The Material Element of Attempt in Crime

الركن المادي للشروع في الجريمة

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Abstract:

Attempt in crime is considered one of the most complex and important topics in criminal law, as it transitions the offender from a stage that is not punishable to one that is punishable. Moreover, the material element of this crime, with its two components, is fraught with difficulties that are rarely encountered in other crimes—whether related to the element of commencement of execution or the cessation of execution. In general, attempt represents a special model of a crime whose intended result has not occurred, even though the offender was striving to achieve it, provided that the failure to achieve that result was due to a cause beyond his will. In this model, the offender has taken a tangible step toward completing the crime, but that did not occur due to a reason outside his control.

key words: Attempt; Commencement of Execution; Cessation of Execution; Material Element; Crime.

الملخص:

يعتبر الشروع في الجريمة من أعقد موضوعات القانون الجنائي وأهمها على الإطلاق حيث ينتقل بالجاني من مرحلة لا عقاب عليها إلى مرحلة يحق عليها العقاب. فضلا عما يكتنف الركن المادي بعنصريه بهذه الجريمة من صعوبات ليس من السهل أن تتكرر في جريمة أخرى سواء الخاصة بعنصر البدء في التنفيذ أو وقف التنفيذ. فالشروع بوجه عام نموذج خاص لجريمة تتخلف نتيجتها التي كان الجاني يسعى إلى بلوغها، متى كان عدم تحققها راجع إلى سبب غير إرادي، فالجاني في هذا النموذج قطع شوطا ملموسا عن طريق إتمام الجريمة ولكن ذلك لم يحدث لسبب خارج عن إرادته.

الكلمات المفتاحية: الشروع، البدء في التنفيذ، وقف التنفيذ، الركن المادي، الجريمة.

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Introduction:

It is well established that once the offender finishes preparing for the crime and is determined to commit it, he proceeds to its execution. However, some causes and factors may arise that prevent him from achieving the intended result, and thus the outcome intended by the commission of the crime does not occur. At that point, he is in the stage of attempting the crime. This attempt is considered a phase of the crime that follows its preparation and precedes its completion.

In other words, attempt in crime is that behavior through which its perpetrator aims to commit a specific crime that would have occurred had it not been for an external factor beyond the will of the perpetrator that intervened at the last moment to prevent its occurrence. Accordingly, it is an incomplete crime — meaning the material deficiency, a deficiency that affects some of the material elements of the crime but not its moral elements. Thus, research into the theory of attempt concerns the material element, as it is assumed that the moral element is present; if the moral element is absent, then studying attempt becomes meaningless.

The image of the material element in the stage of attempt raises many issues in terms of identifying which acts constitute the physical components of the crime and must be punishable, and which acts are not subject to punishment. In addition, the offender's withdrawal also raises many issues regarding whether the withdrawal was voluntary or involuntary and beyond the offender's will.

Given this situation, what are the components of the material element that allow us to distinguish it from the completed crime?

To answer this, we have attempted to divide this study into two sections in which we will address:

First Section: Commencement of Execution

It is well established that a crime passes through several stages, beginning with contemplating it and deciding to commit it, then preparing for it, and finally executing it. This execution may reach completion, in which case we are faced with a completed crime, or it may not reach that point, in which case we are dealing with the stage of attempt.

Commencement of execution is considered the first element in the material element of the crime of attempt, or as it is known, the attempt. However, the question that arises in this context is: when is an act considered a commencement of execution, and when is it not?

Jurisprudence has differed on this issue, and this difference can be traced back to two main schools of thought: the objective (or material) school and the subjective school.

Firstly: The Objective or Material School:

Supporters of this school believe that attempt is the beginning of the execution of the material element of the crime. If the crime consists of a single act, then the attempt is the beginning of the execution of that act. If the crime requires several acts, then the attempt consists of committing one of those acts or at least beginning one of them. Thus, attempt in theft consists of placing one's hand on the property intended to be stolen, since the material element of this crime consists of appropriation—that is, taking the item from the victim's possession and placing it into the perpetrator's possession. Attempt in murder would be using a weapon against the victim. Other acts that fall short of this are not considered attempts because they are not part of the material element of murder according to the legal definition. For example, entering a house with the intent to commit murder is not considered an attempt at murder, because entering the house with that intent is not part of the crime's material element[1].

