

# **RESPECT OWED TO THE DECEASED HUMAN BEING: ASPECTS OF ITS REGULATION IN THE NEW ROMANIAN CIVIL CODE**

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## **Abstract**

This work was supported by the strategic grant POSDRU/89/1.5/S/61968, Project ID 61968 (2009), cofinanced by the European Social Fund within the Sectoral Operational Program Human Resources Development 2007-2013.

This study aims to compare the system of sanctions applicable to juvenile offenders as provided in the current Romanian Criminal Code and the new Romanian Criminal Code adopted by Law no. 286/2009. The new regulations remove criminal penalties, a perspective that characterized the view of the Romanian legislature in 1968, the protection and rehabilitation of minors prevailing and requiring the application of non-custodial educational measures.

The new Romanian Criminal Code reflects, in the matter of sanctions applicable to juvenile offenders, a modern view focusing on educational measures. However, abandoning the educational measure of confinement in an educational medical centre is not a happy choice of the Romanian legislature, mainly because the new Criminal Code does not contain appropriate regulations. Thus, the legislature's concern for all juvenile offenders is not complete, since there is no protection for the minors suffering from physical or mental illness.

## **Key words**

rights of the personality, deceased human being, memory, body, New Romanian Civil Code

## **1. INTRODUCTORY NOTIONS.**

The 1864 Romanian Civil Code, following its French model of 1804, did not regulate the rights of the personality. For a long time, the human being was regarded as a juridical, abstract notion, as a “holder of rights and duties”, and his biological and mental existence was ignored.

The Romanian Civil Code of 2009 (NCC), which came into force on 1 October 2011, contains, for the first time in our legal system, express provisions in this matter. In Book I – “On persons”, Title I – “The natural person”, chapter II is entitled “The respect owed to the human being and his inherent rights” (art. 58-81).

With the marginal title “The rights of the personality”, art. 58 NCC provides: “Everyone has the right to life, health, physical and mental integrity, dignity, his own image, respect of private life, as well as other such rights as recognized by law. These rights are not subject to transfer.”

The rights of the personality are inherent to the status of human beings and belong to each individual by the mere fact that he or she is a human being. They represent juridical instruments meant to ensure appropriate protection for modern man. These rights concern the protection of the human body, as well as that of moral values or moral integrity of the person.

The enumeration achieved by the legislature in this matter is not limitative. This results from the formulation “as well as other such rights” contained in art. 58 NCC.

The rights of the personality are non-patrimonial rights, therefore they have the juridical features of this category of rights. Being inherent to the human being, they last as long as the person is alive. The non-transferable nature is the consequence of the fact that these rights end upon the death of the holder, just as other non-patrimonial rights. They cannot be transferred upon succession. This feature does not allow the transfer of these rights by *inter vivos* juridical acts, onerous or gratuitous acts. Consequently, these rights are not subject to seizure, i.e. they cannot be enforced by a writ of execution in order to satisfy the creditors. These rights are also enforceable *erga omnes*, against any legal subject.

Even if the legal personality ends upon death, and the rights of the personality come to an end too, considering what the human being was during life, respect is owed to the deceased person (Fl. A. Baias & al., 2012:89). Section 4 of the above-mentioned Chapter II is entitled “The respect owed to the person after death” and contains four articles: art. 78 NCC – “The respect owed to the deceased person”; art. 79 NCC – “The interdiction to prejudice the memory of the deceased person”; art. 80 NCC – “The respect for the wish of the deceased person”; art. 81 NCC – “The retrieval from the deceased persons”.

The respect owed to the deceased person has, first of all, a religious, moral and customary dimension, it is a notion pertaining to tradition. It was legally consecrated by the regulations contained in NCC, and also by the special laws.

Thus, Law no. 104 of 27 March 2003 contains express provisions regarding the handling of human bodies and retrieval of organs and tissues from dead bodies for the purpose of transplant, the use of dead bodies for didactic and scientific purposes, as well as the organisation of the services for the exploitation of dead bodies within medical higher education institutions. By dead bodies, one understands the persons with no sign of brain, cardiac or respiratory activity and who have medically been certified dead, in accordance with the law. The

medical certification of the brain death is performed on the basis of diagnosis criteria established by law.

On the other hand, Law no. 95 of 14 April 2006 on the reform in the health field, contains provisions on the retrieval and transplant of human organs, tissues and cells for therapeutic purposes. It regulates the conditions to be met in order to perform the retrieval of organs, tissues and cells from the deceased donor.

The non-heart-beating donor is the person with complete and irreversible cessation of all cardio-respiratory functions, as certified by two primary doctors in hospital. The certification of the non-heart-beating donor is performed in conformity with a resuscitation protocol as provided by law. A heart-beating donor is the person with irreversible cessation of all brain functions, in accordance with the protocol for certifying the brain death, as provided by law.

One should emphasize that the certification of the brain death is performed by doctors who are not members of the teams for the coordination, retrieval and transplant of human organs, tissues and cells. By the clear delimitation of these medical competences – certification of death, on the one hand, and retrieval, on the other hand, the law maintains a balance between those interests which could cause a conflict in this matter.

