

## ***Law***

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# **Crime Preparation Penalty in Georgian Criminal Law in light of the German Doctrine of Attempted Crime<sup>1</sup>**

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*Under the influence of objective theory, Georgian criminal law interprets both crime preparation and attempted crime in restrictive terms and prescribes punishment only for the preparatory actions that are akin to the objectively interpreted attempt. Penal laws of the German speaking countries (Germany and Austria), that do not identify criminal liability for crime preparation, provide extensive interpretation for attempted crime. The general range of punishable actions in one part of delicts displays eventual similarity. Finally, the following conclusion can be derived based on the correlation of the above legal systems: The denial of essential penalty in the legislation and introduction of the penalty for specific corpora delicti of crime preparation might lead to an extensive interpretation.*

### *Introduction*

Several criminal codes were adopted in Georgia in the 20th century, of which the first and second (adopted in 1922 and 1928 accordingly) were subjectively oriented criminal disposition codes. The last Criminal code of Soviet Georgia (adopted in 1960 and entered into force in 1961) was a significant step towards a humane criminal law: like in the codes of other Soviet republics, in the last Criminal Code of Soviet Georgia, the principle of legality received statutory confirmation, analogy in prejudice of a person was abolished, and the groundwork was laid for the objective interpretation of criminal law – criminally punishable illegal and guilty act (*mens reus*) instead of a person's socially dangerous behavior was recognized as the basis for criminal liability, albeit the essential penalty for crime preparation contradicted the objective orientation of criminal law.

The Criminal Code of Independent Georgia adopted in 1999 imposed a penalty for the preparation of grave and especially grave crimes and those on a comprehensive list provided in the law (Part 2, Article 18 of the Criminal Code of Georgia). At the same time, the Code imposed no liability whatsoever for a totally ineffectual attempt (Article 20 of the Criminal Code of Georgia) and interprets preparation and attempt in objective terms (Articles 18 and 19 of the Criminal Code of Georgia). The point in question is whether the general penalty of crime preparation corresponds to the objective point of departure for inchoate crime penalty to any extent. The present article provides a short analysis of the transition from the subjective interpretation of inchoate, i.e. incomplete crime to its objective interpretation and examines the role of the objective theory of incomplete crime penalty in limiting crime preparation penalty in Georgian criminal law. It also focuses on the issue concerning the exclusion of essential penalty of crime preparation and looks at the history of the attempted crime penalty in German penal law drawing parallels between the two legal systems.

### *Stages of Crime - iter criminis*

The inchoate or incomplete criminal penalty stems from the historically developed view that argues that not only the damage caused to the legal good but imperilling the legal good should also entail punishment. By the general

penalty of attempted crime, the state seeks to move penalty to the earliest possible stage ensuring therewith an effective protection of the legal good (Prevention Criminal Justice).

Georgian criminal law has a convention to share the tenet on the stages of crime recognized in German penal law. Crime in Georgian criminal law also consists of a chain of actions: it is a process of acts and not merely a completed event (Tsereteli, 2007, 333; Dvalidze et al., 2007, p. 145; for a similar view in German penal law see: Schönke/Schröder -Eser, 28. Aufl., vor §22/Rn.).

Chapter 6 of the General Part of the Criminal Code of Georgia entitled as Incomplete Crime has provisions for preparation of crime, attempted crime and voluntary refusal to complete a crime.<sup>3</sup> Incomplete crime is defined in legal theory as an act of direct intent brought to a stop at the stage of the crime's preparation or its attempt (Dvalidze, 2007, p. 146; In Turava's point of view, attempted crime can also be achieved through eventual intent: Turava, 2013, pp. 132-138). The concept of incomplete crime is only a *terminus technicus*; it is a generic term for the preparation of a crime and its attempt and has no bearing on determining the penalty of an action. The boundary between a legitimate action and an offence is drawn through preparation and attempt. In criticizing the dogmatic figure of incomplete crime, the assumption that it is understandable for an unprofessional only and cannot describe wrongfulness deserving punishment is short of logical argument in Georgian criminal law since in it incomplete crime has never assumed this function (Willer, 2009, S. 26).

