

## DO WE STILL NEED THE INSTITUTE, CALLED LIABILITY FOR GRAVER CONSEQUENCES?

Slovenia at this very moment is in the process of remodelling its substantive criminal law, including the special part of its criminal code and among others also several incriminations including so called graver consequences. In 2020 an approximately 80 articles strong amendment to the existing Criminal Code of Slovenia (CC-1) should be adopted and put in action, including some new graver consequences in different existing as well as new incriminations. That means, that Slovenia decided not to abolish the given institute in its criminal law. But is this the best possible decision?

In continental Europe the liability for graver consequences is a rather common legal institute, considered traditional. It is found in many modern laws and criminal codes around the world<sup>1</sup>. The legislator's attempt of formulating it in the best possible way in the present CC-1 looks as follows (Art. 19): *"If a graver consequence has resulted from the committing of a criminal offence for which there is a heavier sentence provided under the statute, such a sentence may be imposed on the perpetrator on condition that he has acted negligently with respect to the occurrence of such a consequence."*

The wording is rather clear but the purpose, the reason of the provision, of the sheer existence of this institute looks far from simple. After some more thorough studying it turns out rather quickly, that a lot of states are not able or willing to use this institute precisely and systematically. Slovenia is one of them and it should act as an example, a typical case in this short paper.<sup>2</sup>

If we understand the institute of liability of graver consequence inside the special part of the criminal law as legislator's friendly warnings, that cumulations of threatening and injuring of the same criminal legal goods, deriving from the same act of perpetrator can occur or that cumulations of threats to and injuries of several legal goods, deriving from the same act of perpetrator can occur and that is why we have to deal with potential concurrence of offences, we have a clear case of silly wasting of energy and space in the general as well as in the special part of the criminal legislation. One can even say that from this point of view this is one of the roughest forms of redundancy in law.

It is obvious, that the institute of liability for graver consequence, if understood as a crutch for users of the criminal code, who are not able and willing to learn and use the theory of concurrence of offences and deal intellectually with the theory of criminal legal goods and the consequence as an phenomenon of the theory of the general part of substantive criminal law, is

very strange and should be abolished as clearly redundant.

Another possibility is, that we understand the institute of liability for graver consequence as a legislator's warning, that from certain perpetrator's acts typically, that is founded on empirical, statistical evidence certain mediate, indirect consequences derive. These consequences should be mentioned in the incrimination next to immediate, direct consequences for reasons of technical simplicity and economization of the general part of the criminal code to make the intellectual work of criminal investigation police officers, public prosecutors and criminal judges somehow quicker and easier. In this scenario we are dealing with a variation of the before mentioned form of legislator's playing up to the dogmatically insufficiently educated user of the criminal code with very questionable practical effects.

Only, if we perceive the institute of liability for graver consequence inside the special part of a given criminal legislation as a legislator's possibility to prescribe - for whatever reason - different margins of punishment in comparison with those, achieved with the use of general rules for punishing concurrent offences, in that only scenario the institute seems to be acceptable as a crime-policy tool (but because of that not necessarily an obligatory institute of substantive criminal law).

In this context we are dealing with a crime-policy instrument for more precise dealing with empirical typical combinations of consequences, deriving from forbidden acts.<sup>3</sup> If for instance grievous bodily harm of a raped person is an empirically typical consequence of a rape with an object, of an armed rape, of a simultaneous or consecutive rape by a group of perpetrators or perhaps even of every rape, the legislator could be tempted to use the instrument of liability of graver consequence in the incrimination of rape in the form of grievous bodily harm of the raped victim inside the incrimination of rape. The prescribed margins of punishment must be higher, then foreseen with general rules of concurrence between the crime of rape and the crime of grievous bodily harm (in negligent or even intentional guilt). One cannot stress enough, that such an approach is rational only, if the special part of the criminal legislation concretizes the general idea of the institute in the general part in a systematic, empirically, statistically transparent way.

The whole (rather long) history of the institute of liability for graver consequence is very eloquent and shows clearly, that the institute was born of the canonic legal rule *versari in re illicita* as a reflection of a special aversion of the legislator to the act of the perpetrator from which next to main, direct immediate forbidden consequences additional foreseeable typical forms of mediate, indirect forbidden consequences derive. It was born and developed through centuries as a form of hardening the punishment - elevating the lower, upper or both margins of punishment in comparison with general rules for margins of punishment in cases of concurrent offences.

But there are strange anomalies in the system in Slovenia and its criminal

law in theory, legislation and judicial practice. Firstly, there are cases, where the institute of liability for graver consequence clearly should be used in the special part because of the obvious statistical appearance of mediate, indirect consequences in certain criminal acts, but the Slovenian legislator missed to use this technique without any declared and reasonable cause. I am thinking for instance of severe cases of sexual offences, where bodily harm of victims is almost a rule or at least very foreseeable in practice, as well as armed robbery and similar violent crimes, where the institute of liability for bodily harm as a liability for graver offence in Slovenia is not used by the legislator (see Art. 206, 207, 170, 171, 172, 173 of the Slovenian CC-1).

