

CONSIDERATIONS ON THE RIGHT OF REPLY AND RECTIFICATION

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ABSTRACT: *The right of reply through the media is useful when damage occurs by broadcasting and print media. In Romanian law, the audiovisual media is governed distinctly from the written press. Until the entry into force of Law no. 95/2012, the right of reply for the information contained in written media was governed by the provisions of art. 72-75 of the Press Law of the Socialist Republic of Romania no. 3/1974. Currently, the provisions in this matter are contained in the Code of Ethics for journalists. The legal provisions on the right of reply and rectification in broadcasting are contained in the Broadcasting law no. 504/2002, the Decision no. 220/2011 of the National Broadcasting Council and the Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Corporation and the Romanian Television Company.*

KEYWORDS: *the right of reply and rectification; written press; audiovisual; new Civil Code.*

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1. PRELIMINARIES

The right of reply by means of the press has utility when damage occurs by broadcasting and print media. Press means an activity of information, transmission and communication materialized in newspapers, magazines, newsletters, periodicals; radio and television programmes with character of current information and specific radio-television journalism; news cinema journals, current information and documentary films; any other forms of printing or graphic recording, sound or visual, designed and used as a means of expression and public information in mass (Cosma, 1974, pp. 3-5).

In this matter, the provisions of art. 30 para. (8) of the Constitution under which the liability for any information or creation made public falls upon the publisher or producer, the author, the organizer of the artistic performance, the owner of the copying facilities, the owner of radio or television. In Romanian law, the audiovisual media field is regulated separately from that of printed media, by the Broadcasting Act no. 504/2002.

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2. THE RESOLUTION NO. 74(26)/1974 ON THE RIGHT OF REPLY – POSITION OF THE INDIVIDUAL IN RELATION TO THE PRESS AND THE RESOLUTION NO. 1003/1993 ON THE ETHICS OF JOURNALISM

With respect to the European regulations in this matter, we should mention first the Resolution of the Council of Europe Committee of Ministers no. (74) 26, adopted on 2 July 1974, "on the right of reply - position of the individual in relation to the press"¹.

The Resolution (74) 26 of the Council of Europe concerning the right of reply stipulated, in the Annex, the minimum rules on the right of reply and recommended the States to introduce within the national legislation provisions according to which the exercise of this right may be refused in the following cases: if the request for the publication of the right of reply is not made to a means of mass communication within a reasonable time; if the length of the right of reply is beyond what is necessary to correct the information concerning the facts alleged inaccurate; if the reply is not limited to the correction of the alleged offenses; if the reply is in itself the object of a crime; if the reply harms the interests legally protected of third parties and if the person claiming the right of reply does not justify a legitimate interest. It also states that if the information published in the press represents an interference with the privacy of a person, it must be able to effectively appeal against publishing such facts or opinions, except if a public legitimate and primordial interest justifies making them public, if such person expressly or tacitly consented to the disclosure or if the publication complies with a general accepted practice that is not contrary to law. Similarly, it is provided that there must be the possibility of an effective remedy if the damage is to the dignity, honour or reputation of a person, except where the information were published with the express or tacit consent of the person in question or if publication is justified by a public primary and legitimate interest, or it is a fair criticism, based on accurate facts.

The Resolution no. 1003 on journalism ethics², adopted by the Parliamentary Assembly of the Council of Europe on 1 July 1993, provides that the information is a fundamental right, highlighted in the jurisprudence of the European Commission and the European Court of Human Rights and recognized in the art. 9 of the European Convention on Transnational television channels and in all democratic constitutions; it is a right of the citizen, which has, therefore, the right to ask that the information provided by journalists to be submitted with respect for the truth, for news, and honestly, for opinions, without no external intervention, either by public authorities or private sector.

