SOME CONSIDERATIONS ON THE GENERAL GROUNDS FOR NON-PUNISHMENT IN THE ROMANIAN CRIMINAL CODE

Raluca-Viorica, Lixandru[1]

Abstract

Attempt is the form of crime in the execution phase which is between the beginning of the execution of the action which constitutes the material element of the objective side and the production of the socially dangerous result.

It is an imperfect form of the act (because it was not completed by consummation), reflecting a mismatch between the subjective side (the intention to commit a consummated act) and the objective side, that is, what was actually accomplished.

Key words: attempt, causes of non-punishment, punishment.

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Objectively speaking, the attempt appears as an act of execution, which is followed by an immediate consequence in the objective reality, and from a subjective point of view, the attempt contains the same psychological elements as the completed offence, but the difference from it (typical offence) consists in the occurrence of certain causes (circumstances) that no longer lead to the result desired by the perpetrator.

The legal definition of the attempt is contained in article 32 paragraph (1) of the Criminal Code: "*Attempt consists in the execution of the intention to commit the crime, which execution has been interrupted or has not produced its effect*."

The conditions of the attempt result from its legal definition, namely:

a) the existence of intent to commit a crime, a subjective condition. The decision to commit the offence is manifested only by intention, (which may be direct or indirect), and is excluded in the case of guilt and in the case of praeterintention.

In practice (C.S.J., Criminal Division, Decision No. 1946 of September 12, 1996, in the Repertory), it was decided that hitting a person in the head with an axe handle, resulting in a skull fracture with loss of bone substance and permanent physical infirmity and disability, characterizes attempted murder, there being intent to kill, and not the offence of grievous bodily injury, which excludes such intent. The court also held that the participation of several people in the brawl and the striking of the victim with a chain on that occasion, which caused the victim to suffer a cranial puncture and danger to life, reflected the perpetrator's intent to kill. Such an act constitutes, therefore, an attempt to commit the crime of murder, and not the crime of affray (C.S.J., Criminal Division, Decision No. 504 of February 9, 2000, in the Case Law Bulletin of the C.S.J. for 2000).

Likewise, the act of striking a person, with force, in the neck region, using a piece of broken glass, with the consequence of causing serious, life-threatening injuries, constitutes an attempt to commit the crime of murder, and not the crime of grievous bodily harm (C.S.J., Criminal Division, Decision No. 1710 of June 11, 1995, in the Repertory).

Enclosing a piece of land with a non-insulated electric cable, placed under a voltage of 220 V and touching the cable by a person who was electrocuted and suffered serious injuries, healed after medical intervention, constitutes attempted murder with indirect intent. The defendant's failure to stop the car in front of a roadblock organized by the police and forcing the vehicle to pass, resulting in serious injury of to a police officer, constitutes an attempt to commit the offence of aggravated murder (aggravated murder under the current Criminal Code) and not bodily harm (C.S.J., Criminal Division, Decision No. 3037 of November 24, 1998, in the Bulletin of the Jurisprudence of the Supreme Court for 1998). In the same sense,

[1] PhD Lecturer, Constantin Brâncoveanu University, Pitești.

the head-on collision with a policeman who signals a car stop, after increasing its speed, despite the warning of a witness in the car, but with the consequence of serious brain trauma, constitutes an attempt to commit murder.

b) the criminal intent to commit the offence - is an objective condition and consists in committing one or more acts of the material element of the objective side of the offence.

The distinction between preparatory acts and enforcement acts has generated numerous disputes in criminal doctrine, and some criteria have been put forward to resolve this issue:

- *subjective criteria* – on the basis of which the objective activity of the perpetrator is considered to be an act of execution if it reveals the intention to commit the crime (opening a cash box with a key reveals the intention to appropriate the goods inside, whereas procuring a key print is only a preparatory act);

- *objective criteria* – on the basis of which a certain activity is considered to be an act of execution, depending on its position in the dynamic process of committing the offence, when it is directly oriented and capable of producing the illicit result without any further activity. For example, pointing an axe at a person's head is considered an act of execution, whereas procuring this object is a preparatory act.

