Insurance Fraud: A Material and Intellectual Harm

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Abstract

Insurance fraud is widespread, yet it attracts little public disapproval. Unlike several European legislations, the Moroccan legislator has not created a specific offence for it in either insurance law or criminal law. Insurance fraud is therefore prosecuted under the general offence of swindling in Article 540 of the Moroccan Penal Code, a provision inspired by former Article 148 of the Swiss Penal Code. Its broad and flexible wording gives the judge considerable discretion.

This article examines insurance fraud as a twofold harm, material and intellectual. The first part analyses the material element of the offence. A simple lie is not enough: there must be fraudulent means, namely false assertions, concealment of true facts or the cunning exploitation of another's error, supported by external facts that give the lie credibility. The deception must also lead the insurer to hand over funds or valuables to its own detriment.

The second part addresses the intellectual element. It distinguishes intent from motive and intent from purpose, and highlights the special intent required, namely the pursuit of unjust enrichment for oneself or a third party. It also considers how to identify attempted insurance fraud and how to tell voluntary withdrawal apart from interruption by external circumstances.

The study concludes that swindling has a dual nature. It is an offence against property and also against the freedom of consent, which is particularly significant in the insurance contract, a contract of utmost good faith.

Keywords: insurance fraud; swindling; Article 540 of the Moroccan Penal Code; fraudulent manoeuvres; deception; concealment; special intent; unjust enrichment; attempted fraud; good faith; insurance contract; comparative criminal law.

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Introduction :

"Because of the vast number of fraudulent acts, the various forms they take and the varied circumstances that accompany them, a double trap arises. The language of the law must be broad enough to encompass all that the legislator wishes to achieve, yet precise enough to indicate clearly the limits at which he intends to stop. This is the concept we are trying to circumscribe, based on a definition adopted by the Moroccan legislator, which is notably generalized and flexible. In reality, the broad and considerably extensive terms of the repressive notion of fraud result in intimidation, insofar as they grant the judge a considerably enlarged power, in a complex legal atmosphere that compels him to "torture the text of the law" when he feels that the guilty party must be "punished at all costs". But the formula does embrace swindling in its exact notion of an offence against the patrimony or 'fortune of others'[1]".

"This chaos is exacerbated, mainly in the insurance field, by the jurisdiction attributed to civil courts to rule on these fraudulent acts, as well as by provisions that made repressive actions subsidiary. There can be no doubt that the aim is nevertheless to punish an obvious incrimination and to repress fraudulent maneuvers commonly adopted in civil transactions.

Another form of fraud is, of course, insurance fraud, which attracts little more public disapproval than tax fraud, which in many cases is just a clever trick played on the insurance company[2]. Although less horrific than blood crimes, less spectacular than terrorism, less worrying than major environmental damage, fraud, and even more so insurance fraud, is far from exciting the public and the press[3]. However, several European legislations were more decisive in qualifying insurance fraud within a general swindle provision, following the example of the German legislator who gave a not inconsiderable place to certain attempted insurance swindles stipulated in its article 265 StGB[4] which punishes anyone who, with a view

[1] E-A. GARÇON, « Code pénal annoté », T. I. p. 1293, n°48.
[2] M. J LAFON, « De l'institut de criminologie de Paris » , Revue pénitentiaire et de droit pénal , 1974 , p . 354
[3] J. L BACHER, op.cit. p. 1.
[4] StGB, Deutsches Strafgesetzbuch

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to committing a fraud, sets fire to property insured against fire, or causes a ship insured as such, or whose cargo or freight was insured, to sink or run aground[1].

"However, insurance fraud in Morocco has attracted little interest among specialists, given that it occupies an indispensable legal position within every offence against property. In other words, although the Moroccan legislator has omitted to specifically incriminate insurance fraud in a legal provision relating to fraud, he admits that criminal insurance fraud is established within the repressive provisions of common law, insofar as this incrimination has never been introduced into our insurance law."

"Today, the contemporary definition of fraud has undergone a metamorphosis: the extension of the qualification of fraud has resulted from the transformation of the foundation of the offence. This transformation does not seem to have been clearly underlined until now. It is crucial in our field of offences against property, that fraud has has evolved into an offense against the freedom of consent[2]. Threfore, It seems more appropriate to say that the offence of fraud has a dual nature, due to the duality of the social values it protects. Fraud is both an offence against property and an offence against freedom of commitment by agreement[3].

"Article 540 certainly makes clear the scope of the incriminations it covers. The various possibilities that can be derived from it show the legislator's clear intention to draw inspiration from its Swiss counterpart, by virtue of the wording of former article 148 of the Swiss penal code[4]. On the other hand, the various Swiss authors do not derive the same number of legal conditions from former article 148: some consider cunning as an independent element, while others only mention it in

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[1] « Les nouveaux codes pénaux de la langue allemande, la documentation française », Coll. Codes Pénaux Européens, T. Paris1981, p. 505

[2] R. OTTENHOF, « Le droit pénal et la formation du contrat civil »,. ss,dir. H.SOLUS, préf. H. BALAISE. LGDJ, n°82, p.80

[3] R. MERLE et A. VITU « Traité de droit criminel : droit pénal spécial », par André VITU. Ed. CUJAS. PARIS 1982. P. 1883n°2305

[4] Art 148 C.P.S : « celui qui, dans le dessein de se procurer ou de procurer à un tiers un enrichissement illégitime, aura astucieusement induit en erreur une personne par des affirmations fallacieuses ou par la dissimulation de faits vrais, ou aura astucieusement exploité l'erreur où se trouvait une personne et aura de la sorte déterminé la victime à des actes préjudiciables à ses intérêts pécuniaires ou à ceux d'un tiers sera puni de la réclusion pour cinq ans au plus ou de l'emprisonnement. La peine sera la réclusion pour dix ans et l'amende si le délinquant fait métier de l'escroquerie.

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connection with deception[1]. It goes without saying, then, that the law punishes certain types of behaviour aimed at identifying victims by using fraudulent means to hand over goods. There is no doubt that an analysis of provision 540 of the Penal Code quickly reveals the flexibility and generality of the elements constituting the crime of swindling, of which false assertions, concealment of true facts and cunning exploitation of the error of others constitute the material element of the crime, in addition to the essential elements qualified by criminal law as external material elements intended to give force and credit to the lie[2]. Moreover, it is commonly accepted that criminal fraud is characterized not by the seriousness of the means of deception, but by the result determined by the offender.".

"Paradoxically, intent to defraud does indeed form the basis of the offence. However, culpable intent is a notion that is difficult to define on its own. An intentional act is not simply one that goes beyond clumsiness or negligence; it is an act committed consciously, with the desire to bring it about. The incriminating result must be consciously and voluntarily pursued[3]."

