

The material element in the basic form of the offense of abusive behavior

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Abstract

Legal rules are dynamic, meaning that they change depending on the evolution of the society at a certain time, in order to successfully meet the needs of regulation of social relations. The Criminal Code is no exception to this rule. Insult and slander have been decriminalized by the Law no. 278/2006, a situation which has led to changing legal content of other crimes, such as outrage, referred to in Art. 239 Criminal Code, by repealing its basic variant, relative to insult and slander. Instead, at the offense of abusive behavior, referred to in Art. 250 Criminal Code, the basic variant, represented by „the use of offensive language”, remained in force.

Keywords: *insult, slander, outrage, abusive behavior, decriminalization.*

JEL Classification: *K14, K42*

Introduction

1. The paper aims to analyze how the legislator has chosen to describe the offense of abusive behavior, referred to in Art. 250 Criminal Code, in its basic variant, while the Law no. 278/2006 has decriminalized insult and slander, by repealing Articles 205 to 207 of the Criminal Code. The basic form of the offense of abusive behavior is described as „the use of offensive language against a person by a public official in the performance of his duty”.

2. The issue is important because it enables us to analyze whether the legislator was consistent in criminalizing certain behaviors or if it has created a treatment in terms of enforcement of criminal law only for a certain group of persons. The subject is topical, given the imminent entry into force of the new Criminal Code.

3. The starting point of the analysis is represented by the provisions of the Criminal Code in force, but we also refer to the provisions of the Constitution and last but not least to those of the New Criminal Code.

4. This paper does not reproduce what already exists in this field, but it analyzes the legal provisions of the material element of the offense of abusive behavior, in its basic form, through the decriminalization of insult and slander.

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The Analysis of the Material Element of the Basic Form of the Offense of Abusive Behavior

1. The Offenses of Insult and Slander as They Were Provided in the Criminal Code

Dignity and honor are attributes of a person guaranteed by the Constitution². Until recently, these attributes also benefitted from the protection offered by the criminal law, in that in the Criminal Code in force there were described two crimes, namely: insult, in Art. 205 Criminal Code, and slander, in Art. 206 Criminal Code. These two offenses were part of Title II of the Criminal Code, entitled „Crimes Against the Person ", representing along with Art. 207 Criminal Code regarding the verity proof the fourth chapter of the above mentioned Title, called „Offenses Against Dignity".

According to Art. 205 Criminal Code, the insult was, in the basic form, the harm of the honor and the reputation of a person by words, gestures or by any other means, or by exposure to ridicule". According to Art. 206 Penal Code, the libel was the assertion or imputation in public, by any means, of a fact regarding a person that, if true, would expose that person to a penal, administrative or disciplinary or public contempt".

2. Amendments to the Criminal Code by the Law no. 278/2006

The articles 205 to 207 have been repealed of the Criminal Code by Art. I Section 56 of the Law no. 278/2006³ to amend the Criminal Code and to amend and supplement other laws. On August 11, 2006 the Art. 239 Criminal Code relative to the offense of outrage was amended by Art. I, section 57 of the Law no. 278/2006, meaning that insult and slander against a public official who performs a function involving the exercise of state authority have not represented the normative ways of achieving material element of the offense. Prior to this change, according to Art. 239 Criminal Code, the normative ways of achieving the material element of the offense of outrage were: insult, slander, threatening, hitting or other violence, injury and serious injury. As one can see, the crime of outrage, which is part of Title V of the Criminal Code, entitled „Crimes Against Authority", is a complex crime because it includes in its content as a component, actions who constitute themselves facts that are being described by the criminal law⁴, namely crimes of threat (Article 193 Criminal Code), strikes or other acts of violence (Article 180 Criminal Code), injury (Article 181 Criminal Code) and grievous bodily harm (Article 182 Criminal Code), which are found in Title II of the Criminal Code, reserved to crimes against the person.

² Article 30 par. (6) of the republished Constitution provides that „Freedom of expression may not harm the dignity, the honor, the privacy of a person and nor the right to her own image".

³ Published in the „Official Gazette of Romania" no. 601 of July 12, 2006.

⁴ Costică Bulai, Bogdan Bulai, *Handbook of Criminal Law. The General Part*, Legal Universe Publishing House, Bucharest, 2007, p. 510.

Another amendment to the Criminal Code made by the Law no. 278/2006 has also referred to Art. 250 Criminal Code, article which describes the offense of abusive behavior. Prior to the amendment, the offense had a basic form, represented by „the use of offensive language against a person by a public official in the performance of his duty”, and an aggravated form consisting in „hitting or other violence committed under par. (1)”. Subsequently, by the above mentioned law there were added three different aggravated forms, namely: the threat, the injury and the serious injury committed by a public official under par. (1).