A crime is considered complete if it includes all elements of crime spelled out in the Criminal Code. The concept of complete crime in Georgian criminal law is of formal nature. Complete crime excludes the possibility of voluntary refusal to complete a crime. The legislation allow for effective confession in special circumstances defined by the Law – Article 322 (effective confession to crime against state) and the Note to Article 323 (effective confession to participating in the preparation of a terrorist act). Lately, the Criminal Dogmatics has come to recognize the stage of material completion of crime as well (Dvalidze et al, 2007, p. 153).

### *Grounds for Incomplete Criminal Penalty*

Scholars of criminal law provide different substantiations of the grounds for the imposition of a penalty for an incomplete crime (attempted crime in German penal law). Alongside two contrasting viewpoints around this issue, the objective and the subjective theories of incomplete crime, many mixed theories have also gained prominence. The objective theory considers imperilment of the legal good as the grounds for imposing penalty on incomplete crime, while the subjective view sees such grounds in the agent's ill will.

Incorporating these antipodal views into legislation would lead to different legal consequences. Consistent adoption of the objective views would bring about impunity of crime preparation and inept attempt, since they do not entail any specific threat (Schönke/Schröder *-Eser*, 28. Aufl., vor §22/Rn); at the same time, the line between crime preparation and attempt would also be drawn through objective scales (commencement of the implementation of *corpora delicti*).

Viewing ill will expressed in the agent's action as grounds for an incomplete criminal penalty would bring us to the punishment of inapt attempt or unreal attempt since these cases also involve the expression of ill will. Moreover, crime preparation, attempt, and completed crime would all receive equal punishment since they do not differ from one another in subjective terms. On the other hand, to identify voluntary refusal to complete crime, it would suffice to merely disclose the absence of the desire to complete the offence irrespective of whether the agent's action was causally linked to the crime not resulting in an outcome.

### *A Brief Historical Overview of the Norms and Dogmatic Views on Incomplete Crime in German and Georgian Penal Laws*

The emergence of the objective theory of attempted crime in German penal law is related to the requirement to restrict penalty. Punishability of ill will practiced by the absolutist German state spurred sharp criticism during the Enlightenment period. The criminal dogmatics highlighted that incomplete crime should only be punishable if a serious specific threat is created to the

legal good while immoral acts should be outside the scope of criminal law due to nonexistence of such threat (*Feuerbach, Mittermaier*) (Stratenwerth/Kuhlen, AT, 6. Auflage, §11/Rn. 17 f.; Zaczyk, 1989, S.43 ff.). Adoption of the objective theory led the German legislation to the objective interpretation of attempt (section 43 of the old version of the German Criminal Code, attempted crime as commencement of the implementation of *corpora delicti*) and voluntary refusal to commit crime and urged the Prussian Supreme Court to leave inapt attempt unpunished. In the late 50s of the 19<sup>th</sup> c., the Prussian Supreme Court acquitted the defendants since the barn they entered to steal grains from was empty (GA 1854, S. 548 According to Jescheck/Weigend, AT, 5. Aufl., S. 513; LK- *Hillenkamp*, 11. Aufl., vor §22/Rn. 61.).

The dogmatics underlying the objective theory of attempted crime is discerned in *Liszt-Beling's* view on crime, according to which the objective and subjective sides are strictly separated from one another (Schönke/Schröder-*Eser*, vor §22/ Rn. 18). This view had been dominant in the German penal dogmatics throughout the first decades of the 20<sup>th</sup> c. (Roxin, AT II, 2002, §29/Rn. 25).

The subjective theory, the dogmatic roots of which should be sought in *Von Buhr's* tenet of causality, owes its emergence to the need to prove the punishability of inapt attempt. The way to the subjective theory of attempted crime was paved by one of the decisions of the German Imperial Court (RG 1, 441) in which inapt and apt attempts were equalized. Although the German Imperial Court's penal practice pursued the subjective theory, the scholars of criminal law had basically supported the objective theory of attempted crime up until the National-Socialism period,<sup>2</sup> when, as a result of the pressure coming from the state as well as considering the political expediency, both the penal practice and the criminal legal science diverted to the "Disposition Criminal Law" and the subjective theory of attempted crime.

The subjective theory has never really been dominant in its extreme form in Germany, neither in theory nor in practice (with the exception of the National-Socialist period), since the penalty for unreal attempt had never been acceptable and crime preparation was not essentially punishable. At the same time, preparing for a crime and attempt a crime had been differentiated by means of objective features. Up until 1975, the legislation

recognized the start of the implementation of *corpora delicti* (§43 I a. F. StGB) as the commencement of attempted crime.

