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The Punishable Attempt

Usiłowanie przestępstwa

Наказуемость покушения

1. Regulations penalizing criminal attempts are contained in the General Part of Penal Codes. A characteristic shared by all laws is the exclusion of punishability of an attempted petty offence. In tripartite system providing for felonies, misdemeanours and petty offences, the punishability for criminal attempts is usually extended to felonies and misdemeanours while in bipartite systems providing for felonies and misdemeanours punishability is limited to felonies. However, since felonies in bipartite systems also include acts which are classed as misdemeanours in the tripartite systems, the range of punishability of criminal attempts is similar under all laws. In order to avoid repetition, when referring to "crimes", we shall also be indicating "felonies" (*sensu stricto*) and "misdemeanours", and not petty offences.

The provisions covering individual offences, contained in the Special part of the Penal Codes, provide for the penalizing of specific conduct. The provision on criminal attempts contained in the general Part of Penal Codes extends prosecution to conduct not provided for under the rules of incrimination of individual offences. It is therefore argued that, by means of the provision ruling criminal attempts in the General Part, the range of individual criminal cases in the Special Part be extended.

The extension of the specific punishable case, however, has to be defined. The demand for "certainty" made by the law, as expressed in the principle of legality, implies the description, in clearly defined specific *facti species* (in German "Tatbestand") i.e., legal or abstract

cases, both of the material facts constituting the objective element in the crime, and the description of the material facts constituting the objective element in the punishable criminal attempt. The rule *nullum crimen sine lege scripta et stricta* is also valid for the penalization of criminal attempts.

The main problem in the punishable attempts stems from just this need to establish, with the greatest possible accuracy, the limits to which the extension is admissible, of the *facti species* of an individual crime.

2. Faced with the need to extend the penalizing of criminal *facti species*, the legislator finds himself confronted with the same difficulties he encounters when trying to define those *facti species*. Indeed, drawing the picture of the punishable attempt means the construction of a new type of crime. To the foregoing difficulties is then added the one deriving from the need to construct *facti species* valid for all crimes. The legislator has no wish to draw up a definition of the attempt at a specific crime, and thus to give a description of the material facts which constitute the extension of one particular specific criminal case; instead, he wishes to create a formula valid for any crime; and by that we mean a formula sufficiently general as to cover all crimes, but, at the same time, sufficiently well-defined as to guarantee, with the certainty of law, the citizen's freedom and equality.

The problem can be approached by examining the various formulas adopted by current Penal Codes [1]. Two solutions seem to offer themselves. The first of these requires an intent to consummate a crime, and such conduct as the agent would direct to such an end. The more satisfactory definition of the actions to be carried out in order that a punishable attempt takes shape is thus left to doctrine and jurisprudence. However, such a solution does not exclude the possibility that any activity undertaken by the agent with intent to consummate a crime may be considered an objective element in the punishable attempt; the objective element in the punishable attempt becomes a variable according to the subject's criminal programme and its realization. Such a solution, therefore, may be called "subjective".

The second solution is to require, besides intent to consummate a crime, such conducts that presents certain characteristics. Doctrine and law will have to further define these characteristics, but they can already find certain sign-posts in the law. According to this formula, the objective *facti species* of a punishable attempt are provided by the

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[1] The statutes of the Anglo-Saxon countries sometimes contain a definition of the attempt. (Vide N. 3).

definition of "typical" conduct offering constant requisites. This solution may be called "objective".

3. A formula leaving room for the "subjective" solution was already adopted in art. 49 in the Norwegian Penal Code of 1902: "A punishable attempt exists when a crime has not been completed, but when an act is performed with the purpose of beginning the execution of that crime". The Danish Penal Code of 1930 followed the same line and stated in art. 21 no. 1 that: "acts performed with the purpose of aiding the abetting, or of carrying out a crime are punishable as criminal attempts if that crime remains uncommitted". The Penal Code of Greenland of 1954 contains a similar formula in art. 8, and states that: "acts performed with the purpose of aiding and abetting, or causing the perpetration of a crime are considered attempts if the crime was not completed" Art. 72 of the Canadian Penal Code of 1927 states: "whoever, with intent to commit a crime, does or abstains from doing something in order to achieve his purpose, is guilty of an attempt to commit the planned offence". New York Penal Law, art. 1 para 2 in the part of Definitions which corresponds to the General Part in European Codes, states that "An act, done with intent to commit a crime, and tending but failing to effect its commission, is «an attempt to commit that crime»".

The Cuban Penal Code of 1936 establishes, as a principle, the penalizing of a crime whether completed or uncompleted (art. 25); if the crime is uncompleted, the judges must take into consideration the stage reached by the action and the danger presented by the discovered criminal, when passing sentence. Here, no objective limits are imposed. The Polish Code of 1932 also seems to leave room for the subjective solution when it states in art. 23 para. 1 that: "whoever, in the intent to consummate a crime, but without actually consummating the planned crime, undertakes an action directly tending towards the realization of that plan, is guilty of criminal attempt". The Icelandic Penal Code of 1940 appears to make similar regulations in art. 20: „whoever decides to perform an act qualified as punishable by this Code, indeed, having the intent to, or being able to be considered as having intent to carry out the aforementioned act, has demonstrated his unequivocal intent to commit it, will be declared guilty of an attempt at this act, if the act remains uncompleted". Finally, the Penal Code of the U.S.S.R. of 1961, although distinguishing between preparatory acts and the attempt itself, deems both punishable and states: "the collection and preparation of the means or instruments for the commission of a crime is considered preparation of a crime, as well as the criminal creation of conditions directed towards the same end. Criminal action directly per-

formed in the committing of a crime without, however, achieving that end for reasons beyond the guilty party's control, is considered a criminal attempt". However, as we shall see, in spite of appearances, there do exist objective limits in the Cuban, Polish, and Soviet Penal Codes.

4. An "objective" solution, that is, one in which are indicated the requisites of the material "facts" which must exist in order that an attempt can be recognized, is the one followed by most Penal Codes currently in use.

The first qualification of the fact in the definition of the attempt, was recognized as the beginning of the execution of the crime. This formula was introduced by the French Penal Code of 1810 which stated in art. 2: "Every criminal attempt which has been demonstrated by a start in the execution [. . .] is considered a crime". In chronological order, this solution was subsequently followed by others who, however, extended the limits of punishability. The Austrian Penal Code of 1852, in para. 8 provides that: "The mere attempt at a crime is a crime when, with fraudulent intent, an action has been committed which should result in effective execution", and the Liechtenstein Penal Code of 1859 which, in para. 8, contains an identical ruling. A return to the French Penal Code is found in the Belgian Penal Code of 1867 which rules in art. 51 that "There is punishable attempt, when intent to commit a felony or a misdemeanour has been demonstrated by external actions which constitute a beginning of the execution of that felony or misdemeanour;" and in the German Penal Code of 1870 which states in art. 43/1: "whosoever has demonstrated his intent to commit a felony or a misdemeanour with actions containing the beginning of the execution of that felony, is to be punished for the criminal attempt if that felony or misdemeanour is not actually committed"; and in the Penal Code of the Principality of Monaco of 1874, which returns to the formula set out in the French Penal Code, in its art. 2; and in the Dutch Penal Code of 1886 which rules in art. 45: "a criminal attempt is punishable if the intention of its author was demonstrated by the beginning of its execution"; and in the Portuguese Penal Code of 1886 which, in art. 11 No. 2., calls for the punishability of the attempt: "the beginning of execution" and in art. 14 excludes the punishability of "preparatory actions" which "are used to facilitate or prepare the execution of the crime" "without constituting a step in its actual execution". The Finnish Penal Code of 1889, Chap. IV (1), does not define the punishable attempt but in (3), by stating that: "actions preparatory to a crime are not punishable except in the case of special rulings by the law", it implies the differentiation between them and executive acts, and the limitation of penalties to the latter.

The Argentinian Penal Code of 1921 states in art. 42: "whoever,

with the intent to commit a particular crime, begins its execution but then, under circumstances beyond his control, does not complete it, is to be punished according to art. 44. The Greek Penal Code of 1950 in art. 4 n. 1: "whoever has demonstrated his intent to commit a felony or misdemeanour by an action constituting the beginning of execution, is punished with reduced sentence if the felony or misdemeanour is not actually ocnsummated". The Bulgarian Penal Code of 1951 states in art. 16 that: "the action with which the crime is begun, without it actually being consummated, constitutes an attempt." The Korean Penal Code of 1953 states in art. 25 Sec. (1): "When a person commences the execution of a crime but does not complete it, or the result does not occur, he shall be punished for attempt to commit such crime." Baumann's scheme for a Penal Code (1963) rules in para. 17. 1.: "whoever, with the fraudulent intent (*dolus*) to commit a crime or felony, so acts with conduct pointing to the beginning of its execution, is punished for an attempt."

The Yugoslavian Penal Code in its new version of 1959 states in art. 16 No. 1.: "whoever has begun, but not completed, the execution of a fraudulent action punishable before the law, is to be penalized for a criminal attempt [. . .]"; in the original 1951 version there was mention of whoever had not concluded "the commission" of a punishable action; the modification is eloquent regarding the concept of the beginning of execution, and its acceptance. The preliminary draft for a Japanese Penal Code in 1961 rules in art. 22 (1): "whoever begins the execution of a crime without completing it, is guilty of an attempt." However, the last two codes carry a further delimitation of punishable "executive" activity considered as a criminal attempt; we shall say more of this below.

Some Codes distinguish between an unsuccessful crime and an attempt but, as far as the definition of punishable activity is concerned, they always return to the beginning of its execution. Thus, The Turkish Penal Code of 1926 declares in art. 61 that anyone is punishable for a criminal attempt "whoever, with special means, begins the execution of a felony or misdemeanour which he has the intention of committing", and, in art. 62, condemns the action of "whoever has concluded all the actions he had had the intention of performing in the execution of the felony or misdemeanour" which was not completed; the Swiss Penal Code of 1942, in art. 21, under the heading of "Criminal Attempts", provides for the action of whoever has "begun the performing of a felony or misdemeanour without, however, reaching the conclusion of his action", while, in art. 22, under the heading of "Unsuccessful crime" provides for the action of whoever has "brought his criminal activity to

its conclusion without obtaining the result necessary for the felony or misdemeanour to have been committed." The Spanish Penal Code in its recast text of 1944 states in art. 3 that "an unsuccessful felony exists when the guilty party completes all the actions during its execution likely to produce the committing of the crime which, nevertheless, is not committed", and adds that "a criminal attempt exists when the agent directly begins the execution of the crime with external activities but does not complete all the actions in its execution likely to cause the crime to be committed."

The Hungarian Penal Code of 1950 states in art. 17 that: "The act with which the execution of an intentional crime was begun but not completed, constitutes an attempt." Thus the traditional solution is the one which is fundamentally recognized. Nevertheless, in this code, after setting the penalties for the attempt *on a par* with those for the successfully committed crime (art. 18 No. 1) it extends the penalties to preparatory acts with the regulations in art. 19 stating: "in the cases coming under the law, every individual will be punished for preparatory acts when, with intent to commit a crime, he performs an act which is not one of the constitutive elements of the crime but is of a preparatory nature, for example, whoever assures such conditions as to facilitate the crime and its execution, i.e., the necessary conditions, or purchases the means or accessories necessary to it, or renders them suitable for the consummation thereof, or invites others to commit the crime, or offers to commit it himself, or agrees with others in order to commit it together." Now, from the definition of preparatory activity, we can presume that the concept of attempt and, therefore, of "beginning of execution" is very much more limited than that adopted by the other Codes, since it is limited to the acts which complete "one of the constitutive elements of the crime"; further, from this definition we may assume that the same concept of preparatory act, positively illustrated by the examples set out in the text of the article, has a greater range than that of an act corresponding to one of the constitutive elements of the crime, only in the hypothetical case of a joint agreement between various persons in which, already in general principle, it is never required that all those taking part should completely or partially commit the act in point. Consequently, the punishable attempt appears to be limited in this Code to a narrower range than that permitted by the other Codes so far examined. In the case of the Hungarian Penal Code, as we shall further see, another objective limit exists which can be accounted for by the system, similar to the one characteristic of the Penal Codes of Yugoslavia, Bulgaria, and the U.S.S.R.

5. Awareness of the fact that the criterion of the beginning of exe-

cution is not always sufficient to solve the cases which, in practice, are encountered, and the fact that it is considered necessary to penalize acts which do not yet constitute one of the typical elements described in the *facti species*, but which however approach it, has led some legislators to adopt other criteria. The Italian Penal Code of 1930 has established in art. 56: "whoever performs acts *idonei* and unequivocally directed towards the committing of a crime is responsible for a criminal attempt if the action is not completed or if the result does not take place." With this formula, the beginning of execution is replaced by the idea of "*idoenitas*" and "unequivocality" of the acts. The act is idoneous if it causes "danger" of consummation. Acts are unequivocal when they demonstrate, with certainty, the intent to commit the crime.

However, of these two criteria the idea of "unequivocality" is only partly original. That the action should be "tending" and "directed" towards the committing of the crime had already been illustrated by the Polish Penal Code. Such a requisite is also indicated in the "New York Penal Law". A solution deliberately orientated in this direction was introduced into the Mexican Penal Code of 14th August 1931 which sets out in art. 12: "The attempt is punishable when acts are performed directly and immediately tending towards the realization of a crime, if it is not consummated for causes outside the control of the agent."

6. The uncertainties remaining even after the introduction of the "objective" formulas led certain legislators to define the punishable attempt (and, in general, the range of the crime) by means of the definition of the attempt (or crime) considered impossible and the exclusion of penalties for it.

The Cuban Penal Code which, as we have seen, largely follows the subjective solution in art. 25, adds: "In the hypothesis of the action of the author and the means adopted for the realization of the planned criminal fact being completely not "idoneous" the judge can assume that the author is in a dangerous state and, in consideration of this, can sentence him to whatever safety measure is indicated in Book 4." The Icelandic Penal Code adds in art. 20/3: "if the interest against which the author intended to proceed, or if the act itself was of such a nature that the attempt could not have resulted in the completing of a crime, it may be ruled that there is a non-suit and, thus, no sentence."

The Italian Penal Code, in art. 49/2 provides for the "impossible crime" stating that "penalties are excluded when the harmful or dangerous fact is impossible either because of «*non-idoneitas*» of the action, or of the non-existence of the object of the action." In such a case (art. 49/4) the judge may rule that the acquitted defendant be subjected to safety measures. The *idoneitas* of the actions, the character-

istic of the punishable criminal attempt, contradict "*non-idoneitas* of "Impossibility of the Crime" states: "Even when the consummation impossible crime. The Korean Penal Code in art. 27 under the heading of "Impossibility of the Crime" states: "Even when the consummation of a crime is impossible due to a mistake of the means used or objects chosen for its commission, punishment shall be imposed in the event that there is a risk, but the sentence may be reduced or remitted." The Yugoslavian Penal Code, in art. 17, under the heading of "Non-idoneous Attempts", rules that "if the means with which the author attempted to carry out the punishable action, or else the object against which he attempted to carry it out, are of such a nature that, by using such means or acting against such an object, the action could not be concluded the judge may in this case abstain from inflicting penalties". In para. 23 of the proposed Japanese Penal Code under the heading "Non-idoneous Attempts" it is ruled that: "if an action, by its own nature, is non-idoneous for the attainment of the desired fact, then it cannot be penalized for a criminal attempt".

7. Certain Penal Laws, even while adopting the solution of defining the range of the attempt of a legally proscribed harm by means of the definition of the legally impossible crime, were not satisfied with its objective requisite i.e., the impossibility of its attainment of the consummation but turned to a further criterion.

