



Inchoate offences and the infliction of criminal punishments in a state bound by the rule of law

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Abstract

The troubled history of mankind beleaguered by wickedness in high places and in consequences thereof, innocent people falling victims to a situation they contributed nothing has demonstrated the imperative necessity of attaining the high goal of justice in any system. The concept of inchoate offences has been part of the system for a state bound by the rule of law. The common law offence of incitement and statutory offences of conspiring and attempt are known as inchoate offences, since they may be committed notwithstanding that the substantive offence to which they relate is not committed. Indeed, if the substantive offence is committed, no question of attempt normally arises, and where there has been incitement, the person inciting becomes a party as an accomplice to the substantive offence and is not normally proceeded against for incitement. Conspiracy differs from the other inchoate offences in that even where the conspirators have committed the substantive offence, there are circumstances in which a change of conspiracy is appropriate although the attitude of courts discouraged the practice. Thus, this paper shall examine inchoate offences, the concept of inchoate offences, the importance of inchoate offences. The paper proceeded in making comparative analysis of inchoate offences in Nigeria, America, England and German jurisdictions. The paper adopted doctrinal method of research in the course of the preparation of this work, and argued that some jurisdictions punish inchoate offences as substantive crimes thereof. The paper then made conclusion and provided prescriptions to that effect.

Keywords: inchoate, offences, attempt, conspiracy, incitement, solicitation, criminal law

Introduction

The inchoate crimes^[1] of attempt, conspiracy, and incitement are well established in the every legal system. Inchoate offences allow punishment of an actor even though he has not consummated the crime that is the object of his efforts.^[2] Indeed, the main purpose of punishing inchoate crimes is to allow the judicial system to intervene before an actor completes the object crime.^[3]

Most jurisdictions treat inchoate offences as substantive crimes,^[4] distinct and divorced from the completed crimes toward which they tend. Accordingly, attempt, conspiracy, and incitement are defined broadly to encompass acts leading to the commission of any completed crime. Rather than try to enumerate every act to which inchoate liability attaches, however, legislatures have enacted relatively statutes and Codes containing abstract and prohibitive terms with universal application. It prohibits an act that constitutes a “substantial step” toward the completed offence. The statutes and Codes then fleshes out “substantial step” by listing several nonexclusive examples that have application to numerous completed crimes. It has fallen to the courts to elaborate on the scope of inchoate offences and decide when to administer them. The court analyzes the inchoate offences underlying the criminal law and decides whether those offences require courts to punish certain acts.

Conceptualization of Inchoate Offences

Inchoate or anticipatory or relational crimes allow the judicial system to impose criminal liability on conduct designed to culminate in the commission of a substantive offences.^[5] The inchoate offences of attempt and incitement, for instance, provide the legal basis for courts to punish the actor who has performed every act necessary to

effecting his criminal design, but has failed to achieve the prohibited result due to an intervening fortuity.^[6] More importantly, however, attempt and other inchoate offences allow law enforcement officials to prevent the consummation of substantive offences by permitting intervention once an individual's actions, though not criminal in themselves, have sufficiently manifested an intent to commit a criminal act.^[7]

Like a completed offence, an inchoate offence requires both a mens rea and actus reus.^[8] Unlike the actus reus in a completed offence, however, the proscribed act in an anticipatory crime is not prohibited because of its harmful effect, but because it demonstrates a firm purpose on the part of an individual to act in furtherance of a criminal intent.^[9] The mens rea for inchoate crimes, therefore, is the specific intent to commit a particular completed offence, or target or object crime.^[10] A central premise of Anglo-American criminal jurisprudence is that a court may not punish a bad intent that is not accompanied by a bad act.^[11] Nevertheless, inchoate crimes focus on the mens rea and render ancillary the actus reus to realize the predictive and preventive purposes of the criminal law.^[12]

The three main formulations of inchoate liability are attempt, conspiracy, and incitement. The treatment of these concepts as substantive offences, distinct from the completed offences that are their objects, is of comparatively late origin. Each of the three had its beginning in the authority of common-law courts to create offences. Despite the independent origins and development of the three offences, conspiracy and incitement can be viewed as early stages of an attempt to commit a completed offence.^[3] Further, specific substantive crimes such as assault and burglary have inchoate aspects and can therefore be viewed as crimes in the nature of attempt.

