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ABSTRACT

HUMAN DIGNITY IN ROMANIAN CIVIL LAW

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ABSTRACT

The concept of human dignity has evolved in time. An ancient idea, the dignity is a requirement rather than any philosophical statement that means that something is due to the human being just because it is human. In the Roman world, dignity was seen both in relation to the status result from a function, and as a moral quality recognized on the basis of merit and honor acquired in the society. The philosopher Immanuel Kant seems to have best defined dignity in the modern era. The concept of human dignity has emerged in international law and national legal systems as a result of traumatic experiences of fascism, National Socialism and Japanese imperialism. The impact of these events had a resonance on all humanity, being generalized the feeling of rejection of everything that prejudiced the human being in its essence. As noted, the first meaning of the dignity is to represent legally the refuse of exclusion and the degradation of human mankind.

The etymology of the word "dignity" is enlightening. The term "dignity" comes from the Latin "dignus" which refers to "decet" meaning "proper", where two nouns derived "decus" and "decor". "Decus" means decorum, decency, dignity, where "honor" and "beauty", the physical beauty accompanied the moral beauty, the latter being reserved rather the Latin meaning "decor". Dignity, in its philosophical essence aims to unite the body with the spirit. In Greek, the equivalent of "dignity" is "Axios" (which is decent, which is worthwhile), from which it resulted the word axiom, ie a self-evident proposition that evade any demonstrations. Dignity is a polysemantic concept, which has three meanings. Firstly, the dignity is a quality attached to a rank or official position, for example the ethical norms of a particular profession which penalizes acts that are derogatory to the dignity of a particular profession. Secondly, individualist (dignity in the act) has two dimensions: the moral dimension, which refers to the moral qualities of a person and his behavior that must reflect courage, self-control, strength to overcome a difficult situation and the corporal dimension that refers to individual control that they exercise over their own body, the physical image and the image that they project in the society. Thirdly, universalist or fundamental, the dignity is innate and the simply belonging to the human kind is simple enough for a person to acquire dignity, no matter their actions, gestures, and type of behavior.

The statements or the defamatory imputations on commission by a person of facts which, if true, would expose the person to public contempt or legal sanctions, humiliation or abasement before their own eyes or in front of others, can be regarded as a prejudice brought to dignity, tending to exclude the individual from the community to which it belongs, and causing him distress. Instead, the reputation refers to the appreciation, good reputation, respect and consideration enjoyed by a person from those with whom they interact, the positive public opinion that is gained through qualities, characteristics and merits of persons, ie the image others have about that person and which has an acquired character. Both honor and a good reputation are acquired through their own deeds, gestures and actions and they can be lost. The honor is a complex feeling, determined by the perception that each person has about his dignity, but also how others perceive it under this aspect. The honor has not only an individual but also a social

character, hence the relationship between it and reputation, which can go up to synonymy: a prejudice brought to reputation means a prejudice to honor.

Based on conceptual premises above, we then headed out in Chapter IV of the thesis on the right to dignity. At the end of the nineteenth century, in the German legal doctrine it was established a theory of personality rights to remedy the inability to use with flexibility the torts to punish the person prejudiced. In addition, the Federal Court of Justice has established a general right of personality based on the provisions of art. 1 and 2 of the German Basic Law. The French doctrine of the early twentieth century, inspired much of the German, in 1909, H.E. Perreau publishing the article "*Des droits de la personnalité*" in *Revue trimestrielle de droit civil*, article that constitutes a first attempt to systematize. In French law, the legislative solutions transposed the doctrinal and the jurisprudential guidelines. Thus, by Law no. 70-643 of 17 July 1970 on the strengthening of guaranteeing the individual rights of citizens was amended the article 9 of the Civil Code and it was recognized the right to privacy; by Law no. 93-2 of 24 August 1993 on the reform of the Criminal Procedure Code provided the civil protection of the presumption of innocence under art. 9-1 of the French Civil Code; and by Law no. 93-653 of 29 July 1994 on respect for the human body, were introduced in the French Civil Code in Book I, Title II, Chapter II - Of the respect of the human body, the Articles 16 to 16-9 and Chapter III - About the exam of the genetic characteristics of a person and the identification of a person based on its genetic fingerprint, Articles from 16-10 to 16-13.

