ATTEMPT AND CRIMES AGAINST LIFE AND LIMB

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Abstract When dealing with attempts to commit a crime against life and limb, it is not always easy to distinguish between mere preparatory conduct and criminal attempt. This contribution seeks to first outline some issues which arise when trying to set a clear demarcation line between those two phases of *iter criminis*. In the second part, the search for suitable differentiation theories in Slovene criminal legal doctrine is briefly outlined, while the third part seeks to establish that the individual-objective theory of differentiation can further help us to distinguishing between different steps ("acts") of the perpetrators conduct. What is more, it is argued that the individual-objective theory can be a useful tool for distinguishing between essential and nonessential steps. In the final part of this contribution, author warns that the individual-objective criteria should not be abused as an instrument for arbitrary extension of criminal attempts towards the field of (decriminalized) preparatory conduct.

Keywords:
preparatory conduct, preparatory act, preparatory offence, criminal plan, legal certainty

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1 Introduction

When dealing with attempts to commit a crime against life and limb, it is not always easy to distinguish between the perpetrator's mere preparatory conduct and attempt (Becker, 1974: 282-288). Drawing a clear line between attempt and preparatory conduct is, nevertheless, crucial for legal practitioners and (potential) perpetrators. As a rule, in the Slovene legal system, attempts to commit a criminal offence are punishable. In Article 34, the Slovene Criminal Code[1] (henceforth: CC-1) stipulates the following:

> *(1) Any person, who intentionally initiated a criminal offence but did not complete it, shall be punished for the criminal attempt, provided that such an attempt involved a criminal offence, for which the sentence of three years' imprisonment or a heavier sentence may be imposed under the statute; attempts involving any other criminal offences shall be punishable only when so expressly stipulated by the statute.*
>
> *(2) Against the perpetrator, who attempted to commit a criminal offence, the sentence shall be applied within the limits prescribed for such an offence or it may be reduced.*

In contrast, mere preparatory conduct – although a crucial stepping-stone to committing a crime in the future – is generally not punishable, except in cases when such preparatory conduct is considered a criminal act in and of itself. A person who buys a potent poison in order to kill another person, for example, cannot be held criminally liable for committing an attempted murder. In relation to the criminal offence of murder, securing the poison is considered to be only preparatory conduct. Such person could, however, be held liable for committing a criminal offence from article 306 CC-1 - Manufacture and Acquisition of Weapons and Instruments Intended for the Commission of Criminal Offence. Since of the act of obtaining a lethal poison in order to commit a criminal offence can be seen as sufficiently wrongful conduct in and of itself, the Slovene legislator decided that such preparatory conduct should be criminalized. Criminal offences specifically aimed at criminalizing preparatory conduct are, however, rare. There is a consensus in

[1] Kazenski zakonik (KZ-1), Uradni list RS, št. 50/12 – uradno prečiščeno besedilo, 6/16 – popr., 54/15, 38/16, 27/17, 23/20, 91/20.

Slovene legal theory that criminalizing preparatory conduct should be done with great caution. This is due to the fact that preparatory conduct is notoriously hard to distinguish from conduct which is not prohibited by law (Bele, 2001: 194). In most cases the question of whether conduct can be considered criminal is therefore dependant on where exactly the dividing line between the (decriminalised) conduct and (criminal) attempt is drawn.

In this contribution, we will show why drawing a sharp line between preparatory conduct and criminal attempt is not an easy task. This contribution seeks to first outline some issues which arise when trying to set a clear demarcation line between those two phases of *iter criminis*. The second part provides a brief analysis and search for suitable differentiation theories in Slovene criminal legal doctrine, while the third part seeks to establish that the individual-objective theory of differentiation can further help us to distinguishing between different steps ("acts") of the perpetrators conduct. We will argue that the individual-objective theory can be a useful tool for distinguishing between essential and nonessential steps. In the final part of this contribution, we will warn that the individual-objective criteria should not be abused as an instrument for arbitrary extension of criminal attempts towards the field of (decriminalized) preparatory conduct.

