Regulating negligence in French and Italian criminal law

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Abstract

The modified version of art. 121-3 of the French Criminal Code introduces a hierarchy of the nonintentional forms of guilt according to seriousness. From the perspective of the French legislator, this hierarchy would be the following: deliberate negligence (art. 121-3 para. 2), simple negligence – carelessness, imprudence – (art. 121-3 para. 3) and breaking a duty of care or protection (art. 121-3 para. 4). In the Italian Criminal Code only the conscious negligence is defined, whereas the simple negligence is not defined, but merely exemplified. Thus, article 43 para. 1 states that "There is an offence committed with negligence whenever the result, even though foreseen, is not desired by the agent and occurs because of carelessness, imprudence, lack of skill, or failure to observe laws, regulations, orders or instructions".

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JEL Classification: K14

1. Introduction

In comparative law, there are many legal solutions regarding the ways of regulating the forms of *mens rea* (guilt). The new Romanian Criminal Code, like the previous Criminal Code, adopted in 1968, chose to expressly regulate the forms of guilt, by defining them under art. 16.

Most of legal systems do not contain a legal definition of the forms of guilt, relying instead on the case law and the doctrine to provide the elements necessary to define them. Some of such legal systems include mere enumerations of the forms of guilt that an offender might have when committing an offence without including a legal definition of such forms of guilt, while others do not even expressly refer to such forms of guilt in their legislation.

We previously addressed the issue of regulating negligence in German and Spanish criminal law[2], and we hereby complete our approach by the way in which negligence is approached under French and Italian criminal legal systems.

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[2] Cristinel Ghigheci, *Regulating negligence in German and in Spanish criminal law*, Juridical Tribune, Volume 8, Special Issue, October 2018, p. 39-48.

2. Regulating negligence in French law

In its initial form, ***the French Criminal Code,*** which entered into force in 1994, did not provide any definition of the forms of guilt, providing under art. 121-3 that *"There is no crime or offence in the absence of an intent to commit it. Nonetheless, whenever stated by law, there is an offence in case of imprudence, carelessness or deliberately endangering of others"*. Thus, we can observe that besides intention and negligence, there is another form of subjective attitude consecrated, namely *"deliberately endangering others"*. Such a form of guilt is also encountered as an aggravating circumstance in case of manslaughter (art. 221-6) or involuntarily causing injury (art. 222-19). A similar reference can also be found as a constitutive element of the crime of endangering others (art. 223-1). Thus, it can be observed that the French legislator leans towards granting more attention to the social protection by protecting not only the person who has actually been injured as a result of an action or inaction, but also a person who has been exposed to a danger for their life or health[3].

In 1996 this text (art. 121-3) has been subject to change, thus being divided into 4 different paragraphs, endangerment of others falling between intention and negligence. On July, 10, 2000 (Fauchon Law) this text was once again modified, by including in paragraph 1 the definition of intention, in paragraph 2 the definition of endangerment, in paragraph 3 the definition of negligence (when the offender has failed to observe elementary diligence rules), while in paragraph 4 there is a definition of negligence manifested by the natural person who did not directly cause the prejudice, but contributed to create the situation causing the prejudice or has not taken the appropriate measures that would have allowed for the prejudice to be avoided.

As it can be seen, the modified version of art. 121-3 introduces a hierarchy of the nonintentional forms of guilt according to seriousness. From the perspective of the French legislator, this hierarchy would be the following: deliberate negligence (art. 121-3 para. 2), simple negligence – carelessness, imprudence – (art. 121-3 para. 3) and breaking a duty of care or protection (art. 121-3 para. 4)[4].

French doctrine has favorably received these modifications which largely limit the scope of negligence. However, jurisprudence has shown some reservations regarding the application of such provisions[5]. These reservations were based on the fact that there is no clear-cut distinction between the two forms of negligence defined in art. 121-3 para 3 and para. 4, which seem to be identical, and fail to clearly emphasize the difference between simple negligence, the scope of

[3] George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, in view of criminal law reform and E.U. integration)*, published in Revista de drept penal nr. 2/2003 (Criminal Law Journal nr. 2/2003), p. 19.

[4] *Idem*, p. 19.

[5] Yves Mayaud, *Un bel avenir pour la faute caractérisée*, Rev. sc. crim. Nr. 2/2001, p. 381-385, *apud*. George Antoniu, *op. cit.*, p. 20.

which is to be more and more restrained, and serious negligence (*culpa lata*), the latter being the same with the inexcusable negligence encountered in labor law.

Most of the authors have underlined that the modifications brought to French criminal law were aiming at strengthening criminal liability in order to deliberately create risk situations, sanctioning such actions even before creating a real damage. This represents an evolution of criminal law towards one attempting to solve doubts and uncertainties of the contemporary society, to respond to the need of security of its recipients. Criminal liability cannot only be retributive and protective of classical values, but it is also a protection instrument for the individual facing the new dangers brought about by the achievements of the civilization. Thus, it must contribute to educate the feeling of legal and personal liability for endangering others, in particular in those areas where modern life has revealed such dangers exist: health, environment, transportation, economy a.s.o, where there are diffuse supraindividual interests that must be protected[6].

