



**University of Ferrara**  
**Faculty of law**

# **Introduction to Italian criminal law**

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# Structure of the course

- I. Sources and principles of Italian criminal law;
- II. Criminal liability and grounds for excuse according to Italian criminal law;
- III. Sanctioning system and alternatives to detention;
- IV. Italian criminal procedure and enforcement of criminal sentences.

# Sources and principles of Italian criminal law

- General background of Italian legal system
- History of Italian codification in criminal matters
- The main sources of criminal law in Italy
- The general principles of criminal law

# Criminal liability and excuse according to Italian criminal law

- The mental or moral element of the offence (*mens rea*)
- The material or physical element of the offence (*actus reus*)
- The causes of justification and excuse (*scriminanti*)
- Criminal attempt and the participation to the commission of a criminal offence

# Sanctioning system and alternatives to detention

- The so-called “double track system”. Criminal penalties and security measures
- The main species of criminal penalties
- Alternatives to criminal detention in the sentencing and post-sentencing phase

# Italian criminal procedure and enforcement of criminal sentences

- General principles of Italian criminal procedure
- Various stages of criminal law trial in Italy
- The enforcement of criminal sentence and its judicial review

# Methodology

- I) **Statutory law.** Explanation of the most significant legal provisions and principles of Italian criminal justice system;
- II) **Comparison** with the equivalent provisions existing in some of the most important European legal systems. This step is needed in order make you more aware of what the provisions in force in our system are use for;
- III) **Case method.** We will try to solve cases extracted from the case law in order to apply the concepts explained before.

# General Background of Italian Legal System

- **A. The sources of Italian law and the constitutional organisation of Italian republic.**
- **B. The history of Italian codification.**



## **A. The sources of Italian law and the constitutional organisation of the Italian republic.**

- The Constitution of the Italian Republic (1948)
- Form of Government: Republic. Since the Popular Referendum held in 1946



# **A. The sources of Italian law and the constitutional organisation of the Italian republic.**

## **Article I**

**Italy is a democratic Republic founded on labour.**

**Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution.**



# **A. The sources of Italian law and the constitutional organisation of the Italian republic.**

Separation of powers

- I. The Parliament
- II. The Government
- III. The Judiciary

# **A. The sources of Italian law and the constitutional organisation of the Italian republic.**

## **The Constitutional Court**

### **Article 134 Italian Constitution**

*The Constitutional Court shall pass judgement on:*

- controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions;*
- conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions;*
- charges brought against the President of the Republic and the Ministers, according to the provisions of the Constitution.*

## **B. The history of Italian Codification**

- An historical overview. Italy as a unified country (1861).
- The need for new codes of law.
- The new criminal code of the Kingdom of Italy was only enacted in 1889.
- Three regional codes remained in effect (Kingdom of Sardinia; Tuscany; Kingdom of the two Sicilies).

# B. The history of Italian Codification



## **B. The history of Italian Codification**

- The Tuscan Code of 1786 (so-called “Leopoldina”)
- The Tuscan Code of 1853 (reintroduced the death penalty)
- Subsequent amendment and abolition (1859)

## **B. The history of Italian Codification**

The first Italian Penal Code (1889): the so-called “Zanardelli Code”.

The Code incorporated the most relevant principles of the Classical School of Criminal law.

- 1) Proportioning punishment to guilt
- 2) Guarantees of the accused



## **B. The history of Italian Codification**

The most significant features of the “Zanardelli Code”

- 1) Significant reduction in the severity of punishments
- 2) Avoiding consecutive sentences for multiple offences
- 3) Clarifying the grounds on which punishment might be excluded
- 4) Individual differences among offenders

## **B. The history of Italian Codification**

The most relevant tenets of the Positive School of criminal law and criminology (Cesare Lombroso, Enrico Ferri, Raffaele Garofalo)

- 1) Emphasis placed on the offender rather than on the offence
- 2) Social defence and fight against social dangerousness
- 3) Preventive approach and scientific evaluation of the social danger of the offender

## **B. The history of Italian Codification**

Ferri's draft for the general part of the new Italian criminal law:

*Substituting social dangerousness for individual responsibility as a ground for criminal liability*

# General Principles of Italian Criminal Law

- A. Nullum crimen nulla poena sine lege  
(principle of legality)
- B. Nullum crimen nulla poena sine actione  
(principle of materiality)
- C. Nullum crimen nulla poena sine iniuria  
(harm principle)
- D. Nullum crimen nulla poena sine culpa  
(the principle of guilt)

# Nullum crimen nulla poena sine lege (principle of legality)

- Formal legality: No act can be considered to be a crime if it did not constitute a crime according the law in force at the time it was committed
- Substantial legality: every behaviour which proves to be socially dangerous has to regarded as a crime.

