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Summary Issues of Cybercrime

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Abstract

The present study notices that the definitions of cybercrimes raise big problems of hermeneutics.

Such crimes were created starting from the premise that computer fraud is a sui-generis crime, which is not to be confused with any of the "crimes against patrimony"" (against "patrimonial rights"), because the latter crimes involve a "material contact" with the stolen object, while cybercrimes are committed "remotely" and, as a result, in their case, such "contact" is missing (does not exist).

However, the author considers that this premise is false and that not all crimes against patrimony involve a material relationship with the stolen object. In her opinion, the contrary idea stemmed from the definition that majority civil doctrine gives to the notion of "possession", which is wrong. As Jhering noted, the concept of "possession" does not designate a "state of fact" consisting in the physical mastery of an object, but designates a set of prerogatives conferred by law on the holder of a patrimonial right, by virtue of which he/she may personally use an object or to derive material profit from it, attributing its use to another person.

Also, the author considers that many of the cybercrimes disregard the principle of legality, as well as other principles of law, which reveals that the penal doctrine has not clarified its tasks yet.

Keywords: *possession*, *crime*, *subjective right*, *protected interest*.

1. Introduction.

One of the disadvantages of the development of information systems is that it has created the possibility of committing „remotely," under the protection of anonymity, the most diverse crimes: crimes against the person (threat, blackmail, violation of correspondence etc.), crimes against patrimony, crimes against the state (espionage, communication of false information etc.) or crimes against public morals (such as child pornography or incitement to hatred or discrimination).

Besides, what was even worse was the fact that it was found that while such crimes, called „computer crimes," continued to proliferate, the judicial bodies

declared their inability to combat them – and this, not only because of the difficulty of identifying the culprits, but especially because they did not fit into the traditional schemes of legal thinking. As is known, an act, however dangerous it may be, can only be punished if it is "typical", that is, it meets all the requirements specified in an incriminating norm (because otherwise the principle of legality would be disregarded).

Or, at that time, the quasi-unanimous opinion of the investigators was that the existing incrimination provisions could not be applied to such acts – for example, they considered that the act of illegally transferring a sum of money from the bank account of a persons in another person's bank account could not be punished as a crime of theft, because theft requires that the thief has „material contact" with the object, whereas, in the case of such a transfer, this condition is not fulfilled.

Such a situation, completely unacceptable, lasted until about a decade ago, when European states decided to adopt new incrimination provisions, which would explicitly stipulate that such acts are crimes and allow their punishment. At the same time, they decided that the new crimes, as well as the measures to prevent and combat them, should be provided, first, in a regional convention, but to which any state of the world can accede, in such a way as to ensure legislation harmonization and coordination of activities in the field.

This objective was achieved on November 23, 2001, when the Council of Europe Convention on Computer Crime was adopted in Budapest.

One year later, in November 2002, this convention was supplemented by a protocol, entitled „Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems," which entered into force on March 1, 2006.

2. Brief presentation of the convention in the field

The Convention on cybercrime is made of a preamble and four chapters.

The first chapter, entitled *Use of terms*, includes only one article (art. 1 which defines the terms *computer system*, *computer data*, *service provider* and *traffic data*.

The second chapter – *Measures to be taken at the national level* – is structured in three sections.

The first section is entitled *Substantive criminal law* and includes five titles. Title 1 – *Offences against the confidentiality, integrity and availability of computer data and systems* – defines five crimes, i.e.: *Illegal access* (art. 2), *Illegal interception* (art. 3), *Data interference* (art. 4), *System interference* (art. 5), *Misuse of devices* (art. 6). Title 2, entitled *Computer-related offences*, defines other two crimes: *Computer-related forgery* (art. 7) and *Computer-related fraud* (art. 8). Title 3 – *Content-related offences* – defines *Offences related to child pornography* (art. 9). Title 4 (art. 10) defines *Offences related to infringements of copyright and related rights*. Title 5, entitled *Ancillary liability and sanctions*, addresses the state parties the following

recommendations: to these crimes, also criminalize the acts of "complicity" (or "criminal participation"); to punish the attempt to the crimes defined in art. 3-5, art. 7, 8 and art. 9, paragraph 1, letters a) and c); to provide for the punishment or other liability of legal persons who commit acts as those defined in art. 2-10.

