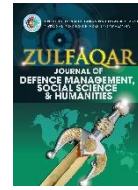




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Abandonment Should Be Mitigated Rather Than Affirmative Defences

Khairul Nizam Taib ^a Mazura Md Saman ^b Jamal Rodzi Dahari ^c Salma Yusof ^d

a. Fellow, Department of Strategic Studies, Faculty of Defence Studies and Management, National Defence University Malaysia, Kuala Lumpur, Malaysia

b. Lecturer, Department of Strategic Studies, Faculty of Defence Studies and Management, National Defence University Malaysia, Kuala Lumpur, Malaysia

c. Senior Lecturer, Department of Strategic Studies, Faculty of Defence Studies and Management, National Defence University Malaysia, Kuala Lumpur, Malaysia

d. Senior Lecturer, Department of Strategic Studies, Faculty of Defence Studies and Management, National Defence University Malaysia, Kuala Lumpur, Malaysia

*Corresponding author: khairulnizamtaib3596@gmail.com.

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ABSTRACT

Crime occurs every day due to a variety of reasons. The failure of social behaviour interaction between members of societies, failure in achieving specific needs, individuals' survivability, opportunities, passion and lack of moral intuition were among the factors accredited to the existence of crime. Often, the accused awaits the fruition of an intended event or crime. At times, the accused was frustrated when the intended crime did not result as expected. However, while the planned crime did not work out, the fact that it was tried is still considered a crime, i.e. the crime of attempt. In any case, issues still need to be addressed when the accused himself abandon an attempt. Could this act still punishable, or the change in the accused moral behaviour, i.e. accused good conscience leaving the crime intended earlier be mitigated? This article addressed the issue of the accused's abandonment of an attempt as an act of voluntary relinquishment with the intention of never again resuming the crime. The study is a purely conceptual one that prolongs the discussion within the ambit of moral and legal philosophy to address the rationality of abandonment as effective mitigation in lights of the accused's moral intuition, prospective reasons, and motive. It endeavours to expand views on motive based on the "Renunciation of Criminal Purpose" principle outlined by the "Model Penal Code". The article is intended to offer new perspectives into both decision and sanction by exploring the question of moral and legal philosophical discretion concerning the abandonment of criminal attempt. It concludes that the essence of abandonment is a legal, philosophical problem that objective parameters cannot simplify.

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Introduction

Failure in the completion of an offence or a crime is an attempt. The offence of attempt is an incomplete crime such that the liability is incurred although the act has not reached fruition with the achievement of the intended event or result (Per Ajaib Singh ACrj, Thiangiah & Anor v. Public Prosecutor [1977] 1 MLJ 79). It is an exception to the rule that in crime, the accused not only has to behave in a particular manner, his act should also have caused a forbidden result or event (Lee et al., 2012, p. 51).

On the other hand, abandonment of an attempt is an act of voluntary relinquishment, giving up of a specific opportunity gained in a commission of a crime by the accused with the intention of never again resuming the crime. The accused may sometimes plead for the abandonment of a crime as an affirmative defence or

mitigate the facts on abandonment on several excuses, inter alia, based on moral intuitions during a criminal trial to get an affirmative defence or mitigate it.

While the abandonment of an offence by an accused person in most countries does not affect the fact that the accused had committed a crime, nevertheless, the court's view on the issue varies from one to another. Some views that it may be accepted as an affirmative defence or an account for mitigation. Others took it as irrelevant facts in sanctioning. This essay argues that the abandonment of a commission of an attempted crime in some certain circumstances should be treated as mitigation rather than an affirmative defence.