Nullum crimen nulla poena sine lege  
(principle of legality)

### **Art. 25 Cost**

*No case may be removed from the court seized with it as established by law.*

***No punishment may be inflicted except by virtue of a law in force at the time the offence was committed.***

*No restriction may be placed on a person's liberty save for as provided by law.*



Nullum crimen nulla poena sine lege  
(principle of legality)

Art. 2 CP

***No one may be punished  
for an act which did not constitute an  
offence according to the law in force at  
the time it was committed***

# Nullum crimen nulla poena sine lege (principle of legality)

The reservation of criminal law to legislation:

- 1) No unwritten sources
- 2) No non-legislative sources



## Nullum crimen nulla poena sine lege (principle of legality)

- Limiting the arbitrary powers of the judiciary
- Limiting the arbitrary powers of the executive
- Exceptions: *the power of the Government to specify the elements of the offence that are already outlined by legislation (Constitutional Court, Judgement n. 26/1966).*

# Nullum crimen nulla poena sine lege (principle of legality)

The allowed sources of criminal law:

- I) Constitutional legislation
- II) Ordinary legislation
- III) Delegated legislation
- IV) Legislative decrees
- V) Government decrees in time of war

# Nullum crimen nulla poena sine lege (principle of legality)

## Corollaries of the principle of legality:

- The principle of reservation to the law
- The principle of the strict interpretation
- The principle of the non retroactivity of the criminal law

The principle of the non retroactivity of  
criminal laws

## **Art. 25 Cost**

*No case may be removed from the court  
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*No restriction may be placed on a person's  
liberty save for as provided by law.*

# The principle of the non retroactivity of criminal laws

## **Art. 2 CP**

*1. No one may be punished for an act which did not constitute an offence according to the law in force at the time it was committed*

# The principle of the non retroactivity of criminal laws

This principle is valid both when:

- 1) a **new offence** is created by law;
- 2) an **existing offence is defined in a different way** as long it results more severe for the offender.

## The principle of the non retroactivity of criminal laws

### “Dog Law”

*“They won't tell a man beforehand what it is he should not do—they won't so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then they hang him for it. What way, then, has any man of coming at this dog-law?”*

Jeremy Bentham, *Truth versus Ashhurs*

# Article 7 ECHR

I. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

II. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the **general principles of law recognised by civilised nations**



# Article 15 ICCPR

I. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

II. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the **general principles of law recognized by the community of nations.**

# **“Nürnberg/Tokyo” Clauses**

**Crime according to “the general principles of law recognized by the community of nations” (Art. 15 ICCPR)**

**Crime according to “general principles of law recognised by civilised nations” (Art. 7 ECHR)**

# The principle of favourable retroactivity

## **Art. 2 CP**

- II. No one may be punished for an act which does not constitute an offence according to a subsequent law; and if the sentence has been imposed, the execution and the penal consequences thereof shall cease.*
- III. If the law in force at the time an offence was committed and subsequent law are different, the law shall be applied the provisions of which are more favourable to the accused, unless a final judgement has been pronounced.*

## The principle of favourable retroactivity

- 1) **Abolition** of an offence Legislation which repeals an incriminating norm applies retrospectively in favour of an accused person. Regardless of whether the accused has already been convicted (*abolitio criminis*);
- 2) The law is only **modified** after the commission of a crime, the most favourable law is applied unless the accused has already been irrevocably convicted.

# The principle of favourable retroactivity

The new law is more lenient when:

- new law abolishes a previous offence;
- new law narrows the scope of an existing offence;
- new law modifies the statute of limitations: when?;
- new law introduces a new attenuating circumstance;

## The principle of favourable retroactivity

The constitutional Court declares a criminal provision illegitimate – what are the effects?