The proposals for a German Penal Code drawn up by R a d b r u c k, at the last comma of para. 23 under the heading of the penalizing of the criminal attempt, rules: "the attempt goes unpenalized if, by lack of judgement, the author attempted a fact against an object or with means, against which or with which, the act could not possibly be consummated". The Polish Penal Code rules in para. 2 of art. 23 that: "an attempt exists likewise when the author did not realize the possibility of carrying it out be it through lack of an object against which such an offence could have been committed, or through the use of inappropriate means in order to attain the result sought"; and, in the next para., No. 3, it rules that: "whoever only believed in the success of his action through superstition or extreme ignorance is not guilty of a criminal attempt." The Swiss Penal Code adopts a similar solution and states in art. 23: "the judge may freely reduce the sentence passed on whoever has attempted a crime with means or against an object of such a nature that the perpetration of the offence was absolutely impossible. He may absolve the defendant from a penalty if the latter acted through lack of intelligence." The Greek Penal Code, too, in No. 1 of art. 43 under the heading "Impossible Criminal Attempts" only allows a reduction in the penalty passed on "whoever undertakes to commit a felony or a misde-

meanour with means or against an object of such a nature that its commission is utterly impossible". Exemption from penalties is ruled in No. 2 of art. 43 only for: "whoever attempted to commit such a felony through sheer simple-mindedness". The 1962 draft for a German Penal Code makes a similiar ruling in para. 27 (3) stating that "if, through lack of judgement, the author has not realized that the attempt, according to the nature of the object against which, or the means with which, the fact should have been committed, could not have been brought to its consummation, the judge may reduce the penalty according to his own judgement (para. 64 cpv 2) or remit it." The author's qualities may also be taken into consideration but only with the purpose of reducing the penalty; this ruling is contained in art. 20/2 of the Icelandic Penal Code which says: "The penalty established for the offence may be reduced in the case of an attempt, especially when it can be deduced from this attempt that its author is of little danger and that his criminal intent was insufficiently well consolidated, leading to the assumption that this would not have been the case with the author of a consummated crime." B a u m a n n' s proposals for a Penal Code state in para. 17, IV: "An attempt demonstrating lack of judgement may be exempt from penalty. An attempt by non-idoneous author bears no penal liability."

In all these codes the criterion of legal impossibility of the committing of the crime is linked to the one concerning the subject's characteristics. In such cases an element taking the author's personality into account is then introduced into the formula concerning material requisites. The modern need to complete the Penal Law of the fact, with a Penal Law of the perpetrator of the fact, is thus also expressed even in the legislative formulas limiting the range of attempts bearing a penal liability.

8. Some Penal Codes which sentence, as attempts, those actions performed with intent to commit a crime, thus leaving room for the "subjective" solution, do not even define the range of such actions through the lifting of penalties from impossible attempts, but do, however, contain another limit of a general nature.

The Hungarian Penal Code, in art. 1 para 3 states: "All socially dangerous acts punishable according to the Law, are to be considered crimes"; and in art. 1 para 2 continues further: "all action or omission harming or endangering the public, social and economic order of the Hungarian People's Republic, or the person or rights of its citizens, are to be considered socially dangerous acts".

The Bulgarian Penal Law rules in art. 2 that: "all conduct socially dangerous (action or omission), guilty or declared punishable by law, is considered criminal." The analogical application of this rule finds

a limit in the qualification of conduct that is "socially dangerous". Art. 3 sets out that: "an action threatening the Bulgarian People's Republic and harming its social régime and its legal order is socially dangerous." The Soviet Penal Code in art. 1 raises the formal definition to the substantial concept of crime by ruling that "in pursuance of its aim" (that of defending the State and Social Soviet régime, socialist property, the personality and rights of its citizens as well as the whole Socialist legal order, from any criminal attempt art. 1/1) the U.S.S.R. Penal Code decides which socially dangerous acts are to be considered crimes. The first comma of art. 7 states: "Every socially dangerous fact coming under the Special Part of this Code (action or omission) presenting a threat to the Soviet Social and State régime, the socialist economic system, socialist property, the person, political, labour or patrimonial rights, or the rights of any nature whatsoever, and also any other socially dangerous fact coming under the Special Part of this Code presenting a threat to the Socialist legal system, are to be considered offences". On the other hand, the second comma of art. 7 rules that, "An action or omission is not a crime which, although formally presenting all the features of a fact coming under the Special Part of this Code, does not, in fact, represent a social danger by reason of its trifling importance."

An analogous ruling is to be found in the Yugoslavian Penal Code, which sets out in art. 4 comma 1: "the socially dangerous fact is a criminal offence when its essential elements are established by law." The same code at comma 2, states: "the fact is not a criminal offence when, although containing essential elements of a crime recognized by law, it presents a minor social danger in view of its slight importance and significance, or absence of a harmful element." Thus, the offensive fact is not a criminal offence when it is not expressly set out by the law. However, the "fact" considered by the law is not a criminal offence if it does not likewise present a harmful or dangerous content against the Socialist legal system. Under this ruling the offence (the harming or endangering of protected legal interest) assumes the character of the essential requisite of a crime, beside the other objective requisites.

This limit, although a similiar one, was difficult to avoid in the definition of the punishable attempt. Indeed if, after establishing that only those facts are offences which are expressly considered as such by the Special Part of the Penal Code, it is added, with a ruling in the General Part, that all conduct performed with intent to commit a crime is to be penalized, then all the specific criminal cases in the Special Part are freely extended, and even the principle of legality is put aside. If, then, the principle of legality has already been abandoned and the possibility admitted of applying the punitive rulings by analogy, as is the case in

the Bulgarian Penal Code, their extension by means of penalties against all conduct performed with intent to commit a crime also allows for great differentiation of treatment and makes serious abuses of power possible.

The requisite of "social danger" or the harming or endangering of legally protected interests, was thus necessarily introduced by the Codes in question, and also tends to set an objective limit to the punishable attempt.

9. The criteria set out by the Penal Codes not only do not solve the same problem by defining the punishable attempt, but converge towards solutions which, in practice, are not unlike each other. While encountering evident differences between the concepts of "beginning of execution", and non-idoneous conduct", and "impossibility of consummation" and of "conduct constituting a social danger of sufficient gravity", which are respectively adopted by various Codes, it can be noted that, when faced with practical cases, law and doctrine reach similar solutions. The variations in the range and extent of the penalized attempt derive not so much from the different formulas inserted in various Codes, as from the jurist's different cultural background, the influence of custom, or the directions in criminal policy followed by a particular nation at a given moment in history.

The evolution of Penal Law implies that it has for some time been tending towards a more extensive and frequent penalization of the attempt [2]. Some modifications introduced into current Codes and into recent drafts for Penal systems, have been expressly inspired by this aim with respect to formulas in pre-existing Codes (*vid* N. 5, 15, 18). A reason for this evolution may be recognized in the growing importance assumed by the subjective element in the crime and, here, from the fraudulent intent (*dolus*), i.e., the intent to commit the crime, in relation to what has actually been undertaken in order to attain the consummation itself, i.e., to the material element in the attempt or, more generally, in the transformation of Penal Law which has, by now, been begun, from a Penal Law of the fact to a Penal Law of the perpetrator of the fact. However, even under the sway of the same ruling, the most wildly different theses may be put forward by different jurists on the question of criminal attempt.

Such a circumstance derives from the elasticity of the formula adopt-

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[2] In the past, the attempt at a crime was not punished because it had not caused any harm (v. Hippel: *Deutsches Strafrecht,* 1930, II, p. 392). The punishability of the attempt is a sign of advanced law (Mezger: *Strafrecht, Ein Lehrbuch,* 1949, p. 375).

ed by the legislator when defining the criminal attempt. Indeed, with only one article in the General Part it is expected to be able to amplify the sphere of whole categories of crimes or extend the range of the corresponding precepts.

The difficulties inherent in such expectations are not, however, without their usefulness. Indeed, the problem presents the same obstacles for the legislators of all countries and for experts on Penal Law all over the world. The formulas adopted by various Statute Books are different, but the concepts to which jurists may turn in their effort to make a step towards a satisfactory solution are always the same. On the question of punishable attempts, as soon as the jurists from different countries start pushing their research further, they realize that they are speaking the same language. Thus their exchange of ideas and collaboration become particularly interesting.

10. The theories elaborated by doctrine on the subject may, as is well known, be grouped under the headings of "objective" or "subjective" [3].

The subjective theories rule that the punishable offence is already recognizable where there exists any activity willingly directed towards the commission of a crime [4]. The old formula *cogitat et agit nec perficit*

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[3] Weiblinger: *Subjektivismus und Objektivismus in der neueren Lehre und Rechtsprechung vom Versuch*, „Zeitschr. f. d. ges. Straf. W", 69 (1957), p. 189 ss. v. Maurach: *Deutsches Strafrecht*, 1954, I, p. 433 ss. Welzel: *Das deutsche Strafrecht*, 1956, p. 156 ss. Mezger: *Strafrecht*, 1960, I, p. 214 ss. Baumann: *Strafrecht*, 1964, I, p. 437 ss. Manzini: *Trattato di diritto penale italiano*. 1961, II, p. 443. Bettiol: *Diritto penale*, 1962, p. 439 ss. Pannain: *Manuale di diritto penale*, 1963, I, p. 355 ss.

[4] v. Buri: *Versuch und Kausalität*, *Gerichtssaal*, 32 (1880) p. 362. Delaquis: *Der untaugliche Versuch*, 1904, p. 189. Saleilles: *Essai sur la tentative*, Rev. Penit., 1897, pp. 53, 321. Garçon: *Code pénal annoté*, 1901, I, nn. 113, 133. R. Garraud: *Traité de droit pénal français*, 1913—1935, I, pp. 232, 483. Donnedieu de Vabres: *Traité de droit criminel et de législation pénale comparée*, 1947, n. 231 Vidal et Magnol: *Cours de droit criminel et de science pénitenciaire*, 1949, 1950, I, p. 971. Germann: *Das Verbrechen im neuen Strafrecht*, 1952, p. 66. Garofalo: *Criminologia*, 1891, p. 233. Ferri: *Sociologia criminale*, 1900, p. 705. Lord Denman C. J. in R. v. Chapman (1849), 1. Den. 432 p. 439 "any step taken with a view to the commission of a misdemeanour is a misdemeanour". The rule *in maleficiis voluntas spectatur non exitus* (I4 Dig. 48.8; conf. C. 9, 8) seems to agree with a subjective conception of the attempt. The law of the Middle Ages was orientated towards this solution (Seeger: *Die Ausbildung der Lehre vom Versuch der Verbrechen in der Wissenschaft des Mittelalters*, 1869, p. 185); the same is true of Canon Law (Dahm: *Strafrecht Italiens im ausgehenden Mittelalter*, 1931, p. 191). This conception was followed until the end of the 18th century in accordance with art. 178 C. C. C. (Schaffstein: *Allgemeine Lehre*, p. 166).

could be taken as that which expresses this solution. It is to be noted that, with this formula, the mere intention to commit a crime does not warrant a penalty since it is also required that the subject should have also carried out some other activity with the aim of realizing the crime itself. Consequently the "subjective" theory, too, requires a psychological element (the intention to commit a crime) and a material element (the conduct followed in order to commit this crime) in order that a punishable attempt might be recognized [5].

According to the conceptions being examined, the psychological element has the appearance of *dolus* (and, probably, *dolus directus* i.e., purpose in committing a crime), the material element has no objectively definable characteristic. The conduct constituting such an element is what the agent has achieved in the individual case in order to commit the crime. The historical fact is assumed to be a typical fact that corresponds to the lack of a general definition of the objective *facti species* of the criminal attempt.

The conclusion remains unchanged if, instead of "describing" the historical fact as a natural event, there is an effort to define it by means of qualifications taking into consideration its "value"; e.g., by saying that the conduct must be "idoneous" for the completing of the crime in question, i.e., "dangerous or harmful" to the legally protected interests. Indeed, for this judgement, too, the subjective theory returns to the evaluation of the agent. Either suitability (*idoneitas*) or harmfulness will exist depending on the opinion of the person carrying out the attempt. And the range and scope of penalties will vary accordingly. The objective danger or lack of it, the objective *idoneitas* or its lack, that is the judgement of the "average normal" man-in-the-street, or of the good *pater familias*, is of no relevance here.

In support of the subjective theory it has been suggested that every action which has not led to the attainment of the desired result, was non idoneous for its attainment, independently of the fact that the hindrance to the commission of the crime occurred during the course of action, or had already existed at the beginning of it. The only characteristic, to be noted, was the action as a necessary condition of the fact, i.e., that it is impossible to exclude that condition without causing the non-occurrence of the result. All the necessary conditions for the occurrence of the fact are equivalent, since it is sufficient not to exist for any one of them that the fact did not occur. When, through lack of one or

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[5] Mezger: *Strafrecht*, 1949, 395. v. Weber: *Grundriss des deutschen Strafrechts*, 1948, p. 76. Bauman: *Strafrecht*, 439. Maggiore: *Diritto penale*, 1955, II, 1, 537.

more of the necessary conditions, the action has not produced the desired result, legal interests were not offended, and, therefore, there was no danger of offence [6]. The only justification for the penalties inflicted against the attempt would thus lie with the criminal intention demonstrated by the agent.

Since the attempt did not attain its desired consummation it had no chance of being realized, and, therefore, the above argument deduces from the exact significance of this that the attempt created no danger of its being consummated. There does, however, exist an illogicality between the two propositions. Indeed, the opinion concerning the impossibility of the attempt, which has remained in the state of mere attempt, to attain its point of conclusion, is given *ex post* (with "wisdom after the event") and it is nothing more than a mere observation of events as they had occurred. However, the opinion on the danger of the committed crime, presupposes that the fact of its being consummated or not, is still at the stage of uncertainty and, therefore, implies that the opinion refers back to a moment preceding the committing itself, that is *ex ante*. The conclusions reached *via* a judgement *ex post* cannot be valid in a judgement *ex ante*. On the other hand, the reasoning under criticism "proves too much". It even goes so far as to deny the possibility of a judgement on the future danger. If the only point of view from which men's actions should be judged is the one of "after the result" there can obviously only be an opinion expressed on whether or not a criminal offence has, in fact, taken place. It is common experience that the whole life, whether of an individual or of society, is permeated with forecasts about future facts, feared or hoped for, harmful or advantageous.

Punishment is likewise justified by conduct leading to the consummation of a crime on the grounds that such conduct represents a violation of the duty to obey the law. Arguing from this position, the suitability ("*idoneitas*") of the conduct to offend the legally protected interests is declared irrelevant. The existence of a voluntary act of rebellion against the law would be decisive [7]. The problem of defining the pun-

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[6] v. Buri: *Versuch*, p. 362; *Id.*: *Über den Begriff der Gefahr und seine Anwendung auf den Versuch*, „Gerichtssaal", vol. 40 (18888), p. 503.

[7] On Penal Law considering intent, in contrast with Penal Law considering the result, see Bruns: *Zur Begriffsbestimmung* des *Versuch* (Unternehmens, Beginns) *im Kommenden Strafrecht*, „Deutsche Justiz", 1936, p. 678; Hall: *Die Abgrenzung von Versuch und Vorbereitung im Willemstrafrecht*, „Gerichtssaal", 110 (1948), p. 97; Klee: *Die Grenzen zwischen Versuch (Unternehmen) und Vorbereitung*, „Deutsche Straf.", 1934, p. 283; Bockelmann: *Zur Abgrenzung der Vorbereitung vom Versuch*, J. Z. 1954, p. 468; Kadecka: *Die Ausführungshandlung*, JBl. 1933, p. 447.

ishable attempt, however, is not concerned with whether deliberate acts of rebellion against the law should be penalized or not, but rather with stating precisely which acts of rebellion should be threatened with penalties and, thus, take the shape of a criminal attempt.

A further legal foundation for the subjective theory was sought in the doctrine of error. As is well known, an error made during the criminal fact constituting a crime, always excludes the *dolus* and, thus, exonerates from penalties an intentionally criminal offence. In the case of an attempt, there would exist a "reversed error". The agent wishing to commit a crime who works towards that end but is unsuccessful, fails because he has made a mistake. This mistake represents the reverse of the exculpating error. Now, precisely because there is an opposite type of error in the attempt to the error which exempts from penalty, it should be concluded that the error typical of the attempt carries the obligation of a penalty. In other words, as there is exemption from penalty for whoever mistakenly held certain facts essential for the crime to be non-existent (when they did, in fact, exist), so the penalty should be ruled for whoever considered the facts essential for the crime to exist indeed (when in fact they did not) [8].