In case of imprudence, natural persons who did not directly cause the prejudice, but contributed to create the situation causing the prejudice or have not taken the appropriate measures that would have allowed for the prejudice to be avoided, are not criminally liable unless it was established either that they have deliberately broken a special duty of caution or security provided by law or by regulations, or that they have committed a deed with a manifest negligence, exposing other persons to a particularly serious risk that cannot be ignored[7]. On the other hand, legal entities do not fall under the scope of para. 4 of art. 121-3 of the Criminal Code. Instead, they can be held liable for a simple deed committed out of imprudence or carelessness[8].

In the French case law, it was held that art. 121-3, as modified, suppressed the ambiguity of articles 221-6 and 221-19, meaning that simply proving that a rule of caution or security provided by law was broken is not enough for establishing that a crime was committed. Instead, the deed resulting from this infringement has to be analyzed also according to the circumstances of the case[9].

According to one opinion expressed in the French doctrine, the form of guilt consisting of deliberately endangering another person has been interpreted as being similar to indirect intention (*dolus eventualis*), with the difference that, as opposed to the latter, the endangerment does not involve the actual causation of harm, but the mere creation of the danger of causing such a consequence. Indirect intention does not only imply accepting the risk to cause harm, but also the harm that has actually occurred (this harm is not wanted, but it is accepted). According to the French point of view, the agent consciously creates the danger ensuing from his/her deed, without wanting such a consequence to occur; he/she manifests an attitude of indifference, of disdain towards the others, of utter selfishness towards the values threatened by his/her conduct. Even reprehensible, such a psychological

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[6] George Antoniu, *op. cit*., p. 20.
[7] Bernard Bouloc, *Droit pénal général*, 25e édition, Dalloz, 2017, p. 267.
[8] *Idem*, p. 269.
[9] T.corr Toulouse, 19 fevr. 1997, in *Code pénal*, 103e édition, Dalloz, 2006, p. 107.

attitude cannot be associated to the will of killing or to harm the health of a person, as it is the case of indirect intention. On the other hand, deliberately creating the danger, implying a conscious attitude towards a result that the agent does not want and that makes no difference to him/her, makes this form of guilt more similar to the conscious negligence[10].

According to another opinion expressed in the French doctrine, endangerment is considered a form of guilt belonging to negligence, and not to intention[11]. It is considered that the only reason for which the indirect intention, the conscious negligence and endangerment should be classified as a form of negligence would be the fact that in all cases the result is not wanted by the author. However, these psychological processes could also be considered as a third form of guilt[12].

3. Regulating negligence in Italian law

In the ***Italian Criminal Code*** only the conscious negligence is defined, whereas the simple negligence is not defined, but merely exemplified. Thus, article 43 para. 1 states that *"There is an offence committed with negligence whenever the result, even though foreseen, is not desired by the agent and occurs because of carelessness, imprudence, lack of skill, or failure to observe laws, regulations, orders or instructions"*. The same article also includes a definition of oblique intention.

Some Italian authors emphasized the fact that the definition of negligence provided by art. 43 is not satisfactory because it only takes into account result crimes committed out of negligence, while excluding conduct crimes. On the other hand, under the Italian criminal law provisions, the result, in certain exceptional cases, can also be wanted, not only unwanted (for instance, in case of negligent excess of self-defence, or of mistakenly concluding that there was an inexistent justification cause, or of de facto error made out of negligence)[13]. From this perspective, the Italian doctrine suggests to elaborate a unitary notion of negligence, that would also include exception cases, namely those of so called *improper negligence* (which was mentioned above), in which the agent acts out of will to obtain the result, but he/she envisages a result which is criminally irrelevant or which is affected by a justification (for instance, the person who believes, in an erroneous manner, that he/she is the subject of violence and wants to kill the opponent in order to eliminate the danger). In such a case, the agent does not commit an intentional crime because he/she envisages a result that is not a crime; but this is not a crime committed out of negligence *per se* because according to the

[10] George Antoniu, *op. cit.*, p. 21.
[11] Jacques Robert, *Droit pénal general*, Paris, 1999, pag. 318, *apud* George Antoniu, *op. cit*., p. 21.
[12] George Antoniu, *op. cit.*, p. 21.
[13] Tullio Padovani, *Dirrito penale*, Padova, Giuffre, 1992, p. 255-256; Ferrando Mantovani, *Dirrito penale*, Milano, Cedam, 1992, p. 322-325, *apud* George Antoniu, *Vinovăția penală (Criminal Guilt)*, Academiei Publishing House, Bucharest, 1995, p. 180.

definition provided by art. 43 the result of such a crime should have not be wanted[14].