Likewise, the crime of arson does not begin unless fire is actually applied to the item intended to be burned. Prior acts are merely preparatory actions that are not punishable[2].

"Veli" defines the commencement of execution that is considered a punishable attempt by reference to the crime the perpetrator intended to commit. If it is found that the act performed by the offender is separate and distinct from that crime, then it is a preparatory act. If it cannot be separated from it, then it constitutes a commencement of execution.

Accordingly, based on the view of the material school's supporters, acts that precede the commencement of execution of the crime's material element are not considered punishable attempts, regardless of how close those acts may be to the actual execution of the crime—such as breaking into a safe containing the stolen items or pointing a weapon at the victim. Despite the precision, clarity, and simplicity of this theory, it limits the scope of attempt to a narrow field, which hinders the protection of society. This may result in individuals escaping punishment even though they have committed acts that are unquestionably

[1] Jamil Mustafa, Khashan. Attempt in Crime. Bachelor's thesis submitted for the degree of Bachelor in Law, Faculty of Law and Political Sciences, 2018, p. 13.

[2] Abdullah, Suleiman. Explanation of the Algerian Penal Code: General Part. Vol. 1, 1998, p. 170.

dangerous to protected interests[1].

The restriction of the scope of attempt has led the supporters of this school to expand it by including aggravating circumstances of the crime among the acts constituting its execution. Thus, breaking in, climbing, or using fabricated keys is considered an attempt to commit theft.

The proponents of this school thus intended to narrow the circle of punishable attempt and to expand the scope of preparatory acts of the crime, which are not punishable in principle—something that contradicts the will of the legislator and the spirit of the law, which aims to combat crime[2].

Secondly: The Subjective School:

The proponents of this school do not look at the material act itself to determine the nature of the executive acts; rather, they consider the act insofar as it reflects the dangerousness of the offender's personality. What matters is not the act in itself performed by the offender but the danger that this act reveals to the right protected by law. In other words, the reference point for the executive act is the extent of danger present in the offender's personality, and the role of the act performed by the offender is merely to reveal this danger to the legally protected interest[3].

"Garraud" laid down a criterion to that effect, stating that the offender must commit an act that would immediately and directly lead to the intended result and its implementation. Thus, it is considered an attempt if the offender is caught placing a ladder against the wall of a house without having yet started climbing, because this act brings him closer to the result and decisively indicates that he is firmly determined to achieve it[4].

The proponents of this school believe that the source of danger lies in the inherent dangerousness of the criminal's personality, i.e., the direction of his criminal intent toward committing the crime—an intent which, if left unchecked, would inevitably lead to the commission of other crimes. Accordingly, danger, in their view, does not lie in the material acts committed by the offender, as these acts have already occurred and ended. Thus, a person caught breaking into a safe is considered a thief; there is a commencement of execution even though he has

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[1] Ali Abdul Qader, Al-Qahwaji. Explanation of the Penal Code: General Part, Theory of Crime. Beirut, Al-Halabi Publications, n.d, p. 353.

[2] Mahmoud Mostafa, Mahmoud. Explanation of the Egyptian Penal Code: General Part. n.p., Dar Al-Nahda Al-Arabia, 1983, p. 283.

[3] Jamil Mustafa, Jamil, Op. Cit, p. 15.

[4] Mahmoud Naguib, Hosni. Explanation of the Penal Code. 2nd ed., Special Part, Cairo, Dar Al-Nahda Al-Arabia, 1994, p. 134.

not yet laid hands on the money inside the safe or seized it.

