

# Chapter 2

## Comparative Analysis

**Abstract** It has been asserted that conspiracy is wholly a common law concept. This chapter shows that some civil law countries such as Germany and Spain also punish the act of agreeing to commit a crime. The main point of departure is that whereas conspiracy is an independent crime in common law jurisdictions, it is more attempted participation in the civil law jurisdictions that recognise it. To combat group criminality civil law countries have preference for offences related to criminal associations. This chapter gives a systematic analysis of the elements of conspiracy in both common law and civil law jurisdictions. It also compares the elements of the crime of conspiracy with those of offences of criminal association. The study shows that although conspiracy may not expressly be punished in all civil law countries, features of criminal association offences indicate that they do punish conduct similar to that punished by conspiracy.

## Contents

2.1	Introduction.....	10
2.2	Common Law Jurisdictions.....	10
2.2.1	United Kingdom .....	11
2.2.2	United States.....	25
2.2.3	The Rationale of Conspiracy Law in Common Law Systems .....	38
2.2.4	Summary .....	42
2.2.5	Analysis.....	43
2.3	Civil Law Countries .....	46
2.3.1	Germany .....	47
2.3.2	Spain.....	58
2.3.3	France.....	64
2.3.4	Italy .....	69
2.3.5	Summary .....	72
2.4	Evaluation .....	74
2.5	Conclusion .....	77

## 2.1 Introduction

It has been suggested that conspiracy is predominantly a common law concept and does not have a prominent role in civil law countries.<sup>1</sup> In fact, the majority of the civil law jurisdictions are considered to reject the idea of criminal conspiracy in principle, and instead have alternative criminal concepts that perform the analogous function of conspiracy. The difference in perception and use of criminal conspiracy between common law and civil law jurisdictions has been the centre of controversy at the international front and has influenced the role and development of criminal conspiracy in international criminal law. Since national criminal laws and doctrine inspire and guide the development of international criminal law, a study of the various systems will create a better understanding of the theories surrounding the international law concept of conspiracy. It is therefore important to analyse the historical background of conspiracy, the practice adopted by individual states in its application, its merits and demerits in the various criminal law systems. This chapter consists of a comparative analysis on the law of criminal conspiracy in common law and civil law jurisdictions. A look at the alternative structures that seem to perform the equivalent function of common law conspiracy within the civil law jurisdictions is also undertaken. Special attention is given to the law in the United Kingdom and United States, two countries under the common law system in which conspiracy law is well established. In the case of civil law countries, the study will focus on the laws of four prominent countries, Germany, France, Italy and Spain, which have well-established legal systems and present a good overview of the laws in most civil law jurisdictions.

## 2.2 Common Law Jurisdictions

Criminal conspiracy may be described to be as old as common law, with its origins being traced back to the early developments of law in the United Kingdom.<sup>2</sup> This study therefore begins with an analysis of conspiracy law in the United Kingdom from its historical background to the current developments.

---

<sup>1</sup> G. P. Fletcher, *Rethinking Criminal Law*, 2nd edn. (2000), p. 221; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), p. 17; W. J. Wagner, 42 *The Journal of Criminal Law, Criminology, and Police Science* 2 (1951), p. 171.

<sup>2</sup> *People v. Schwimmer* 66 A, D, 2d 91, 94 (2d Dept. 1978).

## 2.2.1 United Kingdom

### 2.2.1.1 Historical Background

The birth of criminal conspiracy can be traced back to the reign of Edward I.<sup>3</sup> Conspiracy was introduced to redress the abuse of ancient criminal procedure. Incidences of persons coming together and instituting false charges were frequent with insufficient legal mechanisms in force to address this vice.<sup>4</sup> To fill this gap in the law, the crime of conspiracy was introduced through the enactment of several statutes, culminating into the enactment of The Third Ordinance of Conspirators, 33 Edw. I passed in 1304, and The Statute of 4 Edward III, C.II (1330).<sup>5</sup> When persons agreed to obtain false charges or to bring false appeals or to maintain malicious suits, they could be held liable for conspiracies. The early offence of conspiracy was restricted to the offences against the administration of justice and was strictly construed, confining it to the precise and definite language of the statutes. A defendant's liability for conspiracy would only arise when the person he or she had falsely accused was charged and later acquitted.<sup>6</sup>

The later part of the sixteenth century saw the court revise its stand on the strict interpretation of the crime of conspiracy. This revolution was initiated by the Court of Star Chamber in the *Poulterers' Case* decided in 1611.<sup>7</sup> In this case, the defendants had agreed to bring a false accusation of robbery against Mr. Stone. Their efforts failed because the innocence of Mr. Stone was so obvious that the jury refused to charge him of the crime alleged. Mr. Stone subsequently instituted an action for damages against his false accusers. The defendants argued that Stone was not entitled to his claim as he had neither been indicted nor acquitted as provided for in the statutes on conspiracy. The court rejected the defendants' submissions and found them guilty. It made the ground-breaking decision that the essence of the offence of conspiracy was the agreement the defendants had made together, rather than the false indictment and subsequent acquittal. This decision led to the development of the well settled doctrine of modern law of conspiracy, which recognises that the agreement is the gist of this crime, and no further steps need to have been taken to put it into effect.<sup>8</sup>

---

<sup>3</sup> For a detailed account of historical evolution, see A. Harding, *Transactions of the Royal Historical Society* (1982), pp. 89–108; B. F. Pollack, 35 *Geo. L. J.* (1947), pp. 328–352; F. B. Sayre, 35 *Harvard Law Review* (1922), pp. 393–427; R. S. Wright, *The Law of Criminal Conspiracies and Agreements* (1873).

<sup>4</sup> F. B. Sayre, 35 *Harvard Law Review* (1922), p. 394.

<sup>5</sup> B. F. Pollack, 35 *Geo. L. J.* (1947), p. 340.

<sup>6</sup> A. Harding, *Transactions of the Royal Historical Society* (1982), p. 91; F. B. Sayre, 35 *Harvard Law Review* (1922), at p. 396, 397.

<sup>7</sup> 77 Eng. Rep. 813 (1611) cited in F. B. Sayre, 35 *Harvard Law Review* (1922), p. 398; Cf. R. Hazel, *Conspiracies and Civil Liberties* (1974), p. 14.

<sup>8</sup> B. F. Pollack, 35 *Geo. L. J.* (1947), p. 342.

In the seventeenth century, conspiracy was further expanded to include agreements to commit all crimes of whatever nature.<sup>9</sup> This interpretation later opened a door for the idea that a combination may be criminal, although its object would not be strictly criminal when performed by a single person.<sup>10</sup> Much ambiguity and confusion prevailed during this period with respect to the crime of conspiracy. In 1832 Lord Denman, in an attempt to clarify what constituted a conspiracy charge, made the statement that a conspiracy indictment must “charge a conspiracy either to do an unlawful act or a lawful act by unlawful means”.<sup>11</sup> This well-known and now important statement was perceived to provide a solution to the difficulties experienced in the application of criminal conspiracy, and other judges who had struggled with the concept of conspiracy, enthusiastically embraced this guideline.<sup>12</sup> The principle provided by Lord Denman’s statement could conveniently be adapted to suit any case relating to conspiracy, without giving much thought to the prevailing circumstances of the case. The ambiguity generated by use of the term ‘unlawful’ made conspiracy a convenient charge to bring against offenders when other ways of establishing their guilt were unavailable.<sup>13</sup> The elasticity of the term also made it possible for judges to reflect their prejudices in their decisions leading to unpredictability in this class of cases and in

---

<sup>9</sup> This expansion was motivated by several factors among them the need for a broader and more moral law. The seventeenth century witnessed the confusion of law and morals fuelling ambiguity in the justice system, see F. B. Sayre, 35 *Harvard Law Review* (1922), p. 400; R. S. Wright, *The Law of Criminal Conspiracies* (1873), p. 26.

<sup>10</sup> The expansive interpretation of conspiracy at the time, was especially as a result of what Pollack and Sayre termed as an unfortunate statement made by a renowned scholar Hawkins, who asserted in *Pleas of crowns* that “... there can be no doubt but that all confederacies whatsoever, wrongful to prejudice a third person are highly criminal at common law”. The ambiguity of the term “wrongful” created confusion as to whether it meant “criminal means” on the one hand or on the other hand “tortious” or “immoral”. See B. F. Pollack, 35 *Geo. L. J.* (1947), p. 345; F. B. Sayre, 35 *Harvard Law Review* (1922), p. 402; also D. Harrison, *Conspiracy as a Crime and as a Tort in English Law* (1924), pp. 25 et seq.

<sup>11</sup> Quoted in, F. B. Sayre, 35 *Harvard Law Review* (1922), p. 405. This statement is viewed by Sayre as a reincarnation of the statement made by the renowned scholar Hawkins, and is seen to have created more confusion in the law of conspiracy. The formula was used in several circumstances to expand criminal conspiracy to apply to acts that, though considered immoral, were not in any way criminal. Though this formula became notorious it was later to be repudiated by its author. This ambiguity gave judges the liberty to conveniently impose their individual notions of justice. See also, R. Hazel, *Conspiracies and Civil Liberties* (1974), p. 15 noting that the term ‘unlawful’ actually meant something wider than merely criminal.

<sup>12</sup> W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 614.

<sup>13</sup> B. F. Pollack, 35 *Geo. L. J.* (1947), p. 346.

some instances undesirable results.<sup>14</sup> The leeway judges had in conspiracy cases is seen to have made them serve as quasi-legislators, creating new offences.<sup>15</sup>

This broad nature of conspiracy law also made it subject to abuse by prosecutors who used it to pursue a government agenda.<sup>16</sup> In the United Kingdom, prosecutors used conspiracy in the late eighteenth century to suppress critics of the government and later in early twentieth century it was used in both the United Kingdom and United States to counter union movements.<sup>17</sup> Lord Denman's statement eventually shaped the crime of conspiracy in common law jurisdictions, where it often refers to a combination between two or more persons formed for the purpose of doing either an unlawful act or a lawful act by unlawful means.<sup>18</sup>

The unpredictability of common law criminal conspiracy was mainly because it extended its reach beyond the boundary of criminal offences, making it subject to much criticism.<sup>19</sup> Until the 1970s conspiracy under English criminal law was left to the whims of the judiciary. In this context, it was capable of infinite growth and could accommodate any situation. Often conspiracy was used to prosecute conduct which was more of an antisocial nature rather than a criminal end.<sup>20</sup> On several occasions, criminal conspiracy convictions punished acts that were civil wrongs and not essentially criminal. Two cases illustrate the tendency of the courts to expand conspiracy. In *Shaw v. DPP*,<sup>21</sup> Shaw had published a booklet called the 'Ladies Directory', which advertised the names and addresses of prostitutes. The booklet indicated, "...that the advertisers could be got in touch with at the telephone numbers given and were offering their services for sexual intercourse and, in some cases, for the practice of sexual perversion".<sup>22</sup> Shaw was convicted for a number of offences under the Sexual Offences Act 1956 and the Obscene Publications Act 1959, and was also convicted for "conspiracy to corrupt public morals". On appeal, his counsel's submission that no offence such as conspiracy to

---

<sup>14</sup> B. F. Pollack, 35 *Geo. L. J.* (1947), p. 347, observing that interpreting "unlawful" to mean "criminal" was seen as a much too narrow definition. Conversely, interpreting it to mean "wrongful" made the definition much too wide, making it possible to include in the crime any type of combination which seemed to be socially oppressive or undesirable, though the acts committed in themselves did not constitute crimes; see also criticism by R. S. Wright, *The Law of Criminal Conspiracies* (1873), pp. 62–67.

<sup>15</sup> K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 956; A. Harding, *Transactions of the Royal Historical Society* (1982), p. 91.

<sup>16</sup> K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 956.

<sup>17</sup> K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 956; also see D. Burgman, 29 *DePaul L. Rev.* (1979), p. 80; R. S. Wright, *The Law of Criminal Conspiracies* (1873), pp. 45–62, making reference to cases misused by judges against trade unions in the course of the nineteenth century.

<sup>18</sup> W. R. La Fave, *Criminal Law* (2003), p. 615.

<sup>19</sup> D. Harrison, *Conspiracy as a Crime and as a Tort in English Law* (1924), pp. 80–114.

<sup>20</sup> A. Ashworth, *Principles of Criminal Law* 5th edn. (2006), p. 455; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models Against Criminal Collectives* (2011), p. 73.

<sup>21</sup> *Shaw v. DPP* (1962) A. C. 220.

<sup>22</sup> *Shaw v. DPP* (1962) A. C. at 220–221.

corrupt public morals existed was rejected and the House of Lords upheld his conviction. In the judgment Lord Tucker observed: “It has for long been accepted that there are some conspiracies which are criminal although the acts agreed to be done are not *per se* criminal or tortious if done by individuals”. The court held that where defendants agree to carry out acts that threaten to cause extreme injury to the public, they would be guilty of conspiracy to effect public mischief. In *Kamara v. DPP*,<sup>23</sup> students were convicted for conspiracy to trespass after occupying the High Commission of Sierra Leone in London with the intent of gaining publicity for their political grievances although trespassing was a tort and not a crime. On appeal, their contention that there was no such offence as conspiracy to trespass was dismissed and their conviction upheld. The appellate court was of the view that since an agreement to do an unlawful act was a conspiracy and the commission of a tort was an unlawful act, it followed that an agreement to commit any act of trespass was an indictable conspiracy. In the judgment, Lord Hailsham observed that conspiracy to trespass was a form of conspiracy to effect a public mischief.<sup>24</sup>

The uncertainty and elasticity of criminal conspiracy led to much criticism by legal scholars and practitioners. The criticisms catalysed the making of certain reforms and continues to affect contemporary developments on conspiracy law. To some extent, the judiciary’s conscience to the injustice caused by several decisions made with respect to conspiracy cases was awakened, and as a result it began to make decisions that rejected the broad policy of social defence, adopted to justify the extension of criminal conspiracy to all sorts of conduct considered to be anti-social.<sup>25</sup> To streamline the law on conspiracy, the legislature decided to codify criminal conspiracy, following recommendations of the Law Commission report number 76.<sup>26</sup> The report observed that common law conspiracy was vague and capable of growing in silly ways, which might offend the principle of certainty. The legislature enacted the Criminal Law Act of 1977 (CLA) in which part 1 provides for statutory conspiracy. The House of Lords has acknowledged that this change was a radical amendment to the law of criminal conspiracy.<sup>27</sup> Only two

---

<sup>23</sup> (1973) 2 All E. R. 1242.

<sup>24</sup> *Kamara v. DPP* (1973) 2 All E. R. 1242 at p. 1254 and 1258.

<sup>25</sup> A. Ashworth, *Principles of Criminal Law* 5th edn. (2006), p. 456. The two notable decisions that rejected the elasticity of conspiracy were: *DPP v. Bhagwan* (1972) A. C. 60, and *DPP v. Withers* (1975) A. C. 842. In *Bhagwan* the House of Lords held that there is no general crime of conspiracy to defeat the purpose of an Act of Parliament, and in *Withers*, the accused had been convicted for conspiring to obtain confidential information by deceit from the banks and government departments, the House of Lords while quashing these convictions declared that there was no general offence known to law of conspiracy to effect a public mischief.

<sup>26</sup> Law Commission No. 76, *Conspiracy and Criminal Law Reform*, 1976 [hereinafter Law Com. No. 76]. This commission based its analysis from: The Law Commission Working Paper No. 50, *Inchoate Offences: Conspiracy, Attempt and Incitement* [hereinafter Law Com. 50].

<sup>27</sup> See *Regina v. Ayres* (1984) A. C. 447, 453–454.

forms of conspiracy are maintained under the new law: statutory conspiracy and the common law conspiracies to defraud and to corrupt public morals or to outrage public decency.<sup>28</sup>

### 2.2.1.2 Statutory Conspiracy

Section 1(1) of the Criminal Law Act (CLA) makes it an offence for a person to agree with another or others to carry out what would amount to a criminal offence.<sup>29</sup> Such an agreement amounts to conspiracy to commit the underlying offence. The CLA requires that the parties make the agreement with the intention that it will result in commission of the object of the conspiracy.

A minimum of two people are sufficient to form a conspiracy. However, certain persons are exempt from liability for the offence of conspiracy. Section 2(1) CLA provides that the intended victim of the offence cannot be guilty of conspiracy.<sup>30</sup> Section 2(2) CLA provides that there can be no conspiracy where the only other person to the agreement is a spouse, a person under the age of criminal responsibility, or an intended victim.<sup>31</sup>

---

<sup>28</sup> A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 457 et seq; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 508; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 359 et seq.; N. Padfield, *Criminal Law*, 6th edn. (2008), p. 155 et seq. This study however, mainly concerns itself with statutory conspiracy, which consists of the majority of cases.

<sup>29</sup> The offence of Statutory Conspiracy is set out by s 1(1) and s 1(2) of the CLA which states:

1(1) Subject to the following provisions of this part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either-

(a) will necessarily amount to or involve the commission of any offence or offences by one or more parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any offences impossible, he is guilty of conspiracy to commit the offence or offences.

(2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and one other party to the agreement intend or know that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

<sup>30</sup> It is suggested that victim here refers to offences which exist for purposes of protecting the victim, see M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 273; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 513; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 395.

<sup>31</sup> A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 460, stating that the law in this case places, 'the value of marital confidence above the public interest in having conspirators brought to justice...'; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials* 5th edn. (2003), p. 513; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 394; N. Padfield, *Criminal Law*, 6th edn. (2008), p. 156; also see *Chrastny* (1991) 1 W. L. R 1381, where the court noted it was possible to hold a husband and wife liable for conspiracy where a third

## Elements of Statutory Conspiracy

The jurisprudence illustrates that to prove statutory conspiracy the prosecution must show the existence of two elements: the agreement, which is the *actus reus*, and the *mens rea*, which is the intention to enter into the agreement to carry out the intended underlying offence. The exercise of distinguishing between these two elements with respect to the offence of conspiracy is not always an easy task. This is because the act of agreeing is itself considered to be essentially a 'mental operation'.<sup>32</sup>

### (a) The Agreement

The offence of conspiracy lies in making the agreement and it is not necessary for any other action to be performed in pursuance of the agreement.<sup>33</sup> In *R v Simmonds*,<sup>34</sup> the court observed that a conspiracy involves two or more persons acting or planning to act in concert under some agreement in pursuit of a criminal design.<sup>35</sup> Conspiracy is a continuing offence that lasts until either the criminal purpose is achieved or the agreement is brought to an end.<sup>36</sup>

It must be shown that the parties to the agreement had a meeting of minds for the agreement to exist. Mere negotiation does not suffice.<sup>37</sup> This requires that the conspirators at least define the main elements of the agreement, which means they

---

(Footnote 31 continued)

party was also involved. The husband and wife were considered as one conspirator and the third party considered the second conspirator; The agreement would also be punishable if the married couple had entered into it before marriage, M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 273.

