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Dr. Gábor Zalka
doctorandus
(Ph.D. student of Péter Pázmány Catholic University Faculty of Law,
attorney-at-law,
Budapest, Hungary)

CERTAIN THEORETICAL AND PRACTICAL ASPECTS OF THE CONCEPT OF WILLFULNESS IN HUNGARIAN CRIMINAL JURISPRUDENCE AND CASE-LAW

Several European criminal codes do not contain the statutory definition of voluntary, intentional commission, although, the majority of the codes including the Hungarian, states a statutory notion as well. However, almost all the European codes require intentional or exceptionally negligent commission as a fundamental criterion thus define a responsibility system based on culpability.

This means that 'besides the mere act, the offender's relation to his or her behavior and its result shall be inspected as well' . Since should we determine the lack of the perpetrator's psychic relation to the act, 'the conviction of the person would be pointless and unreasonable' .

Pursuant to Section 7 of the Hungarian Criminal Code 'a criminal offense is committed intentionally if the perpetrator conceives a plan to achieve a certain result, or acquiesces to the consequences of his conduct' . As we can see, the

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Criminal Code defines intentional commission, not the notion of willfulness or intention. ‘Intention is a psychological, willfulness (in the meaning of intentionally committing an act) is a legal concept’ . Intention is pale and neutral: good and bad acts could both be committed intentionally. The ordinary meaning of intention is identical to purpose (aim), since all actions are intended to a certain purpose.

We can distinguish between the conscious, intellectual and emotional, volitional side of willfulness. Authors generally agree that the conscious side of intention (may it be called conscious or intellectual side) is such an essential element which by and large individually exists everywhere. The emotional and volitional side of intention, however, according to several authors does not necessarily belong to the same category. Some authors write about a volitional-emotional element , others distinguish the volitional element from the emotional relation .

According to my standpoint, from the notion of willfulness – as one form of culpability – the volitional element shall be excluded, due to the mere fact that the expressed will of the act may only establish the voluntary characteristic of the act which is a factor belonging to the material side of crime. Only after a 100 years long development did the European jurisprudence terminate the fitful effort to explain undesired result with the notion of volition and resolved the problem with discovering the significance of emotional relation. The examination of emotional relation made it available to define and characterize the exactly not aimed result, introducing the certain concept of foreseeable intent. Consequently, analyzing the current legal notions, our dogmatic system, it could be established that volition is identical to the emotional category of desire. Therefore, only the respect of the legal traditions and the omission of taking the evident consequences deriving from the above explained, could only

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reserve the significance of any element of the volitional side in the sphere of culpability, especially willfulness.

In order to avoid any doubt, it may be noted that I agree with Földvári's concept, that intellect, emotion and volition are the psychological dimension of the commission of crime. However, from my point of view these three factors could not be aligned in a single row and evaluated equivalently: intellect and emotion are features, whilst the volitional element is trigger, the implementation of the psyche. 'Volition is the psychic process which is realized in the human acts consciously aimed at certain purposes' , resulting that it characterizes the whole conduct.

From the aspect of a conduct, which in psychology is inseparable from the emotional and intellectual content of it, the volition of the act includes all the elements of the intellectual and the emotional side as well as 'the conscious commission of an act is based on that the idea that the volition of the behavior is an alleged nerve-relation with the factual conduct, it simply triggers it' – exactly this is the reason why it is an incomprehensible factor in the sphere of criminal law. The artificial concept of the strict dogmatic system therefore dissolves the human conduct into its mere 'psychological components' in order to make punctual legal examination available and to develop legal categories. Consequently, the conduct is evaluated as an element of the material side, the criminal law examines the act from the aspect of a neutral observer, and from this standpoint defines the criterion of volitional conduct, using the notions of consciousness, volition in this meaning. Resulting that volition could only play a role in criminal law as a legal historical concept. The human conduct – including all its element – was namely evaluated in its whole 'human existence' by the past jurisprudence. Subsequently, the concept of distinguishing between the material and substantive elements was developed, resulting that 'conduct' was

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transferred to the world of objective criterion. However, volition – as the trigger of the conduct – remained a notion and terminology used to explain the categories of culpability. Since then, the 'solution' had also been found in the new element of 'emotional relation', assuming its rightful place as well. On the contrary, it seems that it could not eliminate its old rival. According to my standpoint, in order to sustain a criminal law dogmatics using coherent and exact definitions, we should say farewell to the concept of volition regarding the issue of culpability.