One normative way of achieving the material element of the offense of abusive behavior is represented by „the use of offensive language” towards a person by a public official in the performance of his duties. This phrase has a broader meaning, including any damage to the honor or reputation of individuals so that the offense of insult is absorbed by the offense of abusive behavior⁵, respecting of course all the other legal requirements. It may be noted that although insult and slander are not crimes anymore and therefore the legal text of the offense of outrage under Art. 239 Criminal Code has been changed, the legal text of the offense of abusive behavior, provided in Art. 250 Criminal Code, kept as a normative way „the use of offensive language” towards a person by a public official, respecting all the other conditions for the existence of the crime in question.

3. The Point of View of the Constitutional Court

In 2007, the Constitutional Court handed down a decision⁶ which declared unconstitutional the provisions of art. I, section 56 of the Law no. 278/2006 which repealed articles 205 to 207 of the Criminal Code. There were numerous reasons for making such a decision. Thus, the legal object⁷ of the offenses of insult and slander under Art. 205 and, respectively, 206 of the Criminal Code, is the dignity, the reputation and the honor of an individual. The values listed, protected by the Criminal Code, have a constitutional status, human dignity being enshrined in Article 1 par. (3) of the Constitution as one of the supreme values. Thus, the quoted text of the Constitution provides that "Romania is lawful, democratic and social state, in which human dignity, rights and freedoms, free development of human personality, justice and political pluralism represent supreme values in the spirit of the democratic traditions of the Romanian people and of the ideals of the Revolution of 1989 and they are guaranteed".

⁵ Octavian Loghin, Tudorel Toader, *Romanian Criminal Law. The Special Part*, Chance Publishing and Press House, 1994, p. 335.

⁶ It concerns the Decision of the Constitutional Court no. 62 of January 18, 2007 on the plea of unconstitutionality of the provisions of Art. I, section 56 of the Law no. 278/2006 to amend the Criminal Code and to amend and supplement other laws, published in the „Official Gazette of Romania" no. 104 of February 12, 2007.

⁷ The Decision of the Constitutional Court no. 62 of January 18, 2007 available online at the following address http://www.ccr.ro/decisions/pdf/ro/2007/D062_07.pdf (last accessed: April 20, 2012).

Given the importance of the values protected by the provisions of articles 205, 206 and 207 of the Criminal Code, the Constitutional Court found that repealing these pieces of legislation and decriminalizing in this way the insult and the slander was against the provisions of Article 1 par. (3) of the Constitution. Moreover, the Court found that incriminations similar to that contained in the texts of the Criminal Code regarding the offenses against dignity, repealed by the provisions under constitutional control, some even tougher were also found in the legislation of other European countries such as France, Germany, Italy, Switzerland, Portugal, Spain, Greece, Finland, Czech Republic, Slovenia, Hungary and others.

4. The Point of View of the High Court of Cassation and Justice

In 2010, the High Court of Cassation and Justice issued a decision⁸ on appeal in the interest of law by which it was stated that: rules criminalizing the insult and the libel contained in Art. 205 and 206 of the Criminal Code and the provisions regarding the verity proof in Art. 207 of the Criminal Code, repealed by the provisions of art. I, section 56 of the Law no. 278/2006, which were declared unconstitutional by the Decision No. 62 of 18 January 2007 of the Constitutional Court are not in force. One of the reasons behind making such a decision was that as long as the offenses of insult and slander decriminalized through Art. I, section 56 of the Law no. 278/2006, were not considered offenses again by the legislative power, who has the exclusive right in a lawful state to do so, one cannot believe that these facts would constitute offenses and that the repealed law texts that incriminated them returned into force. Therefore, the failure to exercise the prerogative of the Parliament to review the text of the law, deemed unconstitutional, cannot unequivocally lead to the solution to replace this essential power within the lawful state and to issue on its behalf by another authority of a repealing provision, such a process being unacceptable according to the provision stated in Art. 64 par. (3) of the Law no. 24/2000, republished, that was established for the technical value of the laws, "to not admit that the repeal of an earlier repealing act means to restore into force the basic law"⁹.

Thus articles 205 to 207 of the Criminal Code are not in force, Art. 239 Criminal Code relative to the offense of outrage keeps the amendment added by the Law no. 278/2006, but still we find that the normative way of achieving the material element of the offense of abusive behavior provided in Article 250 Criminal Code, is represented by „the use of offensive language against a person by a public official in the performance of his duty”.