The necessity of considering the danger inherent in the criminal's personality requires legislative intervention to impose punishment, out of fear of being dragged into a current of future crime on the one hand, and on the other hand, to defend and preserve the security and stability of society.

It appears that the aim of the legislator in holding the offender accountable when he begins committing the material acts constituting the crime is not so much to prove that he has committed the crime as it is to prove the existence of criminal intent in the offender's character. The material acts are merely manifestations of that intent and reveal it. Proponents of this school affirm their position by asserting that material acts are necessary not only to prove the existence of criminal intent, but also because they must be performed by the offender in order to affirm that the criminal will has indeed and definitively been directed toward the commission of the crime.

Thus, the material acts—for the proponents of this school—are necessary to prove the existence of a genuine and definitive criminal will. However, they are not necessary, as the proponents of the material school argue, to constitute the commencement of the execution of the crime. Accordingly, in the subjective school's understanding, attempt is not the commencement of the crime's execution through material acts; rather, it is the direction of the will toward achieving a specific criminal purpose, once this criminal will is confirmed by external acts sufficient to indicate that it is real and that the offender has resolved to commit the crime[1].

The proponents of the subjective school have proposed several criteria to distinguish between preparatory acts and commencement of execution, such as jurists "Rossi," "Roux," "Vidal," "Rossi," "Sally," and "Frossard." For example, it is argued that acts of commencement of execution are different by nature from preparatory acts. The justification is that the offender, in the execution phase, begins the assault, whereas preparatory acts do not involve an assault.

As for "Deguoy," he believes it is necessary to determine the commencement of execution from the offender's own perspective and according to his assessment. Thus, the act is considered a commencement of execution if the offender knows perfectly well that by performing it, he has started to carry out the crime he intends to commit. It seems that the best criterion proposed by the proponents of the

[1] Mubarak Abdulaziz, Al-Nwaybit, The Theory of Attempt in Crime: A Comparative Study, Journal of Law and Sharia, No. 2, Faculty of Law and Sharia, University of Kuwait, 1994, 9.27.

subjective school—and one that has received support in many countries—is the one laid down by "Garraud," as mentioned earlier[1].

Despite the standards set by the proponents of the subjective school, they fall short of the purpose for which they were established, which is to clearly and unambiguously define acts constituting the commencement of execution. This deficiency becomes evident when applying some of these standards to acts that lie near the boundary between commencement of execution and preparation for the crime—such as ambush, for example. Jurists have differed among themselves on whether acts of ambush carried out with the intent to kill or steal constitute commencement of execution in these two crimes or are merely preparatory acts. Climbing, breaking, and using fabricated keys are also acts around which jurists have disagreed, regarding whether they constitute commencement of the crime of theft or murder inside inhabited places, or whether they are merely preparatory acts for these crimes.

Despite the advantages of this school, it carries the presumption that an act considered an attempt must result in the commission of the crime in the next moment—something that is not always valid. The attempt phase may continue for an extended period before the crime is completed, as in the case of someone digging a tunnel under a bank to reach its vault. The offender may continue digging for a long time before reaching the vaults, yet he is considered to be in a state of attempt from the moment he begins digging. That act clearly indicates that he has taken a significant step toward the crime and is close to infringing upon the right protected by law[2].

Upon reviewing Algerian law, it becomes clear that the Algerian legislator, like other legislations, has adopted the subjective school. This is established explicitly in Article 30 of the Penal Code, reflecting the influence of French judicial reasoning, which enshrined the phrase “an act that directly leads to the commission of the crime”—the same phrase used by the legislator in Article 30. However, it did not require that the act immediately lead to the intended result, since the attempt may take a long time before the crime is completed.

Nevertheless, the legislator’s definition of attempt in the above article—as the commencement of execution or undertaking acts that unequivocally and directly lead to its commission—suggests that the legislator may have adopted both the material and subjective schools.

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[1] Ibid., pp. 28-30.

[2] Ali Abdul Qader, Al-Qahwaji, Commentary on the Penal Code: General Section, Theory of Crime, Beirut, Halabi Legal Publications, 2008, pp. 356-357.

