Ivane Javakhishvili Tbilisi State University

Faculty of Law

Journal of Law

№2, 2017

The following issue is dedicated to the bright memory of the prominent representative of Georgian legal science, Professor Emeritus Guram Nachkebia

უნივერსიტეტის გამომცემლობა

UDC(uak) 34(051.2)
s-216

Published by the decision of Ivane Javakhishvili Tbilisi State University Publishing Board

ISSN 2233-3746

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Particularities of Subjective Element of the Crime in French Criminal Law

French criminal law is characterized by many particular features, which make it different not only from the common law systems but also other countries of continental Europe. The Mens Rea of the crime is also quite peculiar. In difference with Georgian criminal law, in French law, the motive and purpose of the crime are not deemed to be part of subjective element of corpus delicti, while dolus eventualis is not considered to be a form of intention; in crimes accompanied by secondary consequences, as well as in cases, where the principle offender acts beyond common intent, as well as in so called contraventions, elements of objective imputation may be present.

Keywords: *mens rea of the crime, fault, intention, negligence, dolus eventualis, premeditation, liability without fault, norms of foresight.*

1. Introduction

Study of the composition of the mens rea in French criminal law discloses several interesting features, namely, the mens rea of the crime and its place in the structure of the crime are not clearly identified; like in Anglo-American criminal law and in difference with Georgian criminal law, dolus eventualis is not a form of criminal intent; like in Anglo-American criminal law, premeditation is a more serious form of intent, which in a number of cases constitutes an aggravating circumstance; An accomplice may be charged with aggravating circumstances of the conduct of the principle, even though he may be unaware of them; Like in Italian criminal law, in crimes with secondary consequences there is no need to establish mens rea towards secondary consequences of the crime, which points to objective imputation; likewise, objective imputation can be found in so called "faute contreventionelle", which is close to the Anglo-American strict liability.

Lets briefly overview each of these particularities.

2. Place of the Subjective Element in the Structure of the Crime

The structure of the crime and the relationship between its elements still raises controversies in modern French criminal legal doctrine[1]. Traditional school distinguished between legal element (which implies criminal law), material (which implies mainly actus reus) and moral element (which implies mainly the guilt).

Contemporary French authors frequently criticize traditional doctrine. For example, Pradel believes that the legal element, e.g. criminal law should not be included in the definition of the crime. He also believes that the structure of the crime should also not include so called "moral element", because we should clearly distinguish between the offence and the offender. According to Pradel, the psychological elements should be attached not to the crime but to the offender[2]. Consequently his definition of the crime includes only three elements: conduct, result and the causation[3].

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1 See e.i. *Козочкин И.Д.* (ред.), Уголовное право зарубежных стран, Омега, 2003, 275, Also, *Ambos K.*, Observaciones a la doctrina francesa del hecho punible desde la perspectiva alemana, revista para el analisis del derecho, <http://www.raco.cat/index.php/InDret/article/viewFile/124287/172260>, [10.09.2017].

2 Ibid.

3 Ibid, 362-402.

Desportes believes that the crime is composed only of material and mental elements. As to grounds of justification and excuse (he deals with them under the title of objective and subjective circumstances excluding liability), they are placed not under the concept of the crime but beyond.

Michelle Laure Rassat identifies three elements in the crime: material, moral and illegality element. She deals with grounds of justification while dealing with legal element of the crime and considers grounds for excuse to be part of the mens rea of the crime[4].

In order to denote subjective element of the crime, French criminal law uses the terms such as "moral element", "intellectual element", "psychological element". Some authors assimilate subjective element with the fault, while some believe that its' only a part of it[5].

In the French criminal law, there is no uniform definition of guilt, though it is more apparent that the prevailing theory is more inclined towards psychological, rather than normative definition[6].

Dana is opposed to pure psychological understanding of the guilt and believes that the guilt should be defined as indifferent or hostile attitude of the person towards social values, which are ground of its negative evaluation[7].

Due to the ambiguities related to the definition of the fault element, many contemporary French authors skip its definition altogether[8].

French authors-Lavasseur and Bulloc differentiate between fault and imputability and believe that the imputability is a necessary precondition for the imputation of the conduct, which implies the awareness and the will[9]

As it can be seen, the place of the subjective element in the structure of the crime is subject to debate: it is either deemed to be part of the crime, or outside the crime.

