Regulating negligence in German and in Spanish criminal law

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Abstract

Although in German and in Spanish legal systems there are no express provisions with regard to the criminal negligence (culpa), this has not hindered the legal doctrine and jurisprudence to thoroughly analyse this form of guilt. This made it possible to qualify as intentional offences some deeds which in our legal system are considered to be committed with conscious negligence (involving foresight). The difficulty to distinguish between indirect intention (dolus eventualis) and conscious negligence (luxuria) has nonetheless determined Spanish courts to ask the legislator to provide a clear definition of indirect intention, which could be an additional argument with respect to the weaknesses entailed by such a legal approach.

Keywords: *criminal negligence, indirect intention, German legal system, Spanish legal system.*

JEL Classification: K14

1. Introduction

In various criminal legal systems, there is no legal definition of negligence (*culpa*), as opposed to Romanian criminal law, which provides such a definition[2]. At most, such legal systems include mere enumerations of forms of guilt (*mens rea*) that a wrongdoer might have when committing an offence without including a legal definition of such forms of guilt.

As there are opinions in the Romanian doctrine referring to the uselessness of a legal norm containing a legal definition of negligence in criminal law, according to which it is considered that this issue should be the exclusive concern of the theorists of criminal law, it is necessary to analyse the solutions embraced by other legal systems with respect to this issue.

Among the legal systems that have not expressly provided a legal definition of criminal negligence, the most noteworthy are the German legal system, on the one hand, and the Spanish legal system, on the other hand.

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[2] Article 16 (4) of the Criminal Code in Romania shows that the offense is committed by negligence, when the perpetrator: a) provides for the result of his deed, but does not accept it, without justification that it will not occur; b) does not foresee the outcome of his deed, though he should have been able to foresee it. In accordance with paragraph (6) of Article 16 of the Romanian Criminal Code, the offense committed by negligence constitutes an offense only when the law expressly provides for it – for details see Aurel Pasat, *Customs offenses according to the legislation of the Republic of Moldova and Romania*, Adjuris Publishing House, Bucharest, 2018, p.166.

2. Criminal negligence in German legal system

Article § 15 of the German Criminal Code states that *"Unless the law expressly provides for criminal liability based on negligence, only intentional conduct shall attract criminal liability"*.

Such lack of a statutory definition of negligence allowed the German doctrine to carry further research which resulted in considering the negligence (as a form of guilt) either as part of typicity or as part of imputability as essential elements of an offence. In German legal system, which was a source of inspiration for the Romanian lawmaker when drafting the new Romanian Criminal Code, the essential elements of an offence are considered to be: typicity, unlawfulness and imputability. In a nutshell, typicity represents the description of the deed by the criminal legal norm, unlawfulness means that the action contravenes the legal order as a whole (it is not permitted by any other legal norm), while imputability refers to the fact that the deed should be imputable to the person who committed it, that it was committed with guilt.

Thus, nowadays, most of the German criminal doctrine does not treat negligence (*culpa*) as part of the typicity any more, as it does with respect to the intention (*dolus*), but instead it considers that negligence should be exclusively analysed as part of guilt seen as a general characteristic of the offence[3]. Moreover, on the contrary, negligence is not considered as a psychological process, along with intention, but it is considered as a particular type of punishable action which has a completely different structure from the point of view of unlawfulness and culpability[4].

This difference in view on the negligence has practical consequences as well. For instance, in the Romanian Criminal Procedure Code the lack of typicity has as a consequence the application of the case that hinders the initiation and the pursuit of the criminal action provided by art. 16 para. (1) letter b) first sentence of the Criminal Procedure Code, while the lack of the type of guilt provided by law incurs the application of the case provided by art. 16 para. (1) letter b) second sentence of the Criminal Procedure Code.

Although the German Criminal Code only refers to intention (*"Absicht"*) and negligence (*"Fahrlässigkeit"*), in a recent paper C. Birnbaum considers that between intention and negligence there must also be recklessness (*"leichtfertigkeit")* as an autonomous type of guilt[5]. It is considered that the

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[3] Hans Heinrich Jescheck, Thomas Weigend, *Tratado de derecho penal. Parte general* (translation from German), Comares Publishing House, Granada, 2002, p. 605 and the following apud. Florin Streteanu, *Tratat de drept penal. Partea generală (Treaty of Criminal Law. General Part.)*, Vol. I, C.H. Beck Publishing House, Bucharest, 2008, p. 445.

