions; to instigate; to sow; arouse; to provoke; start.”

In legal terms, it can be concluded that *violence* is the general violation of human rights: right to life, to security, to dignity and to physical and mental integrity. In a general sense, it refers to the use of physical force or other persuasive means to bring prejudice to some goods or injuries to a person’s integrity. In this sense, an act of violence, most often, has a premeditated character and is developed intentionally or it signifies the intent to cause suffering or physical injury to another person (Căprioară and Căprioară 2013, 481).

The term *hatred* represents a strong feeling of hostility, a hostile attitude towards someone or something. It was considered that it must exist even in the title of the crime, as it is regulated in the international documents signed by Romania, and there is an obligation to be provided in the crimes of the Criminal Code when a public incitement to hatred is made. Council Framework Decision 2008/913/JHA of November 28, 2008, on combating certain forms and expressions of racism and xenophobia by means of criminal law, published in J.O.L 328 of December 6, 2008, art. 1 lit. a): “Each Member State shall take the necessary measures to ensure that the following acts, committed with intent, are punishable: (a) public incitement to violence or hatred against a group of persons or a member of such a group defined on the basis of race, color, religion, descent or national or ethnic origin (Pascu, Buneci and Buneci 2020, 421 with note no 1).”

*Discrimination* represents the clear distinction made between several objects, ideas, it can be a state policy by which a category of citizens is deprived of certain rights based on illegitimate considerations (Pascu, Buneci and Buneci 2020, 421).

In the European Convention of Human Rights (1950), it is provided in art. 14 prohibiting discrimination as follows: “The exercise of the rights and freedoms recognized by this Convention must be ensured without any distinction based, in particular, on sex, race, color, language, religion, political or any other opinions, national or social origin, membership to a national minority, wealth, birth or any other situation.”

Art. 30 para. (1) of the Romanian Constitution provides that: “The freedom to express thoughts, opinions or beliefs and the freedom of creations of any kind, by speaking, writing, images, sounds or other means of public communication, are inviolable.”

Freedom, as a fundamental principle of the rule of law, is the foundation of all moral principles and requires the development of such legal norms that guarantee all people the right to express their own options in relations with other members of the community. That is precisely why incitement to hatred and discrimination is, in essence, an abusive manifestation of rights and freedoms. Tolerating such facts would contravene all constitutional provisions, as well as international conventions to which Romania is a party - Constitutional Court, Decision no. 480/2004, published in M. Of. no. 1197 of December 14, 2004 (Pașca 2016, 35).

Art. 10 para. (1) ECHR provides that “Every person has the right to freedom of expression. This right includes freedom of opinion and freedom to receive or communicate information or ideas without interference from public authorities and regardless of borders (...).”

However, the right to free expression is not an absolute right, being subject to certain limitations. One of the exceptional situations in which the right to free expression can be restricted is when the limitation is imposed in order to prevent the commission of crimes.

Amendment of art. 369 of the Romanian Criminal Code was operated as a transposition into legislation of the Framework Decision 2008/913/JAI of the Council of November 28, 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, published in the Official Journal of the European Union (OJUE), series L, no. 328 of December 6, 2008.

### **Pre-existing elements**

*The special legal object* of the crime of incitement to violence, hatred or discrimination is social relations regarding coexistence between people, which must be done without violence, hatred and discrimination regardless of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, chronic non-contagious disease or HIV/AIDS infection.

The crime does not have a *material object* because it is one of danger, and consists in inciting or persuading other persons to violence, hatred or discrimination and is not directed at an asset or a person.

## Subjects of the crime

*The immediate active subject* – that is, the perpetrator of the crime can be any person who fulfills the general conditions of criminal liability.

Criminal participation is possible in all forms: coauthorship, instigation and complicity. Coauthors are people who blatantly incite the public to violence, hatred and discrimination. Instigators are those who cause other persons to commit acts of incitement to violence, hatred and discrimination in public. Accomplices are those who provide the perpetrators with the means necessary to promote their actions of inciting the public to practice violence, hatred and discrimination against other groups of persons.

*The main passive subject* is the state, which has the obligation to ensure public order and the social coexistence of its citizens.

