

The Basis of the Punishment for Attempt and the Concept of Attempt: Construction and Application of Theory of Risk Exportation

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Abstract

The purpose of this article is to reconstruct the basis of the punishment for attempt and to define the concept of attempt from the perspective of the harm principle based on the legal subjectivity. The author argues that the wrongdoing in criminal law means infringement of rights of others. In this vein, the concept of attempt as the realization of such infringement can be defined as “exporting risk from one’s own rights sphere to another’s”. Risk exportation from normative perspective and that from subjective perspective are both necessary for the intentional attempt. Risk exportation from normative perspective occurs, when the offender’s act to harm is irreversible based on the facts that he perceived. Risk exportation from subjective perspective is found by the time that the offender thinks the harm irreversible. Under the normative interpretation, intentional attempt is established when two kinds of risk exportation are concurrent. Even if that is not the case, intentional attempt should be considered established, when the two kinds of risk exportation occur in the context of the same risk. The theory of risk exportation could solve the conflicts among the objective theory of attempt, subjective theory of attempt, and normative theory of attempt.

Keywords: crime of attempt, attempt, subjective theory of attempt, theory of impression, theory of explicit breach of norm, objective theory of attempt, harm principle, theory of risk exportation

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