I- The materiality of the act

The law determines that fraud can only be committed by specific means. Not just any form of fraud can be accepted. A fraudulent means must be adopted by the insured, likely to produce an effect on the victim such as to vitiate his or her consent to the delivery of objects or valuables[4]. In other words, the act can only be characterized as fraudulent by one of the procedures set out in article 540 of the French penal code. Fraud consists, first and foremost, of deception designed to cleverly mislead a person, either by making false statements, concealing true facts, or cleverly exploiting a person's situation of error, and thus determining him or her to act in a manner prejudicial to his or her pecuniary interests or those of a third party. Furthermore, the strict interpretation of the text should lead the judge to look

[1] J- L. BACHER « L'escroquerie à l'assurance privée : étude pénale et criminologique », éd. PETER LANG. P.U.E, 1995, P. 33
[2] A. EN NAFKHAOUI, « Précis du droit pénal spécial: étude approfondie et analytique : du Code pénal, des apports de l'avant-projet portant modification du Code pénal, de la jurisprudence »,éd. SOMADIL, 2016, p. 190
[3] E. WAGNER, « La notion d'intention pénale dans la doctrine classique et la jurisprudence »,th.univ. 1976, ss. Dir. A. VITU, p. 7
[4] M. Albert CHAVANE « De l'escroquerie », jur – cl pén ; escroquerie, C. Pén. art. 405. 3, 1952, n°34, p.6.

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cumulatively for the use of one of the means referred to and the fact that these means deceived the victim. There is a risk, however, that in order to establish the material element, the judge will be content to note, for example, that a false name has been used, without investigating whether deception, to the detriment of the victim, has clearly been incurred.

A- Deception as the basis of fraud

The seriousness of the means of deception is a key concept in insurance fraud. French legal doctrine has established an eminent precision to avoid any illusion that might cover this concept. The exclusion of simple lies as a means of fraud is a constant in criminal law. Simple lies, even if they are repeated and put down in writing, cannot constitute the fraudulent maneuvers characteristic of fraud if they are not accompanied by any external fact, material act, staging or intervention by a third party intended to give them force and credibility. The authors do, however, admit the difficulty of distinguishing between punishable lies and simple lies, a distinction which, according to GARRAUD, constitutes one of the most delicate issues in the contemporary conception of fraud[1]. ZÜRCHER stated in his 1908 explanatory memorandum: "A lie only becomes a swindle when the liar has made an effort to make it impossible, or at least more difficult to verify his statements"[2].

From the outset, lies, regardless of their variety, are inherently characterized by an intent to deceive[3]. This deception is manifested through procedures commonly known as fraud. Article 540 of the French Penal Code lists three hypothetical cases of deception which are sufficient to establish the guilt of the swindler. On the other hand, in the absence of external facts giving them credibility, simple allegations, however cunning or disingenuous, do not fall within the scope of article 540 of the penal code. Fraudulent maneuvers require machinations, a combination of facts, an arrangement of stratagems, and the organization of ruses. In a word, a staged performance designed to lend credibility to the lie and deceive third parties. A staging that will give the fraud a tangible character and reveal it in a concrete

[1] Y. MAYAUD, « Le mensonge en droit pénal », éd. l'Hermès, th . univ. Lyon, 1976, n°255 p. 173
[2] Traduction Gautier p. 154 in j. Graven « L'escroquerie en droit pénal suisse, DER BETRUG IM SCHWEIZERISCHEN STRAFRECHT », 1947, p. 14.
[3] Y. MAYAUD, op. cit, n°,265, p : 179 .

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manner[1]. Excluding simple lies as a general mode of committing fraud, fraud is only carried out through the use of legally determined means. Therefore, not every lie is reprehensible, and a simple lie cannot be reprehensible under a specific provision[2]. Consequently, whether qualified or simple, article 540 c.p. could only incriminate falsehood through the interference of facts that are apparent in all their facets. Moreover, fallacious assertions (a) combine the two aspects of mystification. It may be different in the case of concealment of true facts (b), which seems less reckless and less aligned with the principle of strict interpretation of penal law, as the quality of the facts is already true[3]. It is only necessary that by these facts the agent has obtained an illicit advantage. Article 540 indicates that the legislator aimed to punish all maneuvers with the effect of misleading or cunningly exploiting others' errors (c).

a– The fallacious claims

Only a similarity between two wills, Moroccan and French, of the two repressive provisions [4], capable of highlighting the notion of fallacious assertions. A first interference gives rise to both a qualifying duality and the constructive use of misleading procedures in order to incriminate established facts. Firmed up and reinforced by various external elements, to give credence to the lie, this punishable conception of fraudulent maneuvers is subtly distinguished from simple lying. The swindler uses extrinsic evidence to substantiate his false allegations. Garçon asserts that "the production of written documents is a fraud when they corroborate these false allegations and give them an external consistency and a more complete probative force, providing them with an authority independent of the personal assertions of the perpetrator of the fraud. Written documents do not constitute a fraudulent maneuver when they are presented as emanating from the perpetrator of the fraud, but a fraudulent maneuver appears on the contrary if the document emanates or appears to emanate from a third party whose testimony supports the lie"[5].

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[1] F. GOYET,. « Précis de droit pénal spécial», 5°éd p : 546
[2] Y. MAYAUD, op.cit, n°259, p. 176
[3] BOCCARA, op.cit, n°75, p. 71
[4] Art 540 du code pénal marocain.
[5] GARÇON, op cit. n° 26 et 27

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"In short, a pure and simple lie, even if supported by a written document, seems unequivocal and clearly condemnable, particularly when the proof of the document's authenticity is fraudulently established, indicating a manipulative maneuver. Criminal law does not punish lying unless it is accompanied by aggravating circumstances[1]. As a result, the only kind of credulity that is criminally protected under fraud is that which is induced by elements of strong persuasion or credibility[2]. This credibility may be either extrinsic or intrinsic to the lie, being either the creation of the swindler or merely exploited by them[3]. As long as credibility is the result of an improvised lie, of which the elements have no persuasive force in themselves, it is extrinsic to the lie – constructed credibility. It is different if the liar uses elements which in themselves have real persuasive value, in which case credibility is intrinsic[4]. A. CHAVANNE claims that « fraudulent maneuvers are susceptible to infinite varieties. But their common trait is to corroborate the lie by calling upon an element external to the agent, detachable from the lie itself. This external element will undoubtedly be the work of the agent, and will be used by him, but the victim will not be fooled by the mere fact of having believed the lie"[5]. Then a staging becomes necessary.

b– The concealment of true facts

"Concealment in criminal law" involves looking at the semantics of the word to understand how the law uses it. This is not an easy task, given the different meanings and connotations of the word, which evolve with society. Concealment is a concept used in law and jurisprudence. It is defined as the deliberate concealment or transformation of information or an offence, with the aim of defending personal interests or harming the interests of others or the public interest[6].