Furthermore, in para. 27 it is provided that the Member States of the Council of Europe (including Romania) have to implement the Resolution no. (74) 26 mentioned above as well as the relevant provisions of the European Convention on transnational television channels in order to harmonize the application and the exercise of this right in the Member States of the Council of Europe. Art. 26 of the Resolution no. 1003/1993 on journalism ethics states that at the request of interested parties, mass media, shall correct, by appropriate information means, automatically and immediately, providing all the

¹ the text of the Resolution, see [www.coe.int/t/dghl/standardsetting/media/doc/cm/res\(1974\)026_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/res(1974)026_EN.asp).

² Published in Official Gazette no. 265 of 20 September 1994, see [www.lege-online.ro/lr-REZOLUTIE-1003%20-1993-\(54427\).html](http://www.lege-online.ro/lr-REZOLUTIE-1003%20-1993-(54427).html).

information and opinions that have been proven false or misleading, and the national legislation shall provide appropriate sanctions, and where necessary, compensations.

3. DECISION NO. 8/1996 ON THE EXCEPTION OF UNCONSTITUTIONALITY OF THE PROVISIONS OF ART. 74 PARA. (2) AND ART. 75 PARA. (2) OF THE PRESS LAW OF THE SOCIALIST REPUBLIC OF ROMANIA NO. 3/1974

The first argument in favour of the consecration of the right of reply is given by the Constitutional Court which by Decision no. 8/1996³ held that the right of reply is not expressly mentioned in the provisions of the Constitution, but the constitutionality of this right results in a systematic interpretation of its provisions.

The grounds to the objection of unconstitutionality argued that the provisions of art. 71 para. (2) and art. 72 para. (2) of the Press Law no. 3/1974 are contrary to the constitutional provisions of art. 1 para. (3), art. 15 para. (1), art. 16 para. (1), art. 21, art. 24 para. (4), art. 30 para. (6), art. 31 para. (4) and art. 49, requesting to note that the criticized legal texts are no longer in force, being inadequate to the current socio-political conditions of our country. It was also claimed that "the term, meaning and the condition of unfounded refusal preserve an uncertain and general character (...), so that, in the end, it remains only a purely subjective judgment of the court", that "the very fact that the law does not define and does not establish the criteria for which an implied publication refusal has a well founded character or not", can lead practically "(...) that precisely in the course of procedural activity (...) to put forward reasons and excuses of any kind" in order to justify the refusal of the publication to proceed to the publication of the right of reply because, in these conditions, "addressing the court (...) does not certainly lead to the essential goal of enforcement of legitimate rights and interests, but only to the possibility of undergoing certain steps that may be, eventually, with no specific purpose".

Firstly, the Constitutional Court stated that the exception of unconstitutionality relates to the provisions of art. 71 para. (2) and art. 72 para. (2) of the Press Law no. 3/1974, but in reality, following its amendment by Decree of the State Council no. 471 of 24 December 1977, giving a new numbering to articles, as republished, art. 71 para. (2) becomes art. 74 para. (2) and art. 72 para. (2) becomes art. 75 para. (2).

Rejecting the exception of unconstitutionality, the Constitutional Court held that the right of reply has the value of a constitutional right correlative to the right of free expression of opinions, no matter in what form should it be exercised. In addition, the Constitutional Court stated that the right of reply can be considered in close connection with art. 30 para. (8) of the Constitution, which regulates the civil liability for the information disclosed to the public. Since this information may be considered insulting - it is stated in the decision of the Constitutional Court - it is natural that those affected may ask the guilty to repair the moral or material damage suffered by disseminating the information in question, by the means provided by law, and "the first way such an initiative can be achieved is the exercise of the right of reply, able to meet, within certain limits, the repair intention pursued by the injured person".

³ Published in the Official Gazette. No. 129 of 21 June 1996.

The above decision presents in illustrative terms situations in which the right of reply may be wrongly or abusively exercised: in case of absence of the element of damage, defamation, either the situation in which not the person allegedly affected was taken into consideration, but another one; when between the dimensions of the alleged defamatory information and the dimensions of the reply of the injured person there is any obvious disparity in favour of the latter; when the content of the response is not focused on issues with defamatory character it must combat; when the injured person uses a tone or expressions that do not match with the normal requirements of a democratic and at the same time decent press.