The stronger opinion is that the legislator did not intend to adopt both schools; rather, what occurred was merely a redundancy in Article 30, which aimed only at clarification and elaboration.

It is worth noting that both French and British jurisprudence have adopted this school, with the aim of expanding the scope of criminal attempt. In this view, the form of conduct carried out by the offender is not what matters, but rather the criminal danger revealed by that conduct—contrary to the material school, which focuses on the criminal behavior itself[1].

Second Section: Cessation of Execution

For an attempt to be established, there must be a commencement of execution followed by a failure to achieve the criminal result due to reasons beyond the offender's will—that is, he does not withdraw from the act voluntarily. Here, it is necessary to distinguish between voluntary withdrawal and involuntary withdrawal. However, the question that arises in this context is: how can we distinguish between voluntary withdrawal, which constitutes a barrier to criminalization, and withdrawal caused by an external factor, which therefore does not exempt from criminal liability?

Firstly: Voluntary Withdrawal:

Voluntary withdrawal is when the offender begins executing his crime and then retreats from it by his own free will without the intervention of anyone[2].

Voluntary withdrawal may occur due to purely psychological reasons that lead the perpetrator to freely decide not to proceed with completing the crime. In other words, withdrawal is considered voluntary if there are no external factors independent of the offender that influenced him and directed his will toward not completing the crime. Accordingly, voluntary withdrawal is spontaneous withdrawal[3].

It should be noted that withdrawal must occur during the attempt phase. If it occurs before this phase, it has no legal effect, as the law does not recognize that stage. However, if it occurs after the crime has been committed and the result achieved, withdrawal is of no use—for example, a thief who prepares all the necessary tools for theft but then changes his mind, whether out of remorse or for any other reason, is not punished by law. But if he enters the house, takes the money, and is then caught by the homeowner and returns the money, he will be

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[1] Ibid., p. 375.

[2] Ibrahim, Al-Shabbasi. The Concise in the Explanation of the Algerian Penal Code. Lebanon, Dar Al-Kutub Al-Lubnani, 1981, p. 131.

[3] Ahsan, Bouskiaa. The Concise in General Criminal Law. 18th ed., Algeria, Dar Houma, 2019, p. 133.

punished, and withdrawal will not benefit him afterward[1].

Perhaps the wisdom behind exempting the offender from punishment in this type of withdrawal is to leave the door open for him to retreat from his criminal act before completing its elements, thereby preventing the realization of its consequences. This spares the victim the harm he would have suffered and protects society from the disturbance caused by the criminal or crime in general. It also protects the offender who has renounced his crime from punishment. In addition, this exemption encourages the offender to withdraw from his criminal plan, for if it were not for the exemption, the offender would continue with his criminal project as long as he is already implicated and would be punished in any case[2].

Secondly: Involuntary Withdrawal:

Withdrawal is involuntary in every case where an external cause intervenes and prevents the offender from carrying out the crime, forcing him under compulsion not to complete its execution—whether that compulsion is physical or moral. In all such cases, the reason for the failure to complete the execution is unrelated to the will of the offender. Thus, the withdrawal is non-voluntary, and attempt is thereby established[3].

In other words, it is the halting of the crime due to a cause unrelated to the will of the offender, which is what the legislator referred to in Article 30 of the Penal Code[4]. In this case, a distinction must be made between the interrupted crime, in which execution begins but is stopped by a cause beyond the offender's control—such as a thief being caught red-handed during the theft.

It is observed in such a case that the offender began executing the crime but did not complete all the acts necessary for its completion, due to the intervention of some factors beyond his control that halted his criminal activity and prevented him from achieving his intent.

In this and similar cases, the crime is interrupted and is then referred to as a simple or incomplete attempt[5].

