“The review on development trend of attempt to crime in Iranian legal-criminal system”

*Shahab-Aldin Naseri
PhD student in the field of criminal law and criminology, Islamic Azad University,
Kermanshah, Iran
*Corresponding author

Dr. Akbar Varvaei
Associate professor, Amin IR Police University, Iran

Abstract

The subject of attempt to crime has been followed by several noticeable and at the same time positive changes since the past time and the existing legislative gaps have been removed in previous laws to great extent. Unlike the former Act in current Islamic Punishment Act (approved in 2013), attempt to crime is deemed as one of offences except the trivial and few offenses for which no punishment has been stipulated in three clauses of Article 122 (legal article of attempt to crime). Therefore, unlike the Islamic Punishment Law (1991) in this Act, the attempt to crime has been assumed as offense accordingly and the punishment for attempt to crime possesses certain order and has been ranked in three separate clauses. The legislator has also identified other incomplete offenses rather than attempt to crime in the current punishment law and this is not deemed as innovation but considered as legislator’s return to Public Punishment Act (1973) based on which the impossible crime has been implied as attempt to crime and also incomplete crime was mentioned more implicitly along with attempt to crime. Moreover, by accepting voluntarily non-dispensing of offense as the condition for realization of attempt to crime in current law, legislator has removed the ambiguity in the former law. Nonetheless, lack of explicit acceptance of general title of incomplete crimes, expressing the inchoate offense along with attempt to crime, and lack of mitigation of punishment when the culprit voluntarily renounces it but his/ her measures include certain offense are assumed as some defects designated for Islamic Punishment Act (approved in 2013). The present research is intended to analyze development trend of attempt to crime in Iranian criminal system and express this basic question that what the vicissitude are in Iranian criminal-legal system since the past. The methodology of this study has been implemented according to analytical inferences and with respect to documentations from studied reference sources.

Keywords: Development trend, Attempt to crime, Criminal- Legal System, Iran.
Introduction
First of all, the characteristic of criminal law includes the specific feature for the relevant criminal sanction that is enforced in forms of punishment and security and correctional measures in order to provide social order. But, it has been characterized today that not only the criminal measures lack such effectiveness, but also non-criminal efforts should be made for this purpose. The group of criminal and non-criminal measures is called criminal policy (Najafi Abrandabadi, dateless, 270). Thus, attempt to crime is one of the subjects which require both groups of measures (criminal and non-criminal) and prevention from and tackling with subject of attempt to crime are important because of this fact that they may hinder realization of crime. Realization of physical basis of any crime (Actus Reus) comprises of several phases that should be taken by perpetrator to achieve his/ her intent (intention for crime perpetration+ preparation of arrangements+ starting phase of execution+ the crime perpetration phase or complete offense) otherwise s/he may be included in some titles such as attempt to crime or as inchoate offense. The legal measure in which attempt to crime has been respectively addressed by the legislator consists of Article 20 and Article 41 of Civil Code (approved in 1991 and two related provisions and at present including Articles 122-124 of Islamic Punishment Act approved on 21/04/2013).

The Islamic Punishment Act that has been approved on 21st April 2013 includes 728 articles that were ratified in session of judicial and legal commission of IRI Parliament and it was approved by Guardian Council after agreement by IRI Parliament through pilot enforcement for 5 years since 1st May 2013 and it includes some amendments and initiatives in comparison to former punishment law. Most of these initiatives show that the criminal legislative has tried to increase administration of judicial justice throughout the community and proposing modern institutes to correct culprits and criminals and of course for prevention from occurrence of crime. We briefly intend here to express development trend for attempt to crime in Iranian criminal-legal system and analyzed and describe the created changes in the regulations regarding attempt to crime by virtue of Islamic Punishment Act.