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[1] M. HÉRIARD « De la distinction du faux en écriture et de l'escroquerie »,th, univ. Bordeaux, 27 nov 1901,. P. 19
[2] Y.MAYAUD, op. cit, p. 197. N° . 294
[3] A. CHAVANNE, « Le délit de l'escroquerie et la politique criminelle contemporaine », cit in . Y. MAYAUD, n° 295, p. 197
[4] Y. MAYAUD, op. cit, p. 197 n° 295
[5] A. CHAVANNE « Le délit de l'escroquerie et la politique criminelle contemporaine » cit in . Y. MAYAUD, n° 296, p. 197
[6] M. CARRASCO-DAËRON,« La dissimulation en droit pénal », préf. M. Corinne, 2016, p. 66

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Concealment can therefore be seen as a safeguard whose virtues deserve to be appreciated. In the spirit of Moroccan legislation, the concept of concealment corresponds not only to a positive act ("usage", "emploi") provided for by various laws, but also to a negative act. Of course, mere silence does not constitute criminal concealment. Certain "fraudulent" acts or facts are in themselves easy to thwart, and do not present sufficient danger to alarm society and call for criminal prosecution. This solution would therefore be contrary to the legal definition of fraud, which requires the use of genuinely deceptive procedures. In the absence of genuine deception, this incrimination is not intended to punish individuals who simply abuse their victims' credulity to extract funds[1]. There is no doubt that our provision narrows the definition of swindling in relation to the French concept and other criminal laws

Following the example of our legislation, concealment of true facts is stipulated in article 231 of the Kuwaiti penal code. Indeed, anyone who, through deceit, cunningly misleads or keeps a person in a state of error, with a view to obtaining funds for himself or for a third party, is guilty of fraud, whether the deceit is oral, written or by sign.

Fraud in Kuwaiti criminal law is defined as an offence that can only be established by the use of fraudulent maneuvers, such as the illusion of the existence of imaginary facts, the concealment of real facts, the manipulation of the truth, the presentation of a false project, the distortion of its reality or concealment of its existence, the creation of a false expectation of gain, the presentation of a falsified or concealed debt instrument, the disposal of money which the disposing party does not have the right to dispose of, or the use of a false name or capacity. These actions constitute intentional acts intended to deceive or mislead, and may be considered criminal offences in the Kuwaiti legal context[2].

This "genuine deception" or "cunning deception" can result from both positive and negative activity on the part of the agent. The swindler may be guilty by

[1] V. MALABAT « Droit pénal spécial », 9ème éd. DALLOZ.n°800, P.488.

[2] Version originale de l'article 231 du code pénal Koweitien : « يعد نصبا كل تدليس قصد به فاعله ايقاع شخص في الغلط او ابقائه في الغلط الذي كان واقعا فيه، لحمله على تسليم مال في حيازته وترتب عليه تسليم المال للفاعل او لغيره، سواء كان التدليس بالقول او بالكتابة او بالاشارة ويعد تدليسا استعمال طرق احتيالية من شأنها إيهام الناس بوجود واقعة غير موجودة، أو إخفاء واقعة موجودة، أو تشويه حقيقة الواقعة، وذلك كالايهام بوجود مشروع كاذب أو تغيير حقيقة هذا المشروع أو إخفاء وجوده، أو إحداث الامل بحصول ربح وهمي، أو إيجاد سند دين لا حقيقة له، أو إخفاء سند دين موجود، أ و التصرف في مال لا يملك المتصرف حق التصرف فيه، أو اتخاذ اسم كاذب او انتحال صفة غير صحيحة

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omission as well as by commission. He can mislead by acting, speaking, writing, producing a document, acquiescing to gestures, but also by refraining, concealing or even remaining silent when he would, in some cases, be obliged to speak[1].

In all circumstances, criminal law incriminates human behavior, conduct or attitude in a given situation. But this behavior is not always active, it can also be passive[2]. Moroccan criminal law stipulates that fraud by deception requires the swindler to perform both positive and negative acts in order to deceive the victim[3].

In our criminal law, as in the case of Swiss legal doctrine, the issue of swindling involving the concealment of facts through silence poses two questions that have been explored. Firstly, there is the question of whether abstention alone can serve as a means of inducing error[4]. Secondly, there is the inquiry into what determines the duty to provide information, which would allow criticism of the swindler for their silence[5]. Specifically, does omission appear to be characteristic of the crime of fraud, especially in the context of land insurance?

Silence is most often combined with a way of being or doing things designed to inspire confidence and deceive. For example, a person who continues to receive a pension for illness or the consequences of an accident after recovery, fraudulently concealing this recovery from the insurance company, may not only be forced to repay the sums wrongly received, but may also be liable to criminal sanctions[6].

c– Misleading the other

error is the sine qua non of the result of deception. Under Art 540 cp, it may consist of an erroneous representation or ignorance of an important fact[7]. The error

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[1] J. GRAVEN « L'escroquerie en droit pénal suisse ''DER BETRUG IM SCHWEIZERISCHEN STRAFRECHT », études de droit criminel Suisse, publiées par O.A. German. 1947. VERLAG FÜR RECHT UND GESELLSCHAFT AG. BASEL. P.P. 21,22

[2] R. MERLE, A. VITU, « Traité de droit criminel, problèmes généraux de la science criminelle, droit pénal général ».7ème éd.T.1,1997. P. 610

[3] A. NAFKHAOUI, « Précis du droit pénal spécial », op.cit, p. 191

[4] Schubarth Martin , « Kommentar zum schweizerischen Strafrecht » trad, « commentaire sur le droit pénal Suisse », Partie spéciale , 2ème vol . , Art . 137-172 , Berne , 1990 . p.141

[5] J- L. BACHER « L'escroquerie à l'assurance privée : étude pénale et criminologique », éd. PETER LANG. P.U.E, 1995 p. 37

[6] J. GRAVEN « L'escroquerie en droit pénal suisse ''DER BETRUG IM SCHWEIZERISCHEN STRAFRECHT », études de droit criminel Suisse, publiées par O.A. German. 1947. VERLAG FÜR RECHT UND GESELLSCHAFT AG. BASEL. P. 29.

[7] P. NOLL « Schweizerisches Strafrecht, » partie spéciale. Zurich. P. 197.

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may be no more than an inaccurate or incomplete representation of the facts, and in this respect there is no need to distinguish between discrepancy and ignorance[1]. However, it is not possible to mislead a person simply by transforming reality; on the contrary, it is necessary to act on the person's presentation of reality[2]. In fact, this is the solution adopted by the Swiss legislature. Error is what drwas the limits of fraud and contains it within its own sphere[3]. Deception and fraud have in common that they require deception as one of their constitutive elements, which is expressly mentioned in the text of the offence. The commission of these offences, therefore, necessarily presupposes that the victim has been deceived and his consent vitiated by an error[4].

Following the example of Swiss criminal law, the former art. 148, the Moroccan Penal Code, despite art. 540 c.p., apprehends the exploitation of error by perceiving conditions for the error to be decisive of the fraud. Firstly, the error in question cannot be arbitrary; it must be one that the swindler was obligated to rectify either through specific legal mandates or contractual agreements[5]. Secondly, the relationship between the victim (dupe) and the swindler need not be one of special obligation. In words, swindlers must actively engage in exploiting their victims' errors, rather than merely passively benefiting from them[6].

