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Jokes – Legally Speaking (Part two)

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ABSTRACT: Continuing the legal research on jokes, this article outlines how jokes, satire and sarcasm – all forms of discrepancy between appearance and essence – may affect the validity of contracts; also, the research follows the civil legal implications of making jokes or pranks on someone focusing on the liability that stems from law. Jokes, satire and sarcasm are, most of the times, taken lightly but nevertheless, if certain conditions are met, they can produce legal consequences everyone must be aware of.

KEYWORDS: jokes, pranks, jocandi causa, null contracts

1. Joking – a contractual perspective

There has always been a strong correlation between the level of economic development of a country and the frequency contracts are being concluded; the contract of sale, stemming from a perfected contract of exchange, represents one of the pillars of a healthy market economy since ancient human times. (Rosetti-Balanescu and Baicoianu 1943, 277)

The law must provide versatile juridical atoms that make an efficient legal system for the ever growing and developing free market. This was the premise for Romania's new legal framework renewal of the Civil Code (entered into force 2012), Civil Procedural Code (entered into force 2013), Criminal Code (entered into force 2014) and Criminal Procedural Code (entered into force 2014).

The adoption of the new Civil Code represented a change in the way Private Law was set up: the old system of autonomy of civil and commercial field has been abandoned, and the unified theory of private law was embraced. This was a change long overdue, considering the old Civil Code was adopted in 1864, in a time where contracts, compared to today's standards, were scarcely concluded.

The theory of Romanian contract law, borrowing from the French definition for contract (Art. 1101 of the new French Civil Code or Art. 1001 of the old French Civil Code), starts from the premise that a meeting of free wills is enough for it to be considered a contract; of course there are some exceptions where the law stipulates certain obligations especially regarding form in order for said contract to produce effects – for example, the transfer of immovable property operates in the Land Registry held by the National Agency of Cadaster and Land Registry based on a solemn deed, perfected by the public notary or, in the case of usucapion, a judge's formal ruling; thus, a verbal contract will not produce the effect of property transfer in this case.

Having in mind the legal compulsion for a free will to manifest itself with the intention of producing legally binding effects, a question arises as to what happens if an agreement does not meet these standards: Is a contract valid if a subject accepts or makes an offer jokingly?

The answer to this question proves great implications on the very stability of transactions. The reason for the application of the *pacta sunt servanda* principle, that promotes the obligation of the word given by the parties to the contract, is to avoid the conclusion of *jocandi causa* contracts, as well as to guarantee the security of legal relations, in the sense that it does not allow the modification of the binding relations without obtaining the consent of the other party (High Court of Cassation and Justice of Romania 2013, 6).

A subject's will expressed to conclude a contract may be analyzed by two separate aspects: an internal process represented by the intellectual operation, and an external element represented by the manifestation of the psychological process (Buffelan-Lannore and Larribau-Terneyre 2010, 254). It may be concluded that juridical will is composed of: a) consent; and b) cause, or the purpose for which the contract was agreed.

According to Art. 1169 of the Civil Code, the only restrictions pertaining to contracts are the limitations imposed by the law, public order and the principles of morality; thus, having in mind these limitations, the parties may agree upon any contract, having the liberty of establishing the content of their clauses. (Boroi and Anghelescu 2012, 134)

Coming back to what joking represents and how it can interact with contracts we found three distinct situations where facetiousness affects the very validy of a contract: a) *jocandi causa* – for when a person enters an agreement without the seriousness intended for the parties to be legally binded; b) an impossible or exaggerated object of an obligation; or c) impossible condition.

The study of juridical will under different jurisdictions offers us different approaches to the preference of the internal (real) will or external will when establishing the validity of a contract. The Romanian Civil Code, like the French Civil Code, is partial to the real will principle, where the German Civil Code, like most Civil Codes under Islamic law, prefer the objective conception that grants preference to the declared will.

According to the definition of a contract offered by the Romanian Civil Code, an important element of a valid contract is that consent must be expressed with the intent to produce juridical effects (*animo contrahendi negotii*).