Although as of now the final doctrine of offense creates the dogmatic foundation that befits the subjective theory of offense, the latter does not derive from the final doctrine of offense. It was not the “finalists” but the “causalists” who played the decisive role in the legal dogmatics in the 60s of the 20<sup>th</sup> c. The dominant subjective theory of attempted crime had followers during this period not only among the “finalists” but “causalists” as well – *Baumann, Schönke, and Schröder* (Hirsch, 2001, S. 713). What is considered as the subjectively oriented dogmatic foundation in the German penal dogmatics is not finalism, i.e. a doctrine on factoring intent among the elements of crime, but the tenet on intent, as a basic constituent of attempt, and subjective constituents of legal impossibility (Hirsch, 2001, S. 713).

A new tenet called “Impression Theory”, emerged in the German penal law in the 1950s, which has been considered to be the dominant theory since then. Under this tenet, the legal impossibility of an attempt is seen in the impression which derives from the committed act and which can shatter the public trust in justice (rechtserschütternden Eindruck)(In early 20<sup>th</sup> c., A. Horn und v. Bar in Hirsch, 2001, S. 712, Fn. 8; Ebert, 3. Aufl., AT, S. 124; Gropp, AT, 3. Aufl., §9/48; Schönke/Schröder-Eser, vor 22/Rn. 22.). Parallel to the “Impression theory”, other mixed theories of attempt also evolved in the theory of German penal law. Of particular interest among them is the “Mixed Theory” developed by Roxin (Kollrausch, & Lange, 1998, S158) and the dualistic justification of attempted crime by *Schmidhäuser* and *Alwart*. In *Roxin’s* view, aptness of attempt means creating the threat of committing *corpus delicti*, whereas inapt attempt in his consideration is a violation of a legal norm infringing justice (Roxin, 1998, S. 158). Under *Schmidhäuser’s* and *Alwart’s* dualistic tenet of attempted crime, the grounds for the punishability of attempted crime is unworthiness of the threat as well as the end produced by the agent’s action (Alwart, 1982, 158; Schmidhäuser, AT, 2. Aufl., §11/ Rn. 27-36).

The objective theory of attempted crime has been durably sustained only by Spindel (Spindel, 1953, 518-521; Spindel, 1965, 1881; Stock, & Spindel, 1966, 89) who was inspired by “the general objective rudiment” and who considered himself to be “a lonely voice crying in the wilderness”(Hirsch,

2001, 712). The grounds for the penalty of attempted crime were discussed at a professional conference (Strafrechtslehrertagung) held in Frankfurt in 1985 and a conference organized by the Comparative Law Society in 1985, at which the subjectivists took the upper hand.<sup>3</sup> The same problem was voiced at the 1988 colloquium dedicated to Japanese and German penal laws, at which the German doctrine of attempted crime was recognized as subjectively while the Japanese one as objectively oriented (Naka, 1989, 93). Lately, some legal scholars have appeared in the German penal dogmatics who, in spite of the general subjective systemic rudiment, endorse the objectivist theory of attempted crime (e.g. the finalist *Hirsch*).

The objective tenet of attempted crime has no legislative support in the German penal law. Up until 1975, the legislation recognized the objective theory of attempted crime under Section 43 I of the Criminal Code, which defined attempted crime as the commencement of its commission. The “Fathers” of the 1975 Penal Reform, however, renounced the objective theory of attempted crime as defined in Section 43 I of the Criminal Code and interpreted commencement of the attempted crime in subjective terms as the will of the perpetrator in Section 22 of the German Criminal Code; under this provision, a person attempts to commit an offence if he takes steps which will immediately lead to the completion of the offence *as envisaged by him* (According to the critics of the subjective theory of attempt, the penal practice has proved the aporia of this doctrine. See: Jung, 2005).

A similar rivalry between the subjectivist and objectivist perceptions took place with respect to the norms and dogmates on incomplete crime in 20<sup>th</sup> c. Georgia. Under the Bolshevik criminal law of the early Soviet time, the very disclosure of intent was punishable, as in this way “the enemies of people” would receive the strictest possible punishment. Therefore, the stages of crime were somewhat overlooked. Person’s public dangerousness rather than the offence punishable under the Criminal Code constituted the grounds for criminal liability. Subsequently, the judge could impose equal punishment for both attempted offence and incomplete crime (Surguladze, n.d, p. 28).

