PECULIARITIES OF CRIMINAL LIABILITY FOR ATTEMPTED CRIME THROUGH OMISSION

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Abstract

The present article deals with "the peculiarities of criminal liability for the attempted crime in omission delicts". Its concept and forms are analyzed, classification of its main features and elements are given, its structure and the peculiarity of the attempted crime due to omission are studied.

Consequently, the theoretical research of attempted crimes due to omission has not only a dogmatic nature but also practical significance, since as a result of the developed recommendations the uniform model of assessment of this institution is created for court practice.

The purpose of the work is to discuss the main and controversial issues that are related to the liability to penalties for the attempted crime due to omission, to develop recommendations for precise assessment of Article 19 of the Criminal Code, based on the objective and subjective sides of the act.

Keywords: crime, attempted crime, omission, guilt, delict

Introduction

Under the Criminal Code, the concept of crime is based on a three-digit structure. Consequently, the normative theory has been established, which has moved from the theory of intent to the guilt theory.
As a result of establishment of the normative theory a more severe attitude appeared towards the issue of attempted crime, as many issues moved to the guilt level and consequently, with respect of judicial law gave rise to the problematics related to the use of criteria of attempted crime and assessment issues, particularly concerning the delicts due to omission being the topic for our discussion in this work.

Many issues that were established in Georgian legal science and therefore recognized, were still subject matter of discussion when the concept of attempted crime by an eventual intent was revealed.

The problem of determining the attempted crime has received a different look when the concept of an attempted crime by an eventual intention stated about its significance. Under these conditions the science faced a complicated challenge. First of all, the methodological nature of the problem arose with respect of delicts of attempted crime due to omission.

In practice, there are a number of problems of crime attempt to be resolved at the level of the guilt.

**The issue of attempted crime in omission delicts**

In criminal law, it has long been regarded as a matter of concern how it is possible to prepare and attempt to commit a crime in pure and mixed omission. In case of pure omission, the fact of restraining oneself from activity is punishable notwithstanding the observed result. In this respect, it is possible to just prepare the offense (for example, Article 376 of Criminal Code of Georgia – Failure to report crime) and the attempt is excluded.

According to the prevailing opinion in the criminal law dogmatism, mixed omission may include both preparation as well as an attempt of crime. Mixed omission can be prepared, both through activity and omission. In the legislation, the composition of some of the crimes is described so that it is very problematic to substantiate the attempt in such composition. This concerns the compositions both with and without the result. However, in modern criminal law dogmatism the opportunity of completed attempt in some formal crimes is allowed.
It is recognized that in the delicts of pure omission it is impossible to document the attempted crime, as the moments of the beginning and ending of the composition of the action in such crimes coincide with each other. Therefore, as soon as the perpetrator avoids the execution of the imposed duty, the action is considered to be a crime. For example, the parent avoids paying the alimony (Article 176 of the Criminal Code) (1).

In contrast to this view, it can be said that in the delicts of pure omission, it is possible to document the attempt. This idea is based on the following definition, which seeks to determine the moment of initiating the attempted crime. According to the above mentioned concept, there is the attempted crime in a particular case when the deliberate intentional action of the offender is expressed in the particular threat of damage of legal good and it has violated the social-adequacy boundary and thus violated the socio-ethical order of historically established public life.

For example, Article 390 of the Criminal Code of Georgia provides for the responsibility of a military serviceman who avoids the compulsory military service by self-injuring or other methods (1). For example, if in order to avoid the military service he shots firearms in the direction of his legs in the presence of his friends, but the bullet is missed and the friends do not give them the chance to re-fire. In such a case, a pure delict act has been carried out through active activity and such act should be assessed as an attempt to evade the military service (Article 19, 390 of the Criminal Code - Attempt to commit a criminal offense of pure omission through activity).

In addition, in the Criminal Code there are such delicts through pure omission, that are focused on the outcome, for example, Article 383 of the Criminal Code of Georgia which envisages responsibility for the subordinate that does not fulfill the order issued by the supervisor, which has substantially damaged military interest (1).

