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THE FACULTY OF LAW**

**DOCTORAL THESIS  
SUMMARY**

**DIGNITY PROTECTION THROUGH CRIMINAL LAW NORMS  
CONTRASTIVE LAW STUDY**

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## **INTRODUCTORY CONSIDERATIONS**

**The topicality of the theme** is given by the national or international actions of the non-governmental organisations exerting pressure over states and international bodies so that crimes against dignity be abolished from national laws, since they break freedom of expression. The right to the freedom of expression is not an absolute right; hence, for protecting dignity, the limitation of the freedom of expression is completely justified.

Dignity has occupied a central position in the Chart of Fundamental Rights of the European Union, since it started producing effects in 2009.

Its first article stipulates that human dignity is inviolable. It must be observed and protected. This value takes up a central position as the other rights must not affect it. Along the same lines, the Constitution, protects human dignity through article 1, paragraph 3.

Affecting dignity has serious consequences for humans, with multiple repercussions which require a long time for healing. The contribution of the criminal law in achieving the goal of dignity protection cannot be overlooked, especially in point of reducing the number of criminal deeds and punishing the guilty ones.

**The object of the research** herewith is a thorough analysis of dignity protection in the field of criminal law. We consider that the presentation of the dignity protection norms from the European legislations, as well as the analytical comparative study of the opinions of the works of autochthonous and foreign authors shall contribute to a better understanding of the issue of dignity and, implicitly, of its protection.

### **Goal of the thesis and related tasks**

The purpose of this paper is to make a scientific research regarding the doctrinarian concepts related to dignity protection. It includes and analyses the criminal law norms which protect dignity, according to the Romanian, the Albanian legislations, as well as according to the legislations of some other European countries.

The tasks outlined for the achievement of this goal are:

- studying the historical evolution of dignity protection;
- defining the notion of dignity;
- presenting and researching the international legal framework regarding dignity protection;
- analysing the main criminal law norms which protect dignity in the legislations of Romania and Albania;
- presenting and analysing the regulations which protect dignity in several European countries;
- examining the jurisprudence of the European Court of Human Rights regarding dignity protection;
- given the results of the research, formulating the suggestions and recommendations for improving norms regarding dignity protection through criminal law means.

## **CHAPTER I. DIGNITY PROTECTION THROUGH CRIMINAL LAW NORMS**

### **1. Philosophical concepts regarding dignity**

Dignity is an inseparable component of the human, manifesting itself both morally and legally.

## **2. Defining the notion of dignity**

The protection of human dignity is ensured by means of the criminal law, by incriminating and punishing the facts which affect this value. The crimes against dignity are directed precisely against honour or reputation<sup>1</sup>.

The fundamental idea which lies at the basis of law is the respect for human dignity, man's respect for man, sympathy towards the others, observance of all the human legitimate rights, that is, of those which infringe the freedom of the others<sup>2</sup>.

## **3. Historical reference regarding the protection of dignity in certain previous legislations**

The crimes against dignity, as well as the applicable legislation, have undergone various changes along the years. The changes of the types of crimes against dignity are the result of the level of thinking and of people's standard of living.

In the Romanian feudal law the crimes against dignity appear in the codes of laws of the 17<sup>th</sup> century<sup>3</sup>.

The Criminal Code of 1864 was incriminating both insult and slander.

At once with the entry into force of the Criminal Code of 1936, slander is classified in two categories: slander against public or professional life and slander against private life. Also, insult is considered a crime.

## **4. Common aspects of crimes against dignity in the Romanian law**

We have presented and analysed Decision of the Constitutional Court no. 62/2007 and Decision no. 8 / 2010 of the High Court of Cassation and Justice.

## **5. Direct protection of dignity**

We have referred to the norms which protect human dignity, included in the special part of the Criminal Code, precisely under title II, Chapter IV "Crimes against dignity". It comprises the crime of insult (article 205 of the Criminal Code), slander (article 206 of the Criminal Code) and the test of truth (article 207 of the Criminal Code).

## **6. Indirect protection of dignity**

We have analysed the crimes which concern dignity indirectly and which are stipulated in the special part of the Criminal Code. Thus, we examine the crimes against the representative of a foreign state (article 171 of the Criminal Code), the white-collar crime by abridging certain rights (article 247 of the Criminal Code), abusive behaviour (article 250 of the Criminal Code), defying legal bodies (article 2721 of the Criminal Code).