Professor Houmad illustrates the concept of cunningly exploiting error using the field of personal insurance as a case study. He describes a scenario where an individual, having committed a crime and seeking to evade punishment, discloses their crime to a third party under the pretense of seeking a solution and exoneration in exchange for a sum of money[7]. This act, while not constituting swindling due to the absence of the primary element of the offense, still satisfies the subjective

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[1] Ph. GRAVEN P. 12 cit. in. J- L BACHER p. 45
[2] Ibid
[3] J. GRAVEN, op.cit.,p. 16.
[4] V.LARGUIER, P.CONTE. « En principe la consommation de l'infraction qui signale le début de la prescription ; or, dans cette hypothèse, c'est la formation du contrat, et partant, l'exécution de la tromperie, qui consomme le délit. En réalité, les juges cherchent ici à faciliter la répression, en fixant le point de départ du délai au jour où le contractant a pu découvrir la tromperie et a donc pu la dénoncer comme ils le font dans d'autres cas »,V. P.CONTE, P. M. DU CHAMBON, « Procédure pénale », Armand Colin, Paris, 4ème éd., 2002, n°165.
[5] PH. GRAVEN op. cit. p. 13
[6] NOLL PETER. Op. cit. p.313.cit in Jean Luc Bacher .p. 47
[7] عبد الوهاب حومد : القانون الجنائي المغربي القسم الخاص ص: 291

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element of the offense if the perpetrator intended to exploit the error of the third party at the time the agreed funds were transferred.

In the two previous cases of false assertion and concealment of true facts, the victim was deceived by the swindler. Here, the victim is deceived, but the swindler takes advantage of this to achieve the same ends. However, the swindler must not simply take advantage of the other party's error, but must behave in such a way as to constitute "exploitation" under criminal law[1]. For example, an insurance intermediary, after a legal dispute with his insurance company, continues to conclude contracts, taking advantage of policyholders' credulity, and resorts to clearly fraudulent actions to extract funds and exploit them for his own personal benefit

It is the cleverly adverb « that allows us to set the reasonable limits between non-punishable exploitation and criminally reprehensible exploitation of the error of others[2]. This problem relates more generally to that of improperly known offences of omission, or of « offences of commission by omission »: can one be guilty of an offence that is not a simple offence of disobedience simply by remaining silent[3] ?

The practice of exploiting error sheds light on the reasons why the legislator requires positive behavior on the part of the dupe. In fact, it is not enough to mislead the victim. There must also be a delivery of funds through the use of fraudulent maneuvers.

B-The result of the deception underlying the fraud

a- The object of deception

The legislator has another requirement for the offence to be considered committed. Let's assume that the first element has been achieved and consider the second. It is clear that, by one of the incriminating means, the deception has established a false belief in the mind of the victim, who has been induced to respond in favor of the perpetrator by surrendering something of value, which is an indispensable element in the commission of the offence.

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[1] J. GRAVEN, op.cit. P. 25.
[2] J. GRAVEN, op.cit. P.P. 26.27
[3] V. CLERIC , « Betrug verübt durch Schweigen » , Zurich 1918 , BADER , Das Delikt des Betruges etc., p. 40 ss et MELI , Zum Betrugsbegriffe , RSJ 1928 , 24 , p.321.

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Otherwise, the offense would not be constituted. The French Court of Cassation has applied this principle on occasion. It determined that an individual who set fire to their own property, intending to collect an insurance claim, could not be prosecuted for attempted fraud. This was because they had not yet made any claim to the insurance company nor taken any steps to collect compensation. The mere possibility of receiving compensation did not suffice. While they could be charged for arson, attempted fraud did not apply[1]. In contrast, the delivery of the item, typically associated with theft, is a crucial element for the offense of fraud[2]. However, the offense can be committed before the delivery's full consequences unfold. This scenario arises, for instance, when obtaining an insurance contract that may lead to damage to another person's assets. The act of swindling occurs immediately upon obtaining such a subscription through fraudulent means, regardless of the nature, duration, or complexity of the subsequent operations and their consequences[3]. Although complex in certain cases, fraud is an instantaneous offence, because it is consummated as soon as the thing is handed over[4].

In contrast to other legislations, our criminal law considers fraud to be committed as soon as the swindler appropriates the movable property of another, whether or not this appropriation takes place in the presence of an already completed offence. However, in various legislations, the offence is only committed when the perpetrator, through fraudulent maneuvers, induces the victim to hand over the thing. For example, article 655 of the Lebanese Penal Code states that any person who, through fraudulent maneuvers, induces another person to hand over movable or immovable property, or securities bearing a pledge, release or interest, and then seizes them, shall be liable to a prison sentence of between six months and three years and along with a fine of between five hundred and five thousand pounds.

Fraudulent maneuvers are actions designed to deceive the victim into believing in the existence of a fictitious project or to instill hope of gain or fear of harm. This can involve fabricating a lie that the victim believes, possibly with the unwitting

[1] Crim . 27 mai 1959 ; Bull. n ° 282 in M Georges LEVASSEUR « Cours de droit pénal spécial »., licence 4ème année. 1962-1963. P. 350.
[2] R. VOUIN « Précis de droit pénal spécial »,T. I. D. n°49. P.58.
[3] Ibid
[4] Ibid

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assistance of a third party, resulting from a situation created by the criminal or from which they benefit. Also encompassed within this definition is the unlawful disposal of movable or immovable property belonging to another, without the legal right or capacity to do so, or the exploitation of such rights to extort money through the use of pseudonyms or false attributes to deceive and manipulate. Attempting to commit this offense incurs the same penalty[1]. In contrast, Egyptian criminal law, despite Article 336 of the Penal Code, holds that individuals who succeed in obtaining money, offers, bonds, deeds of acquittal, household effects, or luggage by attempting to deprive a third party of all or part of their fortune, using deceptive methods that create the illusion of a false project or fact, raising hopes of an illusory gain, or misleading others into paying a sum acquired fraudulently, are subject to imprisonment.

The existence of an invalid bond, or a falsified document of acquittal, or by disposing of a fixed or mobile asset that he does not own.

Of movable or immovable property of which he is not the owner and of which he does not have the right to dispose, or by taking a false name or profession. False name or profession.

However, attempted fraud without carrying out the act is punishable by detention for a period not exceeding one year ».

On the other hand, under the old French legal code, case law assumed the existence of prejudice once deception was established: "Prejudice, which is a constituent element of the offense, is established when rebates or payments have not been freely consented to, but have been extorted by fraudulent means"[2]. However, a decision rendered by the Criminal Division has cast doubt on this jurisprudence. In its ruling of April 3, 1991, it acquitted a defendant who, following the accidental breakage of his windscreen, submitted an invoice to his insurance company for the installation of a new windscreen. In reality, the invoice was false, as the insured had arranged with the garage to install a second-hand windscreen and

[1] L'article 655 modifié par le Décret- loi n°112 date du 16 septembre 1983 et la loi 239 date du 27 mai 1993.
[2] Crim.,7 mars et 30 octobre 1936,n°196 et 590 ; D., 1992,p.400,note MASCALA ; RSC,1992,579,obs.BOUZAT. in Thierry GARÉ « droit pénal spécial, personnes et biens ». 7ème éd. Paradigme. 2022.p. 164.

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had used the price difference for various bodywork repairs. The Criminal Division determined that the offense of fraud had not been committed, as the insurer was contractually obligated to indemnify the insured. Despite the existence of a fraudulent maneuver (the false invoice), it concluded that "in the absence of any prejudice, one of the elements of the offense of fraud is lacking"[1].