Art. 136 Cost

“When the Court declares the constitutional illegitimacy of a law or enactment having force of law, the law ceases to have effect the day following the publication of the decision”.

## The principle of favourable retroactivity

The law ceases to have effect the day following the publication of the decision – but it's considered deprived of legal force *ex tunc*: since the very day of its entry into force.

What about criminal laws declared invalid?  
Same effects as modifications under article 2 CP.

# The principle of favourable retroactivity

Derogation to the derogation?

## **Art. 2 par. 5 CP**

- 1) Temporary laws
- 2) Exceptional laws



# The non ratification of a decree

I) Acts committed before the enter into force of the decrees

II ) Acts committed during the period of force of the decrees:

- If the provisions of the decree were less favourable
- If law existing previously were more favourable

# Succession of criminal laws in time and changes in the interpretation

- Prohibition of retroactivity for harsher laws vs retroactivity of more lenient laws
- Written law vs judge-made law
- Civil law vs common law – are the two systems converging?
- House of lords (Jones) in 2006
- The rise of «judge-made» law in the civil law countries
- The role of the ECHR and the autonomous notion of «law»

# The interpretation of criminal laws?

- Art. 1 CP the offenses are only the acts which are explicitly defined as such by the law – prohibition of analogy
- Art. 12 of General Provisions on Italian Law, preliminary to the civil code – strict interpretation
- Easy cases (e.g. harassment) and hard cases (e.g. virtual pornography)
- The principles of clarity and legal certainty

# The principle of *Mens rea*

- 1) Historical evolution
- 2) The functions of *mens rea*
- 3) The Constitutional basis of *mens rea*
- 4) The structure of *mens rea*

\* *Mens rea* (i.e. guilty mind) = culpability = moral element of crime

# The principle of *Mens rea*

## Historical evolution

- punishment only on the basis of an act committed by other persons (tort law = criminal law)
- the increasing importance of free will (individual autonomy): *reum non facit nisi mens rea* (Saint Augustine)
- liberal theories and criminal law: the notion of individual autonomy
- individual autonomy as a guarantee for the defendant
- the criticisms raised by the determinists: behaviour is determined by social or biological causes (see Progetto *Ferri*)

# The principle of *Mens rea*

The functions of *mens rea*:

(to answer this question one should preliminarily clarify what are the reasons of punishment?)

- Retributive (or absolute) theories
- Utilitarian (or relative) theories
- Liberal concept of «individual freedom»
- The aim of rehabilitation

# The principle of *Mens rea*

The Constitutional basis of the *mens rea*:

**Article 27 par. 1 Cost**

*Criminal responsibility is personal*

# The principle of *Mens rea*

- **Under Art. 27 par. III Cost.** Punishments may not be inhuman and shall aim at **re-educating the convicted**. There is no room for rehabilitation if one could be convicted on the sole basis of a behaviour that he has committed unknowingly.
- **Under Art. 2 Cost.** Human dignity shall be the focus of the legislature, therefore the freedom of individuals cannot be used as an instrument to pursue aims of general prevention and social defence.
- **Constitutional Court – indirectly – embraced this argument in judgment 24/3/1988 n. 364.**
- Is the penal code compliant with the Constitution: Article 42, paragraph 3 CP, which states that “the law determines the cases in which the event is otherwise charged to the agent as a consequence of his action or omission” = objective (o strict) liability.



# The principle of *Mens rea*

The preconditions to *mens rea*:

- a) “Imputabilità” (art. 85 c.p.)
- b) Awareness of penal law (art. 5)
- c) “Suitas” (art. 42 par. I)

# The principle of *Mens rea*

## Cases of strict liability

“The law determines the cases in which the event is otherwise charged to the agent as a consequence of its action or omission” – Art. 43 c. 2 c.p.

### I. **General part**

Art. 42 c. 3 c.p.

### II. **Special part**

Art. 571 c.p.

Art. 584 c.p.

Art. 591 c.p.

# The principle of *Mens rea*

## The forms of *mens rea*:

- I. Intention (*dolo*) (art. 43 c. I c.p.)
- II. Fault or negligence (*colpa*) (art. 43 c. I c.p.)

# The principle of *Mens rea*

## I. General intention

It is **only** necessary that the agent wants to carry out the fact described in the legal provision.

## II. Specific intention

Besides acting willingly and knowingly, the offender must have a **definite** purpose.