The second section of the same chapter recommends the State Parties to adopt a series of procedural measures, such as: to provide for the obligation of service providers to preserve data related to subscribers and the services offered to them, as well as data related to traffic; to provide for the obligation of the same providers to make the data available to the competent authorities or, as the case may be, to intercept the data and to support, in any other way, the activity of these authorities; to recognize these authorities the right to search a computer system or part of it, and, in case of need, to establish the removal of certain computer data from the system or blocking the access to them etc.

The third and last section of Chapter II reaffirms some rules regarding the jurisdiction of States Parties, in relation to territory and individuals.

Chapter III of the Convention, entitled *International cooperation*, is structured in two sections. The first section includes *general principles*, relating to extradition (art. 24), principles relating to mutual assistance in the field (art. 25), spontaneous information (art. 26), procedures pertaining to mutual assistance and data confidentiality requests in the absence of applicable international agreements (art. 27-28). The second section includes *specific provisions*, regarding provisional measures (art. 29-30), regarding the prerogatives of investigation (art. 31-34) and the network of investigation (art. 35).

Chapter IV, entitled *Final provisions*, reaffirms the right of States Parties to make declarations, reservations or amendments, as well as the conditions for their acceptance.

3. The evolution of the Romanian legislation in the field

The Romanian Parliament ratified the Convention on computer crime by Law no.64/2004.

However, it should be noted that the provisions of this convention had been previously transposed into domestic legislation, stipulated in a special law, more precisely in Title III of Law no. 161/2003 – this, because, at the time, in Romania, they were in progress of carrying out the procedures for the adoption of a new penal code and a new code of penal procedure.

It should also be noted that, with the entry into force of the new codes, Title III of Law no. 161/2003 was, for the most part, abrogated.

Finally, it should be mentioned that, currently, computer crimes are provided for in the new Romanian Penal Code (Law no. 286/2009), where they have been dispersed in different titles, as follows:

- in Title II, entitled „Crimes against patrimony," three such crimes are defined, namely „Computer-related fraud," „Performing financial operations

fraudulently" and „Accepting financial operations carried out fraudulently" (art. 249-251). In the same title, in art. 252 Penal Code, the attempt to commit these crimes was criminalized;

- in Title VI, entitled „Forgery offences," the offence of „Computer-related forgery" is defined (art. 325);

- in Title VII, entitled „Crimes against public safety," six such crimes are defined, namely „Illegal access to a computer system," „Illegal interception of a transmission of computer data," „Altering the integrity of computer data," „Disruption of computer systems operation," „Unauthorized transfer of computer data" and „Illegal operations with computer devices or programs" (art. 360-365). Also here, in art. 365 Penal Code, the attempt to commit these crimes was criminalized;

- in Title VIII, entitled „Crimes that alter relationships regarding social coexistence," the provision criminalizing „Child pornography" (art. 374) has been amended, so that, at present, this crime can be committed not only by „producing, possessing, procuring, storing, exhibiting, promoting, distributing... of pornographic materials with minors" (standard variant, provided in the first paragraph), but also through „Accessing, without right, pornographic materials with minors, through computer systems or other means of electronic communications" (the mitigated version, stipulated in the third paragraph). Also, an aggravated version of the same crime was introduced [art. 374 para. (2)], according to which the acts listed in the first paragraph are punished more severely, if they were committed through a computer system. At the same time, the attempt to commit all these acts was criminalized [art. 374 para. (5)];

- in Title IX, entitled „Electoral offences," the offence of „Electronic voting fraud" (art. 388) was introduced, and the criminal offence regarding „Forgery of electoral documents and records" (art. 391) has been amended, so that, currently, this crime can be committed not only by „falsifying by any means the documents from the electoral offices" (the standard variant, provided in the first paragraph), but also by other acts – for example, by „putting into use or using a computer system program with defects that alter the registration or summation of the results obtained in the polling stations" (the mitigated variant, stipulated in the third paragraph); or, by „introducing data, information or procedures that lead to the alteration of the computer system necessary to establish the election result (the mitigated variant, provided for in the fourth paragraph).