1- Lexical definition of ‘Attempt to crime’ (Inchoate offense)
In terminology, Arabic term” beginning” means embarking on a task, engagement in a business, tendency to and starting something and also beginning, inception, and launching in a task etc.
In his thesaurus, Dehkhoda has narrated a verse from Molavi (great Persian poet) about term “beginning” as follows.
‘He found the main left the trivial started worshiping wisdom in initial’
‘Directed him toward the Christian set off inviting him thereupon’
Similarly, Saadi Shirazi Master of Words implies in his book ‘Sessions’:
‘We start advice for the government bosses and ruling.’ (Dehkhoda; 1994: 12563) Likewise, Dr. Mohammad Moein also has defined term “beginning” in his glossary as beginning and launching and starting task as set off or initiation (Moein; 1984: 2014). This concept has been mentioned for term “Alshare” in Almonjed Thesaurus (Matoo; 1985: 383).
Thus, term “beginning” is used for beginning and in the following jargons.
A: (civil-juristic term) **inchoate in cultivation**: It means to beginning cultivating the arid lands and properties without owners (Article 141 of Civil Code) including placement of stones around a land or digging well etc.

B: (criminal term) **attempt to crime**: It denotes to take preliminary measures to perpetrate crime soon. Nevertheless, this is relative task and it varies according to different types of offenses particularly the immediate arrangements may be not well distinguished from the improbable bases which have been called the preliminary operation of crime (Jafari Langeroodi, 1998: 391).

If perpetrator passes all of phases for committing crime one after another whereas the given crime has been perpetrated perfectly thus the full punishment will be expected for the perpetrator but if before occurrence of crime physical element (Actus Reus) the perpetrator becomes disable for full committing of crime completely due to presence of an external barrier thus s/he is assumed as culprit for attempt to crime (Katebi; 1985: 332).

### 2- Concept of attempt to crime

Crime is a process requires execution of some measures by the perpetrator and passing through certain phases for realization of crime. This process have been divided into 4 phases: Thought and preparation of plot; preparation of arrangements; starting execution, and finally achieving result (Mohseni; 1996: 5-154; Chawla; 2006: p 1) and that is when Actus Reus of crime is externally realized (Feiz; 1990: 193). The lawyers have been discussed and commented regarding this point that in what step of these four phases community may intervene and prosecute the perpetrator and what it deemed unanimously as agreement is that the first and second phases may not be highly subject to prosecution and punishment but this case is totally different at third phase i.e. attempt to crime and law scholars have posited two different attitudes in this regard.

According to attitude of supporters of objective (extra-intrinsic) theory in which only the inflicted damage to the society is addressed, attempt to crime may not be punishable since it does not inflict any damage to social order. In contrast, the followers of subjective (intra-intrinsic) theory in which the committed corruption by perpetrator is noticed instead of the consequence of action, attempt to crime, which refers to delinquent intention and risky attribute in perpetrator, this case is assumed socially as severe as full crime and the perpetrator should be punished the same as for full crime (Dadban; 1998: 322).

The legislators in various countries have considered combination of these two theories with respect to the defect existing in perfect execution of both of theories. Inter alia, the noteworthy subject is that the punishment has been assumed for attempt to crime in all of the given legislation systems (ibid: 322).

Attempt to crime refers to the condition in which an individual has intended to commit a crime but the given offense is not done without perpetrator’s will and intent. Therefore two conditions are necessary for attempt to crime to have criminal aspect: First is that the perpetrator has started executive operation and the latter is this point that s/he has not renounced that crime willfully and voluntarily (Mohseni; 1996: 170).

The subject that should be noticed in this definition is to distinguish starting execution and preliminary actions and the arrangements and measures they may include that they may be apparently not related highly to the given offense. In other words, although preparation and
providing the needed devices for perpetration of crime are not included in physical actions but whereas they do not clearly reveal intention of perpetrator thus s/he may not be subject to criminal prosecution and punishment (Ardebili; 2000: 218).

2-1- Attempt to crime in French legal system

Article 121-5 in French legal system holds that the attempt to crime is realized when the crime appears with starting execution but it remains suspended and ineffective due to circumstances and conditions independent from perpetrator’s will (Zeraat; 2005: 62).

