PROTECTION OF HUMAN DIGNITY
AS A CONSTITUTIONAL VALUE

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“Aware of its spiritual and moral patrimony, the Union is established on the invisible and universal values of human dignity (author’s emphasis), liberty, equality and solidarity; it is based on the principle of democracy and on the principle of the rule of law”. The necessity of protecting these unanimously recognized human rights is obvious, and this should be done through a firm legislation concerning the coercion of the actions that may affect values such sensitively related to the human nature. Thus, constitutional and penal guarantees are to be brought.

I. Today’s seminar theme gets onto very actual matters, of a wide theoretical and practical interest. It is part of the mission of the Constitutional Law and Political Institutions Center of permanently exploring the Constitution’s role and especially its value as a civilizing factor. It is not an easy mission in a society that does not seem to clearly and firmly protect its own values. On the other hand, Hans Kelsen’s opinion, according to which the Church, the State and the Law exist only if people believe in them, is well known. This observation can undoubtedly be applied to the Constitution too, as the Constitution represents the fundamental juridical and political document of a country.

This is why we, the juridical counselors, have the difficult mission of restoring the recognition and the guarantees of the human dignity, its true and deserved place in the hierarchy of the juridical values. These scientific efforts are necessary against the attack that may be noticed against the Constitution and the juridical guarantees.

It is well known that the dignity is related to the identity of the individual as a being endowed with reason and conscience. It is a component of the human dimension, of the civilization and progress.

Human dignity consolidated its role and position in the doctrine, in the constitutions, in the national and international practice. It is present in the European language and in the world’s language. The Universal Declaration of Human Rights (1948) proclaimed, in its preamble, using non-equivocal words, the ideals of a world built on peace, democracy, law and justice: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, … Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person …”. Afterwards, in article 1, the Declaration states that all human beings are born free and equal in dignity and rights.1

1 The present text mainly values the content of the scientific paper presented by Ioan Muraru at the scientific seminar “Guarantees of Constitutional values”, organized on February 23, 2007, in the Council Chamber of the Faculty of Law, Bucharest University, by the Constitutional Law and Political Institutions Center together with the People’s Advocate Institution. The debated themes were: Liberty of Expression; Judges’ Immovability as a Constitutional Value; the Relationship between the National and Communitarian Legislation from the point of view of certain Judgments of the European Courts of Contentious Constitutional Law; The Constitutionality Control – Guarantee of the Constitutional Values; the Protection of Human Dignity as a Constitutional Value in the Communitarian Law; Dignity Protection as a Constitutional Value.
II. Romania’s Constitution establishes, in art. 1, paragraph (2), that “Romania is a rule of law, democratic and social state, where the human dignity, the rights and the liberties of the citizens, the free development of the human personality, the justice and the political pluralism represent supreme values, in accordance with the democratic traditions of the Romanian people and the ideals of the Revolution from December 1989, and they are guaranteed”.

This constitutional consecration was voted in the Constituent Assembly as a reform in this sensitive field of human rights and liberties.

The provisions of the Romanian Constitution actually represent the valuation of a long history. A couple of references to doctrine, legislation and practice are revealing. Thus, the United States’ Declaration of Independence highlighted the truth that: all men are created equal; they are endowed by their Creator with certain unalienable rights; among these are life, liberty and the pursuit of happiness. The same Declaration adds that “to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. Whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness”.

The preamble of the French Declaration presents the cause of all bad things in the world, showing that „ignorance, neglect or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments”.

Professor’s Tudor Drăganu observations are also pertinent and interesting. Thus, this author shows that „the conception according to which the fundamental rights come from the inherent dignity of the human being obviously has a religious source”, (page 84), and then he adds:

„Religion teaches us that man is the only being made in God’s image; only the man has a soul, only he can be accused of committing sins and he can be rewarded with virtues; only man shall be subjected to the final judgment and as a result he shall be banished into hell or received in heaven, depending on whether he observed the sacred commands or not etc. As man has this privileged condition compared to the other beings, it is natural to reach the conclusion that he is the beneficiary of a special position in the universe, of a dignity conferring him certain fundamental rights that no one and nothing can affect, being universally valid. Actually, in their attempt of identifying the most profound resorts of the modern conception concerning human rights, certain famous theologians started from the idea that they originate in the inherent dignity of the human nature”. Tudor Drăganu cites, in order to support his theory, the reformed theologian Jurgen Moltman (according to whom we are in the presence of a particular dignity expressed by rights as well as by obligations), the theologian Trutz Rendorff (according to whom man is a reality endowed with a specific dignity), the philosopher Nicolai Berdiaev.