# The principle of *Mens rea*

## **I. Act of impulse** (*dolo d'impeto*)

The criminal decision is taken suddenly and the action is immediately carried out. Ex. a husband murders his wife immediately when he finds her committing adultery.

## **II. Deliberate intent** (*dolo di proposito*)

Deliberate intent falls between an act of impulse and a premeditated act. The Difference between deliberate intent and premeditation is minimal and it is often hard to distinguish between the two. Ex. two people begin fighting in a bar and one of them waits outside to kill the other.

# The principle of *Mens rea*

## III. Premeditation

- **Time criterion:** a significant lapse of time between the idea and its fulfillment, so that the offender may consider the possibility to give up.
- **Ideological criterion:** the persistency and the consolidation of the purpose to commit a crime.

# The principle of *Mens rea*

A further distinction concerns the voluntary component of the intention:

**I. Direct intention** (*Dolo diretto*)

**II. Indirect intention** (*Dolo eventuale*)

# The principle of *Mens rea*

## **I. Direct intention** (*Dolo diretto*)

The offender foresees and wants the event as a direct consequence of its action.

## **II. Indirect intention** (*Dolo eventuale*)

The offender does not want or desire a certain event, however he accepts it as a consequence of its action or omission. Ex. a person who wants to frighten the people by placing a bomb in a square. His intent is only to frighten people however, he also knows or should know it is probable that people could be injured due to the explosion.



# The principle of *Mens rea*

I. The intention to commit **crimes** (“No one can be punished for an act designed by the law as a crime if he has not committed intentionally”).

II. The intention to commit **misdemeanours** (“With regard to misdemeanours, a person shall be held liable for his knowing wilful act or omission whether intentional or negligent”).

# The principle of *Mens rea*

## **Negligence or *colpa***

“A crime [is] negligent, *id est* contrary to intention, when the event, even though foreseen, is not desired by the actor and occurs because of carelessness (recklessness), imprudence, lack of skill, or failure to observe laws, regulations, orders or instructions”

# The principle of *Mens rea*

## The elements of negligence

- I. The author **does not want** to realize the fact
- II. The fact happens because of lack of diligence, recklessness, or unskillfulness or because of the non-compliance with laws, regulations, orders, and instructions.
- III. The **possibility** to avoid the verification of event prohibited by a criminal provision.

# The principle of *Mens rea*

## **I. The lack of will**

### **A. Unconscious negligence**

The event was not even foreseen by the offender

### **B. Conscious negligence**

The event was foreseen but unintended

# The principle of *Mens rea*

## **II. Violation of precautionary rules**

### **A. Generic negligence**

“Carelessness, imprudence, lack of skill”

### **B. Specific negligence**

“Failure to observe laws regulations orders or instructions”

# The principle of *Mens rea*

## **III. Predictability and avoidability**

According to which standard an event is to be considered predictable and avoidable?

A. The particular conditions, states, and positions of an individual (*homo eiusdem conditionis ac professionis*).

B. The evaluation must be made *in concreto*.

# The principle of *Mens rea*

## Beyond the negligence?

**I. Art. 43 c. 1:** a crime is “preterintentional”, i.e. beyond the intention when an act or omission is followed by a harmful or dangerous event more serious than that desired by the offender.

**II. Art. 42 c. 3:** The law defines the cases in which an event shall be otherwise attributed to the offender as a consequence of his act or omission

# The principle of *Mens rea*

## Subjective grounds excluding criminal liability (*scusanti*).

- I. Error on the content of criminal provision (*error in iure*) – **art. 5 c.p.**
- II. Error on a fact which constitutes a crime under the law (*error in facto*) – **art. 47 c.p.**



# The nature and elements of crime

“The code does not define, in a general manner, the essential elements of a crime; rather, the doctrine has done so in its elaboration of the general theory of crime (Teoria generale del reato; *Allgemeine lehre vom verbrechen*)”.

