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TOWARDS A CRIMINAL LEGAL PERSONALITY OF ARTIFICIAL INTELLIGENCE

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Abstract: *In order to be able to retain the criminal responsibility of the artificial intelligence, first it must be proven that it committed the criminal act knowingly, with one of the forms of guilt provided by the criminal law. In this situation, it could be considered that the respective artificial intelligence is responsible from the point of view of the criminal law for that crime. The science of criminal law as part of the legal sciences must respond to the development of society and must find the necessary tools to uphold and preserve the most important social values against dangerous acts.*

Keywords: *personality; criminal liability; artificial intelligence; AI; legal person; criminal law*

The commission of a crime cannot be conceived without a perpetrator, i.e. without one of the recipients of the criminal law having violated this law and without a person who has suffered because of the crime, i.e. without one of the holders of the law being harmed or threatened by the violation of this law.

Any recipient of the criminal law, when he commits or takes part in the commission of a crime, becomes a criminal. Thus, corpses, animals, not being recipients of criminal law, can never become criminals.[2] But is this also the case of inanimate things like artificial intelligence? What is artificial intelligence? So far, the law does not provide a definition of these systems, and certain definitions can be identified in particular cases that refer to the so-called types of systems equipped with artificial intelligence.[3]

The term artificial refers to an object that is not natural, that mimics a product of nature, and what a product of nature if not man tries to imitate artificial intelligence.[4]

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[2] Vintilă Dongoroz, Drept penal (Reeditarea ediției din 1939), Asociația Română de Științe Penale, București, 2000, p. 295

[3] In simple terms, artificial intelligence (AI) refers to systems or machines that mimic human intelligence to perform various activities, and which can be iteratively improved based on the information it collects. https://www.oracle.com/ro/artificial-intelligence/what-is-ai/

[4] https://dexonline.ro/definitie/artificial

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The term intelligence defines the ability to understand, to grasp what is essential, to solve new situations or problems based on previous experience and artificial intelligence fits perfectly into this definition.[1]

But is this enough to consider artificial intelligence as a subject of criminal law, alongside individuals and legal entities?

The person designates a self-conscious individuality and recognized by others, this term also designates the system of psychosocial characteristics that give a social identity to the individual, each person being unique from this perspective.[2]

But if we can accept that artificial intelligence also meets these criteria, artificial intelligence is not capable of joy, of suffering as the philosopher John Locke defined as agents capable of a law, and happiness and misery.[3]

On 08.12.2023, the European Union reached a provisional agreement on the Artificial Intelligence Act. This regulation aims to ensure that fundamental rights, democracy, the rule of law and environmental sustainability are protected from high risk AI, while boosting innovation and making Europe a leader in the field. The rules establish obligations for AI based on its potential risks and level of impact.[4]

At European Union level, the European Commission has sought to classify the types of artificial intelligence. The first category is represented by software, such as: virtual assistants, computer programs for image analysis, search engines, voice and facial recognition systems and the second category is represented by built-in AI, such as: robots, autonomous cars, drones, the Internet of Things.[5]

Computer programs or artificial intelligence software that can cause criminal liability issues are also robots that operate on the Internet, in some regard limited AI systems developed to perform specific tasks. For example, Random Darknet Shopper, a bot (limited AI system) scheduled to go shopping on the Darknet for an art show, bought ecstasy pills among other illegal items. This is despite any such instructions from the programmers, who had given the bot $ 100 in bitcoin to buy various products each week.[6]

Nowadays, vehicles have autopilot functions, they can change lanes without human assistance or have park-assist systems. But several accidents that led to the death of some and in which autopilot vehicles were involved have recently led to several discussions related to their safety systems.[7]

As long as artificial intelligent software does not have legal personality, their situation resembles legal responsibility for damages produced by animals. For example, a horse can harms a human, but will never be held legally liable for his actions. Thus, in order to attract criminal liability, we need to find a legal basis.

The second condition that any natural person must meet in order to become an active subject of a crime is liability which represents the normal psycho-physical state - in terms of conscious understanding and direction of the facts - that all persons, possessing criminal legal capacity, must have.

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[1] https://dexonline.ro/definitie/inteligenta

[2] Dumitru Cristea, Bazele psihologiei sociale, Ed. Universității Titu Maiorescu, București, 2005, p. 84

[3] John Locke, An Essay Concerning Human Understanding (Book II 27th edn, T. Tegg and Son 1836) 234.