The intellectual, conscious side of willfulness plays a significant role both regarding material and immaterial crimes, in lack of it – due to the lack of willfulness –, the crime could not be realized. Consciousness could be applied to the world's phenomena, and physic processes as well, but all of these are reflected in and by the objective outside world . This conscious content is developed by recognition in the perpetrator's entity, which process is realized as an experience by the individual generating the emotional content. Pursuant to the judicial practice the physic processes relevant during the examination of culpability, shall be inspected with regards to the perpetrator's personality and the objective features of the conduct as well. According to the general, brief definition: 'the consciousness of the circumstances evaluated by the legislator in the statutory definition of the crime' , also 'the consciousness of the material side's elements is required for establishing intentional commission' . These elements belonging to the material side are the followings: criminal conduct, in case of material crimes causality and result, moreover the subject, place, date, mode and instrument of crime. Naturally all these elements are different in every statutory provision, and the perpetrator's criminal liability could exclusively be established for those elements realized by him/her and (s)he shall only be conscious about these circumstances, making this an essential criterion for an

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alleged, future conviction. ‘The perpetrator should acknowledge the elements of the statutory provision from a simple point of view, in line with their everyday meaning and the related general experiences, common knowledge’ , the consciousness of the related legal terms and notions are unnecessary. ‘Generally, the knowledge of the facts is actualized in the form of the so-called ‘thinking-over’ , in this way the perpetrator follows the whole process of the conduct’s commission in his/her mind. However, this so-called ‘thinking-over’ could not always be detected, in some case we may speak only about the in-actual conscious of the perpetrator, e.g.: basic mathematics is known by us without any special ‘thinking-over’; but ‘the common life experiences, factual realities being the basis of this common consciousness should certainly be acknowledged’ . A contrary standpoint is formulated by Géza Tokaji, as he does not accept in-actual consciousness sufficient, and in every single case require the process of ‘thinking-over’ – except regarding the conduct’s social danger.

In case of material crimes and exclusively in this case, as ‘result’ is not necessarily an element realized at the same time with the commission and either is an element required as a factual statutory circumstance, result shall be consciously foreseen by the perpetrator. Géza Tokaji basically taking into account the result imagined in the perpetrator’s mind and the likelihood of its actual realization, distinguish between the following three categories: the consciousness of inevitable, plausible or possible result. In the first case direct intention (dolus directus) could be established, whilst the lowest limit for the establishment of intentional commission and the basis of the delimination between luxuria is: the consciousness of the realistic opportunity of the result’s occurrence.

According to certain authors consciousness shall also extend to the social danger of the conduct. József Földvári especially defines this as the essence of

willfulness and evaluates this as the most important element of it, as according to him this is the pre-condition of establishing intentional commission, 'the basis of the more severe sanctions traces back to the conscious conflict with the social norms' .The knowledge of the precise legal prohibition is not required, nor it is a relevant factor whether the perpetrator himself disapprove the certain conduct, 'the perpetrator shall only be conscious about that his conduct is evaluated as dangerous by the generally accepted norms of the society, it is clearly violating the rules of communal life' . However, 'thinking-over' of this element is not necessary, the existence of 'in-actual consciousness is sufficient' .

Interesting questions may occur during the examination of the question of illegality concerning the theme of culpability. Pursuant to the statutory definition of crime one element of this notion is that the intentional or negligent conduct ordered to be punished shall also be dangerous for the society. Accordingly, the social danger of the conduct is an objective condition of commission of crime. From the aspect of culpability this means that it is not sufficient that the perpetrator's conduct is objectively dangerous for the society, but the present condition shall also be detected in the perpetrator's subjective entity as well.

However, the statutory definition of willfulness does not include the consciousness of social danger as a criterion. One explanation for this could be that culpability as being one element of the notion of crime and a condition-system defined as the subjective side of the committed crime as well, apparently acts upon the whole notional system of crime, and this definition regulates the intentional commission of crime. On the contrary, the perpetrator's mind shall obviously extend to the illegality and social danger of his/her conduct . In case of the formal definition of crime, when crime is defined only as a conduct prohibited by law, a more precise distinction shall be developed concerning

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willfulness, because in lack of that only the punishable characteristic so the strictly defined consciousness of illegality would be required in case of intentional commission. The Hungarian regulation and notion of crime at the same time includes the notion of social danger, therefore it could be disputed whether it is eventually necessary to require the conscious recognition of illegality on the subjective side as a further condition. According to my standpoint the answer is 'yes', due to the following defects of the subjective side's current regulation.

In light of the above, it could be recognized that Section 7 of the Criminal Code does not describe the element of 'consciousness' (or: intent) in the definition of willfulness. It could only be deduced from the notion of gross negligence ('luxuria') or may as well consider naturally given that we may only relate to emotionally foreseen and known consequences or facts. Briefly: we may say that the definition of 'consciousness' is redundant because it is evident, 'straightforward'. However, according to may standpoint: this effort and 'unnecessary' phrase could and should be defined in a statutory provision without any real risk.