The supposition of facts essential for the existence of the crime, however, is not the opposite of the error made about the above mentioned essential facts; the opposite of the error made about the facts essential to the crime to exist is simply the knowledge of these essential facts [9]. Besides, from the fact that a certain type of error excludes fraudulent intent (*dolus*) and, thus, also the accompanying penalty, it does not by any means follow that an error of the opposite type renders both fraudulent intent and its penalty evident and necessary [10]. The deduction under criticism goes beyond the reasons for the ruling which justifies the error made about the fact constituting a crime [11]. Indeed, to commit facts which the subject supposed to constitute a criminal offence, does not necessarily constitute a criminal offence and cannot be penalized under the principle *nullum crimen sine lege*. A subject's opinion on the fact of committing a criminal offence is not at all sufficient to trans-

[8] See in the text Binding: *Der Umgekehrte Irrtum*, „Gerichtssaal", 85 (1917), p. 322, 323; Spendel: *Der sogenannte Umgekehrschluss aus par. 59, StGB nach der subjektiven Versuchstheorie*, „Zeitschr. f. d. ges. Straf. W.", 69 (1957), p. 441; See, in German Jurisprudence, RGSt, 42, 92, 64, 138; BGHSt., I, 13, 15; 4, 254.

[9] Treplin: *Der Versuch, Grundzüge und Wesen der Handlung*, „Zeitschr. f. d. ges. Straf. W.", 76 (1964), p. 441.

[10] Cross and Jones: *An Introduction to Criminal Law*, 1959, p. 112.

[11] Treplin: *Versuch*, p. 452.

form his conduct into such an offence if the law does not expressly recognize it as such.

The "subjective" theory, unintentionally would thus indicate an unjustifiable dismembering of penal law into two separate parts; one made up of the penal law relative to crimes actually committed, in which the principle of legality is current and which requires the committing of a concrete fact conforming to a specified typical case as expressly established by the law and (*facti species*) having an objective character; and another part, constituted by the penal law of the attempt in which the role of the principle of legality is taken over by the principle according to which an offence is created by any conduct which the agent considers idoneous for the consummating of the offence itself, and, thus, the *facti species* become what the subject judged to be the right ("idoneous") procedure for its completing [12].

The weakness of the theory under examination is finally confirmed by the very doctrine adopting it, which admits non-penalizing of an attempt by the not idoneous subject (such as an attempt at "concussione" art. 317 Italian Penal Code by someone not a public official) and of the "superstitious" attempt (such as, for example, attempted homicide by means of witchcraft or through prayers offered to the devil) [13]. Indeed, the agent practising the "magic" or calling down the "curses" or the "evil eye", in the conviction that this will cause the death of the enemy against whom they are being invoked, believes in the effectiveness and the *idoneitas* of the means he is using and of the acts he is performing. The subject insulting a football referee in the belief that he is a public official, imagines himself committing the *oltraggio* against a public official (art. 34 Italian Penal Code) and not simply the *ingiuria* (art. 594 Italian Penal Code). Therefore, to be coherent, the subjective theory should recognize the punishability, as an attempt, of the offence which the agent supposes he had committed and which he wishes to have committed. Instead, in such cases the attempt is judged, respectively, as "superstitious" or "legally impossible" or "not adhering to a specified *facti species*" only according to an "objective" evaluation [14]. One is thus

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[12] Kohlrausch: *Der allgemeine Teil des Entwurf 1925. V. Versuch. Reform des Strafrechts*, hrg. v. Ascott und Kohlrausch: 1926, I, A p. 27, 30.

[13] Bockelmann: *Strafrecht*, p. 465.

[14] The supporters of the subjective theory maintain that in the superstitious attempt, there is no action conforming to the *facti species* because in such an attempt the actions remain outside the physical and psychological causality and the subject's intent can only be put into practice in the absurd. Nagler und Jagusch: *Versuch*, (par. 43 StGB) in *Leipziger Kommentar*, 1954, I, p. 194, (II B 8) RGSt., 33, 321. Yet the concepts of *facti species* and "causality" are only definable with objective criteria.

led to suppose that the "subjective" theory only remains valid in those hypotheses in which the agent's personal opinion coincides with the "objective" one. To all intents and purposes this would amount to an abandonment of the subjective theory.

The theory according to which an attempt is punishable because the agent imagined himself to be performing idoneous acts to commit a criminal offence, would likewise carry the implication, in order to remain coherent, of the exemption from penalties for this attempt in the case of the agent carrying out acts which he did not judge to be of such a nature as to lead to the committing of a criminal offence, even if such acts, according to objective judgement, would prove to be dangerous and their successful conclusion only avoided by sheer chance. In the latter hypothesis, the partisan of the subjective theory also recognizes the punishability of the attempt [15]. With this, the subjective theory is confirmed as unacceptable.

On the subject of criminal attempt, the positivist trend has also recognized the justification of penalties against the danger presented by the agent. Whether the attempt is "idoneous" or not, is utterly irrelevant [16]. Neither would the preparatory or effective nature of the acts be of any interest [17]; nor again, would the existence of an intention against the law be in itself decisive [18]. The punishable attempt would only take shape when the accomplished fact revealed the danger presented by the agent [19].

However, in turn, this danger must be also demonstrated by some objectively recognizable element. The principle of legality obliges us to make further clarification even in a hypothetical penal law based on the author of the criminal offence. If it is admitted that the non-idoneous attempt or the preparatory acts are punishable, if the agent is socially dangerous, then objective criteria ought to be established for evaluating the danger and making the decision; this implies further need of clarification to what extent the "non-idoneous" attempt or the preparatory acts are an indication of the danger itself. At this point, the

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[15] Objective evaluation, according to the "natural conception" of the "beginning of execution", necessary in order that the acts in the attempt may be punishable: see Bockelmann: *Strafrecht*, p. 461.

[16] Ferri: *Principi di diritto criminale*, 1928, p. 541.

[17] Florian: *Parte generale del diritto penale*, 1934, I, p. 657.

[18] Florian: *Parte generale*, I, p. 658.

[19] Garofalo: *Criminologia*, p. 239; Ferri: *Principi*, p. 541; Id.: *Sociologia criminale*, II, p. 277; Hälschner: *Das gemeine deutsche Strafrecht*, 1884—1887, I, p. 342. *Vide* also note 4.

difficulty of the definition of the criminal attempt presents itself again, still unsolved if not, indeed, complicated [20]. On the other hand, from the positivist theory, once accepted, it follows that non-ideoneous attempt or the acts of execution may not carry penalties, if there is no evidence of the subject's danger. This implies further need for the search of objective criteria according to which it would be possible to establish when, even after performing "idoneous" or effective acts, the agent failed to present a danger.

Finally, the conception under examination is already outside the subjective theory. Indeed, it is beyond argument that the degree of danger presented by the agent must not be calculated according to the opinion the agent presents of himself, as a general rule, but according to an objecive judgement.

11. Once the idea is accepted of the fundamental adoption of an objective criterion for the definition of the conduct in the criminal attempt [21], one in agreement with current penal systems, the problem then presents itself of the precise indication of that criterion.

An initial solution was the recognition of the characteristic feature of the punishable attempt in the danger of its being effectively accomplished. The attempt becomes punishable when the *iter criminis* reaches such a point that the danger of the consummation of a crime takes shape [22].

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[20] It is symptomatic that Ferri: *Principi*, p. 541, connects the subject's danger with the fact that he "begins the execution of a crime".

[21] The objective theories originate in the Jurisdictional list's thought and developed after the French Revolution as a reaction against the arbitrary nature of the absolute monarchy. Grozio: *De jure belli ac pacis*, 1625 c. 20 par. 39 n. 4P.T.A. Feuerbach: *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts*, 1926, p. 24; Mittermaier: *Beiträge zur Lehre vom Verbrechen*, Arch. Criminalrechts, 1916; Carmignani: *Teoria delle leggi della Sicurezza sociale*, 1843, p. 200; Carrara: *Programma del corso di diritto criminale*, 1877, par. 353; Ortolan: *Eléments de droit pénal*, 1886, I, n. 100; Chaveu et Hélie: *Théorie du code pénal*, 1887, I, n. 253.

[22] *Vide retro* note 21 H. Meyer: *Lehrbuch des deutschen Strafrechts* 1886; Berner: *Lehrbuch des deutschen Strafrechts* 1898, par. 77. Binding, *Grundriss des deutschen Strafrechts* I, 1913; par. 54, VI; Beling, *Grundzüge des Strafrechts*, 1930 Liszt-Schmidt: *Lehrbuch des deutschen Strafrechts* 1927, p. 295; Sauer: *Allgemeine Strafrechtslehre*, 1949, p. 86; Maurach: *Deutsches S.*, p. 431; Rittler, *Lehrbuch des Österreichischen Strafrechts*, 1954, I, p. 255; Vannini, *Il problema giuridico del tentativo*, 1952, p.; *Id.*, *Il valore del pericolo nel tentativo*, in Suppl. Riv. Pen., 1919, p. 177; Bettiol, *Diritto penale*, p. 443, 444.

Consummation is here understood as the realization of the criminal *facti species,* plus the corresponding criminal offence against, or injury or danger to, interests legally protected under pain of penalty [23].

At this point, however, it is pertinent to define more closely the concept of "danger of consummation".

It has been demonstrated that the danger must be calculated according to a causal relationship between the conduct and the desired result, and it has been further illustrated that there must exist a relationship between "abstract" and "adequate" causality [24]. The term "abstract" causality is used because the existence of the causality relationship is not to refer to a concrete case which actually occurred; indeed, in the case which has occurred, as there is a leaning towards the hypothesis of an attempt, its successful conclusion would not take place, which means that the existing conditions, or those created by the agent, were insufficient to cause it to happen; so that if concrete cases of criminal attempt were to be considered the causality relationship should always be excluded. It was further pointed out that such an assurance consisted in a "posthumous prognosis", i.e., in a judgement given after the non-accomplishment of the (posthumous) deed, but with reference to the situation existing at the time at which the act and its consequences took place (prognosis) [25]. The term "adequate" causality is used to exclude the possibility of creating one or more "conditions necessary to the fact", without which the fact could not have occurred, and it is, instead, intended to state that it is necessary to create material elements which have rendered possible (in the sense of "not improbable" or "not impossible") the occurring of the fact.

Judgement on the "causal adequacy" or the *idoneitas* is referred to the whole of the conduct realized by the agent. Judgement concerning a single act is of no interest. What has to be judged in order to establish whether or not there exists a possible attempt is not one single

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[23] For the "substantial" conception of crime, recognizing in the offence done, an essential requisite of thie, see Bettiol: *Diritto penale,* p. 433. For the „formal" conception of crime requiring the commission of the fact in conformity with the one as defined in the statutes, see: Antolisei: *Manuale,* I, p. 350

[24] v. Kries: *Über den Begriff der objektiven Möglichkeit,* „Viert-Schr. f. vis. Phil.", 12 (1888), p. 181, 287, 293; *Id.: Über die Begriffe der Wahrcheinlichkeit und Möglichkeit und ihre Bedeutung im Strafrecht,* „Zeitschr. f. d. ges. Straf. W.", 9 (1889) p. 528. Rectius Bettiol: *Diritto penale,* p. 408, 448; Pannain: *Manuale,* 1962, p. 546.

[25] v. Liszt: *Lehrbuch des deutschen Strafrechts,* 1932, p. 155; v. Hippel: *Deutsches Strafrechts,* 1930, II, p. 427.

act or one single means considered in isolation, but the whole of the subject's conduct in its entirety and the effects [26].

From a recent extension of these concepts it follows that the beginning of the execution is the criminal intent revealed in an action which, in its author's opinion, should immediately lead to the threatening or endangering of the protected object [27]. Besides, the reference to the intent "clearly" revealed is but an echo of the criterion of "univocality" of which we shall write below (*vid. infra*, N. 15). The reference made to the subject's general plan opens the doors to the criticized solutions offered by the subjective theory (*vid. ret.*, N. 11); the concept of the danger to the (legally) protected object poses the problem of causality without taking sides with its various solutions; the requisite of immediacy has nothing to offer the formula in the matter of precision (*vid. infra* note 44).

The requisite of *idoneitas* of the acts adopted by a part of the doctrine and by some Penal Codes, recalls, in turn, the requisite of an abstract and potential causality [28].

Objections were raised against the idea of the definition of the punishable attempt using the criterion of danger, on the grounds, that the danger of its actual realization being the reason for penalizing the attempt does not represent the requisite which allows for a distinction between the attempt that is punishable and one that is not [29]. A danger would, then, already exist when the agent is examining his criminal plans and during the performance of preparatory acts [30]. With this last point, though, a wider significance for the concept of danger is being

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[26] Petrocelli: *Il delitto tentato*, 1955, p. 61; Vassalli: *Il problema del tentativo*, p. 11, 24; Antolisei: *Manuale*, I, p. 366; Pannain: *Manuale*, I, p. 547; Bettiol: *Diritto penale*, p. 408, 446; Siniscalco: *La struttura del delitto tentato*, 1959, p. 133; Fiore: *Il reato impossibile*, 1959, p. 85; *contra* Scarano: *Il tentativo*, 1960, p. 203, 221, 290.

[27] Schönke-Schröder: *Strafgesetzbuch Kommentar*, 1961 par. 43, I, p. 21; Waiblinger: *Subjektivismus*, p. 214; Carrara: *Atti preparatori, in Reminiscenze, di catedra e di foro*, 1883, p. 358.

[28] Carmignani: *Elementi di diritto criminale*, 1958, p. 69; Carrara: *Programma*, par. 305; Massari: *Le dottrine generali del reato*, 1930, p. 177. Frosali: *Sistema penale italiano*, 1958, II, p. 15; Antolisei: *Manuale*, I, p. 367, note 28.

[29] Delaquis: *Der Untaugliche*, V., p. 220; v. Hippel: *Deutsches Strafrecht*, II, p. 400; Manzini: *Trattato*, II, p. 438; Bettiol: *Diritto penale*, p. 443.

[30] Coester: *Die Vorbereitungshandlung im Entwurf eines allgemeinen deutschen Strafgesetzbuch von 1927*, 1933, p. 84; Zehner: *Die Strafbarkeit der Vorbereitungshandlungen*, 1936, p. 6; Viannini: *Il problema*, p. 86; Scarano: *Il tentativo*, p. 39.

assumed than that admitted by the theory under criticism, and conclusions are drawn which inevitably clash with those drawn from the above mentioned theory; however, in this case the criterion of danger is also accepted. The first point is, in turn, inexact when refusing to accept that danger is a requisite of the crime. The whole category of dangerous crimes", i.e., crimes characterized by the fact of having simply created a dangerous situation for the legally protected interest, is a demonstration to the contrary.

If, as a point of departure, the idea is accepted that the failure to successfully conclude an attempt is always a consequence of the *non-idoneitas* of the means employed, one part of the doctrine suggests a distinction between means that were relatively (in the case as it occurred) or absolutely (in any case whatsoever) out of keeping with the purpose; if the means is relatively non-idoneous a punishable attempt would exist, if, however, the means is absolutely non-idoneous, no punishable offence would exist [31].

However, objections were raised against this theory that an action with reference to a fact can only be idoneous or not [32], consequently the distinction drawn between absolute or relative *idoneitas* would be without foundation. But in this case, with this objection, a concept is assumed according to which the interpretation of *idoneitas* is very different from that contained in the theory under examination. This theory in question speaks of *idoneitas* judged *ex ante* (at the moment at which the agent was performing the deeds); its criteria speak of *idoneitas* judged *ex post* (when the offence had already turned out to be a failure). In the first case we can make out various degrees of *idoneitas*, like various degrees of danger; in the second case, it can only be noted whether or not the attempt has been brought to the desired consummation. On the other hand, the concept of *idoneitas*, like the concept of danger, implies always, and only, an *ex ante* judgement [33]. By means of an *ex post* judgement, it can merely be noted whether the attempt is brought to a conclusion and becomes a fully committed crime. The idea of *idonei-*

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[31] Mittermaier: In the 14th edition of the Lehrbuch by Feuerbach. *Vide* also, Mittermaier: *Der Versuch vom Verbrechen*, „Gerichtssaal", 11 (1859), II, p. 404. Rossi: *Trattato di diritto penale*, 1853, p. 373—374. Pessina: *Elementi di diritto penale*, 1882, I, p. 162. Manzini: *Trattato*, II, p. 454. Garraud et LLahorde-Lacorte: *Précis élémentaire de droit pénal*, 1936, p. 49—50. See also *infra*, N. 22.

