

News and Controversies Regarding the Contravention Liability of University Staff According to the Provisions of the Romanian Law on Higher Education

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Abstract

Objectives of the study - In Title V of Law no. 199/2023, the law on higher education, the legislator intended to regulate a form of liability that can be incurred by higher education personnel, formulated under the title "Legal liability". Unlike Law no. 1/2011 which specifically regulated forms of disciplinary, patrimonial and contravention liability, the current law on higher education, in art.259 does not specify in a concrete way what types of liability the legislator wanted to take into account at the time of drafting this normative act. However, in the existing wording, in some paragraphs of the aforementioned article, certain unlawful conducts that fall within the scope of the contravention are criminalized, conducts that can also be committed by higher education personnel. The research methods used – in this documentation we used the analytical and synthesis method. Results and implications of the study – Even if the legislator's intervention to amend the entire Article 259 is a recent one (the law entered into force at the beginning of September 2023 and the amendment took place in January 2024), we cannot fail to notice the haste with which this intervention was made. Even after this amendment, difficulties in law enforcement will arise in practice. This is because, on the one hand, it is provided in art.259 para. (6) that for the contraventions under para. (5), the finding shall be made by police officers or agents within the Ministry of Internal Affairs "...with competences in the field" and on the other hand, the finding is made at the "reasoned request from the higher education institution". The study concludes with the advancement of a proposal for a ferenda law to amend this article.

Keywords: contravention liability, higher education staff, bachelor's degree papers, dissertation and PhD., ascertain, subject of the contravention.

JEL Classification: K31, K39

DOI: 10.62768/PLPA/2024/13/4/07

Please cite this article as:

Gheorghe, Lucian, „News and Controversies Regarding the Contravention Liability of University Staff According to the Provisions of the Romanian Law on Higher Education”, *Perspectives of Law and Public Administration* 13, no. 4 (December 2024): 566-572.

Article History

Received: 22 August 2024
Revised: 10 October 2024
Accepted: 05 November 2024

1. Introduction

In Title V of the Higher Education Law, the legislator intended to regulate another form of liability that can be incurred by higher education personnel, formulated under the title "Legal Liability". Unlike Law no. 1/2011, the old law on national education, which specifically regulated forms of disciplinary, patrimonial and contravention liability, the current law on higher education, in art. 259, does not specify in a concrete way what typologies (forms) of liability the legislator wanted to take into account at the time of drafting this normative act.

However, in the existing wording, in some paragraphs of the aforementioned article, certain unlawful conducts that fall within the scope of the contravention are criminalized, conducts that can also be committed by higher education personnel.

The novelty of this scientific approach lies in the fact that it analyzes the contravention liability as regulated in the higher education law, identifies the recipients of these regulations, researches the changes already made to this relatively recent normative act that came into force, but also advances some proposals to supplement the law as a result of some lapses of the legislator both at the time of adoption and of the amendments made.

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The article is structured on 5 sections, and in order to describe the operation of interpreting the legal norms, in its realization we used the analytical method and the synthesis method.

The conclusions were materialized by advancing proposals to complete the analyzed normative act.

2. The active subject of contravention liability. Possible controversies regarding the membership of the university community

Chapter XX, section 1, art.166 para.2 provides that "persons who had or who have been members of the university community and have committed misdemeanours according to art. 168² after the date of entry into force of the law on higher education shall be civilly, administratively, professionally or disciplinarily, as the case may be." The verification of violations of the norms of university ethics and deontology provided by the legal provisions in force and by the regulations of the higher education institutions is carried out by the university ethics commissions³.

Regarding the phrase "member of the university community", Article 14 of the Higher Education Law provides "The university community is made up of students, doctoral students, trainees, teaching and research staff, teaching and auxiliary research staff and administrative staff."

Therefore, even in the case of finding deviations on the administrative-contravention component, a member of the university community may be subject to legal consequences, depending on the seriousness of the act committed. However, the legislator's wording regarding the persons who were part of the category of teaching and research staff, teaching and auxiliary research staff and administrative staff is questionable. In essence, those acts, as provided for in Article 259 of the law, are regulated as deviations with the entry into force of the current law on higher education.