Debates on Crime of Attempt

Although the origin of the offence of the attempt dates back to the English Common Law of the 14th century, the offence itself did not become a feature of criminal law until the late 18th century (Christopher & Christopher, 2011, p. 201). The attempt was criminalized under the doctrine "voluntus reputator pro fact" that the intention to commit a crime was to be taken for the deed (Gaur, 2009, p. 547). But then again, the intention by itself is not adequate. Some overt act manifesting the intent was required, even if the act itself was innocent (Francis Bowes Sayre, 1928). Hence, the intent "may make an act, innocent in itself, criminal; nor is the completion of an act, criminal in itself, necessary to constitute criminality" (R v Scofield, Cald. 397 (1784)). The tricky dilemma with the crime of attempt is deciding either the accused's action was a step toward the actual commission of a crime or a mere act of preparation.

The debates concerning the constitution of the crime of attempt lingers around two approaches derived from consideration of:

- (a) What is it to commit an attempt (Munah bte Ali v. Public Prosecutor [1958] MLJ 159); and
- (b) What evidence is required to support that the accused committed the crime (Per Agustin Paul J, Mohd Ali Jaafar v. Public Prosecutor (1998) 4 MLJ 210).

The first approach defines the commission of an attempted crime in reference to the accused's criminal act, which cannot be completed with intent. The crime of negligence or recklessness is the perfect example of an attempted crime. Someone who intentionally shoots and misses the target has not acted negligently or recklessly is said to have completed an attempted murder. The negligence or recklessness in targeting his victim does not affect the fact that an attempted crime has been committed. In this sense, the facts referring to the accused's preparation to shoot the victim, including selecting a weapon to be used, making an appreciation for the opportunity and targeting plan to succeed in committing the crime, are irrelevant. If the accused failed to complete the crime, he is said to have committed an attempted crime, bearing the merit of his intention.

The second approach concerns the required evidence supporting the commission of a crime (Yaffe, 2011). This approach looks upon details of adequate evidence and facts in deciding whether the acts constitute an attempt or not. Thus, preparation and an attempt to commit an offence must be distinguished as a thin line exists between the two. This is important because a point of the stage will determine whether there is attempted crime or not. Suppose the first approach renders the fact referring to the preparation of the accused to shoot the victim which includes weapon selection, making appreciation for the opportunity and targeting plan to succeed in committing the crime as irrelevant. In that case, the second approach asserts that such preparation is an important fact that may lead to attempted crime even if the result did not favour the accused.

In *Tan Beng Chye v PP* (1966) 1 MLJ 173, the accused took the complainant to some bushes and removed his shorts and inner pants. He then made the victim take off her trousers, leaving her in knickers which she refused to take off. Just then, a passer-by came, and the victim shouted for help. The accused was arrested, charged and convicted of attempted rape. On appeal, the Federal Court held that there was not sufficient evidence in the act to constitute an attempt to commit the crime. The accused was in the state of preparation and had not gone beyond the stage of preparation and such, and the accused could not be said to have attempted to commit rape.

Generally, the court's view on these approaches seems to be fruitful when deciding whether the accused has committed the attempted crime or not. However, it has been a long-standing issue when it comes to sanctioning, especially when there is an abandonment of an attempted crime (Yaffe, 2011). The court finds

that attempted crime and abandonment of an attempted crime cannot be addressed to the full extent through these approaches alone. As these approaches seem inadequate, the court finds alternatives and adapts several principles and external factors in addressing mitigating issues relating to attempted crime and abandonment.

Abandonment-Based Mitigation Rationale

Abandonment of an attempt mitigates but cannot be accepted as an affirmative defence, at least in certain circumstances (Duff, 1996). The reason is that the presence of abandonment does not change the facts that an attempt has been committed. This fact is not erased either negated a punishment.

Nevertheless, the question here is that when an attempt has been abandoned, is there a change in the view of reasons that lowering the sanction, should the accused enjoy a final reduction in sentence because he abandoned a crime? (Yaffe, 2011). The function of a mitigating factor is that it may cancel the force of reason. A court may give a particular sanction for attempted crime rather than award a lesser punishment. It is rendered a powerful tool in undermining the types of punishment to be awarded to the accused based on facts and evidence accrued. The argument is that sometimes the reason for awarding a particular sanction rather than a lesser one is that the behaviour punishment is part of a pattern of criminal conduct by the accused (Yaffe, 2011). Considering other factors for awarding punishment remain intact, which is strongly supported by this argument and discussion here, abandonment is positively mitigated. Suffice to say that to accept that abandonment as an affirmative defence is to deny the absence of reason to issue a specific sanction rather than a lower one for a sufficient reason to issue no sanction at all.