Of special note is the fact that the 1921 “Basic Guidelines” and 1922 Criminal Code interpreted consummated attempt in subjective terms as a person’s conception about the commencement of offence (Surguladze, n.d, p. 54, 114). As regards the social protection measure, Article 52 of the 1922 Criminal

Code provided pertinent punishment just for “criminal behavior” or connection with a criminal group without actual commission of a crime or other action posing danger to the public. The 1922 and 1928 Criminal Codes were also distinctively preventive. Both of these codes allowed for the principle of analogy to be used against the agent and ascribed a decisive role to the degree of the agent’s public dangerousness when imposing a punishment (Tsereteli, 2007, p. 328).

The subjective orientation did not concern only Soviet penal legislation but Soviet penal theory as well (Piontkovskii & Kudriavtsev, 1978, p. 115). The tenet under which criminal liability should be imposed for the damage caused to or endangering legal goods started to win grounds in the late 50s, during the so called “Ottepel” (“thaw”) period. The majority of Soviet dogmatists, including *Tinatin Tsereteli*, vouched for the penalty of incomplete crime from the objective perspective. The “objectivists” commented that the subjective justification for the penalty of incomplete crime was inconsistent in so much as the punishment for incomplete crime derives from the objective public threat, i.e. material unlawfulness. The majority of dogmatists rejected the subjective interpretation of attempted crime, i.e. attempt as an agent’s vision of the crime commencement, as the “Disposition Law” (Tsereteli, 2007, p. 426). The legislators shared this perspective. The last Criminal Code of Soviet Georgia, like the Criminal Codes of other Soviet republics, followed a strictly objective interpretation of crime preparation and attempt restricting by so doing the overly broad scope of penal law (Schroeder, 1958, p. 37).

After the 60s of the 20<sup>th</sup> c., the grounds for the penalty of incomplete crime in the Georgian criminal law have been perceived in **objective terms** as a threat created to the legal good rather than a will hostile to law, or commencement of a crime as envisaged by the agent (Tsereteli, 2007, 426; Surguladze, n.d., 313). Under the dogmatics of the penal law, it is impossible to differentiate between crime stages drawing on subjective theories, since the will to commit *corpus delicti* remains the same at every stage. Therefore, to differentiate crime stages from one another, the degree of the threat created by the agent’s action should be factored in (Surguladze, n.d., p. 307; Dvalidze et al., 2007, p. 161).



The supporters of the objective theory observe that preparing for a crime is very different from crime commission. The threat to the legal good on this occasion constitutes strictly speaking an *abstract* threat rather than a real and direct one. While, during attempted crime, the threat is *actual, specific* and *direct* (Dvalidze et al., 2007, p. 161) Direct threat is perceived as *an actual possibility* to inflict damage. By perceiving attempt as a specific threat, the Georgian criminal law does not embrace the formalist-objectivist theory of attempt prominent in the German penal dogmatics. The notion of the commencement of attempt in Georgian criminal law is relatively broad and *inter alia* includes actions that are closely related to crime consummation, i.e. actions directly transiting into consummation, e.g. aiming a gun at someone already constitutes a crime attempt instead of being considered as a stage of crime preparation (Dvalidze et al., 2007, p. 162).

The objective theory of incomplete crime facilitated the switch from the “Disposition Law” of the Bolshevik state to a more or less humanist law. On this thorny and long path, the progressively minded Soviet dogmatists had to overcome lots of obstacles. Today, constriction of the penalty of incomplete crime through the objective theory of attempt is considered to be a marker of humanist penal law.

#### *Penalty for Crime Preparation in the Current Georgian Criminal Law*

The new Georgian Criminal Code provides for two frameworks of penalty for crime preparation:

a) The general “factored out” liability defined in Article 18 of the Georgian Criminal Code under which preparation of crime is intentional creation of conditions for the perpetration of crime.

b) Liability for crime preparation determined for specific crimes, by which the legislation indicates that special punishment should be imposed for actions such as:

1. Illicit production of objects used in making counterfeit money and other related preparatory activities punishable under par. 4 Article 212 of Georgian Criminal Code.
2. Formation of Terrorist Organization or Leading Thereof or

Participation Therein punishable under Article 3302 of Georgian Criminal Code; other *corpora delicti* of crime preparation to counter terrorism.

