

## THE RESPECT OWED TO THE HUMAN BEING EVEN AFTER DEATH

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*Abstract: The article proposes an analysis of the legal aspects covering the respect due to individuals after the time of termination of their lives, issue that is the subject of a separate section within the New Civil Code, but which we also find covered in other special laws, such as Law No. 104/2003 on the handling of human bodies and the removal of organs and tissues from deceased for transplantation or Law No. 95/2006 on healthcare reform. The matter is extremely delicate, since the memory, the reputation or the body of the deceased are concerned. The topic is interesting and current, as the situations that are to be found in practice on this topic are extremely varied and problematic.*

*Keywords: deceased, memory, respect, protection, rights.*

The notion of an "individual" has had numerous definitions across time, some meant to point out the complexity of this notion. Starting from the etymology of the word "person" (*persona*), which, in Latin, means a mask worn by an actor on stage, the emeritus professor Emil Poenaru points out the allegory which transcends, noting that "as the actor has a mask and a voice amplifier which help him enact his character and make himself heard by the audience, the person has a personality and can play his own role on the stage of life or society, he can assume obligations and he can enjoy his rights"<sup>1</sup>.

It was also shown that "while, ab originem the notion of <individual> belonged only to civil law, as it expressed a person's quality of being a civil law's subject, we must also keep in mind that, sometimes, especially in doctrine, the notion of "individual" is accompanied by the attribute of "civil law subject" and this is owed to the fact that the notion under discussion is being used not only in civil law, but also in other areas of the law, in order to express a person's quality of a law subject"<sup>2</sup>.

The rights of a human being as given by the legislator are extremely numerous and the compliance of these rights is insured by the tools and mechanisms created by the legislator for this purpose. The new Civil Code introduces a new chapter devoted to the *respect owed to the human being and its inherent rights*, chapter II of the second title of Book I, which talks about the right to life, health, integrity, as well as the respect owed to the private life and the dignity of the human being and the respect owed to a person after death. In our analysis, we will discuss the aspects of respect owed to the human being after death, a matter discussed in the Civil Code and in other special laws, such as *Law 104/2013 regarding the manipulation of dead bodies and the prelevation of organs and tissues from bodies for transplant*<sup>3</sup> or *Law no 95/2006 regarding the health reform*<sup>4</sup>.

One aspect that we can not ignore and which virtually seals our entire existence is that, "with our birth, destiny invests us with the death sentence, our entry into existence being marked by temporality <seal>"<sup>5</sup>.

"The deceased is owed respect in regard to his memory, as well as his body" states the law in article 78 of the new Civil Code and also the article which opens this section about the

<sup>1</sup> Emil Poenaru, Introduction to civil law. General Theory. Persons. Europa Nova Publishing House, Bucharest, p. 211.

<sup>2</sup> Gabriel Boroï, Civil Law. General Part. Persons, second edition, All Beck Publishing House, Bucharest, 2002, p. 309.

<sup>3</sup> Published in the Official Bulletin no 213 of March 25<sup>th</sup>, 2014.

<sup>4</sup> Published in the Official Bulletin no 372 of April 28<sup>th</sup>, 2006.

<sup>5</sup> E. Poenaru, Medicine and truth, Medical Publishing House, Bucharest, 1963, p. 18.

respect owed to the human being and its inherent rights. “Although after death man ceases to have a legal personality and his rights are gone (as they are *intuitu personae* rights and unable to be transmitted to another person) he is owed respect and consideration for what he was during his lifetime”<sup>6</sup>.

By the phrasing of the text of law we can notice two components which will be the subject of this analysis, the *memory* of the deceased and the *body* of the deceased. The memory, as defined by the Romanian Dictionary is “the memory that posterity keeps about people or events from the past”<sup>7</sup>. In agreement with the provisions of article 79 of the new Civil Code “the memory of the deceased is protected under the same conditions as the image and reputation of the living person”. This text must be correlated with that of article 72 of the same law which establishes in its first alignment that “any person has the right to have his dignity respected” and the second alignment imperatively states that “any detriment to the honor and reputation of a person without his consent or by violating the limits established by article 75 is strictly forbidden”<sup>8</sup>. We must also correlate with the text of article 73 of the new Civil Code which guarantees a person’s right to its own image, as the person is allowed to forbid or prevent the reproduction, in any way, of his physical appearance or his voice, as well as the use of these reproductions.

Another distinctive chapter was inserted in the new Criminal Code with the same purpose, that of protecting the memory and the body of the deceased person. This chapter regulates the crimes against the respect owed to the deceased person, thus there is a perfect correlation with the provisions of the new civil Code. Further, it incriminates - *the desecration of bodies and tombs* as well as *the illegal prelevation of tissue and organs from the deceased person*.

