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THE PROTECTION OF PATRIMONY BY CRIMINALISING DECEPTION

PHD THESIS ABSTRACT

The paper *The Protection of Patrimony by Criminalising Deception* takes as working hypothesis approaching patrimony protection from the perspective of criminal law, by analysing the offence of deception and outlining the specific aspects pertaining to the offence of deception in conventions and the offence through cheques corresponding to non-existent funds, as well as an analysis of certain aspects relevant in delineating the offence of deception from other offences in the Criminal Code or in special laws, which are committed through fraud in a broad sense, or through deception.

The protection of patrimony against deception offences is a desideratum of any modern state, both on a general level, as well as in the specific contemporary context of the Romanian state in its current form, which demonstrates the actuality of the research topic and the constant interest in attempting to find the best methods to counteract deception as a criminal phenomenon. The endeavour of the present research paper consists both of discussing the necessity to protect patrimony, as an irrefutable aspect, as well as the possibilities of actual implementation of this objective, with the distinctive aspects pertaining to the offence of deception, with its position in the general framework of criminal law, alongside the other protection mechanisms, and, in matters of deception, with the connection between the protection provided by criminal law, which is intertwined with the protection provisions ensured in civil law. The topic is currently relevant for analysis due to the necessity to revisit a very serious criminal phenomenon affecting society in general, as the offence of deception has become worryingly frequent in the overall crime context, especially through the amplitude it has been acquiring.

The present paper also explores the offence of deception as part of a whole, progressing from the general level to the individual one; this was achieved by firstly outlining a general framework for the protection of patrimony, within which an analysis of the meaning of the notion of patrimony was performed, in the spirit of its explicit regulation in the New Romanian Civil Code, and a terminological distinction from the conceptualisation of this notion in criminal law; it must be mentioned at this point that patrimony protection is ensured both by means ensured by provisions in civil law, as well as in criminal law, when the degree of protection ensured through other means is insufficient, while the principle of minimal intervention of criminal law is observed, followed by an additional stage, during which the offence of deception is analysed as a part of patrimony protection ensured through the regulation in criminal law which refers both to offences against patrimony, and to other offences in the Romanian Criminal Code or offences in special laws, which are comparatively analysed with the offence of deception by noting the similarities, by making certain correlations and delineations, in an analysis of the position the offence of deception occupies within this framework.

Based on the premise that the offence of deception is traditionally analysed as an offence against patrimony committed through fraud, the paper proposes that, *de lege ferenda*, deception should be regulated as part of a distinct chapter referring to offences against patrimony committed through fraud, even though, as shown in the paper, the New Romanian Criminal Code does not opt for such a solution, but instead includes the offence within a distinct chapter on offences against patrimony committed through violation of trust, a solution which has been criticised for continuing to leave room for interpretation in what concerns the relationship between the concepts of fraud and deception, concepts between which the present paper has endeavoured to delineate.

A wide investigation of criminality in statistical data has been performed as part of this research effort for cases of offences against patrimony, with an emphasis on offences of deceit, which, year after year, occupy a significant segment of the overall crime rates, with data summarised and structured in an appendix containing tables and graphs which show the dynamic

evolution of this criminal phenomenon and the important position the offence of deception occupies within the context of offences against patrimony, as well as that of offences against patrimony in the overall crime spectrum. The paper also emphasises the issues that occur from the lack of complete data, and argues in favour of a future revision which could extend to include exhaustive and specific statistical data regarding the offence of deception, with assessments as to the dimension and evolution of this criminal phenomenon, supported by propositions for increasing the efficiency of the efforts to counteract it.

The paper additionally investigates aspects related to the evolution of deception as a concept, by examining the legal archetype of deception, outlined by Biblical text hermeneutics, followed by an analysis of the historical development of regulations for deception in our criminal law system, with the purpose of demonstrating the constant concern for sanctioning offences of deception and for improving the patrimony protection framework against such offences, of such nature as to justify research of the criminal phenomenon in this field, with the mention that any solution implemented in matters of deception offences must take into account the experience resulted from the previous legal and practical solutions.