According to art. 15 para. (2) of the Romanian Constitution, the civil law provides only for the future. This text "enshrines the unanimously accepted thesis that the new law must respect the sovereignty of the old law, so that it cannot destroy or modify the legal past, and, conversely, the old law must respect the sovereignty of the new law."⁴ Also, the provisions of the current Civil Code do not apply retroactively, being of immediate application to "acts and facts concluded or, as the case may be, produced or committed after its entry into force, as well as to legal situations arising after this moment".⁵ Thus, it can be observed that the new law would not apply to pre-existing legal situations, which are in principle subject to the old law, in other words the law in force at the time of their conclusion/appearance.

The established doctrine, analyzing the issue of the non-retroactivity of the civil law, held that: "it is natural and logical that the past escapes the application of the new civil law, because the latter, being essentially an order, cannot require that an act take place in accordance with its provisions until after it has entered into force. Moreover, the subject of law who would try to take into account a possible future law, by anticipating its content, would disregard the law currently applicable and would expose himself to its sanctions. Moreover, the vocation of the new law to invalidate the previous legal situations would create uncertainty in the civil circuit and would instill distrust in the law, as any possibility of predictability and stability would disappear."⁶ Therefore, in its current formulation, the text of Article 166 paragraph 2, on the one hand, retains certain deviations (including the contravention provided for by Article 259) provided by the current law on higher education and for persons who are no longer members of the university community⁷ and had practically no way to

² Those deviations that concern the norms of university ethics and deontology.

³ Article 5 of Order no. 6869/2024 of September 30, 2024 for the approval of the Framework Regulation on the organization and functioning of university ethics commissions, published in the Official Gazette of Romania no. 990 of 3 October 2024.

⁴ Supreme Court of Justice, Civil Decision no. 281/2002, <https://legeaz.net/spete-civil-csj-2002/decizia-281-2002>, accessed on 01.10.2024.

⁵ Art.6 para.5 of the Civil Code.

⁶ Lavinia Tec, Mircea Dub, Doru Traila, Sebastian Bodu, Radu Rizoiiu, Marius Scheaua. *Codul civil – Comentat si anotat. Despre legea civila. Despre persoane. Art. 1-257*, Rosetti International Publishing House, Bucharest, 2018, p. 19.

⁷ They no longer have a legal relationship with a higher education institution at the time of the entry into force of Law no. 199/2023.

commit them, and on the other hand, These deviations, as regulated by the current Law on Higher Education, were not criminalized on the date when they were members of the university community.

In view of these provisions, I consider that the engagement of any form of liability provided by Article 166 paragraph 2 can be ordered only in the charge of the teaching and research staff, teaching and auxiliary research staff and administrative staff, who currently have this quality and not those who had this quality.

3. Typology of contraventions

Given that the title of the article refers to higher education staff, I will analyze only those contraventions⁸ that can be committed to higher education personnel (individuals) not for contraventions that can be applied to entities, legal entities⁹.

Thus, in Article 259¹⁰, sentence II, it is stipulated that "..... The supervisors of the bachelor's, dissertation and doctoral works have the duty of diligence in terms of verifying the conformity of the scientific works in relation to the specific requirements of an original creation. "

From the structure of the respective text, it is explicitly apparent that the supervisors of the bachelor's, dissertation and doctoral theses, holders of a teaching position, have an obligation of diligence, an obligation that is related to the verification of the conformity of the bachelor's, dissertation and doctoral works, in relation to the specific requirements of an original creation.

Therefore, the law on higher education states that this form of liability can be incurred by the supervisors of bachelor's, dissertation and doctoral works, but only in terms of verifying the conformity of the coordinated scientific works, in relation to the specific requirements of an original creation. This duty of the supervisors of the bachelor's, dissertation and doctoral works is, however, as I have said, one of diligence. It is obvious that in our situation, their duty of care is a legal obligation, arising from the text of the law. The supervisors of the bachelor's, dissertation and doctoral works must act with care, competence and attention in fulfilling their obligation, but do not guarantee that the desired result will be achieved¹¹. In exercising that duty of care, I consider that those teachers must act in a reasonable manner. For the average person, reasonableness can also be inspired by the reasonable man standard in the common law system, which refers to an ordinary person, who does not represent perfection and who is not expected to behave like a hero.

