

someone offers. Undoubtedly, a financial advantage plays a more significant penal role, it is more often a hallmark of a prohibited act than a personal one, and thus, it causes the effects provided for in criminal law in more cases than a personal benefit, which is always somewhat alternative to financial gain. A characteristic feature of a personal benefit, its penal character, is the indicated accessory accessibility in relation to material benefit, the lack of independent meaning designations and the derivative, a secondary relation to material benefit, because it is most often assessed from the perspective of the features that are opposed to it.

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POSSIBILITY TO COMMIT CRIMINAL ATTEMPT BY *DOLUS EVENTUALIS* IN GEORGIAN AND AMERICAN CRIMINAL LAW

One of the most disputed issues in contemporary criminal law of Georgia is the possibility to commit criminal attempt with *dolus eventualis* (indirect intent). Traditionally in Georgia it has been thought that criminal attempt can be committed only by direct intent. However, the possibility of attempt by *dolus eventualis* has been recognized in the latest academic literature as well as court caselaw.

In American criminal law, the concept of reckless attempt is generally rejected. On the other hand, Georgian criminal law as well as American criminal law do criminalize reckless endangerment, which can cover those situations where reckless attempt is not punishable per se.

In Georgian criminal law, the *dolus eventualis* (indirect intent) is defined by art. 9.2. of the criminal code, according to which an act shall be considered to have been committed with indirect intent if the person was aware of the unlawfulness of his/her action, was able to foresee the occurrence of the harmful consequences and did not desire those consequences, but consciously permitted them or was negligent about the occurrence of those consequences. *Dolus eventualis* should be distinguished from conscious negligence which means that the defendant hopes that harmful results will not occur (art. 10.2 of the criminal code of Georgia).

American criminal law is familiar with following kinds of *mens rea*: Purpose, Knowledge, Recklessness, Negligence.

In Model Penal Code, recklessness is defined in following words: A person acts recklessly if he is aware of a substantial risk that a certain result will occur as a result of his actions. The risk must be substantial enough that the action

represents a gross deviation from what a reasonable law-abiding person would do.

American criminal law is not familiar with the concept of *dolus eventualis*. As it is clear from the text of Model Penal Code, two forms of *mens rea* – *dolus eventualis* and conscious negligence would fit into American concept of «recklessness».

In contemporary criminal law, different legal systems would place differently *dolus eventualis* among the forms of *mens rea*. Three main approaches can be identified: the countries in which the *dolus eventualis* belongs to Intention (Germany, Italy, Spain, etc.); countries in which *dolus eventualis* belongs to negligence (France, Belgium); Countries in which *dolus eventualis* is a form of *mens rea* which is in the middle of intention and negligence (UK, USA and other common law countries) (Tsikarishvili, 2008).

Once we have discussed *dolus eventualis* and its American counterpart. We should turn to the definition of attempt in Georgian and American criminal law.

Georgian criminal code (art. 19.1) defines attempt as the conduct immediately directed towards the commission of the crime.

Model criminal code of USA gives following definition of attempt:

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Thus as we see from this definition, according to Model Penal Code, attempt can be committed only with purpose or with knowledge, but not with recklessness.

As to the criminal code of Georgia, it defines attempt as intentional conduct, though criminal code does not specify whether this should be direct or indirect intention.

In Georgian criminal law there are two contradictory views on the question whether the attempt can be committed with *dolus eventualis*.

The oponents of *dolus eventualis* have following arguments:

1. The attempt means that the defendant is attempting something, thus has desire to achieve certain result. Thus, the attempt with *dolus eventualis* is impossible.

2. The words «immediately directed towards» imply that the persons intention should be directed towards the achievement of certain results, which

does not happen with *dolus eventualis*. In *dolus eventualis*, the defendant's intention is directed towards other, socially neutral goal.

3. The legislator has introduced the offences of reckless endangerment and abandonment in danger (articles 127 and 128 of the criminal code) in order to fill the gap, which is produced by the absence of the liability for attempt with *dolus eventualis*.

4. It will be impossible to practically apply the offence of serious bodily harm (art. 117 of the criminal code of Georgia), because such harm should be dangerous to life and thus the conduct would automatically be classified as attempted murder.

5. If we exempt people from liability for withdrawal we should also exempt them from liability when there is *dolus eventualis*, thus the defendant is indifferent with regard towards results and these results do not occur (Mchedlishvili, 2011).

The proponents of attempt committed with *dolus eventualis* cite following arguments:

1. The legislator specifically omitted the definition of intention in the formulation of attempt. Thus, it allowed space for attempt with *dolus eventualis*.

2. Recognizing attempt with *dolus eventualis* is practically useful and will solve many problems in law enforcement.

3. *Dolus eventualis* does not mean that volitional element is not present. We still have volitional element in persons conduct.

4. The offence of reckless endangerment (art. 127 of the criminal code of Georgia) implies only the negligent attitude with regard to harmful results. If the person has *dolus eventualis* with regard to the harmful result, than the conduct should be classified as criminal attempt.

5. Attempt with *dolus eventualis* is widely recognized in German and Swizz criminal law from which Georgia has inherited the crime of reckless endangerment (Turava, 2013).

As it was mentioned, the possibility of commission of attempt by *dolus eventualis* was well recognized by court caselaw. As an example, we can cite a decision of 24 September, 2008, (n. 745ს3-08) the Supreme Court of Georgia, which has found that the defendant has committed attempted murder by *dolus eventualis*. In this case the defendant stabbed the victim twice in the neck and then ran from the scene of the crime. The victim was severely injured but survived. The court ruled that the defendant did not have a purpose to murder the victim, because he had the possibility to inflict additional wounds. Thus, the defendant was acting with *dolus eventualis*, but he was charged and convicted with attempted murder.

To summarize we should say that while in American criminal law, the issue seems to be well settled, in Georgian criminal law, the debate continues

whether the attempt can be committed by *dolus eventualis*. However, what is clear is that the attempt with *dolus eventualis* cannot be equated with the attempt with direct intent (with purpose). When the person is acting purposely, he/she is choosing best suitable means for this purpose, while if the person is acting recklessly (with *dolus eventualis*), he/she is not adjusting means to the ends and is less dangerous. Thus, reckless conduct and purposeful conduct pose different kinds of risks to legal values and they should not be treated equally. Thus reckless attempt should not be recognized in criminal law and such conduct can be penalized by risk created offences which are less serious in nature.

Literature

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SUBSIDIARY LAWSUIT (JUSTIFICATION OR NOT – NORM AND PRACTICE OF THE REPUBLIC OF SERBIA)

One of the key consequences of committing a crime is the initiation and conduct of criminal proceedings against its perpetrator. In this way, not only the goal of the criminal procedure is realized, but also the moral satisfaction of the person injured by the committed criminal act. The practical realization of the goal set in this way is in the hands of the public prosecutor as a state body responsible for prosecuting criminal offenses for which criminal prosecution is undertaken *ex officio*, and this rule also exists in criminal legislations which provide for the category of criminal offenses for which criminal prosecution is undertaken on the basis of a private lawsuit, as is the case with the Republic of Serbia (Stojanović, 2020). However, even in addition to the prescribed obligation of the public prosecutor, and in addition to the obligation to act according to the principle of legality of criminal prosecution, it is possible that the public prosecutor will withdraw from the already undertaken criminal prosecution after undertaking criminal prosecution. In such cases, there is the question of the rights of the person injured by the crime. Should he be allowed the right to take over the prosecution after the withdrawal of the public prosecutor or not? The issue is not only current but also more than justified,