According to the prevailing view, the purpose and motive are not independent elements of corpus delicti. The purpose is deemed to be a part of a specific form of fault – special intent, while the motive is not considered to be a part of corpus delicti[10].

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4 *Rassat M.L.*, Droit Pénal Général, Elypses, 2004, 304-397.

5 *Pollin C.,*Droit Pénal Général, Litec, 2000, 62.

6 Xavier Pin defines guilt as decision of the person to act "in spite of prohibition by criminal law". See, *Pin X.,* Droit Pénal Général, Dalloz, 2007, 141, *Christopher Pollin* explains guilt as a link between the will of the person and the criminal conduct", see *Pollin C.,* Droit Pénal Général, Litec, 2000, 59, *Rassat* defines guilt as psychological element of the crime, See. *Козочкин И.Д.* (ред.), Уголовное право зарубежных стран, Омега, 2003, 290. Cited in: *Ambos K.*, Observaciones a la doctrina francesa del hecho punible desde la perspectiva alemana, revista para el analisis del derecho, <http://www.raco.cat/index.php/InDret/article/viewFile/124287/172260>, [10.09.2017].

7 On this question, Saint Gerard writes following: "criminal law does not give due account to the guilt as independent legal concept. The understanding of guilt is oriented more towards abstraction and philosophy, than towards legal science, due to which the guilt is understood as secondary concept, which is disseminated among other fundamental concepts". Cited in *Ambos K.*, Observaciones a la doctrina francesa del hecho punible desde la perspectiva alemana, revista para el analisis del derecho, <http://www.raco.cat/index.php/InDret/article/viewFile/124287/172260>, [10.09.2017].

8 Jean Larguier also agrees with them. He states "the conduct shall turn into crime, if it is committed by a responsible person, who is using his mental capacities (imputability) and commits it culpably (culpability). See *Larguier J.*, Droit Pénal Général, Dalloz, 2001, 77, Some French authors also propose to replace criminal imputability by the term "penal capacity" (capacite penal), See, *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas, 2008, 432.

9 *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas, 2008, 434, Pradel agrees with them and believes that the imputability is the precondition for the guilt. At the same time, Pradel believes that the grounds such as age, insanity, constraint, mistake exclude the penal capacity, Ibid, 433, 459.

10 The given principle in French legal literature is called the principle of irrelevance of motives (principe d'indifference du mobile). *Renout* describes this principle in following terms: "motives are the personal causes for the conduct. They are different and change according to persons and circumstances. The law does not take into account the motive in building up a crime of murder. The only important factor is intention, which is a necessary and sufficient element. Motive has no role in the construction of the crime. Therefore, they say that the motive is irrelevant for the criminal repression". See

3. Intentional and Non Intentional Fault

French criminal law traditionally distinguishes between intentional and non intentional fault: faute intentionelle, faute non intentionelles.

The gravest offences called "crimes" can be committed only intentionally (art. 121-3 of the French criminal code). Offences with intermediate gravity (delit) may be committed also by negligence (art. 121-3), while the "contreventions" can be committed by any form of guilt (even without fault).

Some authors identify deliberate endangerment as a separate form of mens rea (see below[11])

4. Mens Rea and its Forms

In difference with Georgian criminal code, French criminal code does not define intent. In order to denote intentional conduct, French criminal code uses different terms, such as "voluntarily" (voluntairement[12]), "knowingly (sciemment)[13]", "purposely" (dans le dessein[14]), etc.

Jean Larguier believes that together with the will, the intent also implies the knowledge of the unlawful nature of the conduct (caractere illegal de ses actes[15])

French criminal legal doctrine differentiates between different forms of intent, among which should be mentioned: general intent and special intent; direct and indirect intent, preterintentional intent. Lets briefly discuss each of them:

4.1 General and Special Intent

French doctrine, like Anglo-American criminal law differentiates between general and special intent. General intent implies the knowledge of illegal nature of the act and the will to perform the act[16]. It accompanies every intentional offence.

Pradel describes general intent in following terms: "the intention is in the first place the understanding of the factual and legal nature of the offence by the offender, which means that he is aware of the material element of the conduct and of the fact that it is prohibited by law (...), next the intention is the decision of the person to act notwithstanding the prohibition[17]".