Also important is paragraph (2) of Article 1.480 of the Civil Code, which establishes a special rule for assessing the fulfillment of the duty of care, in the sense that it is assessed taking into account the nature of the activity carried out. This situation also applies to supervisors in bachelor's, dissertation and doctoral works. Therefore, in this situation, we are faced with an obligation related to a professional activity carried out, and the assessment of due diligence must take into account the nature of that activity. The specificity of the duty of care "consists in the fact that the debtor's obligation does not consist in the fact of achieving a certain result, but in that of exercising all the necessary diligence, all his means and (professional) efforts in order for the desired result to be achieved".¹² As teachers, I believe that in carrying out this professional activity they should act as

⁸ Regarding the legal regime of contraventions, see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*. Ed. C.H. Beck, Bucharest, 2016, p. 213-230; Cătălin-Silviu Săraru, *Dreptul administrativ - principalul instrument de reglementare a activității administrației publice*, Ed. ASE, Bucharest, 2020, p. 116-121; Cătălin-Silviu Săraru, *Drept administrativ. Curs universitar*, vol. II, Ed. Universul Juridic, Bucharest, 2024, p. 160-165; Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, Ed. All Beck, Bucharest, 2005, p. 235-270; Anton Trăilescu, *Drept administrativ. Partea specială*. 3rd ed., Ed. C.H. Beck, Bucharest, 2023, p. 250-278; Marta Claudia Cliza, Constantin Claudiu Ulariu, *Drept administrativ. Partea specială*, Ed. C.H. Beck, Bucharest, 2024, p. 450 et seq.; Emilia-Lucia Cătană, *Drept administrativ*, 3rd ed., Ed. C.H. Beck, Bucharest, 2023, p. 529-546; Ana Vasile, *Drept administrativ*, Ed. Pro Universitaria, Bucharest, 2020, p. 214-228.

⁹ For example, the contravention provided for in Article 259 paragraph 4 can only be committed by a legal entity that has previously obtained certain authorizations from ARACIS for carrying out educational activities within programs or specializations.

¹⁰ Article 259 has already been amended, less than 1 year after the entry into force of the Higher Education Law, by Law no. 427 of December 29, 2023, published in the Official Gazette. no.2 of January 3, 2024.

¹¹ I exemplify this sense the duty of the doctor to act with all the prudence and diligence required by medical science and ethics, in order to cure the patient of a certain disease, the failure to achieve the desired result not automatically meaning the failure to fulfill the obligation. Also, in principle, the obligation assumed by the lawyer towards his client is an obligation of means, and not of result.

¹² Alexandru Ticlea, „Răspunderea patrimonială a consilierilor juridici”. *Dreptul* 7/2018, p. 44-51.

competent professionals, demonstrating the necessary expertise in the respective field.¹³ In conclusion, in the case of legal liability on this duty of diligence of the supervisors of the bachelor's, dissertation and doctoral works (ensuring the originality of the content of the doctoral thesis), it could be engaged by the one who considers himself prejudiced, only in the situation in which the supervisors of the bachelor's, dissertation and doctoral works have shown superficiality and have acted with negligence, unprofessionalism, and the diligence necessary to achieve a well-determined goal (for example, guaranteeing the obtaining of the doctoral degree) cannot be imputed to him.

I consider that the most plausible hypothesis as regards the form of liability that can be invoked is, specifically, contractual liability, given that the terminology adopted by the legislator does not explicitly indicate a certain form of legal liability. In relation to contractual liability, the issues related to the existence of the act and the content of the guilt can be complex, especially in situations where obligations of result or means are assumed. Further, paragraph 2 of Article 259 of the Law on Higher Education criminalizes the act of making an offer for sale, sale or making available to interested individuals, for any reason, works in order to be used as scientific works, reports, projects, graduation, bachelor's, diploma, dissertation or doctoral works or in order to promote evaluations.

