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**Defending non Patrimonial Rights in the
 Draft of the European Civil Code**

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Abstract: The draft of the new Civil Code includes Book I, "About Persons", a special title on protection of non-patrimonial rights by specific legal means (Title V - "Defending non patrimonial rights"), made as a result of development and modernization of existing provisions, that are very brief, contained in art. 54-56 of Decree No. 31/1954, on natural and legal persons, which is to be repealed with the entry into force of the new Civil Code. The nowadays legislator has shown a constant preoccupation on the protection of one's personal rights. Currently, the most comprehensive national regulations are, *de lege lata*, in the Quebec Civil Code of 1991 (art. 10-40) - which is one of the main models of the new Romanian Civil Code project – and in the Swiss Civil Code (art. 27, 28, 28a-28l, 29), which is why these modern and highly effective regulations have been the main source of inspiration for the editors of the New Romanian Civil Code (see: art. 58-91, regarding to the respect of human being and its inherent rights, art. 262-274, regarding to the defense of non-property rights). After the Second World War, some regulations regarding the personality rights were introduced in other European civil codes too, with the affirmation and delineation of these rights in the jurisprudence and in the doctrine.

Keywords: protection; non patrimonial rights; the right of reply; the right of rectification; the draft of the New Romanian Civil Code

The headquarters of the matter of non patrimonial rights on their express defense consists of Articles 252 to 257 of the New Civil Code, which are placed at the end of Book I, dedicated to Persons. The provisions of Articles 58 to 83 on the rights of personality are also important. Civil Code is a reflection of the social system. The rules contained in meet the standards of the concrete needs, and at the same time, tend to meet the dynamics of social life. The principles that generate the non patrimonial rights defense in the New Civil Code are, in essence the same. Therefore, a civil code of a civilized nation offers, par excellence, constant law principles, around which any society is structured. However, the serious changes of the Romanian society and of the contemporary European reality require new social values and moral protection to meet the requirements arising from the commitments taken by Romania in the European integration process.

In this context, the importance of the New Civil Code has to be emphasized for the commitments set by the European Commission in the Mechanism for Cooperation and Verification.¹

¹ Commission Decision 2006/920 EC of 13 December 2006, published in the Official Journal of the European Union L series 354 of December 14, 2006.

Report from the Commission to the European Parliament and the Council on Romania's progress on accompanying measures following Accession (Brussels, 27 June 2007) stated the following: “(...) *Concerning judicial reform and the fight against corruption, Romania should continue to move towards meeting the benchmarks and in particular, (...) to finalize the adoption of the new Civil Procedure Code (...)*”

The vast work of ongoing reforming the procedural law can only be achieved through a correlation and legislative consistency with the reform of the substantive law, respectively by the total reform of the Civil Code. Moreover, Interim Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism from Brussels on February 12, 2009 underlines the great importance for the judiciary's adoption of the four codes, and therefore the adoption of the New Civil Code, which borrowed the regulations from the civilized nations, respectively on the defense of non patrimonial rights.

Thus, the French civil code stipulates in art. 9 (amended in 1994): the right to a private life of each person shall be respected, and in art. 9-1 (introduced in 2000), the right of presumption of innocence; also, in art.16, art. 16-1 – art. 16-9 (introduced in 1994) there are regulations on respect of person's life, health, physical and mental integrity.

The Italian civil code regulated ever since 1942 the right to one's own image (art. 10), the defense of the right to physical and mental integrity (art. 5) and the right to have a name (art. 7-9).

Also, the Swiss civil code has a modern regulation, from 1985, on defense of the personal rights. More concretely, it is about the possibility of the person that had suffered a prejudice of his/her personal rights to defend his/her rights against any other person. In this case, the prejudiced person can ask the judge to prohibit the illegal infringement (art.28a), and if the harm suffered was a consequence of an act of the written or audiovisual media, he/she can ask directly to the respective institution to publish his/her right to reply (art. 28g, art. 28h , art. 28i, art. 28k, art. 28l).

Besides this, should the breach into one's personal right be likely to cause to the victim a harm that is difficult to be redressed, the latter is entitled to ask for some provisional measures in order to prohibit the temporary breach. To this end, for instance, the French civil code stipulates in art. 9 paragraph 2 (amended in 1994) that the judges, without breaching into the right to redress the prejudice suffered, can order any measures, such as: seizure, freezing and any other measures meant to hamper or stop any breach into the intimate and private life; in case of emergency, these measures can be taken through a „référé” ordinance (i.e. „ordinance of the panel's president”).