The Importance of and Rationale for criminalization of Inchoate Offences

To establish the importance of inchoate offences, it is necessary to define the concept. Inchoate offence is not a formal category in English or German criminal law.^[14] At the most general level, inchoate offences criminalize conduct perceived to carry the risk that, in the future, a completed crime will be committed. Inchoate offences move criminal responsibility back from the actual occurrence of harmful conduct to the planning and preparation stage – conduct that ‘pre-dates’ the completed offence, and is often quite remote from the threatened harm.

Formally, inchoate offences exist beyond the limit of the actus reus of attempts. In English law, an act, more than merely preparatory to the commission of an offence and^[15] in German law, the taking of ‘steps which will immediately lead to the completion of the offence as envisaged by’ the defendant (D). Roughly stated, attempts liability presupposes that D has taken a significant step towards committing a substantive crime. Punishing attempts is typically legitimate because such significant steps taken in the light of D’s beliefs about what those steps will lead to, pose a sufficiently concrete danger to a legally-protected interest. Through taking those steps, D has shown clearly his hostile attitude towards the law. Attempts may thus shatter society’s trust in the legal order and can legitimately be punished to reinforce the broken norm, and stabilize the populations’ legal loyalty.

Inchoate offences, by contrast, cover conduct that is less proximate to a completed offence. They shift the focus further from tangible harm-doing, into more tangential risk creation, expanding the boundaries of traditional criminal law.

This paper cannot, however, consider all inchoate offences here. That would be unmanageable. Additionally, our arguments are concerned only with the examination of inchoate offences and the infliction of criminal punishments as the severest intrusion into citizens’ rights available to a state bound by the rule of law. Criminalization is accordingly the last resort, and employed only when all other means are considered ineffective. The next discussion shall focus on inchoate offences in Nigeria.

Developments in Nigeria

a. Attempt

This addresses an acknowledgement that the defendant has tried to commit an offence but failed to actualize the actus reus of the offence^[16]. For instance, if X hires an assassin to kill Y but the assassin misses, the actus reus has not been actualized, even though the intention is there. In this case, the defendant must demonstrate the mens rea of intent to commit a crime, and it is immaterial that the offence was not actually finalized. The Various tests for the crime of attempt are; to consider whether the defendant took any substantial steps towards the commission of a crime, how much closer the defendant was to its completion, how far the defendant went and when Res Ipsa Loquitur, which is to determine if when the defendant stopped, there was clarity that there was no other purpose than to commit a crime.

From R v. Owe^[17], the court held that attempt to commit an offence is a crime. In Nigeria, it is governed by the Penal Code and the Criminal Code, both of which specify punishment for attempts of several offences. There are three elements to prove attempt as enshrined in Section 4

of the Criminal Code. These are; that the defendant has begun to convert his intentions into an execution, that he has not fulfilled his intention to the point of actually committing the offence, and that his intention been made manifest by an overt act^[18]. Sequel to this, it is paramount that intent is established when proving attempt as a form of its mens rea. In other words, for the defendant to be found guilty of attempting an offence, intent must be established.^[19]

b. Conspiracy

The offence of conspiracy is the agreement of two or more persons to commit an illegal act. Additionally, the court in case of Eyo v. State^[20] defines conspiracy as an offence that deals with the agreement of two or more persons, to do an illegal act or a legal act by an illegal means.^[21] Hence, it is deduced that agreement constitutes the actus reus of the offence of conspiracy.^[22] Furthermore, in R v. Hoar^[23], the court held that agreement constitutes conspiracy and at this, there is no need to prove that the act has been committed.

Section 96(1) of the Penal Code provides that when two or more persons agree to do an illegal act by an illegal means, such an agreement is a criminal conspiracy.^[24] Under the Penal Code, the elements of this offence are; agreement between both parties, an illegal act, a legal act by an illegal means, and agreement followed by an overt act.^[25] Additionally, Section 516 of the Criminal Code provides that any person who conspires with another to commit any felony is guilty of that felony and will be liable.^[26]

The mens rea of conspiracy is the intention of a person to be part of an agreement to carry out an illegal act. Also, knowledge of a party is essential because if the parties are not aware of the agreement, they cannot be held to be conspirators as held in Schessler v. Director of Enforcement.^[27]

c. Incitement

At common law, incitement is to influence another person into committing a crime. Further to this, in *Plastics Ltd v. Claire*^[28], the court held that a person may incite to do an act by threatening as well as by persuasion. In Nigeria’s jurisdiction, Sections 44 to 46 of the Criminal Code provides for types of incitements, which are; incitement to mutiny, sedition, disobedience or desertion by the military or police.