We also have to mention the Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment, adopted by the General Assembly of the United Nations on December 9, 1975 (resolution 3452 (xxx)), stating that: „Whereas...the recognition of the inherent dignity to all members of the human family and of the equal and inalienable rights is the fundament of the freedom of justice and of the peace in the world”(author’s emphasis).

We also have to mention several Romanian constitutional regulations in order to observe the juridical continuity in the protection of the man’s dignity and personality. Thus, article 24 paragraph

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2 See the text, as well as other observations, in James M. Beck, La Constitution des Etats-Unis, Librairie Armand Colin, Paris, 1923, p. 207 and following.
(2) of the 1866 Constitution was stating that „Media crimes are to be judged by a jury”, while article 105, showed that „the jury is established in all criminal cases as well as for political and media crimes”. Article 26 paragraph (4) of the 1923 Constitution was showing that „Media crimes are to be judged by members of the jury, except for the cases hereinafter established, that shall be judged by ordinary tribunals, according to the common law” (enumeration), while letter c) mentions „the calumnies, the insults, the defamations against private persons or state officials, whoever they are, affecting their private life or their personal honor”.

These constitutional provisions expressed the reality that the freedom of speech (media, words) often affects human dignity, and they tried to accomplish a balance “between expression and dignity protection”. The Constituent Assembly from 1990 -1991 that elaborated the present Constitution followed the same principles. Considering the protection of the human rights and liberties, but also the freedom of conscience and speech, the Constitution created an harmonious normative system, based on the exercise of the rights and on the equal protection, based on tolerance and respect. If we are correctly and faithfully interpreting the constitutional provisions of article 1 (already mentioned), of article 26 (intimate family and private life), of article 29 (freedom of conscience), pf article 30 (freedom of speech), of article 31 (the right to information), we shall identify the utility and the actuality of paragraph (8), the final thesis of article 30, according to which „the media crimes are established by the law”. Observing that until the present moment the Romanian authorities haven’t applied this imperative constitutional provision yet, we may state, without fearing to be wrong, that doctrines, legislations and traditions extremely important for the Romanian society have been neglected, thus favoring the frequent attacks to the human dignity. And even worse, the elaboration of juridical regulations that are difficult to accept.

III. In order to explain the human dignity, we shall also make reference to the Treaty Establishing a Constitution for Europe. In Title I, “Definition and Objectives of the Union,” in article I, 2, „the Union’s Values” it is shown that: „the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”.

Part II is called „The Charter of Fundamental Rights of the Union”. Its Preamble states that: „Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity (author’s emphasis), freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. We shall observe that Title I is called “Dignity”. And article II, 61 states: „Human dignity is inviolable. It must be respected and protected”.

We are also mentioning that in the Treaty, Title I regulates: the right to life (article II, 62); the person’s right to integrity (article II, 63), forbiddance of torture and of punishments or inhuman treatments (article II, 64), forbiddance of slavery and of forced work (article II, 65).

Jean – Luc Sauron, discussing about the values of the Union, mentions that the Treaty presents the values on which the Union is founded (article I, 2): the respect of human dignity, the liberty, the democracy, the equality, the rule of law, as well as the respect of human rights, including the rights of persons belonging to minorities. Then, the author adds that violation of any of these values by a member state may start the alert (d’alerte) and sanctioning procedure against that state, and the rights of member of the Union may be suspended in case of constant violation. „These values are common for all the member states, in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity, equality between men and women and non-discrimination”.5

Finally, even the European Court for Human Rights, in one of its judgments, showed that: „The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords cannot be said to be at variance with the object and purpose of article 7

5 Jean-Luc Sauron, La Constitution européenne expliquée, Gualino éditeur, Paris, 2004, p.28
of the Convention or its fundamental objectives, the very essence of which is respect for human dignity and human freedom.6

IV. The constitutional provisions are also applied and guaranteed through the criminal provisions. As the most serious attacks on human dignity are caused by the crimes of calumny and insult, it is useful and pertinently to present a short history of the crime regulations, provided by article 205 and article 206 of the Criminal Code.

