

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

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Freedom of speech can be defined in a few words as being able to speak freely without censorship. The synonymous term freedom of expression is sometimes preferred, since the right is not confined to verbal speech but is understood to protect any act of seeking, receiving and imparting information or ideas, regardless of the medium used. Since we agree upon this juridical perspective, hereby we refer to this individual right as freedom of expression. The right to freedom of expression is guaranteed under international law through numerous human-rights instruments, notably under Article 19 of the Universal Declaration of Human Rights and Article 10 of the European Convention on Human Rights, although implementation remains lacking in many countries. Thus, Article 19 of the Universal Declaration of Human Rights settles that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless the frontiers, while Article 10 of the European Convention of Human Rights: (1) Everyone has the right to

freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. All this international documents were ratified by Romania. Therefore they are part of the intern law as stipulated in art.11 of the Constitution of Romania: “(1) the Romanian State pledges to fulfill, as such and in good faith, its obligations as deriving from the treaties it is a party to; (2) treaties ratified by Parliament, according to the law, are part of national law; (3) if a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution”. According to Art.20, paragraph 1, “Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to”, whereas paragraph 2 settles that „Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions”.

Freedom of expression finds its explicit expression in the Romanian Constitution in Article 30 that states the following: (1) Freedom of expression of thoughts, opinions, or believes, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable. (2) Any censorship shall be prohibited. (3) Freedom of the press also involves the free setting up of publications. (4) No publication shall be suppressed. (5) The law may impose upon the mass media the obligation to make public their financing source. (6) Freedom of expression

shall not be prejudicial to the dignity, honor, privacy of a person, and to the right to one's own image. (7) 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. (8) Civil liability for any information or creation made public falls upon the publisher or producer, the author, the producer of the artistic performance, the owner of the copying facilities, radio or television station, under the terms laid down by law. Indictable offences of the press shall be established by law.

In practice, the right to freedom of speech is not absolute in any country, although the degree of freedom varies greatly. Industrialized countries also have varying approaches to balance freedom with order. For instance, the United States First Amendment theoretically grants absolute freedom, placing the burden upon the state to demonstrate when (if) a limitation of this freedom is necessary. In almost all liberal democracies, it is generally recognized that restrictions should be the exception and free expression the rule; nevertheless, compliance with this principle is often lacking. One justification for free speech is a general liberal or libertarian presumption against coercing individuals from living how they please and doing what they want. However, a number of more specific justifications are commonly proposed. For example, Justice McLachlin of the Canadian Supreme Court identified the following in *R. v. Keegstra*, a 1990 case on hate speech: (1) Free speech promotes "The free flow of ideas essential to political democracy and democratic institutions" and limits the ability of the state to subvert other rights and freedoms; (2) It promotes a marketplace of ideas, which includes, but is not limited to, the search for truth; (3) it is intrinsically valuable as part of the self-actualization of speakers and listeners; (4) It is justified by the dangers for good government of allowing its suppression<sup>1</sup>. Such reasons perhaps overlap. Together, they provide a widely accepted rationale for the recognition of freedom of speech as a basic civil liberty. A very interesting point of view can be encountered at C Edwin Baker. Baker is perhaps the most consistent and eloquent

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<sup>1</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697, Supreme Court of Canada, file no.21118, archived on the web site of the Supreme Court of Canada

defender of radically protective liberal first-amendment theory in the legal academy. His book, "Human Liberty and Freedom of Speech", represents Baker's most comprehensive effort to defend, on the basis of liberal theory, "a broad realm [of protection for] nonviolent, non-coercive, expressive activity. The book is filled with many extensive descriptive passages concerning political science theories, court cases, and historical developments which are very interesting, though on a few occasions not entirely accurate. C. Edwin Baker "is classified as a leading modern proponent of the marketplace tradition". In fact, Baker's book, "Human Liberty and Freedom Of Speech", articulates a liberty theory of freedom of speech and contests the "marketplace of ideas" theory of the First Amendment. "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom ... Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests"<sup>2</sup>.