Being acknowledged the constitutional nature of this right, the right of reply shall comply with art. 57 of the Constitution under which Romanian citizens, foreign citizens and stateless persons shall exercise their rights and liberties in good faith, without violating the rights and freedoms of others. Therefore, any abusive exercise of this right justifies refusal to publish the reply.

4. PRESS LAW NO. 3/1974

Until the entry into force of Law no. 95/2012⁴, the right of reply to the information contained in the written press was governed by the provisions of art. 72-75 of the Press Law no. 3/1974⁵.

We will further give a brief description of the provisions of the Press Law no. 3/1974 in terms of matter being treated. By the provisions of art. 69, it was held that the freedom of the press may not be used for purposes hostile to the socialist order, to the rule of law provided by the Constitution and other laws, rights and legitimate interests of the natural and legal persons, to the socialist morality, being forbidden the publication and dissemination by the press of materials including incorrect data and facts that can harm the legitimate interests and harm the dignity, honour or reputation of a person, its social and professional prestige or which proffer insults, slander or bring threats to a person, in order to defend the social and personal interests against the abusive use of the right of expression in the media.

The right of reply forms stipulated in art. 72 of the Press Law no. 3/1974, under which "the natural or legal person harmed by statements made in the press that it deems false, may demand, within 30 days, the press body in question to publish a response in the form of reply, rectification or declaration". The aforementioned provision makes the distinction between the forms of the right to response, namely:

- the reply - is a response commenting or fighting someone's claims;
- the rectification - is a response that aims to correct or ameliorate certain statements containing inaccuracies;
- the declaration - an open affirmation of beliefs, opinions and feelings.

Art. 72 of the Press Law no. 3/1974 conditioned the right of reply to the existence of a violation of rights or legitimate interests of the natural or legal person who claims the exercise of this right. A second condition was that the statements made in the press to be untrue, which excluded the possibility of the right of reply if they were true statements,

⁴ Published in Official Gazette no. 453 of July 6, 2012.

⁵ Published in Official Gazette no. 48 of April 1, 1974.

but constituted interference with privacy or detriment to the honour, reputation or dignity of a person without being justified by a primary public interest. Furthermore, according to art. 72 para. (2) the reply should be objective and pursue the restoration of truth. As such, the response should be impartial, have the ability to present the unadulterated reality, detached from subjective impressions (Cercescu, 2002, p. 132). Finally, as is results from the text of the Press Law no. 3/1974, the journalists critical opinions cannot attract the right of reply, to the extent that they satisfy the criterion of honesty and fairness. The art. 72 para. (3) provides that "it shall not be considered to make an objective critical, principled and constructive damage, exercised through the media, in achieving social and political functions". On the other hand, "the opinions are value judgments that cannot be subject to the criterion of truth, but to the criterion of ethics and honesty"⁶ (Cercescu, 2002, p. 133).

On this subject, the doctrine admitted that "if these opinions are based on incorrect or truncated facts or data, the right of reply can be exercised, but it opposes to those data or facts, for restoring the truth, and not to the subjective opinion expressed in the published comment ", as the purpose of the provisions on the right of reply would not be the opportunity to make publicly known the opinions contrary to those expressed in the media. The author C.M. Cercescu presents the following example from the practice of the French courts: „The Association "Club d'horloge", under the guise of an article in the journal "Liberation", dedicated to new forms of extreme right has invoked the right of reply to challenge the club members belonging to this political movement, wishing that the material representing the reply to disseminate the ideology of the club and disclose the political ideas they promote". In a judgment delivered on 15 January 1997, the Court Grand Instance in Paris ruled as follows: "Designed to restore the truth of factual information, the provisions on the right of reply cannot be invoked to combat the analyzes or judgments issued or reproduced by a journalist, in the exercise of freedom of opinion and to establish a free and open forum from which the press body is not able to opt out".