- *formal criteria* – on the basis of which the court considers a certain activity to be a preparatory or enforcement act depending on how it performs the act of conduct prohibited by law. For example, a person who approaches with tools capable of opening a car performs a preparatory act, since he/she has not appropriated the asset, as required by the *verbum regens* of the offence of theft (Article 228 of the Criminal Code: "*Taking movable property from the possession or custody of another, without his/her consent, with the aim of wrongfully appropriating it*").

We believe that in order to solve the problem of the distinction between preparatory acts and enforcement acts, all three criteria mentioned above (Vintilă Dongoroz, 1939) should be taken into account, and a *mixed*, cumulative *criterion* should be considered. Thus, both acts which are part of the act of conduct prohibited by law (*verbum regens*), and acts which are objectively (unequivocally) linked to the material object of the offence will be regarded as acts of execution, without any further activity being necessary to achieve the dangerous result.

c) The execution is interrupted or fails to produce a result. This condition distinguishes the attempt from the completed offence, due to circumstances beyond the control of the offender or within his/her control:

- in case of interrupted (imperfect) attempt - interruption of execution and non-production of the result

- in the case of a completed (perfect) attempt – the execution is completed, but the result is not produced.

Attempt will only be punishable if the offence it refers to is not one of those for which attempt is impossible.

The impossibility of attempt may derive from the specificity of the material element, from the specificity of the subjective element, the will of the legislator or the nature of the offence.

Thus, ***the attempt is not possible***:

- ***Due to the specificity of the objective element***, they are not susceptible to attempt:

a) *omissive offences* – if the person has a legal obligation to act and remains in passivity, the offence is consummated by the subject's abstention, by his/her inaction;

b) *habitual offences* – these offences require the repetition of the act a sufficient number of times, resulting in the unlawful conduct, and the repetition of the act makes it impossible to attempt.

c) *crimes with prompt execution* – which exclude the attempt due to the lack of succession in time of the acts of execution (for example, the crime of threat - Article 206 of the Criminal Code)

- ***Due to the specificity of the subjective element***, they are not susceptible to attempt:

a) *intentional offenses* - because attempt presupposes the existence of an intention to commit a crime. In the case of foreseeable guilt, the result occurs because the person wrongly assumed that it was impossible to produce the result, and in the case of simple guilt, the individual did not even have in mind the representation of a certain result;

b) *pre-intentional offences* – exclude attempt because the more serious result was caused by the fault of the offender, who initially did not want the aggravated result. For example, in the case of blows or injuries causing death - Article 195, which refers to Article 193 and Article 194 of the Criminal Code – the offender initially inflicted blows or other violence on the victim (Article 193), but the result of his/her act became more serious, which requires a new legal classification of the act as bodily injury (Article 194), and if the victim is ultimately killed, the offender will be liable for blows causing death (Article 195 Criminal Code);

c) crimes committed spontaneously exclude by their nature the idea of attempt.

- ***Due to the will of the legislator or the nature of the offence***, attempts are not possible in the case of *offences of attempt* - we are referring to the attempt to endanger national security (Article 401) and the attempt against a community (Article 402 of the Criminal Code), offences for which, by the will of the legislator, the mere attempt to commit these acts is assimilated to the consummated form of the offence.

The grounds for not punishing the attempt are desertion and prevention of the result.

According to Article 34 of the Criminal Code *"(1) The perpetrator shall not be punished if, before the crime was discovered, he/she desisted from committing it or notified the authorities of its commission in such a way that its commission could be prevented, or if he himself/she herself prevented the commission of the crime.*

(2) If the acts performed until the moment of desistance or prevention of the result constituting another crime, the penalty for that offence shall apply."

A. Desistance is the attitude of the offender to voluntarily give up execution begun, even though there was a real possibility of continuing it and the offender was aware of it. Compared with the previous rules, the current Criminal Code states that the withdrawal must take place before the discovery of the offence.

Desistance implies a voluntary abandonment of the execution of the offence, not a renunciation imposed by certain external circumstances. Desistance also implies that the offender is in the act of carrying out the offence, and cannot intervene when the execution has been completed – without producing a result – or after the offence has been completed. Desistance can only occur in the case of interrupted attempts (Costel Niculeanu, 2001).