I) **Teoria bipartita** (bipartite theory)

II) **Teoria tripartita** (tripartite theory)

# The nature and elements of crime

## I. Teoria bipartita

a) Objective element

b) Subjective element

\* Causes of justification: negative elements  
of the *tatbestand*

# The nature and elements of crime

## II. Teoria tripartita

**a) Fact** (*fatto*)

**b) Illegality** (*antigiuridicità*)

**c) Blameworthiness** (*colpevolezza*).

\* Causes of justification: illegality

# The nature and elements of crime

## Crimes and misdemeanours

**I) Penalty criteria (art. 17 c.p.)**

**II) Criminological function of the offence**

# Types of punishment and offences

## Penalty criteria (art. 17 c.p.)

The principal punishment prescribed for:

### I) **crimes:**

- a) Life imprisonment (*ergastolo*)
- b) Imprisonment (*reclusione*)
- c) Fine (*multa*)

### II) **misdemeanours:**

- a) Detention (*arresto*)
- b) Amends (*ammenda*)

# The objective element of crime

**A premise:** the principle of materiality  
(*materialità*)

*Cogitationis poenam nemo patitur*

**I) Art. 25 Cost.**

**II) Art. 2 c.p.**

**III) Art. 56 c.p.**

**IV) Art. 115 c.p.**

**V) Art. 42 c.p.**

# The objective element of crime

- I) Conduct**
- II) Event**
- III) Causation**

# The objective element of crime

Conduct:

a) Action

b) Omission

**Action:** is a simple voluntary muscular movement consciously directed to the commission of a crime

**Omission:** is a purely legislative concept comprising a failure to act in those cases in which a legislative command obliges an action.



# The objective element of crime

## Event:

I) Naturalistic theory

II) Normative theory

**Naturalistic theory:** as the effect (whether physical or psychological) of a human action

**Normative theory:** the harm (an injury or peril) of an interest protected by the law.

# The objective element of crime

## **Causation (causal nexus):**

Why is it necessary to prove a causal nexus?

- I) Art. 27 Cost.
- II) Art. 40 c.p.
- III) Offences requiring it explicitly

# The objective element of crime

## The theories of causality:

- I) Theory of equivalence
- II) Theory of adequate causality
- III) Theory of human causality
- IV) Theory of scientific causality

# The objective element of crime

## Theory of equivalence

**Every condition necessary to bring a given consequence is to be regarded as a cause.**

How can we establish if a certain conduct is a condition necessary in bringing about the consequence? The judge should make resort to a process of **mental elimination**, by wondering “Would the event have occurred without a certain action?”

### Limits:

- a) *Regressum ad infinitum*;
- b) Irrelevance of exceptional circumstances.

# The objective element of crime

## Theory of adequate causality

**An action must also adequate to cause the event.**

An action is considered **adequate** when it is **appropriate for determining an event in accordance** with the **experience** deriving from similar cases (*id quod plerumque accidit*).

### Limits:

- a) Narrowing the area of criminal liability;
- b) Theoretical overlap between moral and material element of crime.

# The objective element of crime

## Theory of human causality

**A conduct which he can “dominate by means of his cognitive and voluntary powers”**

The exceptional factors that lead to the causation of the event are not considered as a cause for criminal law. A factor is exceptional when it cannot be foreseen and prevented with the knowledge and the skills of the offender.

# The objective element of crime

## Theory of scientific causality

**The event shall be the consequence of the action according to the most credited scientific knowledge or experience.**

**(Cassazione penale, Sez. IV, 6 dicembre 1990, n. 4793, *Bonetti*)**

- A) Which scientific rule shall apply?
- B) Which degree of probability?

# The objective element of crime

## A) Which scientific rule shall apply?

- Universal rules: rules from which no exceptions are admissible (ex. rule of gravity; rule of thermal expansion)
- Statistical rules (ex. relation between smoke and lung cancer; relation between assumption of *talimodime* and deformations in children)



# The objective element of crime

## **B) Which degree of probability?**

The degree of likelihood required to demonstrate the existence of the causal nexus between the action and the event, can also be quite low, as long as there are no other possible conditions that can be invoked to explain the verification of a certain event.

**(Cassazione penale, SS.UU, 11 settembre 2002, n. 30328, *Franzese*)**

# Causes of justification

The objective grounds excluding criminal liability (justifications or **scriminanti**) shall not be confused with the subjective grounds, like the error, (excuses or **scusanti**) and shall not be confused either with the circumstances which simply prevent the judge from applying the penalty, such for instance art. 649, the (**esimenti**) which are external to the criminal act (for reason not depending upon the blameworthiness of the fact) exclude the penalty.