The paper analyses the offence of deception as regulated in Art. 215 of the Romanian Criminal Code, with an extensive analysis of the theoretical aspects, alongside the jurisprudence orientations for finding solutions to problems offences of deception create, the outline of divergent opinions and contradictory judicial practices which sometimes prove the difficulties occurring in this field, the outline of interpretations and solutions provided in certain foreign legal systems, as well as an analysis of the specific aspects pertaining to the offence of deception in conventions and the offence of deception through cheques.

The offence of deception in conventions constitutes a way which ensures the possibility for the criminal law judge to intervene in contractual matters, with the purpose of ensuring and sanctioning offences contrary to the normal flow of contractual relations, when such intervention is necessary, with effects that extend beyond the protection offered by civil law, in the sense that a general balance on the societal level is pursued. The paper endeavours to show that the offence of deception in conventions is situated on the border between civil and criminal law, and its inclusion in a distinct paragraph of the current Criminal Code is fully justified, which is why, *de lege ferenda*, it has been proposed that its distinctive aspects be further retained, through its regulation in a distinct paragraph, even though, as it can be criticised, the regulation in the New Criminal Code is not meant in this sense.

The paper emphasises the aspects of civil law relevant for the offence of deception, and analyses the conjunction between the protection achieved through criminal law provisions and the protection achieved through provisions ensured in civil law, through the distinct analysis of the aspects pertaining to the terminology used and the terminological unity in civil and criminal law in the case of the offence of deception in conventions, through the analysis of the *bona fide* principle in civil law, and of the ways in which protection is ensured, in criminal law, through the criminalisation of the offence of deception in conventions, through delineations which must be made between situations protected by civil law through regulations referring to free and unvitiated consent, to the compliance with contractual obligations and to the sanctions for non-compliance with these obligations in the contractual sphere, as well as the institution of selling goods owned by other persons without the ability to pass title, and cases where criminal law is allowed to intervene under the provisions of the offence of deception in conventions, as long as the principle of minimal intervention is observed.

The offence of deception through cheques is analysed in correlation with the offences described in Art. 84 of the Cheque Law No. 59/1934, from which the paper has chosen to delineate it. The paper shows that these regulations are not considered to have been repealed, but it is proposed, *de lege ferenda*, that the lawmaker intervene as soon as possible in adapting the Cheque Law to the current economic and legal realities, considering that the modifications brought to it by the Enforcement Law of the New Criminal Code have not completely corrected the current problems.

The similarities the offence of deception sometimes has with other offences regulated in the Romanian Criminal Code or in special laws, as well as the fact that, even though there are definitions clearly outlined by law, at least on a theoretical level, in actual practice certain solutions are contradictory and call under discussion the criteria for delineating the offence of deception from other offences, which justifies a comparative analysis which the paper has endeavoured to undertake. In this sense, there are certain fields of current interest where problems can be outlined pertaining to the sanctioning of deception offences, and where it is considered that the future intervention of criminal law would be useful, through the possibility of sanctioning the offence of deception in some situations, e.g. in cases of misleading advertising.

The paper analyses patrimony protection against deception offences both from the perspective of the persons committing the offences of deception, through analysing certain criminological aspects specific to the offence of deception, by identifying criminal motivation in these cases, and by establishing a psycho-behavioural profile of the offender in the case of the offence of deception, as well as from the perspective of the persons who suffer the consequences of these offences, through a study centred on the victim of the offence of deception, by outlining a typology of the victim in the case of the offence of deception, as the understanding of specific criminological and psychological aspects and characteristic psycho-behavioural particularities of the persons involved allows, *de lege ferenda*, the implementation of preventive and sanctioning measures with a positive effect on the criminal phenomenon in this field. The paper criticises the lack of higher concern for these aspects, through the negative consequences on the possibility to develop preventive and combative measures for deception offences, as well as on the formulation of prophylactic and self-protection measures in terms of the danger of victimisation, recommending for the future an increase in the efforts to allocate greater interest to the aspects mentioned.