<sup>32</sup> D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 374; see also M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 276.

<sup>33</sup> *Mulcahy v R* (1868) LR 3 HL 306; Law Com. No. 76, para 1.21; M. Allen, *Criminal Law*, 9th edn. (2007), p. 272; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 460; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 504; P. Gillies, *The Law of Criminal Conspiracy*, 2nd edn. (1990), p. 16; J. Herring, *Criminal Law: Text, Cases, and Materials*, 3rd edn. (2008), p. 799; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 362; N. Padfield, *Criminal Law*, 6th edn. 2008, p. 156.

<sup>34</sup> [1969] 1 Q. B. 685.

<sup>35</sup> *R v. Siracusa* [1989] Crim. L. R. 712, with O'Connor LJ stating, 'the essence of conspiracy is the agreement'.

<sup>36</sup> *DPP v. Doot* (1973) All E. R. 940 HL, noting that conspiracy is a continuing offence that lasts until the agreement is realised or otherwise terminated, and different conspirators may join it at various times; *R v Simmonds* [1969] 1 Q. B. 685; M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 273; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 363.

<sup>37</sup> M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 276; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 459–460; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 513; J. Herring, *Criminal Law: Text, Cases, and Materials* 3rd edn. (2008), p. 799; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 363.



agree on a course of conduct that also has to embrace the intended consequences.<sup>38</sup> If no agreement is reached the conspiracy charge will fail. It is not necessary for the parties to have physically met. All that needs to be shown is that the co-conspirators knew there were other parties to the agreement, and the defendant at least communicated with one other party to the conspiracy on the common criminal objective.<sup>39</sup> The agreement may be express or implied.<sup>40</sup> In practice, courts usually infer the existence of the agreement from behaviour that appears to be concerted, rather than direct evidence of a meeting, which the prosecution can hardly rely on, given the secretive nature of conspiracies.<sup>41</sup> The danger of such focus is that too much attention is given to these acts, which may blur the fact that the acts in themselves are not the conspiracy but merely evidence of it.<sup>42</sup> The two or more persons must agree to carry out conduct that is criminal, and not knowing that the conduct agreed upon is criminal does not amount to a defence.<sup>43</sup>

### (b) *The Mental Element*

The *mens rea* of criminal conspiracy requires that each party to the conspiracy know the facts or circumstances with respect to the agreement's objective, and must intend to be part of the agreement, intending also that its underlying offence be carried out.<sup>44</sup> Knowledge of the facts or circumstances surrounding the objective of the conspiracy means that a conspirator must have full intention to

---

<sup>38</sup> A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models Against Criminal Collectives* (2011), p. 81; see also M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 276; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), at p. 461; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 513; J. Herring, *Criminal Law: Text, Cases, and Materials*, 3rd edn. (2008), p. 799, 800.

<sup>39</sup> This was observed in *West* (1948) 1 K. B. 709; "In law all must join in one agreement, each with others, in order to constitute one conspiracy. They may join in at various times, each attaching himself to that agreement; any one of them may not know all the other parties, but only that there are other parties; any one of them may not know the full extent of the scheme to which he attaches himself, but what each must know is that there is coming into existence, or is in existence a scheme which goes beyond the illegal act which he agrees to do". Also see M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 273; J. Herring, *Criminal Law: Text, Cases, and Materials*, 3rd edn. (2008), p. 799; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 365.

<sup>40</sup> M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 272.

<sup>41</sup> See *R v. Simmonds* (1969) 1 Q. B. 685; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 461; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 364.

<sup>42</sup> A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 461; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 364.

<sup>43</sup> *R v. Griffiths* (1966) 1 Q. B. 589, where the court observed that it must be shown that the alleged parties to a conspiracy were acting in pursuance of a criminal purpose held in common between them; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 461.

<sup>44</sup> M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), pp. 280–284; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 462; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), pp. 374–382; N. Padfield, *Criminal Law*, 6th edn. 2008, pp. 157–160.

commit the underlying crime, or has knowledge of the facts or circumstances that make the underlying conduct criminal. The requirement of full intention and knowledge of circumstances applies to all offences even those of strict liability, negligence, or recklessness.<sup>45</sup> In *R v Ali, Hussan, Khan and Bhatti*,<sup>46</sup> it was held that statutory conspiracy has a strict *mens rea* requirement. Recklessness does not suffice. The court observed that to the extent to which a substantive offence imposed liability without knowledge of any particular fact or circumstance necessary for commission of the offence, a defendant would nevertheless not be liable of conspiracy to commit such an offence. Such liability would only arise in a case that the defendant and at least another party to the agreement intended or knew this fact or circumstance shall exist at the time the conduct constituting the offence is to take place.<sup>47</sup>

The *mens rea* requirement that a party to a conspiracy also needs to intend the consequences of such conspiracy has raised some difficulties resulting in diverse opinions. The House of Lords held in *R v Anderson*,<sup>48</sup> that it was sufficient for the prosecution to establish by way of *mens rea* that the defendant had agreed on a course of conduct that he intended to play some part in and knew it would involve the commission of an offence, adding that it was not necessary to prove that he intended the course of action. In this case, the defendant was convicted with several others on account that they had conspired to facilitate the escape of one of them from prison. The defendant's submission that although he had supplied diamond wire to cut bars, he had not intended for the plan to be carried out, neither did he believe in the possibility of its success, was rejected. Lord Bridge in the case asserted:

The necessary *mens rea* of the crime is, in my opinion, established if, and only if, it is shown that the accused when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve.

This rationale has been criticised for being a distortion of substantive principles of criminal law. It is asserted that it creates the strange impression that one may be guilty of conspiracy to commit a crime although they did not intend it, and it also raises some difficulty where the defendant although being part of the conspiracy does not agree to play some part in the agreed course of conduct.<sup>49</sup> Departing from this position, other decisions require that the prosecution clearly establish the

<sup>45</sup> Section 1(2) CLA 1977; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 462–463; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), pp. 377–381.

<sup>46</sup> (2006) Q. B. 322.

<sup>47</sup> See also *R v. Saik* (2006) UKHL 18, Lord Hope of Craighead at para 58.

<sup>48</sup> (1986) A. C. 27 HL.

<sup>49</sup> M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 280–282; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), at p. 463–464; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials* 5th edn. (2003), p. 518; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 375–377; N. Padfield, *Criminal Law*, 6th edn. 2008, p. 157.

intended consequence of the conspiracy and a conspirator's intention in relation to these consequences.<sup>50</sup> This often determines the extent of each conspirator's criminal responsibility. This later view was confirmed in *R v. Siracusa*,<sup>51</sup> a case involving organised smugglers trading in massive quantities of heroin from Thailand and cannabis from Kashmir to Canada, where the court tried to clarify the confusion created by the *Anderson* case. The court held that although a person smuggling heroin could be convicted of the substantive crime if he thought he was smuggling cannabis, the same analogy would not apply to the conspiracy charge, asserting that the prosecution is required to prove the accused's intent in relation to specific intended consequences. O' Connor LJ observed:

[I]f the prosecution charge a conspiracy to contravene...the Customs and Excise Management Act by the importation of heroin, then the prosecution must prove that the agreed course of conduct was the importation of heroin. This is because the essence of the crime of conspiracy is the agreement and in simple terms, you do not prove an agreement to import heroin by proving an agreement to import cannabis.

On the issue of a conspirator's intention to participate in some way in the commission of the underlying offence, the court in *Siracusa* noted that 'participation in conspiracy is infinitely variable: it can be passive or active'.<sup>52</sup> Further, it clarified that it was sufficient for the prosecution to show that an accused assented to play his part 'in the agreed course of conduct, however innocent in itself, knowing that the part to be played by one or more of the others will amount to or involve the commission of an offence'.<sup>53</sup>

Another issue of concern is where the agreed course of conduct leads to commission of other offences that were not intended. The main question posed here is whether such consequences in the case that they were foreseeable should be deemed as intended. The most common view is that consequences should only be limited to those that were intended by the parties.<sup>54</sup>

### Accessory Liability

Under the United Kingdom criminal law system, a party to a conspiracy that intends the underlying crime to be committed shall be guilty of such offence when

<sup>50</sup> *R v. Edwards* (1991) Crim. L. Rev. 45; *R v. Ashton* (1992) Crim. L. Rev. 667; *R v. Harvey* (1999) Crim L. R. 70; *Yip Chiu-Cheung v. R* (1994) 3 W. L. R. 514; M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 276.

<sup>51</sup> (1989) Crim. L. Rev. 712.

<sup>52</sup> *R v. Siracusa* (1990) 90 Cr. App. R 340 at p. 349.

<sup>53</sup> *R v. Siracusa* (1990) 90 Cr. App. R 340–357; *R v. Hollinshead, Dettlaf and Griffiths*, Crim. L. Rev. 653 (1985).

<sup>54</sup> D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 377; see also C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 514; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models Against Criminal Collectives* (2011), p. 93.

committed by a co-conspirator.<sup>55</sup> This however, is not the rule with respect to cases where the conspirators although involved in a form of conspiracy have had no contact with each other or are unaware of each other's existence. In such an instance, the commission of an offence by one of the conspirators only makes the other/s liable for the conspiracy but not the underlying substantive offence.<sup>56</sup> A conspirator who plays a very minor role in the commission of the substantive offence, which is the object of the conspiracy, may be charged as if they actually committed the substantive crime. The reasoning behind this practice was explained by Lord Pearson in *Director of Public Prosecution v. Doot*,<sup>57</sup> when he likened a conspirator's agreement to a contract. Each conspirator being a party to the agreement benefits from each of the acts of the co-conspirators. In practice however, few cases follow the guidelines laid out in the *Doot* case. The courts prefer to hold a conspirator who does not participate directly in the commission of an offence liable for accessorial liability, and not principally liable for the object of the conspiracy.<sup>58</sup>

### Charging Practice

Conspiracy 'in the eye of the law'<sup>59</sup> is considered to be a crime on its own merit. The practice under common law was that all conspiracies except for conspiracy to commit treason were punishable as misdemeanours.<sup>60</sup> Being a misdemeanour meant that in situations where the conspirators agreed to commit a substantive crime that was classified as a felony and successfully carried it out, the conspiracy would merge into the substantive crime. This practice was allowed because of certain procedural advantages that the law availed to a defendant in a trial involving a misdemeanour and not in a felony trial.<sup>61</sup>

Under the CLA, in principle statutory conspiracy remains a separate offence from its underlying substantive offence, and does not merge with the substantive offence even when the substantive offence is committed. Unlike the practice under common law, this position also applies even in the case where the crime involved is a felony. This principle of law was recognised in the case of *Regina v. O'Connell*,<sup>62</sup> when Lord Campbell stated:

<sup>55</sup> D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 170.

<sup>56</sup> D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 170.

<sup>57</sup> 1973 A. C. 807.

<sup>58</sup> K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 980; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 170.

<sup>59</sup> *Regina v Button* 11 Q. B. 929 (1848).

<sup>60</sup> K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 970.

<sup>61</sup> See K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 970.

<sup>62</sup> 8 Eng. Rep. 1061 (H. L. 1844) at p. 1154 cited in K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 971.

Where they have actually done what they intend to do, it may be more proper to prosecute them for their illegal acts; but, in point of law, they remain liable for the offence of entering into the conspiracy.

In support of this position, the Queen's Bench in *Regina v. Button*,<sup>63</sup> dismissed an appeal by appellants who had been convicted for conspiracy to defraud their employer. The appellants had argued that there being evidence of commission of the substantive offence, no conviction should be allowed for the charge of conspiracy, which merges into the substantive offence. The court rejected this proposition affirming that the two offences were different, dismissing the appellants concerns that they might be punished twice for the same offence.<sup>64</sup>

Prosecutors therefore, also have the option of prosecuting suspects only for conspiracy, even in the instance where there is sufficient evidence of commission of the substantive offence.<sup>65</sup> The prosecutors especially prefer to charge conspiracy for the procedural and evidential advantages that come with it.<sup>66</sup> The courts however, do not encourage this practice because a conspiracy charge is usually seen as causing confusion both to the judge and jury. Furthermore, the courts consider conspiracy to be a more difficult concept to comprehend than its underlying substantive crime.<sup>67</sup> In addition, an indictment for the vague offence of conspiracy is seen to create difficulty for a defendant in laying out a defence.<sup>68</sup>

The prosecution may also choose to simultaneously institute charges for conspiracy and the substantive crime. This practice is also not viewed favourably by the British appellate courts because of the confusion that is usually characteristic of most such trials. Although the appellate courts do not prohibit double charging, they have been very critical of the practice.<sup>69</sup> The additional conspiracy charge is seen to complicate the trial and is considered to add nothing beneficial to the trial. It is also seen as making trials intolerably long and allows the admission of evidence that would otherwise be inadmissible. This was the courts view in *Regina*

<sup>63</sup> 11 Q. B. 929 (1848).

<sup>64</sup> See also *R v. Dawson* (1960) 1 W. L. R. 163; *R v. Griffiths* (1966) 1 Q. B. 589; *Verrier v. DPP* (1966) 3 All E. R. 568.

<sup>65</sup> The courts have interpreted section 3(3) of the Criminal Law Act 1977 as allowing this practice, K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 973; also see A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 458.

<sup>66</sup> C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 507; K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 973; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 363, 400.

<sup>67</sup> *Regina v. West* 32 Crim. App. 152 (1948); A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models Against Criminal Collectives* (2011), p. 95; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), pp. 392–393.

<sup>68</sup> K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 972; P. Gillies, 10 *Ottawa L. Rev.* (1973), p. 274; these criticisms were also noted in Law Com. No. 50, paras 54–58 and Law Com. No. 76, paras 1.64–1.71.

<sup>69</sup> A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 458; The Law Society according to para 57 of the Law Com. No. 50, also recommended that prosecutors should not be allowed to charge both conspiracy and its underlying complete substantive offence.

*v. Dawson*,<sup>70</sup> where the court quashed the conviction of six defendants who had been charged and convicted of one count of conspiracy and 14 counts of fraud. The court, to deal with the problem created by double charging, devised a new analytical approach of first evaluating the substantive charge and then determining the viability of the conspiracy charge. This approach changed the traditional practice of first evaluating the conspiracy charge.<sup>71</sup> The court's view on the benefit of such an approach was that it would enable the state to bring smaller and more manageable conspiracies before the court, as opposed to a single, large and complicated conspiracy.

The case of *Regina v. Griffiths*,<sup>72</sup> also illustrates the courts' disdain towards the practice of double charging. Nine defendants were charged and convicted of one count of conspiracy to defraud the government and 24 counts of the substantive offence of false pretences. During the trial the state called 60 witnesses and the defence 35 witnesses. A total of 263 exhibits were produced by both sides. On appeal, the court reversed the convictions holding that the prosecution had failed to prove that there was a single comprehensive conspiracy among all the defendants. The appellate court observed that during the trial two types of confusion were experienced. The first was the "general confusion", which made the jurors to complain. The second was the "procedural confusion", which required the judge to instruct the jury that certain evidence though admissible with respect to the conspiracy charge could not be considered in the instance of the substantive offence. The court, in expressing its disapproval of the practice, stated:

The practice of adding what may be called a rolled-up conspiracy charge to a number of counts of substantive offences has become common. We express the very strong hope that this practice will now cease and that the courts will never again have to struggle with this type of case [...].

In spite of their disapproval, the appellate courts have continued to allow convictions for both conspiracy and the completed offence to stand. This especially occurs in the instance where an appellant does not question the double conviction on appeal.<sup>73</sup> The courts have also refrained from establishing a rule restricting the prosecution from bringing both a charge of conspiracy and the substantive offence, preferring to deal with the problem on a case by case basis.<sup>74</sup> The Law Reform Commission also recognised the challenges raised by double charging, but instead

---

<sup>70</sup> 44 Crim. App. 87 (1960).

<sup>71</sup> K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 976.

<sup>72</sup> (1966) 1 Q. B. 589.

<sup>73</sup> See K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 980. This is illustrated by the case of *Director of Public Prosecution v. Doot* 1973 A. C. 807 where the court let a conviction for the offence of importing cannabis into the United Kingdom together with the conspiracy to import dangerous drugs to stand because the defendants did not challenge it on appeal. The court nonetheless, observed that had the issue been raised the court would have rejected the argument, because the court accords deference to the trial court's determinations.

<sup>74</sup> K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 978.

of recommending a rule that would abolish this practice, it preferred to issue a practice rule that requires the prosecution to justify joinder of the conspiracy and substantive counts, failure to which the prosecution has to choose to pursue one of either of the counts.<sup>75</sup> This recommendation was adopted by the Queen's Bench division issuing a practice notice direction dated 9th May 1977 to the effect that, 'where an indictment contains counts alleging substantive offences and a related conspiracy count, the prosecution may justify the joinder or be required to elect to proceed on the substantive or conspiracy counts [...]. A joinder is justified for this purpose if the judge considers that the interests of justice demand'.<sup>76</sup>

## Enforcement

An accused may be convicted on both counts of conspiracy and the substantive offence, and if the court makes such a conviction it is required to give separate sentences on each count.<sup>77</sup> The possibility of double punishment is however, not encouraged by the appellate courts. In *D.P.P. v. Stewart*,<sup>78</sup> the defendant was charged for the offence of conspiracy under the Customs Act and for the substantive crime of failing to offer foreign currency to an authorised dealer. The defendant was convicted and sentenced to a fine of 30,000 pounds or six months for each offence. On appeal, the sentence for the conspiracy offence was reduced to a nominal 100 pounds. The court's reasoning was that because the two offences arose from the same set of facts to impose substantial penalties on both counts would be excessive. On acquittals, the law recognises that an accused may be found guilty although his alleged co-conspirators are acquitted.<sup>79</sup> Such a conviction can be quashed if the circumstances of the conviction are inconsistent with the acquittal of the other persons involved.

One question that had previously presented a dilemma to the courts is whether a conspiracy conviction can receive a longer sentence than the sentence available for the substantive crime. Under common law, the punishment of conspiracy was not dependent on the punishment of the completed crime. Therefore, it was possible to

---

<sup>75</sup> Law Com. No. 76, paras 1.67, 1.69, its justification for this approach was, 'to guard against the jury having to acquit a defendant because he has not been charged with what the evidence establishes he is guilty of, whether it is conspiracy or the substantive offence. Substantive counts are charged in case the evidence of the conspiracy breaks down; conspiracy is charged in case the evidence on the substantive counts against one or more defendants breaks down'.

<sup>76</sup> Practice Direction [1977] 2 All E. R. 540.

<sup>77</sup> A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models Against Criminal Collectives* (2011), p. 95; Wasik M., *Emmins on Sentencing*, 3rd edn. (2001), p. 147.

<sup>78</sup> 3 W. L. R. 884 (1982).