2 Attempt and Preparatory Conduct

The prevailing opinion of Slovene criminal legal doctrine (*law in books*) as well as case law (*law in practice*) is that purely subjective theories of differentiation between an attempt and preparatory conduct are not acceptable. Ferlinc (2003: 245-246) argues that grounding attempt in mere subjective criteria would allow for arbitrary extensive interpretations of attempt, reaching deep into the field of preparatory conduct. It is true that in the fact-finding process (which a vital part of the criminal procedure) the assessment of subjective evidence is objectivised. Criminalization of mere motives, intentions or plans however provides a fruitful ground for potential abuses of criminal law. Mozetič & Bavcon (2007: 187-189) argue that such abuses of criminal law might include politically and ideologically motivated prosecution as well as prosecution based on fear and demand of the public to search for scapegoats. It seems that the legislator was aware of these issues since the definition of the initiation does not explicitly rely on the perpetrator's motives and ideas related to the commission of a criminal offence. It can therefore be argued that the Slovene

legislator is amongst those who tried to established a clear demarcation line between criminalized and decriminalized conduct (Ferlinc, 2003: 245-246).

The prevailing view of the Slovene criminal legal doctrine is that the question of when a perpetrator initiates the commission of a crime ("*initiation of criminal offence*") is intertwined with the question of when the objective statutory description of a particular criminal offence commences (Bavcon *et al.*, 2013: 326-327; Bele, 2001: 198; Selinšek, 2007: 183). This criterion is supposedly especially useful in cases of criminal offences with descriptive dispositions. If the statutory description of a criminal offence, for example, includes a specific instrument (means of performing a criminal offence) or mode (way of performing a criminal offence) the perpetrator launches an attempt as the instant he uses the specific instrument with the appropriate intent. This understanding of attempt is heavily influenced by the *formal-objective* theories of differentiation, which have their roots in French criminal legal doctrine of the early 18th and the beginning of the 19th century (Novoselec & Bojanić, 2013: 297).

Such theories are useful in instances of criminal offences which can be easily broken down in two or more separate independent conducts or "acts". For example, Article 170 of the CC-1 defines the criminal offence of rape:

> *"Whoever compels a person of the same or opposite sex to submit to sexual intercourse with him by force or threat of imminent attack on life or limb shall be sentenced to imprisonment for not less than one and not more than ten years."*

This definition of rape can easily be broken down into two constituent elements: the "act" of compulsion by force or a threat and the "act" of sexual intercourse. It is true that the conduct of forceful compelling can be merged with the sexual intercourse. It can, however, also be performed at an earlier point in time (for example if the perpetrator uses force to tie the victim to the bed before a sexual intercourse). In such cases, the perpetrator is liable for an attempted rape the moment he ties the victim to the bed, even if the sexual intercourse was not yet initiated and never takes place (for example if the victim manages to break free and flee). This conclusion can be deduced from the fact that the perpetrator already started using force to compel the victim to submit to sexual intercourse, which is an integral part of the statutory description of rape (Korošec, 2008: 231-233).

Slovene criminal legal doctrine nonetheless unanimously argues that such a simplified understanding of the formal-objective criterion is flawed (Bavcon *et al.*, 2013: 326-327; Bele, 2001: 198; Selinšek, 2007: 183). The demarcation line between preparatory conduct and attempt cannot rely merely on the question of when the objective statutory description starts being fulfilled by the perpetrator. Most notably, problems arise in cases of criminal offences with short and simple dispositions. For example, Article 115 of the CC-1 defines the criminal offence of manslaughter:

> *"Whoever takes the life of another human being shall be sentenced to imprisonment between five and fifteen years."*

