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LACK OF PREDICTABILITY IN THE CRIMINAL LAW. THE OFFENCES OF "INSULT" AND "LIBEL"

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Abstract: *At present, provision in the criminal law for the offences of "insult" and "libel" is a controversial issue in Romanian criminal law. Lack of predictability of the criminal law regarding the two above mentioned crimes has consequences on the security of legal relations and affects the defence of social relations covering freedom of expression and its limits.*

Key words: *insult, libel, incrimination, constitutionality.*

Articles 205 (text stipulating the offence of insult), 206 (text stipulating libel), 207 (sample text regulating the proof of truth) and article 236 index 1 (text stipulating the crime of nation defamation) in the Criminal Code were repealed by article A section 56 of Law no. 278/2006.

By Decision no. 62 of the Constitutional Court of 18.01.2007 [1], given the retrospective review of constitutional practice, the abrogation of insult and defamation crimes stipulated by articles 205-206 of the Criminal Code, was declared unconstitutional. The Court held that in the event of unconstitutionality, repealing the law deprives it from its legal effects, but the legal stipulations that formed the subject of abrogation still have consequences, according to art. 147. 1 of the Constitution.

Therefore, the Constitutional Court has found the provisions stipulated by Article 205 and Article 206 C as being constitutional, but the repealing of these texts was considered unconstitutional.

The Constitutional Court decided that the decriminalization of the two criminal offences violates the principle of the free access to justice, recognized by article 21 of the Constitution, the right to a fair trial and the right to an effective appeal provided by article 6 and 13 respectively of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the principle of equity rights' provided by article 16 of the Constitution. The Constitutional Court concludes that the free access to justice does not suppose the mere possibility to address Courts, but also to take benefit of adequate means for the protection of the violated right, in proportion with the social gravity and risk of the injury produced.

As regards the effects of the Constitutional Court's decisions on the laws declared unconstitutional article 147 paragraph 1 of the Constitution established that the provisions of the laws and ordinances in force, as well as the

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regulations found to be unconstitutional, cease their legal consequences within 45 days after publication of the Constitutional Court decision if ,in the meanwhile, the Parliament or the Government, depending on the case, do not agree with the unconstitutional provisions of the Constitution. During this period, unconstitutional provisions shall be suspended by rights.

Strict interpretation of the text of the Constitution leads to the conclusion that the provisions of article A section 56 of Law no. 278/2006, found to be unconstitutional, have ceased their legal effects within 45 days after publication of the Constitutional Court decision no. 62/2007 while neither the Parliament nor the Government, have agreed with the unconstitutional provisions of the Constitution.

However, based on analysis of article 62 paragraph 3 of Law no. 24/2000 concerning the legislative technique, that repeal of a provision or a normative act is final [2], it is undeniable that article I section 56 of Law no. 278/2006 is no longer in force. Thus, article 62 paragraph 3 of Law no 24/2000 stipulates the finality of any repeal, in effect prohibiting reinstatement of a repealed law, either explicitly by the legislature, or implicitly through interpretation of the law made by law enforcement body.

Therefore, the repeal of a law repealed does not lead ipso facto to restoration of the first normative act, but generates a legal vacuum, where the measure is not followed by further legislation of the same material. [3]

To determine the extent of insult and defamation, the offences may be considered to meet the principle of crimes and punishment's legality meaning that they are or not prescribed by law (in relation to their deliberate and final repeal decided by the will of the legislature having no more effects as decided by Constitutional Court) it is necessary to analyze the legal texts governing this principle to establish if another principle - the security of legal relations as an essential element of the rule of law - is observed.

According to article 23 paragraph 12 of the Constitution, no punishment can be established or applied except under the law, and according to Article 61 paragraph 1, the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country.

Also, article 73 paragraph 1 of the Constitution establishes the categories of laws and regulatory matters for constitutional laws and organic laws, and paragraph 3 letter h states that the criminal offences, penalties and their execution are regulated through the organic law.

However, according to the article 2 of the Criminal Code, the law stipulates which conduct constitutes a crime, penalties that may apply to the offenders and measures that can be taken when committing these acts.

According to article 7 of the Convention on Human Rights and Fundamental Freedoms (which is absolute in terms of application, no derogation is permitted) nobody can be convicted for an act or an omission which, at the moment of commission, did not constitute an offence, under national or international law.

Interpretation of the term "law" used within the Convention, the European Court of Human Rights (the Court's jurisprudence and the text of the Convention forming a joint body, so-called the conventional block) has determined that the law should be

accessible (Huvig Case against France, Barthold against Germany, Autronic AG against Switzerland, Decision of May 22, 1990), predictable (Cantoni Cases against France, Sunday Times against the United Kingdom, Hentrich against France), in-force (Olsson Cases against Sweden, Gillow against the United Kingdom) and qualitative (Kruslin against France and Huvig against France). [4]

Provisions of article 147 paragraph 1 of the Constitution states that the legal effects of normative acts declared unconstitutional shall cease within 45 days from the publication of the Constitutional Court decision, but the institution of ceasing the legal effect of a legislative act is not explained either by the Constitution or the Law No. 24 / 2000, special regulations in this area, so that the effect of the decision of unconstitutionality has also no clarification within our legislation.

Moreover, the special law regarding the rules of legislative technique for the settlement of normative acts (articles are cited above) explains how it is inadmissible that, by repealing the repeal, the original law returns, automatically.

So, given that the provisions of the Article 1 pt.56 Law no.278/2006 were found to be contrary to the Constitution, it must perform their repeal, as stipulated under paragraph 1 of Article 60 of Law No. 24 / 2000, and the repeal must be followed by the incrimination of the facts that were stipulated within articles 205 and 206 of the Criminal Code. The Constitutional Court does not repeal the powers and acts, so that their decisions can also have this effect.

All these contradictory or partially explained provisions: invalidation of legal effects, consequences of finding a provision of unconstitutionality repealing within 45 days if the Parliament and the Government, did not agree with the unconstitutional provisions of the Constitution, lead to the conclusion that the Romanian law is not predictable in this matter, so that the conditions examined by the European Court of Human Rights were not fulfilled as we described above.

In conclusion, stating the unconstitutionality of a provision of repealing does not equalize the return of the initially repealed normative act, because only the legislature is empowered to adopt, amend and repeal criminal laws. Otherwise, it could affect the constitutional principle of separation of powers on conditions that a court, be it the Constitutional Court, would create criminal legal rules, which is the exclusive attribute of the Parliament.

Thus, the lack of re-incrimination for the offences of "insult" and "libel" is the only possibility for the interference regarding the freedom of expression to submit to the principles of the conviction legality.

In this regard, the re-incrimination of the above-mentioned offences by the legislature appears to be useful in solving the above described non-unitary jurisprudence, in protecting the social relations related to dignity and honour, while it is in agreement with other democratic states' legislation and is requisite for the Romanian society. [5]

References

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2. Tanasescu, E. S.: *Offenses against dignity*. Curierul Judiciar no 4/2007, p. 9.
3. Constitutional Court, Decision no. 62 from January 18th, 2007, published in

Romanian Official Monitor no. 104 from December 12th, 2007;
4. Article 62 paragraph 3 from Law no 24/2000 regarding the legislative technique stipulates that "the repeal of a provision or normative act is final. It is not allowed that through a repeal of a previously repealed act to restore the initial normative act. Exceptions will be provisions from the Government's ordinances providing norms of repeal that were declined through law by the Parliament".
5. http://www.echr.coe.int