

The Defence of Voluntary Desistance in Criminal Attempts: A Malaysian Legal Perspective

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ABSTRACT

The doctrine of criminal attempts is a critical component of criminal law, designed to punish individuals who intend to commit crimes but are intercepted or fail before completion. However, the concept of voluntary desistance—where an individual willingly ceases to commit a crime before completing the offense—poses complex legal and moral questions. This paper examines the viability and legal recognition of voluntary desistance as a defense in criminal attempt cases within the Malaysian legal framework. Drawing on statutory provisions, case law, and comparative analysis with jurisdictions such as the United Kingdom and the United States, the study highlights the absence of explicit legislative guidance on the issue in Malaysia. It also explores whether existing legal principles allow for the incorporation of voluntary desistance as a mitigating factor or complete defense. The paper concludes by proposing legal reforms that would provide clarity and consistency in handling cases involving desistance in criminal attempts.

Keywords: Voluntary desistance, criminal attempts, Malaysian criminal law, incomplete offenses, legal defense, intent, comparative law, penal code, legal reform, criminal responsibility.

INTRODUCTION

Criminal attempts, or inchoate offences, represent a critical area within criminal jurisprudence, addressing acts that fall short of a completed crime but nonetheless demonstrate a clear criminal intent. The law intervenes at this preliminary stage to prevent harm and deter individuals from embarking on criminal enterprises ^[1]. However, a complex and often debated aspect of criminal attempts is the defence of voluntary desistance, commonly referred to as abandonment. This defence posits that an individual who has taken substantial steps towards committing a crime, but then voluntarily and completely renounces their criminal purpose, should be absolved of liability for the attempt. The rationale often invoked for this defence includes encouraging desistance, distinguishing between truly dangerous individuals and those who genuinely repent, and avoiding punishment for acts that ultimately caused no harm due to the offender's change of heart ^[2].

In Malaysian criminal law, the concept of criminal attempt is primarily governed by sections 511 of the Penal Code, which outlines the punishment for attempts to commit offences punishable with imprisonment. While the Penal Code defines

what constitutes an attempt, it remains largely silent on the specific conditions under which an abandonment defence might apply. This lacuna has led to varying interpretations and applications by the courts, drawing upon common law principles and comparative legal developments ^[3]. This article aims to critically examine the defence of voluntary desistance in the context of criminal attempts under Malaysian criminal law, analyzing its theoretical underpinnings, judicial application, and potential for reform.

METHODS

This study employs a doctrinal legal research methodology, focusing on the analysis of primary and secondary legal sources. The primary sources include relevant statutes, particularly the Malaysian Penal Code, and a comprehensive review of reported Malaysian judicial decisions concerning criminal attempts and any instances where the defence of abandonment has been raised or considered. Secondary sources encompass academic literature, journal articles, and legal textbooks that discuss criminal attempts, the defence of desistance, and comparative criminal law principles from

jurisdictions such as India, the United States (specifically the Model Penal Code), and the United Kingdom [4, 5, 6, 7, 8, 9, 10, 11].

The research involves:

1. **Statutory Interpretation:** Analyzing the wording and legislative intent behind Section 511 of the Penal Code and related provisions to understand the foundational elements of criminal attempt in Malaysia.
2. **Case Law Analysis:** A detailed examination of Malaysian court decisions, such as *Kee Ah Bah v Public Prosecutor* [12], *Mohd Ali Jaafar v. Public Prosecutor* [13], *Munah bte Ali v. Public Prosecutor* [14], and *Tan Beng Chye v PP* [15], to identify how courts have interpreted and applied the law on attempts, and whether voluntary desistance has been recognized, explicitly or implicitly, as a mitigating factor or a full defence.
3. **Comparative Legal Analysis:** Drawing comparisons with the treatment of abandonment in other common law jurisdictions, such as the Model Penal Code in the United States [1], Indian criminal law (as discussed by Gaur [7] and Ranchhoddas & Thakore [9]), and English common law (e.g., *R v Scofield* [16]), to highlight potential avenues for development or clarification within Malaysian jurisprudence.
4. **Theoretical Framework:** Exploring the philosophical and policy arguments for and against the recognition of voluntary desistance as a defence, drawing on works by Duff [4], Yaffe [11], and Chew [2].

By synthesizing these sources, this article seeks to provide a comprehensive understanding of the current legal landscape regarding the abandonment defence in Malaysian criminal attempts and to propose a path forward for its clearer articulation.