Pursuant to art. 78 NCC “respect is owed to the memory of the deceased person, as well as to his dead body”. Therefore, this notion concerns two major aspects: “memory” and “body”. Although not a person any longer, in the legal sense, the dead body is “impregnated with the personality of the one who existed” (O. Ungureanu, C. Munteanu, 2011:105).

The respect for the body of the deceased person can be expressed from several perspectives. First, it imposes a decent behaviour towards the dead body and the funerals of the dead human being. On the other hand, one should take into account that the retrieval of human organs, tissues and cells for therapeutic or scientific purposes must be carried out in accordance with the law.

It is important to mention that the Romanian criminal law punishes the profanation, by any means, of a dead body. The penalty for this offence is imprisonment. The handling of dead bodies, as well as the retrieval of tissues and organs from dead bodies, by failure to observe the legal provisions, is an offence punishable by imprisonment.

## 2. THE INTERDICTION TO PREJUDICE THE MEMORY OF THE DECEASED PERSON.

Pursuant to art. 79 NCC “the memory of the deceased person is protected under the same conditions as the image and reputation of the living person”. The memory of the deceased person is what the people who knew this person, remember about him or her. The juridical protection of the memory of the deceased person is ensured by the

legal provisions consecrated to ‘the right to image’ (art. 73 NCC) and ‘the right to reputation’ (art. 72 par. 2 NCC) of the living person, which is accordingly applied.

Firstly, NCC expressly provides that ”everyone has the right to his own image” (art. 73 par. 1). In the exercise of this right, the person may “prohibit or prevent the reproduction, in any way, of his physical appearance or voice or, accordingly, the use of such reproduction” (art. 73 par. 2).

The publication of a photo or video record which presents the remains of a person, without the consent of the dead person when he was alive and in the absence of the family’s consent, may constitute a prejudice to the memory of the deceased person. Some actions which infringe the obligation to respect the human body even after the death of the human being also represents a prejudice to the memory of that person (such as the case of a dead body profanation).

Secondly, NCC stipulates that it is prohibited to damage the honour and reputation of a person, without his consent or without observing the limits established by law. Honour and reputation are two sides of the right to dignity. Honour is a complex feeling, determined by the perception that each person has about dignity, and also by the way in which other people see this person. If honour is innate, reputation is, most of the times, acquired by exemplary conduct in social or private life (Fl. A. Baias & al.,2012:79).

Thirdly, the right to one’s own image and the right to reputation, as rights of the personality, are not unlimited. NCC provides two categories of limits: a) limits allowed by the law, international conventions or agreements, that the authorities may impose for the general interest; b) limits arising out of the exercise of similar rights. Therefore, it is not an infringement of these rights “the prejudice allowed by law or by the international conventions and agreements on human rights that Romania joined” (art.75 par. 1NCC). Along the same line, “the exercise of the constitutional rights and freedoms in good faith and with the observance of the international conventions and agreements that Romania joined” is not an infringement of these rights (art. 75 par. 2 NCC).

### 3. THE RESPECT FOR THE WISH OF THE DECEASED PERSON.

Pursuant to art. 80 par. 1NCC “everyone can decide with regard to his own funerals and can dispose of his body after death. In the case of those who lack capacity of exercise and those with limited capacity of exercise, it is necessary to have the written consent of the parents or, accordingly, of the guardian.”

A new element in the Romanian law is the *expressis verbis* consecration of the right to dispose of oneself. Art. 60 NCC provides that “the natural person has the right to dispose of himself if other

persons' rights and freedoms are not infringed, if mores or public order are not disturbed".

The right to dispose of oneself or the right to personal autonomy set out in NCC meet the personal need of modern man to make choices as far as his physical or moral integrity is concerned. The origin of this right lies on the ground of bioethics and human rights. The European Court of Human Rights created the concept of "personal autonomy", which gradually penetrated national legislations, including that of Romania. In the case *Pretty v. The United Kingdom* (29 April 2002) the Court held that private life is a wide notion, including aspects of psychical and social identity of the individual, especially the right to self-determination, the right to personal development, the right to respect of the decision to have a baby or not. In other cases such as *K.A. and A.D. v. Belgium* (ECHR, 17 February 2005), *Evans v. The United Kingdom* (ECHR, 10 April 2007), *Dickson v. The United Kingdom* (4 December 2007), the Court developed this concept. Therefore, on the basis of the principle of personal autonomy, the natural person can freely decide by himself, with regard to himself, from all existential perspectives: physical, mental, moral, intellectual.

The acts of disposition with regard to the human body contain the act by which the person who chooses that, after death, his body should be buried or incinerated (art. 80 par. 1 NCC), or consents to the retrieval of his organs, tissues or cells, for therapeutic or scientific purposes (art. 81 NCC).

As for funerals, the person may decide, by will, if and where he should be buried or incinerated, may decide on the purpose of the ashes, or on some details of the funerary ceremony. It is not compulsory that the will should contain dispositions referring to the property of the deceased (art. 1035 NCC), so it may concern only these non-patrimonial aspects.