Each of these justifications can be elaborated in a variety of ways and some may need to be qualified. The first and fourth can be bracketed together as democratic justifications, or a justification relating to self-governance. They relate to aspects of free speech's political role in a democratic society. The second is related to the discovery of truth. The third relates most closely to general libertarian values but stresses the particular importance of language, symbolism and representation for our lives and autonomy.

This analysis suggests a number of conclusions. First, there are powerful overlapping arguments for free speech as a basic political principle in any liberal democracy. Second, however, free speech is not a simple and absolute concept but a liberty that is justified by even deeper values. Third, the values implicit in the various justifications, for free speech, may not apply equally strongly to all kinds of speech, in all circumstances.

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<sup>2</sup> C. Edwin Baker, "Human Liberty and Freedom of Speech", Oxford University Press, USA, 1989, p.69

Freedom of speech is crucial in any participatory democracy, because open discussions of candidates are essential for voters to make informed decisions during elections. It is through speech that people can influence their government's choice of policies. Also, public officials are held accountable through criticisms that can pave the way for their replacement.

Some suggest that when citizens refrain from voicing their discontent because they fear retribution, the government can no longer be responsive to them, thus it is less accountable for its actions. Defenders of free speech often allege that this is the main reason why governments suppress free speech – to avoid accountability.

Restrictions on speech that are sometimes characterized as assaults on freedom of speech include the following: defamation (slander and libel); product defamation (criticism of commercial products; sometimes called product libel or product disparagement; for example, the Texas false disparagement of perishable food products act); obscenity; threats ; lying in court (perjury) ; talking out of turn during a trial, or talk that causes contempt of court ; speaking about a trial outside the court room after the judge forbids it (sub judice); speaking publicly without a permit ; speaking publicly outside of a free speech zone; limits on the size of public demonstrations ; profanity ; hate speech that is defamatory or causes incitement to violence; noise pollution; speech that contains a copyright infringement; company secrets (trade secrets), such as how a product is made or company strategy (example: the recipes of the products sold in fast-food restaurants); political secrets: campaign strategies, dirty past/deeds of a politician, etc.; classified information: sensitive or secret to protect the national interest; lies that cause a crowd to panic or causes clear and present danger or imminent lawless action, such as shouting fire in a crowded theater; fighting words doctrine, "insulting or 'fighting words', those that by their very utterance inflict injury or tend to incite an immediate breach of the peace"; sedition: speech or organization (vs. freedom of assembly) that is deemed as tending toward insurrection against the established order. Sedition often includes subversion of a constitution and incitement of discontent (or resistance) to lawful authority. sedition may include any commotion, though not aimed at direct and open violence

against the laws; treason: to talk publicly of the death of all countrymen or the overthrow of the government; blasphemy is illegal in several western and Muslim countries (freedom of religion as well as speech could be given here); the first clause of UK's terrorism act 2006 punishes "encouragement of terrorism" with up to seven years in jail; in Sweden a law called "hets mot folkgrupp" ("agitation against an ethnic group"), usually translated to hate speech, denies promotion of racism and homophobia; in Finland, a new copyright law was enacted in October 2005, which prohibited "services making possible or facilitating the circumvention of effective technical [copy prevention] measures". (see 2005 amendment to the finish copyright act and penal code); article 301 of the Turkish penal code, makes it illegal to insult "Turkish national identity".

The Constitution of Romania also provides explicit restriction of freedom of expression. Thus, freedom of expression shall not be prejudicial to the dignity, honor, 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<sup>3</sup>. The Romanian Penal 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, honor, 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.

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<sup>3</sup> I. Muraru, E. S. Tanasescu, "Constitutional Law and Political Institutions", All Beck Publishing House, 2005, Bucuresti, p.59

But for a greater protection of press 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 project was adopted by the two chambers of the Romanian Parliament, and the project became Law No.278/2006 for amending the Romanian Criminal 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 courts Timisoara, Targu Jiu and Sibiu, 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 litigant.