## **7. Protecting dignity through special laws**

In order to prevent and punish crimes, the norms provided by the Criminal Code are supplemented by other criminal norms included in special laws. This applies to dignity protection as well.

We have looked into decree law 41 of January 26, 1990 regarding the creation of a climate of order and legality.

Another special disposition can be inferred from article 21 of Law 51 of July 29, 1991 regarding the national safety of Romania.

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<sup>1</sup> Costică Bulai, *Curs de drept penal. Partea specială*, vol. I, Tipografia Universității din București, 1976, p. 189.

<sup>2</sup> Mircea Djuvara, *apud*, Ion Craiovan, *Introducere în filosofia dreptului*, Editura All Beck, București, 1998, p. 292.

<sup>3</sup> Petre Strihan, *Istoria dreptului românesc*, vol. I, Editura Academiei RSR, București, 1980, p. 443

## **8. Procedural aspects regarding the crimes against dignity**

In the case of some crimes against human dignity, the legal pursuit begins upon the prior complaint, while in some cases it begins *ex officio*.

The development of the trial for cases of insult and slander starts from the complaint of the damaged party; therefore, we have focused on the prior complaint.

## **9. Regulating crimes against dignity in the new Criminal Code**

Law 286 / 2009 regarding the new Criminal Code was published in Official Gazette no. 510 of July 24, 2009 and shall come into force in February 1, 2014.

Due to the battle fought by mass-media<sup>4</sup> against insult and slander, in the new Criminal Code these crimes against dignity are no longer present. Although the new Criminal Code draws upon the French, Italian, German, Swiss, Spanish legislation which incriminate those deeds which affect dignity, respectively slander and insult, punishing them harshly, the Romanian lawmaker gave up the protection of dignity through criminal law norms, in spite of the centenarian tradition of the Romanian legal background. In motivation, it is claimed that it exploits the Romanian legislation from 1936 to date, however, those crimes were present in all the Criminal Codes from 1936 to date. This aspect was not taken into account by the committee who prepared the new Criminal Code.

## **CHAPTER II. DIGNITY PROTECTION AT EUROPEAN LEVEL**

### **1. Dignity protection at European level. General notions**

Dignity is safeguarded by two important bodies at European level: the European Council which elaborated the European Convention on Human Rights and the European Union which adopted the Chart of the Fundamental Rights of the European Union and by various applicable directives.

### **2. Dignity protection in the European Convention on Human Rights**

The European Convention on Human Rights does not provide expressly the right to dignity, but it safeguards this right implicitly by regulating several other fundamental human rights. Thus, it regulates the following: article 2 - the right to life; article 3 - interdiction of torture; article 4 - interdiction of slavery and forced labour; the right to image, the right to moral integrity, the sexual freedom, by defending the right to private life, stipulated in article 8; defending reputation, through article 10 - freedom of expression; article 14 - interdiction of discrimination.

#### **2.1 Right to life**

It is determined by the notion of "life" through the optics of the jurisprudence of the European Court of Human Rights, but it is also valorised through the Romanian doctrine.

We have examined the obligations which fall upon states in order to protect the right to life.

#### **2.2 Interdiction of torture**

We have analysed the three types of behaviours forbidden by article 3: 1) torture, 2) punishments or inhuman treatments, 3) punishments or degrading treatments.

The main positive obligations of states are: the obligation to punish the crimes against human dignity, safeguarded by article 3, the obligation to defend the people who are under their jurisdiction from being subject to the kind of treatments mentioned in article 3 and the

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<sup>4</sup> Mădălina Cristina Sima, *Limitarea libertății de exprimare*. În Revista de Drept Penal nr. 3/2007, p. 182.

obligation to carry out a proper investigation if there are clues that a certain person is the victim of torture, punishments or inhuman treatment, of degrading treatments or punishments.

The contracting countries have the negative obligation of not subjecting the people under their jurisdiction to the treatments forbidden by article 3.

A special attention is granted to the issue related to prisoners' dignity.

### **2.2.1 Torture as jus cogens norm**

We have studied the jurisprudence of other countries concerning the relationship between torture as jus cogens norm and the principle of state immunity. We have had in view the jurisprudence of the European Court of Human Rights and of the International Court of Justice.

### **2.3 Interdiction of slavery and forced labour**

We have identified the first pieces of law which forbid slavery. Also, we clarify the notions of "slavery", "servitude", "forced labour" and "compulsory labour".

We have analysed the cases which are left out from the category of forced or compulsory labour.