The offence of incitement requires the actus reus of communication, which may be directed at a person, or the world at large through the newspapers or advertisements to commit an offence. In fact, as held by the court in R v. Chelmsford^[29], if communication fails, the offence of incitement shall lie. It is also required that there is intention of the resultant consequences of the act itself as mens rea. For instance, if X incites Y to shoot Z in the leg, X is not guilty of incitement, however, if as a result Z dies, X and Y are guilty for murder. The comparative analysis of inchoate offences in England and German shall be considered infra.

Comparative Analysis of England and German in perspective

Before discussing the inchoate offences from England and Wales, and Germany, it should be noted that the practical boundaries of inchoate offences are set in two distinct ways. The focus here is on the limits of offence definitions, which in Germany should as a rule mean the range of prosecution. In contrast, English law makes use of prosecutorial

The view that the judicial system should punish one who unsuccessfully solicits another by reason of the solicitation itself is a recent development in criminal jurisprudence.^[39] Viewed solely as an inchoate offence, solicitation appears to impose criminal liability on an act that presents no significant social danger, and approaches punishing evil intent alone.^[40] Penalties for solicitation allow the judiciary to punish conduct far back on the continuum of acts leading to a completed crime—conduct that constitutes “mere preparation” by attempt standards.^[41]

The rationale for the substantive offence of solicitation is that, like conspiracy, it treats the special hazards posed by potential concerted criminal activity. As with conspiracy, the special danger rationale modifies the standards of attempt to place liability at a far earlier stage than in an attempt. The act of revealing the criminal scheme to another extends beyond mere preparation because the act is unequivocal as to make evident the solicitor’s criminal intent.

Solicitation developed as a common-law notion, but American jurisdictions increasingly have defined the offence statutorily.^[42] Unlike the common law, which generally and vaguely described the object crimes that solicitation covered as those that breached the public peace, current state statutes define the offence’s coverage to restrict judicial discretion.^[43]

c. Attempt

Although the law of attempt has roots in the early English law,^[44] its formulation as a general substantive offense is a relatively recent development.^[45] Generally, the elements of attempt are: (1) the intent to commit the completed crime; (2) the performance of some step, usually a substantial one, toward its commission; and (3) the failure to consummate the substantive crime.^[46] Many American jurisdictions now make specific provisions for the punishment of attempts to commit certain offenses, and almost all cover the rest of the field with a general attempt statute. With few exceptions, these general statutes cover attempts to commit any felony or misdemeanor.

Among modern American jurisdictions, some statutes provide that failure is an element of the offense. Further, the rule of merger operates only to the extent that a defendant cannot be convicted of both a completed offense and an attempt to commit it. All jurisdictions treat attempt as a lesser included offense of the completed crime. Moreover, many jurisdictions have held that a defendant may be convicted of the attempt if the state proves the completed crime,^[47] and several states so provide by statute.

The distinction in attempt law between attempt and preparation reflects the notion that the act on which liability is based must sufficiently manifest criminal intent.^[48] The standards developed by courts and criminal-law experts to determine the sufficiency of an act for attempt liability reflects the developing rationales that are unique to anticipatory crimes. The principal purpose behind punishing an attempt, unlike that of a completed crime, is not deterrence. The threat posed by the sanction for an attempt is unlikely to deter a person willing to risk the penalty for the object crime. Instead, the primary function of the crime of attempt is to provide a basis for law-enforcement officers to intervene before individuals can commit a completed offense.^[49] A secondary function is to punish those who have carried out their criminal scheme but have failed to

effects the harmful result due to the intervention of external physical circumstances, including on-the-spot prevention.

The first case to distinguish attempt and preparation is *Regina v. Eagleton*, that introduced a “last proximate act” standard for determining the actus reus of attempt. Under this approach, an actor is not liable for attempt unless he has done all that he intends to do to accomplish the target crime. For instance, a would-be murderer commits the last proximate act when he shoots at his intended victim. Courts since *Eagleton* uniformly have rejected the last-proximate-act standard in favor of standards that give police a margin of safety by allowing them to intervene after an actor’s criminal intent becomes sufficiently apparent.

The two basic standards developed since *Eagleton* reflect different rationales behind criminalizing attempt. The first, a “proximity” standard, focuses on the dangerousness of the actor’s conduct and emphasizes what steps remain for him to take to complete the object crime. The second, and more recent development, an “equivocality” standard, focuses on the dangerousness of the actor himself and emphasizes what the actor has already done in imputing criminal intent to his actions.