The Constitutional Court represents, as settle in Article 142 of the fundamental law, the guarantor for the supremacy of the Constitution of Romania. The Constitutional Court shall have 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; l) 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 also 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 repelling of the offences of slander and libel is unconstitutional.

The Constitutional Court was notified by the Court Timisoara, the appellant being Mihaela Marza in the case no. 3.003/325/2006, the Court Targu Jiu, the appellant being Sofia Țămbălaru, in the case no. 2.414/P/2006 and the Tribunal Sibiu – the Penal Section, the appellant being Elena Iulia Ștefănescu in the case no. 1.462/85/2006. The connexion of the three cases and 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<sup>4</sup>.

The decision of the Constitutional Court was published afterwards, since no opinion had been pronounced by the constitutional judges in the public session. In its motivation, the Court found that, by repelling the deeds of slander and libel, the person's dignity and honor cannot be defended<sup>5</sup>. For 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, honor 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 Penal Code created a legislative vacuum since the possibility admitted to 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 dishonor cannot be repaired, and human dignity cannot be evaluated in money or compensated. Therefore, the repelling of the deeds of slander and libel infringe upon the provisions of Art. 21 – free access to justice<sup>6</sup> - and Art. 30 – freedom of expression.

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<sup>4</sup> The term Public Ministry is a juridical fiction, since there is no ministry involved in the constitutional reality. The Public Ministry is the generic denomination for the organization of the Public Prosecutors Departments, departments that function beside the Romanian courts of Justice. The chief of the Public Ministry is the Romanian General Prosecutor. Therefore, this institution does not function under the authority of the Romanian Government, being a part of the Judiciary Power.

<sup>5</sup> Decision No.62/2007 of the Constitutional Court of Romania

<sup>6</sup> The content of Art.21 of the Constitution of Romania is the following: "(1) Every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests. (2) The exercise of this

The Constitutional Court of Romania observed that the free access to justice does not mean only the possibility of addressing to 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 enables 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 penal 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 Courts observe that as an effect of the repealing analyzed in this case, as contrary to the persons whose rights were infringed – others than honor and good reputation – and who can address to the courts of justice for defending 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 infringement upon the provisions of art.11 of the Constitution of Romania can be explained by the fact that free access to justice doesn't mean only the possibility to address the Court, but also to offer the proper juridical devices to all the persons to defend a right infringed by another person.

The juridical object of the deeds of slander and libel settled in Art.205, respectively in Art. 206 of the Penal Code, is represented by the person's dignity, reputation and honor. The active subject of the offenses analyzed isn't circumstantiated and their deed can be produced directly, orally, by written texts published in media or by

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right shall not be restricted by any law. (3) All parties shall be entitled to a fair trial and a solution of their cases within a reasonable term. (4) Administrative special jurisdiction is optional and free of charge”.

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 offenses damage seriously the human personality, the dignity, the honor or the reputation of those who are thus aggrieved. If such deeds weren't discouraged by the modalities of the penal right, 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 Penal 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 Penal Code, the Constitutional Court of Romania observed that the repealing of these texts of law and thus the desincrimination of the offenses of slander and libel infringe upon the settlements of Art. 1 paragraph 3 from the Constitution of Romania.

The Court observed also that the repealing of Art. 205, 206 and 207 of the Penal Code infringe upon the disposals of Art.30 paragraph 8 from the Constitution of Romania, since in the cases in which the offenses 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 penal law, as the case in discussion, namely the Penal 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 sanction regime elected freely 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<sup>7</sup> 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 (ordre public), or of public health or morals".

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<sup>7</sup> The content of paragraph 2 mentioned above is the following: „Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

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

Finally, the Courts also observed that similar incriminations as those contained in the Romanian Penal Code referring to the offenses against dignity, repealed by the disposals submitted to the constitutional control, one of them even much severe, can be encountered in the legislation of other European states, such as: France, Germany, Italy, Switzerland, Portugal, Spain, Greece, Finland, Czech Republic, Slovenia, Hungary and other.