In difference with the general intent, the special intent implies the "aspiration towards a certain result prohibited by law"[18]. For example, the special intent of murder implies the intention to take away the life of another

Renout H., Droit Pénal Général, Paradigme, 2009, 41. Despite that, he recognizes that in exceptional cases, the motive may present a mandatory element of the crime, and in some cases an aggravating circumstance. Ibid, 142-143. In French legal literature, motive and purpose are not clearly delineated. The purpose of "hindering the finding of the truth", "facilitation of the preparation or commission of the crime", "undermining public order" are cited as examples of motive. See Ibid, *Desportes F.*, Droit Pénal Général, Economica, 2008, 438.

11 *Pin X.*, Droit Pénal Général, Dalloz, 2007, 141.

12 Art. 223-5.

13 Art. 224-8.

14 Art. 434-7-2.

15 *Larguier J.*, Droit Pénal Général, Dalloz, 43. The same approach is adopted by *Renout*. See, *Henout H.,* Droit Pénal Général, Paradigme, 140.

16 *Desportes F.*, Droit Pénal Général, Economica, 430, On the similar classification in American criminal law see *Polock J.M.,* Criminal Law, Routledge 2013, 56-57.

17 *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas, 2008, 469, Such definition of guilt leads to logical conclusion that factual mistake and excusable legal mistake exclude guilt. See, *Desportes F.*, Droit Pénal Général, Economica, 2008, 431.

18 *Desportes F.*, Droit Pénal Général, Economica, 2008, 433, Some authors find special intent in cases, where the intention

person. Special intent also means intent in so called crimes of danger containing criminal purpose[19]".

Desporte states that in many cases, the need of special intent is derived directly from the law (for example, art. 411-4 criminalizes "the collection of data for the purpose of handing over to another State in order to contribute to the hostilities or aggression against France"). But there are cases in which the special intent cannot clearly be visible from legal provision and it is identified by court[20].

4.2 Direct and Indirect Intent

Some French authors differentiate between direct and indirect intent. Pradel states, that in direct intent, the person is aiming to achieve special result[21], while in case of indirect intent, he has no such purpose, but is certain (or practically certain) that this result shall be brought about. For the purpose of the liability, court case-law equates direct intent with indirect intent[22].

It should also be noted that such classification of the forms of intent in French criminal law coincides with the classification of intent into first degree and second degree direct intent in Georgian criminal law[23].

4.3 Dol Preaterintentionel.

Expression preaterintentionel comes from latin words "preater" and "intentionem", which means something beyond intention.

Dol preaterintentionelle reflects the situation, in which the intention was directed towards bringing about specific results, thought it finally caused a different type of harm[24].

In dol preaterintentionel, French authors identify three types of situations:

First, if the different or secondary result is not specifically envisaged by criminal law, then the person shall not bear liability for its occasioning.

Second, if the different or secondary consequence is envisaged by statutory definition of the offence, then this crime can be punished with the same degree of severity, as in case of intentional causing of the harm. For example, if hijacking a plane, or boat or other means of transport caused the death of one or more persons, it shall be punishable by lifetime imprisonment (art. 224-7). If the destruction of property by explosion, arson or other risk creating means has resulted in death of a person, it shall also be punishable by lifetime imprisonment (art. 322-10).

Thirdly, if the secondary consequence is not envisaged by corpus delicti of the crime, it may be punishable less severely than its intentional causing. Art. 222-7 of the criminal code states that violence which unintentionally caused death shall be punished by up to 15 years of deprivation of liberty. Therefore, this crime is punishable less severely than intentional murder (art. 221-1 of the criminal code envisages up to 30 years of imprisonment), though less severely than violence which has not triggered such result (art. 222-22 of the criminal code envisages deprivation of liberty up to 3 years).

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is directed towards the realization of the harm beyond corpus delicti. See e.g. *Pin X.*, Droit Pénal Général, Dalloz, 2007, 145.

19 *Desportes F.*, Droit Pénal Général, Economica, 2008, 433.

20 Art. 221-5 of the French criminal code describes poisoning, as administration of mortal substance. Whether this article requires the purpose to bring about death caused long debates between practitioners and legal scholars. Only in 2003, French Court of Cassation decided that this crime is present if the defendant is acting "with the purpose of causing death". See *Desportes F.*, Droit Pénal Général, Economica, 2008, 434.

