

THE DILEMMA OF POSITIVE LEGISLATOR OR THE DIFFICULTIES OF THE CONSTITUTIONAL PROCEDURAL LAW

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Abstract: *The Constitutional Court is definitely one of the most disputed public authorities in the Romanian constitutional system. The difficulties in approaching the constitutional procedural law come from the lack of juridical tradition in dealing with such a public institution and its decisions. In this essay we want to emphasize the errors encountered in jurisprudence due to the misunderstanding of the constitutional role of the above-mentioned authority.*

Key words: *Constitutional Court of Romania, decision, freedom of speech.*

Freedom of expression is one of the real gains of the Romanian society after 1989. Commonly known as *freedom of speech* (even if we prefer the juridical term “expression”, since we do not deal only with the verbal statements in this case), this individual right is contained in the most important documents ratified or adopted by Romania, such as Universal Declaration of Human Rights, European Convention of Human Rights or the Constitution of Romania. Even if Romanians tend to give an absolute power to this particular gain of a democratic society, freedom of expression is not an absolute right.

The Constitution of Romania also provides explicit restriction of freedom of expression. Thus, freedom of expression shall not be prejudicial to the dignity, honour, privacy of a person, and to the right to one's own image. Any defamation of the country and the nation, any instigation to a war of aggression, to

national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morality shall be prohibited by law. The Romanian Criminal Code used to incriminate in the articles 205 and 206 the offences related to human's dignity in order to offer a serious counterpoint for the Art. 30 paragraph 6 of the Romanian Constitution. By means of the offences of slander and libel the Romanian legislator desired to protect the right to dignity, honour, privacy of a person, as well as the right to one's image. Slander is a type of defamation. Slander is an untruthful oral (spoken) statement about a person that harms the person's reputation or standing in the community. If the statement is made via broadcast media - for example, over the radio or on TV - it is considered libel, rather than slander, because the statement has the potential to reach a very wide audience.

But for a greater protection of press

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freedom and independence, the Minister of Justice initiated in Parliament a project of amending the Criminal Code, a project that repealed the offense of slander and libel. The two chambers of the Romanian Parliament adopted the project and it became Law No. 278/2006 for amending the Romanian Criminal Code after being promulgated by the President of Romania. Promulgation is the constitutional act by means of which a legal text can be sent to Romanian Official Gazette to be published. Three days after publishing, the law comes into force and produces juridical effects.

Due to these circumstances, in front of the Timisoara, Targu Jiu and Sibiu courts, three different persons invoked the objection of unconstitutionality. The three courts admitted the exception and addressed to the Constitutional Court of Romania to solve this litigation.

The Constitutional Court represents, as defined in Article 142 of the fundamental law, the guarantor for the supremacy of the Constitution of Romania. The Constitutional Court has the following powers: a) to adjudicate on the constitutionality of laws, before the promulgation thereof upon notification by the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the Advocate of the People, a number of at least 50 deputies or at least 25 senators, as well as ex officio, on initiatives to revise the Constitution; b) to adjudicate on the constitutionality of treaties or other international agreements, upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 senators; c) to adjudicate on the constitutionality of the Standing Orders of Parliament, upon notification by the president of either Chamber, by a parliamentary group or a number of at least 50 Deputies or at least 25 Senators; d) to decide on objections as

to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration; the objection as to the unconstitutionality may also be brought up directly by the Advocate of the People; e) to solve legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister, or of the president of the Superior Council of Magistracy; f) to guard the observance of the procedure for the election of the President of Romania and to confirm the ballot returns; g) to ascertain the circumstances which justify the interim in the exercise of the office of President of Romania, and to report its findings to Parliament and the Government; h) to give advisory opinion on the proposal to suspend from office the President of Romania; i) to guard the observance of the procedure for the organization and holding of a referendum, and to confirm its returns; j) to check the compliance with the conditions for the exercise of the legislative initiative by citizens; k) to decide on the objections of unconstitutionality of a political party; l) to carry out other duties stipulated by the organic law of the Court. As settles in Art.147 of the Constitution of Romania, (1) the provisions of the laws and ordinances in force, as well as those of the regulations, which are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended de jure. (2) In cases of unconstitutionality of laws, before the promulgation thereof, the

Parliament is bound to reconsider those provisions, in order to bring them into line with the decision of the Constitutional Court. (3) If the constitutionality of a treaty or international agreement has been found according to article 146 b), such a document cannot be the subject of an objection of unconstitutionality. The treaty or international agreement found to be unconstitutional shall not be ratified. (4) Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. As from their publication, decisions shall be generally binding and effective only for the future.

