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THE ABANDONMENT DEFENCE TO CRIMINAL ATTEMPTS IN MALAYSIAN CRIMINAL LAW

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ABSTRACT

This article addresses 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 considering 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 on both decision and sanction by exploring the question of moral and legal philosophical discretion concerning the abandonment of criminal attempts. 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 attempt violation 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[1]. It is an exception to the rule that the accused must behave in a particular manner; his act should 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 a specific opportunity gained in a commission of a crime by the accused never again to resume 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, among other things, 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, the court's view varies. Some opinions 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 certain circumstances should be treated as mitigation rather than an affirmative defence.

[1] Per Ajaib Singh ACrj, Thiangiah & Anor v. Public Prosecutor [1977] 1 MLJ 79.

Crime of Attempt

Although the origin of the offence of the attempt dates to the English Common Law of the 14th century, the crime itself did not become a feature of criminal law until the late 18th century (Christopher & Christopher, 2011, p. 201). The attempt was criminalised under the doctrine of "volunteers' reputation pro fact" that the intention to commit a crime was to be taken for the deed (Gaur, 2009, p. 547). But then again, the choice by itself is not adequate. Some overt act manifesting the intent was required, even if the show itself was innocent (Francis Bowes Sayre, 1928). Hence, the plan "may do an act, innocent in itself, criminal; nor is the completion of an act, criminal in itself, necessary to constitute criminality[2]". The tricky dilemma with the crime of attempt is deciding whether 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[3]; and

(b) What evidence is required to support the accused's crime[4].

The first approach defines the commission of an attempted crime as 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 and is said to have completed an attempted murder. The negligence or recklessness in targeting his victim does not affect that an attempted crime has been committed. In this sense, the points referring to the accused's preparation to shoot the victim, including selecting a weapon to be used, appreciating the opportunity, and targeting the 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 in the stage will determine whether there is an 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 the plan to succeed in committing the crime 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 the case of Tan Beng Chye (1966)[5], 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 insufficient evidence in the act to constitute an attempt to commit the crime. The accused was in a state of preparation and had not gone beyond the practice stage, 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 regarding sanction, especially when an attempted crime is abandoned (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.

[2] R v Scofield, Cald. 397 (1784)

[3] Munah bte Ali v. Public Prosecutor [1958] MLJ 159

[4] Per Agustin Paul J in the case of Mohd Ali Jaafar v. Public Prosecutor (1998) 4 MLJ 210

[5] Tan Beng Chye v PP (1966) 1 MLJ 173

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 fact that an attempt has been committed. This fact is not erased or negated as a punishment. Nevertheless, the question here is that when an attempt has been abandoned, is there a change in the view of reasons that are lowering the sanction, should the accused enjoy a final reduction in sentence because he left 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 a powerful tool in undermining the types of discipline awarded to the accused based on accrued facts and evidence. The argument is that sometimes the reason for granting a particular sanction rather than a lesser one is that the behaviour punishment is part of a pattern of criminal conduct (Yaffe, 2011). Considering other factors for awarding punishment remain intact, supported by this argument and discussion, 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 give no sanction.

Moral Intuition

Moral intuition is a crucial element that the court embraces in mitigating issues relating to abandonment and attempts at 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 ethical reasons gives a different view of his responsibility and liability for such an attempted crime. For example, someone intends to commit a 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 than those not arrested by the police but changed their 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 abandoning his attempt are crucial for the court to decide whether punishment is relevant to the accused. Should the sentence be reduced, or should a particular sanction be awarded if the accused is to be punished? (Yaffe, 2011). Thus, various impure motives for abandoning may guide whatever mitigating force the abandonment offered.

Accused's Perspective Reason

Under this reasoning, the abandonment occurs after a crime of attempt attained its preparatory stage. The accused, in simple words, has completed sufficient steps of *actus reus* in an attempted crime (Ranchhoddas & Thakore, 1998, p. 2525). The only absence in the abandonment is the element of *men's 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 initial step 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 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 leave the crime before *men's rea* is completed. Suppose A intended to blow up a building. The act requirement and intention were made up, and he subsequently lighted up the fuse. However, he changed his mind and rushed to stamp out the fuse but was apprehended by a policeman. The police officers did not 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 were 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 if 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 *men's rea* was 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 "what the accused would have had in light of sanction, in prospect, before the crime he is punished was completed" (Yaffe, 2011, p. 296). Therefore, the

discussion above shows us that abandonment based on completion support abandonment mitigates attempts.

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 leaving the crime. If it is an objectionable motive that corruption will be more profitable in future if performed a little bit later, the accused does not deserve mitigation (Yaffe, 2011). Therefore, abandonment based on comfort 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 PM; 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 are not abandoned per se, but it was adjourned a little further so that he could 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. The accused's assessment because objectionable motive gives him more time, space, opportunity, and likelihood to commit the robbery. Therefore, the accused does not deserve mitigation or an affirmative defence.

