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Summary

Multiple Liability. An analysis of legal concepts that govern multiple criminal offences

Multiple liability will be imposed if a defendant is sentenced for more than one offence. No time limit is applicable here: the defendant can be found liable for two offences at the same criminal trial, or be held liable for one offence and be held liable for another one five years later. Not only does the Court have the authority to determine the liability of a defendant: the Public Prosecution (by imposing a penalty order) but also the administrative authorities (by imposing an administrative penalty) are entitled to do so. This book describes research done in the relationship between legal concepts that regulate multiple liability in criminal law. The central question is whether legal concepts related to multiple liability form a system, i.e. an intrinsically consistent and effectively organized unity of legal concepts. If this is not the case, the next question would be how such a system can be created. The legal concepts in question have been divided into three categories, based on their function in the criminal proceedings. They will be discussed in chapters II, III and IV, which include the search for a suitable system for each category. Chapter V, the synthesis, will focus on the relationship between the legal concepts across the categories and will provide answers to the research questions.

Chapter II discusses the legal concepts of the first category: legal concepts that play a role if, or lead to the fact that, the defendant is tried and punished for more than one offence at the same time. This chapter will especially focus on the concurrence rules. The rules on concurrence of criminal offences (articles 55 up to and including 63 of the Dutch Criminal Code) place limits on the maximum punishment that can be imposed if the defendant is tried for several criminal offences. The concurrence provisions are applicable if a body of facts (one act or a combination of acts) leads to a prosecution for violation of several criminal provisions, but also if several unrelated actions constitute several criminal offences for which the defendant is prosecuted in the same criminal proceedings. The law distinguishes between *concursum idealis*, *concursum realis* and continuous acts. Based on a recent judgment by the Dutch Supreme Court, *concursum idealis* occurs if the actions declared to be proved constitute a body of facts that took place more or less at the same time and place and that is coherent to such an extent that the defendant can (in essence) be charged with one offence. A continuous act occurs if successive actions declared to be proved are so closely linked (also with regard to "volition") that the suspect is (in essence) charged with one offence. All other forms of concurrence of criminal offences constitute *concursum realis*. These three concepts will be discussed in chapter II, on the basis of, inter alia, legislative history and

the case law of the Dutch Supreme Court. Attention will also be given to the application of these legal concepts in the lower courts (courts of first instance and courts of appeal). The discourse will show that the distinction between the three types of concurrence is not always very clear. Judgments, made in the lower courts, show gradual transitions between *concursum idealis* and *concursum realis* on the one hand, and between the continuous act and *concursum realis* on the other. The question arises as to whether or not there is room for each of these forms of concurrence in a system for legal concepts on multiple liability.

Aggravated and habitual offences are also discussed in the second chapter, in so far as criminal offences are concerned that consist of multiple actions which may also be punishable individually. I have referred to these aggravated offences as 'composite offences'. If one of the habitual offences or composite offences mentioned is declared to be proved, the defendant will be held liable for one offence only, although the separate acts may in itself also constitute an offence. Examples are habitual money laundering (article 420ter of the Dutch Criminal Code) or theft accompanied by violence (article 312 of the Dutch Criminal Code). These criminal offences could be considered offence-specific concurrence provisions. From the legislative history of some of these habitual and composite offences it must be concluded that the legislator considered the combination of these criminal offences to be so severe that a higher maximum sentence should be applicable. Moreover, the legal classification of the offence (and therefore the criminal records) will thus express very clearly what the defendant has done wrong. In the case of some of the habitual offences it is however not immediately clear what the added value is of classification as a habitual offence declared to be proved compared to classification as a single offence committed several times. It must be noted here that only a few requirements are set for evidence of habit. Moreover, the maximum sentence in some cases is equal to the maximum sentence applicable to the single offence committed several times. The same goes for some of the composite offences: legislative history does not show whether, and if so why the legislator considered specific combinations of criminal offences to be more reprehensible, whereas at the same time the maximum sentence does not, or does hardly, differ from the maximum sentence applicable to the two criminal offences that constitute the composite offence. In those cases it is conceivable that such habitual or composite offences be abolished.

The final part of chapter II will go into the possibility of taking into consideration conduct not charged earlier, when sentencing. The settlement of offences appended for the Court's information (*ad informandum*) is relevant here. Another element dealt with is the option to take into consideration a criminal offence not charged that does however provide a more detailed narrative on the circumstances of the proved offence. What the rules, provided for in the legal system, offer on the settlement of offences appended for the Court's information are quite clear. The defendant must have recognized these offences and if the Court takes offences appended

for information into consideration when sentencing, the defendant can no longer be prosecuted for these offences. This is different for a criminal offence that is taken into consideration that has neither been charged nor appended for information, but that does provide more details on the circumstances of the commission of the proved offence. It seems that such criminal offences must be physically linked to the facts stated to be proved (as in illegal restraint accompanied with physical abuse), but it cannot be concluded from the Dutch Supreme Court's case law on this subject how close that link must be. Furthermore, it is unclear whether a separate prosecution can be initiated for criminal offences that have thus been taken into consideration in the sentence.