The personality rights are rights inherent to the human person, as belonging to any individual (innate and inalienable) to protect its primary interests. In the literature, Romanian and foreign, there is no full agreement regarding the determination of the rights of personality, with an emphasis on the difficulty to systemize this field, to characterize, and to inventory the component rights. More generally, we can say that there is no universally accepted opinion regarding the list of the personality rights and that each author develops his own approach. In the Romanian doctrine, in an opinion to which we rally, the personality rights are classified depending on the time they protect values inextricably linked to the individual humanity ie during life or after death of the human being and depending on the content of the rights, that are regulated in rights that protect the human body and its biological and psychological functions (right to life, right to health, the right to physical and mental integrity) and rights that protect moral values (right to dignity, the right to free speech, privacy, the right to image, and right to respect the memory of the dead).

Based on article 54 of Decree no 31/1954 which lists the main extrapatrimonial rights of the person ie the right to a name or alias, the right to honor, the right to personal reputation and the extrapatrimonial right of authorship of a scientific, literary or technical work in Romanian law, pending the new Civil Code where is specifically dedicated to this name in article 58, the concept of personality rights appeared in the literature. The personality rights have been included in the category of the extrapatrimonial rights of the person. The classification of the provisions of art. 54 para. (1) of Decree no. 31/1954 presents the drawback of having overlooked primary personality rights such as the right to life, the right to physical integrity, the right to privacy. The

Decree no. 31/1954 did not refer specifically to the right to dignity, but provided protection of the honor and of the reputation of the person. The personality rights do not enter into the patrimony of the person designating an universality of property rights and obligations that belong to the individual.

Chapter II with the generic indication „The respect due to the human being and its inherent rights”, in Book I – „About persons”, Title II – „Natural person” is structured into four sections as follows: the Section 1 - Common provisions (Articles 58-60); Section 2 – The right to life, health and physical integrity of the person (art. 61-63); Section 3 – The respect for privacy and human dignity (art. 70-77) and section 4– The respect due to the person after his death (art. 78-81).

The personality rights are subject to the law in force at the time of their exercise and any infringement to these rights is subject to the law in force at the time of committing the act. In the relations of private international law, the existence and the content of the personality rights are subject to the national law of the natural person, according to art. 2577 of the Civil Code. The repair claims alleging an infringement of privacy or personality, including through the media or through any other means of information, are governed, at the choice of the injured person, in accordance with article 2642 of the Civil Code, by: a) the law of the state of his habitual residence; b) the law of the State in which the result is detrimental; c) the law of State in which the author of the damage has the habitual residence or the headquarters. In the cases referred to in point a) and b), there is required that the author of the damage had to be reasonable to expect that the effects of the prejudice brought to the personality to occur in one of those States. The right of reply against infringement to the personality is subject to the law of the State in which publication occurred or where the show was broadcasted.

The first paragraph of art. 72 of the New Civil Code contains the provision that everyone has the right to respect to his dignity, as in the following paragraph to indicate the content of this right (consisting of the honor and reputation of the person) and prohibit any prejudice to dignity or reputation, without the consent of the rightholder or without the compliance of the limits of art. 75. The prejudices brought to the honor or to the reputation may take the form of insult, which consists in addressing of offending or of invective expressions and of calumny which consists in allegations or imputations on of committing an act likely to undergo disregarding person, public disapproval or sanctions.

As an inherent human right, the right to dignity belongs to any natural person and it extinguishes to his death. Being a right of personality, the right to dignity has the legal characteristics of this category, namely: is an absolute right that is enforceable erga omnes, and all persons are required to not commit acts that could prejudice it; it can't be pursued to achieve the creditors` claims; non-transferable (at the death of the person it extinguishes and cannot be transmitted, in principle, to heirs); imprescriptible and has purely personal and universal character, meaning that belongs to all people. The article 75 of the Civil Code provides for two categories of limitations on the exercise of the right to dignity, ie limits that may be imposed by the State authorities and limitations that result from the exercise of similar rights of others. It

does not constitute a violation of this right the infringements permitted by law or by international conventions and covenants on human rights to which Romania is part of (art. 75 par. (1)), nor the exercise of rights and freedoms in good faith and in compliance with the covenants and of the international conventions to which Romania is part of (art. 75 par. (2)).