Among the situations when consent is not given with the intent to produce legal effects are as follows: the will is expressed too vaguely; it was made with *reservatio mentalis* and the other party knows; purely potestative suspensive condition of the debtor, meaning a condition whose realization depends exclusively on the will of the debtor; and lastly, the will has been expressed out of friendship, curtesy, or in jest (*jocandi causa*).

According to Art. 1235 Civil Code, the cause of a juridical act is the reason that determined each party to enter the agreement, thus the obligation is nothing more than a means through which their goals are reached. In order for the contract's cause to be valid it must exist; it must be lawful and it must be in accordance with good morals (Ciochină 2019, 50-51). The classical example of lack of cause is lack of discernment due to the subject's inaptitude to adumbrate the contracts' consequences. In our opinion, there is, however, another situation where we find lack of reason to contract even though a manifestation in the sense of contracting has been expressed: an agreement expressed in jest.

Jocandi causa represents a distortion of the juridical will that affects the validity of the contract. As mentioned before, juridical will is composed of consent and cause. Entering a contract jokingly affects both a) consent, because according to Art. 1204 Civil Code, it must be *serious*, free and expressed wittingly; and b) the cause of the contract, because the purpose of the contract doesn't exist, it doesn't respond to any envisioned economical need.

The sanction for *jocandi causa* is relative annullability of the contract, but we must keep in mind that a contract is available even though the cause is not expressly mentioned, the existence of which is being presumed until contrary evidence (Art. 1238-1239 Civil Code). Thus, the burden of proof for the joking manner in which a person expressed it will lie upon the said person.

In countries where the subjective theory of the manifested will prevailed, we can see the importance of the validity of the contract's cause; however, some countries that prefer dynamic security of the civil circuit, opted for the objective theory which gave precedence to the declared will. The later theory typical is represented by the German school of thought having in mind that the law governing contracts is interested in the externalization of wills, and not so much on the psychological aspect of contract formation (Bechor 2007, 272).

Saleh (1990, 107) stated in his study on Islamic and Arab contracts: "What can be inferred [...] is that a contract is formed by the conjunction of two concordant declarations of will which either has an immediate effect on the object or objects *in rem* related to their accord or generates an obligation whose performance is deferred to a later stage".

Traditional Islam school of law offers two different approaches to contract formation: Hanaffi school of law had a great influence in Jordan, where the Civil Code adopted the overt will theory; whereas in Kuwait, for example, the Civil Code follows the Malaki teachings that promote inner will. (Saleh 1990, 110)

Title 3 of the German Civil Code, entitled "*Vertrag*" does not offer a definition for contracts, nor declaration of will; it does, however, prescribe in section 118 that a declaration of intent not seriously intended which is made in the expectation that its lack of serious intention will not be misunderstood is void (Zimmermann 2006). There is also an area of contract law where cause, or consideration as it is known in Common law systems, is not important: in matters of commercial contracts.

According to Art. 3.1.2. of UNIDROIT Principles of International Commercial Contracts 2016, a contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement, limiting the possibility of *jocandi causa* contracts. Thus, taking into account that in commercial matters there can be no jest, between professionals, UNIDROIT extends the dispensation of cause in all commercial contracts; the Vienna Convention on International Sales of Goods stipulates in a similar manner, but Art. 29(1) of CISG only applies to international contracts on sale of goods. (Bobei 2016, 99-100)

Moving on, another way in which a contract may be manipulated jokingly on the expense of a co-contractor is through an exaggerated and impossible object of a contractual obligation. Of course, there can't be talks of punitive damages based on non-compliance in a contract where one party assumes the obligation of bringing the moon to the other (Alexandresco 1898, 110). The object of an obligation, be it a good or an action or abstention from an action, must exist, or the least it must be physically or legally possible. Under the sanction of absolute nullity, Art. 1226 par. 2 imposes the object of the obligation to be determined or at least determinable and lawful. The object of the assumed obligation may take two forms: either the transfer of a right to the creditor or a performance from the debtor. Any material implausibility in determining the object of the obligation makes the contract objectless thus null (*imposibilium nulla est obligatio*) (Afrasinei et al. 2012, 489-490). Not far from the ludicrousness of the previous situation is the premise of an impossible condition.

