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# INCHOATE CRIMES

**Abhishek Kumar Mishra***

## Introduction:

Most of the crimes are committed after premeditation but there are some crimes which are committed at the spur of the moment. For the first category of crimes we consider the different stages of the actual commission of the offence. The mere intention to commit a crime is not punishable. Law does not take notice of mere thought of a person. Lord Mansfield[1] had once said: "So long as an act rests in bare intention, it is not punishable by our laws." The reason is that it is impossible to prove the mental state of a man and a court cannot punish a man for that which it cannot know. It has been rightly observed by the Brian, C.J.[2] that "The thought of a man is not triable for the devil himself not the thought of a man." But when this intent is expressed in words and can be inferred from his conduct, the person can be held criminally liable. It means the law only takes notice of an intention followed by some overt act.

The Indian Penal Code punishes a person for criminal intimidation[3], which is a mere expression of one's intention to inflict punishment, loss or pain to another. Sometimes it amount to completed offence.[4] After the stage of contemplation the next stage is known as 'the stage of preparation.' It consists devising or arranging the means or measures necessary for the commission of the crime. Generally the preparation to commit an offence is not punishable. The one reason behind it is the difficulty in proving it and the other is to protect the suspected person from unnecessary harassment. But there are some exceptions to this general rule. In these exceptional cases the mere preparation to commit the offences are punished because they preclude the possibility of an innocent intention.

The third stage is the 'stage of attempt.' An attempt is an overt act towards the commission of an offence after the preparation is made. For example, if a man after having procured a loaded gun pursues his enemy, but fails to overtake him or is arrested before he is able to complete the offence or fires without effect; in all these cases the man is liable for an attempt to murder. But in another situation, if a person purchases and loads a gun with the evident intention of shooting his enemy, but makes no movement to use the weapon

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[1] *In re* Scofield (1784) Cald.402.
[2] Y.B. (1477) p.17.
[3] Section 503 of I.P.C., 1860.
[4] Section 124 A of I.P.C.,1860.

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against his intended victim. Here the person remains at the stage of preparation and his act does not amount to an attempt. The law takes a serious notice of attempts and punishes them accordingly.

The last stage is the actual commission of the intended crime. It is nothing but a successful attempt. The point to be noted here is that all the four stages in the commission of the crimes are found only in those crimes which are committed after premeditation. None of these stages are found in those crimes which are committed due to provocation or at the spur of the moment.

**Inchoate Crimes:**

For every crime two elements are required: '*mens rea*' and '*actus rea*'. Where there is only *mens rea*, there is no crime. The word '*actus'* denotes a deed, a physical result of human conduct. When criminal policy of a country regards such a deed as sufficiently harmful, it prohibits it and seeks to prevent its occurrence by providing a penalty or punishment for its commission. The deed so prohibited by law is known as '*actus reus'*. It may be defined to be such result of human conduct as the law seeks to prevent.

It is to be noted that *actus reus* is necessary to constitute a crime, yet there may be a crime where the whole of the *actus reus* that was intended has not been consummated. For example, A shoots at B, but misses the aim, no *actus reus* is consummated and so there is clearly no murder, but nevertheless a crime has been committed. The law steps into punish acts which constitute an early stage in the commission of a crime. As a general rule, there is no criminal liability where *mens rea* has only been followed by some act that does no more than manifest *mens rea.* Liability begins only at a stage when the offender has done some act which not only manifests his *mens rea* but goes some way towards carrying it out. These are known as inchoate crimes. Some authors [5] criticize the use of the term 'inchoate' as misleading, because the word 'inchoate' connotes something which is not yet completed, and it is, therefore, not accurately used to denote something, which is itself complete, even though it be a link in the chain of events leading to some objects which is not yet attained. But the term 'inchoate' has been in use in criminal law for a very long time and has assumed a technical meaning.

**Kinds of Inchoate Crime:-**

Broadly speaking, there are two classes of inchoate or preliminary crimes. They are

(A) Attempt and

[5] Kenny (17th Ed), Edited by J.W.C.Turner,p.87

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(B) Abetment.