# Causes of justification

- 1) **Consent of the person entitled to the right** (Article 50 c.p.);
- 2) **Exercise of a right** (Article 51 c.p.);
- 3) **Performance of a duty** (Article 51 c.p.);
- 4) **Lawful use of arms** (Article 53 c.p.);
- 5) **Lawful defence** (Article 52 c.p.);
- 6) **Necessity** (Article 54 c.p.).

# Causes of justification

## Consent of the person entitled to the right (art. 50 c.p.)

The *rationale* of this justification is that a right cannot be harmed if the subject of the right consents to what would otherwise be a criminal offence.

Conditions: (capacity to act; capacity to freely determine and understand his act; etc.);

Limits: Only individual rights, which are protected by law as the **exclusive interest** of the owner (i.e., the so-called disposable rights) can be waived

# Causes of justification

## Exercise of a right (art. 51 c.p.)

- 1) **Sources:** Any legitimate power whether deriving from **law, administrative act, contract, judicial decision, custom.**
- 2) **Condition:** The ownership of the right by the actor.
- 3) **Limits:** The exercise of the right is not without limit but must be in **conformity with the limits inherent** in its source.

# Causes of justification

## Performance of a duty (art. 51 c.p.)

- 1) **Sources:** law or a lawful order of a public authority
- 2) **Liability** of the public officer who has issued an unlawful order
- 3) **Limits** to the liability of the person who has carried out the order

# Causes of justification

## Lawful defence (art. 52 c.p.)

- I) **Assault:** a) danger of a wrongful injury for his own or another's *right*;
  - b) the threat must be *present* and not hypothetical and future.
- II) **Reaction:** a) *necessary*, only way to avoid the aggressor's threatened harm;
  - b) *proportionate* to the attack.

# Causes of justification

## Necessity as justification (art. 54 c.p.)

### **I) Danger of a serious bodily harm:**

- a) Present danger not caused voluntarily by the offender;
- b) Threat for the individual rights.

### **II) The fact committed:**

- a) Proportionate;
- b) Not avoidable otherwise.



# Causes of justification

## Negligent excess (art. 55 c.p.)

It may be that the circumstances, which *prima facie* constitute a justifying cause, are affected by the excessive or erroneous reaction of the actor.

An excessive reaction arises where the limits inherent in a defined justifying cause are surpassed, (e.g. the victim of an assault uses a pistol to defend himself whereas a baton would have been sufficient)

# Forme di manifestazione del reato *Erscheinungsformen des Verbrechens*

- I) **Criminal attempt** (*delitto tentato*)
- II) **Circumstantial crime** (*reato circostanziato*)
- III) **Unity or plurality of crimes**
- IV) **Participation in crimes** (*concorso di persone nel reato*)

# Criminal attempt

**Article 56 c. 1 c.p.** provides that if the offender carries out suitable acts unequivocally directed at committing a **crime** (*delitto*), but the conduct has not been completed or the event has not occurred, **an autonomous crime** called 'attempt' occurs.

From a subjective point of view, the criminal attempt is complete, but from **an objective point of view**, only part of the required conduct has been carried out. As a result, the typical offence is **incomplete**

# Criminal attempt

## Art. 56 c.p.

### A) Objective element:

- I) Action is not complete **OR** the event has not occurred;
- II) Acts carried out by the offender are **suitable** (*idonei*) to endanger a right protected by a rule;
- III) Acts carried out by the offender are **unequivocally** (*in modo non equivoco*) directed to commit a crime;

# Criminal attempt

## Art. 56 c.p.

### **B) Subjective element:**

The rule set forth in Article 42 c. 2 c.p. is relevant. Consequently, 'no one can be punished for a fact provided as attempt if he has not committed it intentionally'. Therefore, criminal liability may arise only if the offender has intentionally committed the criminal attempt. **But which intent?**

# Criminal attempt

## Incompletion of the Offence and Perpetrator's Will

- I) *Intentional/Voluntary withdrawal* (art. 56 c. 3 c.p.) – no punishment as long as the portion of action performed does not amount to a different crime.
- II) *Active withdrawal* (Art. 56 c. 4 c.p.) – the attempt has been carried out but the law provides for a reduction of penalty

# Criminal attempt

## The legally impossible offence

### Art. 49 c. 2 c.p.

The person shall not be punishable if the harmful and dangerous event is impossible because of the unsuitability of the action or the inexistence of its object.