Committing a deed out of conscious negligence represents, under the Italian Criminal Code, an aggravating circumstance (art. 61 point 3). This text aggravates criminal liability in case of the accused person who has acted, in case of negligent offences, in spite of foreseeing the result.

The Italian case law[15] considered as being more serious a deed committed out of negligence when the author foresaw the result by the manner in which he/she drove the vehicle on public roads. In other cases, it was considered that the author acted dangerously if he/she drove the vehicle foreseeing the result to a great extent and with an utter lack of caution. In another matter (transmission of the immune deficiency syndrome), courts had a different reasoning, considering that there is indirect intention if the HIV infected husband continued to have sex with his wife without informing her, causing her death. In this case, the court admitted that there is a case of indirect intention. The same decision was also reached by the Court of Assizes of Livorno. Nevertheless, there are also cases where it was ruled that the author acted out of negligence, which was aggravated because the result was forseen (Court of Assizes of Brescia).

Other rulings refer to throwing stones aiming at moving vehicles. The Court of Assizes of Verona considered in a ruling passed in 1995 that the perpetrators of such actions shall be held liable for homicide with direct intention for causing the death of a person and attempted aggravated homicide for the remaining 4 vehicle drivers. Such rulings were also given in cases of homicide as a result of excess speed driving and of breaking the basic traffic rules (not observing the traffic light, excessive speed at crossroads, driving on the wrong lane, for the purpose of fun or in order to prove excessive courage[16], etc.). Nonetheless, there are also rulings in which it was decided this is a case of manslaughter aggravated by the result being foreseen by the author.

Thus, it can be seen that the Italian case law fluctuates between indirect intention and conscious negligence, passing different rulings even though the cases were similar. Criticism was addressed to courts concerning the fact that often the reasoning that in that case there lacked the acceptance of the risk, in order to avoid considering that it was a case of indirect intention, was meant to cover the will of the court to enforce a softer sentence, which lead the court to consider that the action was committed out of conscious negligence[17].

It is noteworthy that case law only partly embraced the reasoning of the doctrine concerned to identify the existence of an obvious similarity between the liability for risk in case of indirect intention and conscious negligence, which

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[14] Ferrando Mantovani, *op. cit*., p. 323-325, *apud* George Antoniu, *Vinovătia penală (Criminal guilt), op. cit*., p. 180.

[15] Francesca Curi, *Tertium datur*, Giufre Editore, Milano, 2003, p. 214, *apud* George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, in view of criminal law reform and E.U. integration), op. cit*., p. 26.

[16] *Ibidem*.

[17] *Ibidem*.

would have imposed a unitary treatment under the criminal law. Also, case law does not reflect the efforts made by the Italian criminal doctrine to introduce in the criminal system an intermediary notion which would include indirect intention and conscious negligence and to reach a sanctioning system which would take into account the obvious differences existing between the different degrees of intensity of negligence[18]. These views of the Italian doctrine are only partially received by the Italian lawmaker. On the other hand, the Italian criminal law does not actually include explicit provisions (like the French or German law) regarding a third form of guilt[19].

4. Conclusions

The French criminal code, as modified in 2000, includes under art. 121-3 paragraph 1 the definition of intention (*dolus*), under paragraph 2 of the same article the definition of endangerment, under paragraph 3 of the aforementioned article there is a definition of negligence which represents the lack of following basic diligence rules by the offender, while under paragraph 4 there is a reference to the negligence manifested by the natural person who did not directly caused the prejudice, but contributed to create the situation causing the prejudice or has not taken the appropriate measures that would have allowed for the prejudice to be avoided.

In conclusion, as opposed to our legal system, the French legal system distinctly regulates a new form of guilt, consisting in deliberately endangering other persons.

Some authors considered that this new form of guilt is a form of intention, while others saw it as being more similar to negligence.

Another aspect that is specific to French law is that through successive legal modifications, the scope of negligence in case of natural persons was restricted, by introducing additional conditions in order for the negligence to be retained.

Art. 43 paragraph 1 of ***The Italian Criminal Code*** only defines conscious negligence stating that *"There is an offence committed with negligence whenever the result, even though foreseen, is not desired by the agent and occurs because of carelessness, imprudence, lack of skill, or failure to observe laws, regulations, orders or instructions"*.

As opposed to the Romanian law, the Italian law refers to the fact that committing an offence with conscious negligence represents an aggravating circumstance (art. 61 point 3 of the Italian Criminal Code), thus aggravating the criminal liability of the offender whenever he/she acted, in case of negligent offences, in spite of foreseeing the result. Therefore, a distinction is made between

[18] *Ibidem*.

[19] George Antoniu, *Vinovăția, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, in view of criminal law reform and E.U. integration), op. cit.*, p. 26.

the seriousness of simple negligence and the seriousness of conscious negligence, the latter resulting in an aggravating circumstance.

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