Therefore, it follows from the legal text that the material element of this contravention can be made through several forms, namely, the offer for sale, the sale itself or the making available to interested persons of works in order to be used later as scientific works or to be used to promote evaluations. It does not matter how the offer for sale or the sale itself is made (directly, through other people, electronic means, web resources). Obviously, since it is a sale, we must have a price.

With regard to the action of making the respective works available to interested persons, I specify that this is carried out through any means through which access to the respective materials is ensured. It does not matter whether the provision is made for a fee or free of charge.

I believe that the active subject of the incriminated conduct can be any person, in the sense that the requirement is also fulfilled when the person comes from both the teaching and research staff, the teaching and auxiliary research staff, the management staff in higher education and from the administrative staff in higher education.

It does not matter whether the person interested (the recipient) in acquiring such works has or is not a student, master's student, doctoral student. For the engagement of legal liability, the quality of the one who makes the offer is important. If he is part of the higher education staff, he will be legally responsible. I consider that this act is imputable to the author only if it is committed with direct intent, qualified by the purpose pursued, because this requirement emerges from the wording of the legal text ".....of works with the purpose of being used as works".

The direct intention (qualified by the goal pursued) is characterized by the fact that the perpetrator foresees the result of his act (the intellectual factor) and aims to produce it by committing that act (the volitional factor). By "foreseeing the result" we mean the ability of a person to have the representation of it, the possibility of realizing that the result will occur if a certain action or inaction is performed. The anticipation of the result represents the knowledge deduced from the exact and prior representation of the action "*.....making available ... scientific papers, reports, projects, graduation, bachelor's, dissertation or doctoral works or in order to promote evaluations*".

When the perpetrator does not know or miscalculates the action or inaction he performs, implicitly he no longer foresees what will follow, therefore, due to the factual error regarding the action or inaction, there will be no guilt in the form of intention. What is interesting to emphasize is the fact that initially, at the time of the entry into force of the law (September 2023), the legislator had not established and had not provided for what kind of sanction was applied to the active subject of such conduct, thus leaving his accountability without finality. Only through the intervention in January 2024¹⁴ was the regulatory framework completed, with a sanction also provided for this illicit conduct. Paragraph 3 of Article 259 provides for an unlawful conduct that can be held against both teaching and research staff, teaching and auxiliary research staff, management staff in higher

¹³ If a person practices in a form of professional organization, he must act according to the special incident legislation.

¹⁴ By Law no.427 of 29.12.2023, published in the Official Gazette. No.2 of January 3, 2024.

education and administrative staff in higher education. This is the one provided for in paragraph 6, namely "it is forbidden to buy works in order to be used as scientific papers, reports, projects, graduation, bachelor's, diploma, dissertation or doctoral works or in order to promote evaluations."

In this variant, a certain quality is not required for the person who buys, meaning that people who are part of the category of higher education staff can also buy such works, obviously when they have a quality (e.g. doctoral student, etc.) and the purchase is made in order to promote evaluations or to be used as scientific works.

From a semantic point of view, the two modalities of the material element of the constituent content of the contravention are different, namely to promote¹⁵ and to be used¹⁶, but the purpose is the same. The conclusion is justified because even in the case of using those works for a certain purpose and in the case of passing evaluations that were also made on the basis of those works, the active subject obtains an advantage for himself, which can be a diploma, a certificate or another academic recognition. Obviously, if they are not used for the purpose required by law, I consider that the constituent content of the contravention is not achieved. The form of guilt is the direct intention, qualified by the purpose pursued and the act is a contravention, the fine being between 100.000 and 200.000 lei.

4. Finding contraventions

A final aspect that I would like to address in relation to contravention liability is that of the bodies empowered to ascertain these facts. Thus, paragraph 6 of Article 259 stipulates "The finding of the contravention and the application of the contravention fines provided for in para. (5) shall be made by the police officers or agents of the Ministry of Internal Affairs, who have competences in the field, at the reasoned request of the higher education institution".

I believe that it is a lacking regulation of the legislator, even after the recent intervention on the text of the law carried out in January 2024.