The Constitutional Court has the power to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration; the objection as to the unconstitutionality may also be brought up directly by the Advocate of the People. Therefore, the Constitutional Court was the only institution liable to solve this problem. After studying the case, the Court admitted the exceptions and decided that the repeal of the offences of slander and libel is unconstitutional.

The Constitutional Court was notified by the Court of Timisoara, the appellant being Mihaela Marza in the case no. 3.003/325/2006, the Court of Targu Jiu, the appellant being Sofia Țămbălaru, in the case no. 2.414/P/2006 and the Tribunal of Sibiu – the Criminal Section, the appellant being Elena Iulia Ștefănescu in the case no. 1.462/85/2006. The debates took place in a public session on 11th of January 2007 in the presence of the author of exception, Elena Iulia Ștefănescu and of the representative of the Public Ministry.

The decision of the Constitutional Court was published afterwards, since the constitutional judges had pronounced no opinion in the public session. In its motivation, the Court found that, by repealing the deeds of slander and libel, the

person's dignity and honour cannot be defended. No matter in which modality these offences are committed, or the quality of the persons who commit the offences, these deeds represent a serious attack to the person's image, honour and reputation. If these deeds are not incriminated by the Criminal Code they shall conduct to a de facto reaction of the persons offended and thus to a permanent social conflict, since the only civil law cannot be the best juridical defense for the one who suffered such an injury. In the Court's opinion, the amendments brought to the Romanian Criminal Code created a legislative vacuum since the possibility admitted for the injured person to obtain moral damages in a civil law does not represent a real juridical defense. A lawsuit based upon the provisions of Art. 998 from the Romanian Civil Code with regard to the patrimonial liability for the prejudices produced by means of licit deeds is definitely not an adequate juridical protection since dishonour cannot be repaired, and human dignity cannot be evaluated in money or compensated. Therefore, the repeal of the deeds of slander and libel infringe upon the provisions of Art. 21 – free access to justice - and Art. 30 – freedom of expression.

The Constitutional Court of Romania observed that the free access to justice does not mean only the possibility of addressing the courts of justice, but it also means that the persons must take benefit of adequate methods of preserving the infringed right, according to the seriousness and of the degree of the social damage of the deed that infringed upon one's right. In the same way, the European Court of Justice stated constantly that in its jurisprudence (see for example the cases *Aydin vs. Turkey* - 1997, *Conka vs. Belgium* – 2002), that the essential effect of the provisions of Art.13 from the

European Convention resides in imposing the existence of an internal recourse that abilitates the national court to offer an “adequate repairing”, the recourse being effective as well as in the legal disposals as well as in the practice of applying the legal settlements.

Or the removing of the criminal methods of guarding the human dignity, as a supreme value of the state of law, determines the infringement upon the effective nature of the access to justice in this matter. Still, the Court observes that as an effect of the repeal analyzed in this case, as contrary to the persons whose rights were infringed – others than honour and good reputation – and who can address the courts of justice to defend their rights, the victims of the deeds of slander and libel have no real and adequate opportunity of taking benefit, on judiciary term, of the defense of their dignity – the supreme value guaranteed by the fundamental law.

The juridical object of the deeds of slander and libel settled in Art.205, respectively in Art. 206 of the Criminal Code, is represented by the person’s dignity, reputation and honour. The active subject of the offences analyzed isn’t circumstantiated and their deed can be produced directly, orally, by written texts published in media or by means of audio-visual communication. No matter the modality in which these deeds are committed or the quality of the people involved – no matter they are common people, politicians, or journalists, etc. – the facts that represent the legal content of these offences damage seriously the human personality, the dignity, the honour or the reputation of those who are thus aggressed. If such deeds weren’t discouraged by the modalities of the criminal law, they would conduct to the reaction *de facto* of those offended and to permanent conflicts that can make impossible the social living based upon mutual respect of the members

of the collectivity and by the just value of one’s reputation. Therefore, the values mentioned above, preserved by the Criminal Code, have a constitutional dimension, the human dignity being consecrated in Art.1 paragraph 3 of the Constitution of Romania as one of the supreme values. Thus, the quoted text from the fundamental law settles that “Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed”.

Taking into consideration the outstanding importance of the value preserved by the disposals of Art.205, 206 and 207 from the Romanian Criminal Code, the Constitutional Court of Romania observed that the repeal of these texts infringes upon the settlements of Art.1 paragraph 3 from the Constitution of Romania.