It is immediately evident that such a broad statutory definition cannot be of any help when we are confronted with the question when exactly the perpetrator began committing the crime. The shortcomings of relying solely on the statutory description in order to ascertain the time of the initiation of a criminal offence is however not problematic merely in criminal offences with short and simple descriptions. This is evident, for example, by examining the criminal offence of Acutal Bodily Harm from Article 122 CC-1:

> *"Whoever inflicts bodily harm on another person resulting in the temporary weakness or impairment of an organ or part of his body, his temporary inability to work, the impairment of his outlook on life or temporary damage to his health shall be punished by a fine or by imprisonment for not more than one year."*

Let us imagine a case of a perpetrator who intends to punch another person in the face and thereby inflict acute bodily harm. The perpetrator is, however, somewhat clumsy and trips over her own feet in front of the victim. Does the extensive description of the prohibited consequences in Article 122/I CC-1 in any way helps us to establish whether the perpetrator initiated the criminal offence? It should be obvious that this is not the case. From the standpoint of establishing the exact time when preparatory conduct (running towards the victim) transformed into an attempt, there would not be any difference if Article 122/I CC-1 would simply state that the offence is committed by the person who *inflicts actual bodily harm on another person*.

Let us now imagine that the perpetrator who is described above decides to attack anew. This time, she decides to use a knife instead of her fists. A few days later, she enters a convenience store and buys a pocket knife with the intention of inflicting minor cut wounds to her opponent. The clumsy perpetrator, however, falls again before she manages to inflict any bodily harm. Such a perpetrator could potentially be held accountable for committing a criminal offence under Article 122/II CC-1:

> *"If the injury under the preceding paragraph has been inflicted by means of a weapon, dangerous tool, or any other instrument, capable of causing serious bodily harm or grave damage to health, the perpetrator shall be sentenced to imprisonment for not more than three years."*

This criminal offence is even more precise than the basic mode of Acutal Bodily Harm from 122/I CC-1. Does the precise definition of tools (instruments) used to inflict bodily harm, however, assist with defining the exact moment when the attacker initiated the attack? Does, for example, the distance from the potential victim play any role? Is it important to establish the distance from the victim in the moment when the perpetrator tripped? Or should we rather establish if she already grabbed the knife – or maybe even pulled it out of her pocket? Does it play any role if the blade of the pocket knife was not yet exposed?

It seems that even when the statutory provision contains a very precise description of the tool (instrument) used to harm the victim ambiguities still remain with respect to the question of how to distinguish between (decriminalized) preparatory conduct and criminal attempts. The more precise statutory description still fails to provide any meaningful criteria that would assist in deciding the exact moment when the criminal offence was initiated. Hence, all criminal offences which do not extensively describe the (active or passive) criminal conduct and where the criminalized conduct cannot easily be broken down into separate independent "acts" require additional theories which help to establish a clearer demarcation line between preparatory conduct and attempt. We shall turn our attention to such theories in the following chapter.

3 In search of suitable theories of differentiation

By now, we firmly established that the formal-objective theory of differentiation cannot in and of itself provide an answer to when a criminal offence is initiated by the perpetrator (Novoselec & Bojanić, 2013: 298). The criteria are so broad that they not only are inadequate when dealing with the short and simple statutory descriptions of criminal offences, but also when dealing with a range of offences with descriptive dispositions. This is why it is important to consider other criteria of differentiation. Only then can the principles of legal certainty and equal treatment of (potential) perpetrators be adequately respected.[2]

Slovene criminal legal doctrine already suggested that additional criteria should be considered when drawing a demarcation line between preparatory conduct and criminal attempt. Selinšek (2007: 184) suggests that the focus should be on both objective and subjective criteria. Account should be taken of both the perpetrator's attempt together with the objective statutory description of the particular criminal offence in question and the extent to which it was fulfilled. She argues, for example, that a criminal offence occurs only if a murderer both aims her rifle at a victim (the objective element) and simultaneously intends to take her life (the subjective element). Using this test, if the rifle is being aimed at another person without the intent of ever shooting, such conduct cannot be described as attempted murder.

