

THE PRIOR COMPLAINT - CONDITION OF PENAL LIABILITY FOR INSULT AND CALUMNY CRIMES

Daniela Aurelia Popa
„DANUBIUS” University Galați
Academic Tutor
daniela.popa@univ-danubius.ro

Abstract: *Beyond limits of expression we find ourselves in the area of penal illicit and this fact leads to incrimination of insult and calumny crimes committed in press.*

The starting point in triggering journalist's liability is injured person's notice of appeal for the prior complaint. Media activity involves coordinated contribution of all those who collaborate to provide a material, but this collaboration does not turn into partaking.

After apprising the judicial bodies regarding commitment of the crime, the injured party manifests expressed will that crime be proceeded against and sentenced, so that person's dignity to be protected. By incriminating the acts of insult, the dignity is protected from both points of view: subjectively, as well as objectively. In case of calumny, in completion to these acts comes the care for public image enjoyed by one person.

Keywords: *dignity, expression, intention, social danger, reputation.*

Journalists' liability is one of the most controversial subjects of debates regarding the legislative reform. During the last years, many draft bills and legislative proposals were issued, providing exaggerated increase in quantum of the punishment for the violations of law performed in press until the total discharge for those violations.

The most severe type of legal liability is the penal liability. The only ground for this liability is the violation of law and only the law can provide under which conditions a person can be held responsible for penal liability. In most situations, committing an infraction instantly entails criminal liability on the perpetrator, respectively on the participants. But there are also infractions less severe, case when starting the penal action, including penal accountability, are conditional upon a prior complaint made by the person who is considered injured.¹

The constitutional regulations, through art. 30, paragraphs 6 and 7, set the limit of the freedom of expression. Beyond this limits we find ourselves in the area of civil or penal illicit, depending on the situation.

According to the fundamental law, the freedom of expression cannot harm the dignity, integrity, private life of a person or the right to personal image. It is forbidden by law to defame the country, the nation, to instigate to aggression war, national hatred, racial hatred, class or religious hatred. It is also forbidden to instigate to discrimination, territorial separatism or public violence, as well as obscene display, contrary to morality.

The criminal law defends human dignity by incriminating the acts of offence (Criminal Code, art. 205) and calumny (Criminal Code, art. 206), by forbidding under the threat of penalty, any action that harms a person's integrity or respect on behalf of other people.²

The calumny and the insult are of penal nature also in France and Italy, but the European Union tries to standardize the legislation for all its countries.

In our country, as well as within the European Union, was put into question if incriminating the insult and calumny as infractions against personal dignity do not touch the freedom of expression, particularly in the field of media. The Constitutional Court, as well as the European Court for Human Rights set out some limitations to this liberty (freedom) and that each State has

¹ Cercelescu Carmen Monica, *Regimul juridic al presei*, Editura Teora, București, 2002, p.171

² Ilie Pașcu, Mirela Gorunescu, *Drept Penal-Partea Specială, Ediția a 2-a*, Editura Hamangiu, București, 2009, p. 220

the sovereign right of settling these limits.³ The Constitutional Court issued, repeatedly, decisions of denial to the constitutional exceptions laid down against the Penal Code provisions from art. no. 205 and 206. This fact leded, in the end, to some incompatibility between the principle of freedom of expression and the incrimination of offence and calumny. As a result it was suggested that the reactivation of these infractions by the Constitutional Court's Decision no. 62/ 2007.

In establishing journalist's liability, specific aspects must be taken into consideration and this involves a thorough analysis of each case. At the same time, especially in democratic societies, under the rule of law, considering the principle of legality of penal liability, as well as the principle of inevitability of penal liability, journalist's activity cannot escape their incidence, to the extent that it is a socially dangerous act, committed with guilt and referred by the penal law.

To the commitment of press crime may attend more than one person, starting with the author of the incriminated material, all way up until the chief editor and even persons who do not belong to the Editorial Office (the person who gave the interview, instigators or accomplices). These persons' contribution to committing the infraction may consist of acts of direct and immediate execution (the author), material and moral support (the accomplice) or acts of persuading to commit acts of crime (the instigator). All these types of involvement are possible as a matter of press crime. Therefore all participants bear penal liability when committing such an infraction and the type and amount of penalty is determined by the court, depending on the specific contribution of each participant.

The criminal proceedings for insult and calumny, in press and general, has as starting point injured person's notice of appeal for the prior complaint.

Prior complaint differs from the complaint or denunciation, as the prior complaint is a necessary condition for initiation and continuation of criminal proceedings.

According to the Penal Code (art. 279) and regulations of crimes against human dignity, starting the criminal action procedure "takes place only based on injured person's prior complaint", the active subject of crime.