3. Preparations for Aggressive War punishable under Article 404 of Georgian Criminal Code.

The new 1999 Criminal Code of Georgia discarded the Soviet tradition of crime preparation providing for a comprehensive and general punishment. It prescribed punishment for the preparation of only especially grave crimes (the crimes for practice whereof Par. 4 of Article 12 of the Criminal Code provides the sentence exceeding ten years of imprisonment or covering a full life term), while Article 56 awarded a more lenient sentence for incomplete crime compared to consummated crimes. The 29.12.2006 amendment extended the liability for crime preparation to grave crimes as well (par. 3 of Article 12 of the Criminal Code defines grave crime as the crime for practice whereof the sentence provided is not in excess of ten years of imprisonment). At the same time, Article 56, allowing for a more lenient punishment for incomplete crimes, was abolished altogether. Currently, judges have the discretion to award a sentence equal to the one awarded for completed crimes. This legislative change is indicative of the diminished influence of objective theory of incomplete crime.

If we examine the annulment of Article 56 of the Georgian Criminal Code from the German perspective, we must pay attention to the fact that awarding equal punishment for both creating a threat to the public good and damaging the public good can be made possible through curtailed *corpora delicti* as well as independent *corpora delicti* of crime preparation, which German penal law allows for. As known, these *corpora* are included in the legislation with the purpose of preventing the possibility of a more lenient punishment, prescribed by the second paragraph of section 23 of German Criminal Code expanding on such crimes. We would have had the same effect of toughening the penalty for incomplete crime if the Georgian legislation had preserved the norm-envisaging leniency of punishment for incomplete crime and had, at the same time, introduced the above *corpora delicti* in return.

Georgian judges today can award a more lenient sentence under Part 3 of Article 53 of the Criminal Code which specifies that, when awarding a

sentence, the court shall take into consideration the circumstances of the crime, in particular, the character and extent of breach of obligations, and illegal consequence. It can be subsequently maintained that, with no illegal consequence at hand, the judge, under this norm, can award a lenient punishment.<sup>4</sup> However, whether or not Georgian judges interpret the above Article in liberal terms is subject to examination.

### *Constraining Crime Preparation Penalty at Objective and Subjective Levels*

There was a heated debate in Georgian Criminal Law over effective protection of the legal good and the legality of the preemptive punishment for actions preceding the actual damage caused to the legal good in the late 50s (De-Stalinization period) and the 90s of the previous century, after Georgia attained independence. During the De-Stalinization period reforms,<sup>5</sup> diametrically opposing views on the punishment for crime preparation were expressed in the Soviet penal dogmatics.<sup>6</sup> The majority of scholars argued that the grounds for criminal liability should be the damage or threat caused to the legal good. Consequently, a part of Soviet dogmatists, including *Tinatini Tsereteli* and *Vladimer Makashvili* went as far as demanding annulment of the general punishment for crime preparation (Gamkrelidze, 2008, pp. 157-159). They underscored that during preparing for a crime, the possibility for perpetrating *corpus delicti* is very little and different circumstances, independent of or dependent on the agent, can prevent the crime from being perpetrated. Essential liability for crime preparation challenges the legal norm providing for the voluntary refusal to commit crime, as it can no longer be used by the agent. Subsequently, the scope of punishable actions becomes exceedingly broad and we transit to the Disposition Law, since actions preceding *corpus delicti* are hard to differentiate in objective terms. Due to the fragmentary nature of criminal law, the legislation should not include actions preceding *corpus delicti* comprehensively and should restrict the state's prerogative to extend the scope of liability (Gamkrelidze, 2008, p. 159; Tsereteli, 2007, pp. 384-402). Acts of crime preparation do not create an immediate threat, and therefore crime preparation should only be punishable if it is akin to attempted crime (Tseretelieteli and Makashvili, according to Gamkrelidze, 2008, 157; Surguladze, n.d., pp. 305-306). The correlation between the value of protected legal good and the created threat

suggests that only such acts of crime preparation deserve punishment are the ones that create an *abstract* threat to the most vital legal goods (such as human life, or crime against state). The position formulated by criminal law experts during the reform period concerning the annulment of the essential punishment and finding a casuistical solution to the problem, i.e. incorporating specific *corpora delicti* of crime preparation into a separate part of the Criminal Code, were not accounted for in the legislation either in the late 60s or the 90s of the previous century.