The Decision of the Constitutional Court of Romania is irrevocable and mandatory, therefore the Romanian legislator must change the settlements found unconstitutional in 45 days from the moment the decision is communicated. If the Parliament takes no action in those 45 days, the unconstitutional provisions come out of force. In this particular case, the legislator took no action, therefore the amendments of the Penal Code ceased their juridical effect, which means that in this moment, slander and libel are sanctioned again based upon the provisions of art.205 and art.206 of the Criminal Code.

The only discussion remained is that regarding the role of positive legislator of the Constitutional Court of Romania. The Court analyzed profoundly its duty when it was asked to solve the objection of unconstitutionality, since the objection referred to a repealing, a situation that was not expressly settled by the Constitution of Romania. The Court knew that if the verdict was that the modification brought to the Penal Code is unconstitutional, the former legal texts would come into force, therefore the Court interferes in the legislator duty. Still, the Court was obliged to sanction any deviation from the constitutionality, and since the legislator acted unconstitutionally, there was no other way but to express one's opinion if addressed, and there was the case. We have the opinion that the Court played its constitutional role. It cannot be

compared to the legislator, since the legislative power made one's duty when incriminated in the first place the offenses of slander and libel and then when repealed them. Any unconstitutionality has its sanction and in this case the sanction was stated: the repealing of the offences being unconstitutional, the offenses come into force again.

A separate opinion was registered in the person of constitutional judge Marieta Safta. The Constitutional Court is not obliged by the law to take its decisions in unanimity. Therefore, some judges may have a different opinion from the majority, and their opinion is registered as a separate opinion, as well as some judges may agree on the same resolution given by the Court, but they may have another opinion regarding the motivation, and in this case their opinion is registered as a concurrent opinion.

In the case of the judge Marieta Safta, she admitted that she hasn't a different opinion regarding the importance of the social relations regarding the human dignity and the fundamental human rights and freedoms when related to freedom of speech, to the protection of the intimate life, or to the protection of person's public image, but she considers that the legislator must have the liberty to choose the modalities in which these values can be protected. Since the Constitution of Romania does not set expressly the juridical modalities in which the above mentioned values must be preserved, the legislator has all the liberty to choose how to protect these social relations, not to mention the degree of the social protection of some deeds that must be incriminated by applying some penal sanctions. The judge also motivated that the reputation and the dignity of the person are protected in other law branches, therefore we are not dealing in this case with a legislative vacuum (surely, as a personal opinion, we consider that the judge should have exemplified, for we consider also that at that particular point, the Romanian legislation in force didn't have sufficient modalities of conserving and protecting human dignity and the public image of a person).

Another argument was related to the ability of the Court to pronounce in this case. According to Art.2 paragraph 3 from the Law No.47/1992, the law of the organization

and functioning of the Constitutional Court, “The Court shall pronounce only upon the constitutionality of the acts it was intimated, without the possibility of modifying and completing the settlements controlled”. Therefore, the judge appreciated that the re-incrimination of the offences of slander and libel is in the strict competence of the Parliament of Romania, otherwise the Court becomes a positive legislator and this role is not stipulated in the constitution or in the Court’s organic law.

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 settled the general disposals concerning the activity of the Constitutional Court. And definitely the legislator didn’t stipulated expressly what decision should the Court take when dealing with the repealing of a legal text, repealing that is considered unconstitutional. If we only think in a limited vision that the unconstitutionality of the repealing 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 in the first place the offences, 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 repealing could be or not sanction, 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 in 7<sup>th</sup> of April 2008, to a plaintiff formulated by O.I.<sup>8</sup> with regard to a libel, one of the prosecutors of the Prosecution Department of the Court of Brasov stated the

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<sup>8</sup> The name is not given for reasons of confidentiality, since we do not deal with cases that are public.

following point of view: the plaintiff is rejected, and the offender M.L.<sup>9</sup> is out of penal action based upon Art.228 from the Criminal Proceeding 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, 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 modified 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 he Constitutional Court of Romania issued the Decision No.62/2007.

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<sup>9</sup> See the commentary made above

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