Moral Intuition

Moral intuition is a crucial element that the court embraces in addressing mitigating issues relating to abandonment and attempted crime. Philosophers use the phrase "moral intuition" to describe "the appearance in consciousness of moral judgments or assessments without any awareness of having gone through a conscious reasoning process" (Woodward & Allman, 2007). The prevalence and strength of moral intuition may mitigate and should be treated differently under the law. The fact that the accused abandons an attempted crime because he changed his mind for some moral reasons gives a different view of his responsibility and liability for such attempted crime. For example, someone intends to commit suicide bombing, resulting in collateral damages in a post office but was apprehended by the police before any damage could be done. The action must be treated differently under the law compared to those who were not apprehended by the police but changed his mind before the plan was completed for laudable moral reasons. Moral intuition in this sense supports the idea that the offender's motives for the change of mind and subsequently abandoned his attempt is crucial for the court to decide whether punishment is relevant to the accused or not. The question is, if the accused is to be punished, should the punishment be reduced, or a particular sanction is awarded? (Yaffe, 2011). Thus, various impure motives for abandoning may impart guidance on whatever mitigating force the abandonment offered.

Accused's Prospective Reason

Under this reasoning, the abandonment takes place after a crime of attempt attained its preparatory stage. The accused, in simple words, has completed sufficient stages of actus reus in an attempted crime (Ranchhoddas & Thakore, 1998, p. 2525). The only absence in the abandonment is that the element of *mens rea* after a preparatory stage. When the accused did not abandon, the crime of attempt is said to have been completed. In another way, abandonment after the preparatory stage would mitigate. In such a situation, in which the accused has some reasons to believe for his future action that he would have in the light of sanction, in prospect, before the crime for which he is punished was completed may lead to mitigation.

Hypothetically, what is the position when a completed crime is abandoned before completion? In other words, the accused abandon the crime before *mens rea* is completed. Suppose A intended to blow up a building. The act requirement and his intention had been made up, and subsequently, he lighted up the fuse. However, he changed his mind and rushed to stamp out the fuse but was apprehended by a policeman. The policemen did not in any way manage to stamp out the fuse, and so did A. The building then exploded, claiming hundreds of lives. A is said to have completed the actus reus of destructing the building but abandoned it before completion. The argument is that if he was not interrupted or interfered with, he would

stamp out the fuse. The fact that the police apprehended him denied his effort to get to the crucial spot. In such cases, it is strongly believed that abandonment may be treated as mitigation based on the change of mind even the *actus reus* is completed. Such hypothetical may change a court's perspective or the landscape of the punishment because abandonment was done before the *mens rea* completed.

However, in cases relating to abandonment mitigates completion, it must be proven with a shred of solid evidence. To make abandonment good mitigation, one must prove that it is corroborated by evidence. This must be done to differentiate it from bare denial. The most vital part is the question of "what the accused would have had in light of sanction, in prospect, that is before the crime for which he is punished was completed" (Yaffe, 2011, p. 296). Therefore, the discussion above shows us that abandonment based on completion support abandonment mitigates attempt.

The Significance of Motive

Motive can be a piece of crucial evidence to prove that an abandonment fits to be accepted as a strong mitigation force. Whether abandoning a crime can be mitigation or not depends on the accused's motive of why he is abandoning the crime. If it is an objectionable motive that crime will be more profitable in future if performed a little bit later, the accused does not deserve mitigation (Yaffe, 2011). Therefore, abandonment based on mitigation in this sense will fail to go through.