[4] Hans Heinrich Jescheck, *Lehrbuch des Strafrecht. Algemeiner Teil*, vierte Auflage, Berlin, Duncker und Humblot, 1988, p. 508-509, apud George Antoniu, *Vinovăția penală (Criminal guilt)*, Romanian Academy Publishing House, Bucharest, 2002, p. 184.

[5] Christian Birnbaum, *Die Leichtfertigkeit zwischen Fahrlässigkeit unt Vorsatz*, Berlin, 2000, p. 130 cited in Francesca Curi, *Tertium datur*, Giufre Editore, Milano, 2003, p. 6 apud. George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, in „Revista de drept penal" no. 2/2003 (Criminal Law Journal no 2/2003), p. 15.

German Criminal Code, in its special part, explicitly states this type of guilt under certain offences. For instance, under art. § 251, which incriminates robbery causing death, the penalty shall be imprisonment for life or not less than ten years if the offender by recklessness causes the death of another person (*"leichtfertigkeit"*). Also, under § 264 the aggravated fraud is punished if committed by recklessness (*"leichtfertigkeit"*)[6].

Recklessness (*"leichtfertigkeit"*), different from (conscious or unconscious) negligence, is considered by other authors as a specific type of guilt consisting in a gross infringement of due diligence and caution duties. This type of guilt could be compared with *culpa lata* known in civil law (for instance, causing a fire and death of the victim, as a result of disrespecting the basic caution duties)[7].

Consequently, the doctrine has been considered this type of guilt either as a form of intention, or as a form of negligence, or even as a third form of guilt, something between intention and negligence. This last solution, in addition to the fact that it would release jurisprudence of the burden of choosing between intention and negligence, would also reduce the scope of unconscious negligence. Thus, it could be deemed that a person acts by recklessness whenever they infringe a duty to protect important values or whenever they did a serious omission in fulfilling an important duty, by ignoring a serious hazard encountered by the social values protected by law[8].

Romanian doctrine, but, especially, Romanian jurisprudence, is well familiar with the difficulty of distinguishing between conscious negligence and indirect intention. Both suppose that the perpetrator foresaw the dangerous result of the criminal deed, but, in the first case, he/she does not accept such result, and, in the latter case, he/she accepts it. Theoretically, this distinction seems easy to be made, but, on a practical level, the judicial enforcers cannot penetrate the perpetrator's mind in order to determine if he/she accepted or not the dangerous result of his/her deed.

This is the reason why judicial doctrine and jurisprudence tried to identify objective elements in order to establish if the perpetrator foresaw or not the dangerous result of his/her deeds. The German doctrine refers to an *agent-model*, as a reference person for assessing the possibility to foresee and avoid the dangerous result, not taking into consideration the category of persons to which the perpetrator belongs. For instance, for a neurosurgeon mastering a complex operating technique, accessible to few specialists in the field, the reference person

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[6] George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, *op. cit*., p. 15.

[7] Reinhart Maurach, *Deutsches Strafrecht. Allgemeiner Teil*, 3. Auflage, C.F. Müller, Karlsruhe, 1965, pp. 457-458; Hermann Blei, *Strafrecht I. Allgemeiner Teil*, 18 Auflage, München, C.H. Beck Publishing House, 1983, p. 305, apud George Antoniu, *Vinovăţia penală (Criminal Guilt)*, *op. cit*., p. 185.

[8] Francesca Curi, *op. cit.*, p. 20-22, apud George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, *op. cit.*, p. 15.

will not be the average careful and cautious neurosurgeon, but the agent-model will be made up only by reference to the specialists practicing the same technique[9]. It is not about asking to the person having an average training to make additional efforts, but about asking that person to use the know-how they have at full capacity[10].