4. Critical aspects

It is clear from the text of the convention itself that the new incrimination provisions, called „computer crimes," are objectionable.

Thus, even at first glance, we can see that some of these provisions may be confused with others, which disregards the principle of legality and, more precisely, the requirement that each crime be strictly delimited (*nullum crimen sine lege certa*).

For example, it is impossible to delimit the crime of *damaging data integrity* (art. 4 in Convention) from the crime of *computer-related forgery* (art. 7 in Convention), since, in both, *the objective element* is achieved through identical acts, respectively either through the „deletion" (suppression, elimination) of computer data, or through the „modification" of such data, including the addition ("introduction") of new such data. It is true that, in the case of computer-related forgery, the text (art. 7 in Convention) claims, in addition, to prove that the perpetrator intended to use the falsified data „for legal purposes." However, upon closer analysis, we can notice that this requirement cannot serve as a delimitation criterion between the two crimes, and this, for at least two reasons: the first is that both criminalizations ensure protection of the principle of good faith and, more precisely, the authenticity of electronic documents, private or public, prohibiting third parties from changing them arbitrarily, without the owner's consent; the second is that, as evidenced by judicial practice in the matter, third parties who falsify (delete or modify) such documents invariably act „for illegal purposes" and, more precisely, with the aim of causing „damage," material or moral, to the owner. From these it is understood that the requirement in question is erroneous and that we cannot distinguish the two crimes, taking into account the purpose pursued by the author of the deed.

The separation of crime of *computer-related forgery* (art. 7 in Convention) from that of *computer-related fraud* (art. 8 in Convention) also raises discussions. As is known, the specificity of computer-related fraud resides in its result, in the circumstance that it causes material damage to the victim. However, if we take into account the fact that the author cannot reach this result, unless, beforehand, he/she has committed, directly or indirectly, one or more acts of computer-related forgery, then we must conclude that these acts do not constitute a distinct crime, as stipulated in art. 7 in Convention, but appear as an attempt at electronic fraud, which must be punished as such, according to art. 11 in Convention. Of course, it could be objected that not all computer-related forgery acts aim to cause material damage to the victim, so they cannot all be punished as „attempted electronic fraud"; or, it could be objected that, often, they do not even constitute an attempt, but are presented as simple acts of preparation, which, as a general rule, cannot be punished. As is known, acts of crime preparation can be punished, only exceptionally, in thoroughly justified cases, and, in such a situation, we are talking about a separate category of crimes, called „preventive crimes" or „obstacle crimes"[1], which differ from the others in that they are no

[1] See *Infraction obstacle*, [Online] Available: https://www.droit.fr/definition/2767-infractionobstacle/#:~:text=En%20droit%20pénal%2C%20l'%20infraction%20obstacle%20est%20celle,acte%20dommageable%20%28une%20atteinte%29%20mais%20l'accomplissement%20d'actes%20préparatoires

longer absorbed into the subsequent crime and the result (as „computer-related fraud" is), but will collide with it. However, if we take into account that there is no definite criterion of delimitation between the acts of preparation (which are not punished) and the attempt itself (which, as a rule, is punished), it becomes obvious that the provisions of art. 7 and 11 in the Convention also do not take into account the principle of legality, as it is created the possibility that the same deed may receive different legal qualifications. More precisely, they allow judges, depending on their own assessment, to punish an identical act either as an attempted computer-related fraud, or as a consummated crime of computer-related forgery, which, possibly, will be retained in the contest (formal, ideal) with the attempted computer fraud – in such situations, the principle of equality before the law will also be disregarded.

Reasoning this way, we also come to notice other shortcomings.

For example, although the Convention recommends that the States Parties criminalize the attempt in almost all computer crimes, we can see that „computer-related forgery," also called „damaging data integrity," can never take the form of an attempt. In such a crime, the attempt is impossible, because it presents itself as an *instant* (*prompt execution*) *crime*, for which it is not possible to conceive a „start of execution," respectively a „start of affecting" the computer data (immediately that the execution has begun, the crime has been completed). In addition, if we take into account that acts of computer-related forgery appear, as a rule, as acts of preparation for the crime of computer-related fraud, it becomes obvious that, following such recommendations, we will end up, over time, no longer making any distinction between *the acts of preparation* of a crime and *the attempt* to commit it.