[32] Massari: *Il momento esecutivo*, p. 191. Besson: *Le délit impossible*, in Rev. crit., 1929, p. 352—354. J. Hall: *General principles of criminal Law*, 1960, p. 582, 592. Sayre: *Criminal attempt*, 41 Harv. L. Rev. 1928, p. 851, 859.

[33] Antolisei: *Manuale*, I, p. 367—369.

tas judged *ex post* is in contradiction with itself (*vid. ret.*, N. 10). In the theory under examination, more open to criticism is the claim to be able to judge the *idoneitas* of the means employed by itself instead of jointly with the behaviour and the circumstances in which it has been performed (*vid. ret.*, N. 11).

It was further objected that *idoneitas* cannot determine the nature of the act (nor establish the beginning of execution or, the punishability of the attempt) because the *idoneitas* is a natural feature of the act and, for that matter, of all acts; it is necessarily present in the earliest preparatory acts just as it is in the act in the most strict statutory *facti species* in the Penal Code. E.g., firing a gun with the purpose of causing death may prove to be idoneous or not, according to the case, but it nevertheless remains an undeniable act of execution; but if this act is not idoneous, the attempt is not punishable. *Idoneitas* is not revelation of execution, but is added to it as another element necessary for its punishability [34]. It must, however, be observed that it is just this conclusion which demonstrates that criterion of *idoneitas* is relevant in the effort to define the punishable attempt.

The objection still remains, according to which the danger of successful consummation is the reason for the penalizing of the attempt, but not the element permitting its distinction from the non-punishable attempt. This objection is valid in the sense that the general reference to the "danger" does not permit such a differentiation. Nevertheless, with a more satisfactory indication of the concept of danger, it is possible to define with sufficient approximation the typical element in the punishable attempt (*vid. infra* N. 16).

12. Part of the doctrine observes that the demand for the danger of a successful consummation understood as the danger of the realization of the whole criminal action as specified in the Penal Code, with the corresponding criminal offence against the legally protected interests by means of that particular legally proscribed offence, narrows the range of the punishable offence excessively. In particular, the existence of cases has been noted in which the author's conduct, although judged *ex ante*, has not given rise to the danger of the consummation of the crime he began, and is thus non-idoneous, but nevertheless the attempt warrants a penalty. E.g., the use of an insufficient amount of lethal poison; the initiating of tricks which, however, do not prove to be clever enough to produce the desired fraud; the exchange of a poisoned cup of tea for a poison-free cup; the taking of one's own umbrella instead of someone else's, similar to it, which one intended to steal; the pickpocket's

[34] Petrocelli: *Il delitto tentato*, p. 127.

hand slipped into an empty pocket because the intended victim has left his wallet at home; the thief's search in the library for a rare volume which has already been locked up in a safe cupboard.

In order to permit penalties and the proscribing of these attempts without falling into the imperfections of the subjective theory, a so--called "mixed" theory has been evolved. This theory having basically accepted the subjective solution, also requires certains objective characteristics existing in reality [35], such as, an objective disturbance of the legal peace and public order [36], that is, an offence against the community's sense of legal security and legal order [37].

The theory in question does possess the advantage of enlarging the range of the punishable attempt and, thus, including those cases in which a danger to some interest or other of the community is to be recognized, although there exists no probability of the successful termination of the offence because of *non-idoneitas* of the conduct or the non-existence of its object. But this solution has the failing of setting limits which are too generic to the punishability of the attempt. The concept of "legal peace" or "legal order", the "sense of legal security and legal order of the community", that is, the formulas adopted by certain Penal Codes which recall the "social régime" and the "legal order" of a state, the "social danger" stemming from the non "trifling nature of the offence" (*vid. ret.* p. 8) are not different from the one which appealed to "The people's sound sentiment" [38] and have a content which is too wide and variable and, therefore, offer insufficient guarantees for the freedom and equality of all citizens.

13. The *facti species* of a crime, otherwise called the "abstract *facti species*" consists, as is well known, in the definition of the facts which tend to make up the criminal offence itself. The definition of a specific and legally proscribed attempt emerges from the combination between the rulings in the General Part defining the attempt, and the rulings in the Special Part defining one individual offence.

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[35] Schönke-Schröder: *Strafgesetzbuch*, par. 43, I, 3. Welzel: *Das deutsche Strafrecht*, p. 171.

[36] Nagler: *Versuch* (par. 43 StGB), *Leipziger Kommentar*, 1951, I (II 2). Welzel: *Das deutsche Strafrecht*, p. 171. v. Maurach: *Deutsches Strafrecht*, I, p. 406.

[37] v. Bar: *Gesetz und Schuld im Strafrecht*, 1906—1909, II, p. 521, 527, 531, 535—537. Mezger: *Strafrecht*, 1949, p. 397.

[38] 28th June 1935, law current in the German Reich: "whoever commits a fact declared punishable by the law, shall be punished, or commits a fact deserving punishment according to the fundamental concept of a Penal Law and according to the people's sound sentiment".

A definition of the punishable attempt has been proposed, in terms of "definition of a specific case as set out in the Penal Code". According to this attitude, a punishable attempt exists when the concrete fact is included in the abstract *facti species*, the result being not included. This exclusion occurs because the action, although containing the legislative characteristics of the definition of a *facti species*, necessary for the occurrence of the result, but not causing it, or else because, although the concrete fact corresponds to the abstract *facti species*, the action (besides not having provoked the desired result) is already lacking a characteristic feature of the recognized abstract *facti species* [39].

Thus, according to this theory, the attempt would be a "non-idoneous" one, and, therefore, not warranting a penalty, when the result failed to occur following the unsuitability or the lack of an element not expressly indicated by the recognized *facti species*, but necessary to cause this fact. The agent's error here would be a nomological one, such as, for example, the error of the pregnant girl who drinks a cup of tea in the belief that it will help to procur an abortion. Instead, the attempt would be "idoneous" and, therefore, punishable when the agent commits an "ontological" error, such as, for example, when he changes the cup of poisoned tea for the non-poisoned cup [40].

With the theory under examination, however, the problem is not solved but merely transferred. When it is said that in a punishable attempt the action must present the features of a *facti species*, necessary for the occurrence of the result, a problem is created, and left unsolved, of establishing the features of such *facti species* which would be necessary for the occurrence of this result. After stating that the attempt is punishable when the action lacks a feature of the *facti species*, but that the concrete actual fact in point is included in the legal one, the problem still remains of establishing which are the features of the concrete case which must exist in order that it be included in the legal one, even though it might lack one feature contained in the latter.

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[39] Graf zu Dohna: *Der Mangel am Tatbestand in Festgabe f. K. Guterboch*, 1910, p. 35. Schuler: *Der Mangel am Tatbestand* (Strafr. Abhandl., n. 181). Natorp: *Der Mangel am Tatbestand*, 1921 (Strafr. Abhandl., N 204). v. Hippel: *Strafrecht*, II, p. 397, 431. Frank: *Strafgesetzbuch Kommentar*, 1926, par. 43, I. Binding: *Handbuch des Deutschen Strafrechts* 1885, I, p. 692. Welzel: *Das deutsche Strafrecht*, I, p. 156 v. Maurach: *Deutsches Strafrecht*, p. 430. Schönke-Schröder: *Strafgesetzbuch K.*, I, Vor. par. 43. Mezger: *Strafrecht*, I, p. 544. Malaniuk: *Lehrbuch des Strafrechts*, 1947, I, p. 210, 216, 224. Rittler: *Lehrbuch.*, I, p. 256. Pannain: *Manuale*, p. 544.

[40] Schönke-Schröder: *Strafgesetzbuch*, par. 43, II, 2.

Now, in order to define the afore-mentioned features of the *facti species*, it will be also necessary to use a criterion. And while this criterion is being sought, it is inevitable to face again the concepts of causality, of *idoneitas*, and of danger, which had already been brought up by the previous theories examined. The formulas adopted by the theory using the *facti species*, indeed, with this different terminology must, necessarily, refer to those famous criteria. For example, to state that the action must bear the features of the legal *facti species* necessary for the result to exist, is the same as saying that the conduct must enjoy causal efficacy in relationship to the result, that is, it must, in other words, be "idoneous" to its commission. The theory of the lack of specific *facti species* is nothing but the disguising of old concepts of causality, *idoneitas*, or danger [41].

Secondly, Penal Law frequently fails to "describe" the facts precisely constituting an offence, that is, the *facti species*. In "free conduct" offences only the causing of a fact is indicated (e.g., "whoever causes the death of a man" art. 575 Italian Penal Code); in these *facti species* all the causal factors of the fact are to be found; and it is up to the interpreter to establish the concept of "cause" and, thus, define the causal factors of the fact in the offence in question. In the offences defined by means of qualifications or which imply a judgement of value (as, for example, in expressions such as "the adulterous wife" art. 559 Italian Penal Code, "whoever takes part in a brawl" art. 588 *ibid.* "contempt" art. 402 *ibid*, "performs obscene acts" art. 527 *ibid.*) neither conduct nor the result are described; the entire *facti species* has to be constructed by the interpreter. To the difficulty of giving in detail by means of a description, facts making up a criminal offence and thus defining the *facti species*, obviously corresponds the difficulty of giving the facts which imply a "lack of *facti species*". The problem of the punishable attempt, therefore, is by no means solved by the mere turning to the lack of requisites required by the statutory offence [42].

The doctrine under examination refers to the differentiation between the "nomological" error, which exempts from penalties, and the "ontolo-

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[41] Beling: *Grundriss*, p. 87 noted that the "idoneous" attempt is nothing else but a lack of *facti species*. Mezger: *Lehrbuch*, p. 396, and Welzel: *Strafrecht*, p. 172 maintain that the lack of *facti species* exists when the realization of the *facti species* is right from the beginning impossible. Germann: *Das Verbrechen*, p. 69 added that, in the formulation of individual criminal *facti species*, thought was never given to the repercussions that these would have on the limitation of the punishable attempt.

[42] Nagler und Jagusch: *Versuch*, II B. 2 c $\beta\beta$ and $\gamma\gamma$, p. 190.

gical" error which does not [43]. The suggested differentiation, together with the appropriate and timely details, is by all means acceptable in the theory of error. The error called "nomological" in fact, corresponds to the "motive-error" that is, to the incorrect knowledge which operates as the motive of the deliberate criminal decision, the lack of knowledge which, if it had existed, would have restrained the criminal intent; instead, the type of error called "ontological" is the same as the "inability error", that is the mistake made by the senses or movements of the body which prevent the realization of the deliberate decision already taken. But it is yet to be examined whether the foregoing differentiation is of use in solving the problem of the punishable attempt.

The "inability error" preventing the carrying out of the consummation certainly leaves the punishable attempt intact. But it is always necessary for the agent to have made this mistake when his previous behaviour already constituted a punishable attempt. Therefore, the "inability error" is not the reason for penalization, nor is it the characteristic feature of the punishable attempt, but a fact which simply does not exclude the taking shape of the criminal attempt: the concept of the "inability error" is not useful in the definition of the punishable attempt. Then in the case of the "motive-error" the attempt is not punishable if, and inasmuch as, the error is made about an element necessary to the causing of the desired result (as, for example, in the case of the pregnant girl wishing to procur an abortion by drinking a cup of tea). It is thus evident that foreknowledge is necessary which elements are necessary to cause the result. At this point, however, the well-known problems crop up once again concerning the causal relationship, *idoneitas*, and danger. On the other hand, once such problems are solved the objective *facti species* of the punishable attempt is achieved and the discovery that the offence was not consummated because the agent made some mistake and the investigation of the nature of this does nothing more than translate into the terms of the theory of error, a solution which has already been found. The concept of "motive-error" is thus of little use in the definition of the non-punishable attempt.

14. The *iter criminis* followed by the agent represents an ever-increasing danger curve as he approaches the actual consummating of the crime. From this point of view, among all the acts performed in the criminal intent a distinction has been made between those, most distant in

[43] v. Hippel: *Strafrecht*, II, p. 431 objects that the differentiation between mistake made on the causal elements of *the facti species* and mistake made on the non-causal elements of the *facti species* unjustifiably attributes greater value to the result than that accorded to the other essential requisites of the crime.

time from the actual consummating of the crime and to which the name "preparatory" was given, and those, nearer in time to the committing of the crime called "executive" [44]. It was then easy to agree that by "executive act" it must be understood to be already at the beginning of execution [45], and not merely the later carrying out.

It has, however, been objected that theory under examination would cause the "levelling-out" between attempt and consummation of crime in the crimes of pure conduct and, that is, without an actual result [46]. But, even in a crime of fact the punishable attempt may take shape when the action has not yet been completely performed. Also in these

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[44] All the doctrine formed under the Codes qualifying as "executive" the acts in the punishable attempt has accepted the distinction between them and the "preparatory acts". See N. 4. The differentiation between preparatory acts and executive acts, according to the criterion of the proximity of consummation, has been partly adopted by the Anglo-Saxon doctrine. Hitchler: *Criminal Attempts,* 43. Dick L. Rev. 211 (1939). Curran: *Criminal and Non Criminal Attempts* 19 Geo L. J. 185, 316 (1930); Strahorn: *Preparation for Crime as a Criminal Attempt,* 1 Wasch. and Lee L. Rew. 1 (1939); *Id.: The Effect of Impossibility on criminal Attempts,* 78 U. of. Pa. L. Rev. 962, 970 (1930). The distinction between "near" attempt and "distant" attempt made according to the chronological criterion (Pessina: *Elementi,* I, p. 251) has, however, an extrinsic character, widely open to influence from subjective factors. (Petrocelli: *Il delitto tentato,* p. 100). It was also suggested that a definition of "the significant damage of the attempt" could be made in terms of "proximity" to the final damage. See Parke B., R. v. Eagleton (1885) Deass. 515 at p. 538 C. S. Kenny: *Outlines of Criminal Law,* 1947, p. 92. p. 11. It was objected that the distinction between "near" acts and "remote" acts indicates a difference of degree and not of nature. (Hall: *General Principles,* p. 583—584). The same objection was raised (Lord Goddard c. j., in Gardner v. Akeroyd (1952) 2 Q b 743 on p. 750. R. v. Robinson (1915) 11 Cr. App. R. 124 on p. 129) against the use sometimes made of the adverb "immediately" (in relation to consummation) in order to qualify the acts making up the punishable attempt. (Cross and Jones: *An introduction,* p. 104. Harris's: *Criminal Law,* by H. A. Palmer, 1960, p. 18). I. Rossi: *Trattato di diritto penale,* 1883, p. 193 had spoken of "acts" which are precipitated in some way, one or the other. The criterion of immediacy was likewise used in combination with others. Garçon: *Code pénal annoté,* 1952, p. 25 n. 51 writes of "immediate" and direct direction, in contrast to "mediate" and indirect direction of the acts. Petrocelli: *Il delitto tentato* p. 138, 150 made use of the concepts of "immediacy" and of "actuality" of execution.

[45] In order to more accurately determine the beginning of execution Petrocelli: *Il delitto tentato,* p. 141, suggested the differentiation between the acts in the attempt, into the "preparatory" ones (not punishable), and "initial" ones, and "executive" ones (the last two, punishable). See also Gugl. Sabatini: *Principi di scienza del diritto penale,* II, p. 104.