Abetment takes three forms, namely,

(I) Instigation or incitement;

(II) Intentional aiding; and

(III) Conspiracy.

**(A) ATTEMPT:**

Criminal law takes notice of attempt as a punishable wrong and awards punishment according to the nature of the act attempted. An attempt to commit a crime must be distinguished from an intention to commit it and also from preparation that precedes it.

**Preparation:**

Preparation consists in devising or arranging means or measures necessary for the commission of the offence. As a general rule, the law ignores the acts of preparation also. It only interferes when such preparation precludes the possibility of an innocent intention. Only such preparations are punished.

In some cases innocence of preparation is ruled out and therefore the state deems it necessary to nip them in the bud. In Indian Penal Code, there are some instances of such preparations which are punished according to their gravity or otherwise. For example, preparation to wage war against the government of India[6], preparation to commit depredations on the territories of a friendly country[7]. In both these cases the preparations are punished as the aim of the state is to put down with a heavy hand any preparation to wage war against the government of India or any preparation for committing depredations or plunder on the territories of states at peace with the government of India. Preparation to commit dacoity[8] has also been made punishable. Assembling to commit dacoity may be an act of preparation for it, but a mere assembly without further preparation is not a 'preparation' within the meaning of section 399. Section 402 applies to mere assembling for the purpose of committing dacoity without proof of other preparations. Dacoity is a very serious offence and, therefore, we find that it is punished in all its stages. So also is the case with making, selling or being in

[6] Section 122 of the I.P.C.,1860.
[7] Section 126 of the I.P.C.,1860.
[8] Section 399 of the I.P.C.,1860

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possession of instruments for counterfeiting of coins or stamps.[9] These offences are punished because the preparation in these cases is of so peculiar nature that they preclude the likelihood of their being meant for innocent purposes. Similarly possession of counterfeit coins, false weights and forged documents are also punishable[10].

**What is attempt?**

We have all come across the fact that there are four successive stages in the commission of the offence i.e. intention, preparation, attempt and the commission of the offence. Penal law of all the countries exempts the first from punishment. The Indian Penal Code punishes the second stage while the third stage i.e. of an attempt makes a distinct advance on the development of criminality, so that it is punishable everywhere. Generally law allows *locus paenitentiae* (opportunity to repent) only up to the second stage, after which it regards the stage of criminality as too far advance to go to unpunished. This puts an important question as to when the stage of preparation ends and the stage of attempt begins. It has not always been easy to draw a line of demarcation between a preparation and an attempt.

The term attempt has not been defined in the Indian Penal Code but broadly speaking it is a direct movement towards the commission of the offence. Mere purchase of the implements of burglary does not amount to attempt. Similarly when a man purchases a spear to injure his enemy, we never say that he attempted to cause an injury.

Stephen has defined[11] 'attempt' as: "An attempt to commit a crime is an act done with intent to commit that crime and forming part of a series of acts, which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case. An act done with intent to commit a crime, the commission of which, in the manner proposed was, in fact, impossible, is an attempt to commit that crime. The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself."

[9] Sections 233, 234, 235, 256,& 257 of the I.P.C.,1860.
[10] Sections 242, 243, 259 and 266 of the I.P.C.,1860.
[11] Stephen, Digest of Criminal Law (8th Ed.), Art. 29 p.26

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Baron Parke observed[12]:-"Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." This view of Baron Parke was approved in *R.* v. *Robinson*[13] and in *R* v. *Miskell*.[14]

Wharton [15] defines attempt to be "an intended apparent unfinished crime." Bishop [16] has observed "briefly, an attempt is intent to do a particular criminal thing, with an act towards it falling short of thing intended."

**Distinction between Attempt and Preparation:**

It has always been felt very difficult to draw a line between the preparation and attempt. But the relative proximity between the act done and the evil consequences contemplated largely determines the distinction. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; while an attempt is the direct movement towards the commission of the offence after preparations has been made. An attempt is manifested by the acts which would end in the consummation of the offence.