In the exercise of the right of disposition regarding the body after death, the person can choose to give the body to a medical higher education institution for scientific research, or to a hospital, for the retrieval of cells, tissues or organs.

The situation when the person did not dispose at all regarding the funerals is also regulated. In the absence of an express option of the deceased, the order is: the wish of the spouse, parents, descendants, collaterals up to the fourth degree, legatees or the dispositions of the mayor of the locality where the death occurred. In all cases, the religion of the deceased must be considered (art. 80 par. 2 NCC). The order provided by law seems binding, the wish of the surviving spouse prevailing over the wish of the parents etc. Last, but not least, if the others do not express their wish, the mayor may intervene.

#### 4. RETRIEVAL FROM DECEASED PERSONS.

The retrieval from deceased persons of human organs, tissues and cells for therapeutic or scientific purposes, is performed in accordance with the law, with the written consent, expressed during life, of the

deceased or, in the absence of it, with the written, free, prior and express consent of (in the following order): surviving spouse, parents, descendants or collaterals up to the fourth degree (art. 81 NCC).

NCC establishes the rule of the *express consent*, unlike other legislations which allow such retrieval from deceased persons on the basis of a *presumed consent* in the absence of a refusal expressed before death.

The civil law distinguishes two situations: a) the person consented during life; b) there is no consent on the part of the person during life.

The person can agree to retrieval after death either by deed, or by entering his name in the National register of organ, tissue and cell donors (art. 147 of Law no. 95/2006). The deed the law refers to is a declaration at a notary public's office (called "declaration – decision"), which should contain reference to the organs, tissues and cells that the person agrees to donate.

It is important to hold that the person who made such a declaration has the possibility to retract his consent. The revocation act can also be in the form of a deed, or it can be written and signed, on condition that it is also signed by two witnesses.

On the other hand, the person can expressly refuse to be subjected to retrieval after death. In such a situation, not even the family can consent to such retrieval. The refusal can be in written form, certified by the family doctor, or entered in the National register of those who refuse to donate organs, tissues or cells.

In case the person did not expressly consent to the retrieval, but did not refuse either, after his death the members of the family can agree in this sense. The order established by law must be observed in this situation too. The surviving spouse is called to decide first. After him/her, the order is the following: parents, descendants or collaterals up to the fourth degree. The principle of kinship proximity is observed: the relatives must decide according to kinship. For instance, children first, then grandchildren, or in collateral line, brother or sister first and then nephew or niece.

The use of dead bodies for didactic or scientific purposes is regulated by special norms. The departments of anatomy, of pathological anatomy (of medical higher education institutions) and the morgue services and pathological anatomy services (in hospitals) can take dead bodies for such purposes in the following situations:

- a) If there is prior express consent, in writing, of the patient or family;
- b) The living persons can offer their bodies, after death, to the medical higher education institution on the basis of some common norms elaborated by the morgue services of hospitals and the management of the medical higher education institutions;

- c) The dead bodies which nobody claims within 10 days after death or those without any family are taken by the services for dead body exploitation of anatomy departments, on the basis of some common norms set out by hospitals and the senate of medical higher education institutions.

The medical higher education institutions which take dead bodies for didactic or scientific purposes ensure the funerary services. They also have this obligation with regard to the bodies used for the purpose of organ or tissue donation for transplant procedures.

## 5. CONCLUSIONS.

The new Romanian Civil Code contains express provisions on the rights of the personality, which are inherent to the status of human being and which pertain to each individual by the mere fact that he or she is a human being.

The legal personality of the human being ends upon death, therefore “the rights of the personality” come to an end, too. The law intervenes in this matter and imposes the obligation to respect the memory of the deceased person and the obligation to respect the dead body. Tradition also imposes the respect owed to the deceased human being, and the respect owed to the mourning of the family and the pious feelings of the descendants.

In the Romanian law, according to the constitutional norms, the free development of human personality represents a supreme value (art. 1 par. 3 of the Constitution). It is a vector of interpretation of all constitutional provisions on freedom (D.C. Dănișor, 2009:65). The right of the person to dispose of himself is mentioned in art. 26 par. 2 of the Constitution. Also known as the right of the person to dispose of his body or body liberty, this right was denied for a long time on religious, moral or customary grounds.

Within this constitutional framework, NCC regulates the right of the person to dispose of his body after death. Unlike other legislations which allow the retrieval of organs from deceased persons on the basis of the consent presumed out of the absence of refusal expressed before death, NCC establishes the rule of the *express consent*.

In case the rights regulated under art. 78-81 NCC are infringed, the law provides the juridical means of intervention which can be used by the family. With the marginal title “the death of the holder of the non-patrimonial right” art. 256 NCC provides: “The action for the reinstatement of the infringed non-patrimonial right may be continued or started, after the death of the injured person, by the surviving spouse, by any relative in direct line, as well as by any collateral up to the fourth degree”. The same persons can start the “action for the reinstatement of the integrity of the deceased person’s memory.” (art. 256 par. 2 NCC).

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