21 *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas, 2008, 469.

22 *Desportes F.*, Droit Pénal Général, Economica, 2008, 434.

23 See e.g. *Turava M.,* Criminal Law, Overview of General Part, Tbilisi, 2013, 132.

24 Similar form of Mens Rea is also known in Italian Criminal Code, see art. 43.

It is important to note that in the last two cases, the French criminal law does not require the guilty attitude of the person towards the secondary consequences (even in the form of negligence)[25], which points to objective imputation[26]. According to French authors, such approach of the legislator is justified by the fact that these crimes are characterized by an increased risk of death. Therefore it is difficult to foresee the consequence. In addition, it is always difficult to prove intent in such situations. Consequently, the legislator has dispensed the prosecuting party from proving mental attitude of the defendant towards the consequence[27].

Georgian criminal law has traditionally maintained the approach, according to which "aggravation of liability for secondary consequences is permissible only when the defendant is at least negligent towards that consequence"[28]. This position was initially formulated in the criminal code of Soviet Republic of Georgia and later reproduced in art. 11 of 1999 criminal code, which states: "If the criminal law envisages the aggravation of the sentence for the occurrence of secondary consequence, which is not covered by defendant's intent, such aggravation is only possible if defendant caused the result negligently".

On the other hand, it is evident that if the intentional act of the defendant (such as attempted murder) negligently caused substantially different result (such as the destruction of the property), defendant shall be charged with two crimes: attempted murder and destruction of property by negligence.

4.4 Premeditation

Premeditation is defined in art. 132-72 of the French criminal code, according to which "decision to commit the offence is taken prior to the commission of the specific crime or delict". Pradel defines premeditation as the intent extended through time[29]. Renout believes that premeditation implies "purposeful calculation, preparation and organization of the crime". In order to illustrate the difference between sudden and premeditated intent, he examines two example: in the first example, a person in a quarrel suddenly grabs a gun hanging on the wall and shoots the opponent, while in the second example, the defendant goes home after the conflict, seizes the arm and commits murder[30].

In addition to theoretical importance, the difference between sudden and premeditated intent also has practical implications in French criminal law: like in Anglo-American criminal law, the premeditation shall turn a homicide into aggravated murder. It is also an aggravating factor in other violent crimes[31].

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25 *Desportes F.*, Droit Pénal Général, Economica, 2008, 441.

26 Italian author – Giuseppe Salvatore Cetere, while discussing the given aspect of the French law concludes that we are facing with objective imputation. "Unintended harm is imputed objectively, so that no faulty attitude is necessary". See *Cetere G.S.*, La Praeterintention, <http://www.penale.it/public/docs/La_praeterintention.pdf>, [10.09.2017]. A different view is exressed by Jean Pradel, who believes that the consequence should be foreseeable. See *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas, 2008, 432. This opinion is also shared by Francoise Durieux, See *Durieux F.*, Droit Pénal Général <www.hugo.nadin.free.fr>, [10.09.2017]. It is worth to note that in Italian law, which is familiar with this form of mens rea, part of the authors think that it expresses objective imputation, while others think that this s a combined form of guilt, where the defendant has intention towards one consequence and negligence towards another. See Astolfo Di Amato , criminal law in Italy, Kluwer Law International, 2011, 86. Similarly, the caselaw is also controversial. See Studio Cataldi, Omicidio Preterintenzionale <http://www.studiocataldi.it/guide-diritto-penale/omicidio-preterintenzionale.asp>[10.09.2017]. Preterintentional intent is also known in Belgian criminal law, though secondary consequence can be imputed only if foreseeable. See, *Kuty F.*, Principes Généraux de Droit Pénal Belge, T. II, Infraction Pénale, 261.

27 *MayaudY.,* Droit Pénal Général, Presses Universitaires de France, 2013, 254-255.

28 See *Tsereteli T.* (Edit.), Authors Collective, Commentaries of Criminal Code of Georgia Socialist Republic, Publishing House – Sabchota Sakartvelo, Tbilisi, 1976, 74.

29 *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas, 2008, 472.

30 *Renout H.,* Droit Pénal Général, Paradigme, 2009, 144.