According to Art. 1402 Civil Code, the condition that is impossible, unlawful and against principles of morals it is considered unwritten, unless the condition represents the cause of the contract, when the sanction is absolute nullity. In the old Civil Code, Art. 1009 provided that the condition of not doing something impossible doesn't make the obligation contracted in such modality to be null; it is an interpretation that holds under the new Civil Code. An impossible condition of an obligation may have material or juridical limitations which make it impossible to perform. Thus is the contract in which a person promises to donate an apartment to the someone under the condition of receiving information telepathically. (Costin and Costin 2010)

2. Joking – a juridically significant fact

After analyzing jokes in the context of contracts, now we must focus on jokes, satire and pranks as juridical facts that produce legal effects. The difference between contracts and juridical facts is that, even though both are sources of rights and obligations, a contract generates them through common will while a juridical fact generates rights and obligations by the power of law, without the consenting will of the performer (Dogaru and Draghici 2009, 202).

Juridically significant facts consist of behavior or events to which legislation attaches legal consequences. Juridical events are circumstances produced independently from the will of a subject and sometimes even from their perception or knowledge (like thunder, passing of time or actions out of negligence or imprudence). A human behavior, unlike juridical events, are human voluntary deeds to which the law binds certain juridical effects even though the subject did not intend for those effects to be created. They may be lawful (eg. *negotiorum gestio*, unowed payment, unjust enrichment) and unlawful (civil delict). Jokes and pranks are often sources of prejudice and sorrow, making the subject entitled to reparations.

The right to dignity is a social value that in Romania has Constitutional protection. Art. 30 par. 5 states that freedom of expression cannot prejudice the dignity, honor, private life of the person, nor the right to one's own image. Also, according to Art. 1349 par. 1 Civil Code, every person has the duty to respect the rules of conduct imposed by the law or local custom and not to harm, through his actions or inactions, the rights or legitimate interests of other people. Whoever, having discernment, violates this duty is responsible for all the damages caused, being obliged to repair them in full.

In a surprisingly manner, it has been noticed that on the level of the European Convention on Human Rights there is a surprising textual absence of the word "dignity", even though through jurisprudence the European Court of Human Rights sought to fill the gaps (Costa 2014, 401).

ECtHR made a strong correlation between "dignity" and degrading conduct: it was held that degrading treatment happened "the applicant was subjected to a strip search in an inappropriate manner, such as the making of humiliating remarks (Iwańczuk v. Poland, 2001, § 59; see also Valašinas v. Lithuania, 2001, § 117 where the applicant was stripped naked in front of a female prison officer and prison guards examined his sexual organs as well as the food he had received without gloves" (ECtHR Registry 2022, 10). Of course, protecting dignity must not become pretext for restriction of rights of individuals to free speach (Fikfak and Izvorova 2022, 24). A delictual civil liability case may be brought to court against a person that made jokes in poor taste that affected the reputation or dignity of a subject, or pranks that caused prejudice.

Harm is an essential element of delictual civil liability; lack of harm does not give rise to juridical action. The negative effect of one's deed might take material or moral form and it needs to be established a direct causal relationship.

The prejudice caused by joking and pranking we may find in two natures: patrimonial prejudice and nonpatrimonial prejudice. Patrimonial prejudice may refer to damages suffered that can readily be economically evaluated like the destruction of a good; nonpatrimonial prejudice can't be easily evaluated in money and usually imply infringements on honor, reputation or dignity. The damages sought for the later are called moral damages.

In a recent case, Cluj-Napoca Court, Romania, offered a teacher moral damages equivalent to 6.000 Eur (30.000 lei) to be paid by the parents of two 7th grade students for making fun by editing pictures of the teacher and creating a Facebook page in her name where similar pictures were uploaded, all in a manner that affected her honor and reputation.