For the perpetrator to benefit from the provisions of Article 34 of the Criminal Code, it is necessary:

- there is a ***commencement of execution*** of the act;

- the execution of the offence is interrupted ***before the material element*** of the objective side of the offence ***is achieved***;

- the interruption must be ***the expression of the free will of the perpetrator***, the reasons for the renunciation are irrelevant, the important thing is that it be irrevocable.

In practice, it has been ruled that there is no desistance if the defendant abandoned the victim, after repeated attempts to kill him/her, following his/her cries for help (Supreme Court, Criminal Division, Decision No. 1407/1978).

In the same sense, it has been decided that there is no desistance when the defendant hits the victim with a bat on the head with the intention of killing him/her and does not repeat the blow, although he/she would have had this possibility, because the perpetrator's action was finished (Supreme Court, Criminal Section, Decision No. 1407/1978).

Desistance also exists when the perpetrator breaks into the house to steal the money he/she finds on the table and although he/she has the opportunity to take it, he/she gives up and leaves the house of his/her own accord. Desistance exists when, in order to neutralise the victim and commit the theft, the perpetrator obtains toxic substances, enters the home and

gives up the theft on his/her own initiative. In this situation there is desistance for theft, but the perpetrator is liable for possession of toxic substances and for housebreaking (Supreme Court, criminal decree no. 2950/1970, R.R.D. no. 3/1971, p. 133).

B. Preventing the result from occurring consists in the perpetrator's wilful frustration of the result of his/her act after it has been fully achieved.

For the perpetrator to benefit from the provisions of Article 34 of the Criminal Code, the following conditions must be met:

- the perpetrator has fully performed ***the action***;
- the perpetrator, after the act has been committed, ***to prevent the result fro occurring***;
- the prevention of the result is done by the perpetrator ***voluntarily***;
- preventing the result from occurring before the ***discovery of the fact***;

Preventing the result is only possible in *material offences*, which presuppose a certain result, *not in formal offences,* where the state of danger occurs when the offence is committed.

In doctrine (Costel Niculeanu, 2001) it has been considered that preventing the result should not be confused with the act by which the perpetrator tries to repair the damage already caused, for example transporting the victim to the hospital.

C. Effects of desistance and prevention of the result

Desistance and prevention of the result are *causes of non-punishment, of impunity, and determine, if they occur, the non-punishment of the offender* even for the attempt to commit the crime in which he/she started the execution or prevented the result.

The effects of desistance and prevention of the result are highlighted in the terminology of Article 34 paragraph (1) of the Criminal Code, which states that: *"The perpetrator shall not be punished if, before the discovery of the offence, he/she desisted or notified the authorities of the commission of the offence in such a way that the consummation of the offence could be prevented or if he himself/she herself prevented the consummation of the offence."*

According to Article 34 paragraph (2) of the Criminal Code, "if the acts performed up to the moment of desistance or prevention of the result constitutes another offence, the penalty for that offence shall be applied."

With regard to the effects of the non-punishment causes, it should be emphasized that the attempt is not removed, it continues to exist, but the perpetrator will not be punished for it.

Impunity arising from the waiver or prevention of the result is not absolute; however, it does not remove the possibility of being held liable for everything that was committed before the cause of non-punishment.

In practice, it has been decided that there is desistance when the perpetrator, after having broken into a dwelling and removed several goods from the cupboard, has left the dwelling on his/her own initiative, without taking any of them; in this case, however, he/she will be liable for the acts carried out up to the moment of desistance (Supreme Court, Criminal Division, Decision No. 2950/1970, in the Collection of Decisions 1970).

Conclusions

There are the following similarities and differences between the two grounds for non-punishment:

- The existence of a commencement of enforcement and full enforcement of the action, in the event that the result is prevented;
- Interruption of execution and prevention of the result - non-consummation of the offence;
- Both grounds for non-punishment must be the expression of the free will of the offender;
- Desistance and prevention of the result must take place before the discovery of the act by the prosecuting authorities or by any person;
- The effect of desisting or preventing the result is that the offender in this situation is not punished;

- Both are personal circumstances, benefiting only the perpetrator or perpetrators who have desisted or prevented the result from occurring.

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