[46] Bockelmann: *Die fünfte Arbeitstagung der grossen Strafrechts Kommission,* „Zeitschr. f. d. ges. Straf. W.", 67 (1955), p. 598.

cases, therefore, the regretted "levelling-out" would occur. In any case, the criminal attempt always has a relative character, since it is always in reference to the consummation of a specific criminal offence. The law can also penalize, as a consummated crime, facts which combine the mere danger of offence or which constitute an attempt against protected interests. With the variations in the fact of consummation, that is, of the formula of the completed crime, there is likewise a variation in the range of the criminal attempt. It is, therefore, impossible to claim that the criminal attempt has the same significance in the crime of result and in the crime of pure conduct.

The differentiation between "preparatory acts" and "acts of execution" emphasizes the dynamic aspect of the attempt, and touches the phase during its carrying out in which a penal significance is acquired by the activity in question.

It has been pointed out that the beginning execution coincides with the endangering of the legally protected interests [47]. But, with this reference, there is a return to the initial objective conception of the criminal attempt as a danger of offence *(vid. ret.*, N. 11). After various other attempts [48], the "beginning of the use" of the means was offered as an indication of the beginning of execution, and it was further pointed out that this happens as soon as "the causal energy starts to operate" [49]. Thus the question mark is removed onto the plane of explanation of the "causal moment" which is "legally relevant" and opens the door to the corresponding problem. It was, again, further pointed out that the "beginning of use" is characterized by the fact of being an integrating part

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[47] Mezger: *Strafrecht*, 1960, I, p. 210; *Id.*: *Lehrbuch*, p. 396; Nagler: in *Leipziger Kommentar*, 1944, p. 276; H. Mayer: *Das Strafrecht des deutschen Volkes*, 1953, I, p. 284.

[48] The solutions considering the beginning of the violation of other people's rights (Carrara: *Atti preparatori*, p. 331), on the threshold of the sphere of others' rights, (B. Alimena: *Diritto penale*, 1910, I, p. 262, 266), the aggression against the legally protected interests by Penal laws (Vannini: *Il problema*, p. 19; M. E. Mayer: *Der Allgemeine Teil des deutsches Strafrechts* 1915, p. 35), at the beginning of the violation of the Penal statute (Manzini: *Trattato*, II, p. 448) considers the object of judgement and not the criterion for the determination of the punishable act (Petrocelli: *Il delitto tentato*, p. 101).

[49] Romagnosi: *Genesi del diritto penale*, 1837, I, p. 293. Impallomeni: *Istituzioni di diritto penale*, 1911, p. 348. Massari: *Il momento esecutivo*, p. 192, 193; Marciano: *Il nuovo codice penale. Innovazioni*, 1931, p. 105; Manzini: *Trattato*, II, 371. Ranieri: *Manuale di diritto penale*, 1956, I, p. 234. Petrocelli: *Il delitto tentato*, p. 130, 135. Vassalli: *Il problema del tentato*, p. 24. Haus: *Principes de droit pénal*, I, p. 337.

of the typical action [50]. But this solution is the same as the solution seeking to establish the beginning of execution by again using the concept of the *facti species*, and which connects the idea of beginning of execution with the idea of a part of the criminal *facti species*. With this theory, known as the "objective formal theory", beginning of execution, and therefore punishable attempt, would occur when the agent performed an act conforming to one of the essential facts necessary for the existence of the crime, as defined in the *facti species* [51]. For example, a punishable attempt of theft would occur with the activity which gives rise to a beginning of the theft of someone else's personal property (art. 257 Polish Penal Code; art. 624 Italian Penal Code; para. 242 German Penal Code). However, according to this solution the fact of leaning a ladder against the window with a purpose to commit burglary would not yet constitute the act of stealing and, thus, is not a means of execution. Such a solution has therefore been discarded since it excessively limits the range of the punishable attempt [52].

The formula under examination has been extended to include in the statutory offence also the aggravating circumstances of the crime [53]. Such an extension, of course, is quite feasible in those Penal Codes which allow for the definition of circumstances of aggravation, but not in those which leave their indication and evaluation to the court's discretion. Besides, it must be understood to imply reference only to those concerning objective elements, and not those concerning subjective elements (such as, for example, premeditation, or contemptible or futile motives). But even with these limitations and details, the formula leaves room for insuperable uncertainties. For example, supposing for larceny the circumstances of aggravation were represented by carrying arms or narcotics, or else the fact being undertaken by a disguised person, or by more than three people, or being directed against travellers' luggage either at the station or in a hotel, the systematic extension of the punish-

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[50] Petrocelli: *Il delitto tentato*, p. 137.

[51] Graf zu Dohna: *Der Aufbau, p. 16.* Allfeld: *Lehrbuch des deutschen Strafrechts*, 1934, I, p. 193. G. Battaglini: *L'incompiutezza dell'azione nel tentativo in Studi in onore di S. Longhi*, 1935, p. 142. F. Alimena: *L'attività esecutiva nel tentativo*, Foro Ital., 1936, IV. Vassalli: *La disciplina del tentativo*, p. 18. Ortolan: *Elementi di diritto penale*, 1857, I, p. 424 had already noted that "from the moment at which the agent has reached the acts of execution, this agent has also entered upon the crime as defined by law".

[52] v. Maurach: *Deutsches Strafrecht*, p. 431—432, Scarano: *Il tentativo*, p. 7.

[53] Nagler und Jagusch: *Versuch*, II. A 2 d, p. 189. Massari: *Il momento esecutivo*, p. 140. Vannini: *Il problema*, p. 20. Manzini: *Trattato*. II. p. 451.

ability of such facts could then become exaggerated. On the other hand, the systematic exclusion of such facts from the range of the punishable attempt would tend in the opposite direction: the defect of their excessive limitation. The thief hidden in the church with the purpose of stealing the money from the offertory boxes would thus escape unpunished [54]. A new theory called the theory "of approaching" then proposed that the punishable attempt should already take shape when the author "draws immediately near" to the realization of the *facti species* (for example, drawing the revolver from his pocket with the intention to kill) [55]. The penal law, however, frequently fails to describe the *facti species* (*vid. ret.* N. 14). So it becomes even more difficult to define the acts "immediately drawing near" to such *facti species.*

Another theory, called the "substantial-objective" theory, defined the executive activity as, on the strength of its necessary connection with an action conforming to the statutory offence, one appearing as an essential part of such an action according to a natural conception [56]. This solution suggests that judgement is to be given according to criteria of common values, but also refers to the action in a statutory offence and, thus, presents the already noted difficulties of the other similar formulas. (*vid. ret.* N. 14).

A further conception returns to the beginning of execution in the action which does not yet conform to *facti species* but is in such a relationship with the action indicated in a *facti species* that, in consideration of the total plans of the agent, and according to natural opinion, the whole of the actions is to be considered as one action only [57]. But this solution, relying on the concept of "oneness" of the action carried out by the subject with the action indicated in a *facti species*, does not wander far from those theories which adopt the criteria of the "necessary connection" or of the "immediate drawing near to" committing.

The solution under examination, then, also recognizes the need to

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[54] This conclusion is reached by Petrocelli: *Il delitto tentato*, p. 118.

[55] Welzel: *Strafrecht*, p. 169 BGH St. 7, 291.

[56] This theory was founded by R. Frank: *Strafgesetzbuch*, par. 43, II, 2 b and followed by a wide section of doctrine. See Kohlrausch-Lange: *Strafgesetzbuch*, 1950, par. 43, Vorb. II, v. Liszt-Schmidt: *Lehrbuch*, 1932, p. 305. v. Hippel: *Strafrecht*, II, p. 399. Nagler und Jagusch: *Versuch*, II, B 2 C p. 190. R G St. 51, 341; 59, 157; 71; 6; 77, 164, 175. Petrocelli: *Il delitto tentato*, p. 152 makes reference to "normal succession and chain reactions effect of the acts"; Carrara: *Programma*, p. 359, 361 had already referred to the act "leading, of its own nature", to a criminal fact.

[57] Ortolan: *Elementi*, p. 436 had called the acts "forming one sole part" with the typical action of the crime, executive acts. RGSt., 51, 341; 54, 36, 66, 143, 154.

proceed towards judgement according to "natural opinion". It is rather characterized by the fact of assuming, as an object of opinion or evaluation, the entire plans of the agent. Besides, this characteristic, at the same time, also constitutes its weak point. Assuming as an object of opinion the above mentioned plans, the judgement is then extended over the thoughts, effects, and the foolish ambitions of the subject [58]. The only objective limit remains that of the "oneness" of the agent's plans and with the objective *facti species*. But even this criterion of "oneness" is very vague. If it refers to spatial or temporal elements it assumes a rigidity rendering it of little usefulness. If, instead, it is understood in a "rational" sense, even the choice of the elements making up the statutory offence to which the punishable offence is to conform, must occur according to an "objective" criterion and "the agent's plans" become quite irrelevant. If, finally, the relevant univocality should be that considered as such by the subject, then it would again fall into the range of the subjective theories plus all the negative consequences we hawe already pointed out (*vid. ret.* N. 11).

The idea that the punishable attempt resides in the beginning of execution of the criminal offence as proscribed in the Penal Code, finally, is merely positive image of the conception according to which the punishable attempt is characterized by the "lack of *facti species*" (*vid. ret.* N. 13). Consequently, the defects already pointed out in this formula are also reproduced in the other. Both, however, have the advantage of approaching the problem from a new point of view, which reveals the connection of the general statutory offence with those special definitions in the Penal Code referring to individual offences.

15. Taking as a point of departure the idea that the attempted criminal offence (called "imperfect") is punished because of "the danger run by society or the offended citizen" (and is punished more leniently than the accomplished offence, called "perfect" precisely because danger run can never be the same as a harm suffered) and, once adopted the solution which requires, for the punishability of the attempt, "a beginning of execution of the offence" consisting in an "external act", another theory [59] had recognized the characteristic features of the criminal attempt in its univocality (as well as in its *idoneitas*).

Univocality is considered as an objective feature of the external acts. For so long as the external acts remain such as to be able to lead either to the crime or to the non-criminal action, there will be a prepa-

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[58] Treplin: *Der Versuch*, p. 465. *vide* also *inf.* No. 18.

[59] Carrara: *Programma*, par. 358 *Id.: Grado nella forza fisica del delitto;* in *Opuscoli di diritto criminale*, 1870, I, p. 69.

ratory act, not at the moment dangerous and, thus, not punishable; when, however, the acts are accompanied by such material conditions as unequivocally demonstrate their leading to a particular crime, they have an executive character and present actual danger [60].

The criterion of univocality was successively rejected because it seemed to confuse the question of the nature of the act with that of the proof of the agent's intention [61]. But precisely against this very confusion, part of the doctrine offered opposition with the observation that the criminal intent is a psychological fact, even if it has to be proved with objective data, consisting both in the agent's exterior behaviour and in other elements outside the individual criminal episode, such as the confession of the "reus", his attitude after the fact, his personal qualities

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[60] The requisite of "univocality" was introduced into the current Italian Penal Code beside the requisite of *idoneitas*. Univocality as a proof of the criminal intent is indicated as typical of the punishable attempt by part of Anglo-Saxon doctrine and jurisprudence. Salmond: *Jurisprudence*, 1924, p. 404. J. W. C. Turner: *Attempt to Commit Crimes*, 5 Camb. L. J., 1934, p. 230, 234—235 and *Modern Approach to Criminal Law*, 1948, IV, p. 279. R. v. Miskell (1954), 1 W. L. R. 438; 1 All E. R. 137; 37 Cr App. R. 214 and R. v. Robinson, 1915, 2 KB. 342. The comment in *"Model Penal Code"* affirms that "purposely" means that the agent is seriously devoted to the consummation of the crime (Com. 10 p. 25). The expression "essential step" for the obtaining of the result, in turn, is to be understood in the sense of a strongly corroborating step of the agent's criminal intent (Sec. 5, 01 (2)), so that the firmness of the criminal intentions proves to be indubitably evident (Com. 10, p. 47). Donnedieu de Vabres in a note on Dalloz, n. 231 p. 134 defines the beginning of execution as the act undertaken and completed with an irrevocable criminal intent. Vidal et Magnol, n. 97, p. 150 consider that beginning of execution occurs when "the agent has made up his mind to run risks of his undertaking, when he has somehow decided to burn his bridges behind him". Bouzat: *Traité théorique et pratique de droit pénal*, 1951, p. 165 talks of passing the "Rubicon of the crime". The criterion of univocality may also be expressed by means of a reference to the "direction" of the criminal intent. The Polish doctrine, based on the formula of art. 23 para. 1 of the Polish Penal Code "action directly tending towards the realization" of the plan to commit the offence, if, on one hand, does not accept the subjective conception of the attempt (Andrejew, Lernell, Sawicki: *Prawo karne Polski Ludowej*, 1950, p. 229; Śliwiński: *Prawo karne*, 1946, p. 297—298 on the other hand, it removes the centre of gravity of the institute from the objective element to the one concerning the intention of the *reo* (Wolter: *Prawo karne*, 1947, p. 231—232; Glaser: *Polskie prawo karne w zarysie* 1933, p. 215. Rappaport: *Komentair*, 1932, p. 246). Criticism of the use of subjective data for the definition of the objective element in the criminal attempt in v. Hippel: *Deutsches Strafrecht*, II, p. 399. The intent and desire to bring the crime to consummation may be extremely firm also during the initial stages of preparation. (Petrocelli: *Il delitto tentato*, p. 144. Manzini: *Trattato*, II, p. 448.

[61] Carrara: *Atti preparatori*, p. 358.

etc., and that univocality constitutes, instead, an objective character of the action, and consists in the fact that the action, in itself, for what it is and for the manner in which it was performed, must reveal the agent's intention [62].

Univocality was likewise deliberately understood, instead of criterion of essence of the punishable attempt, as a mere criterion of proof of the criminal intent [63]. However, objections were raised against this conception that the proof of intention is of no use in establishing the nature of the conduct [64]. Besides, an opinion prevails that modern systematic requirements do not suffer gladly the inclusion of criteria of proof in the substantive Penal Law regulations [65]. The limitation of proof of intention only to the acts performed by the subject, would then carry the obligation of excluding punishability in cases in which the criminal attempt is evident as, for example, in the fact of purchasing a harmless powder in the belief that it is a narcotic substance. Finally, the univocal tendency of the act would not always be evident from this: for example, the opening of a window in somebody's house can be directed towards the committing of a burglary, or towards entering for a rest, or even towards the depositing of an anonymous gift [66].

The fact that the law does not expressly cater for the requisite of univocality does not mean that it is not in conformity with the law. The argument of the arbitrary nature of the above mentioned requisite proves too much, because it bars doctrine and law from proposing criteria which illuminate the meaning and range of the laws, merely because it is not expressly indicated by the lattter. Judgement on univocality, then, concerns all the conduct and the circumstances in which it is carried out; consequently, it cannot be excluded that its being directed towards burglary, or the taking of a rest, or the making of a gift does not become clear in the act of the opening of the window, but may become clear from other contextual facts such as the possession of picklocks, the agent's weariness, or his having the gift in his pocket. Further, it must be re-

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[62] Antolisei: *Manuale*, I, p. 363—364; Pannain: *Manuale*, I, p. 550 Confession cannot transform a preparatory act into a punishable attempt. Petrocelli: *Il tentativo*, p. 70 and Vassalli: *Il problema del tentativo*, p. 23, note that univocality is only proper to those acts conforming to the *facti species*, therefore the requisite of univocality would excessively narrow the range of the punishable attempt.

[63] Bettiol: *Diritto penale*, p. 444. Petrocelli: *Il delitto tentato*, p. 67. Turner: *Attempt*, p. 230, 234, 280—281. Salmond: *Jurisprudence*, p. 404. Kenny: *Outlines of Criminal Law*, 17 ed. par. 63.

[64] Russel on *Crime*, by J. W. C. Turner, 1958, p. 194. See also Note 10.

[65] Vassalli: *Il problema del tentativo*, p. 23.

[66] J. Hall: *General Principles*, p. 582.

cognized that part of the agent's conduct is not sufficiently clear with regard to his intentions; for example, lifting a stick at one's adversary can be an expression of an intention to harm or to kill him, but also to merely give him a beating or to threaten him. It is frequently the intention which illustrates the significance of the act, and the other way round. Besides, by excluding the importance of events following upon the interruption of the crime, from the judgement of univocality, the range of the punishable attempt is excessively limited [67]. For example, in the case of the burglar surprised at night as he opens the window in a young actress's house, even though he may confess his intention to enter the house in order to steal money from it, in the face of the lack of other incriminating elements, he should be acquitted of attempted larceny because his behaviour could also be interpreted simply as a desire to look at a sleeping beauty.