Besides the volitional side of culpability, emotion, the emotional side is a concretely defined element of the stator provision. The question may occur: are 'emotion' and 'feeling' synonyms, could be said that the two notions are identical? The two notions are not identical, but they stand in a close relation, could be deduced from the other. Emotion is a permanent physic relation, which is 'developed by and from the feelings' , therefore feeling is a momentary, 'concrete and dynamic elementary emotional phase' , however, our emotional relations are influenced by our prior feelings as well . Consequently, feeling, the emotional load at the moment of the commission is decisive when establishing the emotional relation concerning culpability, which feeling is slightly

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determined by our emotions. The subsequent, whole emotion related to the commission is strongly influenced by the full process of crime, including the afterward events and consequences. Moreover, the moment of commission is a highly tensional state when consciousness is somewhat narrowed, therefore it seems more adequate to rather speak of emotional reactions in this situation.

Willfulness could be separated into direct and foreseeable intent concerning the emotional side. The intellectual parts of the two forms of willfulness are identical. In case of material crimes both forms of willfulness commission are characterized by that the consequences of the conduct are foreseen by the perpetrator, but in case of dolus directus the perpetrator specially desires these, whilst in case of dolus eventualis only acquiesces to these. Consequently, this differentiation bears only real significance concerning material crimes including result. Several authors conclude to contrary standpoint in this regard as they refer to the legal definition which contains only the 'consequences of the conduct'. Accordingly, this consequence is a feature of every crime – unless result which is only a condition of material crimes – as every single crime cause a negative, harmful impact in the society. Therefore, our legal notion could also be applied to substantive crimes as well. According to Tokaji the statutory provision of willfulness, including the elements of the emotional side could be applied in case of immaterial crimes 'in lack of any statutory consequences […] directly to the conduct itself' . However, I would rather consider this a wrongful train of thoughts, as the conduct itself is a necessary and objective factor of the statutory provision, the commission of crime even at Tokaji as well. The emotional relation reflected to this as an element of culpability is indecipherable. The fact that the perpetrator acquiesces the consequences of his/her conduct simply deteriorate the volitional condition as volitional conducts are grounded on the expressed will, the desire of the act.

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If we do not accept the legal definition for the crimes not including any result, the question may seem to be valid: what kind of definition could be applied and how could be intentional commission defined in this case?

The facts, circumstances and – if it is accepted by us – the awareness of the conduct's social danger (in the legal practice) could all be decisive elements, worthy of being inspected. Further features could not be found in scientific theories, nor in the actual case-law. Despite of the fact that the establishment of willfulness does not cause any problem in the legal practice even in case of immaterial crimes, as 'result' is expressly defined concerning negligent crimes, but due to my standpoint the completeness of the legal definition could be expected from the legislator.

In case of direct intent (dolus directus) the perpetrator desires his/her conduct's foreseeable consequences – as defined in the statutory provision and threatened of penalty –, the result, meaning that his/her conduct is deliberately committed to achieve this certain result. For instance, the felony of manslaughter is committed with direct intention when the perpetrator shots the victim from a directly close distance, aiming the shots at the victim's chest .

The emotional feature of foreseeable intent is characterized by acquiescence. Therefore, in this case not the direct aim of achieving the conduct's consequences, the result is decisive, but that these consequences are foreseen by the perpetrator during the commission. As dolus eventualis is an 'artificial category of criminal law' , its notional limits could be deduced from the related case-law. Moreover, the examination of this may lead us to the following further questions: 1.) how could it be distinguished from gross negligence (luxuria) 2.) in the legal practice how could the two forms of willfulness be exactly separated, which real life factors could help this distinction.

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We may speak of gross negligence when the perpetrator is able to anticipate the possible consequences of his conduct, but carelessly relies on their non-occurrence. Accordingly, the intellectual side of this commission is identical to willfulness as the consequences of the conduct are foreseen by the perpetrator. The difference could be found concerning the emotional side: in case of luxuria this is a careless attitude, whilst in regard of dolus eventualis it is acquiescence. It is a generally valid theorem regarding gross negligence that the careless motive of the perpetrator's conduct is 'an element falling under the scope of judicial evaluation' . Therefore, as the pre-condition of this evaluation process is that according to the prior examination of the case, desired or aimed result could not be revealed, pursuant to the majority of the authors the judge may conclude to the following three – taking into account the real current case-law rather four – consequences:

a) The perpetrator carelessly relied on the non-occurrence of the conduct's consequences, but 'the possible chance of non-occurrence was grounded on a concrete circumstance' . These circumstances shall be grounded on exact facts, 'which may establish and lead to the perpetrator's careless belief in the non-occurrence of the result' . In such case, the risks and possible consequences of the conduct are recognized by the perpetrator, but 'while taking significant risks, (s)he hopes' that the alleged results will not occur. In this situation, gross negligence should be established.