The active subject of crimes against human dignity may be any person who directly commits with guilt a deed that harms the integrity and reputation of another person⁴, and passive subject of crime against human dignity is an individual who's dignity was harmed by committing the infraction. It is necessary to emphasize that the crimes against human dignity may be committed by more then one person, people who concur in consummation of the crime as co-authors, instigators or accomplices, having in the end several active subjects.⁵

The press work involves the coordinated contribution of all people working in a newsroom, but their cooperation never turn into taking part to committing the crime of calumny or insult. The only variation in this respect may be the editor's responsibility together with the author of the material, as accomplice.

The institution of prior complaint includes a dual manifestation of will from the injured person: apprising the judicial bodies regarding commitment of crime against dignity and the expressed will that crime be proceeded against or sentenced, raising the impediment which precludes the activity of criminal procedure. That will must be expressed within 2 (two) months from the day the injured party knew who the perpetrator was.⁶

The insult is incriminated by art. 205 from the Penal Code in two ways: the standard version (the deed of the one who harms the integrity and reputation of another person through words, gestures or any other way, or exposes the victim to ridicule) and the assimilated version (when a defect, disease or infirmity is attributed to a person, which should not be revealed even if they were true). Thus, the constituents of this infraction are gathered for case when the defendant stated, in two of his articles, that the injured party is "plagiarist, he has legal thinking gained from intellectual theft and the students can learn from him only scientific quackery, intellectual theft, wooden

³ Vasile Dobrinou, Norel Neagu, *Drept Penal- Partea Specială, Teoria și practică judiciară*, Editura Wolters Kluwer, București, 2008, p. 245

⁴ Corneliu Turianu, *Insulta și calomnia prin presă*, Editura All Beck, București, 2000, p. 17

⁵ Ibidem, p. 18

⁶ Vasile Păvăleanu, *Drept Penal General, Ediția a 3-a*, Editura Lumina Lex, București, 2007, p. 263

language and ambiguous legal thinking.” The court considered that in this situation, through certain words and ideas repeated blatantly, which are clearly and unambiguously insulting, the defendant went beyond the right to freedom of expression and he was aware that his action produced such a result.⁷

By incriminating the deed of insult is protected with priority the dignity from the subjective point of view, in terms of sense of honour that everyone has to himself and secondly, indirectly, it is protected the person’s dignity from the objective point of view, i.e. in terms of moral appreciation enjoyed by the passive subject and which is evident by the reputation and respect of his fellows.⁸ The crime of insulting is part of the category of crimes with alternative content and, in order to exist, it is enough to achieve any of the aspects laid down in the art. 205 from the Penal Code: any harm to person’s integrity or reputation or attribution of a defect, disease or infirmity to a person. For the existence of this crime it’s not necessary for the victim to be present or even indicated by name, it is enough the perpetrator to act with direct or indirect intention and refer to an issue that allows an accurate determination of that person.

For the crime of insult, advertising is only a circumstance element that may cause aggravation of the court sentence, as the advertising element is essential in just evaluation of the deed – it’s also possible to make the content of the crime of calumny.⁹

Art. 206 from the Penal Code provides that crime of calumny is the assertion or imputation in public, by any means, of a certain fact regarding a person who, if it were true, it would expose that person to a penal crime, administrative or disciplinary crime, or to public scorn. As regarding the means of achieving slander, as news crime, they may consist of written words, graphic signs (e.g. cartoons), reprography of images, photos or videos and, generally speaking, any form of expression which can reproduce a certain fact.¹⁰

As a first difference we can notice when speaking of insult that the offensive action may be confined only to the assertion of an indeterminate fact, while when speaking of calumny, the action of assertion or imputation refers to a specific fact, so that is likely to create the appearance of plausibility in assessing public opinion.

In terms of severity of the immediate consequence of two offenses against dignity, when speaking of insult it can be noticed a shift between the own sense of integrity to an opposite state of mind, and in case of calumny it is created a state opposite to the reputation enjoyed by a person. Indeed unlike his own sense of integrity, reputation is acquired by a person through his/ her own constant efforts, so that when he/ she loses esteem, consideration and respect of his/ her fellows, they can be recovered only with the cost of persistent efforts.

the existence of the crime of calumny “because public assertion or imputation facilitates its resonance in the public sphere”.¹¹

When speaking of insult, the direct active subject (author, creator, journalist) and the indirect active subject (instigator, accomplice), as well as the passive subject (injured person) are not detailed by any special quality or specific requirement.¹²

Opposed to insult, when speaking of the crime of calumny the material element is achieved only by committing the crime, i.e. the assertion or imputation of facts related to a specific individual. The assertion often takes the appearance of sincerity, but by this mean they aim to break a person’s reputation. The penal law considers and punishes malicious endeavour of the perpetrator who tries to create the appearance of authenticity. Imputation, unlike the assertion, is a matter of accusation and requires precise information regarding the details of the fact which attributed to the accused person.