This is because, on the one hand, it is provided that for the contraventions under para. (5), the finding shall be made by police officers or agents within the Ministry of Internal Affairs who have competences in the field and, on the other hand, the finding shall be made at the motivated request of the higher education institution. Regarding the first aspect, the phrase that they have competences in the field is at least debatable and confusing. The Romanian Police is part of the Ministry of Internal Affairs and is the specialized institution of the state¹⁷, which exercises attributions regarding the defense of the fundamental rights and freedoms of the person, of private and public property, the prevention and detection of crimes, the observance of public order and peace, under the conditions of the law. In carrying out the duties incumbent on him, according to the law, the policeman is vested with the exercise of public authority and has the right to ascertain contraventions and to apply contravention sanctions, according to the law. It is obvious that we are talking about a competence given by law to any police officer, namely that of finding contraventions and applying contravention sanctions, and not a distinct procedure to specialize certain police officers and agents to ascertain and apply sanctions to this normative act, to Law no. 199/2023.

At this time, there are no provisions specifically regulating that certain officers and agents are selected on the basis of criteria that would specifically confer on them this power, i.e. to find contraventions for those acts. The finding of contraventions is therefore a general competence of any police officer, given by an organic law, and an intervention in this regard must also be carried out through a normative act of the same rank.

It cannot be admitted that by normative acts issued by the minister, the inspector general of the Romanian Police, etc., such a competence given to a policeman by the law on organization and functioning can be limited. We must not confuse the hypothesis or assimilate it with the situation of the policeman who has the quality of judicial police (the procedure of granting this quality to certain

¹⁵ That is, to successfully finish a class or a year of education.

¹⁶ Which is used for a certain purpose.

¹⁷ Art.1 of Law no.218/2002, republished in the Official Gazette no. 170 of March 2, 2020.

policemen is also questionable, as is the traffic policeman, etc.) who has attributions in the handling of criminal cases. In relation to the second aspect, which the recent amendment of January introduced, it is stated that the procedure for ascertaining those contraventions, as regulated, will materialize only at the reasoned request from the higher education institution.

On the contrary, I conclude that if we do not have such a request, the commission of a contravention could not be done. That is, from a practical point of view, there is the hypothesis that, even if the higher education institution becomes aware of such a situation that falls within the scope of the respective contraventions and remains passive, for any reason, the finding and sanctioning of the facts escapes the law.

Moreover, the new regulation tells us that the request must be motivated, but does it not specify what would be meant by this, that is, it must be a motivation in fact and in law or a simple notification?

5. Conclusions

The reforms in the education system, before reaching the goal proposed by the legislator and desired by the Romanian society, have frequently been the subject of discussions, some pertinent and objective, others remaining subsumed only to the achievement of political desires.

Reality has shown us that in the last two decades, we have witnessed an obvious deterioration in the quality of Romanian education, despite the procedures and institutions created to ensure quality.

Higher education teachers are a main vector in the landscape of the university community, whether they hold a teaching position as defined by the current law on higher education,¹⁸ or whether they hold a quality such as that of doctoral supervisor or member of certain evaluation, analysis commissions, etc. Of all these situations, a teacher who carries out his activity in the university environment may, when he violates certain legal provisions, be subject to legal, administrative, professional or disciplinary consequences.

Through its content, Law no. 199/2023 explicitly regulates certain forms of legal liability that can be imposed on higher education staff and in other situations, even if they are introduced as a novelty, it does not provide us with an express definition or refer to certain rules as applicable in the respective field. Regarding the contravention liability, even though the newly introduced regulations, I believe that there is room for arbitrariness and subjectivism in the procedure of ascertaining the respective contraventions both in terms of the quality of the ascertaining bodies and in terms of the notification of the respective facts. A reasoned request on the part of the university nevertheless presupposes a substantiation on the factual and legal situation, which would amount to an interference in the competence to ascertain and analyze the circumstances of the commission of an offence, which is beyond any representative of a university.

The assessment of the factual and legal situation in this contravention sphere must remain the responsibility of only those who are empowered to do so.

Taking into account the provisions of this article, I propose that Article 259 para. (6) of Law no. 199/2023 to be reformulated as follows: "(6) The finding of the contravention and the application of the contravention fines provided for in para. (5) shall be made by police officers or agents within the Ministry of Internal Affairs".

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¹⁸ Assistant professor, lecturer/head of university papers, associate professor or university professor.

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