The following scenario illustrates the above. Suppose an accused was planning to commit a robbery in a dwelling house in the afternoon. An appreciation of his cause of action assessed that the dwelling house owner would vacate the building at 2 o'clock in the afternoon. However, at the time the accused should proceed with his plan, the owner was still packing his personal belongings and had to adjourn his journey until late in the afternoon (6 o'clock). From these facts, the accused motives to rob the dwelling house is not abandoned per se, but it was adjourned a little bit further so that he will be able to commit the crime independently. The accused must re-appreciate his *modus operandi* so that his *actus reus* can be completed in the future with a more profitable return. Having said that, the assessment of the accused because objectionable motive giving him more time, space, opportunity and likelihood in committing the robbery. Therefore, the accused does not deserve mitigation nor an affirmative defence.

Elements of Motive

According to the "Renunciation of Criminal Purpose" concept of the Model Penal Code, the two most important elements constitute a motive, i.e. voluntariness and completeness (American Law Institute, 1985). Hence, for abandonment to be regarded as a good mitigation factor, the accused must prove that the abandonment is made voluntarily and complete.

a. Voluntary Abandonment

To constitute a voluntary abandonment of an attempted crime for which a person may render it a good mitigation factor, the act of abandoning must result from the accused's conscious choice (Yaffe, 2011). It is the one that is motivated by "a change of heart, timidity, or lack of perseverance" (Chew, 1988, p. 441). The choice need not be the product of thorough deliberation but may stem from an impulse, as long as the accused is physically and mentally capable of exercising restriction and discretion consistent with the law's requirement. Thus, someone who intends to commit a suicide bombing in a compact civilian-populated area but changes his mind before the plan was completed on laudable moral reason is said to abandon his act voluntarily. For such reason, such abandonment will be treated differently under the principle of "Renunciation of Criminal Purpose" (Model Penal Code, S 5.01 (4)).

b. Complete Abandonment

Abandonment must not be influenced by any other factors with the completion of the act of abandoning the crime. Mere abandoning based on seeking future advantages, postponing for better objectives or victims will only undermine abandonment as a good mitigating factor.

Illustration

The importance of the elements for the application of the above elements was illustrated in a Malaysian case of *Public Prosecutor v Zainal Abidin Ismail & 3 Ors* (1987) 2 MLJ 741. In this case, the accused was charged with attempted rape. He laid on top of the victim with the intention of penetrating her but abandoned his plan when he was unable to obtain an erection. He did not remove his trousers. It was held that there could be an attempt where failure to commit the offence was due to "ineptitude, inefficiency, or insufficient means on the part of the accused". Applying this test, the court found him guilty of an attempt of rape, stating:

"Notwithstanding he failed to penetrate the girl by reason of his inability to have an erection, D4 did attempt to penetrate the girl, and that the acts by which he took preparatory to the offence, namely by lying on the top of the girl, with his expressed intention of having intercourse are sufficient in law to constitute an attempt of rape".

It is crystal clear that the accused, in this case, abandoned his plan. However, the abandonment was made because of his ineptitude, inability, insufficient and inefficiency to have an erection. Therefore, the abandonment was incomplete and involuntary.

Involuntary and Incomplete Abandonment

Abandonment in the light of the Principle of "Renunciation of Criminal Purpose" is said not to be voluntary and not complete when the accused transfers his criminal effort or focus on a similar objective or victim. Renunciation also is not voluntary "if motivated by circumstances that increase the probability of apprehension or that make the performance of the attempted crime more difficult" (Chew, 1988, p. 441). The transfer of focus of an accused of robbing a bank to a convenience store may be influenced by security measures taken by the banker. The degree of safety and security offered by the banker is relatively higher than the security and safety measure taken by a convenience store owner. The transfer of criminal effort to a similar objective of a victim based on a level of security and safety does not, in fact, affect the motives of the accused to proceed with his plan. Changes of a target will only show us that the accused will have a better opportunity and higher chances to succeed in a robbery. These advantages will affect voluntariness and completion of an abandonment. Therefore, the argument of abandonment based mitigation in this sense will fail.