We agree that such conduct is insufficient to constitute criminal attempt due to the absence of the actor's subjective intent. This conclusion, however, does not help to differentiate between the different phases of *iter criminis* (preparatory conduct and attempt). The problem of differentiation typically arises in cases involving highly motivated perpetrators with clear intent (see the above example of the attacker with a pocket knife). This means that consideration of subjective criteria aids in the analysis only in those cases where the issue at hand is connected to in the absence of the perpetrators' intent (which rule out the possibility of an attempt in the first place), not the differentiation between preparatory conduct and criminal attempt.

A better solution was suggested by Ambrož, who seeks to extend the *formally-objective* criteria without relying upon *mens rea* - intent or other subjective criteria. He argues

[2] For examples of Slovene case law where essentially similar cases of attempt were treated differently see Florjančič (2011: 64-65).

that when it is not possible to differentiate merely by examining the objective aspect of the statutory description and the criterion of initiation of a criminal offence, one should take into account whether the perpetrators' conduct was so closely connected to the criminal offence that it could be committed without additional essential intermediary steps (Bavcon *et al*, 2013: 327). This begs the question how to properly evaluate whether and when a certain intermediary step is *essential*. Additionally, it is not clear what methodology should be used to distinguish between different *steps* since, in real life, they form a unified continuous flow of events.

To put these troublesome questions into context, let us return to the example of the clumsy attacker with a pocket knife. Do the additional, formal-objective criteria assist in determining if and when the attacker entered the criminal attempt phase? Was her conduct sufficiently connected to the criminal offence when she drew the knife from her pocket? What impact would her drawing the knife from her pocket without exposing the blade play? Should the actions of drawing the knife from her pocket, exposing the blade of the pocket knife and swinging the knife towards the victims count as separate *steps*? If yes – is exposing the blade of the pocket knife an *essential* intermediary step? Ambrož, examining a similar case in which a perpetrator aims at a victim but without cocking the firearm, argues that cocking a firearm is an essential intermediary step to committing the crime. Merely aiming the firearm cannot be considered a criminal attempt since, absent a bullet in the firearm's chamber, since the act of aiming an unloaded firearm is too attenuated (not *close* enough) to actually committing a criminal offence (Bavcon *et al*, 2013: 327). As with the person aiming an unloaded firearm, our hypothetical attacker should also not be held liable before actually exposing the blade of her pocket knife. Even though our hypothetical attacker already has her knife exposed and is reasonably close to the victim (so as to be able to harm the prospective victim), she nevertheless would not yet have entered the criminal attempt stage since before cutting her victim, she would need to perform the essential, intermediary action of exposing the blade of her knife.

Foreign (mainly German) criminal legal doctrine reveals that this approach is plagued by numerous shortcomings (Eser, 2019: §22, n. 40-41). It is difficult to find suitable *objective* criteria to assist in differentiating between the different essential steps. These seemingly objective criteria are, unfortunately, imprecise and therefore subject to the same objections as purely subjective criteria of differentiation – namely, that arbitrary criteria allows for (criminalizued) attempts to be extended deep into the

field of (decriminalized) preparatory conduct. The following chapter should therefore aim to provide for additional (sharper and more precise) criteria.