RESULTS

The Concept of Criminal Attempt in Malaysia

Malaysian criminal law, largely influenced by the Indian Penal Code, defines an attempt as an act done with the intention to commit an offence, which is a step towards the commission of the offence, but falls short of its actual completion. Section 511 of the Penal Code states: "Whoever attempts to commit an offence punishable with imprisonment or with fine or with both, 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 for a term which may extend to one-half of the longest term of imprisonment provided for that offence, or with fine, or with both."

Key elements derived from judicial interpretations of

Section 511 include:

- **Intention:** The accused must have the specific intention to commit the full offence [8]. This is a crucial mental element.
- **Proximity to Completion:** The act done must be "towards the commission of the offence" and must be sufficiently proximate to the completion of the crime. Malaysian courts have generally adopted the "proximity test" or the "locus poenitentiae" (place of repentance) test, which examines whether the accused has gone beyond mere preparation and has embarked on the actual commission of the crime [12, 15]. For instance, in *Kee Ah Bah v Public Prosecutor* [12], the court held that the act must be "immediately connected with the commission of the offence." Similarly, *Tan Beng Chye v PP* [15] emphasized that the act must be "sufficiently proximate to the commission of the intended offence."

Absence of Express Statutory Defence for Abandonment

Crucially, the Malaysian Penal Code, like its Indian counterpart, does not contain any express provision for a defence of voluntary desistance or abandonment for criminal attempts. This contrasts sharply with jurisdictions like the United States, where the Model Penal Code explicitly recognizes such a defence. Section 5.01(4) of the Model Penal Code provides that a person is not guilty of an attempt if they "abandon their effort to commit the crime or prevent it from being committed, under circumstances manifesting a complete and voluntary renunciation of their criminal purpose" [1]. This provision aims to incentivize desistance and distinguish between those who genuinely abandon their criminal intent and those who merely postpone it or are deterred by external factors.

Judicial Treatment of Abandonment in Malaysia

In the absence of a statutory defence, Malaysian courts have generally been reluctant to recognize voluntary abandonment as a complete defence. Instead, it has often been treated as a factor influencing sentencing rather than negating liability.

- **Focus on Proximity:** The primary focus of Malaysian courts has been on whether the act constituting the attempt has progressed beyond mere preparation to a point of no return. If the accused has done an act that is "proximate" enough to the commission of the offence, the attempt is considered complete, and subsequent abandonment, even if voluntary, does not

absolve liability. The *locus poenitentiae* closes once the actus reus of the attempt is established [12, 15].

- **External vs. Internal Factors:** Courts tend to distinguish between abandonment due to external circumstances (e.g., fear of detection, intervention by others, or unexpected difficulties) and abandonment stemming from a genuine change of heart. Only the latter might theoretically be considered for mitigation, but even then, it does not typically lead to an acquittal. For example, in *Public Prosecutor v Zainal Abidin Ismail & 3 Ors* [17], while the case primarily dealt with abetment, the general principle regarding the completion of an act and subsequent withdrawal is relevant.
- **Illustrative Cases:**
 - While direct cases explicitly granting acquittal based solely on voluntary abandonment are scarce, the general approach aligns with the principle that once the act of attempt is complete, liability accrues. Cases like *Mohd Ali Jaafar v. Public Prosecutor* [13] and *Munah bte Ali v. Public Prosecutor* [14] illustrate the courts' emphasis on the overt act and intent, with less focus on subsequent withdrawal as a defence.
 - The Indian position, which heavily influences Malaysian law, also generally rejects voluntary abandonment as a defence once the attempt is complete. In *State of Maharashtra v Mohd Yakub* [18], the Indian Supreme Court held that once the accused has done all that is necessary to complete the attempt, subsequent repentance is irrelevant to guilt. This aligns with the Malaysian judicial stance.
 - The case of *People v Taylor* [19] (a US case, though cited in the references) highlights the Model Penal Code's approach where genuine and complete renunciation *can* be a defence, contrasting with the Malaysian and Indian positions.

Comparative Jurisprudence

The Model Penal Code's approach to voluntary renunciation is a significant departure from common law and offers a policy-driven incentive for offenders to desist. The rationale is that if an offender is offered a "last clear chance" to avoid criminal liability by genuinely abandoning their criminal enterprise, it serves the dual purpose of preventing the crime and rehabilitating the offender [2]. This contrasts with the traditional view, exemplified by *R v Scofield* [16] in English law, which held that once an overt act towards the commission of a crime is done, the attempt is complete, regardless of subsequent change of mind.