### **2.4 Interdiction of discrimination**

The European Convention on Human Rights does not contain a general ban on discrimination referring to all the rights acknowledged by the contracting states. This was achieved with the help of the Committee of Ministers of the European Council which adopted on June 26, 2000, Protocol no. 12 concerning the general interdiction of any form of discrimination. According to article 1 of this Protocol, the exercise of any right provided by the national law is guaranteed, without any discrimination based on sex, race, colour, language, religion, political views or any other views, national or social origins, belonging to a national minority, fortunes, birth or any other situation and that no person shall be discriminated by any public authority on the above-mentioned grounds. This protocol came into force on April 1, 2005.

### **2.5 The relationships between freedom of expression and dignity according to article 10**

The European Court of Human Rights analyses the relationship between the crimes against dignity (insult, slander and their various forms) and the freedom of expression. We could say that article 10 paragraph 2 of ECHR protects dignity indirectly. It stipulates the possibility of restricting the freedom of expression for safeguarding dignity. The Court, with its rich jurisprudence, on the basis of different criteria, established the relationship between dignity and freedom of expression, giving priority either to the freedom of expression or to dignity according to the case in point.

### **2.6 The right to reputation according to article 8**

Formerly, the Court did not recognise the right to reputation as a part of article 8 of the Convention. In the first case of defamation, in *Lingens against Austria*, the Court categorically denied the existence of any conflict between the freedom of expression and the protection of reputation, stating that there was no need to read article 10 in the light of article 8 which safeguards reputation through the prism of private life. The Court reaches this conclusion by literally interpreting article 10 paragraph 2 which does not include the existence of a separate right of reputation, instead of treating it as a private interest which requires protection.

It was not until the cases Chauvy and others against France, Cumpănă and Mazăre against Romania, Radio France against France that the Court starts to acknowledge the right to reputation, honour which is a part of the private life related rights, protected by article 8.

### **3. The right to dignity in the Chart of Fundamental Rights of the European Union**

The main goal of the Chart is to emphasise the fundamental rights. The text does not establish new rights, but gathers the existing rights stipulated in various individual sources. These sources include the European Convention on Human Rights and different other international conventions elaborated by the Council of Europe, the United Nations, the International Labour Organisation.

### **4. Dignity protection in France**

Stress was laid on the law of press. We find here almost all the deeds which prejudice dignity.

### **5. Dignity protection in Italy**

The Constitution protects the person and its dignity and establishes the general principles of citizens' equality before the law and, at the same time, recognises certain situations or characteristics and protects them, such as: sex, race, language, religion, political view, personal and social condition.

We had in view the following crimes:

- Insult;
- Slander;
- Written offences or speeches before legal or administrative authorities;
- Response to challenge and challenge;
- Contempt of political, administrative, legal bodies;
- Contempt of Court;
- Offense to the President of the Republic;
- Also, the exception to the truth test and the prior complaint.

### **6. Dignity protection in Germany**

According to a statistics of the German Police of 2003, the number of crimes of insult and defamation held the 7<sup>th</sup> position out of the total number of crimes perpetrated in the country. In Germany in 2003 a number of 164848 cases of insult<sup>5</sup> were recorded. The number of real cases is obviously much higher than the number recorded by the German Police.

In this part of the paper we focused on the following crimes:

- Insult;
- Defamation;
- Defamation in the know;
- Defamation of political persons;
- Defamation of the Federal President;
- Defamation of foreign representatives;
- Violation of the memory of the defunct.

### **7. Dignity protection in Switzerland**

Taking into account the importance of dignity protection, article 7 of the Constitution of Switzerland stipulates that: "human dignity must be respected and safeguarded". The Swiss

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<sup>5</sup> Hannes Kniffka, *Working in language and law*, Editura Palgrave Macmillan, New York, 2007, p. 118.

Criminal Code protects dignity by punishing defamation (article 173), slander (article 174), insult (article 177).

We have examined the provisions of the Criminal Code regulating the responsibility of people connected with the press, as well as the institution of the prior complaint.

### **CHAPTER III. DIGNITY PROTECTION IN ALBANIA**

According to article 3 of the Constitution, “human dignity, the fundamental rights and liberties are the foundation of the state which is bound to respect and to protect them”. In the preamble to the Constitution, the protection of dignity and of the human personality is formulated as an obligation of the people. We arrive at the conclusion that this principle, by means of the Constitution, is linked to the fundamental rights and liberties. The respect for the principle of dignity is a basic interpretation, in the absence of which none of the other principles can apply. In order to safeguard human dignity, the Constitution binds the authorities of the state to observe the fundamental human rights and liberties and to contribute to their fulfilment. Not even the Parliament is allowed to pass laws which would contradict human dignity<sup>6</sup>.