In the same way, the Swiss civil code stipulates that such measures can be taken, mentioning that, any breach caused by means of the media, the judge is entitled to forbid or cease it only as an exceptional circumstance, that is, only if the breach is likely to cause a serious prejudice, should the breach not be obviously justified and the measure taken by the judge does not seem out of proportion in relation with the damage caused (art. 28c); it is extremely important that there should be also a provision that entitles the judge to compel the plaintiff to deposit a security should the provisional measures ordered by the judge can damage the other party (art. 28d).

As far as the right to reply, regarding the prejudices caused to one's personal rights by the media, the former is unanimously acknowledged at European level, in the regulations on written and audiovisual media, apart from the victim being entitled to have the moral and material prejudice redressed.

For example, this is applicable in France (art. 12, art. 13 and art. 13-1 in Law on media freedom, amended in 2000 as well as art. 6 in Law from 1982 on audiovisual communication and Decree from

1987 on exercising one's right to reply within the services of audio-visual communication), in Belgium (Law from 1961 on the right to retort, reviewed in 2000) or in Spain (Law from 1984 on the right to rectification, amended in 2000).

European Civil Code¹ has not been adopted in a final form. His project was sketch through extensive studies made by the Study Group on the Civil European Code, thematic debates and conferences, taking into account the provisions of the Civil Codes of European nations that worked perfectly over time in the covered areas without any major changes. On the provisions of the Draft of the European Civil Code in relation with the non patrimonial rights defense, the Study Group addressed the subject in a manner similar to the New Romanian Civil Code. The Study Group has treated this subject about the provisions of the Draft of the European Civil Code in relation with the non patrimonial rights defense in a manner similar to the New Romanian Civil Code, that is starting with “*Non-Contractual Liability Arising out of Damage Caused to Another*” (November 2006)

In drafting the texts of the New Civil Code, it was taken into account the necessity for the new regulations to observe the European standards on the protection of private life and the constitutional principles on recognition and safeguard of fundamental rights for each person, especially art. 22 (the right to life and physical and mental integrity), art. 23 (individual freedom), art. 26 (intimate, family and private life), art. 27 (domicile inviolability) art. 30 (freedom of expression and its limits).

Thus, were taken into account the CEDO jurisprudence on freedom of expression², as well as the most updated legal regulations in the field in Europe, especially the provisions of the above mentioned Swiss civil code.

At the same time, national regulations had been taken into account in the field of defending non patrimonial rights. Thus, besides art. 54-56 in Decree no. 31/1954, we refer to the principles of Ethical code of Romanian journalists and art. 48-65 of Regulation code of the audio video content (adopted by Decision of the National Audiovisual Council no. 187 from the 3rd of April 2006³) on exercising one's right to reply and rectification.

We would like to mention that Title V of Book I is not a singular regulation within the civil code but it expresses the general regulation conception in a unitary and complete way of any private legal institution included in the New Civil Code, so that, alongside other substantive issues, specific legal protection means for civil, patrimonial and non patrimonial rights, shall also be determined as the case may be. See the following as *exempli gratia*:

- regulation on concluding the marriage , as well as on the legal claim to find it null and void and on the claim to declare it voidable (art. 288-321 in the New Civil Code);
- regulation on divorce, but also on the right to damages or to return compensation of one of the spouses (art. 388 and the following from the New Civil Code);
- filiation and its legal claims (art. 423 and follow. from the New Civil Code);

¹ Juridica International, Study Group on European Civil Code, <http://www.juridicainternational.eu/>.

² The Court said that sanctioning the journalists for committing some media crime offences it is compatible with the provisions of art. 10 in ECHR, should they be provided by law, aim at a legitimate objective, the authorities provide for serious sufficient grounds that should requires the sanction, and the sanction should be proportional by its nature and seriousness, taking into account the objective aimed. We may cite to this end: ECHR Decision from 31st of January 2006, case Stângu and Scutelnicu vs Romania; ECHR Decision from 17th of December 2004, case Cumpănă and Mazăre vs Romania; ECHR Decision from 28th of September 2004, case Sabou and Pircălăb vs Romania; ECHR Decision from 28th of September 1999, case Dalban vs Romania.

³ Published in the Romanian Official Journal, Part I, no. 338 from 14th of April 2006, with subsequent modifications and additions.