The Court observed also that the repeal of Art. 205, 206 and 207 of the Criminal Code infringes upon the disposals of Art.30 paragraph 8 from the Constitution of Romania, since in the cases in which the offences of slander and libel are committed in media, the constitutional text mentioned above states that „the indictable offences of the press shall be established by law”. In the absence of any distinction, it results that the press offenses can be settled in a

special law – for example a law of press as in the case of France – or in a common criminal law, as the case under discussion, namely the Criminal Code. Therefore, the constitutional dimension of the press offenses imposes that they cannot be eliminated from the legislation, but they can be submitted to a penalty regime chosen by the legislator.

The limits of the freedom of speech, settled in Art.30 paragraph 6 from the Constitution of Romania are in accordance with the term of liberty/freedom that cannot be understood as an absolute right. The juridical and philosophical conceptions promoted by the democratic societies admit that the freedom of a person ends where the freedom of another person starts. In this sense, Article 57 from the Constitution of Romania settles that „Romanian citizens, foreign citizens, and stateless persons shall exercise their constitutional rights and freedoms in good faith, without any infringement of the rights and liberties of others”. An identical limitation is settled in Art.10 paragraph 2 from the European Convention of Human Rights - „no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State” – as well as in Art.19 paragraph 3 of the International Covenant on Civil and Political Rights – „the exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided

by law and are necessary: a) for respect of the rights or reputations of others and b) for the protection of national security or of public order, or of public health or morals”.

From the normative disposals quoted above it results without doubt that there is no incompatibility between the principle of freedom of expression and the incrimination of the slander and libel that imposed in the first case the repeal of the offences mentioned above.

Surely, this decision was historical since its effects were for the first time so disputed. But we agree upon the majority decision, even if we admit that indirectly the Court becomes a positive legislator. The Constitutional Assembly couldn't imagine all the possible social relations when it settled the general disposals concerning the activity of the Constitutional Court. And definitely the legislator did not stipulate expressly what decision should the Court take when dealing with the repeal of a legal text, repeal that is considered unconstitutional. If we only think in a limited way that the unconstitutionality of the repeal has as an effect the coming into force of the former juridical text that was repealed, than we agree that the Court becomes a positive legislator. But we must observe that the Court does not behave as a legislator. The only legislator was the Parliament. The Parliament incriminated the offences in the first place, as well as the Parliament repealed the same offences. The question to ask in this particular case is whether the unconstitutionality of a Law of repeal could or not be sanctioned, and in our opinion any unconstitutionality of a legal text must be sanctioned since the Constitutional Assembly did not make any difference between the legal texts what so ever. Since the main role of the Constitutional Court is to observe and sanction the unconstitutionality of a legal

text, the Court completed its role in the case. The Parliament could take act of the decision and make a change. The legislator could find another modality of incriminating the offences of slander and libel, but as no action was taken, slander and libel found their previous expression.

Unfortunately, the public prosecutors do not share the same opinion. In a resolution given on 7th of April 2008, to a plaintiff formulated by O.I. with regard to a libel, one of the prosecutors of the Prosecution Department of the Court of Braşov stated the following point of view: the plaintiff is rejected, and the offender M.L. is out of criminal action based upon Art.228 from the Criminal Proceedings Code, with regard to Art.10, paragraph 1 letter be of the Criminal Proceeding Code, since his deed is not incriminated by the Criminal Code. The prosecutor takes into consideration the Decision No.62/2007 of the Constitutional Court of Romania regarding the unconstitutionality of the disposals of the Law No.278/2006 for amending the Romanian Criminal Code, but she considers that in order to incriminate the libel, the legislator should have interfered after the moment the Constitutional Court issued the above mentioned decision. The prosecutor considered that only the Parliament could make any legislative changes, therefore since the legislator didn't modify the Law No.278/2006, the deeds of slander and libel are not incriminated by the Criminal Code.

The resolution is quite outstanding, we may say. It is perfectly true that the Constitutional Court of Romania is not a legislative body. Its own purpose is to sanction any infringement brought upon the Constitution by a legal text, but since its decisions are mandatory for the

constitutional subjects, no one can say that a decision of this institutional body does not have juridical effect. The prosecutor must understand that the Constitutional Court does not replace the Parliament in a democratic state where the principle of the separation of powers functions. Its only purpose is to verify if the constitutional subjects respect the provisions of the Constitution of Romania. And in the cases when the Court observes any infringements upon the constitutional settlements, it is entitled to issue sanctions. In this particular case the sanction established is the abrogation of the provisions considered to be unconstitutional. And this sanction was applied for the only reason that the Parliament, the sole legislative body, did not take any action in 45 days, the legal period for modifying the provisions found unconstitutional. And that means, from the constitutional and legal point of view, that libel and slander are offences and are sanctioned on the ground of articles 205 and 206 from the Criminal Code that came into force 45 days after the Constitutional Court of Romania issued the Decision No.62/2007.

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