According to art. 72 of the Press Law no. 3/1974, demanding the right of reply was made by a written notification, addressed, in the absence of express mentions within the law, generally, to the decision factors of the media organization concerned. The press body was bound, according to art. 73, to freely publish the response within 15 days after having received it, whether the media body was daily news, or no later than the second edition after the receipt of the reply, if the media body release to another frequency. The same term of 15 days after receiving the written notification of the individual and/or the legal person which was injured was provided for the communication of the refusal to publish or broadcast the reply. A refusal is also deemed the failure to publish or broadcast the reply within the statutory period (art. 74). From the provisions of art. 75, it appears that in case of refusal to publish or to broadcast the reply, the injured person may bring an action in front of the court to order the press body to release the reply. If the court finds

⁶ The decision of the Chamber of Deputies No. 25/1994 of Resolution 1003 of the Parliamentary Assembly of the Council of Europe on journalism ethics.

that the refusal was unfounded, the press body was obliged to publish or broadcast the reply within 15 days from the date of the final judgment. The publication or the release of the reply was made with the mention that it was ordered by the court, being indicated the number and the date of the judgment, and the court having delivered the judgment.

The Press Law no. 3/1974 was repealed, except for the provisions governing the right of reply (art. 72-75 and art. 93 of the Law republished in the Official Gazette no. 3/1978) of the Government Emergency Ordinance no. 53/2000 on some measures to address the requests for compensation for moral damage. Subsequently, the Socialist Republic of Romania Press Law was repealed by Law no. 95/2012.

5. THE JOURNALIST CODE OF ETHICS

Currently, art.10 of the Journalist Code of Ethics⁷ states that the journalist and editor are obliged to make the necessary corrections in case where, by their own fault, inaccurate information are made public. Media institutions are required to publish/ broadcast, within 5 days after the receipt, for daily newspapers, news agencies, radio and television, and in the next available edition for periodicals, the applicant's right of reply.

If the publication in question refuses to publish the right of reply, the injured party may apply to the Honorary Board of the Romanian Press Club, which is to address the publication, newspaper, news agency, radio and television and will imperatively require the compliance with the Code of Ethics, in case the reply is well founded. In case of ignoring this approach, the Romanian Press Club shall publicly delimit itself from the publication concerned.

6. THE AUDIOVISUAL LAW NO. 504/2002, LAW NO. 41/1994 ON THE ORGANIZATION AND FUNCTIONING OF THE ROMANIAN RADIO BROADCASTING CORPORATION AND THE ROMANIAN TELEVISION SOCIETY AND DECISION NO. 220/2011 OF THE NATIONAL AUDIOVISUAL COUNCIL

The legal provisions on the right of reply and rectification in broadcasting is the Broadcasting law no. 504/2002⁸, the Decision no. 220 of 24 February 2011 on the Code regulating audiovisual content of the National Audiovisual Council. The provisions on the right of reply can be found in Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Corporation and the Romanian Television Company⁹.

According to art. 41 para. (1) of the Broadcasting Law "Every natural or legal person, regardless its nationality, whose rights or legitimate interests, in particular the reputation or the public image have been damaged by an assertion of incorrect facts in a programme, must have a right of reply or rectification".

The Decision no. 220/2011 of the National Audiovisual Council states in detail within Section IV, with the generic name "The right of reply and rectification" the procedure of

⁷ available on www.clubulromandepresa.ro/?page_id=322 .

⁸ Published in Official Gazette no. 534 of 22 July 2002.

⁹ Published in Official Gazette no. 153 of 18 June 1994.

exercising the right of reply and rectification (Chapter I) and contains provisions regarding the notification of the National Audiovisual Council (Chapter II).

According to art. 49 of the Decision. 220/2011, the holders of the right of reply are individuals and/or legal persons whose rights or legitimate interests have been violated by incorrect facts presentation in an audiovisual programme. Consequently, invoking the right of reply, the person who is affected must prove that certain rights or interests have been harmed. The right of reply cannot be applied in the following cases:

- for opinions and value judgments expressed or in order to give opinions and value judgments;
- where broadcasters respected the *audiatur et altera pars* principle. It should be noted that the *audiatur et altera pars* principle involves non-discriminatory conditions of expression within the same programme;
- if the reply is requested to reply;
- where broadcaster responds to the accusations of a person, provided it does not affect the rights or interests of a third party.