b) If the perpetrator reasonably relied on the non-occurrence of the consequences, the conduct does not realize crime. For instance, a professional artist in the circus throwing knifes reasonably hopes that during a well-practiced show, which had already been performed several times without any failure, he will not make any harm to his partner. Several authors may think that this question nevertheless does not belong to the theme of culpability, and rather

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categorize admissible and reasonable risk-taking to the circumstances excluding the illegality of the conduct .

c) In case ‘the perpetrator’s hope was merely groundless’ , as ‘in the factual situation the necessary result could only accidently be default’ or ‘the hope of non-occurrence is only an ungrounded desire lacking any factual basis’ , moreover when the perpetrator does not hope at all the default, and is just neutral to the consequences, foreseeable intent shall be established. For example, when the perpetrator places attenuative liquid to the victim’s body and after that inflames causing the victim’s death due to the severe fire casualties .

d) Nevertheless, if the evaluation of the perpetrator’s consciousness results in the consequence that despite of any possible or alleged chance of hope, it truly was identical to the sense of inevitability, the conduct should be deemed to be committed with direct intent. For instance, both of the following two examples of homicide are committed with dolus directus: the mother abandons her new-born baby on the floor, and due to the lack of sufficient care, the baby dies’ ; or ‘the victim was extruded from a 10 meters high window, who consequently suffers severe injuries’ .

The basis of the distinction lies in the perpetrator’s relation to the conduct and the possible result of it. In case despite of the actual concept of the possible result, the perpetrator ‘evaluated the commission of the conduct more important than the non-occurrence of the result’ , foreseeable intent (dolus eventualis) shall be established. On the contrary, when the perpetrator ‘does not even accept or acquiescence the conduct turning into an offence’ , meaning that if (s)he would have taken the occurrence of harm certain, (s)he would have definitely desisted from the commission, the case of gross negligence could be established.

According to my standpoint, the above description well illustrates that our legal definition could not the least be deemed absolute, it does not cover the

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legal practice, and concerning several issues it was complemented with the artificial developments of jurisprudence. Unfortunately, according to my experiences the theoretical academic thinking – basically due to understandable reasons – also sticks to the legal definition, necessarily creating unrealistic conceptual operations or relations in order to justify the legal definition. However, a – even only in light of the above – this is an inevitably pointless attempt, the legal definition suffers from such defects which could not be simply dealt with the method of interpretation.

Naturally, it would be idealistic to demand from our statutes or any statutory provisions to illustrate the whole several years long development of criminal law and culpability, including the dogmatical, philosophical, sociological, etc. background of this process, but an exact claim could be clearly stated: the basis of the prohibition shall be highlighted in some way. Even the definition of willfulness suffers from severe defects as well, 'exclusively from the definition the notion of culpability could not be deduced, nor the significance concerning the establishment of criminal liability' . It should at last be understood, that a definition based on the distinction between 'desiring' or 'acquiescence' of the possible consequences, could only sketch the grounds of criminal liability in an extremely abstract way. Consequently, due to my standpoint the factors of willfulness should rather be linked to the notions of the recognition of social danger and illegality, the mere fact of acting against to this recognition.

Although the possibility of a legislative reform does not seem realistic for a long-time, I may present briefly my concept of an adequate legal definition, including only some introductory basic thoughts and purposes which could possibly be set out:

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- the legal definition should cover and be interpreted to both material and immaterial crimes,

- another requirement could be that due to the distinction between the intellectual and emotional sides, both of them should be included in the definition,

- the norm's wording should be developed with the process of our dogmatical traditions and current practice,

- the compactness of the definition would be favorable and desired ,

- in idealistic situation the ground of criminal liability, the essence of responsibility would be highlighted in the future legislative text.

According to my standpoint, therefore the idealistic legal definition would sound like the followings:

'The crime shall be deemed to be committed intentionally, if the perpetrator foresees the circumstances of his/her conduct, is aware of the fact that the conduct is prohibited (or morally impugnable) and

a) foresees the conduct's consequences as defined in the statutory definition, and desires or acquiesces to them,

b) despite of this commits the conduct.'

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Gábor Zalka, dr.

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The theoretical and practical aspects of the abstract notion of willfulness was examined in the article. The study laid emphasis on the description and characterization of the effective legal regulation. Afterwards the present dogmatic was analyzed from a critical point of view, including the review of the current notions' defects from a mainly practice-oriented aspect. Finally, the author's individual legal standpoint and several related proposals for the future legislation were submitted.

Key words: criminal law, substantive criminal law,

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