

Practical aspects regarding the tort liability for press offences

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Abstract: - In a democratic society freedom of expression is a fundamental right, creating the conditions required for exercising other human rights. In this context, the authors explore in the following study the limits of journalistic freedom and the consequences, in legal terms, of overcoming such limits and damaging other human rights. The analysis, referring to the Romanian civil jurisprudence, will follow the fulfillment of the conditions of tort liability, in cases in which illegal acts are committed by journalists, affecting the personality rights, such as honor, honesty, dignity or reputation of a person.

Key-words:- freedom of press, press offences, tort liability, moral damages, personality rights.

1. Introduction

In a democratic society freedom of expression is a fundamental right, creating the conditions required for exercising other human rights.

In its jurisprudence [1], the European Court of Human Rights has repeatedly stressed out that "freedom of expression, enshrined in para. 1 of Article 10 of the European Convention of Human Rights [2] is one of the essential foundations of a democratic society, one of the basic conditions for its progress. Subject to para. 2 of the same text, freedom of expression involves not only "information or ideas rated favorably or considered inoffensive or indifferent, but also those which frustrates, shock or disturb, this being the requirement of pluralism, tolerance and the spirit of openness in a democratic society."

In this context, we refer hereinafter to the press freedom, as a specific category of the freedom of expression, finding such an approach as being very useful in order to explore the limits of journalistic freedom and the consequences, in legal terms, of overcoming such limits and injuring other human rights.

The absence of specific regulations regarding such illegal acts committed by journalists, which affect the honor, honesty, dignity or reputation of a person (the so-called "press offences") determined the Romanian courts to substantiate the tort liability for such offences on article 998-999, provisions of Code Civ [3].

Regarding this problem of law interpretation, the Constitutional Court held [4] that the provisions of Civil Code - art.998-999 constitutes the *juris commune* of tort liability in accordance with article 30 alin.8, text of the Romanian Constitution, according to which "the press offences shall be established by law."

We thus have to examine, referring to the Romanian jurisprudence, the fulfillment of the conditions of tort liability - in the situation of the infringements committed by journalists, through overcoming the so-called "admissible criticism."

Following the analysis we will conclude over the assessment of the freedom of press limits in relation with the administration of justice, with the public function, or with cases in which there are violated subjective rights of the above quoted nature, or when it is harmed the presumption of innocence. For that

occasion we will refer also to the civil legal system of compensation for the damages suffered.

From the beginning it is necessary to outline that it isn't our purpose to refer to the aspects concerning possible criminal consequences of such illegal journalists acts, we just remind here the High Court of Cassation and Justice Decision [5], which held in the Joint Sections, for the uniform interpretation and application of law that "the rules of the criminalization of insult and libel contained in article 205 and article 206 of the Criminal Code and article 207 Criminal Code - on the burden of proof, repealed by the provisions of art. I section 56 of Law no. 278/2006, provisions declared unconstitutional by the Constitutional Court decision no. 62 of 18 January 2007, are not in force. "

2. The limitation of press freedom in view of the personality rights protection

The media abuses towards the right of privacy of public persons are more and more often observed. As stated above the freedom of press and public's right to be informed often come into collision with personality rights, so the legal consequences must be examined strictly.

The doctrine refers to many civil judgments regarding the right to privacy and it is considered that the jurisprudence managed to extend the sphere of protection in this area [6]. For instance, in the case-law known as "Marlene Dietrich", referred to in the study mentioned, the court held that a person's memories are part of the right to privacy, so nobody is entitled to make them public without express consent. Also, in the same line of thought, unveiling a public person's health state in the media or the person's emotional life, including her/his love affairs were the subject of civil claims for remedies, by invoking the violation of privacy area.

The Romanian case law, including the jurisprudence of European Court of Human Rights is constant in stating that the limits of acceptable criticism are wider as regards a politician, for example, who is acting as a public figure, compared to an individual, the first inevitably and consciously being exposed to a careful scrutiny of the facts and gestures, by both mass media and the civil society.

Of course, a politician has the right to protect his reputation and dignity, within and outside the privacy framework, but "this protection imperatives must be balanced against the general interest of open discussion of political programs, so the conclusion is that the exceptions to freedom of expression are to be interpreted narrowly"[1].