[4] https://www.europarl.europa.eu/news/en/press-room/20231206IPR15699/artificial-intelligence-act-deal-on-comprehensive-rules-for-trustworthy-ai

[5] https://www.europarl.europa.eu/news/ro/headlines/society/20200827STO85804/ce-este-inteligenta-artificiala-si-cum-este-utilizata

[6] Mike Power, 'What happens when a software bot goes on a Darknet shopping spree?' The Guardian (London, 5 December 2014)

[7] Peter Stone and others, 'Artificial Intelligence and Life in 2030' One Hundred Year Study on Artificial Intelligence: Report of the 2015-2016 Study Panel, (Research Report, Stanford University 2016) accessed 11 February 2017, p. 18-19.

From the Criminal Code perspective, the active subject of the crime is the natural or legal person who actively commits a crime or participates in its commission as an instigator or accomplice.

With the emergence and development of systems equipped with artificial intelligence, or AI, we are once again in the situation where we need to re-evaluate the system of criminal liability and the subjects of criminal law.

The science of criminal law as part of the legal sciences must respond to the development of society and must find the necessary tools to uphold and preserve the most important social values against dangerous acts.

And it must do so in accordance with the basic principles of the criminal law, because any new legislative solution must be in line with these ideas which guide the elaboration and implementation of the rules of criminal law[1], ideas which must then be reflected in the whole criminal legal system.[2] Among the principles governing criminal law, we must consider the principle of personality of criminal liability that reflects the personal nature of the application and execution of the sentence, Romanian criminal law excluding liability for the act of another.[3]

In order to verify the applicability of this principle in the case of criminal liability of artificial intelligence we can consider the model of criminal liability of the legal person. The doctrine has argued that the personality of criminal law sanctions is compatible with the criminal liability of the legal person as long as the sanction applied to the legal person is directed exclusively against it and does not directly affect its members.[4]

In the light of these arguments, we can consider that a possible criminal prosecution of artificial intelligence not only respects this principle, but ensures that the entire legal system of criminal law guarantees its observance. Admitting the possibility of prosecuting artificial intelligence, we ensure that only those subjects of law who have violated the provisions of the criminal law will bear its consequences, thus avoiding the prosecution of third parties,[5] such as computer program programmers, which from a certain point no longer have direct and effective control over artificial intelligence.

Thus, the development of computer programs equipped with artificial intelligence, meaning the emergence of artificial intelligence, raises legitimate questions about criminal liability for acts committed by artificial intelligence as these computer programs act autonomously or semi-autonomously with minimal human intervention.

According to the positive law, the necessary conditions for a natural person to become an active subject of a crime either have a general character, defining the legal condition of the delinquent in relation to any of the crimes he could commit, or a special character, referring to certain particular requirements expressly defined by different criminal norms those crimes with a special subject.

In this sense, article 113 of the Romanian Criminal Code expressly provides the rule that: "A minor who has not reached the age of 14 is not criminally liable", and, art.30 of the Criminal Code stipulates that: "The deed does not constitute a crime provided by the criminal law committed by a minor who at the date of its commission does not meet the legal conditions to be criminally liable".

The criminal acts committed by the AI, must meet the requirements related to the material element and the subjective side the same as for individuals or legal entities. In order

[1] C. Bulai, *Manual de drept penal*, Ed. All, București, 1997, p. 47

[2] Duvac C., *Personalitatea răspunderii penale în dreptul penal român*, Vector European, 2019, p. 25-30

[3] Duvac C., Neagu N., Gamenț N., Băiculescu V., *Drept penal. Partea generală*, Ed. Universul Juridic, București, 2019, p. 207

[4] F. Streteanu *Drept penal. Partea generală 1*, Ed. Rosetti, Bucureşti, 2003, p. 80

[5] Duvac C., Neagu N., Gamenț N., Băiculescu V., *Drept penal. Partea generală*, Ed. Universul Juridic, București, 2019, p. 226

to be able to prosecute a subject of law, the requirements related to the physical action (the material element) and those related to the mental intention to commit the crime (the subjective side) must be met.[1]

The material element represents the prohibited conduct prescribed by the incrimination norm, i.e. the prohibited action or inaction. The subjective side represents the component of the constitutive content of the crime formed by: guilt, with its forms and modalities. Therefore, in order to be able to prosecute an AI system, it must carry out a prohibited action or refrain from carrying out a mandatory action and also possess the cognitive skills necessary to be aware of it.