<sup>79</sup> Section 5(8) CLA; M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), pp. 274–275; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 397.



receive any of the wide range of sentences available at the discretion of the court.<sup>80</sup> It was the practice of the courts to give a harsher penalty for conspiracy charges in the event two situations: The first situation applied in the instance where the conspiracy involved a continuing criminal activity. In *Rex v Morris*,<sup>81</sup> the court rejected the defendant's appeal against his four-year sentence for the misdemeanour of conspiracy to evade duties of customs. The defendant had argued that this sentence was historically disproportionate. The court was of the view that a longer sentence was appropriate in the case where the conspiracy involved more than one distinct activity. The defendant's activity of importing more than 10,000 watches daily was described as 'wholesale smuggling' that had taken place over several months. The conspiracy in this case was regarded as much more significant than any other objective of the conspiracy. The second situation was in the case where the conspiracy involved a single crime of exceptional circumstances. In *Verrier v Director of Public Prosecutions*,<sup>82</sup> the defendant received a seven-year sentence for conspiracy to defraud, when the maximum sentence for the crime of fraud was 5 years. His appeal against the sentence was dismissed. The House of Lords held that a judge may have reasons to treat the conspiracy offence differently and to consider it more serious than the substantive offence.

The law in the United Kingdom on this aspect has since changed, following recommendation by the Law Commission. Part I Section 3 of the 1977 Act sets out the penalties for conspiracy. Section 3(3) of the CLA provides that a person convicted of statutory conspiracy is only liable to a sentence of imprisonment not exceeding the maximum sentence provided for its target offence. Where the conspiracy involves the commission of more than one offence, the maximum sentence would be the longest of the sentences provided. The possibility of receiving a life imprisonment also exists for one convicted of conspiracy to commit murder, or any offence for which a sentence for life imprisonment is provided by law, and other offences punishable by imprisonment for which no maximum term is given.<sup>83</sup> In some instances, the Act gives the court powers to impose a fine at their discretion *in lieu of* or in addition to dealing with the accused person.<sup>84</sup>

In the case where the court convicts for both conspiracy and substantive offence, the court is required to state whether the underlying sentences of the respective convictions will be served concurrently or consecutively.<sup>85</sup> If the sentences are to be served concurrently, the longer of the sentences is taken as the

<sup>80</sup> M. Allen, *Textbook on Criminal Law*, 9th edn. (2007), p. 398; C. M. V. Clarkson & H. M. Keating, *Criminal Law: Text and Materials*, 5th edn. (2003), p. 508; D. Ormerod, *Smith & Hogan Criminal Law*, 11th edn. (2005), p. 397.

<sup>81</sup> 1 K. B. 394 (1951); K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 973.

<sup>82</sup> 2 A. C. 195 (1967).

<sup>83</sup> Section 3(2) CLA.

<sup>84</sup> Section 3(1) CLA.

<sup>85</sup> A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models Against Criminal Collectives* (2011), p. 95.



aggregate sentence, whereas in the case of consecutive sentences, the sum of both sentences is the aggregate even if it is greater than the maximum that would be imposed for any one of the offences.<sup>86</sup> It is important that the court ensures that even while imposing in particular consecutive sentence, the overall sentence should reflect the total seriousness of the conduct being punished.<sup>87</sup>

### 2.2.2 United States

Conspiracy law in the United States was inherited from its common law background. Congress has since enacted several conspiracy statutes. The current law on federal conspiracy is one provided by Congress, and includes the jurisprudence showing the courts understanding of the law on conspiracy.<sup>88</sup> Conspiracy is widely used to counter organised crime, and is one of the most commonly charged federal crimes in the United States.<sup>89</sup> It has played and continues to have a pivotal role in the punishment of uncompleted criminal conduct in white-collar cases, narcotics, and more recently terrorism.<sup>90</sup> Congress enacted a general criminal conspiracy statute U.S.C.18 § 371, which makes it a crime to conspire to commit any crime against the United States or to defraud the United States.<sup>91</sup> In addition to this general statute, specific provisions in other federal statutes criminalise conspiracy to commit certain substantive offences.<sup>92</sup> Most of the conspiracy laws are broadly tailored, usually setting out the statement of conspiracy objective considered to be criminal, and in some instances providing for an overt act requirement. This gives

---

<sup>86</sup> *R v. Prime* (1983) 5 Cr. App. R(s) 127.

<sup>87</sup> See Powers of Criminal Courts (Sentencing) Act 2000, Section 158(2); Criminal Justice Act 2003, Section 166(3)(b); *Jones v. DPP* (1962) A. C. 635, at p. 647; Wasik M., *Emmins on Sentencing*, 3rd edn. (2001), pp. 148–149.

<sup>88</sup> See Doyle C., *Federal Conspiracy Law: A Brief Overview*, Congressional Research Service, Congress Report April 30, 2010, p. 3.

<sup>89</sup> P. Marcus, 65 *Geo. L. J.* (1977), p. 947; J. Winograd, 41 *Am. Crim. L. Rev.* (2004), p. 611.

<sup>90</sup> R. M. Chesney, 80 *S. Cal. L. Rev.* (2007), p. 425 et seq; P. Marcus, 65 *Geo. L. J.* (1977), p. 950; Strader K. J., *White Collar Crime Cases, Materials, and Problems* (2009), p. 51.

<sup>91</sup> Section 371 states;

If two or more persons conspire either to commit any offence against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than 5 years, or both.

If, however, the offence, the commission of which is the object of the conspiracy, is a misdemeanour only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanour.

<sup>92</sup> Examples include conspiracy to restrain trade 15 U.S.C. Sec 1 (2000); conspiracy to bribe in sporting events 18 U.S.C. Sec 224 (2000); conspiracy to deprive persons of their civil rights 18 U.S.C Sec 241 (2000); conspiracy to violate Controlled Substances Act 21 U.S.C. Sec 846 (2000).

latitude to the courts to define the elements of the crime, and the law pertaining to several issues that arise during the prosecution of conspiracy cases.<sup>93</sup> The Model Penal Code is the other source of law that attempts to add more certainty and coherence to the law on criminal conspiracy.<sup>94</sup> Section 5.03 of the Model Penal Code provides that to agree with another to commit a crime or an attempt or solicitation to commit a crime, or to agree to aid a person in the planning or commission of a crime or attempt or solicitation to commit such a crime, makes one liable for conspiracy. Although Congress has not adopted the Model Penal Code into federal law, a significant portion of it has been adopted by several States.<sup>95</sup>

A conspiracy must involve two or more persons.<sup>96</sup> At common law, a husband and wife were considered to be one unit and could not make up the two parties necessary to form a conspiracy where they were the sole conspirators. Several courts in the United States have rejected this rule, observing that the reasons that existed to support the rule no longer prevail in present day settings.<sup>97</sup> A corporation may also be held criminally liable for conspiracy, if its employees and agents carried out such conspiracy at least in part for the benefit of the company.<sup>98</sup> Following the introduction of Wharton's rule, when the nature of a crime is such that it necessarily requires concert of action to be committed, which means it is impossible to commit such crime without agreeing to do so, then the prosecution in such a case is precluded from charging the participants with conspiracy. An example would be in the case where adultery is a crime, the two participants can only be charged with the substantive offence and not conspiracy.<sup>99</sup>

### 2.2.2.1 Elements of the Offence

The jurisprudence shows that under federal law most conspiracies consist of three elements: an agreement to carry out an unlawful act, knowingly engaging in the

<sup>93</sup> H. Wechsler, W. K. Jones, and H. L. Korn, 61 *Columbia Law Review* (1961), p. 957.

<sup>94</sup> H. Wechsler, W. K. Jones, and H. L. Korn, 61 *Columbia Law Review* (1961), p. 957; also see G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), pp. 6–8, they comment that the model penal code is a proposed formulation of statutes relating to criminal law, and is available to the legislature as a guide in making legislation in the underlying field.

<sup>95</sup> K. A. David, 25 *Vand. J. Transnat'l L.* (1993), p. 960; G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 6.

<sup>96</sup> *United States v. Dumeisi*, 424 F. 3d 566, 580 (7th Cir. 2005), where the court observed that 'the elements of the crime of conspiracy are not satisfied unless one conspires with at least one true co-conspirator'; *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).

<sup>97</sup> See *United States v. Dege*, 364 U.S. 51, 54–55 (1960). This rule however, is not decisively settled; see further views in W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 657.

<sup>98</sup> *United States v. Singh*, 518 F. 3d 236, 249–251 (4th Cir. 2008).

<sup>99</sup> See *Iannelli v United States*, 420 U. S. 770 (1975) at p. 774; W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 658; for further discussions on limitations of this rule see V. J. Tatone, 61 *Journal of Urban Law* (1984), p. 505 et seq.

conspiracy with intention to realise its object, commission of an act by one or more members of the conspiracy directed towards realising the object of the conspiracy, otherwise referred to as the ‘overt act’.<sup>100</sup>

### (a) The Agreement

The agreement to carry out the unlawful act is the *actus reus* and is the essence of criminal conspiracy.<sup>101</sup> It is considered to be a manifestation of the intention conceived in the mind.<sup>102</sup> It is the act of agreeing in itself which is criminalised. In *United States v. Pullman*,<sup>103</sup> the court observed that the agreement to commit an unlawful act was the essential evil the crime of conspiracy is directed at. It is from the agreement that courts can determine issues such as, the requisite mental element, the requisite number of conspirators, and the number of conspiracies in existence.<sup>104</sup>

The prosecution does not have to prove the existence of a formal or express agreement. The agreement may be implicit, inferred from the facts and circumstances of the case.<sup>105</sup> In *United States v. Delgado*,<sup>106</sup> the court noted that a conspiracy may be proved by circumstantial evidence showing concert of action. Since conspiracy is largely surrounded by secrecy, proving it by direct evidence is a difficult if not impossible task to fulfil. In such circumstances, the use of circumstantial evidence to prove conspiracy becomes essential. Courts being sympathetic to the prosecution’s hardship have been willing to let the prosecution ‘rely on inferences drawn from the course of conduct of the alleged conspirators’.<sup>107</sup> The course of conduct from which the courts may infer conspiracy include: ‘...the joint appearance of defendants at transactions and negotiations in furtherance of the conspiracy; the relationship among co-defendants; mutual representation of defendants to third parties; and other evidence suggesting unity of purpose or

<sup>100</sup> G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), pp. 355–356; G. P. Fletcher, *Rethinking Criminal Law* (2000), pp. 218–219; W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 621.

<sup>101</sup> See *Iannelli v. United States*, 420 U.S. 770 (1975); *United States v. Feola*, 420 U.S. 671, 694 (1975); *United States v. Beil*, 577 F. 2d 1313, 1315 n. 2 (5th Cir. 1978); *United States v. Chavez*, 549 F.3d 119, 125 (2d Cir. 2008); G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 356; G. P. Fletcher, *Rethinking Criminal Law* (2000), pp. 218, 219.

<sup>102</sup> This was the expression of the court in *State v. Carbone*, 10 N. J. 329, 91 A. 2d 571 (1952), it observed that “...the mind proceeds from a secret intention to the overt act of mutual consultation and agreement,” cited in W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 622.

<sup>103</sup> 187 F. 3d 816, 820 (8th Cir. 1999).

<sup>104</sup> W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 622.

<sup>105</sup> *Iannelli v. United States*, 420 U. S. 770, 777 (1975); *United States v Rodriguez-Velez*, 597 F. 3d 32, 39 (1st Cir. 2010); G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 356.

<sup>106</sup> 321 F. 3d 1338, 1344 (11th Cir. 2008).

<sup>107</sup> *Interstate Circuit v. United States*, 306 U.S. 208, 59 S. Ct 467, 83 L. Ed. 610 (1939).

common design and understanding among conspirators to accomplish the objects of the conspiracy'.<sup>108</sup>

The parties to the agreement must agree on a common objective. In *United States v. Milligan*,<sup>109</sup> the court asserted that it was necessary for the government to prove a meeting of minds between the alleged conspirators to achieve an unlawful objective.<sup>110</sup> The meeting of minds in this instance does not however, apply the same standard like that required with respect to contracts.<sup>111</sup> A mere tacit understanding does suffice. In *United States v. Desena*,<sup>112</sup> the court stated that although the proof of a formal agreement was not necessary, the prosecution had to at least prove a tacit understanding between the parties to further violation of the law. The objective of the agreement should be to achieve an illegal goal.<sup>113</sup> Under common law, it was possible for acts not considered criminal when carried out by a single person, to be punishable as conspiracy when carried out by a combination of persons. This common law position may still prevail in some jurisdictions in the United States, save for instances where statute limits conspiracy to apply only where its object is a crime or a felony.<sup>114</sup> Most States have preferred to restrict the application of conspiracy to criminal objectives following its history of prosecutorial and judicial abuse.<sup>115</sup>

## (b) The Mental Element

An accused is only culpable of conspiracy if he knew of the conspiracy and voluntarily participated in it.<sup>116</sup> This implies that the accused had the intent to bring about the object of the conspiracy. In *United States v. Ceballos*,<sup>117</sup> the court observed that in order to convict a defendant of conspiracy, the prosecution had to prove that the defendant knew of the conspiracy, and joined it with intent to commit the offences, which were part of the conspiracy's objectives. The knowledge requirement is satisfied once the prosecution shows the defendant's

<sup>108</sup> *United States v. Wardell*, 591 F. 3d 1279 at 1287–288 (10th Cir. 2009).

<sup>109</sup> 17 F. 3d 177, 182–183 (6th Cir. 1994).

<sup>110</sup> See also G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 366.

<sup>111</sup> W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 622.

<sup>112</sup> 260 F. 3d 150, 155 (2d Cir. 2001); *United States v. Searan*, 259 F. 3d 434, 442 (6th Cir. 2001).

<sup>113</sup> *State of New Jersey v. Brian Samuels* A-0967-02 T 40967-02T4 court noted that the agreement must have a specific crime as its goal.

<sup>114</sup> W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 636; P. Marcus, 65 *Geo. L. J.* (1977), pp. 962–965.

<sup>115</sup> W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 639.

<sup>116</sup> See G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 372, asserting that there has to be an intent to agree and intent to realise the object of the conspiracy; see also R. M. Chesney, 80 *S. Cal. L. Rev.* (2007), pp. 452–454; W. R. La Fave, *Criminal Law*, 4th edn. (2003), pp. 628–629.

<sup>117</sup> 340 F. 3d 115, 123 (2d Cir. 2001).

awareness of the essential nature of the conspiracy. This means it suffices to prove that the defendant only had knowledge of the general scope of the conspiracy. This was aptly expressed by the Supreme Court in *Blumenthal v. United States*,<sup>118</sup> when it stated:

Secrecy and concealment are essential features of [a] successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

The evidence of knowledge must be clear.<sup>119</sup> Furthermore, in cases involving specific intent crimes, the prosecution is required to show beyond reasonable doubt that the defendant had the specific intent to violate the substantive statute involved.<sup>120</sup> The element of knowledge may also be satisfied by showing the accused acted with wilful blindness. A defendant will not be shielded from culpability where the defendant is seen to have deliberately avoided knowledge of a conspiracy.<sup>121</sup> Wilful blindness is a form of constructive knowledge that allows imputation of knowledge if the evidence shows the accused purposely closed his eyes to avoid knowing what was taking place around him, when given reason to believe further inquiry is necessary and can satisfy the mental element of the underlying offence.<sup>122</sup> In *United States v. Reyes*,<sup>123</sup> the court stated that wilful blindness in a conspiracy case exists where the defendant realised the probability of existence of the conspiracy, but avoided final confirmation. This was also confirmed in *United States v. Faulkner*,<sup>124</sup> where the court held that it would be appropriate to infer deliberate ignorance where a defendant claims lack of guilt, but the evidence supports inference of deliberate indifference.

However, mere knowledge of the existence and goals of a conspiracy does not of itself make one a conspirator, the prosecution must show that the defendant has a more positive attitude towards the forbidden undertaking. The evidence must show that more than just knowledge there is informed and interested cooperation by the defendant. The defendant ‘must in some sense promote [the] venture

<sup>118</sup> 332 U.S. 539, 557 (1947).

<sup>119</sup> *United States v. Cellabos*, 340 F. 3d 115, 123 (2d Cir. 2001).

<sup>120</sup> See *United States v. Cellabos*, 340 F. 3d 115, 123 (2d Cir. 2001); *United States v. Samaria*, 239 F. 3d 228 (2d Cir. 2001).

<sup>121</sup> See *United States v. Whittington*, 26 F. 3d 456 (4th Cir. 1994), where the court noted that in a case of wilful blindness if the defendant was unaware of what was happening it was because he deliberately shut his eyes to it.

<sup>122</sup> *United States v. Ereme*, No. 05-4263 (4th Cir.) Unpublished.

<sup>123</sup> 302 F. 3d 48, 54 (2d Cir. 2002).

<sup>124</sup> 17 F. 3d 745, 767–768 (5th Cir. 1994).

[...making] it his own, have a stake in its outcome or make an affirmative attempt to further its purpose'.<sup>125</sup>

On the aspect of voluntary participation, it is sufficient for the prosecution to show the defendant wilfully participated in the conspiracy at some stage with knowledge of the unlawful nature of his participation. This does not require proof that the accused entered into the conspiracy with full knowledge of its details or that he participated in all phases and aspects of the conspiracy.<sup>126</sup> Once the existence of a conspiracy is established, evidence of the accused person's slight or remote connection with the conspiracy will be enough to show the accused was a knowing member of the conspiracy.<sup>127</sup> The acts carried out by the defendant in furtherance of the conspiracy objective suffice to prove that the accused was a knowing participant. In the alternative, the prosecution needs only to establish the existence of a conspiracy, and the accused person's intent to further its objectives. The prosecution may prove the defendant's participation entirely through circumstantial evidence. In *United States v. Whittington*,<sup>128</sup> the court observed that proof of knowing participation in conspiracy can be shown by 'circumstantial evidence such as relationship with other members of the conspiracy, the length of his association, attitude, conduct and the nature of the conspiracy'. It is not necessary to show the defendant knew all the details, objectives or participants in a conspiracy.

The courts have nonetheless been very cautious in establishing 'knowing participation' from mere association.<sup>129</sup> In *United States v. Maliszewski*,<sup>130</sup> the court observed that participation in a conspiracy's common purpose and plan can be inferred from the defendant's actions and reactions to circumstances, but mere presence at the scene of crime was not sufficient evidence of participation. This was illustrated in *United States v. Pupo*,<sup>131</sup> where the court held that mere knowledge, acquiescence, or approval of crime was not enough to establish an individual as being part of a conspiracy to distribute drugs, and mere presence at the scene of a drug distribution was not sufficient to prove participation in a conspiracy. The court observed that the defendant's actions must be more consistent with participation than with mere acquiescence. In such cases, the jury has often preferred the addition of other evidence to find conspiracy apart from mere close association with co-conspirator. In *United States v. Samaria*,<sup>132</sup> the court

<sup>125</sup> *United States v. Ceballos*, 340 F. 3d 115, 123 (2d Cir. 2001); *United States v. Falcone*, 109 F. 2d 579 at 580 (2d. Cir. 1940); *Direct sales v United States*, 319 U.S. 703 (1943); G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 356.

