DEGREES IN THE COMMISSION OF CRIME

Many acts may be done from the moment when the ‘intention’ is formed in the mind of the criminal till the moment when it materializes.

Acts that have **just begun** and that are punishable under criminal law are called inchoate offences. They may be a preparatory act (where such preparation constitute an offence), a criminal attempt or another inchoate offense.

- The material element of the crime may result in a completed or incomplete offence.

Preparation:

- Criminal law punishes “overt acts” and not mere intentions. A criminal intent, no matter how immoral it may be, is beyond the grip of criminal law until it is manifested by external conduct.
- The requirements of Art. 23 imply that a mere criminal intention does not in itself constitute a crime and is not punishable.
- Various phases normally precede acts. The phases of decision and initial planning (within the realm of thoughts of the criminal) are mental states that do not involve exterior acts.
- The phase of preparatory act is said to have begun From the moment these phases develop into “external conduct” that aims at the commission of a crime,.
- However, not every preparatory act is punishable.

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- For example, a person who has planned to rob a store may buy a pistol, survey the most "appropriate" time of action and arrange various facilities.
- Such preparations apparently involve external conduct. Yet, it is difficult and unfair to punish such acts because we cannot be certain about a person's criminal intent unless the prospective criminal himself tells us.
- This uncertainty is inevitable because preparatory acts are **"remote" from the ultimate harm** and **equivocal** as regards criminal intent, and thus unable to prove "an unlawful design" and the determination to carry it out.
- Most Criminal Laws including Ethiopian Criminal Code do not in principle punish preparatory acts. Preparatory Acts are defined under Art. 26 of the Criminal Code of Ethiopia as those acts which are merely designed to prepare or make possible an offence, by procuring the means or creating the conditions for its commission.

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- As you can remember , MaE is an essential ingredient in constituting crime ...
- Behaviors **cannot be considered to constitute the material element** of the crime unless they are proximate and definite that the offence is likely to be committed.
- This can be further explained by the following examples shown hereunder:
- Mr.X, having determined to kill Ms.Y and having reflected his intention to his friend, decides to use a poison and, he went to the market and buys poisonic substance.
- Mr.X cannot be said to have satisfied the material element of the crime for homicide because it is not clear for what purpose is the poison bought as buying of poison may have different purposes: it could be used for killing rats or killing human beings.
- Since it could be used for the either of harmful or innocent purposes, there is **no way of telling** with reasonable certainty that the poison will be used for evil purposes. The buying is, therefore, equivocal and ambiguous.

Legal Effects Of Preparatory Acts:

Article 26 of Criminal Code reads:

- ***"Acts which are committed to prepare or make possible a crime, particularly by procuring the means or creating the conditions for its commission are not usually punishable; however, such acts are punishable where***
- ***a) In themselves they constitute a crime defined by law; or***
- ***b) They are expressly constituted a special crime by law owing to their gravity or the general danger they entail".***
- Punishing preparatory acts is therefore an exception than a rule under Ethiopian criminal law.

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- Yet the criminal code has a mechanism of precautionary measures. The Criminal Code has a mechanism of precaution against preparatory acts where a person behaves or is likely to behave in a manner which threatens peace or security of the public or citizen (see Art. 141).
- In such cases dangerous articles are seized and the person who poses a threat is required to enter into recognizance (የመልካም ጠባይ ማረጋገጫ ዋስትና).
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- There are two situations where ***preparatory acts*** are punishable.

  Where the Preparatory Acts Constitute a Crime in Themselves (Art 26/a):

- A person who buys a gun as a preparatory step towards homicide is punished for the completed "petty offence" of retaining a gun without license (Arts. 808, 809) even though he is not punishable for his preparatory act; the act of keeping a gun without a license itself is a petty offence.
- Unlicensed possession in itself constitutes

Where the Preparatory Acts Constitute a “Special Crime” Owing to Their Gravity (Art 26/b):

- Certain preparatory acts are expressly constituted a special crime by law owing to their gravity or the general danger they necessarily bring upon the society. For example, material preparation of offences against the state (Art. 256, 257), preparing a mutiny or seditious movement (Art. 300) and preparing machinery and means of counterfeiting currency (Art. 371) are expressly stated to constitute special crimes.
- This is so b/c “in these instances …. A mere attempt might have consequences of such seriousness (civil war, rebellion, counterfeiting currency) that it must be prevented …… at least earlier than is usually possible.
- Preparation , Including [Even under such cases], is punishable only when it has reached such an advanced stage and is close to an attempt that there is **no doubt as to the purpose of the arrangements** made and as to the willingness of the person who made them, to carry them further if he is given the chance of doing so.