German doctrine also makes the distinction encountered in art. 16 para (4) letter a) and b) of the Romanian Criminal Procedure Code, namely between conscious (advertent) negligence (involving foresight) and unconscious (inadvertent) negligence (excluding foresight), with the difference that certain German authors do not consider that a deed committed with conscious negligence will always be more serious than when committed with unconscious negligence, identifying also contrary situations[11]. As it was also described by the Romanian doctrine, the seriousness of culpability (guilt) is not determined by the form of guilt, but by the degree to which the duty was infringed, which can be lesser in the case of conscious negligence than in that of unconscious negligence[12].

3. Criminal negligence in Spanish legal system

Spanish Criminal Code, which entered into force on November, 23rd, 1995, does not expressly provide a legal definition of intention (*dolus*) and negligence (*culpa*). Art. 5 only states that there will be no penalty without intention or imprudence (negligence). This option is certainly the result of the influence of the German legal system, given the similarities of the two legal systems concerning the regulation of criminal liability.

In the absence of any legal approaches, Spanish criminal doctrine made efforts to further develop the two fundamental categories of guilt, considering that there is negligence when committing the deed was not a result of intention, but of the infringement of a caution duty that incurred to the perpetrator[13].

To a greater extent than the Romanian doctrine, Spanish doctrine made efforts to identify various criteria and theories of the way in which the oblique intention (*dolus eventualis*) differs from the conscious negligence (*luxuria*).

In one opinion[14], it is considered that the indirect intention refers to knowing the objective elements of the offence and to the consent given with

[9] Claus Roxin, *Derecho Penal, Parte general* (translation from German), vol. I, Civitas Publishing House, Madrid, 1999, p. 1017-1018, apud Florin Streteanu, *op. cit*., p. 448.

[10] *Idem*, p. 1017.

[11] Hermann Blei, *op.cit.*, p. 305, apud George Antoniu, *Vinovăția penală (Criminal Guilt)*, *op. cit.*, p. 185.

[12] Traian Pop, *Drept penal comparat. Partea generală (Compared criminal law)*, vol. II, Institutul de Arte Grafice «Ardealul», Cluj, 1923, p. 374.

[13] Manuel Cobo del Rosal, Tomas Salvador Vives Antòn, *Derecho penal. Parte general*, Tirant lo Blanch Publishing House, Valencia, 1999, p. 634, apud Florin Streteanu, *op.cit.*, p. 446.

[14] Diego-Manuel Luzon Pena, *Curso de derecho penal*, Madrid, 1996, p. 419, quoted by Francisco Curi, *op. cit*., p. 163, apud George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, *op. cit.*, p. 22.

respect to the possible occurrence of the consequences, which in his inner self the perpetrator approves of. On the contrary, the conscious negligence would suppose the representation of the consequences and of the possibility of the occurrence of the result which the perpetrator, although he foresees, does not conceive as possible. In other words, if the answer to the question "would the perpetrator continued the performance of the deed had he known that the probable result found in his representation will occur" is affirmative, this means that the perpetrator acted with indirect intention, while if the answer is negative, the type of guilt would be conscious negligence. Nonetheless, this theory was criticized because it uses a fiction, by trying to establish the manner in which the wrongdoer reacts in the event of the certainty of the occurrence of the result, certainty that was never in fact in the mind of the perpetrator in the first place. By doing so, the existence of the intention is not established in relation to the perpetrator's deed any more, but in relation to his person, to his criminogenic potential[15].

In the opinion of other Spanish authors, the requirement of accepting the result by the subject is interpreted as suggesting a subjective process that exceeds the mere *volitional* factor. This would be about an inner attitude of the perpetrator, namely a deeper psychological process that the one inferred by the will. It is debatable if, in a profane view on guilt, such a profound interpretation of the individual's mind was receivable: normally, the criminal liability should only take into consideration those psychological processes that have an external manifestation attached to them[16]. Other authors considered that such an analysis of psychological processes, even of the deepest ones, usually occurred whenever there was guilt involved, and it was not specific to indirect intention[17].

According to another viewpoint,[18] the only decision-making process would be the *intellectual* one (conscience), namely the degree of probability of the occurrence of the result of which the perpetrator is aware, without the requirement of any volitional factor. There is indirect intention whenever the perpetrator, when committing the deed, is aware of the high degree of probability of the occurrence of the result, while there is conscious negligence when the perpetrator sees as a mere possibility that the result will occur. In such a view, there is no reference to the inner attitude of the perpetrator, be it of approval, disapproval, indifference towards the result of which he was aware, including the inherent danger entailed by

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[15] Francisco Muňoz Conde, Mercedes Garcia Aràn, *Derecho penal. Parte general*, Tirant lo Blanch Publishing House, Valencia, 1998, p. 303, apud Florin Streteanu, *op. cit.*, p. 446.