With respect to this article, attempt to crime consists of two cornerstones in French legal system i.e. starting to execute and voluntary renunciation. Thus, if perpetrator ceases committing crime namely s/he personally desists following perpetration of crime then punishable attempt to crime is not realized (Dadban; 1998: 327). Based on French legal system, attempt to crimes is punishable and cases of misdemeanor it requires explicit assertion by legislator and it lacks punishment otherwise.

2-2- Attempt to crime in Act regarding Islamic Punishment

In Articles 15-18 of Act regarding Islamic Punishment, the relevant regulations to attempt to crime have been addressed. It has been mentioned in Article 15 of this law to interpret attempt to crime that Anyone who intends to commit an offense and starts doing it but due to external barriers over which perpetrator’s will is not be effective his/ her intention is suspended and given crime does not take place if the operation and measures s/he has started executing them s/he will be sentenced to the punishment for that crime unless s/he will be punished. Article 18 of this law also held that attempt to crime may be punishable only if it has been explicitly mentioned in law.

2-3- Attempt to crime in Islamic Punishment Act

In Article 41 of Islamic Punishment Act, attempt to crime has been interpreted as follows: Anyone who intends to commit an offense and starts doing it but the given crime does not take place if the conducted measures are deemed as crimes s/he will be sentenced to punishment of that crime (Mirzaei; 2011: 98).

Article 41 and two related provisions were replaced with Article 15-18 of Act regarding Islamic Punishment and created some changes about this concept. The first change was deletion of this phrase (…otherwise s/he will be punished) at the end of Article 41 and the second change was omission of Article 18 of Act regarding Islamic Punishment in which attempt to crime was assumed as punishable if it was explicitly asserted in law (Sadeghi, dateless: 89).

It is identified by looking at development trend of this concept (attempt to crime) in regulations of our country this point that legislator’s attitude has been changed toward this concept after Islamic Revolution and this is due to legislator’s effort made for coordination of criminal system with jurisprudential teachings. Proposing of topics regarding punishment in four categories of limits (حدود), retaliation (قصاص), blood moneys (دیات), and discretionary punishments (تعزیرات) by the Islamic jurisprudents caused doubt in accepting concept of attempt to crime which might not be included within framework of certain juristic regulations. In this course, some lawyers have even considered our legal system independent from resorting to term (attempt to crime) and proposed this question that which complex bottleneck has been resolved by attempt to crime in criminal law? (Feiz; 1990: 184)
Nevertheless, the attitude of legislator toward Act regarding Islamic Punishment has become milder by introducing attempt to crime and it has not tended to negate this concept but providers of Islamic Punishment Act- as some of lawyers mentioned- do not basically address concept of attempt to crime and they have considered it as independent from the crime. Thus, if the committed measures are assumed as offense, the punishment will be designated for perpetrator. It is a matter of fact that if the law did not emphasize in this point, commission or omission of criminal action might be described independently and criminally as punishable so there was no need to description (Noorbaha; 1998: 34).

It seems that regardless of bases for introducing attempt to crime, legislator has changed the related concept- the given legal meaning- and without proposing a definition about attempt to crime has held Article 41 in such a way that nothing may be inferred from this interpretation that anyone who commits an offense will be punished for it.

2-4- Attempt to crime in draft of Islamic Punishment Act Bill

Providers of draft for Islamic Punishment Act Bill have mentioned it with proper perception of concept ‘attempt to crime’ in Article 131-1 of this bill that anyone who intends to commit a crime and starts executing it and takes some measures which are directly related to occurrence of crime but his/ her action is suspended or remains ineffective due to external factors in which perpetrator’s will does not intervene, his/ her action is assumed as attempt to crime and if another punishment has been implied in law for starting the given offense s/he will be sentenced to certain punishment unless s/he will be sentenced to the following punishments:

1- If legal punishment of that crime is imprisonment or life confinement, perpetrator will be sentenced to imprisonment from 3 to 5 years and up to 74 lashes proportional to the given crime and characteristics of the criminal.

2- If legal punishment of that offense is amputation or retaliation for lost limbs or confinement for more than five years, the perpetrator shall be sentenced to imprisonment from 1 to 2 years and up to 74 lashes proportional to the given offense and characteristics of the perpetrator.