Attempt

- Attempt is the second degree in the material element of the crime. It is a substantial but unsuccessful effort to commit a particular offence.
- It is a willful effort but without success.
- Attempt includes three most important requirements to exist that include: intent, overt act, and failure to achieve the result.
- Attempt obviously implies more than preparation.
- **Overt Act**: This goes with the known principle of Penal Law that it does not punish mere thoughts.
- A person, therefore, can be held liable criminally if he/she manifests his/her intent by some overt conduct (open deed) tending to the execution of his/her intent.

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- There is of course an act or movement towards the commission of an offence in both attempt and preparation.
- Nevertheless, Attempt requires an act more than preparation.
- The stage of acts towards the commission of the offence **shall reach at a point of no return**. That is, the act shall be a step towards the commission of the crime or it has to be in part execution of the intent, or a direct movement towards the commission of the offence, or the commencement of the execution.
- There is, however, a problem of drawing a line between preparation and attempt. Accordingly, some tests have been utilized by the common law courts. These include: the proximity approach, the probable distance approach and the equivocally approach.

- Intent: An act to constitute an attempted offence shall be preceded by purely internal mental process, which begins with the thought of executing an offence and ends with the decision to commit it, but which does not manifest itself by any overt act. The convictions of attempt rests upon the believe that "Voluntas reputabitur pro facto- the intention is to be taken for the deed.
- Hence, whatever a person does towards the commission of an attempted offence, he must do it intentionally. i.e. Art. 58(1) of the Penal Code shall be met.
- Attempt, therefore, requires a purposeful behavior. A person can be said to have attempted an offence when he **purposefully acts to accomplish** what he has originally intended to commit.

- In connection to this, it has been said that the intent in the mind covers the thing in full; the act covers it only in part. Accordingly, negligent attempt is inconceivable as the person in such case does not desire the consequences.

The intention requirement and the demarcation line of an attempt

- Attempt involves intended consequences w/never the offence under consideration requires the achievement of result. A negligent attempt is in fact unimaginable.
- One is said to have attempted an offence w/n he begins to commit the offence. As stated earlier, preparation to commit an offence doesn't amount to beginning the execution of the offence.
- But it is indeed difficult to draw a precise demarcation point b/n preparation and the beginning of executing the offence. As holmes

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- If a person starts a journey to murder his target victim we may say that he is in preparatory Phase. When is then the prospective offender is said to have begun the commission of the offence? Is it when he arrives at the would be victim's premises? When he faces the victim? when he raises his gun? When he aims at the victim when he pulls the trigger?
- Holmes suggests that the nearness of the danger, the greatness of the harm and the apprehension felt by the accused person can determine the line of demarcation between preparation and attempt.
- When a man buys matches to fire a haystack, or starts on a journey ….. To murder at the end of it**, there is still a considerable chance that he will change his mind** before he comes to the point. But when he has struck the match or cocked and aimed the pistol, there is usually little chance that he will not persist to the end, and that danger becomes so great that the law steps in.

- Cr law doesn’t give a clear-cut formula w.r.t demar line for attempt b/c the subjective condition of the prospective offender and the objective conditions of the particular situation may lead to varying conclusions.
- In spite of such difficulties, criminal law provides various tests for a reasonable and pragmatic demarcation line. The ff tests have emerged to determine the point at which the criminal attempt consummates.
- Last act – an A occurs at least by the time of the last act.
- Phy prox test - the defendant’s conduct need not reach the last act but must be proximate to the completed crime.
- Dangerous Prox test- an A occurs w/n the defendant’s conduct is in “dangerous proximity to success”, or when an act is so near to the result that the danger of success is very great.
- Indispensable element test – an A occurs w/n the D has obtained control of an indispensable feature of the criminal plan.
- Probable desistance test- an A occurs when the D has reached a point where it was **unlikely that he would have voluntarily desisted** from his effort to commit the crime.
- Unequivocality test- an attempt occurs when the person’s conduct, standing alone, unambiguously manifests his criminal intent.