<sup>126</sup> *United States v. Ereme*, No.05-4263 (4th Cir.) Unpublished.

<sup>127</sup> See *United States v. Leahy*, 82 F. 3d 624, 633 (5th Cir. 1996).

<sup>128</sup> 26 F. 3d 456, 465 (4th Cir. 1994).

<sup>129</sup> Doyle C., *Federal Conspiracy Law: A Brief Overview*, Congressional Research Service, Congress Report April 30, 2010, p. 6.

<sup>130</sup> 161 F. 3d 992, 1006 (6th Cir. 1998).

<sup>131</sup> 841 F. 2d 1235, 1238 (4th Cir. 1988).

<sup>132</sup> 239 F. 3d 228, 235 (2d Cir. 2001).

observed that a cab driver, who took conspirators in a stolen credit card scheme to their requested destinations, did not have the requisite knowledge and specific intent necessary to be considered a participant in the conspiracy. The court stated ‘[t]he broad reach of the federal conspiracy statute does not extend so far as to permit conviction upon evidence of mere association or suspicion’.

### (c) The Overt Act Requirement

Although under common law it was not necessary to establish conspiracy by proving an overt act, most conspiracy statutes in the United States now require proof that one or more members of the conspiracy carried out an act (otherwise known as an overt act) in furtherance of the conspiracy.<sup>133</sup> In *Yates v United States*,<sup>134</sup> the court stated that the rationale for the overt act requirement was to show that the conspiracy is at work and not a mere scheme in the minds of the perpetrators.<sup>135</sup> To support a conspiracy conviction, the overt act does not have to be unlawful, neither does it need to be the substantive offence itself, it only needs to be a step toward the criminal objective.<sup>136</sup> The defendant needs not to have personally carried out the overt act, a co-conspirator’s overt act will be sufficient to hold other co-conspirators liable.<sup>137</sup> The overt act must be an act carried out before commission of the substantive crime, or before the objective of the conspiracy is realised.<sup>138</sup>

### Accessory Liability (The Pinkerton Doctrine)

A party to a conspiracy may be held liable for foreseeable substantive offences committed by a co-conspirator in furtherance of the conspiracy, even though the party did not participate in commission of such substantive offences, or have any

---

<sup>133</sup> G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 357; Doyle C., *Federal Conspiracy Law: A Brief Overview*, Congressional Research Service, Congress Report April 30, 2010 p. 8; G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 223; P. J. Henning, 44 *Wayne L. Rev.* (1998–1999), p. 1316.

<sup>134</sup> 354 U.S. 298, 334 (1957).

<sup>135</sup> See also D. Burgman, 29 *DePaul L. Rev.* (1979), p. 101, stating that the overt act shows the conspiracy is meant to be carried out, and thus evidence of the serious threat it poses.

<sup>136</sup> See *United States v. Rehak*, 589 F. 3d 965, 971 (8th Cir. 2009); *United States v. Crabtree*, 979 F. 2d 1261, 1267 (7th Cir. 1992), where the court stated that an overt act does not have to be the substantive crime; *United States v. Montour*, 944 F. 2d 1019, 1026 (2d Cir. 1991), here the court observed that an overt act need not be inherently criminal; G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 358; G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 224.

<sup>137</sup> *United States v. LaSpina*, 299 F. 3d 165, 176 (2d Cir. 2002).

<sup>138</sup> See *United States v. McKinney*, 954 F. 2d 471, 475 (7th Cir. 1992).

knowledge of them. This rule was laid down in *Pinkerton v. United States*.<sup>139</sup> Pinkerton was convicted for conspiring with his brother to evade tax, including other substantive counts of tax fraud allegedly carried out by his brother. The Court of Appeal dismissed his appeal, rejecting the allegation that he was not the party that carried out the plan, although, there was evidence showing that at the time some of the offences were committed the appellant was in jail. The court observed that as long as co-conspirators had not withdrawn from the conspiracy, they were aiding the commission of the substantive offence.<sup>140</sup> The court while making this holding observed that the offence for which a conspirator will be held liable must be one in furtherance of the conspiracy and was reasonably foreseeable. It added that a defendant could only escape liability for such an offence, by showing they had withdrawn from the conspiracy at the time of commission of the alleged offence.<sup>141</sup>

Courts have been willing to interpret knowing participation and find liability on account of foreseeability mainly because of due process concerns.<sup>142</sup> In *United States v. Corneaux*,<sup>143</sup> the court held that the defendants who were experienced drug dealers must have been aware of the prevalent use of firearms in drug deals, therefore, they could be held liable for the foreseeable offence of a co-conspirator possessing a firearm during the drug deal in furtherance of conspiracy.

A defendant who joins a conspiracy is also likely to be considered to have adopted acts done by co-conspirators prior to joining the conspiracy, therefore, liable for them. In *United States v. Rea*,<sup>144</sup> the court observed that being present from the inception of a conspiracy was not a prerequisite for a defendant to incur liability for acts committed by co-conspirators, both before and after the defendant became a member of the conspiracy. This rule of liability does not extend to substantive crimes committed by co-conspirators before the defendant joined the conspiracy.<sup>145</sup> In *United States v. Ocampo*,<sup>146</sup> the court held the defendant was liable for acts done by co-conspirators prior to having joined the conspiracy, but declined to extend culpability to substantive offences committed in furtherance of

---

<sup>139</sup> 328 U.S. 640 (1946); also see *United States v. Solis* 299 F. 3d 420 (5th Cir. 2002) the court observed that a party to a conspiracy may be held criminally liable for an act, committed by a co-conspirator even if the party did not know of the act and did not participate in it, as long as it was foreseeable.

<sup>140</sup> *United States v. Pinkerton*, 328 U.S. 640 (1946) at p. 646.

<sup>141</sup> *Pinkerton v. United States*, 328 U.S. 640 (1946) at 646; *State v. Barton*, 424 A. 2d 1033 (R. I.1981); *United States v. Robertson*, 474 F. 3d 432 (7th Cir. 2007).

<sup>142</sup> *United States v. Collazo-Aponte*, 216 F. 3d 163, 196–197 (1st Cir. 2000).

<sup>143</sup> 955 F. 2d 586, 591 (8th Cir. 1992).

<sup>144</sup> 958 F. 2d 1206, 1214 (2d Cir.1991).

<sup>145</sup> *United States v. Blackmon*, 839 F. 2d 900, 908–909 (2d Cir. 1988).

<sup>146</sup> 973 F. 2d 1015, 1022–1023 (1st Cir. 1992).



the conspiracy, prior to the defendant's participation. Liability does not also extend to acts done after the defendant's withdrawal from the conspiracy.<sup>147</sup>

Under the Pinkerton doctrine, distinction between accessories and perpetrators is eliminated, and any conspirator can be liable for the multitude of offences carried out by co-conspirators in pursuance of the conspiracy. Every participation or contribution makes one a perpetrator under the conspiracy, and all participants thereto are equally responsible for all actions pursuant to the conspiracy.<sup>148</sup> The Pinkerton doctrine is criticised for spreading liability too widely, carrying with it the strong implication of guilt by association. It is seen as undermining a fundamental principle of criminal law that requires liability to be founded on an individual's personal guilt.<sup>149</sup> Holding a co-conspirator liable for acts that he had no knowledge of, or control over, or would have objected to, is seen as imposing liability for a crime to which the co-conspirator did not have the requisite *mens rea*.<sup>150</sup> Not all states favour the principle in this doctrine and some courts have rejected it.<sup>151</sup> The Model Penal Code's provision on conspiracy also rejects Pinkerton liability.<sup>152</sup>

To counter the criticisms, various theories have been used to justify the Pinkerton rule. Participation in the formation of the conspiracy is considered to sufficiently establish intent of the conspirators in respect to commission of the underlying crimes. As a consequence, each conspirator is seen to have instigated the commission of the underlying crimes, thereby making them vicariously criminally responsible. Here, commission of the said criminal acts is considered to have been dependent upon the encouragement and material support of members of the conspiracy as a whole.<sup>153</sup> Pinkerton liability is also favoured for its supposed

<sup>147</sup> See *United States v. Luthian*, 976 F. 2d 1257, 1262 (9th Cir. 1992), the court held that a defendant could not be held liable for substantive offences committed after withdrawal from a conspiracy.

<sup>148</sup> G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 660; see also 18 U.S.C.A. § 2 (a), which states: 'Whoever commits an offence against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal'.

<sup>149</sup> G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 663, observes that this controversial theory derives from the influence of the law of agency.

<sup>150</sup> W. R. La Fave, *Substantive Criminal Law*, 2nd edn. (2005), §13.3 a.

<sup>151</sup> The doctrine has been rejected in the State of Washington, see *State v. Stein*, 144 Wn. 2D 236, 241–242, 27P. 3d 184, 188–189 (Wash. 2001); State of Arizona, see *State ex. rel. Woods v. Cohen*, 173 Ariz.497, 501, 844. P. 2d 1147, 1151 (Ariz.1992); *State v. Small*, 301 N.C. 407, 272 S. E. 2d 128 (1980), where the North Carolina Supreme Court asserted that the principle behind Pinkerton was an erroneous idea, cited in G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 137; J. D. Ohlin, 98 *J. Crim. L. & Criminology*, (2007), p. 148.

<sup>152</sup> Model Penal Code § 5.03.

<sup>153</sup> G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 137; see also J. D. Ohlin, 98 *J. Crim. L. & Criminology* (2007), pp. 147 et seq., grounding the justification for Pinkerton liability on the group will, which results from collective reasoning, asserting at p. 183, 'that group deliberations are sufficiently integrated to yield collective intentions of the sort that might ground the *mens rea* for Pinkerton'.

deterrent effect. It is argued that group activity presents a greater potential danger to the public than the action of an individual, and should therefore, be discouraged with rules such as Pinkerton. This provides an incentive against joining a criminal conspiracy in the first place.<sup>154</sup>

The theory underlying Pinkerton liability resembles the accessorial liability theory in the United Kingdom criminal law, known as joint enterprise liability.<sup>155</sup> Under this concept, persons who agree to undertake a criminal venture are liable for all criminal acts arising from the ambit of the common criminal purpose.<sup>156</sup> Similar to conspiracy, agreement forms an essential part of this theory of liability.

### Withdrawal, Impossibility, and End of Conspiracy

To avoid liability on account of withdrawal, a conspirator is required to make an unequivocal withdrawal. The court has interpreted this to mean that the conspirator must commit 'affirmative acts inconsistent with the object of the conspiracy and in a manner reasonably calculated to reach co-conspirators'.<sup>157</sup> Merely stopping to participate in the conspiracy is not sufficient. In *United States v. Febus*,<sup>158</sup> the court held that the defendant was still part of a conspiracy despite a decade long absence from the conspiracy, because the defendant had not affirmatively acted to abandon the conspiracy. Such withdrawal only stops a defendant from being held liable for any further acts committed in the future pursuant to the conspiracy, but does not exempt him from liability for acts carried out before the withdrawal.<sup>159</sup>

Failure to achieve the illegal objective of a conspiracy does not shield a defendant from liability. In *United States v. Feola*,<sup>160</sup> the court stated that the law of conspiracy permits punishment for the agreement and overt act whether the crime agreed upon is committed or not. A defendant may be held liable for conspiracy even in the case where the object of the conspiracy is impossible to achieve. In *United States v. Rodriguez*,<sup>161</sup> the court held that factual impossibility is no defence to a conspiracy charge. It observed that the crime is the illegal

<sup>154</sup> G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 137; Katyal N. K., 112 *Yale Law Journal* (2003), pp. 1372–1373.

<sup>155</sup> J. D. Ohlin, *Chicago Journal of International Law* (2011), pp. 705–706.

<sup>156</sup> *R. v. Anderson*; *R. v. Morris* (1966) 2 Q. B. 110; see *R. v. Powell (Anthony) and English*, 1 A. C. 1 (HL 1999), for a detailed discussion of the various situations that may arise under this concept; J. Herring, *Criminal Law: Text, Cases, and Materials*, 3rd edn. (2008), pp. 849–850.

<sup>157</sup> *United States v. United States Gypsum Co.*, 438 U.S. 422, 464 (1978); *Hyde v. United States*, 225 U.S. 347, 369 (1912); *United States v. Dabbs*, 134 F. 3d 1071 (11th Cir. 1998).

<sup>158</sup> 218 F. 3d 784, 796 (7th Cir. 2000).

<sup>159</sup> Ohlin J. D., 98 *J. Crim. L. & Criminology* (2007), p. 205.

<sup>160</sup> 420 U.S. 671, 694 (1975).

<sup>161</sup> 215 F. 3d 110, 116 (1st Cir. 2000).

agreement and it did not matter that the purpose of the agreement was not achieved, or even that achieving such purpose was factually impossible.<sup>162</sup>

A conspiracy only comes to an end once its objective is achieved or its purpose abandoned.<sup>163</sup> In *United States v. Roshko*,<sup>164</sup> the court held that a conspiracy to defraud the government ended when the INS approved the defendant's application for a green card, which was the object of the conspiracy.

### Procedural Attributes of a Conspiracy Charge

In the United States, a conspiracy charge allows the prosecution to have the trial in any location where any of the conspirators carried out an overt act.<sup>165</sup> This possibility gives the prosecution the choice of having the trial at a place of its convenience regardless of the inconvenience it may pose to the defendant.<sup>166</sup> The prosecution is also allowed to try the conspirators jointly in one trial.<sup>167</sup> Alleging a

<sup>162</sup> There is a distinction between factual impossibility and legal impossibility. Whereas factual impossibility is "impossibility due to the fact that an illegal act cannot physically be accomplished" a legal impossibility refers to "impossibility due to the fact that what the defendant intended to do is not illegal". Black's Law Dictionary, 7th edn. (1999), p. 759. In the latter case of legal impossibility a defence lies. In *United States v. Rosario-Diaz*, 202 F. 3d 54, 64 (1st Cir. 2000), the court held that a defendant cannot be held liable for a crime for which there was no charge and which does not exist under federal law. §371 inherently recognises the defence of legal impossibility by requiring proof that the defendant intended to commit any offence against the United States; see also J. Winograd, 41 *Am. Crim. L. Rev.* (2004), p. 632.

<sup>163</sup> See *United States v. Knowles*, 66 F. 3d 1146, 1155 (11th Cir. 1995).

<sup>164</sup> 969 F. 2d 9, 11 (2d Cir. 1992).

<sup>165</sup> See *Whitfield v. United States*, 543 U.S. 209, 218 (2005).

<sup>166</sup> One of the constitutional guarantees for a defendant under the Sixth Amendment of the United States Constitution is to have the criminal trial at the place where the crime occurred. In the case of conspiracy this would be where the agreement was made, but to establish this in an 'omnipresent' offence such as conspiracy is difficult. In *United States v. Corres*, 356 U.S. 405, 78 S.Ct. 875, 2 L.Ed. 2d 873 (1958), the court criticised the advantage given to the prosecution on this account, stating that it defeated the purpose of the sixth amendment, which is to "safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place"; see G. E. Dix and M. M. Sharlot, *Criminal Law*, 4th edn. (1999), p. 354; W. R. La Fave, *Criminal Law*, 4th edn. (2003), pp. 616, 617.

<sup>167</sup> Federal Rules of Criminal Procedure rule 8 states:-

(a) Joinder of offences. The indictment or information may charge a defendant in separate counts with 2 or more offences if the offences charged-whether felonies or misdemeanours or both-are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

(b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offence or offences. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count; also see *Zafiro v. United States*, 5056 U.S. 534, 537 (1993), noting that Joint trials are seen to promote efficiency in the justice system and serve the interest of justice by avoiding inconsistent verdicts; see W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 613 at 620, arguing that such

conspiracy allows the prosecution to introduce certain co-conspirator statements made ‘during the course and in furtherance of the conspiracy’, which would otherwise be excluded under the hearsay rule.<sup>168</sup> A conspiracy charge also gives the prosecution the possibility of eluding restrictions under the statute of limitations.<sup>169</sup> Since conspiracy is a continuing offence, it is able to avoid the constraints of *ex post facto* principle.<sup>170</sup> An enhancement of the penalty of an on-going conspiracy would not offend the *ex post facto* laws as long the conspiracy had not yet been completed at the time the new law was enacted.<sup>171</sup> In addition, since conspiracy and its contemplated crime are considered to be separate crimes, the double jeopardy clause is no impediment for their successive prosecution or punishment.<sup>172</sup>

## Enforcement

The conspiracy charge is considered to be a separate offence from the target offence and does not merge with the completed substantive offence.<sup>173</sup> Therefore,

---

(Footnote 167 continued)

joint trials are seen to present the defendant with certain disadvantages, which include a limited discretion in determining members of the jury, and increase the likely hood of a defendant’s conviction.

<sup>168</sup> Federal Rules of Evidence rule 801 (d) (2) (E), the rationale for this exception is that co-conspirators are agents of one another, and a co-conspirator is considered the best witness to a conspiracy; In *United States v. Angiulo*, 847 F. 2d 956 (1st Cir. 1988), the court observed, “As long as it is shown that a party, having joined a conspiracy, is aware of the conspiracy’s features and general aims, statements pertaining to the details of the plans to further the conspiracy can be admitted against the party even if the party does not have specific knowledge of the acts spoken of”; *Anderson v. United States*, 417 U.S. 211, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974); *United States v. Kelly*, 204 F. 3d 652, 656 (6th Cir. 2000); W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 618; J. Winograd, 41 *Am. Crim. L. Rev.* (2004), p. 633.

<sup>169</sup> 18 U.S.C 3282 provides that the statute of limitations for most federal crimes is five years. In reference to conspiracy crimes with an overt act requirement, the statute of limitations begins with the last overt act carried out in furtherance of the conspiracy, while for those with no overt act requirement, it begins to run when the conspiracy is abandoned or its objectives accomplished; see *United States v. Seher*, 562 F. 3d 1344 1364 (11th Cir. 2009); *United States v. Bornman*, 559 F. 3d 150, 153 (3d Cir. 2009).

<sup>170</sup> The law governing *ex post facto* prohibits the application of criminal laws to conduct that was not criminal at time of its commission, and the application of more severe punishment than that prescribed at the time the criminal conduct was carried out, U.S. Constitution Article I, §§ 9, 10.

<sup>171</sup> *United States v. Julian*, 427 F. 3d 471, 482 (7th Cir. 2005), noting “It is well established that a statute increasing a penalty with respect to a criminal conspiracy which commenced prior to, but was continued beyond the effective date of the statute, is not *ex post facto* as to that crime”.

<sup>172</sup> *United States v. Yearwood*, 518 F. 3d 220, 223 (4th Cir. 2008); U.S. Constitution Amendment V declares that no person shall ‘be subject for the same offence to be twice put in jeopardy of life or limb’.