Other types of Motives Undermining Abandonment Mitigation

According to the Model Penal Code, there are another two types of motives regarding abandonment that undermine mitigation (Model Penal Code, S 5.02 & S 5.03). The first is that there is a better chance that the accused will get caught as he had expected it. The case *Kee Ah Bah v Public Prosecutor* (1979) 1 MLJ 26 is best to illustrate this reasoning. In this case, the accused was charged with having been knowingly concerned in an attempt of fraudulent evasion of export duty on 21 bags of tin ore contrary to the Customs Act 1967. The 21 bags of tin ore were hidden in his car with the intention to smuggle it to Singapore, therefore the evasion of export duty. He left the immigration checkpoint at Johor Bahru causeway and approached the customs checkpoint. When the car was about 10 yards from the checkpoint heading to Singapore, a customs officer signalled the accused to stop, with two cars ahead. The accused reversed and made a U-turn and escaped back, heading to Johor Bahru. The car was then discovered shortly afterwards, still containing the tin ore. The prosecution appealed against the acquittal, and the court, in allowing the appeal, decided that the accused had the intention to leave the country when he presented his travel documents at the immigration checkpoint. When he approached the customs checkpoint, the act of abandoning by making a U-turn was his opportunity to escape from being apprehended.

The second type of motive of abandonment that undermines mitigation involves the scenario when completion is harder than expected. The completion of abandonment is inversely proportional to the completion of an attempted crime. The discussion illuminates that the higher degree of sufficient act of completion of an attempted crime, the harder completion of abandonment that can be completed. The best explanation can be illustrated in the case of *State of Maharashtra v Mohd Yakub* (1980) Criminal Law Journal 793, whereby the accused was charged and convicted of attempting to smuggle silver out of India contrary to Indian Customs Act 1962. He pleaded for abandonment and was acquitted in the High Court. However, on appeal to the Supreme Court, it was found that the intention of the accused to export the silver from India by sea is clear from the circumstances. They were taking the silver ingots concealed in the two

vehicles under cover of darkness. They had reached close to the seashore and had started unloading the silver there near a creek. Beyond the preparatory stage, most of the steps in the course of the export by sea had been completed. The only step that remained to be taken was to load it on a sea craft to move out of India's territorial waters. But for the intervention of the officers of the law, the unlawful export of silver would have been consummated. Thus, the defence of abandonment was undermined because it was held that the completion of abandonment became harder than the accused expected when the act of unlawful exporting silver went beyond the stage of preparatory.

It cannot be negotiated that the motive for abandonment shows sensitivity on the accused's part to the typical function. The motive shows that the accused is weighing, making an appreciation of what will he profit or borne in the future. Thus, this shows us that abandonment is involuntary and incomplete. Therefore, the argument for abandonment based mitigation does not go through.

The irrelevancy of Prospective Reasons

Prospective reasons by the accused at some point, however, seems to be irrelevant when the accused abandoning the crime with voluntary intention and completed the abandonment. The reason is that if the sanction were smaller, the accused still abandoned his attempt. Therefore, when abandonment raised no motives at all and was voluntary and complete abandonment, it is, without doubt, a legitimate mitigating factor. But what if there are other motives that did not fall under the Principle of Renunciation of Criminal purpose. Does it count to decide such cases should be mitigated? The court may have different views on this issue. In *People V Taylor*, 598 NE 2d693 (NY, 1992), the accused broke into the victim's apartment and threatened her with a knife. He also made some aggressive sexual advances with the intention to rape the victim. The victim, fearing for her safety, could dissuade the accused from continuing his threats by making him believe that he could be her boyfriend if he stopped the advances. Believing that the victim submitted herself to him, the accused then brought her to her bedroom and started to undress her. Before the accused completed undressing the victim, she persuaded the accused, and they went back to the living room. While talking, the accused took off his surgical gloves and saying that he was "not going to be needing these anymore". The victim convinced the accused to get a bottle of liquor at the liquor store before they continue their activity in her place. On the way out, the victim ducked back into the apartment and locked the door behind her, leaving the accused in the hall. The accused knocked on the door and tried without success to get her to open it. Meanwhile, the victim called the police. The court rejected the possibility of abandonment under the statute derived from the Model Penal Code on the ground that the renunciation was not made "voluntarily and complete". The court rejected it because the accused "preference" for consensual over non-consensual sex was, in fact, non-consensual sex that bearing a specific punishment. Thus, in this case, the accused may have thought that the prospect of consensual sex, bringing with it the risk that he would not have sex with the victim at all, was not worth pursuing. He abandoned only if he thinks that consensual sex outweighs non-consensual, calculation quite possibly made by considering the penalty for non-consensual sex. Therefore, the argument for accused preferences on motives for abandonment based mitigation does not go through.