Crimes against dignity were subject to different regulations of the Criminal Code. Thus, the Criminal Code of Romania from 19677 establishes that insult is that fact consisting of an attack against the reputation of a person by words, gestures or other means, or by exposure to revilement, as well as the fact by which a person is attributed a flaw, illness or infirmity, that even if they are real, they should not be revealed. The legislator provided at that time, for the crime of insult, the punishment of prison from one month to three months or a fine. At the same time, the Criminal Code of 1968 established that the penal action started based on the previous complaint of the insulted, and if the parties settled the matter, the penal responsibility is removed.

Calumny was defined as publicly stating or imputing a determined fact concerning a person, which, should it be true, would expose that person to a penal, administrative or disciplinary sanction, or to the public contempt, a similar definition with the one provided by the Criminal Code in force. The text of the 1968 Criminal Code highlights a more severe punishment of the deed than the present one, the punishment provided by the 1968 Criminal Code being of three months up to a year of prison or a fine.

As to the veracity evidence, it was provided that it was acceptable, if the statement or the imputation was made in order to defend a legitimate interest, and the deed related to the veracity evidence is not a crime of insult or calumny.

The amendments made by the Romanian Criminal Code from 19738 are not concerning the regulation of these crimes, the legislator preserving the way of defining the deeds, as well as the punishment provided for them. Moreover, the norms concerning the veracity evidence are remaining into force in the same form.

At the same time with the entering into force of the 1997 Romanian Criminal Code9, the legislator makes sensitive amendments related to the quantum of the punishments. Thus, article 205 of the Criminal Code was providing a punishment ranging from one month to two years or fine for committing the crime of insult, while article 206 of the Criminal Code establishes a punishment ranging from 3 months to 3 years of fine for committing the crime of calumny. At the same time, the legislator includes the provision according to which publicly stating or imputing a determined fact concerning a person, which, should it be true, would expose that person to a penal, administrative or disciplinary sanction, or to the public contempt may be committed “using any means”.

The Government’s Emergency Ordinance no. 56/200210 brings about new amendments of these articles, making a new change of the punishments’ quantum. Thus, the punishment at prison for committing the crime provided by article 205 of the Criminal Code was removed, and it shall be sanctioned only with a criminal fine, while for committing the crime of calumny, the punishment was diminished, consisting of prison from 2 months to 2 years or fine. But by the Law that approves the

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6 See Judgment from November 22, 1995 (Chamber), (series A nr. 335-C) in the Case of C.R. v. United Kingdom – Convicting a man for tentative of rape over his wife, European Court of Human Rights Practice, I.R.D.O. 1998, pages 298-299.
7 Published in the Official Journal no. 79 bis from June 21, 1968
8 Published in the Official Journal no. 55 from April 23, 1977.
9 Published in the Official Journal no of Romania, Part I, nr. 65 from April 16, 1994.
10 Government’s Emergency Ordinance no. 58/2002 from May 27, 2002 concerning the modification and the amendment of certain provisions of the Criminal Code related to crimes against dignity and crimes against authority, as well as of certain provisions of the criminal Procedure Code.
Government’s Emergency Ordinance no. 58/2002\textsuperscript{11}, the punishment with prison was also removed for committing the crime of calumny, which shall be punished with criminal fine ranging from 2.500.000 ROL to 130.000.000 ROL.

We have to mention that in time, the provisions of the Penal Code concerning the crimes against dignity had been attacked by bringing in front of the Court numerous unconstitutionality exceptions.\textsuperscript{12}

By the provisions of article I, point 56 of Law no. 278/2006\textsuperscript{13} for the modification and amendment of the Criminal Code, as well as for the modification and amendment of other laws, the provisions of articles 205, 206, 207 had been abolished. Subsequently, these provisions of Law no. 278/2006 were the object of certain unconstitutionality exceptions, that the Constitutional Court solved by the Judgment no. 62/2007.\textsuperscript{14}

Thus, the Constitutional Court accepted the unconstitutionality exception of the provisions of article I point 56 of Law no. 278/2006, considering that the abolition of this texts of law and implicitly the removal of the incrimination for the crimes it refers to is against the provisions of article 1, paragraph (3) of the Romania’s Constitution, as “in the absence of the juridical protection provided by articles 205, 206, 207 of the Criminal Code, the dignity, the honor and the reputation of the persons do not benefit from any form of real and adequate juridical protection”.

