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INCHOATE OFFENCES

Abstract

The main objective of the criminal justice system is to , safeguard the interests of the society at large and ensure safe and securing living environment . At the same time , the legal system does not aim to deplete the right of an individual i.e alleged offender without legitimate reason , in order to protect interests of society . Right now , this concern has been prevailing since long time, and the concept of inchoate offences is making it worser as it has incorporated fear in innocent offenders. Though , the concept focuses on , the notion of preventing the occurrence of crime , which is indeed a impressive step towards well being , there has been no consistency while dealing with these offences. The scope of interpretation of these offences has no checks and balances and the opinions of courts has been largely distinct and contradicting with no underlying principles in common. The main concern addressed in this chapter , is the legality behind the arguments of objectivist and subjectivist and establishing a balance between them for a sound and unquestionable criminal system.

Introduction

The criminal law has been very much precautionary from the day of its birth , it not only focuses on the outcome of an act but also the intent behind the person in indulging in an act irrespective of the nature of the outcome. That is why, the criminal justice system came up with the concept of “inchoate offence” where it includes wide range of offences which may not come into the ambit of completed substantive offence. It is an earlier stage of accomplishing an offence without reaching the stage where , the wrongdoer reaches his desired outcome. These type of crime revolves around the terms such as aiding , attempting , anticipating and acting. These are punished with the motive that , the completion of the act would cause harm to social security. The presumption of completion of an act would cause harm , itself gives us a clue that it is a incomplete offence. So, penalising before completion of an act , may have numerous lethal effects, as there is a strong probability of voluntary renunciation at any stage of action towards commission of a crime. At the same time , non – penalising these would , result in voluntarily allowing and encouraging a commission of a crime. The perfect balance of these two opposing views , results in equitable justice.

There has been lots of research work on the concept of inchoate offences , its essentials and stages to constitute a crime but , there has been no attempt in balancing in contradicting perspectives. This paper focuses on positive aspects of both the rationales and reaches to a conclusion with necessary reforms.

The common law has given to 3 general offences [inchoate / preliminary offences] which are conspiracy , attempt and incitement . The principal feature of these offences are that , they are committed with a motive to constitute a substantive offence but are not completed and no harm results. Even the failed attempt constitutes an incomplete offence, for example – if conspiracy comes to nothing , if the words of incitement are ignored in these the people who are indulged to commit these acts , would be liable of inchoate offence. The criminal liability requires both culpability and harm , in these case people may appear culpable but no harm is caused , this is where the conflict and difference of opinions arises. There is involvement of criminal law because it is believed that , a person who tries to cause a prohibited harm and fails is liable for moral culpability , and is not materially different from a person who tries and succeeds. The difference in outcome is determined by chance rather than choice. There is no reason that why a human system for judging should be a slave of chances. But some think that , these offences are miles away from actual harm happening and from the need to take preventive action. The need of the hour is to reach a conclusion without outweighing both the point of views , which the concern of this paper.¹

What are Inchoate Offences ?

The term inchoate means, just begun / undeveloped. The law-makers have created offences of preparing to commit certain crimes, of supporting certain types of criminal activity, and of membership or participation in certain types of criminal group. Others are designed to deal with more mundane threats. For example, law-makers have created increasingly expansive offences of endangerment, and of possession of dangerous objects such as weapons or instruments of crime. This concept of inchoate offences includes variety of acts such as

- a. Committing a lesser crime , intending to commit a greater one
- b. Committing a crime , intending to do some non – criminal wrong
- c. Committing a civil wrong , intending to commit a crime
- d. Doing something overtly innocent , intending to commit a crime

In the case of inchoate offence, the intended outcome and the actual outcome may not be same or no where proximate to each other. From all these examples , it is very clear that the act committed is different from the act intended , which may be due to the practical difficulty of executing the mental plan or prosecution at the very early stage of committing a crime or some time may be due to voluntary repentance. The chances of voluntary repentance is always reasonable to be believed , as in all these cases the act intended is of higher harm when compared to the act done. This instance can happen in any stage of the crime, such as

- a. Building an intention to commit an offence
- b. Preparing the mental as well as the physical environment for the commission of the crime
- c. Attempt to commit a crime , after getting equipped with mental plan of action

¹ gbadamosi, olaida a (2019) ‘justification for the law of attempts’, *kampala international univeristy law journal*, 3(2).

d. Completion / commission of a crime

The voluntary repentance if happening earlier, the gravity of penalising proportionally decreases as the evidence to prove the mental intention of completing a crime loses its strength.

Origin of Inchoate Offences

Because of the social need to prevent crimes before they occur, the common law long ago established three separate and distinct categories of inchoate crimes- the crimes of attempt, conspiracy and solicitation². Over the years, there has been little addition to this category of crime with the possible exception of possession (as in possession of burglar tools, bomb materials, gun arsenal etc) and another, seldom-heard offence based on the notion of preparation which has normally not been associated with inchoate crimes.