3. Conclusions

Jokes and pranks, seen as juridical facts, in certain cases can be a source of great sorrow. The Bible, in Ephesians 5: 3-4, addresses the issue of joking stating: "Let no dirty words be heard, nor rash words, nor bad jokes, which are not proper; but rather words of thanks". In a similar manner, Islam teachings touch on jokes and pranks: a) making fun of Islam is forbidden; b) the jokes should be truthful; c) pranking people by scaring them or making fun of them is forbidden; d) excessive and persistent joking is also forbidden.

Joking in contracts can have different outcomes: the absolute nullity of a contract/obligation, relative nullity of a contract/obligation, reinterpretation of the affected contract/obligation. Art. 1266 Civil Code states that contracts shall be interpreted through the concordant will of the parties and not through the literal sense of the terms. Thus, a contract to borrow money where the lender states he wants the money back "when pigs fly," is obviously not valid as a lending contract but it may be considered a donation. Even though we usually treat humor lightly, not every time the liability waver "it's just a joke!" protects us from civil juridical repercussions, be it concerning contracts or our actions.

References

Afrasinei, Mădălina, et al. 2012. Noul Cod civil: comentarii, doctrina, jurisprudenta (The new Civil Code: comments, doctrine, jurisprudence). Bucharest: Hamangiu Publishing House.

Alexandresco, D. 1898. *Explicatiunea teoretica si practica a dreptului civil roman in comparatiune cu legile vechi si cu principalele legislatiuni straine (Theoretical and Practical Explanation of the Romanian Civil Law*). Iasi: Nationala Publishing House.

Bechor, Guy. 2007. *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)*. Leiden-Boston: Brill Publishing House.

Bobei, Radu Bogdan. 2016. *UNIDROIT Principles of International Commercial Contracts 2016*. Bucharest: C.H. Beck Publishing House.

Boroi, G., Anghelescu, C.A. 2012. *Curs de drept civil. Partea generala (Civil law course. the general part),* ed. a 2-a, Bucharest: Hamangiu Publishing House.

Buffelan-Lannore, Y., Larribau-Terneyre, V. 2010. *Droit civil. Les obligations*. Paris: Sirey Publishing House.

Ciochină, Daniela. 2019. *Drept civil. Contracte (Civil law. Contracts)*. Bucharest: Universul Juridic.

Costa, Paul. 2014. *Human Dignity in the Jurisprudence of the European Court of Human Rights*. In Christopher McCrudden (ed), Understanding Human Dignity (2014). Oxford University Press.

Costin, M.N., Costin, C.M. 2010. *Dictionar de drept civil de la A la Z (Dictionary of civil law from A to Z)*. Bucharest: Hamangiu Publishing House.

Rosetti-Balanescu, I., Baicoianu, Al. 1943. *Drept civil roman. Studiu de doctrina si jurisprudenta (Romanian civil law. Study of doctrine and jurisprudence)*, vol. II, Bucharest: Socec Publishing House.

Dogaru Ion, and Draghici Pompil. 2009. Bazele dreptului civil. Vol. III Teoria generala a obligatiilor (Basics of civil law. Vol. III The general theory of obligations). Bucharest: C.H. Beck.

ECtHR Registry. 2022. *Guide on Article 3 of the European Convention on Human Rights. Prohibition of torture*. 1st ed. Available online at: https://www.echr.coe.int/Documents/Guide_Art_3_ENG.pdf.

Kikfak, Veronika and Izvorova Lora. 2022. *Language and Persuasion: Human Dignity at the European Court of Human Rights* in Human Rights Law Review, 2022, vol. 22. Available online at: https://doi.org/10.1093/hrlr/ngac018.

High Court of Cassation and Justice of Romania, 2nd civil section, decision nr. 3913/2013.

Saleh, Nabil. 1990. *Definition and Formation of Contract under Islamic and Arab Laws*. In Arab Law Quarterly, Vol. 5, No. 2 (May, 1990), pp. 101-116. Brill Publishing House.

Timișoara Appeal Court, Administrative contentious and fiscal section, decision nr. 704/2000.

Zimmermann, Reinhard. 2006. *The German Civil Code and the Development of Private Law in Germany*. Oxford U Comparative L Forum 1. Available online at: https://ouclf.law.ox.ac.uk/the-german-civil-code-and-the-development-of-private-law-in-germany/.