3- In other punishments except the crimes listed in Clause (C) of Article 122-, the perpetrator will be sentenced to imprisonment from 91 days to 6 months and up to 74 lashes proportional to the given crime and characteristics of the perpetrator.

N. B. 1: Attempt to perpetration of crimes will be punishable in offenses that are subject to discretionary and deterrent punishments provided it has been explicitly specified in the law.

N. B. 2: If committed action is directly related to the crime perpetration but occurrence of crime is impossible because of physical reasons of which the perpetrator is unaware it is considered as impossible or inchoate offense and it is deemed as attempt to the crime.

One of advantages of this bill is explicit acceptance of establishing attempt to crime that terminates the present ambiguities in our legal system. The changes occurred in the relevant regulations for attempt to crime in our legal system has created this imagination in some of lawyers that the Islamic Punishment Act has assumed attempt to crime as non-punishable and therefore it has led to implicit cancelation of all of previous legal cases in which attempt to crime has been declared as offense and punishable.

Article 131-1 has been codified in such a way that it has posited accurate definition about attempt to crime based on the relevant accepted concept in other legal systems.
One of the other advantages of this bill is in that it has assumed involuntary renunciation as condition for realization of attempt to crime and it has held according to Article 131-3 that when someone starts committing a crime and then quits it voluntarily s/he will not be prosecuted as culprit for attempt to crime but if s/he will be sentenced to the that punishment to the extent of the offense s/he has perpetrated.

3- Systematization of attempt to crime in current Islamic Punishment Act
Two major changes have been exerted in subject of attempt to crime in new Islamic Punishment Act. One is that the concept of attempt to crime has been defined according to scientific criteria and the other is that the related punishment has been ranked accordingly.

Under the present conditions in criminal law, the criminal liability is deemed as the requisite for implementation of punishment for the perpetrators. It is obvious that if someone lacks criminal liability, it is impossible to punish him/ her for it in whatsoever. What noteworthy in this regard is that someone may pass through criminal route to achieve his/ her intention and wish and perhaps several factors may intervene in this path and sometimes actions of perpetrators may be ceased due to voluntary or involuntary factors within the limit of intention and executive operation for starting crime. In such cases, subject of attempt to crime may be implied that it may be punishable on many occasions. Also sometimes the perpetrator may follow the path of criminal operation to the end but for some reasons his/ her given offense does not take place or in other words the offense is failed or occurrence of this offense is impossible. If the perpetrator continues the criminal path to the end and crime is terminated according to perpetrator’s intention this is deemed as complete crime so we will discuss about each of the aforesaid cases in the followings.

3-1- Conditions for realization of attempt to crime in present criminal system
The possibility and condition for realization of attempt to crime has been mentioned in Article 122-124 of Islamic Punishment Act (approved on 21/04/2013):

Anyone who intends to commit a crime and starts executing it but his/ her intention remains suspended due to external factor out of his/ her will, shall be punished as follows:
A: s/he will be sentenced to fourth-degree discretionary imprisonment under conditions the punishment for those offenses are life-confinement or first- to third-rate discretionary imprisonment;
B: To be sentenced to fifth-degree discretionary imprisonment in crimes for which the legal punishment is the limit lash or fourth-rate discretionary confinement;
C: To be sentenced to sixth-degree discretionary imprisonment or lash or cash penalty in crimes for which the lash or fifth-rate discretionary confinement has been designated

N. B.: If the committed action is directly related to the given offense but occurrence of that crime is not be feasible due to physical reasons of which the perpetrator is unaware, the committed action is deemed as attempt to crime (Shams Nateri et al; 2014: 26).

Article 123- Exclusively intention for perpetration of crime and or operation and measures are assumed as introduction for crime and they are not directly related to occurrence of crime and not considered as attempt to crime therefore it is not deemed as punishable in this sense (ibid: 279).