The best doctrine has assumed the responsibility of this serious defect and has pointed out that the requisite of univocality is likewise to be taken as implying that the action had such a development as to exclude an appreciable probability that the "reus" ceases to bring it to a successful conclusion [68]. However this characteristic feature is no longer necessarily part of the concept of an "act tending in an univocal direction", i.e., the conduct actually realized, but is concerned with the subject's foreseeable future conduct. This, then, introduces a further aspect of the problem which concerns the agent's intention and personality and which must be dealt with and examined separately. (*vid. infra* N. 21).

16. The solution adopting the criterion of "danger", the one using the concept of *idoneitas* and the one referring to the "abstract and adequate causality" differ from each other only in name [69]. In fact, it frequently happens that the "beginning of execution" is defined in terms

[67] Petrocelli: *Il delitto tentato*, p. 73.

[68] Antolisei: *Manuale*, I, p. 374. Germann: *Das Verbrechen*, p. 66, 74, adopted the criterion of the "irrevocable decision" in a definition of the range of the subjective solution he himself adopted. Elements of this solution are to be found in the German draft proposals of 1922 and 1935. Klee: *Deutsches Strafrecht*, p. 289 considers significant the fact that the subject has already followed so much of the way towards realization of the crime that the way to be followed in order to turn back is no longer evident. In Swiss jurisprudence see B.G.E. 80, IV, 180.

[69] Also abreast with the formula in the Italian Penal Code (art. 56 Italian Penal Code) created with the purpose of overcoming the difficulty of the differentiation between preparatory acts and executive acts (*Relazione Ministeriale sul progetto del cod. pen.*, 1929, n. 70) part of the doctrine has supported that this distinction should remain valid. De Marsico: *Diritto penale*, p. 218. O. Vannini: *Il problema giuridico del tentativo*, 1952, p. 24. G. Battaglini: *Diritto penale*, p. 301. F. Alimena: *L'attività esecutiva*. Marciano: *Il nuovo codice penale*, p. 27. Petrocelli: *Il delitto tentato*, p. 57. Vassalli: *Il problema del*

of the concept of *idoneitas* which, in turn, is defined in terms of "adequacy" with the corresponding reference to "causality" and, further, that these ideas are used to define the commission of a crime conforming to the definition of the *facti species*, or *vice versa*. This, then, is merely a change of vocabulary, and no progress whatsoever is made towards the solution of the problem (*vid. retro*, N. 11).

The *idoneitas* of the conduct in relation to the consummation of the crime substantially coincides with the danger of the consummation of the crime itself. Both consist in a probability of offence against legally protected interests. The juridic concept of causality, however, is concerned with a specific requisite in offences of result; its initial point is to be found in the conduct and its terminating point in the result as a natural event. The transfer of this concept into the field of the attempt does not, therefore, appear admissible, first of all because in the criminal attempt the fact itself never actually occurs and, also, because in criminal offences the criminal attempt can take shape without fact brought about through "pure conduct".

The concept of causality can be employed for the definition of the punishable attempt only after undergoing certain modifications and adjustments. The first one is that causality in the criminal attempt refers not only to the relation between the conduct and the result, but also the relation formed, within the conduct, between individual acts and the effect stemming from them of crime of result and the concept of causality as a requisite. The second adjustment is that, in the attempt, causality has, as a final point, not the fact as a natural event, but the offence against legally protected interests, which is also a feature of offences. These adjustments, however, may cause confusion between the concept of causality as a requisite of crime of result and the concept of causality as requisite of the punishable attempt. The term "danger" is more general and thus can also be used to sketch out the characteristic features of the punishable attempt. Further, this term seems more appropriate than that of *idoneitas* mainly because the *idoneitas* is a qualification necessarily attributed to the conduct realized by the agent, while, as we shall see, in order to define the punishable attempt, it is also necessary to consider other elements and evaluate them from a different point of view (*vid. infra*, N. 21).

The efforts made by the doctrine to define the punishable attempt or

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tentativo, p. 13. This phenomenon is also to be found in Polish doctrine which, although lacking an express reference in art. 23, para 1 ("undertakes an action...") continued to recognize that preparatory acts are excluded from the punishable attempt. (Wolter: *Prawo karne*, p. 231—232; Śliwiński: *Prawo karne*, p. 297—298).

the executive act in it, with reference to a *facti species* in turn (as has already been pointed out) conceal beneath the flow of verbosity the concepts of "causality", *idoneitas* and "danger" of consummation. Thus, the idea of attacking the problem in terms of a *facti species* might as well be abandoned for the sake of the concept of "danger" of successful conclusion of the fact.

The most delicate problem, however, lies not so much in the choice of terminology for the material facts making up the punishable attempt, as in their definition. Once we accept the idea that the attempt is punishable when the agent's behaviour has created the danger of its consummation, the crux of the matter remains in supplying the interpreter with a more precise criterion, which would be of use in individual cases, to establish whether or not this danger actually existed.

Judgement on the danger of a fact taking place must necessarily refer to a moment preceding the offensive fact. After the offensive fact has actually occurred no further "danger" exists, but its place is taken by "damage" or "injury". When the fact has not occurred and can no longer occur, there is no further danger, even, of offence. Judgement on danger can only be formulated at a moment at which the occurrence of the fact, or more precisely its consummation is still uncertain. Thus the formula of the "posthumous prognosis" (*vide retro* N. 11) is confirmed.

The reference to a moment at which the committing of the fact was still uncertain is important since it is intended to limit the range of the necessary knowledge for the judgement. If all happenings, including those coming to light after the non-commission (or, instead, effective commission) were to be considered, judgement would be a question of certainty and not of danger, i.e., certainty of non-consummation (or of effective consummation).

However, even after referring to a moment at which the effective consummation was still uncertain, excluding the necessity of knowing all the circumstances which have to be taken into consideration about the fact, it is still necessary to establish precisely what these circumstances are which have to be taken into account in order to pronounce judgement on the danger.

In the first place, we must consider all the material facts, and only the material facts, known to the agent. But with such a method the danger, and with it the punishable attempt, is excluded in all those cases in which consummation did not take place because of an obstacle which had already existed at the moment of the fact but were unknown to the agent as, for example, in the case in which the intended victim of the criminal attempt was already addicted to that particular poison, or the weapon already out of order at the time of the attempt.

A correction of this solution has been sought by adding to the material facts known to the agent, those material facts which might well have come to the knowledge of a normally observant person; or else, taking as a basis the material facts which might well have been known by a normally experienced person, plus those material facts actually known to the agent [70]. But with this solution, too, the attempt would go unpunished in certain cases, for example, when the material fact of the addiction to the particular poison used or the non-working of the weapon were difficult to recognize or only recognizable to an expert, while the agent himself had no particular knowledge of the subject.

Secondly, it is necessary to establish the degree of specialized knowledge or experience required for the formulation of a judgement of the danger, based on particular elements of materal fact. The solution of referring to the agent's specialized knowledge and experience puts it in direct proportion to the range of punishability of the attempt; for instance, the criminal snatching up a gun and firing it with intent to kill could well hope to escape unpunished if he were ignorant, and were handling a fire-arm for the first time and against a distant target. The solution of referring to a normal person's specialized knowledge or experience leaves unpunished the attempt carried out by someone possessing very specialized and superior knowledge; for example, the meteorological expert who noted the formation of a cyclone, foresaw its rapid arrival, would not be committing a punishable attempt if he encouraged his mother-in-law to take a boat trip which would thus endanger her life. The solution of basing judgement on a normal subject's specialized knowledge and experience plus the agent's own knowledge leaves those cases unpunished in which the danger exists according to the specialized knowledge and experience above the average level, but which enjoys only a normal measure of specialized knowledge and experience as far as the subject is concerned.

The only remaining solution is, therefore, that of assuming the best specialized knowledge and experience, both for the indication of the circumstances (recognizable in the actual situation in which the agent finds himself) and for the evaluation of the danger of consummation.

Finally, it is necessary to establish the degree of danger justifying legal action. In a mathematical evaluation "probability" is the relation between the favourable cases and the possible ones. But, in everyday language, an event is said to be probable as the possibilities of its happening outnumber those of its not happening. In other words, when the ratio between favourable cases and the possible ones is more than 50/50.

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[70] Antolisei: *Manuale*, p. 368.

The probability is the stronger the nearer this ratio comes to 1. The infinite variety of cases and the inevitable lack of statistical information, however, render the adoption of mathematical criteria unfeasible and orientate the doctrine towards the solution of considering dangerous the attempt whose effective conclusion presents a considerable degree of possibility, even without reaching the higher ratio of 50/50. The combination of the two criteria leads to the definition of the concept of significant "cause" in Penal Law. Such is the necessary and probable antecedent of an effect, and, therefore, one which the effect itself will probably follow according to the best knowledge and experience of the agent at the moment at which the antecedent is put [71]. It is possible that this idea be also used in the definition of an initial aspect of the objective element in the punishable attempt. Such is the conduct that, at the moment of the fact, according to known circumstances and with the criterion supplied by the best knowledge and experience, makes effective consummation very likely indeed [72]. The objective *facti species* of the criminal attempt is made up of such conduct.

When dealing with the problem of causality relation, it was found that the opposite of causality was given by the case of pure chance or force "majeure". Chance, as an unlikely and necessary condition of the fact, excludes the causality relation between the agent's conduct and the result itself. The latter, attributable to chance, can no longer be charged against the agent's responsibility [73].

The *facti species* corresponding to the punishable attempt can be similarly defined by means of a formula representing the reverse of the likelihood of consummation. The foregoing *facti species* is made up of behaviour which only by "chance" did not reach its consummation. In other words, the typical figure of the punishable attempt may be determined either in terms of "likelihood" or "danger" of consummation, or in terms of "chance" or "luck" because of the non-consummation of the crime. The two propositions are equivalent. They constitute, as it were, two sides of the coin. So, for example, if the agent administers a dose of poison which would normally be lethal to someone who is, instead, addicted, then his death is prevented by a fact foreseeable within the realm of possibility, and thus assumes the nature of "luck"; if the thief puts his hand into the pocket of someone who has left his wallet at home, the theft is prevented by a fact not foreseeable within the realm

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[71] Malinverni: *Il rapporto di causalità ed il caso*, in Riv. Ital. dir. pen. 1959, p. 57.

[72] Waiblinger: *Subjektivismus*, p. 217.

[73] Malinverni: *Il rapporto*, p. 68.

of possibility and thus, again, having the nature of "luck" or "chance" [74].

The agent may also count on "chance". For example, a son-in-law may invite his mother-in-law to go for a walk in the woods in the hope of an outbreak of a storm and her being struck by lightning. But the fact of having foreseen and, indeed, even wished for that thunderbolt and its striking his mother-in-law does not constitute a change in the fact of the "Act-of-God" nature of the lightning since, also according to the best of specialized knowledge and experience, there was no probability of its taking the desired direction, neither could the agent do anything to increase such a probability. Consequently, if the fact was to occur, it would be attributable to "chance" and not to the son-in-law. This is even more true in the case where the subject, in the committing of the criminal attempt, relied on "chance" and carried out none of the acts "idoneous" to the conclusion of the crime itself and, therefore did not commit the fact typical of the criminal attempt. Indeed, in spite of the agent's hopes and forecasts, no objective danger of the successful conclusion of the criminal offence took shape.

17. It is time to indicate the moment at which danger must exist. The *iter criminis* can include a very wide range of acts and can take place over a period of time. It certainly cannot be required that the danger should exist and continue to exist for the whole time in which the conduct is developing. It could, however, be required, and it is thus frequently understood, that the danger should exist at the moment at which execution was interrupted or exhausted. For example, when it is noted that the poisoning attempt by means of an insufficient dose of poison in a cup of tea has not created the danger of offence against the life of the person in question, the moment is considered at which the agent finished preparing the poisoned tea, or at which he had already offered it to the victim. Such a reference, however, is unjustified and the source of mistaken evaluations.

If the purpose of penalizing the attempt is to avoid the danger of an injury or offence equivalent to a successful conclusion, it is sufficient that this danger present itself following the subject's actions or omissions; there is no reason to expect such a danger to continue during the whole course of the conduct or that it should be contextual to the beginning or end of it, or that it should be only of significance if it takes shape at a particular point of the *iter criminis*. Given the function of the rulings penalizing the attempt, it is enough for this danger to

[74] J. Hall: *General principles*, p. 592.

have occurred some time between the beginning of the conduct and its interruption which prevented its consummation, at whatever point this may have happened. Consequently, in the case of attempted murder using a lethal poison, administered, however, in an insufficient quantity, it can be assumed that, at the moment the agent began pouring out the poison, he was likely to have continued the operation until he had used a dose sufficiently strong to kill; the danger then took shape and the attempt became punishable. The fact that the agent actually stopped pouring before reaching a lethal dose does not exclude the danger which had already, by then, presented itself. The same is true in the case of a rival coming up to this victim with a loaded weapon, firing at too far a distance to reach its objective; if, at the moment preceding the agent's decision to stop it could be considered likely that he would have continued going nearer his victim, then the danger of a successful conclusion presented itself and the attempt became punishable.

18. Once the content of a judgement on danger has been defined, it is necessary to examine the object of this judgement on danger, i.e.; whether the situation is dangerous or not.

Penal Codes generally define criminal attempt by means of the qualification of the subject's behaviour. The terminology used to this end varies: terms such as "acts", "actions", "to do or abstain from doing something", "preparation of means or instruments", "creation of the conditions", "showing", or "demonstrating" the intent to commit a crime, "undertake an action", "beginning of execution", and similar ones are in current use. But all these formulas are in agreement with the agent's conduct (action or omission) being the objective requisite of the criminal attempt.

Now, in cases in which the conduct presents defects preventing a successful conclusion, where such defects are recognizable to the best knowledge and experience of a specialist (or a man of normal experience, or the agent himself), the interpreter may be encouraged to deny that such conduct constitutes a danger of offence against legally protected interests and that the attempt is punishable. For example, without house-breaking instruments, a petty thief forces his entrance into a solicitor's office with the idea of stealing money which is securely locked in a solid safe; he does not perform actions dangerous to the solicitor's property; the deliquent who wishes to kill and uses a long out-of-order revolver does not endanger the intended victim's life. The likelihood of the safe's locks yielding without instruments or the working of the revolver will have to be excluded in certain circumstances. The action judged *ex ante*, also according to the best of specialized knowledge

and experience (and even more so when judged according to normal specialized knowledge and experience plus the agent's own) must be held to be "non-idoneous"; it would not, therefore, give rise to the *facti species* of the punishable attempt.

Judgement of *idoneitas* would only be positive if the agent's supposed circumstances were taken into account. The thief imagined the money to be in an unlocked drawer and the delinquent supposed the revolver to be in working order; according to such elements conduct would be idoneous, and therefore dangerous, and consequently the attempt would be punishable. But this system again transfers the whole evaluation onto the subjective plane and forces the admission of the existence of the punishable attempt even in the case in which the agent, wishing to kill, fired a revolver shot at the victim's body, supposedly asleep, whereas he had, in fact, just died from a heart attack. The case in which a superstitious agent tried to cause his rival's death by means of witchcraft would be also punishable.

In order to avoid limitation of punishability deriving from the fact of only assuming conduct actually carried out as an object of judgement, some theoricians suggested bearing the agent's plan in mind [75]. If only the actually realized part of the plan is considered, the object of judgement remains restricted to the conduct, and if the unrealized part of his plan is considered too, then mere intentions on foolish ambitions are also offered for judgement. Besides, in the case where the agent's entire plan is evaluated, and the part which has been realized does not carry with it the danger of a consummation, then a decisive importance is attached to the intentions and foolish ambitions. Thus the punishable attempt is emptied of its objective requisite (*vid. ret* N. 10 and note 58).