The Model Penal Code has incorporated the equivocality standard in its definition of an attempt as “an act or omission constituting a substantial step in a course of conduct planned to culminate in commission of the crime. The Code goes on to define certain preparatory acts as substantial steps that may be strongly corroborative of an actor’s criminal purpose.^[50] Because it does not consider proximity to the actus reus of the object crime, the Model Penal Code’s approach effectively draws the line between attempt and preparation further back in the continuum of preparatory acts leading to culmination of the object offense. The Code’s subjective approach also comes closer to punishing evil intent alone, but seeks to mitigate this criticism by defining substantial step—the actus reus—in terms of acts that constitute necessary elements of specific offenses. The acts from which the Code allows fact finders to infer wrongful intent and a resolute purpose to realize that intent, however, include acts not necessarily unlawful in themselves.

Conclusion and Prescriptions

Criminal attempt, conspiracy, and incitement punish inchoate criminality conduct falling short of the completed object offense. Because the inchoate offenses are aimed at actors who specifically intend to commit another offense and who, by hypothesis, ignore the sanction for the object offense, they provide no significant general deterrence. They do, however, permit law enforcement personnel to intervene and prevent the intended harm. Moreover, inchoate crimes perform other important penal functions by permitting punishment of those who demonstrate a disposition toward criminality punishment before they do any real harm particularly when the failure to complete the offense is fortuitous, as when the bullet misses its intended victim.

Most jurisdictions punish inchoate offenses on the basis of relatively short attempt, conspiracy, and solicitation statutes that contain abstract conceptual terms with universal application. This practice confronts courts with the task of determining, in each of the infinite number of fact situations that may arise, the precise point at which inchoate liability attaches. Because general inchoate statutes are abstract and

vague in some jurisdictions, courts in the past have used a rigid conceptual approach to analyze those offences.

This paper is not a call for untrammelled judicial discretion in the area of inchoate offences and liabilities. Indeed, with the above historical survey of the jurisdictions, this paper recommends an integrated legislative policy towards inchoate liability that would eliminate the need for conspiracy-to-attempt and attempted-conspiracy formulations. This proposal entails the adoption of inchoate offences statute by a state bound by the rules of law for proper and effective administration of criminal justice system devoid of infringing the citizens' rights without legal justification.