Elements of Motive

According to the "Renunciation of Criminal Purpose" concept of the Model Penal Code, the two most essential elements constitute a motive, i.e. voluntariness and completeness (American Law Institute, 1985). Hence, for abandonment to be a suitable mitigation factor, the accused must prove that the abandonment was made voluntarily and complete. 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. Still, it may stem from an impulse if 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 is 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)). 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 applying the above factors is illustrated in the Malaysian case of Public Prosecutor v Zainal Abidin Ismail & 3 Ors (1987)[6]. In this case, the accused was charged with attempted rape. He laid on top of the victim to penetrate her but abandoned his plan when he could not 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 the failed to penetrate the girl because 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". (p 748)

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

[6] Public Prosecutor v Zainal Abidin Ismail & 3 Ors (1987) 2 MLJ 741

Abandonment in the light of the principle of "Renunciation of Criminal Purpose" is said not to be voluntary or complete when the accused transfers his criminal effort or focuses on a similar objective or victim. Renunciation is also not voluntary "if motivated by circumstances that increase the probability of apprehension or 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 banker's degree of safety and security is relatively higher than a convenience store owner's security and safety measures. The transfer of criminal effort to a similar objective of a victim based on a level of security and safety does not affect the accused's motives to proceed with his plan. Changes in 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, two other motives regarding abandonment 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 than he had expected. The case Kee Ah Bah v Public Prosecutor (1979)[7] is best to illustrate this reasoning. In this case, the accused was charged with knowingly being concerned about the 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 to smuggle it to Singapore, therefore evading export duty. He left the immigration checkpoint at Johor Bahru causeway and approached the customs checkpoint. A customs officer signalled the accused to stop when the car was about 10 yards from the checkpoint heading to Singapore, with two cars ahead. The accused reversed, made a U-turn, and escaped, running to Johor Bahru. The vehicle 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 more complicated than expected. The completion of abandonment is inversely proportional to the completion of an attempted crime. The discussion illuminates that the higher degree of the good act of completion of an attempted crime, the more arduous completion of abandonment that can be completed. The best explanation can be illustrated in the State of Maharashtra v Mohd Yakub (1980)[8], whereby the accused was charged and convicted of attempting to smuggle silver out of India contrary to the 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 accused's intention to export the silver from India by sea was clear from the circumstances. They were taking the silver ingots concealed in the two vehicles under darkness. They had reached close to the seashore and started unloading the silver near a creek. Beyond the preparatory stage, most of the steps during the export by sea had been completed. The only measure 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 law officers, 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 more complex than the accused expected when the act of unlawful exporting silver went beyond the preparatory stage.

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

However, at some point, the accused's prospective reasons seem irrelevant when the accused abandons the crime with voluntary intention and completes the abandonment. The reason is that if the sanction were more minor, the accused would still leave his attempt. Therefore, when defection raised no motives at all and was voluntary and complete abandonment, it is, without doubt, a legitimate mitigating factor. But what if other reasons did not fall under the Principle of Renunciation of Criminal purpose. Does it count to decide whether such cases should be mitigated? The court may have different views on this issue. In People V

[7] Kee Ah Bah v Public Prosecutor (1979) 1 MLJ 26

[8] State of Maharashtra v Mohd Yakub (1980) Criminal Law Journal 793

Taylor (1992)[9], the accused broke into the victim's apartment and threatened her with a knife. He also made some aggressive sexual advances to rape the victim. Fearing for her safety, the victim could dissuade the accused from continuing his threats by making him believe he could be her boyfriend if he stopped the advances. Considering that the victim submitted herself to him, the accused brought her to her bedroom and started undressing 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 said he was “not going to need these anymore". The victim convinced the accused to get a liquor bottle at the liquor store before continuing their activity in her place. The victim ducked back into the apartment and locked the door behind her on the way out, 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 because the renunciation was not made "voluntarily and completed". The court left it because the accused "preference" for consensual over non-consensual sex was, in fact, non-consensual sex that bore 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, was not worth pursuing. He abandoned only if he thought that consensual sex outweighs non-consensual, a possible calculation by considering the penalty for non-consensual sex. Therefore, the argument for accused preferences on abandonment-based mitigation motives 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 subjective and cannot be simplified with objective structures or formulations. Furthermore, abandonment and attempt are two kinds of acts that sui generis from 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 weighing competing reasons that derive from the facts of a particular case. It is puzzling whether to consider the critical question of why and how to choose those who abandon their crime of attempts but complete their offence, nonetheless. An accused who leaves engaged in behaviour worthy of censure and, therefore, sanction but simultaneously shows 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 considerations and reasons some outcome may be reached, i.e. whether abandonment should be mitigated rather than an affirmative defence.

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