"Obviously, the main challenge in insurance delivery lies in discerning its nature. Moreover, if such delivery is deemed unlawful, the question arises: when should measures be taken to address it, and what are the detrimental implications of the delivery?"

b- The nature of the delivery

From Article 540 of the French Penal Code, it can be inferred that committing fraud entails causing harm to the victim's assets, particularly of a pecuniary nature. In the absence of such harm or the intent to cause harm, the maneuvers and the transfer of the item are merely circumstances lacking objective criminal reality[2]. Therefore, the offense is completed by the transfer. Fraud thus involves fraudulently obtaining a benefit. This transfer must concern any type of security, as any security can be defined as an object of property. However, the law does not define these terms, neither movable nor immovable property, nor tangible or intangible assets. The formula, being very general, appears to encompass all property, whether tangible or intangible, movable or immovable. Thus, it must apply to any object, leaving the determination of this notion to the judges responsible for ruling on the nature of the transfer, and this determination is unquestionably sovereign.

However, the surrender must relate to tangible or intangible property with pecuniary value. Whereas the incrimination and repression of theft tend to protect the right of ownership in itself, no matter what the property to which it relates, even if it has no patrimonial value. On the contrary the thing of which the delivery has been made must, for there to be fraud, have a certain value, an appreciable value in money[3].

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[1] Crim.3 avril 1991, Bull.crim.,n°156, D., 1992,p.400,note MASCALA ; RSC,1992,579,obs.BOUZAT.
[2] GARÇON op. cit. n°. 107.
[3] G. LEVASSEUR « Cours de droit pénal spécial »., licence 4ème année. 1962-1963. P. 351.

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However, the delivery must involve tangible or intangible property with asset value. While the incrimination and punishment of theft tend to protect the right of ownership itself, regardless of the property's value, even if it lacks pecuniary worth. For fraud to occur, the surrendered item must possess a certain value, appraised in monetary terms.

What about service? Is it incriminated in the insurance field?

In this case, we are faced with two conceptions. On the one hand, the view that services do not constitute the crime of fraud[1]. For example, a policyholder entering an insurance company to solve his problem by convincing the security guard that he has an appointment with the head of an insurance department, even if the means employed aim at obtaining a service lacks the element of the delivery. On the other hand, one concept expressly targets "service fraud"[2]. Consequently, an insured person who, by providing confidential access codes to customer services, impersonates the legitimate policyholder and changes the membership number, thereby inducing the insurance company to provide him with an insurance compensation discount, could be considered to have committed fraud.

The service provided must have a pecuniary value, which excludes, for example, a testimonial[3]. No provision of the penal code explicitly delimits the need for funds, securities or property of any kind. In truth, funds and securities are sums of money, whether in cash or in the form of a cheque or transfer order. Property of any kind includes all tangible items such as furniture, jewelry, paintings, books, merchandise, etc. For law enforcement to be possible, it is essential that the object obtained has a certain patrimonial value.

Bringing "interest" and "object" together has inspired some pertinent reflections, moving out of the realm of theory with the altercation that arises over the meaning of "interests." A suitable approach, which brings together and takes advantage of the word "interest" for a practical and coherent analysis of the "object," was considered. Do we accept, when "interest" signifies the object, that there is no need to

[1] عبد الوهاب حومد، القانون الجنائي المغربي ، القسم الخاص، مس، ص301
[2] مبارك السعيد بن القائد، القانون الجنائي الخاص،م س، ص257
[3] J. PRADEL et M. DUNTI-JUAN « Droit pénal spécial : droit commun – droit des affaires »,. 8ème éd. Cujas. 1er août 2020. n°904.p.597

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distinguish between objects with material or venal value and those with only moral value?

In 1921, the Iranian legislator passed a law entitled "Transfer of Another's Property." This law addresses "property" without making any distinction between movable and immovable assets. It considers as a fraudster anyone who transfers to a third party another's property, whether movable or immovable, either in full ownership or usufruct, knowing that the property belongs to another. It also considers as a fraudster the buyer who is aware of this fact. Following the legislator, Iranian jurisprudence has also declared that there is no evidence that the property targeted by the 1921 law does not concern immovables[1].

II-The intellectual structure of the insurance fraud

A- The Undeniable Criteria of Insurance fraud

Policyholder fraud has always been, and remains, a major concern for insurers. And when you consider that it can go as far as the murder of a tramp whose body is passed off as that of a deceased policyholder, it's understandable. However, fraud can take many other forms, more banal and everyday, whose common characteristic is to deceive the insurer with blatant lies that profit the perpetrators, to the detriment not only of the insurer but also of the community of other policyholders subject to the same risk. Such behavior is immoral[2].

However, insurance law is, according to an article that has remained famous both for the personality of its author and for the sharpness of its language, "fundamentally unequal" due to the disproportion between the parties involved. This assertion is statistically indisputable, even if the weaker party is not always the one we assume, whether in insuring certain major industrial risks or in concluding certain group insurance policies. In the latter case, it is especially important to consider the interests of at least the members, if not the policyholder[3].

It is undeniable that any swindle implies, in addition to a material element defined by a remittance, a moral aspect defined by the incriminating text, namely

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[1] Cass. 1937.n°.8067, 4071. ABDOH. P. 199n°848. In V. ABOLFATH « L'escroquerie et le délit d'émission de chèque sans provision, dans le droit pénal iranien »., th. Univ. Paris. 21 juin 1957. P.60.
[2] G. DURRY, « la place de la morale dans le contrat d'assurance »., Risques 1994,n°18.p. 49
[3] G. DURRY, op. cit. Risques 1994,n°18.p.51,52

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article 540 of the Penal Code. This provision stipulates that the offence must have been committed "with a view to procuring or procuring a third party", which clearly indicates an intentionality manifested by an intentional fault. The notion of intention is therefore difficult to grasp, as it must be linked to other elements in order to be fully understood. An intentional act is not simply one that goes beyond clumsiness or negligence; rather, it is an act committed in full awareness with the desire for its accomplishment, a conscious and voluntary pursuit of the result[1]. In this context, swindling undoubtedly implies general fraud, since the awareness of deceiving the victim is established. The act of cleverly misleading through deceptive assertions, concealing true facts or exploiting an error, inevitably acts in bad faith. For this reason, an insured who, in good faith, makes an inaccurate statement in the absence of proven bad faith, cannot be held liable. Knowing what you are doing means knowing the consequences of your actions.

Fraud requires the perpetrator to have acted with the aim of procuring unjust enrichment for themselves or a third party. This is the objective pursued by the swindler. The advantage that must compensate for the prejudice they intend to cause their victim[2]. Consequently, it is undeniably necessary to distinguish between motive and intent (a), as well as between intent and purpose (b).

a- Intention and motive

The loyalty required of the parties sometimes even leads us to say that the insurance contract is one of "extreme good faith"[3]. Morality and insurance, or today ethics and insurance, have always been the subject of in-depth study[4].