31 See e.g. art. 222-3 (torture), art. 222-8 (violence that resulted into death).

5. Non Intentional Fault

According to prevailing view, in the course of non-intentional conduct, the defendant does not strive toward the realization of a criminal harm, but reveals an indifferent attitude towards socially protected values[32].

French criminal law differentiates between three forms of intentional fault: deliberate endangerment (mise en danger deliberee), negligence (imprudence ou negligence) and contraventional guilt (faute contraventionelle).

5.1 Deliberate Endangerment

One of the particular features of the French criminal law is that it unites two forms of guilt, which in Georgian criminal law are known as eventual intent and conscious negligence under specific forms of mens rea – deliberate endangerment. By this approach, it approximates with Anglo-american recklessness[33].

Following examples of deliberate endangerment are cited in the French Law: Supervisor, which lets the workers on an unstable scaffolding; driver who passes another car in limited visibility area, defendant throwing a heavy furniture from the window without being interested in the fate of by- standers. Renout states that according to old criminal code, the given cases, if ended up in a criminal harm would constitute criminal negligence. Though, in case of absence of criminal harm, would be left unpunished, or liable as a formal violation (such as violation of traffic rules or road safety norms) [34].

Criminal Code of France of 1994 envisaged this form of guilt only in the general part of the criminal code in the form of "deliberate endangerement", however, in the special part of the code, it is only envisaged in the form of several crimes.

Art. 121-3 envisages deliberate endangerment as a specific form of guilt. It states: "whenever the law so provides, a delict can be committed though deliberate endangerment of another person". At the same time, according to the law, the deliberate endangerment should be preceded by "a manifestly deliberate violation of a specific duty of care or foresight".

1. Deliberate endangerment as a form of guilt is characterized by following conditions:
2. First, there must be a violation of a specific duty of care or vigilance (this can be e.g. construction norms, road safety regulations, etc. [35])
3. The norm in question should lay down a specific duty of safety or precaution. which means that the judge cannot rely on rules of general nature[36].
4. Violation of the duty should be manifestly deliberate[37]

Deliberate endangerment as a form of guilt has its peculiar features in result and conduct crimes.

In result crimes it may be an aggravating circumstance (if it is envisaged specifically by law) [38]

As to the conduct crimes, criminal code envisages only one such crime containing deliberate endangerment. Namely, art. 223-1 of stipulates the "immediate placement of another person into the risk of death or injury, or permanent work disability through a manifestly deliberate violation of duty of care or safety set down by the law or regulation[39]"

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[32] *Renout H.,* Droit Pénal Général, Paradigme, 2009, 146.

[33] See*Tsikarishvili K.,* Question of Commission of Attempt with Dolus Eventualis in Italian, French and Anglo-American Criminal Law, "Martlmsajuleba and Kanoni", 2009, №1, 10.

[34] *Renout H.,* Droit Pénal Général, Paradigme, 2009, 154.

[35] *Renout H.,* Droit Pénal Général, Paradigme, 2009, 155.

[36] Ibid, 155.

[37] Ibid, 155.

[38] According to art. 221-6 of the criminal code, negligent homicide is punishable by deprivation of liberty up to 3 years and fine up to 45 000 Euro. According to the par. 2 of the same article, if the conduct is committed in deliberate violation of norms of security or foresight, it will be punishable by 5 years of deprivation of liberty and fine of 75 000 Euro.

[39] Similar crime in American law is reckless endangerment, which like French mise-en-danger, does not require the

In order to charge a person under this article, following conditions must be present:

1. Creation of immediate risk of life or health of another person.
2. This risk must be caused by a specific duty of safety or care envisaged by the law or regulation[40]
3. The violation should be manifestly deliberate. However it is not necessary that the defendant is aware of the risk[41].

The expression "manifestly deliberate means that the violation of the norm should be the choice of the person and not be caused by inadvertence[42].

Xavier Pin criticizes the legislative formulation of deliberate endangerment. The author differentiates between *dolus eventualis* and conscious negligence. While in dolus eventualis, the person shows indifferent towards the harm, in conscious negligence, the person hopes that the it will not occur. The author does not agree with the placement of both forms of guilt under one and the same category. He believes that deliberate endangerment should cover only dolus eventualis, while the conscious negligence should belong to negligence[43].

5.2 Negligence

French criminal code defines neither intention nor negligence. The negligence is expressed in terms such as "imprudence", "negligence", "inattention", "maladresse".