<sup>173</sup> The merger doctrine was rejected by the court in *Pinkerton v. United States*, 328 U.S. 640 (1946) at 643, when it noted that a conspiracy ‘has ingredients, as well as implications, distinct

a defendant may be sentenced separately for the two offences. In *Callanan v. United States*,<sup>174</sup> the court held that a defendant, who had been convicted of one count of conspiracy and another for the substantive offence under the Hobbs Anti-Racketeering Act, could be sentenced separately for each conviction. The court stated that cumulative sentencing was permissible unless there was a statute prohibiting this practice. It further observed that cumulative sentencing was not cumulative punishment, justifying the practice with the danger inherent in a conspiracy that extends beyond the target crime. Nonetheless, the court acknowledged that cumulative sentencing could in some cases amount to harsh punishment. In *Pereira v. United States*,<sup>175</sup> the Supreme Court held that cumulative sentencing did not violate the double jeopardy rule, because the legal requirements and evidence of proving conspiracy and the completed substantive offence were different. The court, in addition, observed that even in the instance where the prosecution used the same overt acts to prove the conspiracy and the substantive offence this still did not violate the double jeopardy rule.<sup>176</sup> However, practice shows that persons convicted of both conspiracy and its target offence are hardly punished separately. Most convictions on conspiracy and its object crime require that the sentences be served concurrently, and consecutive sentences are very rarely given.<sup>177</sup>

In principle, it may also be possible in some cases for a defendant convicted of conspiracy to be given a longer sentence than that which is prescribed for the substantive offence.<sup>178</sup> In *Clune v. United States*,<sup>179</sup> the defendants were found guilty of conspiracy to obstruct the United States mail and were sentenced to 18 months in prison. This sentence was more severe than the \$100 fine penalty for the substantive offence. The appellate court upheld this sentence stating that since conspiracy was a separate offence from the substantive offence, it could be punished separately. The court noted that a statute could provide a penalty for the offence of conspiracy that was more severe than the penalty for the substantive offence.<sup>180</sup> In *United States v. Cattle King Packing Co.*,<sup>181</sup> the court of appeal upheld a sentence where the defendant was convicted on one count of conspiracy and six separate counts of substantive offences connected with the conspiracy.

---

(Footnote 173 continued)

from the completion of the unlawful project'; also in *Iannelli v. United States*, 420 U.S. 770, 777-778 (1975).

<sup>174</sup> 364 U.S. 587 (1961); see also G. C. Thomas, 47 *U. Pitt. L. Rev.* 1 (1985), pp. 49-50.

<sup>175</sup> 347 U.S. 1(1954).

<sup>176</sup> For further critics on the double jeopardy rule see K. G. Schuler, 91 *Michigan Law Review* (1993), p. 2220 et seq; V. J. Tatone, 61 *Journal of Urban Law* (1984), p. 505 et seq.

<sup>177</sup> P. Marcus, 65 *Geo. L. J.* (1977), p. 938.

<sup>178</sup> *Iannelli v. United States*, 420 U.S. 770, 777-778 (1975).

<sup>179</sup> 159 U.S. 590 (1895).

<sup>180</sup> *Clune v. United States*, 159 U.S. 590 (1895) at 595.

<sup>181</sup> 793 F. 2d 232 (10th Cir. 1986).

The defendant was sentenced to 4 years for the conspiracy offence, although the maximum sentence for any of the substantive offences was 3 years.<sup>182</sup>

Reforms have led to streamlining of sentencing laws in respect to conspiracy charges. Currently, under the general conspiracy law U.S.C 18 section 371, conspiracies are punishable by imprisonment for not more than 5 years. In reference to other conspiracies, their respective statutes prescribe punishment similar to their underlying crimes, making them subject to more severe punishment than conspiracies covered in section 371.<sup>183</sup> In addition, all conspiracies are subject to a fine of not more than \$ 250,000 (in the case of organisations not more than \$ 500,000) and may serve as a basis for a restitution or forfeiture order.<sup>184</sup>

A defendant may be convicted of conspiracy even if the charge alleges that unknown persons participated in the conspiracy as long as the evidence supports such participation.<sup>185</sup> A defendant may also still be convicted of conspiracy although all other defendants alleged to have been members of the conspiracy are acquitted.<sup>186</sup>

### 2.2.3 *The Rationale of Conspiracy Law in Common Law Systems*

Doubts have been raised about the logic of making conspiracy criminal. The critics often question the wisdom of attaching punishment at the moment of agreement, which is seen to pose no known social danger or harm.<sup>187</sup> Several justifications have been advanced for the existence of conspiracy as a distinct crime. An overview shows that generally two main rationales support the use of criminal conspiracy in common law jurisdictions. The first is its role in the prevention of crime, also known as the early intervention rationale. An agreement to commit a crime presents with it the potential danger of its adherents actually setting out to realise its criminal objective. Second, conspiracy is seen to have an important role

<sup>182</sup> See also *Iannelli v. United States*, 420 U.S. 770, 777 (1975); cf *Pinkerton v. United States*, 328 U.S. 640 (1946).

<sup>183</sup> 21 U.S.C 846 (conspiracies relating to drug trafficking); 18 U.S.C 2339 B (conspiracies relating to terrorist attacks); 18 U.S.C § 1962 (d) (conspiracies relating to racketeering); 18 U.S.C (conspiracies relating to fraud).

<sup>184</sup> See Doyle C, *Federal Conspiracy Law: A Brief Overview*, Congressional Research Service, Congress Report April 30, 2010, pp. 10–12.

<sup>185</sup> In *United States v. Martinez*, 83 F. 3d 371, 375, (11th Cir. 1996), the court declared that a conspiracy conviction could stand even if the other alleged conspirators had not been identified.

<sup>186</sup> *United States v. Loe*, 248 F. 3d 449, 459 (5th Cir. 2001); Model Penal Code § 5.04 (1).

<sup>187</sup> See A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 455–460; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), pp. 504–508; I. H. Dennis, 93 *LQR* (1977), pp. 31 et seq.; Abraham S. Goldstein, 68 *Yale L.J.* (1959), pp. 414 et seq.; Philip E. Johnson, 61 *Cal. L. Rev.* (1973), pp. 1140 et seq.; P. Marcus, 65 *Geo. L. J.* (1977), p. 966.

in combating criminal enterprises, since any group dedicated to the commission of crimes is considered to present an on-going threat to society.<sup>188</sup>

The early intervention or prevention rationale was the main reason for retention of criminal conspiracy in the United Kingdom. The Law Commission observed that ‘conspiracy needs to be retained as a crime as it enables the criminal law to intervene at an early stage before a contemplated crime had actually been committed...’.<sup>189</sup> Conspiracy is seen as essential in tackling preparatory criminal conduct, as opposed to attempt which applies to conduct, which ‘[...] is more than merely preparatory to the commission of an offence’.<sup>190</sup> This rationale is also recognised in the United States, where conspiracy is seen as an important tool in striking at preparatory activities involving crimes.<sup>191</sup> In *United States v. Feola*,<sup>192</sup> the court observed that early intervention and prosecution was justified by the increased likelihood of the crime occurring once the parties came to agreement. It described the agreement as the crystallisation of criminal intent. Doubts have been cast on this rationale, since a majority of cases involve conspiracies that have already been carried out far enough that their constitutive acts could be punished as attempt and incitement, or the underlying crime has in any case been committed making it sufficient to charge the defendants for the substantive criminal conduct.<sup>193</sup>

The second justification for conspiracy may be referred to as the ‘group danger’ rationale. It aims at dealing with the supposed continuous and inherent danger that criminal enterprises are seen to pose to the society.<sup>194</sup> The exceptional danger is inferred from the special dynamics that group behaviour is considered to cultivate. These dynamics include: (i) the group develops a destructive identity that suppresses personal identity, (ii) groups are considered likely to have extreme attitudes and behaviour, (iii) it is more difficult to discourage a group from undertaking criminal activities, (iv) several persons working together encourage specialisation creating more efficiency in execution of crimes, (v) specialisation means criminal conduct is spread over a number of persons making it difficult to trace criminal responsibility to any particular individual, especially those who may

<sup>188</sup> R. J. Hoskins, 6 *N.Y.U. J. Int’l & Pol.* (1973), p. 245; also see D. Burgman, 29 *DePaul L. Rev.* (1979), pp. 84–86.

<sup>189</sup> Law Com. No. 76, report, para 1.5; see also C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507; D. Omerod, *Smith & Hogan: Criminal Law*, 11th edn. (2005), p. 399; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 455.

<sup>190</sup> The Criminal Attempts Act of 1981 at Section 1(1).

<sup>191</sup> R. M. Chesney, 80 *S. Cal. L. Rev.* (2007), p. 448; N. K. Katyal, 112 *The Yale Law Journal* (2003), p. 1310, 1311; W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 620.

<sup>192</sup> 420 U.S. 671 (1975) at 694.

<sup>193</sup> A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 458–459; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507; P. Marcus, 65 *Geo. L. J.* (1977), pp. 930–931, 937.

<sup>194</sup> A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 455, 458; D. Omerod, *Smith & Hogan: Criminal Law*, 11th edn. (2005), p. 399.



be considered most criminally responsible for their organisation and planning roles.<sup>195</sup> The group danger rationale was particularly popular with the English courts in the seventeenth and eighteenth centuries. The focus by the courts on the potential harm of group conduct is illustrated by a statement made in *Quinn v. Leatham*.<sup>196</sup> Here, the court made an interesting observation that innocent acts carried out by an individual may “become dangerous and alarming [when performed in a conspiracy], just as a grain of powder is harmless but a pound may be highly destructive”. This rationale was later viewed with disfavour by the courts. Several courts now regarded it as flawed and misguided because the focus in conspiracy cases shifted from the combination of conspirators to the damage the conspiracy caused.<sup>197</sup> Lord Glaisdale’s quote in *Regina v. Withers*,<sup>198</sup> shows the emerging criticism to the group conduct theory:

And although some conduct which causes or tends to cause extreme injury to the public may be heinous and more damaging when committed by numbers, not all such conduct will be so; nor may some such conduct when committed by numbers be necessarily more heinous and damaging than other such conduct when committed by an individual.

Currently, the courts in England hardly mention the group conduct rationale in their conspiracy decisions, preferring to justify the enforcement of conspiracy simply from the perspective that it is provided in the criminal law statute.<sup>199</sup> In contrast, the group danger rationale is especially prominent in the United States. The courts have often observed that the action of two or more people coming together poses more threat to the society than the act of one. In *Krulewitch v. United States*,<sup>200</sup> Justice Jackson observed that ‘the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone ranger’. The potential danger is seen from the possibility that a criminal partnership can achieve more complex goals in comparison to an individual effort, and furthermore, the likelihood of abandoning the object of the agreement decreases when people act

<sup>195</sup> See N. K. Katyal, 112 *The Yale Law Journal* (2003), pp. 1315–1325; see also Law Com. No. 76, para 1.6, on conspiracy’s important role in ‘striking at the heart’ of criminal activities by providing a ‘useful means whereby persons who plan or organize crimes, but take no active part in them, can more easily be brought to justice’; D. Burgman, 29 *DePaul L. Rev.* (1979), pp. 84–86; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507; K. A. David 25 *Vand. J. Transnat’l L.* (1993), p. 966; A. Maljevic, ‘Participation in a Criminal Organisation’ and ‘Conspiracy’: *Different Legal Models Against Criminal Collectives* (2011), p. 76.

<sup>196</sup> (1901) A. C. 495, cited in K. A. David 25 *Vand. J. Transnat’l L.* (1993), p. 963.

<sup>197</sup> *R. v. Kamara* (1974) A. C. 104.

<sup>198</sup> (1975) A. C. 842 at 870 (appeal taken from England).

<sup>199</sup> K. A. David 25 *Vand. J. Transnat’l L.* (1993), p. 966; also see A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 458; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507, stating that this rationale is unproven.

<sup>200</sup> 336 U.S. 78 (1915) at 88.



in a group.<sup>201</sup> This apprehension towards concerted criminal activity is also compounded by the possibility of the group evolving to perpetrate other criminal activities.<sup>202</sup> Certain scholars have cast doubt onto the presupposition that group behaviour presents a greater danger to society as opposed to a single individual with equal motivation and determination to cause harm. It is argued that it doesn't always follow that several persons who come together towards a criminal purpose necessarily mean a greater danger to society, than an individual who is resolute on committing equally if not more heinous crimes.<sup>203</sup>

To combat the exceptional danger and the special circumstances that relate to group criminal activity, the conspiracy charge carries with it certain procedural conveniences and evidential benefits. These exceptional advantages of a conspiracy charge are used by investigators as bargaining tools to extract information from co-conspirators. They particularly, facilitate the prosecution of persons who would otherwise escape criminal responsibility, because it is difficult to determine their exact role in commission of a crime. This especially applies to the organisers and planners who often do not have a direct role in commission of the crimes.<sup>204</sup> As a consequence, the prosecution is able to roll up charges indicting several crimes, which otherwise on their own would not be considered serious enough, under the charge of conspiracy. This makes it possible for a large number of defendants to be held criminally responsible.<sup>205</sup> In such cases, the conspiracy charge is considered to give a more rounded impression or a true picture of facts and circumstances surrounding commission of the crimes, especially, in terms of planning and the various roles played by the participants.<sup>206</sup>

---

<sup>201</sup> *Callanan v. United States*, 364 U.S. 587, 593 (1961); K. A. David 25 *Vand. J. Transnat'l L.* (1993), p. 969; cf A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models Against Criminal Collectives* (2011), p. 77.

<sup>202</sup> The court in *United States v. Rabinowich*, 238 U.S. 78, 88 (1985), observed that the group had potential of 'educating and preparing conspirators for further and habitual practices'; also see Justice Frankfurter in *Callanan v. United States*, 364 U.S. 587, 593 (1961) where he states, 'Nor is the danger of a conspiratorial group limited to the particular end toward which it was embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise'.

<sup>203</sup> A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 458; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507; I. H. Dennis, 93 *LQR* (1977), p. 49; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models Against Criminal Collectives* (2011), pp. 76–77; P. Marcus, 65 *Geo. L. J.* (1977), pp. 932–934.

<sup>204</sup> See Law Com. No. 76, para 1.6, asserting that conspiracy makes it easier 'to explain to a jury a simple requirement of proof of an agreement than to make clear that someone who has not actually done anything can be guilty, by reason of complicity, of the substantive crime'; A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), p. 458; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507; N. K. Katyal, 112 *The Yale Law Journal* (2003), p. 1307 et seq.

<sup>205</sup> P. Marcus, 65 *Geo. L. J.* (1977), p. 940.

<sup>206</sup> See A. Ashworth, *Principles of Criminal Law*, 5th edn. (2006), pp. 457–558; C. M. V. Clarkson & H. M. Keating, *Criminal Law*, 5th edn. (2003), p. 507, describing this as the

### 2.2.4 Summary

Under common law jurisdictions, conspiracy is a crime that creates criminal responsibility for the mere fact of agreeing to commit a criminal offence, irrespective of whether its underlying objective is carried out. It is an inchoate crime, distinct and separate from the substantive crime that the conspirators plan to commit. Several jurisdictions have now codified the law on conspiracy. This has given more clarity to a concept that has had a long winding history, initially created to punish those who collaborated to subvert the justice system and later gradually evolved to accommodate all sorts of crimes and nuisances. In the United Kingdom, Section 3 of the CLA provides for statutory conspiracy while in the United States, 18 U.S.C 371 the general conspiracy provision, outlaws conspiracy to commit some other federal crime. In addition, both jurisdictions have other statutes that specifically prohibit conspiracy to carry out other proscribed criminal conduct.

The essential elements of conspiracy are similar in both jurisdictions. The first element is the agreement which forms the backbone of a conspiracy charge. It must involve at least two people. The crime is complete upon making of the agreement. Although the act of agreeing may be considered to be a wholly mental operation, it is usually manifested in the spoken or written words of the conspirators, or by some other overt action. The second element is the intent to enter into an agreement, and intent to carry out its underlying objective, which involves the commission of a substantive crime. It must be shown that the conspirators engaged in the conspiracy with knowledge and intention to further its goals. A third element that certain statutes in the United States specifically provide for, as a safeguard against prosecution of what may be termed to be mere thought or speech alone, is the overt act requirement. The prosecution should show that one of the conspirators has carried out some overt act in furtherance of the conspiracy scheme. Although the overt act requirement is not specifically provided for in all conspiracy statutes, in practice, it is an element that may be inferred from all conspiracy cases. The conspiracy is not only some wish resting in the mind of its authors, there is often some outward manifestation indicating that the conspirators are already at work. An overt act by a single conspirator is sufficient to use in a conspiracy charge against all other alleged conspirators.

The conspiracy charge has a double personality trait. A defendant charged with conspiracy may be held liable under two heads. First, the defendant may be held liable for agreeing to be part of a conspiracy to commit an underlying offence, and second, for any other substantive offences carried out by co-conspirators in furtherance of the conspiracy. The defendant need not have contemplated or

---

(Footnote 206 continued)

“full story” rationale; D. Omerod, *Smith & Hogan: Criminal Law*, 11th edn. (2005), p. 400; A. Maljevic, ‘Participation in a Criminal Organisation’ and ‘Conspiracy’: *Different Legal Models Against Criminal Collectives* (2011), p. 77; P. Marcus, 65 *Geo. L. J.* (1977), p. 928 et seq.

participated in these substantive offences to be criminally responsible, it is only sufficient for the prosecution to show that given the object of the conspiracy these offences were foreseeable. In the first sense, conspiracy is a separate inchoate crime, while in the second sense, it is a form of complicity.

Once the conspiracy is entered into, to escape liability, a renouncing defendant must show he carried out positive acts to prevent the conspiratorial plan from being realised. A defendant may be convicted of conspiracy even though all other alleged conspirators are acquitted. Since conspiracy is an independent offence, one may be charged with either the conspiracy or its target offence or both. The practice of charging both the conspiracy and its underlying offence is however not encouraged, particularly in the United Kingdom where the prosecution is required to justify a decision to institute cumulative charges.

In principle, a defendant may also be convicted for both conspiracy and its underlying substantive crime. The practice of double conviction again finds most disfavour in the appellate courts of the United Kingdom. In many instances, this practice has been viewed as carrying with it implications of double punishment. Even in the United States where conviction for both charges may be common, most courts have a preference to order that both sentences be served concurrently. Previously, it was possible for a conspiracy charge to attract more punitive measures than its underlying offence, this possibility has since radically been curtailed. Reforms have led to adoption of provisions that set out specific punishment for a conspiracy charge. At most, punishment of conspiracy can only be equivalent to the punishment prescribed for its underlying substantive crime.