Article 124- When someone starts a crime and quits it willfully, s/he will not be prosecuted as culprit for attempt to crime but if that action is assumed as offense to the extent s/he has
committed s/he will be sentenced for the related punishment (ibid: 281). By virtue of legal articles in addition to definition of attempt to crime\(^1\) that is in accordance with resorting to crime operational factors if of which perpetrator does not desist them and no barrier is created the crime may inevitably occur one can imply the following attributes for realization of attempt to crime:

A: *Necessity for criminal intention* (Mense Rea): Thus assuming attempt to crime is logically negated in unintentional crimes (Sanei, dateless: 350; and Mohseni, 1996: 2-165).

B: *Operational actions*: It is considered as physical element (Actus Reus) for attempt to crime that is distinguished from pretension to criminal intent.

C: *Involuntary renunciation*: Omission of an action may be one of examples for attempt to crime. For example, railroad officer may remain inert in order to create accident and not to turn on alarm light; surely, his omission of doing this action will be punishable as an attempt to crime if it is accompanied to other conditions in attempt to crime (Sanei, dateless: 360; and Noorbaha; 1998: 232).

3-2- *Attempt to crime in the conduct crimes*

The legislator considers absolutely an action as crime regarding the conduct crimes and if no damage and loss is inflicted the perpetrator of criminal action will be punished. Many lawyers argue that whereas the operational action of crime is completed with realization of crime and attempt to crime does not apply to the conduct (absolute) crimes thus the crime is done as operational action is executed. Therefore, attempt to crime may be only analyzed and studied in the result-crimes. Apparently, since achieving criminal consequences is assumed as conditions for realization of the conduct-crimes thus attempt to crime may not apply to them but assuming attempt to crime is possible in these crimes as well. For example, it may be assumed that someone invites people to his/ her home by intention to encourage people to corruption and fornication (Clause B of Article 639 of Islamic Punishment Act) and prepares all arrangements for this purpose as well and just when s/he intends to start it the police officers enter and arrest him/ her. It cannot be implied that this part of operation was only for preparation of arrangements or inversely for perfect crime and or regarding gold- trafficking crime it can be assumed someone has bought some gold and left his/ her home for smuggling of this goods but police officer comes across him/ her and arrests him/ her. This part of action may not be also assumed as preparation of arrangements or the completed crime but it is attempt to crime (Mohseni; 1996: 2-167). It should be noticed; of course, that the period of occurrence is not the same in all of the conduct-crimes and technique of perpetration is effective in formation of process of crime (Article 661 of Islamic Punishment Act) since it is impossible to determine accurately time of renunciation of perpetrator of his/ her action or quality of non-occurrence of crime due to effect of external factors so that attempt to crime does not take place. Inversely, in perpetration of blackmailing crime (Article 592 of Islamic Punishment Act) which is considered as a conduct crime, the physical actions comprise of giving fund or payment note or delivery of property directly or indirectly. But if blackmailer intends to put bill of money in shelf of a public employee for doing a task that is considered as duties for governmental employee and during which s/he is arrested then attempt to crime of blackmail has been realized. It is obvious that if that person renounces from doing of this action willfully this action will not be subject to any punishment (Ardebili; 2000: 1-229).

\(^1\) - Awards Nos. 1744 (10/10/1950) and 1924 (03/11/1950) issued by National Supreme Court second branch
Voluntary renunciation (desisting due to free will) and involuntary renunciation in attempt to crime: The voluntary renunciation is in the case when the perpetrator exclusively avoids from completion of criminal action based on his/her will and without intervention of external factors. Attempt to crime is negated if renounced voluntarily and if conducted actions are not deemed as crimes the perpetrator may not be punishable.

3-3- Incomplete offense, impossible crime

There are all conditions for realization of crime in perpetration of incomplete offense such means and legal elements etc. and perpetrator makes best efforts to achieve the given result but due to some unpredictable reasons which are out of his/her will, the favorable result is not achieved (Ardebili; 2000: vol.2: 237).