The paper examines aspects of criminal procedure law referring to the jurisdiction of the criminal investigation body and of the court of law for deception offences, with particularities on deception offences that fall under the jurisdiction of the National Anticorruption Directorate (for cases prior to the enforcement of the Emergency Government Ordinance No. 63/2013) or of the Directorate for Investigating Organised Crime and Terrorism, with particularities on the enforcement of the special procedure for the prosecution and trial of flagrant offences or the special procedure for engaging criminal liability for legal persons in the case of the offence of deception, as well as the fact that a distinct analysis is made of the specific aspects involved in investigating deception offences, with an outline of the investigation specifics in certain cases (e.g. in cases of computerised deception offences).

The paper includes a specific analysis of Art. 74¹ of the Romanian Criminal Code applied to the offence of deception, found unconstitutional by the Romanian Constitutional Court, also detailing the discussions and controversies this article has raised, making certain actual calculations meant to demonstrate the incoherent manner in which, theoretically, these regulations would be applicable to the offence of deception and the unjust consequences they could lead to, and it signals the fact that, through and within the New Romanian Criminal Code, similar provisions were introduced in the category of legal mitigating circumstances [Art. 75 Para. (1) d)].

The research thesis is concerned with investigating regulations for the offence of deception in foreign legal systems, in the context of certain comparative law aspects, which are obtained through correlation with the legal solutions in the reference legal systems for European criminal law (e.g. the French, Italian, German, Spanish legal systems), as well as with other foreign legal systems (e.g. the American, Swiss, British legal systems), with the mention that these regulations may influence Romanian national regulations.

The research effort supporting the paper implies a parallel analysis of the regulations in the current Criminal Code, alongside the legal perspectives concerning the regulation of the offence of deception in the New Criminal Code, through comparisons, delineations, assessments or critiques addressing the future regulation. The paper criticises the lack of regulation in the

New Criminal Code of the aggravated form of the offence of deception, which has had extremely severe consequences, especially since it has allowed an increase of the value limitation for extremely serious consequences, based on the argument that, in the absence of this norm, the protection of patrimony would not be possible against highly serious offences of deception.

The paper also underlines the lack of consistency on the part of the lawmaker in what concerns offences of deception in the New Romanian Criminal Code, as, on the one hand, certain special forms of deception are introduced, which are distinctly regulated and constitute special forms of deception that frequently occur in practice, norms which will be applied with a higher degree of priority than the regulations of deception offences in Art. 244 of the New Romanian Criminal Code, and on the other hand, it can be criticised, the distinct regulation of the offence of deception in conventions and the offence of deception through cheques corresponding to non-existent funds are eliminated, even though they also constitute special forms of deception, encountered just as frequently or even more frequently in the criminal context, and which would be sanctioned based on Art. 244 of the New Criminal Code, with the mention that these have not lost any of their significance, and this cannot be a matter of decriminalisation of these offences, which are current issues of high severity, the only acceptable interpretation correlated with the new incriminating norm being in the sense that these forms will continue to constitute factual modalities for committing the offence of deception.

In conclusion, ensuring patrimony protection against deception offences is not only a theoretical and formal desideratum, but also a real necessity justified by the surge of the criminal phenomenon in the field of deception, and in order to counteract the offence of deception, a future reassessment of the vision of counteracting this phenomenon is necessary, through an emphasis on intensifying preventive measures, through informing and educating the individuals at risk of becoming victims of deception offences. *De lege ferenda*, the research paper proposes a reconfiguration of the incriminating norm of deception offences in the New Romanian Criminal Code, and a change of vision from the initial option, in the sense of reintroducing both the aggravated form of the offence of deception, which produces extremely severe consequences, with the purpose of ensuring patrimony protection against highly severe deception cases, as well as the offence of deception in conventions and the offence of deception through cheques corresponding to non-existent funds, with the mention that in the absence of specific regulations for these two special forms, the interpretation that they would continue to represent factual modalities of the offence of deception may prove insufficient and constitute grounds for discussion as to their enforcement, without making a positive contribution to the fight against the criminal phenomenon in cases of deception.