Conclusion

There is no simple mathematical solution to the issue regarding abandonment and an attempted crime. The nature of abandonment and attempt is a subjective matter that cannot be simplified with objective structures or formulations. Furthermore, abandonment and attempt are two kinds of an act which sui generis from any other crimes. Both "allow us to weigh competing claims or reasons and, on the other hand, sanction typically but to sanction less than typical" (Yaffe, 2011, p. 309). In simpler words, abandonment and attempts provide our discretion to decide through a process of weighing competing reasons that derive from the facts of a particular case. It is problematic and puzzling issues whether to consider the critical question on why and how to decide those who abandon their crime of attempts but complete their crime nonetheless. An accused who abandon engaged in behaviour worthy of censure and therefore sanction but simultaneously shows some sufficient reasons to refrain from completing the crime makes sense to give the accused a lower sanction than is typical for an attempt. Model Penal Code may provide some guidelines, i.e. in understanding motives to assess and weigh all consideration and reasons some outcome may be reached, i.e. whether abandonment should be mitigated rather than an affirmative defence.

References

Books and Journals

- American Law Institute. (1985). Model Penal Code. <https://www.ali.org/publications/show/model-penal-code/>.
- Chew, M. (1988). Should Voluntary Abandonment be a Defence to Attempted Crime. *American Criminal Law Review*, 26(2), 441–461.
- Christopher, K. H., & Christopher, R. L. (2011). *Criminal Law: Model Problems and Outstanding Answers*. Oxford University Press.
- Duff, R. A. (1996). *Criminal Attempts*. Clarendon Press.
- Francis Bowes Sayre. (1928). *Criminal Attempts*. *Harvard Law Review*, 41(7), 821–859.
- Gaur, K. D. (2009). *Textbook on the Indian Penal Code*. Universal Law Publishing.
- Lee, C. F., Hassan, C. A., & Bajury, M. S. H. M. (2012). *Introduction to Principle and Liability in Criminal Law*. Lexis Nexis.
- Ranchhoddas, R., & Thakore, D. K. (1998). *The Law of Crimes* (24th ed., Vol. 2). Bombay Law Reporter.
- Woodward, J., & Allman, J. (2007). Moral intuition: Its neural substrates and normative significance. *Journal of Physiology Paris*, 101(4–6), 179–202. <https://doi.org/10.1016/j.jphysparis.2007.12.003>.
- Yaffe, G. (2011). *Attempts: In the Philosophy of Action and the Criminal Law*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199590667.001.0001>.

Cases

- Kee Ah Bah v Public Prosecutor (1979) 1 MLJ 26.
- Mohd Ali Jaafar v. Public Prosecutor (1998) 4 MLJ 210.
- Munah bte Ali v. Public Prosecutor [1958] MLJ 159.
- People v Taylor, 598 NE 2d693 (NY, 1992).
- Public Prosecutor v Zainal Abidin Ismail & 3 Ors (1987) 2 MLJ 741.
- R v Scofield, Cald. 397 (1784).
- State of Maharashtra v Mohd Yakub (1980) *Criminal Law Journal* 793.
- Tan Beng Chye v PP (1966) 1 MLJ 173.
- Thiangiah & Anor v. Public Prosecutor [1977] 1 MLJ 79