The debate often revolves around the voluntariness and

completeness of the renunciation. Abandonment due to external factors (e.g., police presence, victim resistance) is universally rejected as a defence, as it does not reflect a genuine change of heart but merely a pragmatic response to unforeseen obstacles [2]. The challenge lies in proving a truly voluntary and complete renunciation, which delves into the subjective state of mind of the accused [11].

DISCUSSION

The current state of the law in Malaysia regarding the defence of voluntary desistance in criminal attempts presents both clarity and ambiguity. The clarity lies in the courts' consistent application of the "proximity test" and the general reluctance to recognize abandonment as a full defence once the attempt is complete. This approach ensures that individuals who have taken substantial steps towards committing a crime are held accountable, reflecting a strong emphasis on deterrence and public safety.

However, the ambiguity arises from the absence of a specific statutory provision addressing abandonment. This leaves Malaysian courts without explicit guidance on how to treat instances of genuine and voluntary desistance. While it is currently treated as a mitigating factor in sentencing, this approach may not fully align with the policy objectives of encouraging desistance and distinguishing between individuals who genuinely repent and those who are merely thwarted by external circumstances.

Arguments for and Against the Defence

Arguments in favour of recognizing a defence of voluntary desistance include:

- **Incentivizing Desistance:** As argued by Chew [2], an explicit defence could encourage individuals to abandon their criminal plans, thereby preventing the commission of actual crimes. This aligns with the preventive function of criminal law.
- **Moral Culpability:** From a moral perspective, an individual who genuinely and completely renounces their criminal purpose may be seen as less culpable than one who persists or is only prevented by external factors. As Yaffe [11] explores, the philosophy of action plays a role in understanding criminal attempts and the significance of a change of mind.
- **Resource Allocation:** Recognizing the defence could potentially reduce the burden on the criminal justice system by encouraging self-correction.

Arguments against the defence, which likely underpin the current Malaysian approach, include:

- **Evidentiary Challenges:** Proving that an abandonment was truly voluntary and complete, and not merely a tactical withdrawal or postponement, is inherently difficult and subjective [3]. It requires delving into the accused's mental state, which can be elusive.
- **Deterrence Dilution:** Critics argue that recognizing such a defence might dilute the deterrent effect of the law on attempts, as offenders might be tempted to proceed with their plans, knowing they could still escape liability by abandoning them at a later stage.
- **Completion of Actus Reus:** Once the accused has performed an act that is sufficiently proximate to the commission of the offence, the actus reus of the attempt is complete. From this perspective, the crime has already been committed, and subsequent repentance should not negate past actions.

Potential for Reform in Malaysia

Given the comparative examples, particularly the Model Penal Code, Malaysia could consider introducing a statutory defence of voluntary and complete renunciation. Such a provision would need to be carefully crafted to address the concerns raised by its opponents. Key considerations for any reform would include:

- **Strict Conditions:** The defence should only apply if the abandonment is truly voluntary (not influenced by external factors like police presence or unforeseen difficulties) and complete (not merely a postponement or a temporary halt).
- **Burden of Proof:** The burden of proving such abandonment should lie with the accused, on a balance of probabilities, given the subjective nature of the defence.
- **Clarity on "Proximity":** While the proximity test is well-established, a statutory defence could provide clearer guidelines on when the *locus poenitentiae* is truly closed, and when an act is considered "too far gone" for abandonment to be a defence.

The introduction of such a defence would align Malaysian law with modern trends in criminal jurisprudence that seek to encourage positive actions from potential offenders. It would also provide a more nuanced approach to culpability, distinguishing between those who genuinely turn away from crime and those who are merely frustrated in their criminal endeavours.

CONCLUSION

The defence of voluntary desistance in criminal attempts remains a complex and largely uncoded area within Malaysian criminal law. While the courts have consistently applied the proximity test to determine liability for attempts,

the absence of an express statutory defence for abandonment means that genuine repentance is typically only considered at the sentencing stage. This contrasts with jurisdictions that have adopted the Model Penal Code, which explicitly recognizes voluntary and complete renunciation as a full defence, aiming to incentivize desistance.

While the current Malaysian approach prioritizes accountability for overt acts of attempt, there is a compelling policy argument for reconsidering the role of voluntary desistance. Introducing a carefully defined statutory defence could serve to encourage individuals to abandon their criminal pursuits, align Malaysian law with progressive criminal justice principles, and provide a clearer framework for judicial discretion. Such a reform would require careful consideration of the evidentiary challenges and potential impacts on deterrence, but it holds the promise of a more equitable and effective criminal justice system that recognizes the moral significance of a change of heart.

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