[16] Santiago Mir Puig, *Derecho penal. Parte Generale*, Barcelona, 1988, p. 245, quoted by Francesca Curi, *op. cit.*, p. 163, apud George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, *op. cit*., p. 22.

[17] Diego-Manuel Luzon Pena, *op. cit.*, p. 420, apud George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, *op. cit.*, p. 23.

[18] Enrique Gimbernat Ordeig, *Acerca del dolo eventual*, Madrid, 1990, p. 245-265, apud George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, *op. cit.*, p. 23.

his conduct. This theory could be criticized because it does not value an essential element of the intention, namely the volitional factor. On the other hand, it is not always the case that the awareness of a high probability of the occurrence of the result leads to the existence of the intention. Suffice it to observe offences concerning driving on public roads. Most of them are about deeds committed by imprudence, audacious driving, although the perpetrator is aware of the probability of causing an accident. Things become even more complicated when the probability of producing the result is neither too high, nor to low, in such cases being difficult to quantify the probability and to draw a clear line between (indirect) oblique intention and conscious negligence[19].

According to other authors, the distinction between conscious negligence and indirect intention should be made taking into consideration the subjective position of the perpetrator towards the social value protected by the criminal norm. Thus, when from the manner the perpetrator acted, one can infer a lack of interest, indifference or disdain from his part for the protected social value, it is a case of intention[20].

These theories are also useful to the Romanian doctrine and practice in order to distinguish between conscious negligence and indirect intention, in those difficult cases when such distinction is extremely difficult to make. The nature of the action leading to the occurrence of the dangerous result is not always important as it can be a case of indirect intention even if the action of the author represented only an apparently minor factor compared to other factors overlapping the same action. For instance, the Romanian doctrine produced the example of a station master that gives the signal for starting the train when the rail is not yet free, counting on luck for a clash not to happen, as he foresaw the risks of a clash and accepted them, otherwise he would not have given the starting signal. In such a case, if the clash does occur, there will be indirect intention, and not conscious negligence.[21]

With respect to oblique intention Spanish doctrine has embraced three lines of though: to classify oblique intention as direct intention or as negligence or, in a minority opinion, oblique intention should be considered as a type of guilt between intention and negligence[22].

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[19] Francesca Curi, *op. cit.*, p. 165-168, apud George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, *op. cit.*, p. 23.

[20] Angel Calderòn, José Antonio Choclàn, *Derecho penal. Parte general*, Bosch Publishing House, Barcelona, 2001, p. 145, apud Florin Streteanu, *op.cit.*, p. 451.

[21] Traian Pop, *op.cit.,* p. 373-374.

[22] George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, *op. cit.*, p. 23.

Spanish courts' practice shows that most of the solutions in that matter are for considering the indirect intention as closer to the negligence; and only in isolated cases the indirect intention is considered as a form of intention[23].

The difficulty to distinguish between indirect intention and conscious negligence has determined Spanish courts to ask the lawmaker to provide a clear legal definition of indirect intention (*dolus eventualis*) and to place it in an intermediary position between intention and conscious negligence, following that audacious imprudence (conscious negligence) be placed between indirect intention and (simple) unconscious negligence (*negligentia*)[24].

Although such notions of subjective type, "obvious audacity" and "wilful disdain", are not found in the general part of the Spanish criminal code, as previously shown, they can be identified within the definition of some offences against safe driving on public roads. Thus, art. 384 of the Spanish Criminal Code provides the penalty of the person who, with a wilful disdain for the life of other persons, drives a motor vehicle with an obvious audacity (manifest audacity) causing a concrete danger for the life or physical integrity of that person.

This regulation was entailed by the worrying surge of the number of victims of traffic accidents in Spain, which forced the Spanish legislator to look for new, original solutions for sanctioning such deeds, turning into offences deeds that were previously sanctioned as contraventions.