- Acc to the last act test, an attempt murder by shooting doesn’t occur until the D pulls the trigger of the gun. Under the PPT, however, the D’s conduct need not reach the last act but it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct mov’t towards the commission of the offence after the preparations are made. Under the physical proximity test, robbery, for e.g. can be considered if the accused has a weapon in his hand and has his victim in view and can immediately proceed to rob her, absent external factors (such as the intervention of the police)

- *Read*
- The Ethiopian Criminal Code defines attempt in Art. 27/1 Para 1, as the intentional act of beginning to commit a crime and thus renders the point of commencement necessary.
- The second paragraph of the provision states what is meant by the act of beginning to commit an offence.
- It reads:

"The crime is deemed to be begun when the act performed clearly aim, by way of direct consequence, at its commission".

- Here the terms 'clearly and direct" require careful analysis.

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- The term "clearly" is intended to mean in an unequivocal manner. An act unequivocally aims at a desired harm where the doer's criminal intent and determination clearly or unequivocally aim at the completion of crime. If an act directly aims at its consequence, the final act is no more remote.
- A given act normally manifests two things namely:
  a. Intent (the doer's subjective state of mind)
  b. The acts' material (objective) proximity or remoteness to the intended consequence.
- The word "... clearly" refers to the doer's subjective state (unequivocal intent) and the phrase "by way of direct consequences" can logically be presumed to apply to the **objective location** of an act in the path towards the desired result.

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- The purpose of Art 27 is to punish danger (not necessarily concrete) before it crystallizes into harm. The material proximity of a give danger is relative.
- The phase of buying a gun for the purpose of murder, for e.g. doesn't prove unequivocal intent & is definitely remote from the desired result. On the contrary, the act of putting ones finger on the trigger and aims at a person apparently renders intent unequivocal and the harm imminent.
- The act of buying a gun is typical act of preparation & putting ones finger on trigger is punishable incom attempt.
- But certain acts that fall b/n these phases are controversial.

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- ወሳን ምእራፍ ለሁሉም ሰወ እኩል መሆን አለበት
- የመጸጸት እድል አለው የሃላ ታሪኩ መልካም ባህሪይ የሆነ
- ደጋጋሚ ወንጀለኛ ከሆነማ ወሳን ምእራፍ እስኪደርስ መጠበቅ ተገቢ አይደለም ነጻ ማዉጣት ወንጀል የመፈጸም ቁርጠኝነት
- በሌላ በኩል ቁስ-አካላዊ ቅርበት የህጉን መስፈርት ወደ-ጎን መተው የለብንም ከመጨረሻው ድርጊት ራቅ ያለዉን ሁሉ መቅጣትም የለብንም
- ስለዚህ የሃላ ታሪኩና ባህሪው ለወንጀሉ መፈጸም ካለው ቅርበት ጋር መጣጣም ሚዛን መምጣት አለበት።

- Although imminence of real harm is an essential criterion, it should not be taken as an absolute requirement,
- as long as act under consideration is proximate enough (under the Ds circumstances) to the desired result and if it, in effect, proves unequivocal intent and determination, we can say Att exists.
- The subj consi is thus pervasive, b/c it is the cornerstone of the sub test (unequivocal intent and determination) and the obj test of mat proximity to the Ds ultimate act.
- This is so b/c our CC has sub inspiration, of course, with regard for the obj test of remoteness and proximity.
- Thus, sub and obj tests (in combination) can be carefully utilized to distinguish Att from preparatory acts, although drawing a clear-cut demarcation line is virtually impossible.