Or, we can observe that the Romanian legislator not only provided separately for the offences of „Computer-related forgery" (art. 325 Penal Code) and „Alteration of the computer data integrity" (art. 362 Penal Code), or criminalized both the attempt of computer-related fraud (art. 252 Penal Code) as well as the attempt of altering the integrity of computer data (art. 366); on the contrary, in addition to these, he „invented" two more crimes, namely the crimes of „Performing financial operations fraudulently" (art. 250 Penal Code) and „Accepting financial operations committed fraudulently" (art. 251 Penal Code). Thus, noting that the account administrator can be partner in crime in an electronic fraud crime (art. 249 Penal Code), the Romanian legislator decided to punish these acts of complicity more gently. As a result, he has distinctly criminalized, in art. 251 Penal Code, the act of the official who, knowingly, accepts the performance of fraudulent financial operations, providing for this a maximum of 5 years imprisonment. At the same time, he incriminated once again, in art. 250 of the Criminal Code, the acts of direct execution of a computer fraud, providing for a maximum of 7 years in prison, for the operations of "cash withdrawal" or "transfer of funds", carried

out without the consent of the holder. Moreover, in order to create the impression that this would be another crime, which is not to be confused with computer fraud, the Romanian legislator included among the "fraudulent financial operations" those of "loading or unloading an electronic money instrument (...), without the consent of the holder" – which is pure nonsense, since, as is known, the holder can only decide to "upload" or "download" his own bank account, but he cannot change the value of an "electronic money instrument" (Bitcoin or other cryptocurrencies).

5. A questionable necessity

It is not enough to point out that computer crimes have many shortcomings, but we also have to point out that their very necessity is debatable.

As we have already shown, the main argument invoked in support of their creation was that the respective acts cannot be punished as „crimes against patrimony" (theft, fraud etc.), because they are committed „from distance," without the perpetrator having any "material contact"2 with the stolen object, while crimes against patrimony would claim to have a „material, manual manipulation of the thing"[3].

Yet, in this context, we also have to show that not all specialists agreed with such an „argument." On the contrary, many of them argued that not all crimes against patrimony involve a material relationship with the thing and that such a crime can be committed not only by acts of "physical absconding", but also by acts of "juridical absconding" (Ph. Conte, p. 300), as it happens, for example, in the case of the so-called „electricity thefts" where the perpetrators only interrupt the functioning of the electric meter, without ever entering into „material contact" with the stolen energy (otherwise, they would risk dying).

Unfortunately, these debates took place only among the penalists, and they failed to demonstrate, convincingly, that the respective facts can be punished very well as „crimes against patrimony," provided that possession is given a different meaning. Although it was obvious that the notions of "physical absconding" and "juridical absconding" refer to two different understandings of the notion of *possession* and therefore it is necessary to revise the civil theory of possession, however, in the absence of a solid argumentation, no one supported this explicitly.

That is why we should specify that, as early as 1926, two great French civilists, professors Marcel Planiol and Georges Ripert, asked for the replacement of the so-called „subjective theory of possession" with an „objective theory"[4]. In

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[2] Philippe Conte, *Droit pénal spécial*, 2003, Paris, Litec, p. 320.

[3] Michèle-Laure Rassat, *Droit pénal spécial. Infractions des et contre les particuliers*, 2006, Paris, Dalloz, p. 110.