### 2.2.5 Analysis

Certain critical issues stand out with respect to the conspiracy doctrine under the common law jurisdictions. First, conspiracy is considered to be inherently an ambiguous and vague crime.<sup>207</sup> Perhaps, the statement that perfectly captures this alleged characteristic is Justice Jackson's description of conspiracy as an 'elastic, sprawling and pervasive offence...so vague that it almost defies definition, chameleon like [taking] on a special coloration from each of the many independent offences on which it may be overlaid'.<sup>208</sup> While the idea of making an agreement to commit a crime is clear and has no ambiguity, the challenge emerges with proving the existence of an act that is often mental in its composition. The uncertainty and ambiguity of conspiracy often manifests itself in the difficult

---

<sup>207</sup> See F. B. Sayre, 35 *Harvard Law Review* (1921–1922), p. 393, 'A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought'; see also P. Gillies, 10 *Ottawa L. Rev.* (1978), p. 274; W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 616.

<sup>208</sup> *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949).

task of the prosecution showing what constitutes the agreement and its requisite mental element. These elements are not easy to prove.

Second, often persons who agree to pursue a criminal end will do it in very secretive circumstances. Such persons are very discreet in their conduct to avoid discovery. To deal with the challenge posed by proving the existence of conspiracies several procedural and evidential exceptions are availed to the prosecution. Here, the rationale is that the defendants should not benefit from their ingenuity. Therefore, the law allows wide latitude in the use of circumstantial evidence to infer existence of conspiracy. This latitude has, in some cases, led to defendants being connected to a conspiracy with very little evidence to prove it.<sup>209</sup> In addition, once the prosecution shows on a balance of probability that a conspiracy exists, a declaration by any of the co-conspirators may be admitted in evidence against all other alleged co-conspirators to prove involvement in the conspiracy. These exceptions are heavily skewed in favour of the prosecution and have been criticised for ‘overcompensating for the difficulties faced by prosecution’.<sup>210</sup> The conspiracy charge does away with stringent *mens rea* and *actus rea* requirements, which are needed to establish responsibility for traditional forms of crime. This makes it a very attractive charge for the prosecution, especially, because it presents a high probability that the alleged conspirators will be found guilty.<sup>211</sup> Although it is true that these exceptions place the defendant in a conspiracy case in a particularly vulnerable position, without them the conspiracy charge would be rendered redundant. To guard against unjust verdicts arising from conspiracy charges, several constitutional and procedural safeguards exist in the various jurisdictions, where a balance is drawn between the benefits that any exception presents as against its prejudicial effect to the defendant. In practice, these safeguards are also bolstered with the cautious manner in which the judiciary often treats conspiracy charges, always demanding a higher standard of proof from the prosecution than that actually asserted in theory. These safeguards ensure that more often than not only defendants who have played a meaningful role in the conspiracy are held criminally liable.

The third issue that perhaps is the most controversial aspect of common law conspiracy arises from its second personality trait, which makes a defendant liable for all foreseeable substantive crimes carried out in furtherance of the conspiracy even without his contribution, knowledge or participation. This broad reach of conspiracy, which recognises vicarious liability for acts of accomplices, shows the

<sup>209</sup> W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 619; P. Marcus, 65 *Geo. L. J.* (1977), p. 943.

<sup>210</sup> W. R. La Fave, *Criminal Law*, 4th edn. (2003), p. 619.

<sup>211</sup> Despite the conspiracy charge being considered the “darling” of the prosecutor, several interests are usually considered before resorting to this charge. The decision to prosecute must be balanced against the possibility of it being outweighed by the undesirable factors associated with conspiracy prosecutions. See S. A. Selz, 5 *Am. J. Crim. L.* (1977), p. 35, for a more detailed account, of factors influencing conspiracy prosecutions in Chicago; also P. Marcus, 65 *Geo. L. J.* (1977), p. 938; J. Winograd, 41 *Am Crim. L. Rev.* (2004), p. 613.

potential danger of a conspiracy charge lapsing into a crime that promotes guilt by association. The advantage of this practice is that the prosecutor's burden is lightened. Once it is shown that the defendant had some connection with a conspiracy, the need to show the defendant's role in other offences committed pursuant to the conspiracy is absolved. Prosecutors often take advantage of this feature of common law conspiracy, using it as a bargaining tool to extract information from alleged co-conspirators. This complicity feature of the common law conspiracy is also applauded for its potential deterrent effect. The knowledge that a conspiracy charge carries with it such far-reaching consequences can act as a discouragement of any desire to be involved in such criminal association. Nonetheless, to hold a defendant liable for crimes that he neither contemplated nor approved of violates the principle personal culpability. One should only be criminally responsible for an offence that he consciously contributes to or participates in. There has certainly been a withdrawal from applying this aspect of conspiracy with the courts in the United Kingdom. The courts mostly demand that an accused can only be held liable for crimes that he specifically intended pursuant to the conspiracy, this effectively excludes the alleged foreseeable crimes. Some States in the United States have also rejected this rule, which is reflected in the Pinkerton doctrine, choosing instead to adopt provisions reflected in the Model Penal Code that exclude liability for such conduct.

The fourth critical issue is the practice of cumulatively charging and punishing conspiracy and its target crime. Since conspiracy is a crime distinct from its underlying offence, the practice of charging both offences is both legally and logically justifiable. The main contention is the rationale of pursuing conspiracy when there is evidence that its contemplated crime has in any case been realised. The idea of punishing both the conspiracy and its contemplated offence and even in some instances giving a harsher sentence to a conspiracy charge seems to be excessive punishment. It is inequitable to the perceived damage that the conspiracy may seem to present. Prosecutors prefer to have the cumulative charges in circumstances in which they are not sure of obtaining a conviction for the substantive crime alone. The conspiracy charge in this case acts more like a buffer zone or safety net mechanism. The practice of charging both the conspiracy and its underlying offence is often superfluous and there is very little or no practical justification for it, given that more often than not the same set of facts and same evidence is used to prove both offences. Several courts have expressed their general disapproval of this practice, noting that the extra conspiracy charge only brings more confusion and adds no particular benefit to the trial. So much time is also consumed as a result of such trials. It would be preferable in the circumstances if the use of conspiracy is restricted to only prosecute incomplete crimes and should be prosecuted with its complete underlying offence in exceptional circumstances. A rule to restrict this practice would be most appropriate. The practice adopted by the United Kingdom to deal with this problem provides a highly commendable guideline. Any choice by a prosecutor to bring cumulative charges is required to be justified, with the conspiracy charge only being allowed in instances it is considered to be of particular benefit to a case. The circumstances

under which a conspiracy charge may be allowed include: (i) cases of factual and legal complexity where the interest of justice demands the need to present the overall picture of prevailing circumstances of commission of the crime, (ii) cases where evidential constraints make it difficult to meet the requisite burden of proof for the underlying offence and (iii) cases where the conspiracy is seen to have more far-reaching dangerous consequences than just its contemplated crime.<sup>212</sup>

## 2.3 Civil Law Countries

The Nuremberg trial made obvious that the common law approach to criminal conspiracy was foreign to civil law countries.<sup>213</sup> A crime considered to be so vague as to defy definition and always “predominantly mental in composition”, does not fit well in the civil law countries’ approach to the principle of legality.<sup>214</sup> Traditionally, civil law countries do not recognise the broad concept of common law conspiracy, where conspiracy is a separate crime punishable regardless of its results. Among the few civil law countries that proscribed conspiracy, most mainly restricted its punishment to politically subversive crime and it was rarely prosecuted.<sup>215</sup> Whereas conspiracy in common law countries is considered to be an effective tool in combating criminal enterprises, civil law jurisdictions have alternative methods of dealing with criminal enterprises. In the recent past, however, more civil law jurisdictions have introduced conspiracy in their criminal law systems and extended its use to crimes beyond the field of political plots. This section of the thesis looks at to what extent conspiracy is recognised and the approach used with respect to the concept of criminal conspiracy in Germany, Spain, France, and Italy. It also looks at the alternative structures that these jurisdictions use to deal with crimes carried out by combinations, explaining to what extent they differ with or are similar to the common law concept of conspiracy.

---

<sup>212</sup> See N. Kaufman, ‘Problems Encountered in Investigating and Prosecuting Conspiracies to commit Terrorist Offences’. Paper presented at the First Annual Conference on Human Security, Terrorism and Organized Crime in the Western Balkan Region (2006), commenting on the British Practitioners Handbook Archbold, p. 6.

<sup>213</sup> Justice Jackson in *Krulewitch v. United States*, 336 U.S. 78 (1951) at 88 observed that conspiracy as understood in common law, ‘does not commend itself to jurists of civil law countries, despite universal recognition that an organised society must have legal weapons for combating organised criminality’; R. J. Hoskins, 6 *N.Y.U. J. Int’l & Pol.* (1973), p. 245; W. J. Wagner, 42 *The Journal of Criminal Law, Criminology, and Police Science* (1951), p. 171; see also Chap. 3.

<sup>214</sup> *Krulewitch v. United States*, 336 U.S. 78 (1951), pp. 447–448; C. Pelsler, 4 *Utrecht Law Review* (2008), p. 58.

<sup>215</sup> C. Pelsler, 4 *Utrecht Law Review* (2008), p. 58; W. J. Wagner, 42 *The Journal of Criminal Law, Criminology, and Police Science* (1951), p. 171.

### 2.3.1 Germany

§§ 30 (2), 31, 127, 129 and 129a of the German “Strafgesetzbuch” (StGB)<sup>216</sup> are the main provisions which criminalise conduct that would otherwise be punished under the notion of conspiracy in common law countries.

#### 2.3.1.1 Criminal Agreement (“Conspiracy”)<sup>217</sup>

§ 30 (2) StGB provides for punishment of criminal agreement. This section is part of the general part (“Allgemeiner Teil”) of the StGB which contains basic legal principles that apply to all crimes of the special part (“Besonderer Teil”). The history of § 30 goes back to 1876, when it was included into the German criminal code as a reaction to the so called *Duchesne case*.<sup>218</sup> In 1873, Duchesne, a blacksmith from Belgium, tried to instigate the Archbishop of Paris and the Jesuit province of Belgium Joseph Hippolyte Guibert, to pay him money for the killing of German chancellor Otto von Bismarck. The Archbishop refused to do so, and reported the matter to the authorities. This type of conduct was at the time not criminal in Belgium and at the request of German authorities, the Belgian Criminal Code was amended to make it punishable in the future. This incident influenced the German government to include in the German criminal code a crime that would criminalise conduct such as Duchesne’s, leading to introduction of the then § 49a on 26 February 1876. For the first time in Germany, this provision implicitly made punishable conduct relating to criminal agreements.<sup>219</sup> The law on criminal

<sup>216</sup> The German Penal Code.

<sup>217</sup> “Versuch der Beteiligung”.

<sup>218</sup> See on the Duchesne case C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. II (2006), § 28, marginal no. 75; J. Wessels/W. Beulke, *Strafrecht Allgemeiner Teil*, 40th edn. (2010), marginal no. 564.

<sup>219</sup> § 49a *Strafgesetzbuch für das Deutsche Reich* (Reichsgesetzblatt 1876, p. 25), stated: (1) *Wer einen Anderen zur Begehung eines Verbrechens oder zur Theilnahme an einem Verbrechen auffordert, oder wer eine solche Aufforderung annimmt, wird, soweit nicht das Gesetz eine andere Strafe androht, wenn das Verbrechen mit dem Tode oder mit lebenslänglicher Zuchthausstrafe bedroht ist, mit Gefängniß nicht unter drei Monaten, wenn das Verbrechen mit einer geringeren Strafe bedroht ist, mit Gefängniß bis zu zwei Jahren oder mit Festungshaft von gleicher Dauer bestraft.*

(2) *Die gleiche Strafe trifft denjenigen, welcher sich zur Begehung eines Verbrechens oder zur Theilnahme an einem Verbrechen erbietet, sowie denjenigen, welcher ein solches Erbieten annimmt.*

(1) Whosoever asks another to commit a crime or to take part in a crime, or whosoever accepts such an invitation, shall unless the law states otherwise, where the crime is punishable by death or life imprisonment be liable to not less than three months imprisonment, where the crime is punishable by a lesser punishment be liable to imprisonment of up to two years, or of equal duration as the crime.

(2) The same punishment shall be imposed to one who offers to commit a crime or take part in a crime, and to one who accepts such an offer or proposition. (Translation by Author).

agreement has evolved over a number of years to what it is now in the StGB.<sup>220</sup> § 49a was amended in 1943 and the term agreement was then explicitly added. Apart from criminalising unsuccessful instigation and unsuccessful aiding and abetting, the provision created criminal responsibility for whoever offers or agrees to commit a criminal offence, or seriously gets involved in such activities.<sup>221</sup> A minor change was introduced in 1953, exempting from punishment those who withdrew from the criminal agreement.<sup>222</sup> The second law on reform of the criminal law changed the wording of § 49a, splitting the content into § 30, and § 31 of the current StGB.<sup>223</sup> Consequently, § 30 (1) StGB, provides that a person who attempts to induce another to commit a felony shall be liable, and § 30 (2) StGB makes it criminal for one to declare willingness or accept an offer or agree with another to commit or abet the commission of a felony.<sup>224</sup> § 31 StGB provides for an opportunity for a participant (perpetrator) in the criminal agreement to avoid criminal responsibility, by exempting from liability the perpetrator who voluntarily withdraws from the inducement, declaration or agreement to commit a felony, and makes some earnest effort to prevent commission of the crime.<sup>225</sup> Two

<sup>220</sup> See for a more detailed account on its development H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. II (2003), § 28, marginal no. 75; J. Wessels/W. Beulke, *Strafrecht Allgemeiner Teil*, 40th edn. (2010), marginal no. 564; in English language see R. J. Hoskins, 6 *N.Y.U. J. Int'l & Pol.* (1973), pp. 254–260; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy' (2011); also W. J. Wagner, 42 *The Journal of Criminal Law, Criminology, and Police Science* (1951), pp. 175–177.

<sup>221</sup> Verordnung zur Angleichung des Strafrechts des Altreichs und der Alpen- und Donau-Reichsgaue (Strafrechtsangleichungsverordnung) from Reichsgesetzblatt 1943 I, p. 339.

<sup>222</sup> Drittes Strafrechtsänderungsgesetz, Bundesgesetzblatt 1953 I, p. 735.

<sup>223</sup> Zweites Gesetz zur Reform des Strafrechts, Bundesgesetzblatt 1969 I, p. 717.

<sup>224</sup> § 30 StGB reads:

(1) Wer einen anderen zu bestimmen versucht, ein Verbrechen zu begehen oder zu ihm anzustiften, wird nach den Vorschriften über den Versuch des Verbrechens bestraft. (...)

(2) Ebenso wird bestraft, wer sich bereit erklärt, wer das Erbieten eines anderen annimmt oder wer mit einem anderen verabredet, ein Verbrechen zu begehen oder zu ihm anzustiften.

(1) A person who attempts to induce another to commit a felony or abet another to commit a felony shall be liable according to the provisions governing attempted felonies. (...)

(2) A person who declares his willingness or who accepts the offer of another or who agrees with another to commit or abet the commission of a felony shall be liable under the same terms. (Translation from M. Bohlander, *The German Criminal Code, a modern English translation*).

<sup>225</sup> § 31 StGB reads:

*Rücktritt vom Versuch der Beteiligung*

(1) Nach § 30 nicht bestraft, wer freiwillig

1. den Versuch aufgibt, einen anderen zu einem Verbrechen zu bestimmen, und eine etwa bestehende Gefahr, daß der andere die Tat begeht, abwendet,

2. nachdem er sich zu einem Verbrechen bereit erklärt hatte, sein Vorhaben aufgibt oder,

3. nachdem er ein Verbrechen verabredet oder das Erbieten eines anderen zu einem Verbrechen angenommen hatte, die Tat verhindert

(2) Unterbleibt die Tat ohne Zutun des Zurücktretenden oder wird sie unabhängig von seinem früheren Verhalten begangen, so genügt zu seiner Straflosigkeit sein freiwilliges und ernsthaftes Bemühen, die Tat zu verhindern



instances of exemption are given to the renouncing perpetrator. The first exemption is in the instance where the contemplated crime is not carried out independent of the renouncing perpetrator's efforts, and the second exemption is when the contemplated crime occurs independent of the renouncing perpetrator's previous conduct. In both instances, the renouncing perpetrator's good faith effort to stop the crime is sufficient.

The offence of participation in a criminal agreement in the StGB is a form of criminal participation rather than a specific or distinct criminal offence, like in the case of conspiracy in the common law countries.<sup>226</sup> This provision on punishing criminal agreements extends criminal responsibility to the earliest stages of preparing to commit serious offences. Its location in the general part of the StGB is interpreted to mean that it allows for protection of all legal interests.<sup>227</sup>

### Elements of the Offence of Participation in Criminal Agreement

§ 30 (2) only punishes agreements in relation to commission of a felony ("Verbrechen"). § 12 (1) StGB, defines a felony as an unlawful act punishable by a minimum sentence of one year imprisonment. Unlike the American federal criminal conspiracy, this provision on criminal agreement makes no reference to an 'overt act' requirement.

---

(Footnote 225 continued)

Withdrawal from conspiracy

(1) A person shall not be liable under § 30 if he voluntarily

1. gives up the attempt to induce another to commit a felony and averts any existing danger that the other may commit the offence;

2. after having agreed to commit a felony or accepted the offer of another to commit a felony prevents the commission of the offence; or

3. after having agreed to commit a felony or accepted the offer of another to commit a felony prevents the commission of the offence.

(2) If the offence is not completed regardless of his actions or if it is committed independently of his previous conduct, his voluntary and earnest effort to prevent the completion of the offence shall suffice for exemption from liability. (Translation from M. Bohlander, *The German Criminal Code, a modern English translation*).

<sup>226</sup> H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. II (2006), § 28, marginal no. 75; Schünemann B., *Leipziger Kommentar*, 12th edn. (2006), § 30 marginal no. 1; J. Wessels/W. Beulke, *Strafrecht Allgemeiner Teil*, 40th edn. (2010), marginal no. 564; also see M. Bohlander, *Principles of German Criminal Law* (2009), p. 175, referring to the offence of participation in a criminal agreement as attempted participation; G. P. Fletcher, *Rethinking Criminal Law* (2000), p. 221; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models against Criminal Collectives* (2011), p. 59. Some commentators, especially those of the nineteenth century, argued that it should be considered a separate criminal offence, see Franz v. Liszt, *Lehrbuch des Deutschen Strafrechts*, 5th edn. (1996), p. 344.

<sup>227</sup> T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 2 et seq; B. Schünemann, *Leipziger Kommentar*, 12th edn. (2006), § 30 marginal no. 1.