The incomplete crime in Islamic Punishment Act (2013): Acceptance of incomplete crime is subject to doubt and ambiguity. On the other hand, the committed actions in incomplete crime do not comply with provision in Article 122 of Islamic Punishment Act since as it mentioned, this provision determines the status of impossible crime. The physical aspects do not hinder realization of crime in incomplete crime but personal factors are effective in this process such as mistake, carelessness, and or lack of skill in perpetrator of criminal operation.

Conclusion

Following to analysis on relevant generalities to the subject of attempt to crime, it is concluded in Islamic Punishment Act that Article 41 of this law (approved in 1991) not only did not remove the defects and faults in Articles 15-18 of law concerning Islamic punishment (1982) about lack of punishment for attempt to crime in many crimes against social expediencies and public order, but also has ignored the nature of attempt to crime and the related constituent elements despite of several years of experiences and this subject in internal and external rules and judicial procedures by deleting subject of intervention of perpetrator’s will in non-occurrence of the given offense (as basic and primary condition for the so-called attempt to crime) and also omission of the criminal nature of the conducted actions in such a way that it has also made problematic the punishment for several present examples of this case due to improper definition of attempt to crime and removing the related concept. Although in the present process, the courts practically assume attempt to crime as punishable only in a few legal examples such as attempt to theft and or attempt to fraud etc. by considering the previous definition and concept regardless of regulations in Article 41 of Law (approved in 1991), the fact is that with respect to transformation of constituent elements of attempt to crime and the given improper definition, punishment for a few examples may not be legally justifiable in terms of principal criteria. The other subject about Islamic Punishment Act (approved in 1991) is that not only legislator has not addressed attempt to crime as terminological concept, but also despite of the hazardous status of the given perpetrator and harmfulness for the society, he requires the court to enforce mitigated punishment for the independent and designated crime by the perpetrator. If it is imagined about regulations of new law that such transformation has occurred due to conflict of regulations about the so-called attempt of crime with rules in Islamic holy Sharia, then the answer is that regardless this fact that Islamic legislator had principally accepted the concept and nature of attempt to crime in act regarding Islamic punishment (approved in 1982) despite of the related defects and given there is no
contradiction among attempt to crime and regulations of Islamic criminal law, essentially according to attitude of Islamic lawyers any action that has been done in attempt to crime and complied with the fault will be punishable under title of discretionary crimes. Defect and existing gap in new law about regulations of attempt to crime and at the same time lack of punishment for risky criminal measures in concept of so-called attempt to crime and incomplete and impossible crimes such as attempt to murder, abduction, forgery and falsification and the like is totally tangible and comprehensible where despite of determination of punishment for the silent cases in former law such as abetting in murder and or punishment of perpetrator of murder in Islamic Punishment Act (approved in 1991) and or similar cases, the legislator has overlooked this crucial issue in criminal law despite of definite hazard for the community and stimulation of perpetrators in the law (approved in 1991). As a result, it can be said following to removal of terminological concept of attempt to crime and emphasis in punishment of the related perpetrator (provided criminal nature) and criminal measure of perpetrator without need to presence of Article 41 of law (approved in 1991) and also this crime which is punishable and it has only remained as a title in this law fortunately in 2013 most of existing defects were removed in Articles 15-18 of Islamic Punishment Act (1982) and Article 41 of Islamic Punishment Act (approved in 1991) that was subject to critique by lawyers with their ambiguity and they might lead to dispersion of attitudes and votes in section of crimes at Articles 122, 123, 1244.

Attempt to crime is assumed as crime within various offenses in Islamic Punishment Act (approved in 2013). Unlike Punishment Act (1991) in this Act the case of attempt to crime is assumed as crime and punishment for attempt to crime follows specific order and it has been ranked in three separate clauses. Also rather than attempt to crime, other incomplete crimes have been identified. Moreover, by explicit accepting of voluntary renunciation as condition for realization of attempt to crime, the legislator has removed the ambiguity in the previous law. Nonetheless, one of the given defects in Islamic Punishment Act (approved in 2013) is non-acceptance of general title of incomplete crimes explicitly and expressing it as incomplete offense rather than attempt to crime and lack of mitigation for the punishment when the perpetrator renounced voluntarily this action but his/ her measures include certain offense.
References