Therefore, the opinion that it is impossible to document the attempt in the delicts of pure omission, cannot be accepted.

It is possible that initiation of the attempted crime was preconditioned by the activity of other individuals.
In the case of mixed omission, the attempted crime is as possible as in case of committing the crime through activity. Any attempt through omission consists of subjective and objective elements just like the attempt through activity. These elements are: non-fulfillment of the act prescribed by law (objective side of omission) and knowledge of the outcome, willingness and the consciousness of an offence (the subjective side of omission).

From the beginning of the 19th century, the idea emerged in the criminal dogmaism that the offense could be committed to delicts through omission. The distinction of the omission delicts into mixed and pure omission delicts was first observed in case of Lude.

In criminal law dogmatism, there was an opinion that challenged the punishability of attempted crime of omission. Since omission is not acting, the dogmatism of the earliest period considered it a violation of the principle of prohibition of analogy to establish punishability for omission.

The possibility of attempts in crimes committed through mixed omission does not lead to dispute in criminal law dogmatism and judicial practice. However, it is a matter of dispute at what instance the attempt of crime is initiated in the delicts through mixed omission. There are different opinions about this:

- There is the attempt upon the exhausting the first chance of the victim to survive.
- The attempt is initiated only after missing the last chance of the victim to survive.
- The third view focuses on the provision of the guarantee, which means that the omission is observed when, according to the offender’s point of view, the omission creates a serious threat to protected legal good.
- Increased danger emerges when the offender loses control over events.
- According to the fifth view, the main thing is the opinion of the offender and it does not matter for the assessment of the omission as attempted crime whether there is threat or not.

In addition, in omission delicts it is a matter of questioning whether it is possible to make the difference between unfinished and finished endeavors, as it has been done in the delicts
committed through activity. Some theories have emerged in this respect that justify this issue in certain way.

A part of the scientists thinks that in omission delicts unfinished attempts are unacceptable. They indicate that at the time of omission the person is always at the stage of finished attempt and that's why such division loses its significance (3.33) That is why, according to the theory of “finished attempt” the difference between unfinished and finished attempts of mixed omission is either impossible or simply not necessary. In addition, the idea has been developed that the attempt at the time of mixed omission is similar to the attempted action finished during the active activity.

The obligation to protect a legal good by a person is violated when it is necessary to intervene to save the legal good, i.e. when the failure to fulfill the obligatory act leads to threat or strengthens it.

Contrary to the foregoing theory, which indicates that the attempt committed through inactiveness exists only in finished form dogmatically, the attitude was developed that distinguishes finished and unfinished attempts at the time of omission and, at the same time provides its justification of assessment of giving up voluntarily. This view, in particular, finds the significant outcome of the differentiation that the offender represents the risk of avoiding the outcome only at the end of the attempt (5.9) (5.10). Differentiation of attempts into finished and unfinished attempts in omission delicts is rather effective and it shows that there might be different scale.

Differentiated doctrine originates from Schröder and Lyon. Schröder believes that unfinished attempt is observed in omission delicts when the perpetrator is still able to prevent the outcome in such a way that for conditioning the result further omission is necessary from his/her side. As for the finished attempt, it is observed when the offender thinks that he/she is unable to avoid the outcome despite his/her involvement. Of course, in such case we cannot speak about giving up voluntarily. The differentiation of the attempt defined by Schröder was modified by Lyon in certain way (2.72) (2.73).
According to the "Differentiated Theory", modern dogmatism recognizes an incomplete attempt in omission delict when according to the opinion of the offender the outcome is avoided through rescue actions.

As for the omission delicts, the immediate initiation of the implementation of the action composition in the omission delicts is already observed when the first opportunity to assist with the provision of the guarantee has already been missed. However, sometimes it happens that the offender does not even know when the victim will face the danger.

Evidently, according to this theory, the behavior that has not been sufficiently dangerous for legal good will turn into a criminally relevant omission. Since this view has moved the judgment to the very early stage, it was not accepted by the scientists. It is obvious that this theory is somewhat closer to the so-called criminal justice of opinion (4.338).