### (a) Agreement

Under German criminal law agreement forms the essence of the offence of participation in a criminal agreement. It is the *actus reus* and is defined as the coming together of wills to commit a crime, or to instigate another to commit a crime.<sup>228</sup> At least two people are required to enter into the agreement.<sup>229</sup> Such agreement may be reached by different means of communication and may be demonstrated either explicitly or implicitly. It is imperative that the parties had finished negotiations on the main elements of the purpose of the agreement and jointly made the decision to carry it out.<sup>230</sup>

Only two forms of participation in a criminal agreement are punishable. Those who agree to commit a crime as co-perpetrators and those who agree to jointly instigate commission of a crime will be considered to be the perpetrators in a criminal agreement.<sup>231</sup> Agreements between aiders, or aiders and perpetrators are seen to have neither the quality, nor the seriousness that makes them worthy of punishment.<sup>232</sup> This clearly differs from the common law perspective where all participants in an agreement to commit a crime, regardless of what their form of participation was, are considered criminally responsible under conspiracy.

<sup>228</sup> T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 12; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models against Criminal Collectives* (2011), p. 62; R. Maurach, 'Die Problematik der Verbrechensverabredung', *Juristen Zeitung* (1961), p. 137, 139; C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. II (2006), § 28, marginal no. 43; Schünemann B., *Leipziger Kommentar*, 12th edn. (2006), § 30 marginal no. 60; J. Wessels/W. Beulke, *Strafrecht Allgemeiner Teil*, 40th edn. (2010), marginal no. 564.

<sup>229</sup> RGSt (decisions of the Supreme Court of the German Reich) Vol. 5, p. 8; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; C. Roxin, *Strafrecht Allgemeiner Teil*, Vol. II (2006), § 28, marginal no. 43; Schünemann B., *Leipziger Kommentar*, 12th edn. (2006), marginal no. 60.

<sup>230</sup> T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 12; A. Hoyer, *Systematischer Kommentar*, 7th edn (2001), § 30 marginal no. 46 et seq; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models against Criminal Collectives* (2011), p. 63.

<sup>231</sup> See Schünemann B., *Leipziger Kommentar*, 12th edn. (2006), § 30 marginal no. 72, who refers to conspiracy as a pre-stage of co-perpetration; also see H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models against Criminal Collectives* (2011), p. 65; J. Wessels/W. Beulke, *Strafrecht Allgemeiner Teil*, 40th edn. (2010), § 30 marginal no. 560.

<sup>232</sup> Decision of the Federal Supreme Court of 11.7.1961, no. 1 StR 257/61; decision of the Federal Supreme Court of 27.1.1983, no. 3 StR 437/81; Schünemann B., *Leipziger Kommentar*, 12th edn. (2006), § 30 marginal no. 72.

*(b) Mens Rea*

The participants in the agreement have to know that they agree upon the commission of a criminal offence and they must intend that the agreed crime be committed.<sup>233</sup> Since the object of the agreement does not need to be agreed upon in full detail, the perpetrators do not need to have knowledge of every detail of commission of the crime. It suffices if they only know the basic elements of the agreed crime.<sup>234</sup> The participant in a criminal agreement does not need to have personally known the other participants. The prosecution is only required to show that the perpetrator knows there is at least another person with whom he agrees to carry out the underlying criminal objective.<sup>235</sup> Perpetrators may also be held criminally liable for criminal agreement even if they acted only with indirect intent (*Eventualvorsatz/Dolus eventualis*).<sup>236</sup>

## Merger and Enforcement

Under German criminal law, once the underlying crime of the criminal agreement has been completed or attempted, the criminal agreement merges with the substantive crime, making only the substantive crime punishable.<sup>237</sup> The rationale behind such merger seems to be the value that is actually protected is that which the substantive crime makes criminal, hence, once the substantive crime has been carried out, the need of punishing the criminal agreement disappears. This may also be considered from the perspective that the whole idea behind conspiracy, like all other inchoate crimes, is to punish incomplete crimes. Therefore, when the underlying crime is completed the justification for punishing conspiracy

---

<sup>233</sup> Commentators refer to the need of the conspirators to seriously want to commit the underlying crime, see T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 12; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; R. Maurach, 'Die Problematik der Verbrechensverabredung', *Juristen Zeitung* (1961), pp. 137, 139.

<sup>234</sup> T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 7; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy' (2011), p. 67.

<sup>235</sup> T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 9; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 III; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models against Criminal Collectives* (2011), p. 68.

<sup>236</sup> Decision of the German Federal Supreme Court of 18.10.1955, *Neue Juristische Wochenschrift* 1956, pp. 30, 31; decision of the Higher Regional Court of Cologne of 1.6.1951, *Neue Juristische Wochenschrift* 1951, p. 612; C. Roxin, *Leipziger Kommentar*, 11th edn. (2003), § 30 marginal no. 63.

<sup>237</sup> T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 30 marginal no. 18; R. J. Hoskins, 6 *N. Y. U. Int'l & Pol.* (1973), p. 257; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 V.; W. Joecks, *Münchener Kommentar zum Strafgesetzbuch*, 2nd edn. (2011), § 30 marginal no. 66.

disappears. This is a characteristic that makes the German concept of conspiracy differ from the conspiracy under common law countries, where conspiracy is a distinct crime that remains punishable even when its underlying offence has been executed.

There may be instances where the perpetrators agree to carry out a crime but actually commit a completely different offence, a situation referred to as cases of 'qualitative excesses'.<sup>238</sup> In these latter cases, the perpetrators will be held simultaneously liable for the criminal agreement and the committed crime. There may also be occasions where the perpetrators agree to commit a crime and end up committing a crime more serious than the crime agreed upon. In such cases of 'quantitative excesses', the perpetrators will only be held criminally liable for the committed offence.<sup>239</sup>

One who participates in a criminal agreement under the German criminal law is considered to be less culpable than one who participates in actual commission of the substantive criminal conduct. The law directs that a mere participant in a criminal agreement should get a much lower sentence.<sup>240</sup> Participants in a criminal

<sup>238</sup> H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 V.; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models against Criminal Collectives* (2011), p. 70.

<sup>239</sup> H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil*, 5th edn. (1996), § 65 V.; W. Joecks, *Münchener Kommentar zum Strafgesetzbuch*, 2nd edn. (2011), § 30 marginal no. 66; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models against Criminal Collectives* (2011), p. 70.

<sup>240</sup> See § 49 StGB *Besondere gesetzliche Milderungsgründe*:

(1) *Ist eine Milderung nach dieser Vorschrift vorgeschrieben oder zugelassen, so gilt für die Milderung folgendes:*

1. *An die Stelle von lebenslanger Freiheitsstrafe tritt Freiheitsstrafe nicht unter drei Jahren*  
 2. *Bei zeitiger Freiheitsstrafe darf höchstens auf drei Viertel des angedrohten Höchstmaßes erkannt werden. Bei Geldstrafe gilt dasselbe für die Höchstzahl der Tagessätze.*

3. *Das erhöhte Mindestmaß einer Freiheitsstrafe ermäßigt sich*  
*im Falle eines Mindestmaßes von zehn oder fünf Jahren auf zwei Jahre,*  
*im Falle eines Mindestmaßes von drei oder zwei Jahren auf sechs Monate,*  
*im Falle eines Mindestmaßes von einem Jahr auf drei Monate,*  
*im Falle eines Mindestmaßes von einem Jahr auf drei Monate,*

(2) *Darf das Gericht nach einem Gesetz, das auf diese Vorschrift verweist, die Strafe nach seinem Ermessen mildern, so kann es bis zum gesetzlichen Mindestmaß der angedrohten Strafe herabgehen oder statt auf Freiheitsstrafe auf Geldstrafe erkennen.*

Special mitigating circumstances established by law

(1) If the law requires or allows for mitigation under this provision, the following shall apply:

1. Imprisonment of not less than three years shall be substituted for imprisonment for life.

2. In cases of imprisonment for a fixed term, no more than three quarters of the statutory maximum term may be imposed. In case of a fine the same shall apply to the maximum number of daily units.

3. Any increased minimum statutory term of imprisonment shall be reduced as follows:

a minimum term of ten or five years, to two years;  
 a minimum term of three or two years, to six months;  
 a minimum term of one year, to three months;  
 in all cases to the statutory minimum.

agreement under the StGB are punished in accordance with the rule defining punishment for attempted crime, with the difference being that whereas the rules on punishing attempt allow for the possibility of mitigation, § 30 makes mitigation mandatory for cases related to the offence of criminal agreement.<sup>241</sup> Furthermore, the offence of criminal agreement under the German criminal law does not recognise features of vicarious criminal liability like the common law conspiracy.

### 2.3.1.2 Criminal Associations

To address the specific problem of criminal enterprises the StGB has specific provisions that deal with criminal organisations. §§ 127, 129 and 129a prohibit the forming, joining or participating in activities of armed groups (§ 127 StGB), criminal organisations (§ 129 StGB) and terrorist organisations (§ 129a StGB) respectively.

Under § 127 StGB one is liable to imprisonment or a fine if he or she unlawfully forms or commands a group in possession of weapons or dangerous instruments or joins such a group, provides it with weapons, money or any support.<sup>242</sup>

To form or participate as a member, recruit members, or in any way support an organisation whose aim or activities are directed at the commission of crimes, makes one liable under § 129 StGB to imprisonment of up to 5 years or a fine. The provision even goes as far as creating criminal responsibility for attempt to form such an organisation.<sup>243</sup> Participation as a member requires that one integrate

---

(Footnote 240 continued)

(2) If the court may in its discretion mitigate the sentence pursuant to a law which refers to this provision, it may reduce the sentence to the statutory minimum or impose a fine instead of imprisonment. (Translation from M. Bohlander, *The German Criminal Code, a modern English translation*).

<sup>241</sup> See § 30 (1) read together with § 30 (2) StGB; § 23 StGB defining rules on sentencing criminal attempt; § 49 StGB setting out rules on limits of mitigation.

<sup>242</sup> § 127 *Bildung bewaffneter Gruppen*

*Wer unbefugt eine Gruppe, die über Waffen oder andere gefährliche Werkzeuge verfügt, bildet oder befehligt oder wer sich einer solchen Gruppe anschließt, sie mit Waffen oder Geld versorgt oder sonst unterstützt, wird mit Freiheitsstrafe bis zu zwei Jahren oder mit Geldstrafe bestraft.*

§ 127 Forming armed groups.

Whosoever unlawfully forms or commands a group in possession of weapons or other dangerous instruments or joins such a group, provides it with weapons or money or otherwise supports it, shall be liable to imprisonment of not more than two years or a fine. (Translation from, M. Bohlander, *The German Criminal Code, a modern english translation*).

<sup>243</sup> The provision reads in part:

Forming criminal organisations

(1) Whosoever forms an organisation the aims or activities of which are directed at the commission of offences or whosoever participates in such an organisation as a member, recruits members or supporters for it or supports it, shall be liable to imprisonment of not more than five years or a fine.

(2) ...

(3) The attempt to form an organisation as indicated in subsection (1) above shall be punishable.

into the association, subordinate one's will to that of the association and take part in activities of the association directed towards the commission of criminal offences.<sup>244</sup> This means that criminal responsibility for membership does not arise by mere declaration of membership or by one's passive behaviour.<sup>245</sup> § 129 extends criminal responsibility to the preparatory stage of criminal offences. By making it possible for intervention of criminal law at these initial stages it represents one of the preventive tools used to counter criminal associations.<sup>246</sup> This provision was initially adopted to fight political associations trying to achieve their goals by illegal means, but from 1951 its course changed to punish behaviour related to criminal activities in general.<sup>247</sup> Since the 1970s it has mainly been used against terrorist and other organised criminal associations.

To qualify as a criminal organisation pursuant to § 129 StGB, such an association requires a certain level of organisation,<sup>248</sup> needs to exist for a certain period

---

(Footnote 243 continued)

§ 129 *Bildung krimineller Vereinigungen*

(1) *Wer eine Vereinigung gründet, deren Zwecke oder deren Tätigkeit darauf gerichtet sind, Straftaten zu begehen, oder wer sich an einer solchen Vereinigung als Mitglied beteiligt, für sie um Mitglieder oder Unterstützer wirbt oder sie unterstützt, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.*

(2)...

(3) *Der Versuch, eine in Absatz 1 bezeichnete Vereinigung zu gründen, ist strafbar.*

<sup>244</sup> K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 59.

<sup>245</sup> T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 24; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models against Criminal Collectives* (2011), p. 43; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 61.

<sup>246</sup> Decision of the German Federal Supreme Court of 11.10.1978, *Neue Juristische Wochenschrift* 1979, pp. 172, 173; decision of the German Federal Supreme Court of 21.10.2004, *Neue Juristische Wochenschrift* 2005, pp. 80, 81; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 3; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 1.

<sup>247</sup> See T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 1; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models against Criminal Collectives* (2011), pp. 26–33 for a detailed discussion on the historical development of this law which is traced back to the end of the eighteenth century during the reign of Friedrich Wilhelm, the King of Prussia.

<sup>248</sup> Decision of the German Federal Supreme Court of 11.10.1978, *Neue Juristische Wochenschrift* 1979, p. 172; decision of the German Federal Supreme Court of 10.1.2006, *Neue Juristische Wochenschrift* 2006, p. 1603; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 6; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 21 H.-J. Rudolphi/U. Stein, *Systematischer Kommentar zum Strafgesetzbuch*, 7th/8th edn. (2006), § 129 marginal no. 5.

of time,<sup>249</sup> should consist of at least three persons,<sup>250</sup> who subordinate their individual will to the will of the organisation.<sup>251</sup> These requirements make up the objective elements of this provision.<sup>252</sup> In reference to its subjective elements, all forms of participation in this provision (i.e. founding, membership, recruiting and supporting) presume a direct intent, and with the exception of recruiting, indirect intent (*dolus eventualis*) would also apply to the other forms.<sup>253</sup> Intent here embraces an awareness of all objective elements of such criminal association and a general awareness that its activities are directed towards commission of criminal offences.<sup>254</sup>

It is possible that a member commits certain criminal activity pursuant to the criminal organisation, and such criminal activity happens to breach some additional criminal norms other than membership in a criminal association punishable under § 129. The general rule is that if the crimes are of the same seriousness or less serious than the crime of membership in a criminal organisation, in accordance with § 52 StGB all these offences will be considered to be one criminal offence, that is membership in a criminal organisation.<sup>255</sup> If however, various criminal activities are committed by a member pursuant to the criminal organisation, which other than violating § 129 violate other criminal norms that are more serious than the crime of membership in a criminal association itself, then in this case § 53 StGB directs that the situation be treated as concurrence of offences. Here, the perpetrator will be convicted separately for each of the more serious crimes, but the penalty given shall be an aggregate sentence taking into account the sanction prescribed for the most serious offence and increasing it.

---

<sup>249</sup> H.-J. Rudolphi/U. Stein, *Systematischer Kommentar zum Strafgesetzbuch*, 7th/8th edn. (2006), § 129 marginal no. 6a.

<sup>250</sup> Decision of the German Federal Supreme Court of 11.10.1978, *Neue Juristische Wochenschrift* 1979, pp. 172–173; idem decision of 10.1.2006, *Neue Juristische Wochenschrift* 2006, p. 1603; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 6; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch*, (2005), § 129 marginal no. 22.

<sup>251</sup> Decision of the German Federal Supreme Court of 1.10.1991, *Neue Juristische Wochenschrift* 1992, 1518; decision of the German Federal Supreme Court of 11.10.1978, *Neue Juristische Wochenschrift* 1979, p. 172; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 7; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 30–33; H.-J. Rudolphi/U. Stein, *Systematischer Kommentar zum Strafgesetzbuch*, 7th/8th edn. (2006), § 129 marginal no. 6b, 6c.

<sup>252</sup> A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models against Criminal Collectives* (2011), pp. 35–38.

<sup>253</sup> Decision of the German Federal Supreme Court of 3.10.1979, *Neue Juristische Wochenschrift* 1980, p. 64; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129 marginal no. 34.

<sup>254</sup> A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': *Different Legal Models against Criminal Collectives* (2011), p. 68, 69.

<sup>255</sup> Decision of the German Federal Supreme Court of 11.6.1980, *Neue Juristische Wochenschrift* 1980, 2718; H.-J. Rudolphi/U. Stein, *Systematischer Kommentar zum Strafgesetzbuch*, 7th/8th edn. (2006), § 129 marginal no. 34.



Stiffer penalties of imprisonment ranging from six months to five years are prescribed for the ringleaders or “Hintermänner”,<sup>256</sup> and in cases where the organisation is formed to carry out certain serious crimes.<sup>257</sup> An accomplice whose role was minor may be discharged from liability, and one who voluntarily makes effort to prevent the organisation from carrying out the planned crime or discloses the same to the authorities may also be discharged from liability, or the same may act as a mitigating factor to the sentence the court decides to give.<sup>258</sup>

In 1976, in times when the German government had to deal with the terroristic radical left wing organisation RAF (“Rote Armee Fraktion”—Red Army Fraction), § 129 a StGB was introduced as a qualified crime in relation to § 129 StGB.<sup>259</sup> In addition to the material elements of § 129 StGB, § 129 a StGB requires a special intent that is directed at the commission of serious crimes (felonies), which include murder or other grave offences against persons, and since 2002, genocide, crimes against humanity, war crimes or grave offences against a person. § 129 a (3) StGB, further introduces an independent crime that makes a person liable to imprisonment from six months to five years, for forming an organisation ‘directed at threatening’ the commission of any of the offences highlighted in subsections 1 and 2. This subsection was created to comply with the EU Framework decision of 13 June 2002 (2002/584/JHA) on combating terrorism.<sup>260</sup> It can be inferred from the provisions and the respective commentaries that with the group crimes, an accused’s criminal responsibility only accrues for participation in the group or organisation, and not for other crimes committed by the group, unless they participate or contribute to their commission.

---

<sup>256</sup> See § 129 (4) StGB. The “Hintermann” is one who although not a member of the criminal organisation, exercises spiritual or economical influence on the leading structures of such an organisation; decision of the German Federal Supreme Court of 12.5.1954, *Neue Juristische Wochenschrift* 1954, p. 1253.

<sup>257</sup> See A. Maljevic, ‘Participation in a Criminal Organisation’ and ‘Conspiracy’: *Different Legal Models against Criminal Collectives* (2011), p. 55, describing the three situations recognised as defining the category of serious crimes, (i) if the association has a serious goal such as removing the constitutional order of Germany to replace it with a dictatorial one, (ii) if activities of the criminal association are directed towards carrying out offences usually defined as organised criminal activities such as drug trafficking, human trafficking, and (iii) in case of less serious crimes if their consequences are of an extraordinary nature.

<sup>258</sup> See § 129 (5) and (6) StGB.

<sup>259</sup> T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129a, marginal no. 2; H.-J. Rudolphi/U. Stein, *Systematischer Kommentar zum Strafgesetzbuch*, 7th/8th edn. (2006), § 129 marginal no. 1 et seq; also see M. Kilchling, ‘Organised Crime Policies in Germany’, in C. Fijnaut and L. Paoli (eds), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), pp. 717–762, at p. 746, observing that courts tend to interpret terrorist activities in Article 129a as an aggravated form of Article 129.