In line with the same concern there is also the phrase used in the Spanish law (art. 384 of the Criminal Code), i.e. "*disregarding the life of others*" with the purpose of providing a more efficient protection of society against driving with excessive speed of vehicles on public roads. These provisions were also applied in case of those who, in order to show excessive courage or to have fun, drive with speed the vehicle on the wrong lane of the road or of those who, having a reckless confidence in their own abilities, drive the vehicle on the road making various changes of direction and the like, actions bound to cause a strong social alarm.

The same objective is also envisaged by the phrase used in art. 381 of the Criminal Code that punishes whoever drives a motor vehicle *with manifest recklessness*, namely disrespecting the most basic requirements of diligence for driving on the street (for instance, he/she drove disregarding the colour of the traffic light, passed through an intersection with excessive speed, drove with excessive speed and no car lamps on and the like).

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[23] Francesca Curi, *op. cit.,* p. 174, apud George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, *op. cit.*, p. 23.

[24] Deciziile Tribunalului Suprem din 24 octombrie 1989 şi din 25 octombrie 1991 (Decisions of the Supreme Court from October, 24, 1989 until October, 25, 1991), quoted by F. Curi, *op. cit.*, p. 176, apud G. Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, *op. cit.*, p. 24.

In both cases, the conscious contempt towards the life of others or the manifest recklessness are considered forms of intent and not forms of negligence (imprudence)[25].

It is worth mentioning that these solutions provided by the Spanish legal system are not currently embraced by the jurisprudence of Romanian courts, according to which it is considered that such cases are instances of conscious negligence. Nevertheless, there is a recent case when a Romanian court gave a final decision according to which it was considered that the driver who drove with speed across the city, overran on the wrong lane a line of cars, ran on the red light through four crossroads, barely avoided hitting two pedestrians, after which hit a car driving regularly on the road and thus causing the death of two spouses who were in the hit car, acted with intent. [26].

What is specific to the Spanish law is the fact that, in line with the concern to provide a maximum protection for criminal law recipients against serious threats to their peace and safety, slight negligence (*culpa levis*) is only exceptionally punished: for instance, art. 621 para. 2 of the Criminal Code punishes with fine from one to two months whoever causes the death of another person with slight negligence, whereas art. 621 para. 3 punishes with a fine from 15 to 30 days any injury caused with the same form of negligence. In both cases, these misdemeanours shall be reported by the offended person.

Therefore, the Spanish lawmaker intended to sanction only the gross negligence, whereas the slight negligence should be punishable when it concerns the life or physical integrity of the person. Such a solution allows for a massive decriminalization of deeds committed by slight negligence and using the criminal instrument in fact only against serious instances of social indiscipline[27]. Thus, negligence has an exceptional character as the rule in the Spanish criminal law is the incrimination of deeds committed with intent, the principle of minimum intervention limiting the criminalization of deeds committed by negligence to those situations in which fundamental social values are impaired[28].

4. Conclusions

Although in German and in Spanish legal systems there are no express provisions with regard to the criminal negligence (*culpa*), this has not hindered the legal doctrine and jurisprudence to thoroughly analyse this form of guilt. This made it possible to qualify as intentional offences some deeds which in our legal

[25] George Antoniu, *Vinovăţia, în perspectiva reformei penale şi a aderării la Uniunea Europeană (Guilt, under the perspective of criminal reform and the integration in the European Union)*, *op. cit.*, p. 24.

[26] C.A. Iași, Secția penală, dec.pen. nr. 178 din 14.03.2018 (Court of Appeal Iasi, Criminal Section, Criminal Decision no 178 of 14.03.2018), published on the Web site http://portal.just.ro/45/SitePages/Dosar.aspx?id_dosar=9900000000156381&id_inst=45, last accessed on 7.04.2018.

[27] *Ibidem*.

[28] F. Muňoz Conde, M. Garcia Aràn, *op.cit.*, p. 315, apud. F. Streteanu, *op.cit.*, p. 446.

system are considered to be committed with conscious negligence (involving foresight).

The difficulty to distinguish between indirect intention (*dolus eventualis*) and conscious negligence (*luxuria*) has nonetheless determined Spanish courts to ask the legislator to provide a clear definition of indirect intention, which could be an additional argument with respect to the weaknesses entailed by such a legal approach.

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