[4] M. Planiol, G. Ripert, *Traité pratique de droit civil française*, Tome III („Les Bien"), 1926, Paris, Librairie générale de droit & de jurisprudence, pp. 154-162.

this sense, they showed the following: the fact that the first definitions of possession date from the Roman law; the fact that, from the beginning, the Romans mistook possession for the right of ownership, conceiving it as a state of fact (physical power), which allows the holder to own a material thing and use it, in a current and exclusive manner; the fact that, somewhat later, the Roman jurisconsults admitted that, in addition to de facto possession (*possessio rei*), which consists in the possession of tangible things, there is also a legal possession (*possessio juris* or *quasi-possessio*), which consists in the exercise of a right (it was, more precisely, the exercise of the right of servitude); the fact that, starting from this ancient distinction, the first French Civil Code (Napoleon's Code) defined possession both as the "physical possession" of a thing, as well as the "use" of this thing (art. 2228); the fact that, in the traditional conception, of Roman origin, possession is composed of two elements, namely of a material element, called „corpus," and of an intentional element, called „animus"; the fact that, in the 19th century, a famous German jurist (Savigny) formulated the so-called „subjective theory of possession," according to which the difference between *physically possession* (*in fact*) and *true possession* resides in a different intentional element: the intention of the true possessor is to use the thing (the individual acts with *animus domini*), while the intention of the physical possessor is to keep the thing for another (the individual acts with *animus detinendi*); the fact that this theory was harshly criticized, from the beginning, by another famous German jurist, Professor Rudolf von Jhering, who formulated the so-called „objective theory of possession"; the fact that, according to Jhering, the distinction between *precarious possession* and *true possession* derives from the law, not from a different intentional element (in his view, personal will cannot have such arbitrary power) – which means that possession presents itself as *a legal prerogative* and, more precisely, as *a specific prerogative of all real rights*.

6. Possession in the current theory.

Although it was clear that Jhering was right when he argued that possession is a *legal prerogative* or a *legal possibility*, by no means a simple „state of fact"[5], most of the civil doctrine preferred to ignore his theory – and this, because accepting it meant abandoning the naturalistic (materialist and deterministic) conception of law and adopting, instead, a normativist conception, which takes into account the fact that, through its norms, law constructs *a juridical reality* (*abstract, ideal*), with own entities, which differ significantly from the concrete entities from which it starts.

However, the refusal to adopt a new explanatory paradigm had the consequence that, gradually, the theory in the matter became more and more confused and

[5] Constantin Stătescu, Corneliu Bîrsan, *Drept civil. Teoria generală a drepturilor reale*, 1980, University of Bucharest – Faculty of Law, p. 235.

contradictory. In this sense, it seems eloquent to us that, as early as two centuries ago, civilians began to distinguish between *precarious possession* and *true possession*, not caring that such a distinction was incomprehensible, as long as the civil codes continued to define possession as „*physical possession* of a thing" and that they themselves continued to define possession as a simple „state of fact."

Very likely, they reached such a distinction, starting from the practice of law, which highlights that the *physical possession* of the thing represents, even for the owner, a simple prerogative, which he/she can use or not, as he/she wants. As an example, we mention that the owner of a house may never live in it, and yet if he/she rented that house and made a steady profit from it, legally he/she is considered to have exercised *continuous and uninterrupted possession* of it, even if, in reality, he/she had no "material (physical) contact" with that house.

However, as a consequence of the above-mentioned refusal, most of the majority civil doctrine has not been able, even today, to build another – more coherent – theory, in which possession should be no longer confused with the material (physical) mastery of a thing. For example, we see that the new Romanian Civil Code (Law no. 287/2009) tried to avoid this confusion, defining possession as „the actual exercise of the prerogatives of the right of ownership over an asset" [art. 916 paragraph (1)]. Yet, if we take into account that the first prerogative which the law confers to the owner is to physically master his/her thing, it could be argued that this definition has not changed anything, but leads to the same conclusion, namely that possession is a "state of fact". In any event, from this, it can hardly be inferred that possession designates a *licite action*, fully compliant with the law (with the prerogatives it confers on the owner).

In addition to all these, we see that, in art. 555, this code defines property as „the right of the owner to possess, use and dispose of a good... within the limits provided by law." In other words, we see that, according to this new definition, possession is neither a *licite action* nor a *legal prerogative*, but is confused with a certain subjective right, called "property right" – which disregards the fact that all real rights confer on the holder the prerogative to use (possess) the thing, and not just the property right.