The current Criminal Code of Georgia (Par. 1 of Article 18) determines preparation of crime as intentional creation of conditions for the perpetration of crime. The overly expansive legislative interpretation induces both the legal theory and practice to specify the concept of crime preparation. It becomes necessary to elaborate discrete criteria for differentiating the expression of unpunishable intent, punishable crime preparation, and attempted crime. The differentiation of crime preparation and attempt from one another is not only a dogmatic problem. Since preparation of misdemeanor (under Par. 2 of Article 12 of the Criminal Code of Georgia, the sentence for such crimes is not in excess of five years of imprisonment) remains outside punishment, when differentiating crime preparation from attempted crime we deal with the decision as to whether or not misdemeanor should be punishable.

The present interpretation of crime preparation extends penalty on to actions preceding any *corpus delicti* and provides no scale whatsoever to separate preparation and planning of crime. Therefore, crime preparation in the current criminal dogmatics is interpreted in *restrictive* terms on both the *subjective and objective levels*: criteria enabling separation of crime preparation from simple planning and attempt have been developed. Old dogmatic as well as practical knowledge, according to which crime preparation shall be punishable only if the act of preparing a crime is close to attempt and constitutes a social danger, is also taken into account (Gamkrelidze, 2008, p. 159; Piontkovskii & Kudriavtsev, 1978, p. 508; Tsereteli, 2007, p. 389).

Legislation considers preparation, purchase or handling of a weapon or instrument and finding an accomplice with the purpose of perpetrating a crime first and foremost to be the conditions for committing an offence

(Gamkrelidze, 2008, p. 154). Although the legislation establishes *objective criteria* for differentiating crime preparation and mere planning by enumerating pertinent case groups, it says nothing new as this understanding of crime preparation is in line with the crime preparation interpretation stipulated in the last Criminal Code of Soviet Georgia. Examples of crime preparation in the penal dogmatics are: preparation of appropriate keys, switching off the alarm system, finding accomplices, collecting information, purchasing a ladder and delivering it to the crime site, putting poison in a drink, ambushing, luring a victim out to a desolate place, etc (Gamkrelidze, 2008, p. 156; Surguladze, n.d., p. 302).

Constriction of incomplete crime penalty at the **subjective** level occurs at the demand to specify the crime plan. We do not have crime preparation if the agent had purchased weapon not for the purpose of committing a specific crime but for committing *any* crime. A person has not prepared banditry yet if he has *ever* purchased a weapon to perpetrate *any act of banditry* and if he has not specified a victim yet. The intent of crime preparation must include all constituent elements of offence (Gamkrelidze, 2008, p. 155).

The question to ask is whether the experience from the German penal dogmatics could avail to specify a preparatory action. The legislation provides different models of crime making at the stage when threat is created to the legal good. Alongside threat *delicts* and curtailed *corpora delicti*, German penal law, Section 30 of the German Criminal Code (conspiracy), imposes punishment for creating a threat to the legal good through casuistical *corpora delicti* of crime preparation (Weber, 1987, 7-22). In other words, punishment for crime preparation by an individual perpetrator in German penal law is imposed not as a matter of principle, in the general part, but only based on *corpora delicti* provided for in a separate part of the Criminal Code.

It is interesting to know if specific *corpora delicti* of the German Criminal Code on crime preparation could be used to specify essential penalty for crime preparation provided for in the Georgian Criminal Code. The German penal law specifies *corpora delicti* for crime preparation in different ways: it identifies both narrow and broad *corpora delicti* for crime preparation. The narrow *corpus delicti* for crime preparation has a detailed list of preparatory actions, including preparation of weapons and instruments to perpetrate a

crime (Sections 87, 149, and 310 of the German Criminal Code). Similar tenets can be found in the old Criminal Code of Soviet Georgia, Article 18, and in *Gamkrelidze's* Commentary on the Georgian Criminal Code (Gamkrelidze, 2008, p. 154).

