# The Institute, Called Liability for Graver Consequences in Slovenian Criminal Law on Road Traffic*

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## Abstract

There are not many provisions of the general part of substantive criminal law, as interesting from the point of view of logical coherence as well as crime-policy, as the institute of liability for graver consequence (in German: *erfolgsqualifizierte Delikte).* In Slovenian criminal law one can find some anomalies in the criminal law in theory, legislation and judicial practice, regarding this institute. Firstly (1.), there are cases, where the institute of liability for graver consequence clearly should be used in the special part of Slovenian Criminal Code 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. For instance, there are several severe cases of sexual offences, where bodily harm of victims is almost a rule or at least very foreseeable in practice. Further there is 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). In other cases (2.) this institute is used in the special part of Slovenian Criminal Code,

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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. At least from the ethical point of view the probably worst such case are road traffic offences, dealing with several killed persons in one traffic accident.

**Key words:** Substantive Criminal Law, Slovenia, Liability for Graver Consequence, Road Traffic

## Liability for Graver Consequence in General

There are not many provisions of the general part of substantive criminal law, as interesting from the point of view of logical coherence as well as crime-policy, as the institute of liability for graver consequence (in German: *erfolgsqualifizierte Delikte).* In comparative criminal law, it is a rather common legal institute, considered traditional and found in many modern laws and criminal codes[1]. The legislator's attempt of formulating it in the best possible way in the present Criminal Code of Slovenia[2] 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 many 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.

We can 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

[1] See for instance § 18 of the present German Criminal Code (StGB) with the exact wording as follows: ***"Schwerere Strafe bei besonderen 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] *Official Journal of the Republic of Slovenia, Nr. 55/08, 66/08, 39/09; 91/11.*

same criminal legal goods, deriving from the same act of perpetrator can occur. We also can understand the same institute as legislator's friendly warnings that cumulations of threats to and injuries of several legal goods, deriving from the same act of perpetrator can occur. In both those cases, it is in fact a warning of the legislator to the users of the legal text that we have to deal with potential concurrence of offences. It is obvious, that in such an understanding of the role and goals of the institute of liability for graver consequence, we have a clear case of silly wasting of energy and space in the general 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 seems clear, 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, is a very strange phenomenon. As such, it should be abolished as redundant long ago.

If 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, the situation is not much different. The legislator mentions these consequences 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.[3] If for instance a 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 (long) history of the institute of liability for graver consequence is very eloquent and shows clearly the following. This 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. In history, it occurs very typically in restaurant fights, often ending with heavily injured, crippled and killed fighters. The legislator knew, that fighting (often drunk fighting) in restaurants is especially dangerous because it so often ends in killings, although unintentional; that is why he incriminated deadly strikes in restaurant fights even more repressive then deadly strikes among humans in other conditions. The institute

[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. Opći dio kaznenog prava [Criminal Law – General Part]. Zagreb: Sveučilište u Zagrebu 2004, pp. 242-246.* Slovenian legal theoreticians do not deal with this problem thoroughly.

of liability for graver consequence 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. In history, but also nowadays it seems to make sense as an exclusively repressive institute, a hardener of punishment.

## General Paradoxes of the Institute of Liability for Graver Consequence in Slovenian Criminal Law

However, there are strange anomalies in the system in Slovenia and its criminal law in theory, legislation and judicial practice. Firstly (1.), 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. Further, there is armed robbery and similar violent crimes, where the legislator does not use the institute of liability for bodily harm as a liability for graver offence in Slovenia (see Art. 206, 207, 170, 171, 172, 173 of the Slovenian CC).

In other cases (2.) 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. One of especially ethically most interesting cases can be found in several killed persons in a traffic accident under Art. 323 of the Slovenian CC, 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 10 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 (because it has been revoked by the authorities), 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, Negligent Causing of Death), although the institute of liability for graver consequence is used by the legislator in §2 of Art. 323 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). It is obvious, that the Slovenian institute of liability for graver 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).

## Liability for Graver Consequence in Road Traffic or what do we want to protect with Road Traffic Incriminations

The nature and structure of legal goods is one of the most central and important prerequisites to understand properly every possible incrimination. It is nothing less than the key to proper application of almost every possible institute of the general part of substantive criminal law to a certain incrimination and most clearly to the proper use of the institute of concurrence of offences. At the same time the nature and structure of legal goods are among the most theoretically underrated and almost scandalously neglected instruments of criminal law in history and in present time. Moreover, among all groups of incriminations of the general parts of criminal laws of the world, read traffic incriminations are very dominant in this regard. Inside the personal traffic through public space, because of the sheer statistical occurrence especially on the roads, the colliding legal goods and ethical and political interests in these incriminations are specially worth studying. Very different goods and interest meet here: the very prominent criminal legal good of human life with all the symbolic political weight as a good of limited disponibility[4] meets obviously