French authors Conte and Maistre De Chambon define intention and negligence in following terms: "while intention is the directed will, the negligence is the failure to direct the will. If the intention is the will which is directed towards unlawful result, the negligence is the failure to foresee the result, while the defendant does not envisage the risk of occurrence of the harm[44]".

Different authors define negligence differently. Renout states that the negligence implies the failure to foresee the harm. Consequently, the negligence means lack of foresight[45]. The given definition is quite narrow, because it does not embrace conscious negligence.

causation of specific harm, <http://definitions.uslegal.com/r/reckless-endangerment>, [10.09.2017].

40 In difference with negligence, the given norm does not imply the violation of unwritten norms of foresight. As it is often referred, while incriminating this conduct, the legislator primarily had in mind traffic and workplace safety violations. See, *Desportes F.*, Droit Pénal Général, Economica, 2008, 460.

41 *Renout H.,* Droit Pénal Général, Paradigme, 2009, 156. Despite the fact that this was established by February 16 Decision of 1999 of the Court of Cassation, some authors contest this statement (See *Desportes F.*, Droit Pénal Général, Economica, 2008, 459). The given statement questions the assimilation of this crime with dolus eventualis or with conscious negligence, because in both cases the defendant is familiar with the risk of occurrence of the harm. In Georgian criminal law, similar provision is contained in art. 127, in the form of "deliberate placement into danger". However, the comparison of these two incriminations also reveals a significant difference: According to Georgian criminal code "the victim should have no possibility to take measures for self-protection", while according to French code, this danger should be caused by "violation of specific obligation of security or foresight established by the law or reglement.

42 *Desportes F.*, Droit Pénal Général, Economica, 459.

43 *Pin X.*, Droit Pénal Général, Dalloz, 2007, 157. Pradel also agrees with such differentiation, though he uses a different formula. According to Pradel, in deliberate endangerment, the defendant holds the occurrence of the harm possible, while during conscious negligence, he rules out such possibility. See *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas, 2008, 486. *Renout* qualifies as reckless endangerment only those cases, when the defendant hopes that the result will not occur, however he never states, what will be the qualification when the defendant tolerates the occurrence of the harm. See *Renout H.,* Droit Pénal Général, Paradigme, 2009, 38.

44 *Conte P., Maistre Du Chambon P.*, Droit Penal General, 203, cited from *Козочкин И.Д.* (ред.), Уголовное право зарубежных стран, Омега, 2003, 293.

45 *Renout H.,* Droit Pénal Général, Paradigme, 2009, 146. These clarifications inadequately reflect the essence of negligence, because they do not cover the cases of conscious negligence.

The duty of foresight may be derived from different sources. French criminal law doctrine differentiates between two types of negligence: first, when the duty of foresight is envisaged by the law or regulation, and another type, when it is not[46].

This difference has practical meaning: in some cases the law foresees only the first type of negligence (e.g. art. 332-5 of the criminal code: destruction of property through explosion or arson, through violation of duty of safety or foresight stipulated by the law or regulation).

An interesting issue is the interpretation of violation of the duty of foresight.

Traditionally, the courts evaluated the violation of the duty of foresight *in abstracto,* from the viewpoint of an average person, without taking into account specific skills and experience of the defendant[47]. Some French authors believe that this approach was modified by 1996 law, which stipulated that the negligence is present when "the person failed to take reasonable measures of precaution taking into account his mission, functions, competences as well as powers and means at his disposal". Since enactment of this legislative novelty, the judge has a duty to evaluate the violation of duty of foresight in the light of specific experiences and powers of the person" [48].

5.3 Faute Contreventionelle

French criminal law is also familiar with so called "contraventional" guilt, which is beyond traditional concepts of intention and negligence and is close to the Anglo-American strict liability [49].

Contraventional fault is expressed only in violation of the prohibition established by the legal norm (regulation or the law). The prosecution does not have to prove the existance of intent or negligence. Sometimes these violations are called "material violations". The violator is exempted from liability only due to a constraint[50], insanity[51], lack of age or *force majeur*[52].

Desportes justifies the existence of contraventional fault by the fact that the relevant prohibitions do not reflect fundamental values of contemporary society, but some social discipline and their infringement does not entail any social blame[53].