The Civil Code brings new elements in the field of civil legal means to defend the extrapatrimonial rights under the Title IV-"The protection of the extrapatrimonial rights" in Book I - "About persons", Articles 252-257. The provisions apply to the right to dignity as well. These provisions must be correlated with the common law, the torts regulated by articles from 1349-1391 of the Civil Code. Depending on the time of committing the illicit act, the individual whose right of personality has been violated, may require to the court the following measures: a) to prohibit illicit act, if imminent; b) if the unlawful action is current, the court may order the termination of the infringement and its prohibition for the future; c) for an offense happened in the past, but which lets the survival of disturbance, the Court may determine whether it is unlawful (art. 253 par. (1) Civil Code). As for the right to dignity, there are applicable the provisions of article 253 paragraph (2) of the Civil Code which provides: "Notwithstanding the provisions of paragraphs. (1), in the case of infringements of the extrapatrimonial rights by exercising their right to freedom of speech, the court may only take the measures under paragraph (1). b) and c) ". It is possible to exercise separate, successive actions depending on the time of committing the unlawful act (before, during or after running the illicit action), and converting an action to another action if the illicit activity is more alert than the judicial proceedings.

In addition, the Court may order the offender to publish the sentence at his expense and to take any other measures to end the illicit act or for the remedy of damages. The principle of full compensation of the prejudice requires the public disclosure of the name of the author of the illicit act, if the court has ordered the publication of the sentence.

According to article 253 para. (4) of the Civil Code, the holder of the right to dignity can obtain compensation of the non-patrimonial damages, and the right to action is subject to extinctive prescription. If the right of action on the right to dignity is inalienable as a direct consequence of its inalienability, the right to civil action for compensation for the remedy of damages caused by the violation of this right is subject to the common system of extinctive prescription, because it has an patrimonial object that is different from the object of the subjective right violated. The solution of the new Civil Code is in line with the orientation of the legal practice which decided in what concerns the term within which the action to be performed to repair the moral damage consisting of infringement of the personal non-patrimonial rights that although these rights are imprescriptible, the damage compensation of their violation, being pecuniary, represents a right that is prescriptible according to article 1 of Decree No. 167/1958.

If the desire to exercise the right to dignity was expressed, the infringement of the subjective right engages the civil liability, without the need to prove the damage suffered because, is presumed "iuris et de iure" that the infringement of the subjective right was also created the reduction of the claimant`s patrimony, too. In relation to personality rights, the law

presumes absolutely the interest, and the manifestation of will is left to the person. Therefore, it may be contracted the civil liability without requiring the proof of the injury suffered, only to the extent that the injured person has an express interest in being compensated for the moral damages suffered.

On the other hand, according to article 255 of the Civil Code, by way of presidential order, the court may decide interim measures, especially the provisional termination of the harmful action and take the necessary measures to preserve the evidences. For the damages brought through print or audiovisual media, the court may rule the provisional termination of the harmful act only if the following conditions are met: 1) the plaintiff's prejudices are serious; 2) there is no justified reasons as listed in article 75 of the Civil Code and 3) whether the measure ordered by the court appears to be disproportionate in relation to the prejudice that was caused. The need to meet the cumulative conditions set is translated into extra protection enjoyed by the freedom of the press.

We believe, in agreement with the views that have been expressed in recent literature, that the current system of protection of personality rights is not completely detached from the principles underlying liability, so, it is not yet possible to speak of an empowerment of the legal regime applicable to the personality rights. When a prejudiced person introduces an action for compensation or for reparation for pecuniary damage, even non-patrimonial, that was caused to him, the tort liabilities are applicable (Article 1349 and the next ones of the Civil Code).

In relation to the personality rights, the non-patrimonial loss is a non-economic damage, usually temporary, consisting in suffering made of a prejudice to dignity or to privacy, whose repair is not an economic compensation of non-property values, but a satisfactory repair damage to an infringement of a personality right. The infringement of the right to dignity can be materialized in a moral prejudice and in a patrimonial prejudice, for example, if after some defamatory statements who have violated its professional reputation or following a slanderous denunciation, the victim was fired or had its labor contract modified with the consequent loss or reduction of the salary previously received.

The provisions of the current Civil Code apply to the infringements causing damages committed after its entry into force and no to the infringements committed before. In accordance with Art. 3 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, the acts and legal actions concluded or, if applicable, performed or produced before the entry into force of the Civil Code cannot produce legal effects other than those provided by the law in force on the closing date or, where applicable, on the date of their commission or the date of their occurrence.

Under the provisions of art. 103 of the same law, "the obligations arising from extracontractual legal actions are subject to the provisions of the law in force when they were manufactured or, where appropriate, their commission". In conclusion, for torts causing injury committed before the entry into force of the present Civil Code, the material damages are established in compliance with the civil law in force at the time of these acts, respecting the rule *tempus regit factum* / *actum* and not as provisions of the new Civil Code.