References

1. For purposes of this paper, an "inchoate" crime is a prohibited act performed in anticipation of committing a completed" crime. A "completed" crime is an act that itself achieves a harmful consequence prohibited by statute. Murder is the prime example of a completed crime, in that the prohibited act results in the intended harmful consequence, rather than in a realization of a stage of preparation in anticipation of another harmful consequence. For an analysis of inchoate offences, see, U.U, Chukwumaeze, International Criminal (Imo State University Press, 2018) 368-374.
2. Failure to consummate the ultimate crime, however, is not essential to conviction for an inchoate offence.
3. See, Art. 5 of the commentary 1985, 294.
4. For purposes of this paper, an "object" or "target" crime is an offence to which an inchoate or anticipatory crime relates. An inchoate crime must have another crime as its object.
5. J Hall. General Principles of Criminal Law (2nd ed., Oxford, 1960, 575.
6. W Lafave, A Scott. Criminal Law (Oxford University Press, 1986, 498- 99. See, Passim generally K Robins, Attempting the Impossible: The Emerging Consensus, Harv.J.,1986:23:377.
7. Great Britain Law Commission, Inchoate Offences: Conspiracy, Attempt and Incitement (Working Paper No. 50, 1973); P. Meehan, Attempt Some Rational Thoughts on its Rationale) Crim. L.Q,1977:19:215.
8. R Perkins, R Boyce. Criminal Law Reinner Publisers, 1982, 605.
9. The term "harmful" in this statement refers to actual harm to person or person or property. See also S, S, Schulhofer, 'Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law', U.P.A.L. REV,1974:122:1505-06.
10. Merritt v. Commonwealth 1 SE,1935, 395.
11. Williams G. Criminal Law: The General Parts 2, Oxford, 1961, 33.
12. Williams G. Textbook of Criminal Law stating that comparative leniency for attempt reflects a crude retaliation theory, in which the degree of punishment is a function of the amount of damage done rather than the intent of the actor. (Oxford,1983), 404-06.
13. See, K Robbins, Solicitation, in Encyclopedia of Crime and Justice (1502):1505 S Kadish. *et al.* eds. (conceptualizing conspiracy and solicitation as steps in the direction of crime on a continuum of preparatory acts, rather than as distinct crimes), 1983.
14. See, Law Commission, Conspiracy and Attempts (Consulation), 1998, 16.
15. See, generally, Card, Cross and Jones, Criminal Law (Butterwords, 1998, 526-571.
16. Parry Bloy. Principles of Criminal Law (Cavendish Publishing Limited, 2000,188.
17. 1 All N.L.R. 1961, 680.
18. S. 4, Criminal Code Act, Cap C38, Laws of Federation of Nigeria, See also s. 95 of the Penal Code of the Northern Nigeria, 2004.
19. Okonkwo, Naish. Criminal Law in Nigeria, (2nd edn Spectrum Books Limited, 2012, 185.
20. 1 NWLR Pt. 1335, 2013, 324-346.
21. AO Filani. ' An Overview of the Law of Conspiracy in Selected Jurisdictions', AIJCR, 2018:2(8):6.
22. Mulcaphy Rv. L.R, 3 H.L 306, 1868, 318.
23. 34 A.L.R 357, 1981, 364.
24. S.96 (1), Penal Code, Laws of Federation of Nigeria, 2004.
25. Oladejo v State. 6 NWLR pt. 348, 1994, 101-127.
26. S
27. . 516, Criminal Code Act, Cap C38, Laws of Federation of Nigeria, See, also s. 114 of the Penal Code of the Northern Nigeria, 2004.
28. A.I.R., 549, 1970.
29. R.T.R,251, 1976.
30. Crim L.R. 437, 1973.
31. All references to conspiracy should be read so as to refer to conspiracy under s. 1 of the Criminal Law Act 1977.
32. Rex v Jones. 110 Eng. Rep. 485- 487 (conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means"); Rex v. Journeymen Taylors of Cambridge, (1721) 88 Eng. Rep. 9-10 (a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it), 1832.
33. Pinkerton v. United States, 328 U.S. 640, (crime of tax fraud did not merge with distinct crime of conspiring to commit tax fraud, 1946.
34. People v. Hoyt. 20 Cal, 316-17, (conspiracy to rob and robbery); People v. Escobedo, (1956) 138 Cal. 232 (conspiracy to commit abortion and abortion), 1942.
35. Interpreted by Illinois Supreme Court as embodying bilateral conspiracy approach, People v. Foster, 457 N. L.R.405, 1983.
36. Callanan v. United States, 364 U.S. 587- 593.
37. Thus, prosecutors frequently must rely on inferences drawn from the course of conduct of the alleged conspirators See Interstate Circuit, Inc. v. United States, (1939) 306 U.S. 208- 221, 1961.
38. See also Hyde v. United States, 255 U.S. 347-359, where at the common law, it was not necessary to aver or prove an unlawful act, 1912.
39. Scott R. The Common Law Offence of Incitement to Commit Crime', 4 Anglo-am. l. Rev,1975:11:289- 290.
40. Prior to the nineteenth century, the English common law courts held indictable two specific forms of solicitation: importuning another to commit either a forgery for use in a trial or perjury demonstrated in Rex v Johnson. 89 Eng Rep, 753-756, 1679.
41. See National Commission on Reform of Federal Criminal Laws, Working Papers,1970, 370.

42. *Gervin v. State* 212 Tenn 449-451, wherein the court stated that solicitation requires less proximity to success than does attempt, (1963).
43. Thirty-three states and the United States currently catalogue solicitation as a general substantive crime.
44. In both England and the United States, solicitation of another to commit a felony or a misdemeanor that would breach the peace, obstruct justice, or otherwise disturb the public welfare was a misdemeanor at common law.
45. Sayre H. *Criminal Attempts*; Harvey L Rev,1928:(41):821:822-27.
46. The modern doctrine of attempt has its origin in the case of *Rex v. Scofield*, Cald. Mag. Rep, 1784, 397.
47. *People v Miller*. 2 Cal. 2d, 1935, 527- 530.
48. *Guzik V. United States* 54 F.2d, 1931, 618-619.
49. Skilton K. 'The Requisite Act in a Criminal Attempt', U. Pit. L. Rev,1937:3:308.
50. Ullman U. 'The Reason for Punishing Attempted Crimes', L. Jurid. Rev,1939:33:363.
51. Misner A. *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, Stan L. Rev,1981:33:201.