In other cases this institute is used in the special part, but without any clear distinction in effect of general punishment in concurrent offences or the effect of the use of the institute of liability for graver consequence is even opposite. The most ethically bizarre case here are several killed persons in a traffic accident under Art. 323 of the Slovenian CC-1, under which “(§1) *A person participating in public traffic who, by negligent violation of the regulations on road safety, causes a traffic accident whereby another person is seriously injured, shall be punished by a fine or sentenced to imprisonment for not more than three years*” and “(§2) *If the offence under the preceding paragraph entails the death of one or more persons, the perpetrator shall be sentenced to imprisonment for not less than one and not more than eight years.*” If you kill 25 persons at once negligently by for instance driving a car under influence of alcoholic drinks, far too fast and at the same time without any driving licence, the margins of punishment in Slovenia are several times(!) lower in comparison with killing them negligently under general provisions of the incrimination of killing a person in negligence (Art. 118 of the Slovenian CC-1, Negligent Causing of Death), although the institute of liability for graver consequence is used by the legislator in §2 of Art. 323 CC-1 where the death of a person is dealt with as a mediate, indirect consequence of a breach of regulations on road safety and a traffic accident is considered to be the immediate, direct consequence (§1 of Art. 323 CC-1).

It is obvious, that the Slovenian institute of liability for grave consequence urgently needs dogmatic improvement (let alone the ethical and philosophical problems of legal equalling of one or several deaths in criminal law inside the first element of the general notion of crime), but the newest remodelling of the CC-1, we are facing in Slovenia at the moment is neither willing nor able to deal with this issue. It seems, that every new remodelling of the criminal legislation in Slovenia just adds new and new anomalies to the existing ones, erodes the system further. Since similar, although not so severe systemic problems can be observed in other contemporary criminal legal systems, especially in the so called new European democracies (further eastern bloc countries) too, that is why the institute of liability for grave consequence can be seen as a broader systematic problem in modern criminal legislation and calls

for more theoretical and legislative interest. It is a pity that at least in Slovenia there was absolutely no step further made in this regard in the last decade.

#### *Literature*

1. See for instance § 18 of the present German Criminal Code (StGB) with the exact wording as follows: “Schwerere Strafe beibesonderen Tatfolgen. Knüpft das Gesetz an eine besondere Folge der Tat eine schwerere Strafe, so trifft sie den Täter oder den Teilnehmer nur, wenn ihm hinsichtlich dieser Folge wenigstens Fahrlässigkeit zur Last fällt.”

2. Compare Damjan Korošec: Some problems with the institute, called liability for graver consequences in Slovenian criminal law. V: Problemi ta perspektivi pozvitku juridičnoī nauki ta osviti v Ukraīni: materiali Vseukraīns'koī naukovo-praktičnoī konferenciī do Dija nauki: Kiīv, 17 travnja 2012 roky. Kiīv: Nacional'nii aviaciīniī Universitet, cop. 2012. Str. 205-208.

3. In the region of former common Yugoslavia see a very clear picture of this topic by the famous Croatian criminal legal theoretician Petar Novoselec in his textbook of the general part of substantive criminal law (of Croatia): Novoselec P. 2004. Općidiokaznenoprava. Zagreb: Sveučilište u Zagrebu. 242-246. Slovenian legal theoreticians do not deal with this problem thoroughly.

УДК 343 (043.2)

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### **CASTIGATION OF MINORS AS A CIRCUMSTANCE EXCLUDING ILLEGALITY (A COUNTERTYPE)**

**Introductory remarks (the concept and the classification of the so called countertypes).** Not in every case does the fulfilment of the statutory features of a forbidden act have to be the expression of the objective social harmfulness of the perpetrator's behaviour. Sometimes circumstances excluding illegality (the so called countertypes) occur which lead to the exclusion of the social harmfulness.<sup>1</sup> In other words, there are possible exception to the rule (implying the negative assessment) that a behaviour fulfilling the statutory features of a forbidden act is characterised by social harmfulness.<sup>2</sup> According to W. Wolter, the author of the concept of countertype “By countertypes we understand those and only those circumstances which, even though the act fulfils the statutory features of an act forbidden by the statute under the threat of punishment, make that act not socially harmful (possibly it can be positive), and hence not illegal; so these circumstance legalise an act generally considered to be illegal”.<sup>3</sup> Every countertype is the description of a human act and its specific feature is that it has no autonomous sense (i.e. alone, isolated from the type, it makes no sense<sup>4</sup>). A countertype may therefore function only in connection