⁷ Ibidem, p. 244

⁸ Corneliu Turianu, *op. cit.*, p. 37

⁹ Corneliu Turianu, *op. cit.*, p. 48

¹⁰ Cercelescu Carmen Monica, *op. cit.*, p.176

¹¹ Ibidem, p. 55

¹² Ibidem, p. 55

The penal law also punishes the one who makes assertions or imputations referring to real facts, unless it is proved that the assertion or imputation was made to defend a legitimate interest, when it is admitted the evidence of the asserted or imputed facts as being real (art. 207 from the Penal Code). To qualify for this special clause which discards the criminal nature of the deed is necessary for the perpetrator to prove that his/ her assertions or imputations are truthful.¹³ It does not matter if the defamatory assertion or imputation refers to the public or private life or activity of the injured party, as the penal law protects the human dignity either from private or public point of view. The requirement of the law will be fully abided whenever a precise act attributed to someone would lead the injured party to a penal, administrative or disciplinary penalty.

In case of libel, there is advertising whenever the written material was communicated to two or more persons or it was distributed, sold or displayed in public places.¹⁴ The calumny committed through press complies with advertising conditions in two phases: first is the journalistic material in an editorial that after receiving "imprimatur" is multiplied in thousands of copies, becoming known to a large number of people who become aware of its contents. The second phase, of advertising, occurs when the newspaper came into the hands of readers, who can learn the defamatory statement. This kind of press defamation may also be seen in other situations of calumny, committed through other media means, without having a heavier penalty.

The calumny crime is committed with guilt in both situations, directly or indirectly. By their profession, the journalists have the duty to inform the readers regarding all aspects of interest for the public, but this information must be correct (art. 21 from the Constitution, paragraph 4). When a person who works in the media inserts in a newspaper or broadcasts an audio-visual material that contains statements about a person's life and work and some information is beyond the limits of correct information, then his deed is likely to fall under art. no. 206 from the Penal Code. The journalist acts intentionally because he anticipates the advertising gained by the denigrating statement and he/ she is aware the statement is outside the limits of proper exercise of the media attributions. In all situations the penal nature of the deed is discarded if proved to have been committed in order to protect a legitimate interest.¹⁵ As in case of no prior complaint, withdrawal of the complaint, when penal action is set in motion based on the prior complaint of the injured party, is a reason that discards criminal liability.¹⁶

However it is possible for the journalist to make erroneous statements or reports under the fast pace of the press activity and, in such cases, it is allowed to invoke good faith i.e. the error, which excludes guilt from intention.¹⁷ For it is possible the journalist to had been misinformed, he/ she had not been sufficiently vigilant in recording facts or checking the information, being the victim of informers who have misled him/ her.

Regarding press calumny, the motive may have an important role in decoding the true psychical position of the journalist, which sometimes is able to reveal the previous impulse that made the journalist to deviate from his/ her duty of correctly informing the readers. Such a motive, relevant for an existent intent, might be some interests of the newspaper, which would be likely to explain the deviation from objectivity or some bias. Another motive could be the personal relationship between the journalist and the injured person whom was attributed the denigrating fact, but the journalist is not allowed to pursue personal resentment in his/ her statements.

With proper notice of both infractions, giving the injured party the initiative to transform the interpersonal conflict in a conflict of criminal law, as well as the possibility to quash the litigation amicably by conciliation with the perpetrator, they were inspired by the wise thought that "the noblest revenge is to forgive suffered injuries".¹⁸

¹³ Corneliu Turianu, *op. cit.*, p. 61

¹⁴ *Ibidem*, p. 74

¹⁵ Ilie Pașcu, Mirela Gorunescu, *op. cit.*, p. 222

¹⁶ Vasile Păvăleanu, *op. cit.*, p. 267

¹⁷ Corneliu Turianu, *op. cit.*, p. 87

¹⁸ Gheorghe Diaconescu, Constantin Duvac, *Tratat de Drept Penal- Partea Specială*, Editura CH Beck, București, 2009, p.236

Individually, human dignity is a good belonging to the person, collectively, it has social value, it's a must to social coexistence and, therefore, worth to being legally protected.

Any action conducted by a person, that would offend the sense of dignity of another person harms the moral personality of that person. Such actions are not allowed as they would lead to endless conflicts and would make social coexistence impossible. There should be respect and appreciation for each member of the community.

Freedom, and generally the freedom of speech, is a temptation that can make some journalists exceed the limits of correct practice and can lead them to addressing some immoral issues, written in a vulgar or indecent language.

The crimes of insult and calumny committed by the media, which take place in various circumstances and situations, embed to the facts a certain degree of social danger such as to justify their incrimination as infractions. Incrimination of these infractions is closely related to the condition that the person whose dignity has been harmed should give notice of appeal for a prior complaint.

Media plays a key role in a democratic society. It shouldn't pass certain limits pertaining to protection of the reputation and rights of others and, if it does, then it goes beyond the limits of freedom of expression. As long as there will be public statements and imputations which determine transition from one's own sense of honour to a contrary state or to a state contrary to the reputation enjoyed by a person, the penal law will always ensure the protection of human dignity for both, public and private life.

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