Another distinction is from the penal frame of reference i.e. preparations are generally not punishable, whereas an attempt is punishable. There is fourfold reason as to why preparations are not punishable, which are:-

(i) A preparation is generally a harmless act;

(ii) It is very difficult if impossible in most cases to show that preparation was directed to a wrongful end or was done with an evil motive or intent. Therefore, if mere preparation were punishable, it would cause unnecessary harassment to innocent persons as there is a *locus paenitentiae*, and the doer may have changed his mind;

(iii) It is not the policy of the state to multiply offences. If preparations were to be punishable, innumerable offences will have to be created;

(iv) A mere preparation does not and cannot ordinarily affect the sense of security of the individual to be wronged, nor would the society be disturbed or alarmed as to rouse its sense of vengeance.

[12] In Eagleton (1855) Dearsly 515
[13] (1915) 11 Cr.App. R. 124
[14] (1953) 37 Cr. App. R.214
[15] Wharton, Criminal Law, Vol.1p.173
[16] Bishop, New Criminal Law,Vol.1,Sec. 728

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The Indian Penal Code has dealt with 'attempt' in three different ways. First, in some cases the commissions of an offence as well as the attempt to commit it are dealt with in the same section and the extent of punishment prescribed is the same for both. There are 27 such sections in the Indian Penal Code.[17] In all these cases, both the actual commission of the offence and the attempt to commit it are made punishable equally. Secondly, in some cases attempts are treated as separate offences and punished accordingly. There are four such offences- attempt to commit murder[18], attempt to commit culpable homicide[19], attempt to commit suicide[20]and attempt to commit robbery.[21] In all these sections attempts for committing specific offences are dealt with side by side with the offences themselves but separately, and separate punishments are provided for the attempts from those of the offences attempted. Thirdly, the offences of attempt which are not covered by the above two clauses are governed by the general provision contained in section 511. This section reads as: "Whoever attempts to commit an offence punishable by this code with imprisonment for life, or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of imprisonment provided for that offence, or with both."

Pointing out the language of section 511 of the penal code Huda[22] observes that 'it is somewhat redundant' and puts a question as "could there be any attempt at all unless something had been done towards the commission off the offence attempted?" Gaur[23], also observes, "the words in 'such attempt does any act towards the commission of the offence' of section 511 are equivalent to the English phrase 'does an overt act'. They exclude a mere intention not followed by an overt act; they also exclude acts not proximate and necessarily connected with the commission of an offence."

Lord Blackburn[24] marks out the difference between a preparation and an attempt, as: "there is no doubt a difference between a preparation antecedent to an attempt and actual attempt, but if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt

[17] Sections 121, 124, 124A, 125, 130, 131, 152, 153A, 161, 162, 163, 165, 196, 198, 200, 213, 239, 240, 241, 251, 385, 387, 389, 391, 397, 398 and 460.
[18] Section 307 of the I.P.C., 1860
[19] Section 308 of the I.P.C.,1860
[20] Section 309 of the I.P.C.,1860
[21] Section 393 of the I.P.C.,1860
[22] Huda, p.50
[23] Gaur,K.D. The Penal Law of India, vol.II(4th Ed.) p.2804
[24] R. v. Cheesman (1862) 1 I&C,140.

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to commit the crime." In another case[25] Cockburn C.J. has observed: "the word 'attempt' clearly conveys with it the idea that if the attempt had succeeded the offence charged would have been completed." Halsbury's Laws of England[26] also states :- "any overt act immediately connected with the commission of the offence, and forming part of a series of acts which, if not interrupted or frustrated, would end in the commission of the actual offence, is, if dome with a guilty intent, an attempt to commit the offence."

**Essentials of attempt:-**

There are three essentials of 'attempt'-

(i) There must be an intention or *mens rea* to commit the offence;

(ii) An act is required to be done which constitutes the *actus reus* of a criminal attempt;

(iii) There should be failure in the accomplishment.

Kenny[27] has observed- "it is true that the criminality of the attempt lies in the intention, the *mens rea*, but this *mens rea* must be evidenced by what the accused has actually done towards the attainment of his ultimate object. Thus the *actus reus* of attempt is reached in such act of performance as first gives clear *prima facie* evidence of *mens rea*."