- right of private property and the legal means to defend it, first of all the legal claim for recovery of property (art. 572-583 from the New Civil Code);
- rights of recording the property title in the land-book and its legal claims of (art. 900-929 from the New Civil Code);
- possession and the possessory claims (art. 963-966 from the New Civil Code);
- right of inheritance (art. 967 and follow. from the New Civil Code), but also the heredity petition (art. 1140-1141 from the New Civil Code), revocation of donations (art. 1033-1042 from the New Civil Code), returning excessive gifts (art. 1102-1110 from the New Civil Code) or statement of donations (art. 1166-1169 from the New Civil Code);
- validity conditions of the contract and its legal claims to find it null and void or to declare it voidable (art. 1187-1278 from the New Civil Code);
- civil liability and its legal claim (art. 1362 and follow. from the New Civil Code);
- the right to coercive enforcement of the obligations and its legal claims, the rescisorry and annulment claim or the claim for diminishing the obligations of one party (art. 1526 and follow. from the New Civil Code);
- the rights of unsecured creditor and its means of protection (the preservation measures, oblique (indirect) claim and actio pauliana (art. 1569-1576 from the New Civil Code);
- vendor's obligations and buyer's legal claims guaranteeing eviction and faults of the sold good sold (art. 1681-1728 from the New Civil Code);
- mortgage (art. 2352 and follow. from the New Civil Code) and the mortgage claim (art. 2438 and follow. from the New Civil Code) etc.

Regarding the defense of non patrimonial rights, the New Civil Code establishes the principle of safeguarding the values tightly related to the human being and the main means to ensure their observance:

A. The civil claim, which aims at ceasing the deed that hinds one or several protected values.

I. The object of the judicial claim available to the person alleged to have been prejudiced in his or her personal non patrimonial right is hereby mentioned (enumerative presentation: prohibition of the breach, cease of the infringement and its prohibition for the future; determining the illicit nature of the infringement).

II. It is also stipulated the possibility to initiate this judicial claim if the infringement of the non patrimonial rights is imminent;

III. Restrictive measures are provided against the author of the breach in order to lead to restoring the prejudiced right, such as:

- a) seizure, destroying, confiscation or retrieving of the goods that are within circuit or of the means that had been used or meant to be used for committing the infringement;
- b) obligation of the author to publish the conviction decision or to pay an amount of money to a non patrimonial legal person that carries out charity activities;
- c) any other measures required to recover the damage caused and to cease the illicit prejudice to one's personal rights.

B. Another specific defense means set up in the New Civil Code is the right to reply and the right to rectify the wrong information shown in the audio and video media, which can prejudice the personal non patrimonial rights. We would like to emphasize that the right to reply and the right to rectification are already stipulated in the Regulation code of the audio video content (Decision of the National Audiovisual Council no. 187 from the 3rd of April 2006); it has been frequently used, both in the

audiovisual and written media, and the text from the New Civil Code took into account this decision, codifying some of its provisions. The following had been taken into account: the general provisions, likely to be applicable irrespective of the nature of the media that had been used to communicate the challenged information and bearing in mind the fact that, as a general rule, the Code stipulates general provisions and not detailed ones. The detailed provisions are stipulated, as a general rule, in secondary legislation (regulations, rules etc.). In concreto, we talk about the following:

- art. 48 - Any natural or legal person, irrespective of his/her nationality whose rights or legitimate interests have been prejudiced by showing within an audiovisual program of some false deeds is entitled to the right to reply;
- art. 50 para. (1) - Any natural or legal person, irrespective of his/her nationality whose rights or legitimate interests have been prejudiced by showing within an audiovisual program of some inaccurate information is entitled to the right to rectification;
- art. 53 - The text of the replies shall refer only to the challenged untrue deeds shall be expressed within the limits of decency and shall not embody any threats or marginal comments;
- art. 55 - The deadline for sending the request is at most 20 days from the date of broadcasting the program in which the prejudice had been committed;
- art. 57 – (1) the institution broadcasting the radio program shall decide, within two days from the date of receiving the request of the right to reply on allowing it or not.

(2) Should the institution broadcasting the radio program decide on giving the person the right to reply, the people in charge shall notify the prejudiced person, within two days from the date of receiving the request, the day and the hour when his/her right to reply will be broadcasted.