Thus, “(1) the theft, destruction or desecration of a body or the ashes resulted from the cremation of that body is punished with imprisonment from 6 months to 3 years. (2) The desecration, by any means, of a tomb, a funeral urn or a grave is punished by imprisonment from 3 months to 2 years or with a fine”<sup>9</sup>, whereas “the illegal prelevation of tissue or organs from a body is punished with imprisonment from 6 months to 3 years or with a fine”<sup>10</sup>. As regards the human dead body definition, it is found in the wording of the first article of Law. 104/2003 *on the handling of human dead bodies and the removal of organs and tissues from cadavers for transplant*, according to which “the human corpses are persons who do not present any signs of brain heart or lungs activity and who are declared legally dead from the medical point of view, according to law.”

In accordance with the provision of article 80 first alignment of the new Civil Code “any person can choose his own funeral procedures and can make arrangements for the disposal of his body after death” as long as he has full mental capacities. For those without or with limited mental capacities, the written consent from the parent or the guardian is needed.

In case the deceased did not express his will prior to his death, the will which will be taken into consideration is that stated in article 80 second alignment of the new Civil Code in the following order “the will of the husband, the parents, the descendants, the collateral

<sup>6</sup> Eugen Chelaru, Civil law. The persons in the NCC regulation, C.H. Beck Publishing House, Bucharest, 2012, p.40.

<sup>7</sup> Vasile Breban, The Romanian General Dictionary, Encyclopedic Publishing House, second volume, Bucharest 1992, p. 608.

<sup>8</sup> According to art. 75 of the new Civil Code “(1) It is not a violation of the rights stated in this section the detriments which are allowed by the law or the international conventions regarding human rights to which Romania is a part of. (2) The exercising of constitutional rights in good faith and by respecting the international conventions to which Romania is a part of is not a violation of the rights stated in the current section .”

<sup>9</sup> Article 383 of the new Criminal Code.

<sup>10</sup> Article 384f the new Criminal Code.

relatives until the fourth degree, the universal heirs or the mayor of the town or county where the death occurred”.

As for the funeral, as shown in doctrine “the person can express their will by testament, stating if and when he wished to be buried or cremated, what will be destination of the ashes resulted from the cremation, details of the burial ceremony”<sup>11</sup>.

The issue of cremation generates numerous discussions which, as the doctrine states “the orthodox canon law opposes cremation and the Romanian Orthodox Church refuses any religious service to those who opt for cremation”, that is the reason why „the deceased’s living relatives might consider easier not to respect the wishes expressed by the departed, than to risk opposing the Church and face public disapproval. The reverse situation is also possible –to cremate someone against his will in the absence of a last will and testament”<sup>12</sup>.

As for the prelevation of organs, tissue and/or cells from the deceased person, article 81 of the new Civil Code states that this operation will occur only for “medical or scientific purposes” and “only under the conditions stated by law and with consent from the deceased person, expressed during his lifetime or with the written consent of the surviving husband, the parents, the descendants and finally the collateral relatives until the fourth degree”.

To complete these regulations, we have Law no 95/2006 *regarding the health reform* which establishes in article 147 first alignment point 5 that the prelevation of organs, tissue and/or cells from a deceased person “can be done without the deceased person’s consent if, during his lifetime, the deceased expressed his option to donate his organs and register himself in the Organ Donor Registry through a notary document”. It is also shown that the prelevation is forbidden in case, during its lifetime, the deceased expresses his wishes as not to donate organs by a notary act; this document must be presented by the family of the deceased to the transplant coordinators<sup>13</sup>.

Law. no 104/2003 *on the handling of human dead bodies and the removal of organs and tissues from cadavers for transplant*, adds further details about the use of cadavers for teaching and scientific purposes and also for sampling of tissues and organs from cadavers, art. 23 establishing the conditions in which it is possible to take the dead bodies for the purposes described above. They are as follows:

- a) when there is a prior express written agreement of the patient or family;
- b) persons who are alive can provide their body, after death, to the human medical higher education institution, based on common regulations developed by hospital morgue services and by medical management of human higher education institutions;
- c) unclaimed dead bodies are taken by the services for using the dead bodies of the anatomy university disciplines.

Concerning the issues developed above, we recall an opinion expressed in the doctrine which qualifies as a “delusion of continuing the existence of the human person capacity of use after his death (...) the execution of *de cuius* testamentary requests by implementing the provisions regarding the permission or prohibition of using his dead body or the removal of organs as well as the activity done after his death by the foundation, which he - eventually - founded”<sup>14</sup>.

<sup>11</sup> E. Chelaru, op. cit., p. 40.

<sup>12</sup> For details, see S.-D. Şchiopu, *Burial vs. Cremation in Romania - A Legal Perspective*, în „Legal Practice and International Law”, International Conference on Private Law (PL 2011), Braşov, Romania, 7-9 April 2011, WSEAS Press, 2011, p. 241-246.

<sup>13</sup> Art. 147, first alignment, point 6 of Law no 95/2006.

<sup>14</sup> I. Nicolae, *Institutions of family law*, Hamangiu Publishing House, Bucharest, 2009, p. 90.

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