So far as first essential is concerned there is no special difficulty because it is purely a matter of fact, every attempt is based upon a specific intent, i.e. intent to commit some particular crime. The second essential is that the *actus reus* of the attempt must be a step towards the commission of the crime which the accused is charged with having attempted. The form and nature of overt act vary infinitely, since it depends upon the nature of the crime and the circumstances of each particular case. It must be, however, some act done in actually committing the crime as distinguished from acts of mere preparation.[28] The third essential element in a criminal attempt is that the act must fall short of completion of the intended crime. But unless specifically provided in the statute, an attempt merges in the consummation of the crime and there can be no conviction for the attempt when the offence is completed.[29]

[25] McPherson's case; D&B, 202
[26] Vol.X(3rd Ed.),1955,p.307.
[27] Kenny, Outlines of Criminal Law,(17th Ed.) p.92
[28] Burdick, The Criminal Law, vol.1,p.181
[29] R. v. White (1910) 2 K.B. 124

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**Test to distinguish attempt from preparation:-**

Various tests have been suggested for determining whether the conduct of the accused would amount to an attempt to commit the crime or it is a mere preparation. The first test is known as proximity test which lays down that an act or series of acts constitute an attempt if the offender has completed all or at any rate all the more important steps necessary to constitute the offence, but the consequence which is the essential ingredient of the offence has not taken place. The second test is that if the offender has not completed all the steps necessary to constitute the offence, he is in the preparatory stage but has proceeded far enough to necessitate punishment for the protection of the society.

**(a) Proximity rule:-**

This rule notices that the non-production of the consequence may be due to the want of skill on the part of the offender or other causes. But in all these cases the attempt in legal sense is complete. One important aspect of this proximity rule is the cases if "impossible attempts". Earlier these were not treated as punishable because they were held to be on the footing of mere preparation or of mere intention. Therefore, in Q. v. Collins[30],it was held that if the person puts his hand in the pocket of another with the intention to steal but the pocket was empty, he could not be convicted of an attempt to steal. So also in R. v. Mcpherson,[31] it was held that a person could not be properly convicted of breaking and entering a building and attempting to steal goods which were not there. But the principle laid down in the above two cases were reviewed in R. v. Brown,[32] where Lord Coleridge declared that these cases were decided on a mistaken view of the law. Finally, in R. v. Ring,[33] the accused was convicted for an attempt to steal from the pocket of a woman, though the pocket was empty, and all the cases to the contrary which have been noted above, were overruled, though no reasons were given for this decision. In another situation, where B puts aspirin in P's tea thinking it is a sweetening tablet for which P has asked. The act is innocent, it harms no one; yet it is the *actus reus* of attempt to murder; if B intended to poison P and believed that an aspirin would kill him, his administration of it would be an attempt to murder. Aspirin is a poison if given in large quantity and it would be no defense in attempt to say that the amount administered was insufficient to kill. Therefore, in a case [34] where one put two grains potassium cyanide in his mother's nectar in order to kill her, was held guilty of attempt even though the quantity was

[30] 9 Cox C.C. 407
[31] D. and B. 197
[32] 24,Q.B.D.,537
[33] (1892) 17 Cox C.C.491
[34] R. v. White,(1910) 2K.B.124(CC.A.)

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insufficient to kill her. In this case instead of potassium cyanide if common salt had been given, it would not have been offence of an attempt.

**(b) Second test:**

The second test is that an act or series of act constitute an attempt if an offender has not completed all the steps necessary to constitute the offence, but has proceeded far enough to necessitate punishment for the protection of society. These cases present a difficult situation, so they have to be dealt with from a different stand point. For instance, the offender may have stopped to proceed further not abandoning the idea of committing the offence either as a result of penitence or fear of consequence that might befall him as a result. In such cases the law allows the offender a *locus paenitentiae* that is a time for repentance. But, if the offender has desisted from proceeding further owing to his attempt being discovered or because a policeman was at his elbow, law will not excuse him as the evil intention is still there.