We have looked into the crimes of insult, racial or xenophobic insult, slander, insult directed at the representative of the foreign state, insult related to the public function, slander related to the public function, slander to the President of the Republic and insult to the judge.

#### **Conclusions and legislative suggestions**

1. The European states have a hundred-year long tradition in punishing the crimes of insult and slander, in the protection of human dignity here included. Most of the criminal codes punish these deeds, for instance the Italian, German, Austrian, Swiss, Spanish, Portuguese, Greek Codes or press law in France, taking also into account that these crimes have been present in all the Romanian Criminal Codes. Due to these reasons, we consider that these crimes must remain in the Romanian Criminal Law.

2. At present, there is no press law in Romania; however for a better development of the activity of press, a law should be passed, stipulating the rights and obligations of press, and at the same time including press-related crimes. The suggestion is in line with article 30 paragraph 8 of the Constitution which provides that press offences are set by the law, but no press law has been adapted so far.

3. Although the use of insulting words or obscene gestures directed at legal bodies are punished, this does not rise up to the protection of honour, reputation, dignity, as stipulated in relation to the crime of contempt in paragraph 1 of article 239 of the Criminal Code before its abrogation by article 1 item 2 of Law 160/2005. First of all, the number of the protected people is limited (judge, prosecutor, police officer, gendarme, criminal investigation bodies), secondly the material element is more limited; it includes the crime of insult, but not that of slander. At the same time, by de-incriminating the first version of the crime of contempt, some disequilibrium appears between the crimes of contempt and abusive conduct, because punishments are harsher for the offenses brought by a public to servant a private person, than for the offenses brought by a private person to a public servant, although the social danger is greater in the latter case.

Out of reasons of equity and protection, we consider that these deeds should be re-incriminated, in the manner of paragraph 1 of article 239 of the Criminal Code, before their abrogation by article 1 item 2 of Law 160/2005.

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<sup>6</sup> Aurela Anastasi, Luan Omari, *E drejta kushtetuese*, Editura ABC, Tirane, 2008, p. 68-69.

4. Law 270/2010 amends article 37 paragraph 2 of Law 5/1995 for the organisation and performance of the profession of lawyer, which incriminated the insult and slander against the lawyer. This change does not seem too favourable since there are many insults and accusations brought against lawyers; at the same time, the quality of justice is prejudiced since lawyers play an important part in the performance of justice. The lawgiver should be more intolerant towards such deeds, than towards similar situations which occur between private persons. Therefore, we consider that the crimes of insult and slander against lawyers should be re-incriminated.

5. The Council of Europe adopted the Additional Protocol to the Council of Europe Convention on informational criminality, regarding the incrimination of the racial or xenophobic deeds achieved by information systems. This came into force on March 1, 2006. Romania ratified the Protocol through Law 105/2009 and it produced legal effects starting with November 1, 2009. Romania reserved the right to not apply the provisions of article 5 paragraph 1 of the Protocol, regarding the insult on racial or xenophobic grounds. Until January 2013, this Protocol was not ratified by all the member states of the Council of Europe. The following member states of the Council of Europe incriminate racial or xenophobic insult: Germany, France, Holland, Portugal, Slovenia, Cyprus, Latvia, Lithuania.

In order to protect human dignity from racial or xenophobic insults, we deem that the Romanian state should withdraw its reserve and notify its withdrawal to the General Secretary of the Council of Europe the sooner the better.

Our proposal complies with the requirements of article 13 of the Protocol, according to which the General Secretary of the Council of Europe may ask the contracting states to consider withdrawing their reserves, should it be the case.

The racial or xenophobic insults represent a greater social danger than usual insults and, therefore, the punishment must be harsher. Many European countries incriminate racial or xenophobic insults separately, the afferent punishment being harsher, and the same example should be followed by the Romanian lawgiver.

6. In article 119 of the Albanian Criminal Codes we find the phrase “insult with a purpose...” and in article 120 “purposeful attribution of statements and of any information...”, hence we infer that the deeds which fall under the category of insult and slander are only incriminated when made on purpose; the deed may be also perpetrated with indirect intention, but in this case it is not incriminated; therefore, the notion of “purpose” should be removed from the text, in order to improve dignity protection.