Moral considerations play a significant role in the legal framework governing the individual relationship between insurer and policyholder, which constitutes an insurance contract. The legislator, the supervisory ministry, and the courts have sought, on one hand, to balance the contract by protecting both the insurer against fraud by the insured and the insured against abuse of power by the insurer; on the

[1] E. Wagner « La notion d'intention pénale », op.cit.,p. 7.
[2] J GRAVEN,. Op.cit,.p. 43
[3] M. PICARD et A. BESSON « Traité général des assurances terrestres »., T.I. LGDJ, 1938, n°110. P.214.
[4] J. KULLMANN dir.sc.ouv. et Evgeny GOLOSOV SEC géné réd « LE LAMY ASSURANCES « contrat d'assurance, assurances de dommage, assurances de personnes et intermédiaires d'assurance »., éd 2022. n°27. P.15

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other hand, to prohibit, or retroactively annul, contracts or clauses that appear to favor operations or acts contrary to morality[1].

Fraud is an intentional crime, and mere negligence is not sufficient to constitute fraud in the absence of intent. This intention or guilty conscience must relate not only to the prejudice resulting from the delivery of the thing, but also to the fraudulent means used to obtain it. There is no fraud if the insured, acting in good faith, believes he or she is entitled to the false name or capacity, has faith in the seriousness of the chimerical enterprise, or does not intend to appropriate all or part of another's fortune. On the other hand, it is irrelevant what motive inspired the action, as the legitimacy of the aim does not make the illegitimacy of the means disappear. The offence is committed by the creditor who secures payment by fraud[2]. This last condition, in addition to constituting the moral element of any offence and consequently necessary to the existence of the incrimination, is formally required by the text. Thus, the means provided for by the law and employed with the aim of deceiving the victim imply by themselves the intention to defraud. Indeed, for the offence of fraud to exist, the agent must have acted with the knowledge and intent to cause prejudice to the person making the remittance or to defraud the fortune of another. Case law has consistently required that this condition be met. Culpable intent is the first element of the offence of swindling; otherwise, the offence does not exist[3].

It's important to distinguish between intention and motive, and avoid confusing them. Motive refers to the interest or feeling that motivated the action. While intention is a necessary element of the offence, motive is irrelevant, and criminal law does not take into account the motives that prompted the offender. While intent must always be culpable and fraudulent for an offence to be established, motives can be almost opposite. The perpetrator may act under the influence of a variety of motives and feelings, using fraudulent maneuvers to appropriate another's fortune out of greed, or collecting funds for charity. Whatever the motive, an act committed with culpable intent remains reprehensible and punishable. However, it

[1] G. DURRY, op.cit, Risques 1994,n°18
[2] R. VOUIN « Précis de droit pénal spécial »T. I. Dalloz. n°51. P.59.
[3] V. ABOLFATH « L'escroquerie et le délit d'émission de chèque sans provision, dans le droit pénal iranien »., th. Univ. Paris. 21 juin 1957. P.63

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should be noted that motive plays an important role in determining whether the perpetrator can benefit from the mitigating circumstances provided for in the penal code[1].

On the other hand, the challenges of proving the psychological aspect, namely the presence or absence of inner will, and the repressive imperatives that underlie and justify criminal law, prompt the penal authority to blur the distinction to ease the application of sanctions. However, intellectually, nothing could be esier to achieve. Introducing the concept of "foresight" suffices: a straightforward logical deduction justifies the syllogistic inference of intention from the existence of foresight.

In most cases, proof is straightforward, as intent is clearly demonstrated by the means employed. The French Court of Cassation has acknowledged that "everyone must open their eyes where it is required of them. One who lightly succumbs to a lie, where it would have been easy for them to protect themselves with a minimum of attention, cannot seek the protection of the criminal judge. A simple false indication that is easy and, in a way, normal to verify is not sufficient to constitute a criminally reprehensible act, unless the deceived party has omitted verification precisely because they were diverted from it by the cunning or artifice of the perpetrator, or if verification could not, according to the circumstances, normally be expected[2]". Indeed, intent is distinct from motive, which is irrelevant to the commission of the offense. Fraud exists even if the motive is not criminal[3].

b–The intention and purpose

The motives behind all actions are emotional, but they are not necessarily conscious. On the contrary, they are often partly, or even largely, unconscious. An unconscious goal, on the other hand, is conceptually inconceivable, since the goal (Zweck , scopo , fine) represents the result towards which the author tends through his action. It is therefore a noetic phenomenon, not an affective one. The goal is the finality, while the motive is the source of the act. The difference between these

[1] V. ABOULFATH. op.cit. 64-65
[2] J. GRAVEN, op.cit.,1947, p. 15.
[3] Com 15 déc.1943 D 1945-131 note, Donnedieu DE VABRES . 10 jan 1947.gaz Pal 1947-1- 137. JCP 1948 II-4474, 18 juill 1975. Gaz Pal 1975-é-661. In F. SAUVANT « L'erreur en droit pénal », th. Univ. LILE. Janvier 1997. P. 61.

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two notions is demonstrated by the fact that one and the same goal can correspond to a variety of motives[1]. In this respect, it is important to remember that motive is irrelevant, and as soon as fraudulent maneuvers or a false capacity have been used to obtain certain things, there is fraud even if the purpose of the action was laudable[2].

B – Establishment of a committed offence

a – The requirement of special intent

The notion of fraud, which is a purely legal concept based on psychology, differs from that of motive and purpose. Motives constitute the creative cause of fraud, i.e., the psychic factors that give rise to the will or acceptance of the objective accomplishment of the crime. Fraud is, in turn, the direct cause of the act. As the psychic content of fraud corresponds to the objective elements laid down by law for each crime, it is always the same for each type of crime ("Tatbestand"). However, the motives for a crime may vary and cannot be prescribed by law. Moreover, intent is, by its very nature, always conscious, whereas motive can be unconscious. Although the final aim also differs from fraud, the two notions nevertheless have one thing in common: their noetic (intellectual) nature. The final aim and fraud is, therefore, always conscious. However, whereas fraud stops at the punishable act, the final aim goes beyond it. In general, the punishable act is simply a means by which the guilty party seeks to achieve their final aim. The content of fraud is precisely defined by the law in each case; however, its aims, which may vary, are ignored[3].

It is worth noting that fraud is an offense that demands a particularly evident intent[4]. Primarily, fraud necessitates a general intent: the awareness of deceiving others. This is typically straightforward to establish[5]. For instance, an insurance agent who cunningly deceives a policyholder by presenting false information, concealing true facts, or exploiting a mistake on the victim's part to induce actions detrimental to their financial interests or those of a third party, unmistakably acts in

[1] A. YOTOPOULOS-MARANGOPOULOS « Les mobiles du délit : étude de criminologie et de droit pénal »,. Préf. PROF BENIGNO DI TULLIO. LGDJ. 1973. n°10.p.23.
[2] M. Georges LEVASSEUR « Cours de droit pénal spécial »,. Licence 4ème année.1962-1963. P.365.
[3] Alice YOTOPOULOS-MARANGOPOULOS, op.cit, pp.107.108.
[4] V.ABOLFATH, op.cit, P.64
[5] E. DREYER « Droit pénal spécial »., éd LGDJ. 2020.n°696.p401.

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bad faith. Neminem cum alterius detrimento fieri locupletiorem, or, in other words, no one can enrich themselves at the expense of another[1]. Proof of such intent only diminishes in case where the agent has deluded themselves by exploiting their victims.