As a general rule we may say that so long as the steps taken leave room for a reasonable expectation that the offender may of his own free will still desist from a contemplated attempt he will be considered to be still on the stage of preparation. Such an exception may be based on the remoteness of the act done from the last proximate act that would complete the offence.

Thus the distinction between attempt and preparation may be marked as:- where there has been merely the procuring of the means for the commission of the offence and thereafter there is a gap between the said procuring of the means and the commencement of the act that would in all likelihood lead to the offence, then the procuring of the means would not be punishable as an attempt. The reason for this is twofold, first, such an act looks perfectly innocent and, secondly, there is possibility of change of mind in the interval between the procuring of the means and the commission of the act. Therefore, where both these reasons are wanting, such an act ought to be punished.

**B. ABETMENT**

Where several persons take part in the commission of a crime then the punishment is awarded according to the degree of culpability of each. This is prevalent both under the English law and the Indian law. Under English law, a clear distinction has been drawn between principles and accessories, between principles of the first degree and the second degree and between accessories before and after the fact. It is possible that the act may be done by the hand of one person, while another is present or is closed at hand, ready to afford assistance. Besides these participations there may be other who contributes less directly to the commission of

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the offences by instigation, persuasion, incitement or aid. The person who suggests the commission of the crime is called an abettor or under English law an accessory.

Section 107 of Indian penal code clearly defines the abetment of an offence as thus -

"A person abets the doing of the thing, who –First: instigates any person to do that thing; or Secondly: engages with one or more person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly, intentionally aids by an act or illegal omission, the doing of that thing".

Thus abetment takes three forms:

1) by instigation
2) by intentional aiding
3) and by conspiracy

**Abetment by instigation:-**

Literally, the term to instigate means to goad, to urge forward, or to provoke, to incite or to encourage to do an act. Thus instigation is the act of inciting another to do a wrongful act. Under English law the words used for instigation are counseling, procuring or commanding. But mere acquiescence or silent assent would not amount to instigation. For instance, A tells B that he is going to murder C. B says; you may do so as you like and take the consequence." A kills C. Here B cannot be said to have instigated A to murder C.

In order to constitute instigation, it is necessary to show that there was some active proceeding which has the effect of encouragement towards the perpetration of the crime. For instance two men agree to fight with their fits and each one of them deposited a sum of money with A as a stake holder to be paid to the winner. One of the participants was killed. The stake holder was held not guilty of instigating the manslaughter[35]. Cockburn C.J., in this case, observed: "there must be an active proceeding on his part. He must incite, or procure, or encourage the act…I do not think that mere consent to hold the stake can be said to amount to such a participation as is necessary to support the conviction.

[35] R. v. Taylor (1875) L.R.2.C.C.R.147

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It is important to note that the silent approval would also amount to abetment of offence if it has the effect of inciting or encouraging the offence. For instance, where a woman prepared herself for sati. X and y followed her to the funeral pyre and stood by her repeating Ram- Ram and thereby actively connived and countenanced the act. They were held guilty of abetment[36].

**Abetment by intentional aiding:-**

It may be committed either by: (a) doing of an act, that is to say, directly assisting the commission of the crime, or (b) no acts at all but of illegal omissions resulting in the consequence, or (c) acts, though not directly assisting in its commission but affording a facility for its commission.

It is important to note that person cannot be held guilty of aiding the doing of an act when the thing has not been done at all. This position follows from the explanation to of section 107, which lay down: "Whoever, either prior to or at the time of commission of any act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act." For example, if a servant keeps open the gates of his master house, so that the thieves may come, but the thieves do not come, he cannot be held guilty of abetting of the commission of the theft.

**Difference between instigation and intentional aiding:-**

These difference may be put as follows, whoever encourages, urges, provokes etc is said to instigate but whoever prior to or at the time of commission of the offence does anything in order to facilitate the doing of a thing is said to intentionally aid. For instance, A incites B to commit an assault; but C puts a Lathi in hands of B with the object that B may commit assault; C is said to intentionally aid him. Both A and C in the above illustration abate the offence of assault; A by instigation and C by intentional aiding.