19. Conduct creating objective danger for a successful conclusion of the crime undertaken constitutes a punishable attempt. But there still remains the requirement to extend the range of the punishable attempt to other behaviour too. The problem is to determine objectively the limits of this extension.

Besides those cases in which the agent's conduct bore the probability of achieving his offensive purpose, the danger of offence can be also recognized when the agent's conduct did not bear the probability of reaching a successful conclusion of the intended crime, due to the agent's

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[75] Schönke-Schröder: *Strafgesetzbuch*, Par. 43, I, c. Welzel: *Das deutsche Strafrecht*, p. 156. Nagler und Jagusch: *Versuch*, II AEcB, p. 189. Baumann: *Strafrecht*, p. 459. Waiblinger: *Subjektivismus*, p. 214 BGH St 2, 380; 4, 273; 6, 98.

stumbling over a mistake, which he would have presumably been able to avoid or would have wished to avoid and would have had the possibility of avoiding if he had been aware of it. For example, if the murderer puts a lethal dose of poison in a cup of tea and then changes this cup for another and so offers a non-poisoned cup to the intended victim, the danger of a murder taking place if this were not recognizable in the conduct carried out, nevertheless exists since it is probable that had the agent realized his mistake with the cups in time, he would have corrected it and so achieved his goal. If the pickpocket puts his hand into his neighbour's pocket but finds it empty because its owner had put his wallet in another pocket or has inadvertently left it at home, the danger of a consummation of that act of larceny is not recognizable in the conduct actually carried out, but the danger of the theft nevertheless still exists because it is a probability that if the agent had known that he would find that particular pocket empty, he would certainly have tried another one, or chosen another victim.

In these cases the object of the qualification is not only the conduct actually realized by the agent, but likewise the conduct he would have desired to realize. The danger of offence must be evaluated, then, by taking into account both the conduct which has been realized and that which would have been realized had the agent been aware that the conduct he had started was not such as to lead to a consummation.

Judgement on the danger of offence, extended from actually effected conduct to supposed behaviour of the agent is transformed from judgement on an existing object to judgement on a hypothetical one. However, the hypothesis must present all the features of reality. That is, it must be possible to consider probable that, if the agent had been aware that his conduct would not lead to a successful conclusion, he would have changed it in such a way as to make it suitable (idoneous) for that purpose. Besides, it is necessary that, at the moment at which that conduct was being carried out, there still existed the possibility of correcting the conduct itself in order to render it proper for the successful conclusion. In the case of an explosion of machine-gun fire against the bed in which he imagined the victim asleep, while in reality he had just died of a heart attack, the possibility of such a useful correction does not exist and, therefore, a danger of offence and its corresponding punishable attempted murder, do not present themselves [76].

Finally, with the suggested solution, the danger of consummation previously referred to the material crime which it was the agent's inten-

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[76] Germann: *Das Verbrechen*, p. 44; *Id.*: *Über den Grund der Strafbarkeit der Versuch*, 1914, p. 149, conf. Weiblinger: *Subjektivismus*, p. 220—221.

tion to commit, it is then referred to the consummation of a crime of a type desired by the agent. In other words, because there exists the danger of consummation, the likelihood of the consummation of the particular criminal fact towards which the agent had been working, is not necessary, but the likelihood of the successful conclusion of a fact belonging to the same group of crimes is significant [77]. More crimes belong to the same group and are of the same type, in the sense of interest here, when, by means of the corresponding penalties, the Law protects entirely or partly, the same legal interests. In order to define these legally protected interests, it is not enough to take into consideration the little index in the Penal Code in which the crime is set out, but it is necessary to take into consideration the object of the specific statutory ruling incriminating punishment.

The proposed solution has so far been offered in the terms of penal law based on the fact itself, in agreement with the system currently adopted by Codes in use. For this reason we have spoken of the likelihood of the dangerous behaviour leading to a consummation, instead of the non-dangerous behaviour undertaken, in view of the subject's ability, desire or possibility of carrying out the change. But such a solution, as has been proposed, can be also set out in terms in agreement with a penal system based on the doer of the fact, a system towards which penal law is moving. And in this case we could speak of the subject's likely ability and desire to carry out the possible dangerous behaviour proper for the consummation, instead of the non-dangerous behaviour which he had wrongly embarked upon.

Further, the terms of the proposed solution may be reversed. Instead of speaking of the likelihood of dangerous conduct leading to a consummation in view of the subject's ability, desire and possibility of correcting the non-dangerous steps taken, we could speak of the unlikelihood of dangerous conduct leading to a consummation, in view of the subject's inability, lack of desire and impossibility to realize it. Instead of proposing the subject's likely ability and desire to carry out possible dangerous conduct leading to a consummation, it may be equally a question of his likely inability and lack of desire to do this. Each one of these propositions illuminates the question from a different point of view, thus contributing to its deeper understanding. However the crux of the problem and its solution remain unchanged.

20. The problem may, likewise, be considered from the point of view of error. Taking as the object of judgement the conduct carried out by the agent, the most significant error is the one preventing the consummation.

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[77] J. Hall: *General Principles*, p. 593.

Now, if it is a question of incapacity-error (for example, the murderer who misses his target or exchanges the cup of poisoned tea for a normal one, or the thief in the cloakroom snatching up his own overcoat instead of someone else's) the attempt remains punishable since it is more than likely if not certain, that the agent would have had the ability, desire and possibility of correcting his mistake if he had been aware of it. Indeed a mistake of execution, as is the incapacity-error, can be also made by shrewd and socially dangerous subjects.

If we want to draw a parallel between the significance of this type of mistake in the theory of the attempt and in the theory of error, then in case of the latter, the incapacity-error which caused behaviour different from that intended or desired, excludes the *dolus* and leaves untouched penal responsibility and guilt only if, and when the mistake can be attributed to carelessness and if the fact is catered for by the law as an offence only due to carelessness (*culpa*). Now, precisely because this type of mistake excludes, together with the *dolus* also the punishing of the intentionally criminal offence, it must be noted that, in the event of its preventing the desired successful conclusion, it does not exclude the *dolus* and, therefore, cannot exclude the punishing of the deliberate attempt. In other words, for the same reason that the incapacity-error giving rise to behaviour corresponding to the type penalized, but not intended by the agent, excludes responsibility for *dolus*, so it also forces a non-exclusion of the responsibility for *dolus* when penally insignificant behaviour was caused by an incapacity-error, against the agent's will, which was directed towards the performance of behaviour constituting a crime.

The motive-error too, consisting in the mistaken or non-representation of present facts, or in the mistaken forecast of future facts, or in mistaken or non-representation of qualifications of facts, objects or subjects, may influence the outcome of the attempt. But here distinction must be made between two types of mistake. The mistake falling upon the qualifications set out by law as essential for the taking shape of the crime, does not exclude the consummation but the very committing of it. The subject who imagines himself to be a public official while he is merely an ordinary private employee, trying to appropriate illegally money from the office can perform an attempt illegal appropriation but is in the "legal" impossibility of undertaking the committing of the crime of *peculatus*, (art. 314 Italian Penal Code) and not only in the impossibility of consummating such a crime. The problem of the punishability of the attempt in these cases cannot even be posed. The only problem is of finding out whether there exists the possibility of beginning the committing of the crime. The same is also true for the case where

the agent attempts to cause an offence to someone (for example by means of an offensive letter which was posted but not delivered) whom he imagines to be a public official whereas he is, in reality, simply a private citizen; this is a case in which the beginning of the committing of the *oltraggio* (art. 341 Italian Penal Code) against a public official is quite impossible, and there only remains a possible attempted *ingiuria* (art. 594 Italian Penal Code). The same is also true in the case where the agent attempts to steal property which he recognizes perfectly in its physical appearance, but which he wrongly assumes, through an *error juris*, to belong to someone else when it is really his own property; this is case in which the possibility is radically excluded of his having undertaken an act of petty larceny and not only the possibility of his having brought it to a consummation.

Other motive-errors do not exclude the possibility of undertaking the attempt. And in such cases it is a question of deciding whether a punishable attempt has taken shape. When it is stated that the superstitious attempt is not punishable, a judgement is expressed which partly concerns the agent's ability to draw up an objectively dangerous plan, and partly his desire not to achieve an objectively dangerous plan. The old maid deciding to make her rival fall ill with an ulcer by means of the telepathic induction of nightmares, while other objectively dangerous means could have been used, had presumably given up the idea of such means. If it is considered likely that this old maid could have also attempted other superstitious practices, such as a magic spell, or novenae of prayers offered to her favourite saint, or even through a voodoo "hexing", but would never have had the courage to use a means or conduct which could be construed objectively dangerous, against her rival's health, such as a lethal poison or a fire-arm, the motive-error about the *idoneitas* of the means employed excludes the punishability of the attempted injury. But, on the other hand, it is stated that the person administering to his rival, with intent to kill, a lethal poison, but in insufficient quantity, is punishable for attempted murder, and it is also true of the thief who has forced an entry into a study without safe-breaking instruments to steal money which he supposes is left in an unlocked drawer, and who is punishable for attempted burglary, and so on, a judgement is expressed on the likelihood of the agent's ability to correct the mistake in his plan in such a way as to render it objectively idoneous for the carrying out of a consummation, and it is likewise expressed on the agent's desire to carry out this possible correction. Through this investigation of the error, the second aspect of the punishable attempt is again partly clarified.

21. When the attempt is considered as a fact which might be followed by its consummation and, with it, by the offence against the legal interests threatened in those circumstances, the definition of its punishability can only be made through the qualification of the conduct as a complex of necessary and likely conditions leading to a consummation. Thus the *facti species* takes shape for the criminal attempt. From this viewpoint the criminal attempt is considered in its "real" value, i.e., according to the value presented by the fact, separate from the subject who has carried it out.

When, however, it is attempted to establish what would have been the agent's behaviour if he had been aware that the facts he had already carried out were not idoneous for the consummation, then the facts already carried out by him are no longer considered according to their "real" value but rather assumed according to their "symptomatic" significance. The object of judgement, in turn, is no longer limited to the subject's behaviour but is extended to every other element of use in revealing his personality. Indeed, the knowledge of this personality is essential to the purpose of establishing what would have been the subject's likely behaviour in the event of his having become aware of the fact that his conduct was not going to lead to the consummation of the crime.

Checks thus carried out can lead to the discovery of a criminal attitude and of a social attitude; that is, respectively, aptitude for committing acts constituting crimes, or for performing acts for the public good:, and, that means, a tendency to correct his behaviour so far undertaken in order to commit the crime in question so that he might realize all the conditions required for its consummation and avoid all obstacles to this.

The idea of considering the punishable attempt as an indication of a socially dangerous personality, has long been supported by the positivist tendency (*vide ret.* N. 10). On the other hand, the difficulty of a precise measurement of these indications of the socially dangerous personality, as would also prove necessary in the case of a penal law based on the doer of the deed, falling within the guarantees of the citizens' equality and freedom [78] has, to date, obliged the legislator to continue to be tied to formulas which afford significance to the behaviour actually carried out by the subject.

Also the idea of drawing up the attempt on the basis of the *iter criminis* in which the subject has taken a decision from which he believes

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[78] Malinverni: *Per una teoria delle circostanze aventi a fondamento la personalità del soggetto del reato,* in Sculoa posit., 1965, p. 185.

there is no longer any chance of turning back, or else in consideration of the moment at which the subject is so far forward in the execution of the crime that, according to experience, no turning back is seen to be possible (*vide ret.* N. 15), this idea also emphasizes the subject's personality. However, a criminal decision may exist, as we have already seen, at a moment prior to the beginning if its preparation; a firm decision may likewise encourage the execution of an irreversible but completely non-idoneous attempt, such as the "superstitious" one. On the other hand, attempts may be encouraged by a will bedevilled by fears and uncertainties which, nevertheless, reach the stage of being in danger of a consummation. The strength of will directed towards the committing of a crime is an important feature in the subject's personality, but it does not constitute a typical feature of the punishable attempt.

The solution we propose holds tight to the notion of punishable attempt constructed on the basis of a "real" judgement on the danger of a consummation to be found in the conduct performed by the agent, in agreement with the current penal system based on the "fact". Our solution only inserts into this system a branch concerning the evaluation of one specific aspect of the subject's criminal attitude [79]. Such evaluation consists in a judgement about the probability of the agent actually achieving conduct which would be dangerous from the point of view of the successful conclusion of the crime, understood as offence or injury to legally protected interests, if he had become aware that the conduct carried out could not have produced the consummation. Consequently, it is no longer a question of trying to formulate the general and problematic judgement on the danger, concerning the probable committing of new facts constituting an offence, but rather it is a question of trying to express a specific and much less acceptable judgement on the likelihood of the "correction" which the agent would have made to his conduct wrongly considered to be idoneous for the consummation of the crime.

The need to amplify the traditional range of the rulings on the punishable attempt by means of reference to the subject's personality, has already been accepted by some modern codes which have connected non-punishability of the non-idoneous attempt, also known as impossible,

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[79] It has been recognized that judgement on danger not only concerns the objective elements in the crime, but is the result of a synthetic evaluation of objective and subjective elements, v. Gemmingen: *Die Rechtswidrigkeit des Versuchs*, 1932 (Strafr. Abhandl. N. 306) Ralis: *Der Begriff und die Strafbarkeit des Versuches*, „Zeitschr. f. d. ges. Straf. W.", 61 (1942), p. 53. and, above all, that among the latter, the characteristic features of the subject's total personality are to be inserted V. Rohland: *Lehrbuch des Strafrechts der RDR.*, 1957, I, p. 422.

to the "great lack of judgement", to the "simple-mindedness", to the "superstition", to the "extreme ignorance" of the subject, or refer to the fact that he is of "little danger" [80]. But these or other similar formulas only permit indirectly the definition of the non-idoneous attempt which is at the same time punishable since the subject possessed a certain common sense or a certain shrewdness or experience. Besides, even after such a reversing of the formula the problem which, to us, seems the pivot of the whole problem, remains obscure: it is essential to establish what would have been the subject's behaviour if he had been aware that the conduct followed was not going to lead to the consummation; investigation of his psychological characteristics must be directed towards this objective if it is to have any strict sense. Indeed, it is therefore possible that senseless, ignorant, ingenuous or supersitious subjects may have been able to extract from the knowledge of their error, some lesson of use for the carrying out a dangerous attempt. In these cases we say that the concluded attempt, although not dangerous, and in spite of being undertaken by a person of a very modest intellectual level, should be punishable [81].

22. On the subject of the "impossible criminal offence", also called "impossible attempt" or "non-idoneous" or "unreal" [82] the same questions

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[80] *vide ret.* No 7 Mezger: *Strafrecht*, 1960, I, p. 216; Welzel: *Das deutsche Strafrecht*, 1956, p. 159; Nagler und Jagusch: *Versuch*, II B 8; J. Hall: *General principles*, p. 592. Germann: *Das Verbrechen*, p. 66, notes that the discipline of the non-indoneous attempt in the Swiss Penal Code has conquered a "key position". A very considerable part of the doctrine recognizes that, on the subject of the attempt, the Swiss Penal Code is fundamentally based on the body of the subjective theory. Logos: *Commentaire du code pénal suisse*, I, p. 90. Thormann und v. Overbeck: *Schweizerisches Strafgesetzbuch*, 1940, I, p. 117. The subjective nature of the definition of an impossible attempt in the Yugoslavian Penal Code is affirmed by: M. Ancel et Srentic: *Le droit pénal nouveau de la Yougoslavie*, 1962, p. 44. Vassalli: *Il problema del tentativo*, p. 21, an express reference to the symptomatic value of the acts, in relation to the concretely demonstrated danger of the agent, in the case of the completion of preparatory acts of particular gravity, which, however, do not constitute a criminal attempt (art. 49/2 and 4, Italian Penal Code).

[81] The subject figures with the one concerning the presence of mental illness which diminishes or exclude ability to understand or intend. Weiblinger: *Subjektivismus*, p. 221; J. Hall: *General principles*, p. 592; F. Alimena: *La questione dei mezzi inidonei nel tentativo*, 1930, p. 156—157.