Indeed, fraud not only requires general intent like any other offense but also special intent. This entails not only being aware of committing an unlawful act but also intending to commit it as an offense and intending to cause harm to the victim through this act[2]. The public prosecutor must be able to demonstrate that the agent sought to achieve both the immediate and final results necessary for the commission of the offense. The agent must have intended to deceive the victim in order to persuade them to hand over a good or provide a service. Consequently, this involves the use of fraudulent maneuvers and the intention to gain an illegitimate advantage from the delivery of the coveted item.

This proof is derived from the established causal link between the delivery and the deception that caused it[3]. Special intent in fraud is widely accepted, but a small portion of the doctrine remains hesitant about this notion. Some criticize its superfluous nature compared to general intent, which is already sufficiently defined as the will to commit the offense as defined by the law. According to R. BERNARDINE, "these two notions, in fact, cover one and the same reality". Indeed, according to *GARÇON's* formula, intention is the will to commit the offense as determined by the law, and the guilty party's awareness of undertaking the legal prohibitions; thus, special intent is necessarily included in the notion of general intent, or vice versa. Admitting special intent is tantamount to asserting, without being able to demonstrate it, that there is an offense in the mere act of abstractly violating the law, which is inconceivable. Delinquents in intentional offenses always seek to achieve the conduct or result forbidden by the repressive text, rather than abstractly violating the penal law. Thus, general intent and special intent are one and the same[4].

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[1] H. ROLAND et L. BOYER « Adages du droit français » 4ème éd. Litec.n°241.p. 475
[2] V. ABOLFATH, op.cit. P.64
[3] E. DREYER « Droit pénal spécial »., éd LGDJ. 2020.n°696.pp 401.402.
[4] R. BERNARDINI « « Droit pénal spécial : principaux crimes et délits contre les personnes et contre les biens », éd. Gualino, v.1, 2000,

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However, jurisprudence generally accepts that fraud can occur even when the tradens, the person handing over the item, is not its owner, so this argument would not be entirely decisive [1]. In any case, intent must be assessed at the moment of employing deceptive tactics and delivering the item. If the swindler subsequently returns the fraudulently obtained goods, this action only amounts to active repentance, which must be considered by the criminal courts when determining the penalty[2]. Thus, fraud is only committed if the perpetrator of the deception knowingly and voluntarily misled their victim or exploited their error, both with the intention of causing harm and with the intention of securing a pecuniary or financial advantage for themselves or a third party. This special form of intent, namely the pursuit of unjust enrichment, should not be confused with the motive of greed, which is not a constituent element of the offense but is indispensable for its commission[3]. Although the texts are silent on this point, it is generally accepted that one of the constitutive elements of fraud is linked to the intention of the perpetrator. Legal doctrine emphasizes this psychological element, requiring the intentional nature of the deception. Jurisprudence is characterized by the intention to deceive the co-contractor with the aim of inducing him to conclude a legal act[4].

The perpetrator of an offense is only the individual whose physical activity or inactivity produced the offense. This approach does not mean that the perpetrator is answerable for his actions in a purely objective manner. It means that authorship is linked to acts of execution that materialize a guilty thought. This guilty thought can only be taken into account once it has been expressed in an act [5].

"The perpetrator of the fraud is the person who personally carries out the deception that determines the handover. Where applicable, the fraud will be attributed to co-perpetrators, each of whom has personally and decisively carried out all or part of the fraudulent procedures [6]. The personal interest of the perpetrator

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[1] M-G. LEVASSEUR « Cours de droit pénal spécial »,. Licence 4ème année.1962-1963.p. 366
[2] A. LEPAGE et H. MATSOPOULOU « Droit pénal spécial »., Thémis droit. 2015. n°727.p.512.
[3] J. Graven, op.cit, p. 44
[4] E. DREYER « Droit pénal général » ;. 6ème éd. LexisNexis 2021.n°1034.p.824
[5] H. MATSOPOULOU et C. MASCALA « Le lamy droit pénal des affaires » ;. éd.2022. sec. géné. réd. Annabelle REVERDY.n°359.p. 145.
[6] Cass . crim . , 15 mai 2008 , nº 07-87.228 , RGDA 2008 , p . 1042 , note Fortis E. in Jérôme KULLMANN dir.sc.ouv. et Evgeny GOLOSOV SEC géné réd « LE LAMY ASSURANCES « contrat d'assurance, assurances de dommage, assurances de personnes et intermédiaires d'assurance »., éd 2022. n°813. P.333.

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is not essential. In one case, for example, the deputy manager of a carpentry agency took the initiative of adding to the list of goods damaged by the storms of December 1999, certain items that had been broken by employees at his request. The fact that the beneficiary of the insurance indemnity was not himself, but the company, was irrelevant[1]. On the other hand, when the insured is a legal entity and the fraudulent declaration is made by an employee, it has been ruled that the former is not exonerated from liability for the actions of its employee, since the latter acted during the time and on the occasion of the work entrusted to him by his employer, which implies that he did not act outside the scope of his duties. Nonetheless, the insurer has a liability action against the employee at fault."[2]

The existence of a delegation of authority may establish that the person concerned acted in good faith, thereby exonerating him or her. However, he remains liable if he has nevertheless taken part in the offence.

b- Identifying attempted insurance fraud

Criminal thinking is a psychological movement over which we have no control. It is a temptation[3]. An offence cannot be evoked without some physical action on the part of the offender; however, two conceptions seem to be demanding. Either the execution is complete, which constitutes a committed offence, or it only reaches a certain degree of realization, which is commonly referred to as an attempt.

The criminal will thus escapes any sanction, even from a religious or moral point of view, because it presupposes no fault and involves no responsibility. Resolution is, together with the conception of the crime, the definite will to commit it (voluntas sceleris). As long as this conception and resolution remain locked in the conscience, there can be no question of punishment, since the criminal will is still unknown to social power[4]. Attempted insurance fraud is also punishable, but differs

[1] Cass . 2º civ . , 16 avr . 2015 , n ° 14-14.573 RGDA 2015 , p . 286 , note Kullmann J. in J. KULLMANN dir.sc.ouv. et Evgeny GOLOSOV SEC géné réd « LE LAMY ASSURANCES « contrat d'assurance, assurances de dommage, assurances de personnes et intermédiaires d'assurance »., éd 2022. n°813. P.333.
[2] E. DREYER « Droit pénal général » ;. 6ème éd. LexisNexis 2021.n°1034.p.824
[3] H. MATSOPOULOU et C. MASCALA « Le lamy droit pénal des affaires » ;. éd.2022. sec. géné. réd. Annabelle REVERDY.n°359.p. 145.
[4] Cass . crim . , 15 mai 2008 , nº 07-87.228 , RGDA 2008 , p . 1042 , note Fortis E. in Jérôme KULLMANN dir.sc.ouv. et Evgeny GOLOSOV SEC géné réd « LE LAMY ASSURANCES « contrat d'assurance, assurances de dommage, assurances de personnes et intermédiaires d'assurance »., éd 2022. n°813. P.333.