Traditionally, inchoate crimes have always been considered misdemeanours, but over the years they have been merged into felonies as society has put more power in the hands of law enforcement and prosecutors to deal with recalcitrant problems such as organized crime, white collar crime, and drug crime. Traditional rules that exist are

(1) a person should not be charged with both the inchoate and choate offence, according to the so-called doctrine of Merger, except conspiracy which can be a separate charge

(2) lesser penalties should ideally be imposed for inchoate crimes, but in many cases the penalty should be exactly the same as for the completed offense.

(3) inchoate crimes should have specific intent, spelling out clearly what the mens rea elements are and

(4) some overt action or substantial step should be required in the direction of completing the crime.³

This set of rules is sometimes referred to as the doctrine of inchoate crimes. Generally all inchoate crimes is originally incorporated in Indian Penal Code of 1860. For example preparation, abetment, conspiracy and attempt. But criminal conspiracy was not originally in Indian penal code of 1960. It was incorporated in 1913 by way of chapter V A in Indian Penal code of 1860. The main logic behind making the preparation, abetment, conspiracy

² (V-SEM-Specific-Principles-of-Criminal-Law-L-4005-lecture-on-Inchoate-Crimes.pdf, n.d.)

³ *Specific principles of criminal law* (no date) *The Lawyers & Jurists*. Available at: <https://www.lawyersjurists.com/article/specific-principles-of-criminal-law/> (Accessed: 10 April 2024).

and attempt punishable is to prevent the crime at its inception. Precaution is better than cure, so it is proper to make punishable, the very early stage of a crime.⁴

Types of Inchoate offences :

1. Conspiracy

A conspiracy occurs when two or more people agree to commit an illegal act and take some step toward its completion. It does not always require the completion of an illegal act it is deemed to be an offence , from when the parties to conspiracy agree on doing something unlawful , that's why it is an inchoate offence. It is different from other inchoate offences as the parties to agreement for an unlawful object can be charged for the conspiracy and also for the commission an completion of a crime agreed upon. It is also immaterial that if the illegal act , is the subject matter of the agreement or incidental thereto ⁵. Section 120 A of Indian Penal code deals with conspiracy , which states that

120A. Definition of criminal conspiracy – When two or more persons agree to do, or cause to be done

(1) an illegal act

(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 a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.⁶

Essentials to constitute a conspiracy

- a. Agreement between two or more persons

⁴ *Inchoate-crimes - inchoate-crimes notes - class: Ll. IV semester Crimininal Law Group subject: (no date) Studocu*. Available at: <https://www.studocu.com/in/document/army-law-college/law/inchoate-crimes-inchoate-crimes-notes/41801228> (Accessed: 10 April 2024).

⁵ *Conspiracy to commit a crime & legal defenses (2023) Justia*. Available at: <https://www.justia.com/criminal/offenses/inchoate-crimes/conspiracy/> (Accessed: 10 April 2024).

⁶ *Section – 10 of indian evidence act, 1872 (no date) Section – 10 of Indian Evidence Act, 1872*. Available at: <https://www.drishtijudiciary.com/to-the-point/ttp-indian-evidence-act/section-10-of-indian-evidence-act-1872> (Accessed: 10 April 2024).

This is the basic ingredient to constitute a conspiracy . The term agreement refers to the meeting of minds , no requirement of actual physical meeting. If the agreement is still at the stage of negotiation , without having decided on what has to be done, it does not constitute criminal conspiracy.

Exceptions:

The following are exempted by the law of conspiracy :

*Agreement between husband and wife , without the involvement of third party

* Agreement with the person , under the age of criminal responsibility

b. Agreed on criminal conduct

Two or more persons must agree on commission of crime. The members involved in the course of agreement , need not know that the agreed course of conduct does amount to a crime. The course of conduct not only includes acts agreed upon but also the consequences of the happening of the subject matter agreed on.

c. The fault requirements

Each defendant must have knowledge of any facts specified in substantive offence and should intend that the conspiracy must be carried out . The person deemed to be guilty of conspiracy should have intended to play some part , in the agreed course of conduct.

2. Attempt

The term attempt has nowhere been described in the IPC chapter XXIII titled as of attempts of commit offences does not give any definition of attempt but simply provides for punishment for attempting to commit an offence punishable with imprisonment for life or imprisonment. The term attempt constitutes third stage of committing a crime , in this stage offender is all set to proceed with the commission of the crime with necessary preparations at hand.