At the same time, the Constitutional Court stated that the abolition of articles 205, 206, 207 of the Criminal Code is also breaching the principle of the free access to justice, provided by article 21 of the Constitution, the right to an equitable trial and the right to an effective appeal, provided by article 5, article 13 of the Convention on the protection of human rights and of fundamental freedoms, but also the principle of equality in rights, provided by article 16 of the Constitution.

Moreover, the Constitutional Court considered that the abolition also breaches the provisions of article 30, paragraph (8) of the Constitution, when the crimes of insult and calumny are committed in the media.

When enacting this Judgment, the Court also considered the provisions concerning the freedom of speech, from article 30 of the Constitution of Romania, article 10 paragraph 2 of the Convention on the protection of human rights and of fundamental freedoms and article 19, paragraph 3 of the International Agreement on the civil and political rights.

As to the matter of absolving from incrimination or re-incriminating these actions, we have to emphasize the fact that, according to article 147, paragraph (1) of the Constitution of Romania, as well as to article 31 paragraph (3) of the Law no. 47/1992\textsuperscript{15} concerning the organization and the functioning of the Constitutional Court, „The provisions of the laws and ordinances in force, as well as those of the regulations, that were considered to be unconstitutional, cease to produce juridical effects within 45 days since the publishing of the Constitutional Court’s Decision if, within this delay, the Parliament or the Government, whichever the case may be, do not match the unconstitutional provisions with the provisions of the Constitution”.\textsuperscript{16}

Consequently, as the Romania’s Parliament has not adopted a new normative document until now, considering that the unconstitutionality exception was accepted, and considering that the 45 days

\begin{footnotesize}
\textsuperscript{13} Law no. 278/2006 for modifying and amending the Criminal Code as well as for adopting other laws, published in the Official Journal of Romania, Part I, no. 601 from July 12, 2006.
\textsuperscript{16} Article 147 paragraph (1) from the Constitution of Romania, republished in the Official Journal of Romania, Part I, no. 767 from October 31, 2003.
\end{footnotesize}
deadline provided by the Constitution was exceeded, the provisions of article I point 56 of Law no. 278/2006 ceased their effects. As a result, articles 205, 206 and 207 of the Penal Code remain into force, in the form they had before the abolition, as it was presented above.

We have to notice that by this decision the Constitutional Court has reestablished the constitutional and legal normality status.

V. We shall add to our presentation several very good scientific observations made by professor Valerian Cioclei.

Law no. 278 from July 4, 2006, for the modification and amendment of the Penal Code, presents an “apparently harmonized” configuration of article 239 of the Criminal Code – the outrage, and of article 250 of the Criminal Code – the abusive behavior. The typical version of the crime of abusive behavior initially had a correspondent in the outrage, namely the old paragraph 1), the one that used to have a material element “the insult or calumny committed directly or using direct means of communication against a state official”. This original typical version of the outrage was, as it is well known, abolished some time ago, namely by article I point 2 of Law no. 160 from May 30, 2005.

“It is known that the outrage was initially a sort of collateral victim in the media battle against crimes of insult and calumny, crimes falsely felt as being directly invented against the journalists. Subsequently, the outrage became a target itself, but, despite the arguments, it has succeeded, for the time being, to save itself.”

“However, one has to notice that from the point of view of the equability between outrage and abusive behavior, the disappearance of the original typical version of the outrage causes a flagrant protection instability. More clearly, while on the one hand the use of vexing expressions, or in other words, insults, against a person, by a state official exercising his duties is punished, on the other hand, insulting the state official has no relevance from the penal point of view. Thus, only a false equability is created, as well as an abnormal situation, without justification in a strategy of penal politics.”

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