[4] In German: *»Güter mit begrenzter Disponibilität«, »begrenzt disponible Güter«, »begrenzt verfügbare Güter«, »beschränkt verfügbare Güter«.*

non-disponible[5] goods, like for instance public safety (safety on public roads as a public, general accessible space). The conglomerates of these different goods are legally complex and open many questions, which are typically neglected in criminal legal doctrine (at least) in Slovenia and even more in criminal jurisprudence. What is and what should be the role of forbidden consequence in the unlawfulness of the criminal act? Is the stress in determining unlawfulness of the criminal act in the unlawfulness of the acting and the unlawfulness of the forbidden consequence because of the aleatority of it should be at best minimal? On the other hand: should the unlawfulness of the forbidden consequence be crucial in the judging of the unlawfulness of the criminal act in all cases of crimes, like we are long used as self-evident in murders and other intentional, but also negligent killings of humans? We accept as culturally, almost anthropologically normal, that taking a life of ten people is a very different ethical category, that taking one single life, although in both cases through one single acting. Why should road traffic be different? Do we really want, are we ethically allowed to look at human lives as appendices of public safety on roads and push them in legal wordings like "one or more lost lives", covered with the same margins of punishments in the law? Or the same problem from another viewpoint: should we built and maintain a so called vitacentrical (life-centered) criminal law on road traffic, where the uniqueness of every human individual and its life is central for criminal law? Or are we willing and used to reduce human lives to secondary, subsidiary goods next to the safety of public spaces in the form of shamelessly cumulating numbers of dead persons under hoods of same margins of punishments and even worse: under much lower margins of punishments than in "non-road-mass-killings" of people (inside a non-vitacentrical approach to unlawfulness in road traffic law)?

Taking a life of a person in a road traffic accident, that is negligently, is without doubt a form, a variant of taking a life of another human. There are typical special circumstances: the road traffic as the special activity, where the accident happens, the road as a special public space, where the accident happens and usually a

[5] In German: *»nicht disponible Güter«, »nicht (frei) verfügbare Güter«.*

motorized vehicle as an especially dangerous machine, involved in the accident (where the perpetrator is responsible for safe manoeuvring). It seems that there is no special need to form specialized incriminations of negligent killings in road traffic accidents; there are enough general incriminative provisions of causing a death of another human negligently. Using an especially dangerous machine while killing seems to make the crime more severe, taking part in a very complex and hard to manage activity (necessary for modern economies), like public transport, seems to make the crime less severe at the same time. However, these too phenomena act mutual neutralizing, so there seems to be no real need to form specialized crimes in law texts, at least politically speaking. Still, many states feel the political need for special incriminations and in some of them, like in Slovenia, they even neutralize the number of killed persons as a factor of unlawfulness of the criminal act by the use of the institute of liability for graver consequence, as shown before. In these legal systems, it looks politically, like there are no lives of humans in the mind of legislators, but mainly the fear from repression in road traffic. With more criminal scientific words: the use of the institute of liability for graver consequence is perverted into the opposite of its original functions, from a repressive hardener into a softener in cases of deadly attacks on masses – by nature crimes, the legislators around the world should be very much feared off.

## Comparative Legal View

The use of the institute of liability for graver consequence inside the road traffic law differs strongly among states. In Austria for instance, there is a very general approach to causing public danger and injuries and deaths of other humans and roads are perceived as a form of public space and subsumed under general provisions of crimes against public safety, human body and human life. The fact, that those goods are endangered or hurt with motorized vehicles, makes the crimes in principle higher punishable, but not worth special incriminations.

The Scandinavian states typically do not use the institute of liability for graver consequence in their road traffic criminal law but use general provisions of concurrence of offences in such cases.

Germany has a very tight net of incriminations, covering road traffic misbehaviours, especially for punishing intoxicated dangerous drivers, even when no killings occurred. Also in Germany all general provisions on concurrence of offences are applicable, there seems to be no need to use the institute of liability for graver consequence for covering deaths of persons in traffic accidents.

The institute of liability for graver consequence is vividly traditionally used in so-called socialistic countries of the European east, nowadays-called new European democracies or sometimes alternatively "post-transition countries". At least in Slovenia this institute is not used in a transparent, systematic way in the special part of the criminal law and shows severe dogmatic and ethical problems and inconsistencies when dealing with several injured or death victims of road traffic crimes under one hood of margins of punishment.

## Conclusion

In Slovenia, the use of the institute of liability for graver consequence is dogmatically not used by the legislator in a satisfactory way. Especially it is not clear, why in several incriminations of the Slovenian Criminal Code (like Rape or Robbery) this institute is not used at all, while in other incriminations it covers several deaths of persons, that is several killed persons the same way as one killed person and in that way aggressively milder than the institute of proper concurrence of crimes would. A very prominent such case in Slovenian criminal law are special road traffic incriminations.

After thorough comparative criminal legal analysis, one can question if there is really such an important need for the institute of liability for graver consequence in Slovenian criminal law on road traffic. Even more, there seems to be no special need to form specialized incriminations of negligent killings in road traffic

accidents; there are enough general incriminative provisions of causing a death of another human negligently. Using an especially dangerous machine while killing seems to make the crime more severe, taking part in a very complex and hard to manage activity (necessary for modern economies), like public transport, seems to make the crime less severe at the same time. However, these too phenomena act mutual neutralizing, so there seems to be no real need to form specialized crimes in law texts, at least politically speaking.

On the legislative level, it differs strongly from developed criminal legal systems in Europe. It cries for a thorough rethinking and remodelling at least in the special part of Slovenian substantive criminal law. Even a full abolishment of this institute from the general and special part of the criminal law in Slovenia is presently not unimaginable.

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