7. An objective theory of possession.

In our opinion, such a theory should start from what Hans Kelsen showed, namely that the juridical notion of *person* (*physical* or *moral*) does not designate a human being, but only „a unit of obligations and rights" (p. 214) belonging to a man or group of people. As he observes[6], legal relationships, created by rules, do not include individuals as such, but only their behavior, more precisely their *licit*

[6] H. Kelsen, *Doctrina pură a dreptului* (Romanian transl.), 2000, Bucharest, Humanitas Publishing House, pp. 205, 209, etc.

actions (commissions or omissions), which constitute, where appropriate, the fulfilment of an obligation or the exercise of a subjective right. Moreover, he observes (p. 167) that the traditional distinction between „rights of persons" (*ius in personam*) and „rights over objects" (*ius in rem*) is only misleading, because, in reality, all legal relations are established between persons.

Or, if we start from here, we can make new observations.

First of all, we can observe that the series of errors starts from the general theory of law, which has not yet clarified the meaning of the juridical notion of *subject of law* or *person* (*physical* or *moral*), nor its relationship with the notion of *patrimony*; on the contrary, it introduced another notion, that of *the subject of the legal relationship*, which only unnecessarily complicates things. Moreover, anyone can note that these matters, which are essential and of interest to all branches of law, continue to be highly controversial.

Secondly, we can observe that, regarding the relationship between the notions of *person* and *patrimony*, the prevailing opinion in the current doctrine is that the former is a broader, superordinate notion that includes the latter. More precisely, according to this opinion, the notion of *person* designates the totality of rights and obligations that belong to a man or a group of people, while the notion of *patrimony* designates, strictly, the „patrimonial" rights and obligations of the person, those that have as object „things in trade" or, in other words, things that the holder can alienate.

Thirdly, we can observe that the legal doctrine classifies subjective rights into *non-patrimonial rights* and *patrimonial rights*, and subdivides the latter into *real rights* and *personal rights*[7], but cannot specify the criteria for these classifications. In any case, it failed to note that every subjective right refers to a thing, and that the reason why it became necessary to distinguish between non-patrimonial rights and patrimonial rights is that not all rights and, by implication, not all things can be alienated. More precisely, patrimonial rights, which have as object things independent of man, can be alienated, but not non-patrimonial rights, which have as object things inherent to the human being, such as life, health, freedom etc. – because these things cannot be given to another, neither free nor for a price, even if the law would allow it. Also, it did not notice that the division of patrimonial rights into real rights and personal rights takes into account the prerogatives conferred by law on the holder. In the light of that criterion, it may be noted that, unlike the holder of a real right, who has both the prerogative to preserve the (corporeal) thing and the prerogative to use (or master) it, the holder of a personal right has only the prerogative to preserve the thing – that is, without using it. In other words, we can notice that only real rights give the holder the

[7] See *Real rights and personal rights*, [Online] Available: https://docslib.org/ doc/3559097/ real-rights-and-personal-rights

prerogative to „possess" the body thing, that is to say, to use it personally or, as the case may be, to derive other material profits from it. Hence the reason why Jhering defined *possession* as a *specific prerogative of real rights*.

Fourthly, we can observe that, without any basis, the majority doctrine still claims to today that the notion of *possession* would designate a mere "state of fact", which implies a "material contact" with the corporeal thing. In reality, it must be emphasized, the juridical notion of *possession* designates a set of *licit actions*, corresponding to different legal prerogatives and, quite often, even to different rights. And, being so, it would be necessary, when we describe a factual situation, not to mention indifferently the possession of a thing, but specify whether, in the present case, it is a *legal possession* or an *illegal possession*.

Finally, fifthly, we can observe that, regarding the relationship between the notions of *person* and *patrimony*, there is also another opinion, according to which these notions are synonymous. Such an opinion notes that the distinction between *patrimonial rights*, which are „in trade" (can be alienated), and *non-patrimonial rights*, which are not „in trade" (therefore cannot be alienated), is a relative distinction, applicable only in the private legal relationships (between individuals), and not in the legal relationships of authority (between the state and individuals) – because, in the latter relationships, all rights, even non-patrimonial ones, can be evaluated and compensated in money. Moreover, it is known that, for centuries, judicial practice has been constant in the sense that not only the one who damages another individual's patrimonial right, but also the one who damages a non-patrimonial right of another, such as the right to life, health etc. should have civil liability for causing (illegaly) a material prejudice. Taking into account such aspects, the followers of this opinion concluded that „all rights are, strictly speaking, *liability rights*"[8] or, in other words, *personal rights*.