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from actual fraud in that the indemnity has not been given. Moreover, the fact that the insurance guarantee is not intended to cover the claim in question does not prevent conviction for attempted fraud, since this fact is a circumstance beyond the control of the accused[1]. The comparison between an attempt and the commission of an offence is often made, with the perpetrator of a punishable attempt generally incurring the same penalties as the person who actually commits the offence. However, this assimilation is not complete, as the attempt is generally considered less serious than the commission of the offence. This is why an attempt to commit a felony is always punishable, whereas an attempt to commit a misdemeanour is only punishable in the cases provided for by law, and there is no such thing as an attempt to commit a contravention[2]. In addition, between mere criminal intent, which is not punishable, and the actual commission of the offense, which is always punishable, there exist preparatory acts, the initiation of execution, and completed execution, albeit without achieving the intended result (attempted offense or impossible offense)[3]. It is therefore necessary to determine how an interrupted attempt is punished and at what stage criminal activity falls under the purview of criminal law.

Article 114 of the French Penal Code states that any attempt to commit a crime, manifested by the beginning of its execution or by clear acts leading directly to its commission, is treated as a completed crime and punished as such, provided that it was neither suspended nor failed due to circumstances beyond the perpetrator's control.

The attempt only begins with the execution. The acts that precede this moment are not punishable for what the agent intended to achieve. The classic distinction between the two categories of acts is therefore marked by the "beginning of execution"[4].

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[1] Cass . 2º civ . , 16 avr . 2015 , n ° 14-14.573 RGDA 2015 , p . 286 , note Kullmann J. in J. KULLMANN dir.sc.ouv. et Evgeny GOLOSOV SEC géné réd « LE LAMY ASSURANCES « contrat d'assurance, assurances de dommage, assurances de personnes et intermédiaires d'assurance »., éd 2022. n°813. P.333.
[2] R. GARRAUD « Traité théorique et pratique du droit pénal français »., T. premier. 3ème éd. Recueil Sirey. 1913.n°227. p. 480.
[3] Ibid
[4] J. KULLMANN, dir sc l'ouvrage et Evgeny GOLOSOV. Scr géné réd « Le lamy assurances : contrat d'assurance, assurances de dommages, assurances de personnes et intermédiaires d'assurance » ;. éd 2022.n°812. p. 332.

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Nonetheless, Italian law avoids any legal reference to the commencement of the offence when it refers to punishable attempt. The difficulties linked to the distinction between preparatory acts and commencement of execution, therefore, also seem to be set aside[1]. Article 56 of the Italian Penal Code sets out the concept of an "adequate act", carried out in an "unequivocal" manner. This raises difficulties similar to those encountered in other legislations.

The German legislator also combined the two concepts, objective and subjective, in the 1975 reform. Paragraph 22 of the Penal Code now requires an act which, according to the perpetrator's prediction, is likely to lead directly to the commission of the offence [2].

But we cannot consider only the nature of the act itself, without relating this act to the circumstances and the aim pursued by the agent. In fact, there are two categories of acts of execution: those which consist in the actual fact of the offence, and those which consist in facts close to the offence, constituting the beginning of its execution. The former alone leave no doubt as to the agent's intention. they are unambiguous (to use Carrara's expression). the latter are less definite in character, equivocal and must be reconciled with this intention, which the judge must first ascertain [3].

The nature of the attempt essentially involves a connection between what has been done, and a criminal result that has not been obtained. It is obvious that the closer the acts performed are to the result, the less doubtful the perpetrator's intention and the more obvious the demonstration of his criminal intent [4].

Voluntary withdrawal, which is effective in the sense that it eliminates all liability from the attempt, should not be confused with active repentance, which occurs after the offence has been committed and is inoperative [5].

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[1] Ph. BONFILS et M. GIACOPELLI « Droit pénal général » 3ème éd. CUJAS.n°180.p.119.
[2] B. BOULOC « Droit pénal général », 27ème éd. Dalloz 2021.n°251.p.245
[3] R. GARRAUD, op.cit,.n°228. p. 483.
[4] N. HUSTIN -DENIES et D. SPIELMANN « L'infraction inachevée en droit pénal comparé » ;. Préf. Christiane HENNAU- HUBLET. Univ Catholique de LOUVAIN. BRUYLANT. BRUXELLES. 1997. P.85.
[5] Cette disposition énonce « Commet une tentative d'infraction celui qui, selon sa prévision, est sur le point de réaliser son élément constitutif », in « Nathalie HUSTIN -DENIES et Dean SPIELMANN, op.cit,. pp.83-84.

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The voluntary withdrawal of the perpetrator is likely to put an end to any prosecution. However, determining whether a claim has been voluntarily withdrawn can sometimes pose challenges, especially in cases of fire or theft insurance fraud. In such instances, the policyholder may withdraw the claim because the situation did not unfold as expected. For example, if the insurance company hesitated or indicated plans for certain investigations, it is at this juncture that the individual no longer pursues compensation[1].

Is it therefore a case of voluntary withdrawal on the part of the insured, or is it extrinsic events that have prevented him from pursuing their fraud?

In such cases, the court may impose a lenient sentence, or even waive the penalty altogether, but it cannot conclude that no offence has been committed[2].

This refers to a condition traditionally linked to the subject matter, or more precisely to a classic expression used to reflect the terms of the law, according to which the failure of the attempt must result from "circumstances beyond the control of its perpetrator"[3].

One might think, of course, that it's less serious to stop along the way than to go all the way, but that there is nonetheless evidence of a certain guilty intent in the attitude and especially in the acts previously performed, which would justify a mitigated sanction, but a sanction nonetheless[4].

Unlike withdrawal, which occurs prior to the commission of the offence, active repentance, which occurs afterward, does not have any effect on the legal consequences of the act; however, it does not erase the criminal nature of the act[5].

At the end of the evolution, the criminal will is repressed even if the act by which it is expressed remains without effect[6]. Under the terms of article 117 of the French Penal Code, "Attempt is punishable even if the intended goal could not be achieved due to a factual circumstance unknown to the perpetrator". There can be no dispute

[1] R. GARRAUD, op.cit,.n°228. p. 490.
[2] R. GARRAUD, op.cit,n°228. p. 482
[3] W. JEANDIDIER « Droit pénal général »,. 2ème éd. DOMAT/ DROIT PRIVÉ. Montchrestien 1991.n°219.p. 248
[4] M. Georges LEVASSEU, op.cit, .p. 370
[5] F. DESPORTES et F. LE GUNEHEC « Droit pénal général » ; 6ème éd. ECONOMICA. 1er septembre 2009.n°454.p.414
[6] Y.MAYAUD « Droit pénal général »., PUF .7ème éd mise à jour juillet 2021.n°265. p. 323

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that an attempt is punishable whenever it is conceivable, without going beyond defining the nature of the offence."

The justification for eliminating attempt charges for all offences may lie in the fact that, since by hypothesis, the offence has not been committed due to circumstances that can in no way be invoked in the perpetrator's defense, guilt remains the same[1].

[1] M- G BRIÈRE DE L'ISLE « Cours de droit pénal général » ;. D.E.U.G. 1ère année. Les cours de droit. P. 203.

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