The Indian penal code 1860 deals with attempt in three different ways:

1. In some cases the commission of an offence and the attempt to commit it are dealt with in the same section and the extent of punishment is also the same for both. Such provisions are contained in Section 121, 124, 124-A, 125, 130, 131, 152, 153A, 161, 162, 163, 165, 196, 198, 200, 213, 239, 240, 241, 251, 385, 387, 389, 391, 394, 395, 397, 459 and 460

2. In some cases attempts are treated as separate offence and are punished accordingly. There are four grave offences, attempts are described separately but side by side with the offence and specific punishment is prescribed for them.

These are: - a) Murder is defined under section 300 penal provision is there in section 302 of Indian penal code 1860 and attempt to murder under section 307.

b) Culpable homicide not amounting to murder is punishable under section 304 and attempt to commit culpable homicide is under Section 308.

c) Attempt to commit suicide punishable under Section 309. However 309 stands as a class by itself as the completed offence here is not punished as it cannot be punished. This is a very controversial area and the constitutional validity of Sec.

d) Dacoity with murder is punishable under Section 396 and dacoity with an attempt to cause death is punishable under Section 397. Voluntarily causing hurt in committing robbery is punishable under Section 394 and attempt to cause grievous hurt in committing robbery is punishable under Section 397.

3. Provision has been made in Section 511 in respect of those offences which are not covered by the above two categories i.e. which are not otherwise provided for in the Indian Penal Code.

The fifth Law Commission of India expressed its dissatisfaction about the manner in which the law of attempt, in general, and Section 511, in particular, is sketched and made operative in India. Terminology of Section 511, according to it, is most mystifying. It is not only of "little assistance" in defining "attempt" but, contrary to legislative intent, also suggests that each act, in series of acts done by an accused "towards the commission of the offence", is punishable as an attempt. Such an interpretation obliterates the inbuilt distinction between "preparation" and "attempt". So, the Law Commission, after making an enriching survey of prevailing definition of attempt, proposed some structural as well as substantive changes. It proposed deletion of Section 511 and insertion of a new Chapter VB entitled "Of attempt" consisting of the two Sections 120C and 120D after Chapter VA dealing with "Criminal Conspiracy". It is an effort to group inchoate crimes together.

There are two types of attempts namely – complete attempt and incomplete attempt. Complete attempters can comparatively cause reasonable harm as they have almost gone through 2 stages of crime and have only one step ahead to complete their crime, but due to some reasons their plan to surpass 4th stage fails. Though that results in failed attempt, the conduct is still wrong, as the stoppage of occurrence of crime is only due to luck or any other external factor, which does not erase the evil intent of the doer. On the other hand, the incomplete attempters have set out to commit an offence but has not yet done, all act necessary. The culpability of incomplete attempter is less than the complete attempter.

Elements for criminal attempt:

a. Fault element

In this stage, it is shown that the defendant intended to cause harm and had knowledge of facts and circumstances. The law commission has restricted the crime of attempt to subjective knowledge of circumstances.

b. Conduct element

These element has 2 types of approach :

- Fault centred approach – in this approach, the conduct element must comprise, the proof of intention and act designed to implement intention.

- Act centered approach – this approach criminalizes only the act close to substantive crime. As the law should require proof of an unambiguous act, close to commission of crime before conviction of an attempt. The least requirement would be, overt act. But this is objectionable, because of risking oppressive police practices and leaving little opportunity for attempter to withdraw.

c. Problem of impossibility⁷

3. Encouraging / Assisting Crime

These types of crimes are enlisted in Part 2 of Serious Crime Act, 2007. These type of offence concerns about the future conduct, these offences of indirect endangerment is concerned with the conduct of third parties. There are various types of encouraging / assisting a crime such as :

- Intentionally Encouraging / Assisting an offence
This is enumerated in Section 44 of 2007 act, this applies independently of whether principal offence is committed or not, Section 65[1] states that the encouragement includes – threatening person / putting a pressure on him. Section 65[2] states that, this offence also brings into the ambit, any steps taken to reduce possibility of criminal proceedings.
- Encouraging/Assisting an offence believing it will be committed
- Encouraging / Assisting An offence believing one or more will be committed
Under this offence a person shall be convicted, even if he does not know which of the offence will be committed.⁸

4. Possession Offences

Despite all the above, however, there remain some inchoate crimes that target conduct that seems neither culpable nor wrongful. Consider, for example, offences of ‘mere’ or ‘simple’ possession: offences that criminalise the possession of dangerous articles such as weapons, without requiring an intention to use the article to cause harm. Based on what we’ve seen so far, possession of dangerous articles might sometimes be wrongful. For example, it might be part of one’s own plot to cause an ultimate harm, or it might

⁷ (No date) *Specific principles of criminal law code: L 4005 topic: ...* Available at: <https://ccsuniversity.ac.in/bridge-library/pdf/LLM-1805-IV-SEM-Specific-Principles-of-Criminal-Law-L-4005-lecture-on-Inchoate-Crimes.pdf> (Accessed: 10 April 2024).