Freedom of expression also implies duties and responsibilities, the guarantees offered for the journalists by article 10 of the European Convention on Human Rights being subject to the condition that they act in good faith so as to provide accurate and reliable news, in compliance with the journalistic ethics [7]. In this respect are also to be seen the provisions of article 19 of the International Pact on Civil and Political Rights. Moreover, paragraph 2 of art. 10 ECHR allows the restriction of the freedom of speech exercise, if this right is being used in such manner that harms certain values, such as reputation and other rights of individuals.

According to article 11 and article 20 of the Romanian Constitution and pursuant to the jurisprudence of the Constitutional Court and High Court of Cassation and Justice, as per the doctrine too, rules of the European Convention of Human Rights as interpreted by case law of the European Court of Human Rights, are directly applicable in the national law.

Thus, in the light of the above mentioned principles, as regulated by international documents and based on the provisions regarding the tort liability, the court decided in favor of the plaintiff, politician, against whom a depreciator media campaign has been launched through the publication and transmission in media, in order to disseminate, of defamatory material.

The court held that these press materials violate the Resolution nr.1003 (1993) of the Parliamentary Assembly of Council of Europe on journalistic ethics, adopted by the Chamber of Deputies Decision no. 25/1994 and by Senate Decision no. 32/1994. It has also been noted that by the publication and transmission to broadcast of such materials an unlawful act causing damages has been committed, seriously harming personal non-property rights protected by law, such as right to honor and reputation and the right to own image.

The plaintiff had suffered significant moral damages represented by the grievance of the honor, of the good reputation he had in society and in the family environment.

Therefore, the action was admitted after checking the fulfillment of the tort liability conditions, as follows:

- illegal act: it consists of publishing the defamatory press material. In this respect it was concluded that no legal text can be retained as excuse in defendant's defense and that the freedom of expression does not allow media to use such an offensive and disrespectful language against someone, be he/she a public person, and any statement within the article must be formulated in non insulting terms;

-damage suffered: the press article has created for the plaintiff "a state of psychological discomfort, disturbance of his spiritual peace, of the moral peaceful and healthy climate, at which any person is entitled".

-causal link between the illegal act and the damages suffered: it is estimated that this reveals from the facts

itself (ex re) because "the act has not only the real ability to cause moral damages claimed, but has also caused those damages".

- the guilt: it is obvious and takes the form of intention; in tort liability any form of guilt, no matter how easy it would be obliged to remedies for compensation.

In other case-law, Romanian courts ruled as to restore the honor of public function, which assumes "the defense of the institutional prestige against illegitimate offence" [8], being ruled the need for the public servants to benefit in the exercise of their function of the public trust without undue disturbance.

In this respect, in the case-law we refer to, it is ruled that the content of the media news according to which the mayor used his public position in order to influence the Court's Decision regarding a property litigation is likely to harm the institution of mayor, the prejudice consisting of damaging the institution's image [9].

Therefore, we can conclude that there are met all the elements of the tort liability, following the above analysis.

It is true that by virtue of the role it is granted, the press actually has an obligation to alert the public when it is informed about the existence of alleged illegal facts, but the reference to specific persons, indicating their names and positions, involves the responsibility to provide a sufficient factual basis.

We appreciate that it cannot be accepted the defense in which it is sustained that those expressed in the media article are value judgments, seeing that in the motivation of its decision, the Court held, in the case-law cited above that when a journalist's statement has the character of value judgments whose truth cannot be verified, representing personal opinions or judgments of individuals, all these are protected by Article 10 of European Convention of Human Rights, provided that they are based on some truths; so even a value-judgment could prove excessive, if it totally lacks a factual basis.

In connection with these issues approached in our study, it is useful to analyze as well the limits of freedom of expression in relation to the administration of justice.

A first issue to be examined in this matter is that of the journalistic comments and leaks of information about ongoing criminal trials that have in center politicians or notorious people, press articles that speculate the public interest but are designed disregarding the presumption of innocence of the investigated persons, with serious damages to their public image [10].

Romanian courts retained in such cases brought before them-when it is about breaching the legal principle of presumption of innocence-the civil liability of the defendant under article 998-999 of the Civil Code.