Kinds of Attempt

- Basing on the 'reason' for the failure to achieve the intended result attempts can be classified into three categories:

  "Incomplete Attempt":

- If the accused chooses not to do **or is prevented from doing the last act of the crime**, the attempt is said to be incomplete.
- Article 27... Attempt (1) Whoever intentionally begins to commit a crime and does not pursue or is unable to pursue his criminal activity to its end, or who pursues his criminal activity to its end without achieving the result necessary for the completion of the crime shall be guilty of an attempt. The words "... do not pursue ... his criminal activity to its end" in Article 27 define "incomplete attempts" because of **voluntary withdrawal**.
- For example, an accused aims at a person, touches the trigger and then changes his mind is said to have voluntarily withdrawn. Article 28/1 gives due credit to an offender who renounces the pursuit of his criminal activity by allowing reduced punishment (Art. 179), free mitigation (Art. 180) "if circumstances so justify" or no punishment "if the renunciation was prompted by honesty and high motives".

- The part of the provision that reads, “… or is unable to pursue his criminal activity to its end”, on the other hand, **indicates an incomplete attempt because of external interventions**, that is outside the volition or will of the accused.
- In cases where the withdrawal occurs due to external circumstances, the non pursuance of criminal activity is involuntary.
- **Taylor’s Case** (1859): The defendant approached a haystack with the intention of setting fire to it and lighted a match for that purpose, but abandoned his act on finding that he was being watched. The case illustrates the **external circumstances resulting in withdrawal**.

“Complete Attempt”:

- An attempt is said to be complete when the wrongdoer has performed everything on his/her part, which is considered to be necessary without, however, result having occurred. In other words the perpetrator has done all that he/she intended to bring about the result, **but the desired result has not followed**.
- The reasons for the failure to achieve the result may be of two types:
- (1) one, it may happen that the offender did every thing that was necessary to bring about the result but the achievement has not occurred **due to situations beyond his/her control.**
- This point has the idea that the attempter would in all probability have achieved in causing the desired result had it not been for the existence of **unexpected** events. This category of attempt includes impossible offence.

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- (2) Attempt could also felt to achieve the result due to the active involvement of the perpetrator him/herself. This is known as **active repentance**.
- E.g. If a criminal having poisoned a victim with a dosage sufficient to cause death, regrets and voluntarily takes him to hospital there by enabling complete recovery, the criminal has apparently "undone" the effects of what he had done. Such an "active repentance" (Art. 28/2) enables courts to reduce punishment without restriction (Art 180).

“Impossible Attempt” Art. 29:

- Certain attempts are incapable of achieving the desired result. Such attempts involve situations where a offender attempts “to commit a crime by means or against an object of such a nature that the commission of the crime was absolutely impossible”.
- Article 29 covers the cases of absolute impossibility and not relative impossibility where the circumstances in which the criminal acted are unable to cause the criminal’s intended harm due to the means used or because of the object against which the act is committed.
- Failure to achieve result because of an unloaded gun is an absolute impossibility due to the means used.
- Poisoning a person with an insufficiently fatal poison is a case of relative impossibility due to insufficient means. If a doctor attempts abortion over a woman who is not pregnant, there is absolute impossibility due to the missing object.

- Such a distinction between absolute and relative impossibility is significant because free mitigation (Art. 180) may be allowed under cases of absolute impossibility.

Importance of Distinction between Preparation and Attempt:

- The relative proximity between the ‘act’ done and the ‘evil consequences’ contemplated largely determines the distinction.
- Firstly, preparation consists in devising or arranging the means or measures necessary for the commission of the crime; while an attempt is the direct movement towards the commission of the crime after preparations have been made.

- An attempt is manifested by the acts, which would end in the consummation of the crime, but for the intervention of certain circumstances independent of the will of the party.
- Secondly, preparations are generally not punishable, whereas attempts are always punishable. The reasons why preparations are not punished are fourfold, namely:
- A preparation apart from its motive is generally **a harmless act;**

- It would be impossible in most cases to show that preparation was directly to wards a wrongful end or was done with an evil intent.
- Therefore, if mere preparations were punishable it would cause unnecessary harassment to innocent persons as there is a *locus poenitentiae*, and the doer may have changed his mind; in preparation persons have substantial time to a 2nd thought.
- It is not the policy of law to create and multiply crimes. If preparations were to be punished, innumerable crimes will have to be created;
- A mere preparation does not and cannot ordinarily affect the sense of security of the individual to the wronged, nor would the Society be disturbed or alarmed as to rouse it sense of vengeance.