8. Some conclusions

The first conclusion that emerges from the previously stated considerations is that, in most of them, the new incrimination provisions, called „computer crimes," have no justification.

For example, the existence of the crime of „computer-related forgery" (art. 7 of the Convention) and its various variants, such as „Altering the integrity of computer data" (art. 4 of the Convention), is not justified and this – and this because those acts can be punished as a crime of "material forgery", which criminal laws have already provided for a long time. At most, taking into account that, usually, their purpose is to materially harm a person, it would have been necessary to specify that these acts cannot be punished as „attempted computer fraud." As

[8] Giorgio Del Vecchio, *Lecții de filosofie juridică* (Romanian transl.), 1995, Lugoj, Europa Nova Publishing House, p. 246.

we have already shown, forgery crimes are presented as „preventive crimes" or „obstacle crimes", which always preserve their autonomy, so that if they have achieved their goal and the victim has actually been harmed, these offences enter into contest with the subsequent and result offence, currently called "Computer Fraud". At the same time, it would have been necessary to clarify whether, lest, the "use of forgery" and "attempted fraud" represent only two different names of the same act, so that one of them would be abandoned.

Or, the existence of the offence of "Computer fraud" (art. 8 of the Convention) is not justified. It is true that the acts so named cannot be punished as a crime of *theft*, since, indeed, theft implies a "physical absconding" of the thing, as its legal definitions show (for example, art. 228 of the Romanian Penal Code defines theft as „*taking* a movable property from the possession or custody of another")[9]. But, as noted, these acts can be punished without any difficulty as crimes of *deception* (*swindle*, *scam*), given that, unlike theft, deception can also be carried out through a „legal absconding", that is to say, by a simple scriptual amendment, which unrealistically attests to an operation which, in reality, the rightholder has never carried out. In any event, it cannot be claimed that computer fraud and deception are two separate offences, since both involve misleading a person (such as a financial institution) in order to obtain „for oneself or for another an unfair material benefit" [art. 244 para. (1) of the Romanian Penal Code]. Moreover, it can be noted that computer fraud is invariably carried out by "using false names or qualities" – a situation in which, according to the Romanian law, the crime of deception is punished more severely [art. 244 para. (2) of the Romanian Criminal Code].

Or, the existence of the crime of *affecting the integrity of the system* (art. 5 of the Convention) is not justified, since this act can be punished, without any difficulty, as a crime of destruction. In this sense, we can recall that *destruction* can also be committed by "bringing an asset belonging to another in a state of non-use" (art. 253 of the Romanian Criminal Code).

Also, from the foregoing considerations, it may be inferred that this unnecessary and even aberrant multiplication of the incriminating norms has been reached, as a result of the fact that juridical science has adopted a materialistic and deterministic conception, which prevents it from clarifying its tasks or from answering other, more concrete questions, such as specifying the criterion for the systematisation of criminal offences. At least, this is the only way to explain why, instead of perfecting the existing incriminating norms and, as far as possible,

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[9] In France, some courts have upheld the existence of a "theft of information" (see *Le vol d'information*, online available: https://www.bing.com/search?q=le+vol+des+informations&cvid=ae2eb8c5b7d741ccaa38dca623564d01&aqs=edge..69i57.14195j0j1&pglt=4), which obliges us to report, in passing, that the information is not "in trade" and therefore cannot be the object of theft or other crimes against patrimony. Such acts affect either non-patrimonial rights or mere protected interests, economic or otherwise, and must therefore be provided for as separate criminal offences.

reducing their number, the current legislators are constantly increasing the number of these norms, not caring that this "legislative inflation"[10] contravenes any logic and risks generating a real social chaos.

Therefore, it is perhaps useful to recall three aspects.