Chapter III focuses on the second category: legal concepts that make it possible to take convictions for offences committed earlier into consideration when determining the punishment. The essence here is the possibility to impose higher sentences in case of recidivism. The main theme of this chapter is the different forms that the legal concept of recidivism takes in the Dutch Criminal Code, in the prosecution guidelines and in the orientation points for the judiciary. First, attention will be given to the justification in legislative history and literature of higher punishments in the case of recidivism, which has gradually changed over the course of time. Recidivists used to be seen as more "depraved" than first offenders, meaning that more could be imputed to them. Today, preventive considerations prevail: the punishment imposed earlier apparently did not have the intended deterrent effect. It therefore seems logical to impose a higher sentence, in the hope that the defendant will not repeat the offence (again). Next, statutory provisions on recidivism are discussed, most notably article 43a of the Dutch Criminal Code, and recidivism as a relevant factor in the sentence. An interesting fact is that the law, the prosecution guidelines and the orientation points for the judiciary refer to recidivism as grounds for an increase in punishment in different ways. The extent to which the penalty can be increased differs most of all.

Recidivism only occurs if the offence stated to be proved was committed after the final judgment. Other final judgments – if these were still not final at the time of the commission of the proved offence – can also play a role in the sentencing. Under the law as it stands, article 63 of the Dutch Criminal Code applies in those cases. Several appeal cases before the Supreme Court are discussed in which complaints were made on the implication of earlier convictions on the sentencing. An analysis of these court decisions shows that the Supreme Court only sees cause to quash the judgment of the Court of Appeal, if this Court considered that the earlier conviction apparently did not discourage the defendant to commit the proved offence, whereas the relevant conviction was not final at the time of the commission of the offence stated to be proved. Sometimes the Appeal Court takes earlier convictions into consideration that were not final upon the commission of the offence declared to be proved but that are final later, without applying the aforementioned consideration. Generally, the Supreme Court does

not normally quash the judgment in these cases, even though the Appeal Court took the relevant conviction into account to reach a higher punishment. This gives rise to the question as to whether this case law narrows the distinction between recidivism and concurrence (article 63 of the Dutch Criminal Code), and if so, how this narrowing must be valued.

The final part of chapter III is devoted to the custodial order for repeat offenders; a recidivism provision in the form of an order, applicable to defendants with long or even very long criminal records. The introduction of this measure was accompanied by strong criticism. The custodial order for repeat offenders was said to have taken the form of an order only to justify long prison sentences for persistent offenders, without such prolonged detention being proportional to the severity of the proved offence. It was claimed that only the duration of the measure differed from regularly imposed shorter prison sentences for these criminal offences. Research into the practice of the custodial order for repeat offenders however shows that this measure is normally only demanded and actually imposed if it is clear that problems causing the commission of multiple criminal offences would be tackled in the execution of the measure. Moreover, the Court often performs interim reviews on the execution of said measure.

Chapter IV focuses on the final category: legal concepts that offer protection against multiple liability. The principle of *ne bis in idem*, in all its forms, receives the most attention. This principle prohibits the repeated prosecution and punishment of the same person for the same criminal offence. Given the prohibition of repeated prosecution, multiple liability can also be prevented by successful invocation of the *ne bis in idem*-principle. This chapter examines what protection the *ne bis in idem*-principle offers after liability has been imposed by the Court, the Public Prosecution Service (penalty order) or administrative authorities (administrative penalty). When assessing whether a second trial is prohibited pursuant to the *ne bis in idem*-principle, the components *idem* (is there any question of the same offence?) and *bis* (is there any question of a second trial?) must be weighed up. The interpretation of these components establishes the extent to which the *ne bis in idem*-principle offers protection against multiple liability. The more *idem*, the better the defendant will be protected against a second trial. If however that second trial is not considered to be *bis*, the defendant can be prosecuted and held liable for the same offence again. The scope of the component *bis* is therefore relevant.

Secondly, chapter IV discusses the offence-specific grounds for excluding criminal responsibility. The use of these grounds can prevent multiple liability from being imposed on a defendant. Think of the Dutch *heler-stelerregel* (i.e. the thief is not the receiver), which prevents the defendant from being convicted for both theft and the handling of the stolen goods. Of particular relevance to this research are the specific grounds for excluding criminal responsibility that may be invoked if the defendant launders the proceeds of his own crime by acquiring or possessing it, as these grounds

aim (inter alia) to prevent multiple liability. However, these specific grounds for exclusion from criminal responsibility seem to have become somewhat out-dated with the criminalisation of (culpable) self-laundering.