Rassat justifies the existance of such norms by the fact that the legislator requires utmost vigilance from the citizens in order to prevent violation of norms established by the law or regulation[54].

Old criminal code envisaged contraventional fault not only for petty offences but also for delicts. However, the new code limited this type of mens rea only to contraventions. This does not mean that all contraventions can be committed with such form of mens rea. Sometimes, the legislator clearly states that this particular offence can

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46 In some cases, the legislative formulation of a specific crime envisages only the first type of negligence (such as art. 332-5 – destruction of property by explosion or arson, which is caused by violation of norm of safety or foresight established by the law or regulation).

47 *Renout H.,* Droit Pénal Général, Paradigme, 2009, 147.

48 Ibid, 148.

49 See *Tsikarishvili K.,* Strict Liability in Anglo-American Criminal Law, Legal Anomaly or Effective Regulatory Tool, Journ., "Samartali", 2000, № 2.

50 See Crim. 28 Juillet, 1881, Dp, 1882, 1., 95. see. *Desportes F.*, Droit Pénal Général, Economica, 2008, 476

51 *Rassat M.L.*, Droit Pénal Général, Elypses, 2004, 342.

52 The court case-law interprets the force majeur broadly and also includes in it the cases where the person was not and could not be aware of the prohibition. For example, the driver which goes in opposite direction through one-way traffic may be excused by force majeur, if the prohibiting sign was removed. *Rassat M.L.*, Droit Pénal Général, Elypses, 2004, 341.

53 *Desportes F.*, Droit Pénal Général, Economica, 2008, 475.

54 *Rassat M.L.*, Droit Pénal Général, Elypses, 2004, 342, 344. Similar arguments are brought by English and American authors in support of strict liability in common law countries (see, *Tsikarishvili K.*, Strict Liability in Anglo-American *Criminal* Law, Legal Anomaly or Effective Regulatory Tool, Journ., "Samartali", 2000, № 2.

be committed only through intention or negligence[55].

Some authors conclude that the contraventional fault implies a liability without fault, for which the fact of material violation of the norm suffices[56].

Rassat disagrees with such approach. She believes that if this were the case, than the defenses such as lack of age, insanity or constraint would not exclude liability. Rassat believes that the contraventional fault is more a procedural institution, which exempts prosecuting party from the proof of mens rea and bars defense party from proving the contrary. Therefore, this must be regulated rather by procedural, than substantive law[57].

Subsequently, many authors denominate this type of mens rea under "presumed guilt" [58]

6. Forms of Mens Rea and Complicity

The French criminal law requires that the accomplice should be aware of the intent of the perpetrator[59]. According to Gaston Stephani, the intention of the accomplice is different from the intention of the perpetrator: "it consists of the intent of the accomplice, his willingness to join to the conduct of the perpetrator[60]". Is it possible for the accomplice to act by negligence? Michele Laure Rassat writes on this subject:

"A negligent conduct, in whatever form it is expressed, even if it is causally linked with the result and this is sufficient to ground civil liability may not serve as basis for the accomplice liability. The concierge of the house or a baby-sitter, which tells to an outsider about the habits of the residents of the house, may not be held liable as accomplice to theft or kidnapping, even if his conduct has a crucial causal effect to the occurrence of the result[61]"

We should separately treat the issue of so called "perpetrators excess". French criminal law distinguishes between three types of "excess":

1. If the perpetrator commits the different type of crime[62] other than envisaged by the accomplice, the latter shall not be criminally liable[63].
2. If the perpetrator commits the same crime, which was covered by the intent of the accomplice but in aggravating circumstances, the accomplice shall be charged with these circumstances even if he/she was not aware of them[64].

A famous case illustrating the the court caselaw is the "Oriol Murder". In this case, deputy police chief Maria intended to kidnap and kill his boss Massy for political and personal reasons. He assigned this task to four of his accomplices, who assaulted the house of Massy and while they were waiting for him, they tied 5 family members, including a 7 year old child. Because one of the members of the family recognized the assailant, they killed them all. Later, they also killed Massy. The instigator of the crime – Maria has been found guilty for the

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55 See e.g. articles R. 625 and 626

56 *Schmidt* J.C., L'element intentionel en matiere de contravention, Rev. Penit. 1932. In its judgment "Salabiaku v. France, ECtHR stated that the presumed guilt did not violate art. 6 of the European Convention with the precondition that it is confined "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence" See Salabiaku v. France, judgment of 7 October 1988, Series A, No 141-A.