In the case of criminal offenses committed by omission or by an action, we must consider whether artificial intelligence can be considered an innocent agent acting on behalf of a person or not.[2] If artificial intelligence does not act according to instructions or is not controlled by a person, especially in the case of artificial intelligence that learns itself from its own interactions or experiences or from the experiences of other artificial intelligences we cannot presume that the criminal act was predictable by the human subject, therefore he should not be held responsible for that criminal act in this case the artificial intelligence being responsible.

This does not exclude the criminal liability of the programmer or of the person who was to supervise the activities of artificial intelligence, especially since in certain situations the programmer or supervisor may be another artificial intelligence.

But in order to be able to retain the criminal responsibility of the artificial intelligence, first it must be proven that it committed the criminal act knowingly, with one of the forms of guilt provided by the criminal law. In this situation, it could be considered that the respective artificial intelligence is responsible from the point of view of the criminal law for that crime.

Intention or guilt, as forms of criminal guilt, are necessary to establish the criminal liability of artificial intelligence. Thus, if we analyse the provisions of art. 16 of the Criminal Code, we can easily observe that there may be situations in which artificial intelligence, although it had all the necessary data at its disposal, did not foresee a certain situation or, although it did, it did not accept it.

In terms of intent, artificial intelligence can act for the clear purpose of committing a certain criminal act or can accept for such a criminal act to be committed Act which the AI does not seek to occur but accepts it in order to achieve another certain goal.

And if in the end we could accept that an artificial intelligence meets the criteria criminal responsibility, we are facing another dilemma. What kind of punishments can we impose to an artificial intelligence?

To answer this question, we can resort to the model of criminal liability of the legal person or to the educational measures applicable to juvenile offenders.

Starting from antiquity cases of punishments applied to communities are mentioned in the form of destruction of cities or subjecting a community to the payment of a collective fine. But does the legal person have its own will? Can the punishment still be effective in the case of a legal person given that it cannot feel the effects of the punishment?

These questions were answered on the grounds that these are cases in which a criminal act was pursued and committed by all the members managing the legal entity. Thus, the sanction applied to the community will be effective because it will determine in the future an attitude of observance of the laws by those who make up the community. So, a punishment imposed to the community that easily chose its leader, who was not attentive to their activity,

[1] https://www.crimemuseum.org/crime-library/criminal-law/actus-reus/
[2] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law 95-96*.

will be effective because it will force the members of that community to proceed with care and seriousness in the future.[1]

Considering the provisions of the International Conventions in criminal matters to which Romania has become a party, which establishes the application of criminal sanctions in the case of legal entities, as well as the commitments assumed by our country in the negotiations for accession to the European Union 278/2006 - regarding the criminal liability of the legal person.[2] The current criminal code preserves the principles that substantiate the criminal liability of the legal person, being maintained the principle of direct liability being established in art. 135 of the Criminal Code that the criminal liability of these persons may be incurred not only by the actions of bodies or representatives, but also by the action of any person.[3]

The Criminal Code stipulates that the punishments applicable to the legal person are the fine, as the main punishment, and the complementary punishments. The criminal fine is the only main punishment that can be applied to legal entities and consists of the amount of money that the legal entity is ordered to pay to the state.

The complementary punishments applicable to the legal person are: dissolution of the legal person, suspension of the activity of the legal person, closure of some working points of the legal person, prohibition to participate in public procurement procedures, placement under judicial supervision, display or publication of the conviction.

Thus, the following sanctioning regime can be imposed to artificial intelligence: the harshest punishment being the deletion of the artificial intelligence software equivalent to the dissolution of the legal person. Then, in order of severity, the suspension of artificial intelligence activity for a certain period of time, the placement of artificial intelligence under surveillance for a certain period of time, the reanalysis of artificial intelligence software and, of course, the publication of the conviction can be considered.

So, given that there are some models of criminal liability and the possibility of imposing a penalty, all that is needed is the manifestation of the will of the legislator in the sense of regulating those situations that society following its` technological development requires of the law.

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[2] Florin Streteanu, „Răspunderea Penală a persoanei juridice în legislaţie şi doctrină. Examen de drept comparat", Revista de DreptComercial, nr.3/1997, Bucureşti.

[3] Duvac C., Neagu N., Gamenț N., Băiculescu V., Drept penal. Partea generală, Ed. Universul Juridic, București, 2019, p. 747

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