⁸ *Inchoate offences - inchoate liability is often justified because D has demonstrated a willingness* (no date) *Studocu*. Available at: <https://www.studocu.com/en-gb/document/university-of-lincoln/criminal-law/inchoate-offences/15586626> (Accessed: 10 April 2024).

unleash an unjustifiable risk that others will use the article harmfully. But possession offences also criminalise conduct that involves no such plot or risk. Some argue, therefore, that they can be criticised as overinclusive: they target a narrow range of wrongful conduct, but do so by criminalising a wider range of more easily proven conduct, much of which is entirely innocent. They therefore risk the unjust conviction and punishment of those who have done nothing wrong. To illustrate this criticism, consider an article whose criminalisation is especially controversial: guns. Imagine that you enjoy shooting as a sport, and that you own a handgun for this purpose. You have no criminal intentions in which your handgun might play a part. Moreover, since you are entirely stable and responsible, you are unlikely to develop any such intention in the future. Of course, it is theoretically possible that a third party might steal your gun and use it to cause harm. But you are alert to this possibility: you keep your gun in a locked case, which you store in a safe; and when the gun is out of its case, you never let it out of your hands. Are you doing anything wrong simply by possessing a gun? Not obviously. Yet in some 19 jurisdictions, you are committing a serious criminal offence, punishable by several years' imprisonment. This, the critics argue, is unjust: in the absence of any culpability for the relevant ultimate harm, you simply do not deserve punishment for your actions.⁹

Justifications Against Criminalisation of Inchoate Offences

1. The newer inchoate offences target a wide range of conduct, and sometimes do not require intention – or indeed, any form of culpability – as to the ultimate harm. Metaphorically, these offences are said to target conduct that is increasingly remote from the harm that they aim to prevent.
2. Law-makers focus exclusively on preventive efficacy, they ignore other factors that they ought to consider in making decisions to criminalise. They ignore the fact that criminalisation is not like other regulatory tools: it renders citizens liable to punishment, to the stigma of a criminal record, and to the coercive and intrusive enforcement actions of criminal justice officials.
3. They lead to unjust convictions and punishments.
4. Offence criminalises only conduct that deserves punishment, it might yet be illegitimate, because its effects are disproportionate: simply put, its costs might outweigh its benefits. The worry is that inchoate crimes are especially likely to be disproportionate when compared to the traditional core crimes.
5. the reasons for their creation are relatively weak: the need to censure and punish the conduct that they target is not as strong as it is for crimes of culpably and directly harming others.
6. They restrict citizens' liberties to a greater extent, and afford expansive enforcement powers that are easily abused.
7. Criminalisation of these offences are unnecessary.

⁹ Alexander, L., & Ferzan, K. K. (2019). *The Palgrave Handbook of Applied Ethics and the Criminal Law*. Springer Nature.

8. These offences criminalise conduct that does not cause the ultimate harm that they aim to prevent; thus, the state need not prove in court any causal connection between the relevant conduct and the relevant harm.
9. Law-makers are not social scientists: they are likely to get such judgements wrong.
10. Circumstantial actions of a person can also lead to inchoate offence which ends up being unjust.
11. The scope of interpretation granted to court with regard to inchoate offences has no checks and balances, as most of the aspects are left to the discretion of the court.
12. Convictions can be based on confessions which are the result of fear, confusion or even police fabrication.
13. The whole concept of application of inchoate offences is limited to beliefs about the facts.
14. The whole concept of voluntary renunciation is being neglected.¹⁰

Justifications for Criminalisation of Inchoate Offences

1. It is because of realisation of social importance of authorising official intervention before harm is done.
2. The difference in the outcome is a matter of chance and probability rather than the choice of the person.
3. It is based on the presumption that, a person who has done all the acts intended, with beliefs required for an offence is, no less blameworthy than a successful offender.
4. Most demanding request is that, the consideration of the nature of the last act before the completion of the offence and its degree of completion is to be penalised but not the earlier stages, but this is way out of controlling and prevention.

Conclusion

At the end of discussion from the end of both objectivists and subjectivists, at last the need of the hour is not to compare and compete the intellectual capacity of these two different rationalists, it is to reach out for the betterment of the current legal system and method of administration of justice.. The criminalisation of these types of offences goes hand in hand with proportionality, the intent of preventive efficacy should be sought less costly means of achieving it, i.e rather than affecting the rights and liberties of large people it can be achieved by enacting preventive guidelines with legal sanctity, which could promote use of common principles while hearing cases related to inchoate offences.

¹⁰ (No date a) *Ed.* Available at:

https://www.pure.ed.ac.uk/ws/portalfiles/portal/126035747/Inchoate_Criminality_AFV.pdf (Accessed: 10 April 2024).