According to art. 51 of the Decision no. 220/2011, the holders of the right to rectification are individuals and/or legal persons whose rights or legitimate interests have been violated by erroneous information being presented into an audiovisual programme, provided that the error is obvious and significant.

The doctrine argued that the right of reply concerns the right of a person to dignity and truth, when the right to rectification aims at establishing the accuracy of specific situation, in charge of a person invested with public authority (Cercesescu, 2002, p. 127). It is noteworthy that Romanian law is inconsistent on the matter. The Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Corporation and the Romanian Television Society¹⁰, the two terms refer to consecutive procedural steps, the application for admission of the right of reply intervening when the application for admission of the right of correction was rejected¹¹.

From the provisions of art. 52 of the Decision no. 220/2011 it appears that the applicant may request the broadcaster to re-view or re-listen that program within 15 days from the date of its broadcasting. The broadcaster has the obligation to ensure the access to the re-viewing or to the re-audition of the programme within 24 hours of receipt of a written request to that effect, either directly, at the broadcaster's head office, or indirectly, by providing a video or audio copy, as appropriate. The request of re-viewing or re-audition shall be signed by the parents or legal representative of a minor under the age of 14 years, and for the minor aged between 14 and 18 years, the application must be signed by him and by its parents or legal representative. Likewise, the Decision no. 220/2011 stipulates that the child will be assisted in re-viewing or re-listening by its parents or legal

¹⁰ Published in Official Gazette no. 153 of 18 June 1994.

¹¹ The right of rectification is regulated in art. 14 para. (5): "Broadcasting information violating the rights or interests of an individual or legal person entitles it to request the specialized editors to rectify them, which must occur within 48 hours of the request of the individual or legal person concerned". In case of refusal - shown in art. 14 para. (6) - the person which is considered injured in a right or legitimate interest may request the General Director of the company, no later than six days after the deadline set out above, to be granted the right of reply. Broadcasting the right of reply shall be made within the same programme, at the same time when the right or the legitimate interests of the person were injured, and within 48 hours after the request of the person concerned. According to art. 14 para. (10), the other cases on the right of reply shall be exercised in accordance with the compulsory norms established by the National Audiovisual Council.

representative. The person who considers itself affected by the presentation of an audiovisual programme containing incorrect facts or misinformation shall proceed by submitting a request in writing at the station head office that broadcasted the incriminated program. Under sanction of nullity, the claim must be submitted within 15 days from the date of broadcasting the programme in which the injury occurred and shall contain the following:

- the name of the person who considers itself as being affected, its address, phone number or details of any other way to enable fast and efficient contact;
- the name of the programme and the broadcasting date;
- the incorrect facts for which it is requested the right of reply or the erroneous information for which rectification is requested;
- the motivation of the demand and
- the reply text that should relate only to the contested incorrect facts.

When the applicant is a minor, the application must be signed by its parents or legal representative, if the minor is under 14, the request shall be signed by him and the parents or legal representative if the minor is aged between 14 to 18 years.

According to art. 54, the demand for a right of reply/rectification shall be recorded by the broadcaster, specifying the date and time of receipt and the applicant will receive a written confirmation thereof. If the broadcaster refuses to register the application, the applicant may appeal to the National Audiovisual Council, within maximum 30 days from the date of broadcasting the programme that caused the damage.

According to art. 55 of the Decision no. 220/2011 of the National Audiovisual Council, the broadcaster may refuse to exercise the right of reply or rectification in the following cases:

- the request was not submitted within the period and under the conditions laid down in the Decision of the National Audiovisual Council;
- the broadcaster has evidence proving the truth of the facts presented or the conditions for non-granting any right of reply are met, or in the case of the right to rectify the error is not obvious nor significant;
- the applicant does not accept to shorten the text of the reply when its length exceeds the requirements for the right of reply.