In relation to the right to dignity, the principle of full compensation for the damage can not have only an approximate character, as these prejudices do not have an economic content and no monetary equivalent. As it has been emphasized in the legal literature, and we have noted, if one accepts the idea of granting a repair, the principle according to which this must be full must be mitigated in favor of a compensation with compensatory nature, whereby the victim is offered an equivalent, which may be an amount of money that allows to mitigate the unpleasant result of the tort through certain advantages.

The judicial practice set that the freedom of speech shall not be prejudicial to the dignity, honor, privacy of person, and its right to self image, by using offensive vexatious words, and determining the amount of compensation for the prejudices brought to the honor or dignity involves a subjective assessment by the judge who must, however, take into account objective criteria resulting from the specific case before the Court, the degree of damage to protected social values and it requires an assessment of the intensity and severity of the damage to them. In turn, the literature has admitted that the problem of compensation for moral damage cannot be reduced to an evaluation in the economic sense, ie an appreciation of the dignity, honor, physical or mental sensitivity of a person in money, but it is about a complex and delicate operation of multilateral appreciation of the aspects where the injuries and the consequences caused are externalized, falling under the decision of the court. Therefore, in order to settle the case, the judge must consider the general principle according to which the compensation problem is solved, namely the principle of full compensation for the damage caused by the tort, but in terms of repair of moral damage, restoring the previous situation is almost impossible, by merely seeking compensation of procuring the satisfaction of the aggrieved party, in this area there are no objective and mathematical criteria for measuring the damages, and the judge has a wide marge in determining the amount to be paid to the aggrieved party, considering the severity of impact produced by statements denigrating the dignity, the honor and the reputation of the plaintiff. In determining the extent of damages, there is not taken into account the financial situation of the victim or perpetrator of the damage, which are elements that can be considered only in the manner of payment of compensation in lump sum or in installments. As shown in article 253 para. (4) and in article 1391 para. (5), the victim of a moral damage resulting from the infringement of a personality right other than the right to life, health and physical integrity of the person, may request monetary damages, as it may cumulate these with specific and adequate measures to protect that right of personality.

A separate section of this chapter is devoted to presenting the right of reply and rectification. We appreciate that in order to strengthen the protection given to the human dignity, it would have been desirable that the new Civil Code contain provisions on the right of reply and rectification, designed not as a general right to truth, but as a right for a person who is considered aggrieved by the presentation of incorrect facts in the media to present their own version, to correct the inaccurate information or to make additions that he consider necessary for a correct understanding of the situation. We believe that the first argument in this respect is the jurisprudence of the Constitutional Court that by the decision no. 8/1996 held that the right of

reply is not expressly mentioned in the Constitution, but the constitutionality of this right results from a systematic interpretation of its provisions. The right to response to the information contained in the press was governed by the provisions of art. 72-75 of the Press Law no. 3/1974, repealed by Act no. 95/2012. The legal provisions on the right of reply and rectification in broadcasting is The broadcasting law no. 504/2002 and the Decision No. 220/2011 on the regulation of the audiovisual content code of the National Broadcasting Council.

The European Court of Human Rights ruled on the right of reply in the sense that it represents an element of the right to privacy as guaranteed by article 8 of the European Convention relating to the protection of reputation. We expressed particular concern to highlight the position of the E.C.H.R. concerning the criminalization of insult and calumny, in the judgment in Case *Cumpănă and Mazăre* against Romania, the Grand Chamber stated that "the punishment of imprisonment for a press offense is not compliant with journalists' freedom of speech guaranteed by article 10 of the Convention, only in exceptional circumstances, especially when there have been severely affected other fundamental rights, such as the broadcasting of hate speech or violence". Therefore, the possibility of a prison sentence in a classic case of defamation inevitably produces a disproportionate deterrent. The European court demonstrates more rigor in assessing the relevance of use of custodial sentences for journalists regarded as disproportionate and cautions the States that they should avoid adopting measures that may cause the media and opinion makers not to act as warning the public about issues of general interest. Also, the European Court considers not only the amount of criminal sanction, but also considers that in itself the sentence to a criminal fine gives of measures taken to the applicant's high gravity.

In a separate section there is a retrospective presentation on the criminalization of insult and libel in Romanian law. It was considered the position of the national court on the issue of the stay in effect of the rules criminalizing the insult and the calumny.

In Chapter V of the work it was illustrated with relevant practical examples the position of the National Council for Combating Discrimination, it holding that discrimination itself is an affront to human dignity and the discriminatory treatment has the effect of humiliation, degradation or interference with the dignity of the person who is discriminated, in particularly when this treatment is manifested in public and treating someone less favorably because of inherent criteria suggest first contempt or disrespect for his personality.