In omission delicts, according to the “last possible act”, the attempted crime is observed when according to the opinion of the guarantor the last chance of assistance has already been exhausted. This opinion lead to a conclusion that in omission delicts there is no incomplete attempt, a completed act is always observed in such case as the initiation and finishing the attempt always coincide with each other.

This view was impossible to be introduced in criminal science because it extends the area of timing of omission and, as a result, begins to protect the legal good too late, this means that during the omission it does not hurry to start the attempt and waits for the last moment of the possibility to assist. In this respect, the doctor will not be punished for the attempted murder if he/she does not give the patient food when according to his/her opinions there are still several weeks remaining for the outcome to be observed (2.56)(2.57). This is the criminal-political drawback of this view. The guarantor is required not only to avoid the outcome but also to avoid the threat to the outcome.

The dogmatic drawback of this theory is that it considers it is impossible to give up the omission voluntarily. This, in turn, contradicts the requirement of the law, which envisages the possibility of giving up voluntarily in all cases of attempt.

Criminal science has developed a view that names creating a specific threat to the victim the only criterion for initiating attempt in omission delicts. The author of this view is Fogler.
According to his conception, if the driver crashed into the pedestrian as a result of violation of driver's safety and caused serious damage to him, and after that he intended to kill the victim and disappeared from the scene, this will be the fact of the attempted murder no at the time when the driver left the accident scene, but at the time when the victim faced the threat of death due to absence of assistance (6.427).

Consequently, as according to this view the boundaries of punishability of attempts in omission delicts is too broad, it cannot be accepted.

A theory has been developed about the initiation of attempt in omission delicts that is actively used for determining the initiation of attempt in the crime committed through activity. This theory is known as the “Alternative theory”.

The initiation of attempts at non-functioning delicacies has developed a theory that is actively used to determine the initiation of an attempted crime. This theory is known as the "alternative theory".

According to this opinion, the attempt starts at the moment when the guarantor launches the attempts from the area under its control. But if the development of the causation is still under the control of the guarantor, it is considered that omission has not gone further than the crime preparation stage. In addition, the attempt is observed when there is a direct threat against the victim.

In criminal science the attempted crime, except for the mixed omission delicts, as well as in so called pure omission delicts, is considered acceptable in the form of both worthy and unworthy attempts. In case of worth attempt it is reasonable to take into account that, if the composition of crime committed through omission does not depend on the outcome, it is inadmissible to speak about the worth attempt. Because omission is a crime that has been completed. Therefore, the person who does not help others commits the foreseen composition of the crime, in particular the failure to assist, because the existence of the attempt was not recognized by the legislator as legal. But the other is the case when the delays of the pure omission delict foresees the outcome.

In the omission delicts it is more possible to observe worthless attempt.
It is a matter of worthless attempt in the crime committed through omission that is disputable in the criminal law dogmatism. Some scientists believe that in this case the use of judgments is about "to bring the thought down to criminal justice," because the threat does not exist objectively and the offender has not decided to commit any act damaging the legal good, so only his/her evil idea is left as the basis for the punishment. But the argument about the irrelevance of punishment raised at the time of worthless attempt through omission does not prove anything, as the attempt through worthless omission is as dangerous as at the time of the attempt committed through active activity.

**Conclusion**

Studying the attempt of crime allowed us to make conclusions:

1. At the time of interpretation of signs of attempt of the crime it should be taken into account that the knowledge about the attempt of the crime had been accumulated in Georgian criminal law on the basis of criticism of formal-objective, subjective and mixed concepts focusing on the problems of subjective concept of the composition of act. But in this period formal-objective concept suffered evolution in German doctrine and developed into eventual intent, the crime attempt concept that is easily established within the frameworks of mixed concepts accepted by the majority of scientists.

2. At the level of the composition of act it is important to meet those provisions, according to which the crime is considered to be completed when all the signs of the composition of the crime intended by the offender have been carried out.

3. At the time of subsuming the crime attempt it should be taken into account that the attempt might be carried out only through a direct intention, when the person started realizing his/her intent but was unable to complete the action.

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