The application shall be reviewed within two days, then it shall be communicated to the applicant the day and time of broadcasting the right of reply or rectification or the reason for refusal. The reasoned refusal shall obligatorily specify the possibility for the applicant to address to the Council within 30 days after the date of broadcasting the programme that has caused the damage.

The Decision no. 220/2011 of the National Audiovisual Council contains detailed provisions regarding the form and content of the right to rectification or reply. The right of reply shall be broadcasted for free. Also, no comments of the broadcaster are allowed and shall be provided a period of maximum three days from the date of the application being approved where the right of reply should be broadcasted under the same conditions in which the rights or legitimate interests of the person were injured: within the same time span, the same programme, with the same duration and with the precision of the programme in which the injury occurred. If the next edition of the programme in which the damage occurred is planned within more than seven days from the date of the request

approval, the right of reply shall be broadcasted within 3 days from this date, in the same time frame and mentioning the programme in which the damage occurred.

In terms of form, the right of reply is exercised either by the broadcast of a direct intervention of the injured person or by broadcasting a recording made by the broadcaster or by the applicant and if the applicant agrees, the right of reply can be run under the form of a written text. The right of rectification is exercised through free broadcast within maximum 3 days from the date of approval, in the same time span, of some details through which the broadcaster corrects the erroneous information that caused the damage, indicating the programme having presented erroneous information and the date of its dissemination, the form of the rectification must be agreed in advance with the injured person. According to art. 59 of the Decision no. 220/2011 of the National Audiovisual Council, if the applicant has been refused by the broadcaster the right of reply or rectification, it may apply to the National Audiovisual Council no later than 30 days from the date of broadcasting the programme having caused the damage. The notice shall contain all the information in the application for the right of reply or rectification and the applicant's arguments concerning deviations from the rules laid down in the Decision no. 220/2011 of the National Audiovisual Council. The National Audiovisual Council is obliged to rule on notification within 7 days from the date of its registration. If the applicant is successful, the broadcaster shall comply with it within 3 days from the notification of the decision.

Finally, in accordance with art. 41 para. (3) of Law no. 504/2002 of the Broadcasting and art. 63 of the Decision no. 220/2011 of the National Audiovisual Council, the broadcasting of the rectification or reply shall not prevent the injured person to turn to the courts.

7. CONCLUSIONS

We believe it would have been desirable for the new Civil Code to contain provisions on the right of reply and rectification, designed not as a general right to the truth, but as a right of a person who considers itself affected by the presentation of certain untruthful facts in the media to present its own version regarding them, to correct inaccurate information or to make the additions it considers necessary for a correct understanding of the situation. Within the laws of other countries, for example Switzerland, the Civil Code contains detailed provisions on the right of reply¹².

¹² Therefore, art. 28 g of the Swiss Civil Code provides: "1. Any person whose personality rights are directly affected by a representation of events in periodically appearing media, especially the press, radio or television, shall have a right of reply. 2. There is no right of reply in respect of accurate reports of the public dealings of an authority in which the affected person took part". Art. 28h "1. The text of the reply must be succinct and confine itself to the subject matter of the contentious representation. 2. The reply may be refused if it is plainly incorrect or violates the law or public morals". Art. 28i "1. The author of the reply must send the text to the media company within 20 days of learning of the contentious representation, but at the latest within three months of publication. 2. The media company must immediately inform the author of the reply when it will be published or why it is rejected". Art. 28k "1. The reply must be published as soon as possible and in such a manner as to ensure that it reaches the same audience or readership as the contentious representation. 2. The reply must be identified as such; the media company is not permitted to make any addition except to state whether it stands by its representation or to indicate its sources. 3. The reply must be published free of charge". Art. 28l "1. If the media

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company obstructs the right of reply, rejects the reply or fails to publish it correctly, the party in question may petition the court".