57 *Rassat M.L.*, Droit Pénal Général, Elypses, 2004, 342.

58 *Rassat M.L.*, Droit Pénal Général, Elypses, 2004, 341. Desportes does not agree with the approach according to which the contraventional fault implies presumed guilt. The presumption may be overridden by proof that the person acted neither by intent nor negligence">, *Esportes F.,* Droit Pénal Général, Economica, 2008, 476.

59 *Elliott C.*, French Criminal Law, Willan, Routledge, 2001, 90.

60 *Stefani G., Lavasseur G., et Bouloc B.*, Droit Pénal Général, Precis Dalloz, 1981, 269

61 *Rassat M.L.*, Droit Pénal Général, Elypses, 2004, 411.

62 *Pradel* differentiates between different types of crimes according to legally protected values, infringed by those crimes, *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas,2008, 423.

63 Ibid.

64 See *Pradel J.*, Manuel De Droit Pénal Général, Editions Cujas,2008, 426. *Pradel* justifies this approach by stating that "every participation in the crime contains hazard, risk that no accomplice can rule out. *Ibid.*

instigation of murder of 6 persons, even though he intended to kill only one of them[65].

3. Like in Georgian criminal law, if the perpetrator commits the same type but less grave crime as envisaged by the accomplice, (for example uses the weapon that handed over for murder for the commission of body injury) he shall be liable for the crime factually committed[66].

7. Intention in Attempted Crime

French criminal law, like the criminal law of many European nations does not generally envisage liability for the preparation of the crime. An attempted crime can only be committed with intent[67]. However, because in French criminal law, dolus eventualis does not belong to the intent, this excludes the possibility of attempt committed with dolus eventualis. Subsequently, in French criminal law, the attempt is only possible with intent.

8. Conclusion

The present overview highlights that in European criminal law, there are many differences with regard to the *mens rea* and many issues are still under elaboration. From this viewpoint, thanks to the legal school, Georgian criminal law stands on solid grounds. However, the theoretical foundations of Georgian criminal law should be strengthened, even by way of comparative research, which shall enable Georgian legal system to find its place in common European family.

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[65] See e.g. <http://www.lemonde.fr/ete-2007/article/2006/07/31/la-tuerie-d-auriol-massacre-chez-les-barbouzards_799844_781732.html>, [10.09.2017], In present case, Georgian criminal law differs from French, namely according to art. 26, par. 2 of criminal code of Georgia, the co-principle or accomplice shall bear no liability for the principle's deviation from criminal purpose. According to par. 4 of the art. 25 of Criminal code, if the conduct of the principle or accomplice is accompanied by a circumstance, which characterizes the unlawful conduct, this circumstance shall be imputed to the accomplice or other co-principle, who was aware of it.

[66] See *Larguier J.*, Droit Pénal Général, Dalloz, 2001, 104. On the other hand, if the principle commits the same crime, of which the accomplice was aware, though through different method, this shall not have any effect on the qualification (Ibid.). Georgian legal literature traditionally differentiated between quantitative and qualitative access of the principle. Quantitative excess is considered to be the case, when the principle committed the crime of the same nature, which was within the accomplice's intent, though more grave. Qualitative access shall be the case, when the principle committed the crime of different nature. According to the prevailing view, the accomplice should be liable for the conduct which was covered by his/her intent (see Ibid.). This approach was reflected in art. 26 of the criminal code, which states that the other accomplice or co-principle shall bear no liability for the perpetrator's excess.

[67] *Tsikarishvili K.,* Question of Commission of Attempt with Dolus Eventualis in Italian, French and Anglo-American Criminal Law, "Martlmsajuleba and Kanoni", 2009, №1, 10, Georgian criminal law traditionally rejected the possibility of attempt with dolus eventualis. (See *Tsereteli T.,* Problems of Criminal Law, Vol. 2, Tbilisi, 488). However, the latest literature and case law, has seen more and more supporters in favor of this position. See *Turava M.* Criminal Law, Overview of General Part, Tbilisi 2013, 136.. See also Feb. 20, 2016 Decision n. 41 AP of the Criminal Chamber of the Supreme Court of Georgia.

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