First, we must recall that the incriminating norms do not describe some concrete facts, objectively existing, that we call *crimes*, but define *abstract facts*, which exist only in thought. The very practice of law draws our attention to this, because it highlights that a concrete act can be characterized as a *crime*, only when it is „typical," that is, it meets all the requirements set by an incrimination provision. In other words, the very practice of law highlights that the crime is a creation of the law, and not a concrete entity. Besides, anyone can find that, in nature, there are no *crimes* (*theft*, *forgery* etc.), but only an amorphous mass of facts. Including the distinction between *licit actions* and *illicit actions* (crimes, misdemeanors, disciplinary violations etc.) is an abstract distinction, purely intelligible, because, in concrete (perceptible) reality, there are only some beings (humans, animals or plants) that behave in the most varied ways. Consequently two aspects result: on the one hand, the fact that law is not an empirical science, but is a formal, predominantly deductive science (more precisely, it presents itself as *a deontic, applicative logic*); on the other hand, the fact that the task of criminal doctrine is to perfect the concepts (definitions) of different crimes, in such a way that they can be applied to all acts of the same type, regardless of their concrete particularities, and by no means that of constantly inventing new penal concepts, under the pretext that the old concepts are outdated and no longer correspond to the new methods or means of committing crimes.

Then, we must recall the fact that the incriminating norms have a subsidiary (complementary) character, which means that any such norm provides protection for another norm, which is earlier and which enshrines a *subjective right* or, as the case may be, a mere *legitimate interest*, imposing a penalty, in case of its violation. In this sense, it has already been observed both the fact that it is not possible to conceive an incriminating norm deprived of a "protective purpose" ("guardianship purpose") or a "legal object" (*oggetto giuridico* – as the Italians say), and the fact that not all incriminating norms provide protection for subjective rights. This is not even possible, because, as noted, although any subjective right presents itself as „an interest protected by law"[11], there are not as many subjective rights as there are protected interests – for example, it is in everyone's interest to ensure the protection of morals or the environment, but „there is not a corresponding subjective right in every citizen". But, unfortunately, only rarely, the juridical doctrine also noticed the fact that the interests to be protected cannot be established

[10] See *Inflation législative*, [Online] Available: https://fr.wikipedia.org/wiki/Inflation_législative.

[11] Del Vecchio, *op. cit.*, p. 249.

by the criminal legislators, arbitrarily; on the contrary, those interests must pre-exist, be prior to the incriminating norm or other sanctioning norm, which ensure their protection. And this, precisely because a sanctioning norm does not have autonomy, but is a *subsidiary norm*, which is justified only as long as it provides protection to a pre-existing norm, of a „civil" nature (in a broad sense), which enshrines a „legitimate interest" and which is provided for in a separate legal act (statute, professional regulation etc.). In other words, we must emphasize that the interests to be protected are established *by social consensus* (not by the legislator) and that the purpose of the sanctioning norms, including incriminating norms, is reduced to ensuring adequate protection of those interests. From where it is understood that another task that falls to the criminal doctrine is to ensure that the criminal norms respect the logical priority of the civil norms and their consensual (democratic) character.

Finally, we must remind that, without sense, the Convention in the field recommends to the States Parties to punish „the legal (or moral) persons" who commit computer crimes.

Such a recommendation tends to remove *the principle of guilt*, which is one of the most important principles of criminal law, and this, only because this principle cannot be explained, neither starting from a strictly deterministic conception, which denies freedom of will, nor starting from a naturalistic conception, which conceives guilt as a psychic attitude (as especially the German authors noted, the concept of *guilt* does not designate any natural entity, but designates some reasoning or logical ideas, more precisely, some "value judgments", which justify the "imputation" of the deed and the will that determined it).

However, little has been noticed that by removing this principle, which opposes the punishment of so-called „legal persons," the very existence of nation states is endangered. That is why it is necessary to note that there is no definite criterion of delimitation between the responsible legal persons and penally irresponsible legal persons – which means that, following this path, it may happen, among other absurdities, that a court decides *the dissolution of a state*, on the grounds that one of its officials has committed a computer crime.

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