4 Individual-objective theory of differentiation

One possible solution to this conundrum is to better define what constitutes differentiation by utilizing not only objective, but also additional subjective criteria. In this contribution, we argue that differentiating between various events (steps) and establishing their essential value constitutes a plausiblesolution, but only if the perpetrator's plan of (criminal) conduct is also taken into account. The criminal plan must obviously aim to fulfill the objective criteria of the criminal offence. To distinguish between preparatory conduct and criminal attempt, also it is also important to determine, in objective-normative sense, whether the perpetrator himself considers certain conduct to be a crucial separate step (condition precedent) before committing a criminal offence (Höpfel & Ratz, 2018: §16, n. 31). This view has been dubbed the *individual-objective* theory of differentiation, and is utilized in the criminal legal doctrine of numerous states, including Germany (Rengier, 2016: 292-293; Jescheck, 1988: 466), Austria (Höpfel & Ratz, 2018: §16, n. 30; Kodek, Foregger & Fabrizzy, 1999: §16, n. 17) and Croatia (Novoselec & Bojanić, 2013: 200-300). The core idea of the *individual objective* theory is described by Bohlaner (2009: 139) as follows: "the intention of the offender decides whether she has begun with the execution of the offence or is about to do so because an attempt by definition requires absence of the full actus reus so one only has the state of the offender's mind to rely on in order to determine what offence was going to be committed and how."

Although not widely recognised or adequately explained, this view can also be found in Slovene criminal legal doctrine. Most notably, Bele (2001: 198) argued that when dealing with simple and short dispositions, a criminal offence is initiated with the first move which is an integral part of a uniform conduct of a perpetrator which should lead, *according to his view*, to the commission of a criminal offence.

The usefulness of the described criteria can be demonstrated by examining once again the examples of the clumsy attacker with a pocket knife and perpetrator who aims at a target without cocking her weapon. Admittedly, it is not easy to distinguish between the acts of pulling a knife from the pocket, exposing the blade and swinging it towards the victim. It is even more difficult, using purely objective criteria, to

determine whether each of those steps should be considered as essential. Accordingly, it also is important to consider how the perpetrator (subjectively) imagined the timeline for committing the crime. She might, for example, intend to pull out her knife, expose the blade, and swing it towards the victim in one swift, continuous motion and perceives this as unified conduct or route to committing the criminal offence. Following this reason, our hypothetical attacker entered the criminal attempt stage when she pulled the knife out of her pocket.

The pocket knife attacker might, on the contrary, intend to first pull out her knife and open the blade, then threaten and frighten her opponent by brandishing the weapon, and cutting her afterwards. The attacker's first actions do not differ when viewed through the lense of only objective criteria. The second case should nonetheless be treated differently if the attacker trips, for example. before managing to expose the knife's blade since there was an essential intermediary step between the act of pulling out the knife and then actually swinging it towards the victim – namely the threatening of the victim. This supports the argument that merely pulling the knife out of her pocket did not constitute a criminal attempt. When considering the perpetrator's criminal plan, her actions should be treated as (decriminalized) only preparatory conduct since she had not yet initiated a criminal offence.

The case of the perpetrator who merely aims her weapon at her target can be explained in a similar manner. The criminal law cannot treat a person whose plan can be simply described as "weapon cocking-aiming-shooting" in the same way as a perpetrator whose plan can be described as "weapon cocking-aiming-explaining to the victim why she will lose her life-shooting". Obviously, the steps in both of these perpetrators' blueprints to commit a crime differ substantially. This difference is crucial in determining whether the perpetrator who merely aims at her victim is already in the stage of a criminal attempt or merely in the stage of (decriminalized) preparatory conduct. The first perpetrator already entered the phase of criminal attempt, while the other (most likely) did not.

5 Discussion

We briefly described how the individual-objective theory of differentiation might be used to further enhance the pure formal-objective theories. Ambrož cautions, however that any substantive extension of formal-objective criteria should be done with restraint (Bavcon *et al*, 2013: 328). His views should be understood by

considering various questions which arise in relation to legal interpretation and argumentation in general. It is a prevalent view of Slovene criminal legal doctrine that giving expansive interpretations to the linguistic meaning of statutory (criminal) provisions should be the rare exception and not the rule (Bavcon *et al*, 2013: 224-225). Hence, the individual-objective theory of differentiation should not be used as a tool for radical expansive interpretations of criminal offences.