A foiled crime is when the offender begins executing the crime and exhausts all his criminal activity, but the effect of this activity fails due to reasons unrelated

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[1] Mansour, Rahmani. The Concise in General Criminal Law. Algeria, Dar Al-Uloom for Publishing and Distribution, 2006, pp. 160-165.

[2] Mustafa, Al-Awji. Criminal Law. Beirut, Al-Halabi Legal Publications, n.d, p. 546.

[3] Ali Abdul Qader, Al Qahwaji, Op. Cit, p. 365.

[4] Ordinance No. 66-156 dated 08 June 1966 containing the Penal Code, as amended and supplemented, *Official Gazette of the People's Democratic Republic of Algeria*, No. 61.

[5] Abderrahman, Khalfi. Lectures in General Criminal Law. Algeria, Dar Al-Huda, 2010, p. 100.

to the will of the offender or as a result of circumstances independent of the perpetrator's will, according to the expression in Article 30 of the Penal Code. In this scenario, the offender performs all the necessary acts to execute the crime, yet the intended result does not occur.

For example, the perpetrator not only points a gun at the victim but actually fires a bullet at him, which should have killed him. However, the bullet misses its target due to reasons beyond the offender's control. In this case, nothing stops the offender's criminal activity; in fact, he completes all his criminal acts to the end, performing all the material acts that should have led to the result punishable by law. Nevertheless, the result fails due to a reason unrelated to his will, such as being apprehended before he can escape. This case is known as a foiled crime, or in other words, a complete attempt[1].

An impossible crime is one where the offender undertakes an action with the intention of achieving a criminal result that is materially or legally impossible to achieve due to a reason he is unaware of, no matter how much diligence he applies.

This may occur either because the object of the crime does not exist at all or because the means used are unsuitable under the circumstances to bring about the result.

Thus, the legally protected interest in this scenario is not actually threatened, as the offender's activity was doomed to fail from the start. An example of this is someone attempting to perform an abortion on a woman he believes is pregnant, while she is not[2].

The theory of the impossible crime has dominated criminal jurisprudence, suggesting that the impossibility of committing a crime stems either from the means used or from the object of the crime.

Jurisprudence has been divided into two schools of thought regarding the impossible crime. The first, led by the German jurist "Feuerbach", holds that no punishment should be applied to an impossible crime, whether the impossibility arises from the means used or from the object of the crime. Their reasoning is that punishable attempt presupposes a commencement of execution. If an impossible crime cannot be executed, how can it be imagined that someone could begin executing the impossible? [3]

Furthermore, an impossible crime is merely an expression of criminal intent

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[1] Mustafa, Al-Awji, Op Cit, p. 555.
[2] Adel, Qoura. Lectures in Penal Law: General Part – The Crime., n.p., n.d, pp. 128-129.
[3] Nasreen Abdel Hamid, Nabih. The Impossible Crime. Alexandria, Dar Al-Wafaa, 1998., p. 123.

that lacks the material element due to its infeasibility. Therefore, it does not constitute a crime or an attempt and is not punishable[1]. It also does not cause the kind of social disruption typically resulting from completed crimes[2].

French jurisprudence has been influenced by this materialist view, holding that if the criminal result is impossible to achieve, then the commencement of execution is also impossible. Moreover, according to this perspective, attempt cannot be constituted by an ineffective[3]

Others, however, argue that an impossible crime should always be punishable, as it constitutes a complete attempt. The commencement of execution is achieved, and all the acts performed by the offender reflect his dangerousness and cause harm to others. Therefore, they believe the punishment should be based on the criminal intent of the offender, not on the result.

Despite the previously mentioned positions—whether in favor of non-punishment or punishment in all forms—there is a reconciliatory opinion that seeks to bridge the two approaches. Some jurists have argued for distinguishing between types of impossibility: Some differentiate between absolute impossibility and relative impossibility, while others distinguish between material impossibility and legal impossibility.

Absolute impossibility, as proposed by the German jurist "Mittermaier" and supported by "Ortlan", exists when the crime is fundamentally impossible due to essential reasons, such as the absence of the crime's object or the complete unsuitability of the means used.