- a) **unsuitability of the action** (complete prognosis on the suitability of the action)
- b) **inexistence of its object** (absolute or relative inexistence?)

# Circumstantial crime

I) Essential elements

II) Accessory element

Although the former are essential for the existence of a crime, **the latter are not** and are known as circumstances which merely affect the seriousness and penalty of a crime.

A fact may be either a constituent or a circumstantial element, depending upon its function. Consequently, a fact may be such as to distinguish one crime from another.



# Circumstantial crime

## A) **Aggravating** circumstances:

as long as they result in an increase of penalty which may be *quantitative* or *qualitative*.

## B) **Extenuating** circumstances:

as long as they result in a decrease of penalty which may be *quantitative* or *qualitative*.

# Circumstantial crime

- **Common effectiveness:** a modification of the penalty up to one third of the entity provided for by the law (see articles 61, 62, 64, 65 c.p.);
- **Special effectiveness:**
  - a) Autonomous circumstances (type)
  - b) Independent circumstances (min-max)
  - c) Special effect-circumstances (more the one third)

# Circumstantial crime

- The **objective circumstances** include: the *nature, object, means, species, time, place*, and any other aspect of the act; the *seriousness* of the *injury* or peril caused by the crime;
- The **subjective circumstances** include: subjective circumstances include: the degree of intention (*dolo*) or negligence (*colpa*); the personal conditions or characteristics of the accused; and the relationship between the accused and the victim.

# Circumstantial crime

Other possible distinctions:

- I) Real and personal;**
- II) Common and special;**
- III) Antecedent, concomitant and successive.**

# Circumstantial crime

## Application of increases or reductions of penalty:

- Base:** the total punishment otherwise applicable; the total punishment resulting from previous incr./red.
- Extent of incr./red.:** not exceeding one third (art. 64, 65 c.p.)
- Limits to increases and reductions:** art. 66; art. 67 c.p.

# Circumstantial crime

## **Generic circumstances or generically extenuation.**

Art. 62-bis c.p. provides that the court may take into account any circumstances, other than those listed in art. 62 c.p., that justify a diminution of the penalty. This provision introduces the possibility of mitigating the penalty as a result of circumstances not expressly contemplated by art. 62 c.p.

# Circumstantial crime

## Concurrence and balance of circumstances

- Where there is a concurrence of several **homogeneous** circumstances (that is, all attenuating or all aggravating circumstances) the increase or decrease in penalty, with certain exceptions, is proportional to the number of circumstances.
- Where, however, the concurrent circumstances are **heterogeneous**, the court decides the prevalence or equivalence of the aggravating and attenuating circumstances. This evaluation by the court is not subject to review.

# Participation in crime

- I) The **differentiated model** under which the liability of participants is graduated according to the different role played by them in the commission of the offence. The different forms of participation are therefore described by the law (StGB; Codice penal)
  
- II) The **model of equal liability**, in which participants are all considered equally responsible for the crime committed (Codice penale)



# Participation in crime

Requirements (art. 110 c.p.):

- 1) plurality of persons;**
- 2) commission of a principal offence;**
- 3) a causal nexus between the activity of the accessory and the commission of the event prohibited by the law;**
- 4) awareness and will to play a role in carrying out the fact**

# Participation in crime

## Plurality of persons

- **Principal**
- **Co-author/Joint author**
- **Accessory.**

# Participation in crime

## **Commission of a principal offence**

According to Article 115 c.p., participation requires the existence of a principal criminal offence, ie., a crime covered by law. Consequently, in order to have participation in a crime, the law requires a principal offence be carried out by the principal, namely the author in a strict sense. Because a crime can occur both when there is a complete crime and an attempted crime, participation is possible both in offences and attempts.

# Participation in crime

**Causal nexus between the activity of the accessory and the commission of the event prohibited by the law:**

- I) condicio sine qua non (e.g., an essential/necessary part) of the offence**
- II) sufficient to have an influence on the accomplishment of the crime.**

# Participation in crime

## **Awareness and Will to Participate**

Criminal responsibility for participation does not arise if the principals and the accomplices do not intentionally, (i.e., knowingly and willingly), cooperate in order to achieve a common criminal result.