Identification Of The Stage Of Attempt:

- some tests have been evolved by the courts to determine at what stage an act or a series of acts done towards the commission of the intended crime would become an attempt. These tests are:

Reasonable Inference test or Unequivocality Test:

- What it mean? an attempt occurs when the person's conduct, standing alone, unambiguously manifests his criminal intent.
- To constitute an attempt, the act must be such as to clearly and unequivocally indicate the intention to commit the crime. If what is done indicates beyond reasonable doubt that the end is towards which it is directed, it is an attempt, otherwise it is a mere preparation.

Execution Test:

- According to this test, there is an attempt as of the moment the accused begins to commit the crime. “An act amounts to the beginning of execution when the intention behind it is irrevocable. The doer should, therefore, go beyond what might be called the point of no return.
- The execution of the crime includes the doing of an act, which in the **criminal’s plan amounts to a decisive step** towards the achievement of the result, after the taking of which there is normally no possibility of drawing back…”
- This test is basically subjective. Yet, it does not disregard objective considerations, because **the objective overt act of the ‘decisive step’ serves as a landmark** in embarking upon the subjective point of no return.

Renunciation:

- Renunciation is provided under Article 28 of the Penal Code as:
- *“if an offender of his own free will renounce the pursuit of his criminal activity the court shall reduce the punishment within the limits provided by law (Art. 179) or may reduce it without restriction (Art. 180) if circumstances so justify. No punishment shall be imposed if the renunciation was prompted by reasons of honesty or high motives.”*
- It refers to situations where a person abandons the pursuit of his or her criminal activity by his or her own free will without completing the act required producing the result. Renunciation exists when the criminal activity is abandoned absolutely. As it is in an attempted crime, it must be accompanied by guilty state of mind in the form of intent. There is also no doubt that the act should not achieve the result.

- it may without restriction impose a sentence for a term shorter than the minimum period prescribed or substitute a less severe sentence for the sentence provided;
- The person may also be exempted from punishment when the abandonment is grounded on honesty and high motive.

Active repentance:

- The failure to achieve the result after the completion of the act may also occur when, after having performed all the acts to bring about the desired result, the perpetrator himself either prevents or contributes for the prevention of the result.
- This is what is called **active repentance** which is dealt with under Article 28(2) of the Penal Code that reads: If an offender, having completed his or her criminal activity, of his or her own free will prevents, or contributes to prevent the consequent result, the court may without restriction reduce the punishment (Art. 180).

Other Inchoate Offences

- Like attempt, they share the common cxs of making it criminal to participate in the commission of incomplete offence.
- The crimes w/c penalize conduct before the commission of the (full or substantive) crime are called inchoate offences. The rationale is to prevent from happening.
- There are also other Ios under the Eth law, namely instigation that has induced an atempt (36) complicity in an attempt (37) and conspiracy irrespective of resultant harm (38). Incitement, accomplice, conspiracy are sometimes knwn as double Ios b/c comparatively they are remote from the full offence.
- In chapter 5. Yet it is necessary to describe the inchoate aspect of these acts. Any incitement or complicity (intentional assistance provided to the principal offender before or during the commission of the crime) entails criminal liability if the crime is at least attempted.
- Charges of attempt, in effect, include instigators and accomplices. However, acts of instigation and complicity cant be a ground for cr liability in charges of preparatory acts.

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- The act of conspiracy aggravates punishment in cases of punishable preparatory acts (exceptions) or in cases of att to commit an offence. Moreover, conspiracy in itself is an inchoate w/r it constitutes an offence irrespective of the realization of its objectives.
- It suffices to mention that they fall under ios as long as they are attached to incomplete offences.