Such an illicit act is seriously prejudicial to the ongoing trial, harming the personality rights, namely the right to a fair trial, the presumption of innocence, dignity, honor and reputation, causing to the person investigated considerable moral damages and a loss of image, this person becomes subjected to public criticism even more since he/she is a public person.

Regarding the causal link between the illegal act and the damages suffered: it is estimated that this reveals from the facts itself (ex re) because "the act has

not only the real ability to cause moral damages claimed, but has also caused those damages”.

The guilt is obvious as long as the journalists act in bad faith, as long as the person criticized was not found liable by a Court.

Furthermore, illicit acts of the journalists, most of the times, could be also interpreted as an interference in the judiciary act, beyond the boundaries of information, the damage consisting in creating a bad image for the magistrates body, that should enjoy a good reputation.

Harming the professional reputation of a judge has as a consequence a loss of confidence in his objectivity, honesty, integrity and impartiality [11]. When the prestige of a judge is harmed, it becomes clear that the judiciary’s prestige, globally, is affected. The remedy in this case comes from the acceptance of a request submitted for the protection of professional reputation, the solution in this case being subjected to publishing.

3. Civil procedure for damage compensation. Moral damages

Firstly, we must make some remarks about the burden of proof regarding the moral damages. It is the place to quote an opinion expressed [12] by the Romanian doctrine, according to which whereas the material damage is subject to probation, both regarding to its existence and stretch, the moral damage cannot be subjected to the same probation system. In this opinion, the moral prejudice isn’t requested to be proven, but it is ascertained, being subjected to the simple presumption of the judge, inferred from the causal facts. The judge evaluates the personal data of the person entitled to the compensation for the damages suffered, the negative consequences suffered, the importance of the rights protected etc.

Article 54 of the Decree no. 31/1954 regulates that: “the person whose right to name or nickname, to honor, reputation, to personal law prerogatives of the author of a scientific, artistic or literary work, as an inventor or any other personal prerogatives has been harmed, may request in front of a judge to order the cease of the illegal act”.

According to paragraph 2, "one who has suffered an infringement of his/her rights may request the court to order the offender to undertake any measures deemed necessary by the court, in order to restore the infringed right."

Summarizing, the compensation for all personal damages which we referred to in the body of this study, may consist of publishing the court decision that acknowledged the right infringed by the illegal act, of the right of reply through the press and also the right to rectify.

For moral damages, the jurisprudence and doctrine [13] recognize currently that the person who suffered an infringement to his/ her rights of personality may also seek redress for money, even if such damage quantification is more difficult.

In this respect, we keep in mind from a court decision [14] the arguments in favor of such guideline:

„The unestimated character of the moral damages cannot affect the protection of the victim and the compensation granted mustn’t be considered as an

equivalent, but as a substitute satisfaction. Admitting otherwise – that financial compensation for moral damages cannot be granted because it doesn’t exist precise, mathematical criteria in order to determine its amount means to subordinate the principle of the victim’s right to redress to a matter regarding the probation.”

The Romanian courts also stated that the financial compensation granted must be in concordance with the severity of the injury.

Although it remained isolated in the doctrine, we mention hereby the opposite opinion [15] according to which "the money awarded to cover the moral damages reveal nothing else but a punitive action, which has nothing to do with the redress function of the tort liability.”

The ground for this opinion is that, usually, through such civil actions brought before the court, the plaintiff demands both the equivalent compensation for the damages suffered (by requesting a sum of money), but also the compensation in kind, so if the Court would rule in favor of both heads, this would allow a double remedy, so the consequence will be that of an enrichment without legal basis.

This issue will not be a controversy, when the New Civil Code [16] will come into force, as in article 253 it is regulated clearly that the “injured person may demand financial compensation as a remedy, even for the moral damages suffered”.

4. Conclusion

The personality rights present certain particular features.

When a personality right is damaged there aren’t exact criteria to be applied in order to determine the amount of money that must be paid as an equitable remedy.

If an economic loss is always the same, regardless of the victim who bear the moral damages, the moral damage is always different from case to case, depending on the person affected [12].

We join the opinion expressed in the doctrine [8], according to which within the mixed legal system of remedies established for the cases when the personality rights are harmed by illegal acts of journalists (financial compensation and non-property measures), the last have to be a priority.

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