**CRIMINAL CONSPIRACY:-**

The third form of abetment is the abetment by conspiracy. Section 107(2) of the Indian Penal Code provides – "a person abets the doing of a thing who…. Secondly – engages with one or more other person or persons in any conspiracy for the doing of that thing if, an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing.

[36] Queen v. Mohit 3N.W.P.316

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Section 107 treats only those conspiracies where some act or illegal omission takes place in consequence of those who conspires the acts. But under English law conspiracy as such without any act done in consequence thereof was punished under the criminal law.

Chapter VA of the Penal Code expressly provides for the punishment of the conspiracy of all types whether an overt act has been done or not .Therefore we shall examine the law of conspiracy in all its bearing according to section 107 as well as section 120A and 120B of the Indian penal code. Section 120A provides: "when two or more person agree to do or caused to be done, (1) an illegal act or (2) an act which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy, provided that no agreement except an agreement to commit an offence shall amount to criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Thus there are four essentials to constitute a criminal conspiracy, namely, first, an agreement between two or more persons; secondly, to do an illegal act; thirdly, to do a legal act by illegal means; and fourthly, an overt act done in pursuance of the conspiracy. Therefore there are two points of difference between English and Indian law, namely, first, the first three elements alone suffice to constitute a criminal conspiracy under English law but an overt act is necessary under the Indian law for the conspiracies other than those covered by section 120A. Secondly, English law treats mutual consultation and agreement as sufficient overt act but under Indian law some act independent of this mutual consultation and agreement is necessary to constitute a conspiracy under section 107.

In conspiracy there can be no doubt that *mens rea* is an essential element but what *mens rea* should be has not been authoritatively defined. Humphrey J. observed[37] that: "a criminal conspiracy consist in agreement to do an unlawful act without reference to the knowledge on the part of the accused of its illegality". These observations suggest that in all cases of conspiracy *mens rea* has no place.

**Conspiracy why punished?**

Therefore it is crystal clear that so long as the design to do wrongful act rests in the intentions only, it is not criminal, but as soon as two or more persons agreed it to carry it out, the agreement goes beyond the mental concept of the design and therefore is an offence of conspiracy. Mukerjee J.[38] has observed that "the offence of criminal conspiracy is of technical nature and the essential ingredient of the offence is the

[37] R. v. Sorsky (1944),2All.E.R.333;336
[38] B.N.Mukerjee v. Emp.AIR 1945Nag.163;166.

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agreement to commit the offence. In leading case Malcahy v. Queen[39], it was stated that "a conspiracy consist not only intention of the two or more, but in the agreement of two or more to do an unlawful act or to a lawful act by unlawful means. So long as such a design rests in the intention only, it is not indictable. When two agreed to carry it into the effect the very plot is an act itself.

**Conclusion :-**

Thus we see that preliminary crimes have sometimes been erroneously described as 'inchoate' offences. This is misleading because the word 'inchoate' connotes something which is not yet completed, and it is therefore not accurately used to denote something which is itself complete, even though it be a link in a chain of events leading to some object which is not yet attained. The offence of incitement is fully performed even though the person incited immediately repudiates the suggested deed, a conspiracy is committed although the conspirators have not yet moved to execute their proposed crime, and the performance of criminal attempt must always have been reached before the end is gained. In all these instances it is the ultimate crime which is inchoate and not the preliminary crime.

Therefore all kinds of inchoate crimes are punished on the basis of the reason which has been propounded by Bentham, who observes "the more these preparatory acts are distinguished for the purpose of prohibiting them, the greater the chance of preventing the execution of the principle crime itself... If the criminal be not stopped at the first stage of his carrier, he may at the second, or the third. It is thus a prudent legislature, like a skillful General, reconnoiters all the external posts of his enemy with the intention of stopping his enterprises he places in all defiles, in all the winding of his rule, a chain of works, diversified according to circumstances, but connected among themselves in such a manner that the enemy finds in each a new dangers and new obstacles.

[39] 1868,L.R.3 H.L.306;317.