Some *corpora delicti* of crime preparation in German penal law do not specifically name punishable actions and do not separate crime preparation from general planning of a crime (Sections 80, 83, and the third “a” paragraph of Section 134 of the German Criminal Code). Subsequently, such *corpora delicti* require a general explanation of crime preparation. Crime preparation in Section 80 of German Criminal Code (Preparation of a war of aggression) implies any type of action in support of the planned war, even a neutral one (Fischer, Schwarz, Dreher, & Tröndle, 2011, p. 52, 58). In this norm, the line between punishable and unpunishable actions is drawn through a statutory requirement of *specific threat*. Also, in Section 83 (Preparation of an enterprise directed at high treason), preparation is any supportive action both subjectively, i.e. as envisaged by the perpetrator, and objectively, be it even through a *neutral* action (Fischer, Schwarz, Dreher, & Tröndle, 2011, §83/Rn. 3). For an action to be considered punishable, the object of assault, instrument for assault, and assault time shall all be necessarily specified (Schönke/Schröder-Sternberg-Lieben, §83/Rn. 1). Georgian criminal law, as shown above, uses the same statutory requirements to specify intent for crime preparation.

According to one general interpretation to crime preparation given in German penal dogmatics, crime preparation constitutes “an action that creates valid prerequisites for perpetrating a crime” and goes beyond planning (bloße “Bei-sich-Planen”) the perpetration of crime (Maurach-Gössel, AT, Teilband 2, 6. Aufl., §40/1). This is an extremely general interpretation of crime preparation and it cannot therefore draw a line between punishable and unpunishable actions applicable by the state. It is particularly noticeable that both the Georgian legislative interpretation of crime preparation and its scientific interpretation by German penal law resemble in terms of their vagueness and are inappropriate to constrict the penalty of crime preparation. It becomes evident that the general interpretation of crime preparation given in the German penal theory cannot be applied to Georgian penal law to specify the general concept of crime

preparation, since the German penal dogmatics do not suggest any new insights to Georgian criminal law to limit the penalty of crime preparation.

Preparation of crime instruments or weapons and handling them can be as well achieved through neutral actions. These actions are not indicative of the crime that a person has planned to commit. A legal state should not deem socially adequate actions as crime preparation punishable by law even if there is threat involved in such crime preparation. To avoid excessive expansion of crime preparation penalty and to constrict crime preparation penalty, affinity with intent – a criterion traditionally recognized in Georgian criminal law - should be applied. The formula of attempted crime developed by *Heinrich* in German penal law can be used in Georgian criminal law for interpreting crime preparation. Action, under the latter tenet, can be considered to be crime preparation only after it ceases to be socially adequate and clearly and definitely indicates the criminal end (Spotovsky, 1987, 126), i.e. when the agent handles the crime weapon or instrument in such a way that renders him unable to “explain his action convincingly” (Heinrich, AT 2, Rn. 726). E. g., setting a ladder against another person’s open windows at midnight indicates that the agent is driven by the desire to crawl over the window. Putting poison in another person’s drink or holding a loaded pistol and ambushing a person in the entrance to his house indicate that we have to do with the attempt of murder or the intention to inflict injury. But until a person has overstepped the bounds of the socially adequate, his actions remain within his personal realm and the state should not punish him for that.

#### *Several Examples of Crime Preparation and Attempted Crime from Georgian and German Penal Laws*

As highlighted above, Georgian criminal law recognizes general penalty for crime preparation by an individual perpetrator, something that is foreign to German penal law. Several practical examples from Georgian and German penal laws are brought below to help determine whether general penalty of crime preparation can lead to excessive expansion of the state’s punitive power. Let us look at how German penal law evaluates actions akin to *corpus delicti*.

Entering the victim's apartment with the purpose of murdering him, looking for the victim to kill him, taking the weapon in hand while laying an ambush (before taking aim) if the agent thinks that the victim is coming qualify as attempted crime in German penal law. (NK-Zaczyk, 2. Aufl., §22/Rn. 25; Wessels/Beulke, 36. Aufl., Rn. 603). Similarly, an action in distance delicts is classed as an attempted crime when the agent sets to motion the chain of causality that encroaches the legal good thus depriving himself of the possibility to be in charge of that very causality (poisoning food intended for the victim to eat).<sup>9</sup> It can be subsequently construed that due to nonexistence in German penal law of the delicts endangering human life, i. e. of the ultimate legal good, the attempted crime directed against human life merits extensive interpretation. In terms of the crimes against humanity, the extensive interpretation of attempted crime by German criminal law in the majority of cases corresponds to the penalty of crime preparation against humanity provided for in Georgian criminal law.