*Secondary passive subject* can be any category of persons exposed to the action of incitement to violence, hatred or discrimination.

## Constituent content

### *The objective side*

*The material* element is achieved by the action of inciting the public by any means to violence, hatred or discrimination against certain categories of persons.

The objective side can only consist of an action, the commission of the crime through an omission being factually excluded. The inciting action can be carried out by any means: audio, video, press, online, etc.

*The immediate consequence* of the crimes consists in creating a state of danger for social order relations and public order.

*The causal link* results *ex re*, that is, from the commission of the crime itself.

### *The subjective side*

*The form of guilt* is direct intent. Through the activity of persuasion or incitement to violence, hatred or discrimination, the perpetrator foresees the result of his actions, following its occurrence by committing the act.

*The motive* and *purpose* will be taken into account when individualizing the punishment. For the realization of the subjective side of the crime, the motive or purpose is not important.

## Forms of the crime

*Preparatory acts* are possible, but not punishable. *The tentative* is not criminalized.

*Consummation of the crime* – the crime is consummated when the state of danger for public order was created by inciting violence, hatred or discrimination against a certain category of people. It is immaterial to the consummation of the offense whether or not the act of incitement had a result, but it must come to the knowledge of the public.

*Exhaustion of the crime* – this can last over time by repeating acts of incitement based on the same criminal resolution, actions that each present the content of the same crime, exhaustion occurring when the last material act is committed.

## Penalties

The crime of incitement to violence, hatred or discrimination is punishable by imprisonment from 6 months to 3 years or a fine.

## Procedural aspects

The action is set in motion *ex officio*. The competence to carry out the criminal investigation rests with the criminal investigation bodies of the police (see in detail Buneci 2022, 26-30). Jurisdiction in the first instance rests with the court (see in detail Paraschiv, Teodorescu and Nicolescu 2022, 1-6).

## References

- Buneci, Bogdan. 2022. Drept procesual penal. Partea specială. Curs universitar (Criminal Procedural Law. The Special Part. University Course). Bucharest: Universul Juridic Publishing House.
- Căprioară, Florin-Mihai and Căprioară Alina-Cornelia. 2013. "What is and what is not violence??" In *Acta Universitatis George Bacovia. Juridica* - Volume 2. Issue 2/2013, available at [https://www.ugb.ro/Juridica/Issue22013/11\\_Ce\\_este\\_si\\_ce\\_nu\\_este\\_violenta\\_Mihai\\_Caprioara.EN.pdf](https://www.ugb.ro/Juridica/Issue22013/11_Ce_este_si_ce_nu_este_violenta_Mihai_Caprioara.EN.pdf).
- Constitutional Court, Decision no. 480/2004, published in M. Of. no. 1197 of December 14, 2004.
- 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, published in J.O.L 328 of December 6, 2008. <http://eurlex.europa.eu/legal-content/EN/TXT/?uri=celex:32008F0913>.
- European Convention of Human Rights. 1950. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5., 213 U.N.T.S. 222.
- Law no 170 of June 3, 2022 for the amendment of art. 369 of Law no. 286/2009 regarding the Criminal Code.
- Paraschiv, Carmen-Silvia (coord.), Teodorescu Maria-Georgiana and Nicolescu Alin Sorin. 2022. Drept procesual penal. Partea generală. Note de curs (Criminal procedural law. The general part. Course notes). 4th Edition. Bucharest: Hamangiu Publishing House.
- Pașca, Viorel in Coord. Antoniu George and Tudorel Toader. 2016. Explicațiile noului cod penal. Vol. V Articolele 367-446 (Explanations of the New Criminal Code. Vol. V Articles 367-446). Bucharest: Universul Juridic Publishing House.
- Pascu, Ilie, Buneci Petre and Buneci Bogdan. 2020. Drept penal. Partea specială. Vol. II (Criminal Law. The Special Part. Volume II). Hamangiu Publishing House.
- Romanian Constitution. published in the official gazette of Romania, Monitorul Oficial, Part I, No. 233 dated 21 November 1991. Amended and completed by the Law No. 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003.
- Romanian Criminal Code. Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania no. 510 of July 24, 2009.