Interpretative leaps such as this would be especially dangerous in cases of unfinished attempts, where from the viewpoint of the actor the "legally protected good" has yet to be placed in jeopardy. Consider, for example, cases where either the expected contact involving the perpetrator's and the victim's "sphere" did not yet occur or where the perpetrator's conduct and the "expected prohibited consequence" are not in close temporal proximity (Kühl & Heger, 2018: §22, n. 4; Roxin, 2003: 374-377). To establish that a perpetrator entered the criminal attempt phase, the prosecution needs to prove that according to her criminal plan, her conduct is sufficiently close ("leaning onto") to objectively committing a criminal offence (Welzel, 1969: 190-191). Bohlander (2009: 139; 141) describes sufficient proximity as "a degree of imminence about [the perpetrator's] actions leading to the commission of the offence," as well as "being on the immediate verge of committing the offence."

It would therefore be wrong to say that the perpetrator entered a criminal attempt when drawing a knife and exposing the blade if her victim is still on the other side of a football field – even if in her mind, she already entered the final phase of her criminal plan. It is clear that the objective essence ("*Tatbestand*") of a criminal offence which the perpetrator seeks to commit is not reached in this hypothetical since the victim in not in any immediate danger, even according to the perpetrator's criminal plan. Similarly, if the perpetrator with the pocket knife is still dozens of meters from the victim and trips, it cannot be argued that she is sufficiently close to committing a criminal offence to have already entered into the *iter criminis* phase of a criminal attempt.

Such limitations cannot restrict the scope of a criminal attempt when the attempt is already completed at a time and at a location which are not the same as the time and location where the expected forbidden consequence should occur (according to the perpetrator's criminal plan). When a perpetrator intends to take a victim's life by sending her poisoned candy via mail, the criminal attempt phase will be reached even before the victim's life will be - according to the criminal plan - seriously threatened.

The perpetrator in this hypothetical will be liable for an attempted murder at the moment when she hands the poisoned candy over to the postal clerk since that act marks the time when the perpetrator concludes the final essential step of her criminal plan. This same approach applies when dealing with the criminal offence of Fraud under Article 211/I:

> *"Whoever, with the intention of acquiring unlawful property benefit for himself or a third person by false representation, or by the suppression of facts leads another person into error or keeps him in error, thereby inducing him to perform an act or to omit to perform an act to the detriment of his or another's property, shall be sentenced to imprisonment for not more than three years."*

A perpetrator could enter the criminal offence phase by sending (via mail) the falsified documents to the victim of the criminal offence. This means that an attempt can be completed even if the perpetrator never enters into a direct contact with the victim.[3] Differentiating between completed and unfinished attempts is therefore important for understanding the regulation of voluntary withdrawal from completing the criminal offence. It also plays a vital role for drawing a more precise demarcation line between criminal attempts and preparatory conduct.

5 Conclusion

The analysis of these hypothetical cases demonstrates that drawing a sharp line between preparatory conduct and criminal attempt is not an easy task in some particularly hard cases involving crimes against life and limb. These difficulties are reflected in the various conflicting theories of differentiation which were developed by (German, Austrian, Croatian and Slovene) criminal legal doctrine to try to cope with these issues. Even though these theories range from purely subjective to exclusively objective, we argued that theories which draw from both the subjective as well as objective criteria are more convincing. The individual-objective theory is especially useful in cases where the criminalized conduct cannot easily be broken down into separate independent and essential "acts".

[3] See for example the judgment of the Slovene Supreme Court I Ips 191/2001 from 16.01.2003.

Criminal legal doctrine and courts alike should exercise caution to avoid over emphasing the role of the individual-objective theory. Even though this theory places emphasis on the perpetrator's criminal plan, the actor still needs to be sufficiently close to objectively committing a criminal offence for her conduct to be treated as a (criminalized) attempt. The perpetrator's subjective criminal plan should not be used to extend the reach of a criminal offence deep into the field of preparatory conduct. in cases involving unfinished attempts where the legally protected good is not yet endangered. When understood correctly, the individual-objective theory should therefore improve legal certainty without allowing for arbitrary criminalization of preparatory conduct.

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