Commencement of attempted crime directed against property in German and Austrian penal laws transits to the region of crime preparation. These legal systems interpret any action related to assault on the legal goods whether time-wise or space-wise as attempted theft: e.g. going over a furrow and approaching a hen-house to steal hens (Fischer, Schwarz, Dreher, & Tröndle, 2011, §242/Rn. 16); luring a guarding dog aside to penetrate (break in) a house or a storage facility to perpetrate theft (Kühl, JuS 1979, S. 718, 874; JuS 1980, S. 120, 273; Wessels/Beulke, AT, Rn. 604); being on the watch for the collector to rob him albeit he did not appear at the planned place at all (Pfeffertütenfall, 1952, 514; For criticism of the German Supreme Court practice on the commencement of attempted crime, see LK-Vögler, 10. Aufl., §22/Rn. 68.). Georgian criminal law defines such crimes as crime preparation.

### *Conclusion*

*De lege ferenda*, the following proposition can be made regarding the penalty of crime preparation: the general definition of crime preparation needs to be specified in the Criminal Code and only intentional action *clearly and objectively indicating the affinity with the attempted crime* should be defined as punishable crime preparation.



Under the influence of objective theory, Georgian criminal law interprets both crime preparation and attempted crime in *restrictive terms* and prescribes punishment only for the preparatory actions that are akin to the objectively interpreted attempt. Penal laws of the German speaking countries (Germany and Austria), that do not identify criminal liability for crime preparation, provide *extensive interpretation* for attempted crime. The general range of punishable actions in *one part of delicts* displays eventual similarity. Finally, the following conclusion can be derived based on the correlation of the above legal systems: it is superfluous to reject essential penalty of crime and introduce penalty only for specific *corpora delicti* of crime preparation, if Georgian criminal legislation consigns the problem of defining the limits for the penalty of an abstract threat created by a specific action to a separate section. The denial of essential penalty in the legislation and introduction of the penalty for specific *corpora delicti* of crime preparation might lead to an extensive interpretation.

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### Endnotes

1. The present article was published in Georgian in: Crime preparation Penalty in Georgian Criminal Law in light of the German Doctrine on Attempted Crime, The Science of Criminal Law in the process of United European Development, the digest of the Academic Simposium on Criminal Law, *Turava* (ed.), Tbilisis 2013, p. 83-105. I extend my gratitude to the editorial staff of the book for enabling its publication in English.
2. *Hirsch*, Untauglicher Versuch und Tatstrafrecht, Festschrift für Claus Roxin 70. Geburtstag, 2001, S. 712, Fn. 7-8. in the works by Schafstein and Mezger (the latter had been the proponent of the 'Impression Theory' since 1951) on "The Disposition Criminal Law" from the national-socialist period
3. At the meeting, the objective theory of attempt was shared by *Jakobs*, *Hirsch*, and partially *Schmidhäuser*. see. *Jakobs*, Kriminalisierung im Vorfeld einer Rechtsgutsverletzung, ZStW 97 (1985), S. 751 (763); Tagungsbericht der Frankfurter Strafrechtslehrrtagung, *Gropp*, Diskussionsbeiträge der Strafrechtslehrrtagung 1985 in Frankfurt a.M., ZStW 97 (1985), 919, 921, 924;
4. For a pertinent interpretation of Part 3 of Article 53 of Georgian Criminal code, see *Dvaladze*, group of authors, general part of the criminal law, p. 164 (in Georgian)..
5. Already in the mid 20s of the 20th c., *Piontkovski* put forward a tenet in the Soviet penal law theory maintaining that crime preparation should not be punishable under any circumstance. See *Piontkovski*, Criminal Law, History of Legal Science, *Kudriavtsev* (ed.), 1978, p. 115 (in Russian).
6. For heated discussions in the „Thaw“ period Soviet criminal law over the penalty of crime preparation see *Schroeder*, Das Strafrecht der UdSSR de lege ferenda, S. 37 f.