In such cases of absolute impossibility, the offender is not punished, and there is no ground for considering the crime as attempted[4].

Relative impossibility, on the other hand, is considered a type of foiled crime that is punishable under the provisions relating to attempt. It does not prevent the establishment of a punishable attempt and may be due to the object of the crime or the means used.

Some, like the French jurist "Garraud", argue for a distinction between legal impossibility and material impossibility.

Legal impossibility exists when one of the legal elements of the crime is absent, such as the element of a living person in the crime of murder.

Material impossibility, however, results from the absence of a physical condition that does not negate the existence of attempt, since all the legal elements

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[1] Ibid.
[2] Ahsan, Bouskiaa, Op. Cit, p. 113.
[3] Ali Abdul Qader, Al-Qahwaji Op. Cit, p. 376
[4] Ali Abdul Qader Al-Qahwaji, Op. Cit, p. 376.

of the crime are present. The criminal result fails not due to a lack of legal elements but because of an external material condition not required by law as a crime element.

Accordingly, all cases of impossibility related to the means used are considered material impossibility, which does not prevent the establishment of attempt, since the law generally does not take into account the means of committing the crime, as they are not part of the crime's legal structure[1].

This approach excludes punishment when it comes to legal impossibility, but affirms it when the matter involves material impossibility.

This view is criticized for reaching the same conclusions as the previous view, which also distinguishes between absolute and relative impossibility. It holds that the impossibility related to the means is, in most cases, a type of material impossibility that is punishable, and rarely legal[2].

Moreover, material impossibility includes all cases where the impossibility stems from the means, whether that impossibility is relative or absolute. As such, it encompasses some cases that are not punishable under the earlier concept of absolute impossibility[3].

Referring to Article 30 of the Algerian Penal Code, which states: "…even if the intended result was not achieved due to a material circumstance unknown to the perpetrator."

It is clear that the Algerian legislator has explicitly addressed the impossible crime and the need to punish the attempt. He distinguishes between material impossibility and legal impossibility, considering material impossibility a form of punishable attempt, whereas legal impossibility does not constitute attempt and is not punishable because a required legal element of the crime is missing—thereby excluding some cases where the means are the cause, as indicated in Articles 260 and 304 of the Penal Code.

Conclusion:

The material element of the attempt in crime, also known as the attempt or the incomplete crime, with its two components, raises many issues—whether those related to the first element, which is the commencement of execution, or to its second element, which is the incompletion of the crime or the cessation of execution.

The issue of determining the commencement of execution presents

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[1] Nasreen Abdel Hamid, Nabih, Op. Cit, p. 124.
[2] Abdullah, Suleiman, Op. Cit, p. 182.
[3] Nasreen Abdel Hamid, Nabih, Op. Cit, p. 127.

numerous difficulties, making the attempt in crime one of the most complex topics in criminal law.

Commencement of execution is the dividing line between permissibility and criminalization, which clearly highlights the importance of defining it precisely and distinguishing it from other acts.

In addition, the matter becomes delicate and extremely difficult when it comes to its second element—non-completion of the crime—through which it is possible to distinguish between what constitutes a completed crime and what constitutes an attempt, on the one hand, and, on the other hand, through which it is also possible to differentiate between what is considered a punishable attempt and what is not punishable.

Most criminal legislations require, for punishment of an attempt, that the offender has begun the execution of the crime. As for acts preceding that, they remain outside the scope of punishment.

In line with the findings reached, we propose several suggestions that may guide the legislator's efforts in the future, including:

Since the element of danger in attempted crimes is a real and not presumed danger, we urge the legislator to stipulate that danger is not only the basis for the criminalization of the attempt but an element of it. This is because holding the offender accountable for attempting a crime requires that his behavior has led to exposing a legal right to danger.

There is a necessity to consider the extent of harm in attempted crimes, and thus, as a general principle, the punishment for such crimes should be lesser than that of the completed crime.

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