[82] The expression impossible or non-idoneous "attempt" emphasizes the activity carried out by the agent and directed towards the consummation and considers its *indoneitas*, or impossibility of its reaching the point of consummation. The expression impossible "offence" emphasizes the offence, and considers the impossibility of

are again to be found as had already nagged at the subject of "punishable attempt". Because their examination has already been undertaken during the consideration of the punishable attempt, is is now possible to make direct use of the conclusions reached.

The legal picture of the "impossible criminal offence" constitutes a general limit which is also applied to the frontiers of the punishable attempt. Where the range of the punishable attempt ends, there begins the impossible criminal offence. Consequently, with the definition of the punishable attempt, it is sufficient to recognize its reverse side in order to define the impossible criminal offence [83]. If, instead, the formula of "impossible attempt" is adopted, or that of the "non-idoneous attempt", the punishable attempt finds therein its specific limit.

The definition of the non-idoneous attempt or the impossible criminal offence by means of reference to the *non-idoneitas* of the conduct in relation to the successful conclusion of the specific crime undertaken, that is, with reference to the impossibility of that crime being brought to a consummation with the conduct carried out, constitutes the reverse of the definition of the punishable attempt as an idoneous fact proper for the obtaining of the consummation of the crime desired. Such a de-

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this taking shape. In both cases the essential is to define the characteristic features of the *non-idoneitas* or the "impossibility". In turn, these two terms are generally synonimous, although only the first of them refers actually to the concept of "probability".

[83] Antolisei: *Manuale*, I p. 369; Bettiol: *Diritto penale*, p. 388; Pannain: *Manuale*, I, p. 553; Fiore: *Il reato impossibile*, p. 83; Siniscalso: *La struttura*, p. 172; Welzel: *Das deutsche Strafrecht*, p. 158; Mezger: *Strafrecht*, I, p. 212, 216; v. Maurach: *Deutsches Strafrecht*, I, p. 445. Part of the German doctrine sees in the non-idoneous attempt, either through a lack in the agent's qualities (for example, when he wrongly believes he is a public official and, therefore, believes he is committing an offence proper to a public official) a putative crime (Schönke: *Strafgesetzbuch*, K., 1952, par. 43, IV, p. 151; Lange-Kohlrausch: *Kommentar zum StGB*, 1950, VI, an par. 43; Welzel: *Das deutsche Strafrecht*, p. 159; RG, 8, 200). The mistake made about a quality of the subject is a mistake about the fact constituting a crime (*error facti*) and not, as in the "putative crime", a mistake about the punishability of a fact (*error juris*). Thus, exactly (J. Maurach: *Deutsches Strafrecht*, I, p. 445, vide also Mezger: Strafrecht, I, 207—208; J. Hall: *General principles*, p. 594). However, this solution implies the acceptance of the idea that the qualification of a fact constituting a crime (for example, the ownership by others of the object which has been removed, the quality of public official of the insulted individual) is a requisite of the "fact"; therefore, that the mistake made about such qualifications still remains a mistake about the "fact" and does not become a mistake about "the law" qualifying the fact.

finition, however, as has been seen (*vide ret.* N. 19) excessively limits the range of the punishable attempt [84].

When the punishability as an attempt is extended to include the subject who has set in motion behaviour non-idoneous for the successful conclusion of the crime desired, but rather which the subject would very probably have had the possibility of, know-how, and the desire to follow in such a manner as to render it idoneous if he had been aware of its insufficiency or imperfection, the notion of non-idoneous attempt or impossible criminal offence remains correspondingly restricted to those cases in which not only the conduct was not idoneous for the obtaining of a successful conclusion, but in which it could very probably be

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[84] Part of the Anglo-Saxon doctrine followed the idea that no crime exists in the attempt to complete something which it is "physically impossible to do". (R. V. M'Pherson, 1857 D. and B. 197; 7 Cox 281; *Modern Approach*, p. 286). Successively, however, its impossibility was no longer accepted as a defence. R. v. Ring, 1892, 61 L. J. M. C. (116, 17 Cox 491). It is admitted that it is impossible to compare the case of the thief finding the pocket empty with the case of someone who, wishing to kill, fires at a corpse or at a statue. (Russel: *On Crime*, p. 199; Kenny: *Outlines*, p. 94); but the existence is denied of general principles which permit a distinction between the two cases. It would only be a question of proof and, to be exact, of making clear that the agent having put his hand into a pocket, wishes to rob, or, that he wishes to kill a man. Such a proof may emerge from elements outside the act of putting his hand in someone else's pocket, or of firing at the statue (Russel: *On Crime*, p. 199—200). With this point, however, there is already a solution in an affirmative sense of the problem of the punishability of the impossible attempt.

Another part of the Anglo-Saxon doctrine makes a distinction between absolute and relative impossibility. Absolute impossibility is that consisting in "legal impossibility" of committing and concluding the crime. It is to be noted that if the entire fact is not punishable for its commission, even less so is that part of the fact which has actually been committed. The impossibility is called "legal" when it derives from the lack of one of the essential requisites of the crime such as age (for example, a child below the age of 14 years cannot be sentenced for the offence of kidnapping) or the nature of the object (for example, what the law excludes as an object of theft, cannot be stolen, as for example, a human corpse from a grave). J. Hall: *General Principles*, p. 586; J. Miller: *Handbook of Criminal Law*, 1934, p. 101). In the case of mistake made about the subject of the *facti species* (Hardwig: *Der Versuch bei untaugliches Subjekt*, in Goltdammer Archiv, 1957, p. 170. Nagler und Jagusch: *Versuch*, par. 43, II, 2b) neither can the crime be begun. In the case of the lack of object we must look for a differentiating criterion (shooting with intention to kill someone who has just died, is different from firing at the bed in which it is believed the victim is sleeping, while he had got up and left that bed). Besides, the lack of desired effect does not imply "legal impossibility", but of fact. With the solution under examination, finally, the "superstitious" attempt would always be punishable because the possibility of consummation would here only be of "fact".

excluded that the subject would have had the possibility of knowing how or wishing to correct it in such a manner as to render it idoneous.

If the punishable attempt is a fact, performed with the end of committing a crime creating the danger of offence, the impossible criminal offence includes the fact, performed with the end of consummating a crime without creating the danger of offence. If the danger of offence emerges both from the realization of necessary and likely conditions for the consummation, and from the likelihood that such conditions would have been realized by the agent if he had been aware of the insufficiency of those put into action, the danger of offence is lacking whenever the facts actually realized do not constitute the necessary and probable conditions for the consummation and, besides, when it is likely that the agent, even if he had been aware of their insufficiency, would not have realized the necessary and probable conditions for the consummation. Precisely this inadequacy of the realized facts and the unlikelihood of adequate facts being realized, is characteristic of the impossible criminal offence. If the positive judgement of the likelihood of the existence and causal efficacy of the facts and the committing of facts having causal efficacy, is given according to the evaluated "probability" based on the best specialized knowledge and experience useable in one of the moments which come between the beginning of the conduct and the interruption preventing its successful conclusion, the judgement of unlikelihood, which leads to the recognition of the "non-idoneous attempt" must be given with the same criteria. Unlikelihood reaches impossibility when the object of the conduct does not exist *in rerum natura*, that is, when this object or the active subject or the passive subject lack essential requisites for the existence of the crime. For example, a thief digging in someone else's property in search of hidden treasure which does not exist; or a person, wishing to kill a rival, enters his bedroom and fires at him in the belief he is asleep whereas he had shortly before died of a heart attack; or the agent wishing to commit the crime of insult and injury against a public official and shouting insults to the referee of a football match in the belief his being a public official; or else, an agent working in a travel agency imagining himself to be a public official and appropriating money from the till, in the belief to be committing the crime of *peculatus*.

The extension of the range of the punishable attempt, which saw its objective element consists in the necessary and likely conditions for the consummation, and then its further enrichment with the insertion of a judgement on the likelihood of the agent having realized such conditions if he had been aware of the inadequacy of those set into motion,

has necessarily restricted the range of the impossible criminal offence. Therefore, it is logical that while the solution penalizing as an attempt only the realization the necessary and likely conditions for the consummation leaves within the range of the impossible criminal offence facts which reveal the danger presented by the agent [85]. The solution penalizing as an attempt also the realization of facts with constituent and likely conditions for the consummation but which the subject would probably have included and corrected had he been aware of their inadequacy, leaves within the range of the impossible offence or the non-idoneous attempt only facts not revealing a specific danger presented by the agent, and consequently do not constitute any danger against the legally protected interests. In other words, the specific dangerous personality of the subject, being called upon to constitute the requisite of a second form of punishable attempt, can no longer figure in the impossible offence nor in the non-idoneous attempt, which is its opposite.

The insertion of the dangerous personality of the subject in the attempt, however, indicates the need for putting at the judge's disposal (besides the usual sentences having a retributive content) also an arsenal of measures proper for the pursuing of re-educationary ends, or purposes of correction, or special prevention.

STRESZCZENIE

Autor analizuje pojęcie usiłowania przestępstwa w kodeksie karnym Norwegii, Danii, Grenlandii, Kanady, Stanu Nowy York, Kuby, Islandii, Polski, Związku Radzieckiego, Francji, Austrii, Lichtensteinu, Belgii, Niemiec, Księstwa Monaco, Holandii, Portugalii, Finlandii, Argentyny, Bułgarii, projektu niemieckiego Baumanna (1963) kodeksów karnych Jugosławii, Japonii (projekt 1961), Turcji, Szwajcarii, Hiszpanii, Węgier, Niemiec (projekt 1962), Włoch, Meksyku. Autor ponadto dokonuje analizy pojęcia usiłowania nieudolnego w kodeksie karnym Kuby, Włoch, Islandii, Korei, Jugosławii, Japonii (projekt 1961), projektu niemieckiego Radbrucha (1923), kodeksu karnego Polski, Szwajcarii, Grecji, Niemiec (projekt 1962).

Autor utrzymuje, że pomimo różnorodności sformułowań istniejących w omawianych kodeksach i projektach problem zdefiniowania usiłowa-

[85] Thus the solution of submitting the "non-idoneous attempt" is justified, either obligatorily or according to the court's discretion to penal measures (e.g. Art. 49/4 Italian Penal Code).

nia przestępczego jest identyczny we wszystkich ustawodawstwach i kryteria, które mogą być stosowane przy jego określeniu, są zawsze te same. Autor dochodzi do wniosku, że prawnicy różnych krajów omawiając problem usiłowania przestępczego posługują się tą samą terminologią i że wymiana myśli oraz współpraca między nimi zasługuje na poważne zainteresowanie.

Autor przechodzi następnie do omówienia teorii wypracowanych w odniesieniu do poruszanego problemu przez doktrynę i naukę prawa karnego różnych krajów. Wszystkie teorie dzieli na podmiotowe i przedmiotowe. Teorie podmiotowe wychodzą z założenia, że do karalności usiłowania wystarcza, aby sprawca chciał popełnić przestępstwo i przedsięwziął czynności, które jego zdaniem byłyby potrzebne do dokonania tego przestępstwa. Natomiast teorie przedmiotowe (oprócz woli popełnienia przestępstwa i postępowania przedsięwziętego przez sprawcę, które by go do tego celu doprowadziło) dodają jeszcze fakt, by postępowanie sprawcy charakteryzowały odpowiednie cechy przedmiotowe, tzn. wg różnych koncepcji, by postępowanie to stwarzało niebezpieczeństwo popełnienia bądź polegało na działaniu umożliwiającym popełnienie przestępstwa, na zakłóceniu spokoju prawnego bądź porządku publicznego, na rozpoczęciu realizacji, na dokonaniu jednego z faktów stanowiących element czynu przestępnego, na bezpośrednim zbliżeniu się do jednego z takich faktów w przedmiotowo jednoznacznym kierunku działania. Przy każdej z tych koncepcji autor przedstawia ich cechy szczególne.

Autor zwraca uwagę na potrzebę bliższego określenia pojęcia „niebezpieczeństwa popełnienia przestępstwa". W tym celu proponuje określić je jako prawdopodobieństwo, ocenione według najlepszej wiedzy i doświadczenia, wykorzystanych w momencie faktu. Działalność siły wyższej wyklucza takie prawdopodobieństwo. Karalne jest usiłowanie, które nie zostało zrealizowane jedynie wskutek „przypadku". Jest jednak w zupełności wystarczające, że „niebezpieczeństwo popełnienia przestępstwa" miało miejsce w jakimkolwiek momencie pomiędzy początkiem działania a przeszkodą w dokonaniu. Poza tym w zakres oceny „niebezpieczeństwa popełnienia przestępstwa" winno być włączone nie tylko postępowanie dokonane przez sprawcę, ale również to, które by on prawdopodobnie mógł, umiał i chciał zrealizować, jeśliby zdał sobie sprawę z przeszkód, które mu uniemożliwiały realizację przestępstwa. Niebezpieczeństwo popełnienia i karalność usiłowania istnieją zatem także wówczas, kiedy sprawca miałby prawdopodobnie możliwość, zdolność i wolę poprawienia własnego postępowania w taki sposób, by dokonać przestępstwa, jeśliby on był świadom przeszkód stojących na drodze dokonania przestępstwa.

РЕЗЮМЕ

Автор производит анализ понятия покушения в уголовных кодексах Норвегии, Дании, Гренландии, Канады, Штата Нью Йорк, Кубы, Исландии, Польши, Советского Союза, Франции, Австрии, Лихтенштейна, Бельгии, Германии, Княжества Монако, Голландии, Португалии, Финландии, Аргентины, Болгарии, немецкого проекта Баумана (1963), уголовных кодексов Югославии, Японии (проект 1961), Турции, Швейцарии, Испании, Венгрии, Германии (проект 1962), Италии, Мексики. Автор анализирует понятие негодного покушения в уголовных кодексах Кубы, Италии, Исландии, Кореи, Югославии, Японии (проект 1961 г.), немецкого проекта Радбруха (1923), уголовного кодекса Польши, Швейцарии, Греции, Германии (проект 1962).

Автор утверждает, что при всем разнообразии формулировок в упомянутых кодексах и проектах, проблема определения преступного покушения одинакова во всех законодательствах и критерии дефиниции всегда те же. Автор приходит к заключению, что юристы разных стран пользуются одинаковой терминологией и что обмен мыслей и сотрудничество между ними заслуживают серьезного внимания.

Автор обсуждает теорию вопроса в свете науки уголовного права разных стран. Все теории делит на субъективные и объективные. Исходным положением субъективных теорий есть утверждение, что для наказуемости покушения достаточно, чтобы виновник хотел совершить преступление и предпринял действия, которые по его убеждению необходимы для совершения самого преступления. Объективные теории принимают, что кроме воли направленной на совершение преступления и действий в том же направлении, необходимо, чтобы эти действия характеризовались такими именно объективными признаками, т. е. чтобы действия создавали объективную опасность совершения преступления или чтобы создавали возможность совершения преступления или чтобы нарушали правопорядок или общественный порядок или чтобы действия были началом осуществления преступления или состояли в совершении действий, входящих в состав преступления, или свидетельствовали о приближении к одному из таких действий в направлении объективно однозначащем. Рассматривая каждую из этих доктринальных концепций автор представляет их характерные черты.

Автор указывает на необходимость более конкретного определения понятия „опасность совершения". Предлагает определить это понятие как вероятность, установленную на основе знания и опыта,

использованных в момент свершившегося факта. Наличие чрезвычайных обстоятельств (форс-мажор) исключает такую вероятность. Наказуемо покушение, которое свидетельствует о том, что только случайно преступление не было осуществлено. Однако вполне достаточно, чтобы опасность осуществления была на лицо в какой-либо момент между началом исполнения и препятствием к совершению. Кроме того, оценивая опасность следует учесть не только деяние осуществленное виновником, но и то деяние которое он мог, умел и желал бы осуществить если бы давал себе отчет о препятствиях, которые помешали ему осуществить преступление.

Следует принять наличие опасности совершения преступления и наказуемости покушения также в том случае, когда можно установить, что виновник имел бы вероятно возможность, способность и волю поправить свое поведение, если бы ему были известны препятствия к совершению преступного деяния.