Also, the *lex specialis derogat legi generali*-rule laid down in article 55(2) of the Dutch Criminal Code acts as specific exclusion ground: a body of facts is only considered to be a particular criminal offence and not (also) a general offence. The various *specialis* and *generalis* relationships will be dealt with at the end of chapter IV. Although these are designed to lead the Court and the Public Prosecution to the most suitable offence, they also often prevent multiple liability from being imposed on the defendant. Therefore, the special penal provisions have been included in this research on multiple liability.

Each of the aforementioned chapters concludes with an answer to the question about how the legal concepts discussed interrelate. This question will be repeated in chapter V, but this time from a broader perspective and beyond any division into categories. Especially the relationship between the legal concepts of *concursum idealis*, continuous act and *ne bis in idem* will be looked into further, as will be the relationship between the concepts of recidivism and *concursum realis*. In the concluding observations, a system of legal concepts on multiple liability will be proposed, based on all the recommendations made earlier. The system proposed is as follows:

The legal concept of *concursum idealis* must offer protection against multiple liability if, based on the facts stated to be proved, the defendant can (in essence) be charged with one offence only. When assuming *concursum idealis*, the criminal act must therefore be treated as a singular offence; only the gravest of the facts stated to be proved must be included in the classification of the offence. In the case of non-simultaneous prosecution, the *ne bis in idem*-principle constitutes an obstacle for a second trial if the defendant is charged with in essence the same offence. The assessment framework for one offence within the meaning of article 55(1) of the Dutch Criminal Code and the same offence as referred to in the *ne bis in idem*-principle are very similar, but not identical. Cases in which there is more than one offence constitute *concursum realis* in the event of simultaneous prosecution. Non-simultaneous prosecution may in some of these cases conflict with the *ne bis in idem*-principle, as regards the principles of due process or otherwise. This situation could occur in a case where the defendant is convicted for reckless or dangerous driving resulting in death and is subsequently prosecuted for driving under the influence of alcohol, whereas these two criminal offences took place simultaneously and the defendant could already have been charged with the second offence during the first trial. Although two offences can be distinguished here, it is conceivable that a second trial prosecution will fail against the *ne bis in idem*-principle. Alternatively, situations may occur in the case of simultaneous prosecution in which one offence includes another offence. In such an event, *concursum idealis* must be assumed in the case of simultaneous prosecution, whereas

non-simultaneous prosecution is not at all times incompatible with the *ne bis in idem*-principle. For example, a defendant is charged with carrying out a preparatory act and the offence resulting from it. In the case of simultaneous prosecution, the completed offence includes the preparatory act, so that it is fair to assume *concursum idealis*. In case of non-simultaneous prosecution, with firstly the prosecution of the preparatory act and secondly a new trial for the completed offence, reliance on the *ne bis in idem*-principle will not necessarily be successful. It is argued that continuous acts do not have any added value compared to *concursum idealis* or *concursum realis*. Situations that at this time are considered to be continuous acts, can after all also be regarded as *concursum idealis*. The concept of the continuous act could therefore be abolished.

If an offence is committed after the final judgment on another offence, there is the question of recidivism. The punishment for the offence stated to be proved can in such a case be increased. This is not so if a suspended punishment is already being executed for the circumstance of repeated infringement. The additional increase of a punishment for the offence declared to be proved for reasons of recidivism would be double. If an earlier conviction had not yet been pronounced or had not yet become final upon commission of the offence proved, the concurrence rule applies *mutatis mutandis* pursuant to article 63 of the Dutch Criminal Code. In the proposed system, the relevant conviction cannot lead to an increase in the punishment for the offence stated to be proved.

If a punishment is increased because of recidivism, a possible starting principle could be that no more than one third can be added to the original punishment, which given the severity of the proved facts was deemed to be proportionate. Specific recidivist provisions – in any case in so far as these relate to serious offences – lack added value since the entry into force of article 43a of the Dutch Criminal Code and can therefore be abolished. The existence of the custodial order for repeat offenders in itself is justified in a system of legal concepts related to multiple liability, as this order is tailor-made for a specific category of offenders and its imposition and execution are subject to certain requirements. Composite offences and habitual offences also take a distinctive position within a system of legal concepts related to multiple liability. However, this is only true where these offences are considered to be more severe than the ‘ordinary’ combination of criminal offences that constitute the relevant composite of habitual offence. With regard to habitual offences it is recommendable that certain criteria are set for evidence of habit, in such a way that it can be distinguished from classification of the proved facts as a single offence committed several times.

Finally, the importance of a correct application of the legal concepts discussed is stressed, some of which are of importance in a great number of criminal cases. Although there may not be an interest in appeal in cassation when it concerns complaints on the proper use of a concurrence rule or differences in application of the concurrence rules under article 63 of the Dutch Criminal Code and recidivism, a defendant may in a concrete case have a strong interest in the correct application of these legal concepts.