We believe that this could create legal inequities as the rights of some individuals are protected both by means of criminal and civil law, and the rights of some others, are protected only through the exercise of the civil action. As the High

⁸ It concerns the Decision no. 8 of October 18, 2010, published in the „Official Gazette of Romania”, First Part, no. 416 of June 14, 2011.

⁹ The Decision no. 8 of October 18, 2010, available online at the following address <http://www.scj.ro/Decizii%20SU/RIL%208%202010%20SU.htm> (last accessed: April 20, 2012).

Court of Cassation and Justice ruled that the provisions of articles 205 to 207 Criminal Code are not in force, the dignity and the honor of a person, attributes guaranteed by the Constitution of the country, will be protected by means of civil law by exercising the civil action. This is valid only when the subject to damage of the dignity and the honor is both a private person and a public official who performs a function involving the exercise of state authority, and the acting is of an individual. The inequity appears when the honor of an individual is injured by a civil servant in the performance of his duty because that person is the passive subject of the offense of abusive behavior, provided in Art. 250 par. (1) Criminal Code (the use of offensive language), so he enjoys the protection provided by the criminal law, but he also can start a civil action for damages brought by a qualified active subject.

It is true that by criminalizing the abusive behavior it will defend, in the first place, the activity of institutions and of other units of those provided in Art. 145 Criminal Code, since this offense is a service one, being part of Title VI of the Criminal Code, entitled „Crimes affecting public activities or other activities regulated by law", but alternatively, it protects persons who come into contact with some officials in the conduct by them of certain activities¹⁰. If the legislator has opted to maintain the normative ways of achieving material element of the offense of abusive behavior, we believe that the same solution would have been imposed for the offense of outrage. The latter offense is found in Title V of the Criminal Code, entitled „Crimes Against Authority" so that the description in the Criminal Code protects, first, the authority, and, secondly, the official.

We consider appropriate, for future regulations, to modify the legal content of the offense of abusive behavior in the sense of removing from the legal text the normative way relative to „the use of offensive language". As a result of this change, the normative ways of achieving the material element of the offense of abusive behavior would be: threat, according to Art. 193 Criminal Code, hitting or other violent acts within the meaning of Art. 180 Criminal Code, personal injury, according to Art. 181 Criminal Code, and serious injury within the meaning of Art. 182 Criminal Code.

It is true that one may say that the current legal text of the offense of abusive behavior should remain as any use by a public official in the performance of his duties of offensive language against an individual is serious because this qualified active subject would harm by his action, without prejudice, first the institution he represents and where he works at, and then, in the alternative, the private person.

For the same legal reasoning, we state that the offense of assault should have maintained the normative way that was repealed by the Law no. 278/2006 because when an individual insults a public official who performs a function involving the exercise of state authority this represents lack of respect for the state authorities, primarily, and secondarily, for the official person. But, given the

¹⁰ Ilie Pascu, Mirela Gorunescu, *Criminal Law. The Special Part*, second edition, Hamangiu Publishing House, Bucharest, 2009, p. 380.

legislator's option, we consider that par. (1) of Art. 250 Criminal Code relative to the offense of abusive behavior should be repealed.

We support this having as an argument the provisions of the new Criminal Code¹¹. Thus, in this legal act we cannot find the description of the offenses of insult and slander. The offense of outrage, referred to in Art. 257 of the new Criminal Code¹², has no normative way relative to insult, as well as the Criminal Code in force, and the material element of the offense of abusive behavior, referred to in Art. 296 N.C.C., in the basic form is represented by „the use of offensive language against a person by those in the exercise of their duties”.

Conclusions

1. By the Law no. 278/2006 that has decriminalized the insult and the slander there have also been repealed the normative ways of achieving the material element of the offense of outrage regarding the hypothesis of insult and slander against a public official who performs a function involving the exercise of state authority, as was naturally. However, in the case of the offense of abusive behavior, although the legislator has added three aggravated variants, namely: the threat, the injury and the serious injury, there has not been repealed the legal form consisting in „the use of offensive language”. We believe that this normative form should be repealed in order to avoid the creation of a situation in which criminal rules will apply only to a certain group of persons.

2. This results can be used in order to change for the future the regulations of the Criminal Code in force or of the New Criminal Code.

3. We always have to take into consideration the amendment of the laws in force to see whether there is or there is not inconsistency because all legal acts are extremely important for the smooth development of social relations in general.

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¹¹ It concerns the Law no. 286/2009 regarding the Criminal Code, published in the „Official Gazette of Romania” no. 510 of July 24, 2009.

¹² Next N.C.C.