(3) Should the institution broadcasting the radio program deny the right to reply, they shall notify in writing the decision taken to the applicant as well as its justification, within two days from the moment the request had been received;

- art. 58 - (1) The right to reply shall be broadcast free of charge, within 3 days since the approval of the request, under the same conditions in which one's rights or legitimate interests have been prejudiced: within the same time slot, of the same program, with the same duration and with mentioning the program where the prejudiced had been caused.

(2) Should the program where the prejudice had been caused is scheduled in more than 7 days, the right to reply shall be broadcasted within 3 days, within the same time slot also mentioning the program where the prejudiced had been caused;

- art. 59 - The right to reply shall be exercised by broadcasting the live intervention of the prejudiced person, either by broadcasting a recording made either by the institution broadcasting radio the program or by the requesting person; the recording made by the requesting person shall comply with the technical standards used by the institution broadcasting the radio program;
- art. 62 - The deadline to communicate the request is at most 20 days since the date of broadcasting the program where the prejudice had been caused;
- art. 63 - (1) The institution broadcasting the radio program shall decide, within two days since the date of receiving the rectification request, on allowing it or not.

(2) Should the institution broadcasting the radio program decide on rectification, it shall communicate it within at most two days since the date of receiving the request to the prejudiced person alongside the date and the hour for broadcasting it.

(3) Should the institution broadcasting the radio program deny the right to rectification, it shall notify in writing to the applicant, within two days since the date of receiving the request, the decision taken, its justification and the information stipulated at art. 57 paragraph (4);

- art. 64 - (1) The right to rectification shall be exercised by broadcasting free of charge on the radio, within 3 days since the date of receiving the request, within the same time slot, of a material made by the institution broadcasting the radio program, through which the inaccurate information that had caused a prejudice are corrected, in the spirit of truth.

(2) The institution broadcasting the radio program shall mention the program where the inaccurate information had been presented and also the date of its broadcasting.

(3) The institution broadcasting the radio program shall not broadcast the rectification without prior consent of the prejudiced person.

C. The New Civil Code also stipulates the regulation of the provisional measures, until the litigation is solved, which can be ordered by the judge, at the request of the prejudiced person, using the ordinance of the panel's president. These measures can be: prohibition of the action that constitutes the breach into non patrimonial right or its provisional cease, taking the measures of preserving the evidence etc.

D. There are also provided some safeguards for the author of the deed allegedly assumed to cause a prejudice:

- 1) It is foreseen that the panel of judges should not be able to order provisional cease of the prejudice by means of the written or audio and video mass media unless this prejudice causes serious damage, it is not obviously justified and the measure taken by the judge does not seem out of proportion in relation with the damage caused.
- 2) Also, should the provisional measures ordered by the judge can damage the other party, the judge can compel the plaintiff to deposit a security, under the sanction of annulment of the ordered measure;
- 3) The plaintiff has to repair, should the interested party ask it, the damage caused by the provisional measures, should the merits of the case be dismissed as not-grounded.

Conclusions

When regulating the exercise of the right to information and free expression, the authorities shall guarantee the observance of the right to dignity and private life by suitable means of protection, bringing to life the principle in the Romanian Constitution in art. 30 para. (6), republished: „Freedom of expression shall not cause any prejudice to one's dignity, honor, private life or to the right to one's own image.”

In this context, the Draft of the New Civil Code aims to set a balance between two rights equally guaranteed in the Constitution and in the Convention on the protection of rights and fundamental freedoms: the right to free expression and the right to private life. Moreover, the freedom of expression of the press will be given more protection in the New Civil Code; the foreseen provisional measures will not operate against the journalists except in exceptional circumstances (serious damage, obviously unjustified prejudices to private life). The proposed texts are to be read in conjunction

provisions of art. 10¹ of the Convention and the case law of the European Court on Human Rights in Strasbourg, which clearly state judge's assessment limits in the cases of the freedom of the press.

On the grounds of the above mentioned, we consider that the fear of possible restrictions that the new civil code could bring to the exercise of the journalist profession is not justified. On the contrary, we talk about European updated regulations, which do not aim at possible excess of the expression of the media, but at general protection of all personal non patrimonial rights, against any prejudice, no matter who the author is.

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Romanian Official Journal, Part I, no. 338 from 14th of April 2006.

¹ According to article 10 (Freedom of expression) from the Convention on human rights and fundamental freedoms:
“1. Everyone has the right of freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”