<sup>260</sup> Gesetz zur Umsetzung des Rahmenbeschlusses des Rates vom 13. Juni 2002 zur Terrorismusbekämpfung vom 22.12.2002, *Bundesgesetzblatt* 2003 I, 2836.



The creation of §§ 129, 129a StGB as well as every amendment with respect to these provisions have been accompanied by harsh criticism from German scholars.<sup>261</sup> The criticism has especially been directed towards the very low threshold used to criminalise supporting acts. One scholar observes for example, that §129 penalises to a great extent behaviour that may be considered to be socially acceptable (“sozialadäquate Verhaltensweise”).<sup>262</sup> By this, it is said, the legislator criminalises the mere mental attitude of the perpetrator (“Gesinnungsstrafr echt”).<sup>263</sup> The high minimum penalty and extension of the catalogue of crimes, for which the organisation must be directed at, to crimes that are not typically terrorist acts has also been the subject of criticism.<sup>264</sup> This position of law is seen to lead to the possibility of circumstances in which mere membership to a group that aims to commit certain crimes in some cases may most likely receive a stiffer penalty, than the commission of the crimes provided for in § 129a StGB.<sup>265</sup>

Criminal associations are seen to pose increased danger for the legal goods and interests that the state and its citizens seek to protect.<sup>266</sup> Generally, the legal interest protected under the provisions §§ 127, 129 and 129a StGB is ‘public security and the state’s order’.<sup>267</sup> In addition, criminal associations are considered to present a general danger to society arising from their internal dynamics, where the individual’s will is subordinated to that of the group. This reduces a feeling of individual responsibility thereby making it easier for its members to commit

---

<sup>261</sup> For an overview see T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129a marginal no.1a.

<sup>262</sup> F. Dencker, *Kritische Justiz* (1987), p. 36, 49.

<sup>263</sup> F. Dencker, *Kritische Justiz* (1987), p. 36, 49; also see M. Kilchling, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 746, who states that as a result the Federal Court of Appeals has established very high evidentiary standards for the subjective elements of the offences set out in Articles 129 and 129 a to avoid abuse of the two provisions.

<sup>264</sup> K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129a, marginal. no. 11, 12, give as examples § 305a (“Destruction of important means of production”) and § 316b (“Disruption of public services”) StGB.

<sup>265</sup> K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129a, marginal. nos. 11, 12; see further F. Dencker, *Kritische Justiz* (1987), p. 36, 49, who considers measures adopted in these provisions to be rather similar to those of a state run by the police (“polizeistaatlichen Charakters”).

<sup>266</sup> A. Maljevic, ‘Participation in a Criminal Organisation’ and ‘Conspiracy: Different Legal Models against Criminal Collectives’ (2011), p. 34.

<sup>267</sup> Decision of the German Federal Supreme Court of 22.2.1995, *Neue Juristische Wochenschrift* 1995, p. 2117, 2118; decision of the German Federal Supreme Court of 10.3.2005, *Neue Juristische Wochenschrift* 2005, p. 1668, 1669; T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129, marginal no. 2; K. Miebach/J. Schäfer, *Münchener Kommentar zum Strafgesetzbuch* (2005), § 129 marginal no. 1.

crimes.<sup>268</sup> The practical relevance of §§ 127 to 129a StGB is relatively low, given that there have been few prosecutions.<sup>269</sup>

The crimes set out in §§ 127, 129 and 129a StGB bear certain similarities with the offence of criminal agreement in § 30 StGB. Both concepts create criminal responsibility for co-operation in carrying out crime, and criminalise conduct involved in the preparatory stages of a crime. However, some crucial conceptual differences can be identified. While it is sufficient for two people to form a criminal agreement, the crimes of criminal association require the involvement of at least three people and a certain level of organisation. In particular, under § 129 and § 129a StGB the mere agreement by a perpetrator to commit or contribute directly to the target crimes would not be sufficient to create criminal liability, instead, they require the performance of an act by such a perpetrator that supports the functional ability of the organisation itself. Whereas the offence of criminal agreement in § 30 StGB is classified as a mode of participation, the crimes on criminal association are distinct crimes in their own right.

## 2.3.2 Spain

### 2.3.2.1 The Offence of Conspiracy (Criminal Agreement)

The offence of conspiracy in Spain is not considered a crime in its own right but is classified as attempted participation.<sup>270</sup> Liability for conspiracy is provided in Article 17 of the Spanish criminal code.<sup>271</sup> This article actually refers to punishment for attempted participation in respect only to some crimes.<sup>272</sup>

<sup>268</sup> The German Federal Supreme Court decision of 11.10.1978, *Neue Juristische Wochenschrift* 1979, 172–173; A. Maljevic, 'Participation in a Criminal Organisation' and 'Conspiracy': Different Legal Models against Criminal Collectives (2011), p. 34.

<sup>269</sup> Most authors consider the provisions to be important rather for their symbolic value, see T. Fischer, *Strafgesetzbuch und Nebengesetze*, 58th edn. (2011), § 129a, marginal no. 3; with regard to symbolic criminal law in general see W. Hassemer, *Neue Zeitschrift für Strafrecht* (1989), p. 553.

<sup>270</sup> F. Muñoz Conde and M. García Arán, *Derecho Penal-Parte General*, 8th edn. (2010), p. 448 et seq; José Luis De la Cuesta, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 802.

<sup>271</sup> *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*.

<sup>272</sup> Article 17 states:

1. *La conspiración existe cuando dos o más personas se conciertan para la ejecución de un delito y resuelven ejecutarlo.*

2. ...

3. *La conspiración y la proposición para delinquir sólo se castigaran en los casos especialmente prexistos en la Ley.*

1. Conspiracy exists when two or more persons agree to the commission of a crime and resolve to execute it.

2....

3. The conspiracy and incitement to commit a crime is punished only in cases expressly provided for by law. (Translation by Author).

Article 17.1 provides that two or more people are liable for conspiracy when they agree upon the commission of a crime and resolve to execute it. Subsection three of the article further makes conspiracy punishable only with respect to those crimes specifically proscribed by law. It is interesting to note that genocide, crimes against humanity and war crimes are among the crimes, which are punishable under conspiracy in the Spanish criminal code.<sup>273</sup>

To constitute a conspiracy there should be a union of wills by its participants, reflected in a complete and concrete plan, aimed towards the commission of the same act, and with a firm intention to carry it out.<sup>274</sup> In the instance that the underlying crime is committed, the conspiracy merges into the substantive offence.<sup>275</sup> The participants in the conspiracy are then classified either as perpetrators or accessories depending on their role in contributing to commission of the target crime. This fact of merger confirms that conspiracy under Spanish law is a mode of participation as opposed to a crime in its own right. All members of a conspiracy are equally liable for participation in the conspiracy.<sup>276</sup> Since conspiracy is classified as attempted participation, it is also absorbed into attempt of the target offence, once the actions of the participants qualify as such.<sup>277</sup> Conspiracy under Spanish law, unlike the common law conspiracy, does not attribute vicarious liability to a defendant for acts carried out by other co-conspirators in pursuance of the conspiracy, without any contribution on the part of the defendant.<sup>278</sup> Liability for conspiracy attracts a much lower punishment or penalty in comparison to its target offence.<sup>279</sup> A co-conspirator who decides to abandon a

---

<sup>273</sup> Article 615 referring to crimes against the international community. Other provisions which provide for crimes punishable for conspiracy are: Articles 141 makes it criminal to conspire to commit murder; 151 conspiracy to assault; 168 conspiracy to kidnap; 269 conspiracy to commit robbery with violence; extortion, fraud, criminal conversion; 304 knowingly receiving stolen goods; 373 conspiracy to commit drug related crimes; 477 conspiracy to commit treason; 488 conspiracy to commit crimes against the crown (killing, assaulting and kidnapping); 519 illegal association (described in Article 515 to constitute those who come together for purposes of committing a crime); 548 conspiracy to commit crimes against public order; 553 conspiracy to attack a public servant; 579 conspiracy to commit terrorist crimes; 585 conspiracy to help Spanish enemies attack Spain.

<sup>274</sup> José Luis De la Cuesta, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 802.

<sup>275</sup> Muñoz Conde and García Arán, *Derecho Penal Parte General*, 8th edn. (2010), p. 447.

<sup>276</sup> Obote-Odora A., 8 *Murdoch University Electronic Journal of Law* (2001), para 19.

<sup>277</sup> Muñoz Conde and García Arán, *Derecho Penal Parte General*, 8th edn. (2010), p. 449.

<sup>278</sup> José Luis De la Cuesta, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 802, stating that no special attributes have been introduced in Spain to broaden the field of conspiracy.

<sup>279</sup> Muñoz Conde and García Arán, *Derecho Penal Parte General*, 8th edn. (2010), p. 448, referring to conspiracy as attracting a penalty which is lower in one or two degrees than the punishment of its target offence. For example in the case of homicide the Spanish Penal code provides for a penalty of 10–15 years imprisonment, following the formula provided for punishing conspiracy, conspiracy to commit homicide would make one liable for 5 years to

conspiracy will only escape liability if the act is done voluntarily and sufficient effort is used to effectively frustrate the conspiracy.<sup>280</sup>

### 2.3.2.2 Criminal Organisation Offences

To counter the special dangers posed by group criminal activity the Spanish criminal code, in its special part, provides for certain group crimes that specifically address this issue. The first category of crimes is that referring to illicit associations. Although the Spanish constitution does recognise the fundamental right of association,<sup>281</sup> illicit associations are criminalised in Articles 515 to 521, to punish those who abuse this fundamental right. Article 515 criminalises and provides for punishment of four types of illicit associations.<sup>282</sup> The first refers to illicit associations whose goal is to commit a felony or after their formation, promote

---

(Footnote 279 continued)

10 years (one degree lower) or 2 years and 6 months to 5 years (two degrees lower) imprisonment.

<sup>280</sup> Muñoz Conde and García Arán, *Derecho Penal Parte General*, 8th edn. (2010), p. 449. Voluntarily in this context means a decision made without any initial intervention from the authorities.

<sup>281</sup> Article 22 of the Spanish Constitution.

<sup>282</sup> Article 515 states: *Son punibles las asociaciones ilícitas, teniendo tal consideración:*

1. *Las que tengan por objeto cometer algún delito o, después de constituidas, promuevan su comisión, así como las que tengan por objeto cometer o promover la comisión de faltas de forma organizada, coordinada y reiterada.*

2. *(abroged)*

3. *Las que, aun teniendo por objeto un fin lícito, empleen medios violentos o de alteración o control de la personalidad para su consecución.*

4. *Las organizaciones de carácter paramilitar.*

5. *Las que promuevan la discriminación, el odio o la violencia contra personas, grupos o asociaciones por razón de su ideología, religión o creencias, la pertenencia de sus miembros o de alguno de ellos a una etnia, raza o nación, su sexo, orientación sexual, situación familiar, enfermedad o minusvalía, o inciten a ello.*

6. *(abroged)*

The following shall be considered punishable as illicit associations:

1. An association formed to commit a felony, or an association which after its foundation, promotes the commission of such crimes, and those association formed for purposes of committing or to promote the commission of misdemeanours in an organised, coordinated and consistent manner.

2. [Deleted].

3. Those associations which, although designed for a lawful purpose, use violent means or alter or control personality to achieve their goals.

4. Any paramilitary organizations.

5. Those associations which promote discrimination, hatred or violence against persons, groups or associations on grounds of ideology, religion or beliefs, membership of its members or any of them to an ethnic group, race or nationality, gender, sexual orientation, family situation, illness or disability, or incite such conduct.

6. [Deleted]. (Translation by Author).

commission of such crime, or those whose intention is to continually commit or promote the commission of misdemeanours in an organised, and co-ordinated manner. The second type (subsection 3) refers to associations which although have a legitimate aim use violent means or means that control personalities to achieve their aim. The third one (subsection 4) refers to associations of paramilitary character and the last one (subsection 5) refers to associations that promote discrimination, hatred or violence against people, groups, or associations because of ideology, religion or other beliefs. Under Article 517 it is criminal to be a member of an illicit association. The provision further provides for a distinction between simple members and the founders, directors and presidents of such a group by giving more severe punishment for those in leadership positions.<sup>283</sup> Co-operation with such an illicit association is also punishable under Article 518. Co-operation here means any help or support given to the association, which is not sufficient to qualify one giving such assistance as a member of the association.<sup>284</sup>

Both conspiracy in the Spanish criminal code and the crime of illicit associations punish cooperation for purposes of committing crimes, but certain differences exist. Unlike the concept of conspiracy in the Spanish criminal code, the crime of membership in an illicit association is independent and is punishable regardless of commission of crimes pursuant to its criminal goal.<sup>285</sup> Therefore, a defendant in this case would be liable for both the crime of membership and any other crime he contributes to. The concept of illicit association further targets associations with a long-term goal and such associations should consist of at least three persons. It may have a complex or organised power structure depending on its activities, with a criminal programme and division of labour.<sup>286</sup>

---

<sup>283</sup> Leaders will be sentenced to 2–4 years' imprisonment, a fine and are prohibited from holding public office for 6–12 years. Members are only sentenced to 1–3 years' imprisonment and a fine.

Article 517 reads: *En los casos previstos en los números 1 y 3 al 6 del artículo 515 se impondrán las siguientes penas:*

1. *A los fundadores, directores y presidentes de las asociaciones, las de prisión de dos a cuatro años, multa de doce a veinticuatro meses e inhabilitación especial para empleo o cargo público por tiempo de seis a doce años.*

2. *A los miembros activos, las de prisión de uno a tres años y multa de doce a veinticuatro meses.*

<sup>284</sup> See Muñoz Conde and García Arán, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 849.

<sup>285</sup> Muñoz Conde and García Arán, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 847.

<sup>286</sup> The Spanish Supreme Court defines criminal associations as groups of at least three persons organised in a hierarchical manner, with discipline being an integral part of their operation, STS, 2nd hall, 25-1 and 27-5-1988; Muñoz Conde, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 847; José Luis De la Cuesta, 'Organised Crime Control Policies in Spain: A 'Disorganised' Criminal Policy for 'Organised' Crime, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 800.

Recently, to fortify the crime of illicit associations, the legislature introduced certain provisions in the criminal code creating criminal responsibility for belonging to criminal organisations or groups.<sup>287</sup> The promotion, creation, organisation, co-ordination, or leadership of a criminal organisation is a criminal offence.<sup>288</sup> Active participation, membership and co-operation with such an organisation are also punished. The constitutive elements of a criminal organisation are five: (i) the existence of a group, (ii) such group should consist of more than two persons, (iii) it should have an indefinite time structure/stable character, (iv) its members share functions and tasks in an agreed or co-ordinated manner and (v) has a goal to commit serious crimes or repeatedly commit misdemeanours.<sup>289</sup> Punishment for involvement in such an organisation depends on the crimes, which constitute the goal of the organisation.<sup>290</sup> The punishment here is cumulative with punishment for other crimes committed by such organisation.

---

<sup>287</sup> Organic Law 5/2010 of 22 June.

<sup>288</sup> Article 570 bis of the Spanish criminal code states:

1. *Quienes promovieren, constituyeren, organizaren, coordinaren o dirigieren una organización criminal serán castigados con la pena de prisión de cuatro a ocho años si aquella tuviere por finalidad u objeto la comisión de delitos graves, y con la pena de prisión de tres a seis años en los demás casos; y quienes participaren activamente en la organización, formaren parte de ella o cooperaren económicamente o de cualquier otro modo con la misma serán castigados con las penas de prisión de dos a cinco años si tuviere como fin la comisión de delitos graves, y con la pena de prisión de uno a tres años en los demás casos.*

*A los efectos de este Código se entiende por organización criminal la agrupación formada por más de dos personas con carácter estable o por tiempo indefinido, que de manera concertada y coordinada se repartan diversas tareas o funciones con el fin de cometer delitos, así como de llevar a cabo la perpetración reiterada de faltas.*

1. Whosoever promotes, constitutes, organises, directs, coordinates an organization created for criminal purposes will be punished with imprisonment from four to eight years if its purpose or object is the commission of serious crimes, with imprisonment of three to six years in other cases, and those who actively participate in the organization, form part of it or support it financially or otherwise, shall be punished with imprisonment from two to five years if it was intended to commit serious crimes and with imprisonment of one to three years in other cases.

For the purposes of this Code a criminal organization means a group of a stable nature or exists for an indefinite period consisting of more than two people, who concertedly and in a coordinated manner carry out various tasks or functions in order to commit serious crimes and to repeatedly bring about the commission of misdemeanours. (Translation by Author).

<sup>289</sup> Muñoz Conde and García Arán, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 910.

<sup>290</sup> For those involved in formation and leadership of the organisation punishment ranges from 4 to 8 years for serious crimes and 3–6 years for misdemeanours. Those involved at the membership or co-operation level will be liable for 2–5 years for serious crimes and 1–3 years for misdemeanours, see Article 570 bis 1 note 241 of the Spanish criminal code.

Article 570 *ter* further criminalises the creation, financing or membership in a criminal group.<sup>291</sup> A criminal group is defined as a union of at least two people not having one or more traits of the criminal organisation with the goal of committing serious crimes or repeatedly committing misdemeanours. Criminal groups are not necessarily organised in any hierarchical manner and may be referred to as loose associations. Also punishable under criminal groups are terrorist groups, which were previously punishable as illicit associations.<sup>292</sup> Similarities can be drawn between the constitutive elements of a criminal group and the concept of conspiracy under common law jurisdictions. Like with common law conspiracy, two people suffice to form a criminal group, and it does not need to be organised in a hierarchical structure. The offence on criminal groups is also an independent crime.

The element of shared functions or tasks in an agreed manner makes the crimes of criminal organisation and groups resemble the conduct punishable as conspiracy

---

<sup>291</sup> Article 570 *ter* in part reads: 1. *Quienes constituyeren, financiaren o integren un grupo criminal serán castigados:*

...

*A los efectos de este Código se entiende por grupo criminal la unión de más de dos personas que, sin reunir alguna o algunas de las características de la organización criminal definida en el artículo anterior, tenga por finalidad o por objeto la perpetración concertada de delitos o la comisión concertada y reiterada de faltas.*

Whosoever constitutes, finances a criminal group or integrates into it will be punished

...

For the purposes of this Code a criminal groups means the union of at least two people who concertedly, without meeting one or more of the characteristics of the criminal organization as defined in the previous article, have the purpose or intend the commission of serious crimes or the repeated commission of misdemeanours. (Translation by Author).

<sup>292</sup> Article 571 states in part:

1. *Quienes promovieren, constituyeren, organizaren o dirigieren una organización o grupo terrorista serán castigados con las penas de prisión de ocho a catorce años e inhabilitación especial para empleo o cargo público por tiempo de ocho a quince años.*

...

3. *A los efectos de este Código, se considerarán organizaciones o grupos terroristas aquellas agrupaciones que, reuniendo las características respectivamente establecidas en el párrafo segundo del apartado 1 del artículo 570 bis) y en el párrafo segundo del apartado 1 del artículo 570 ter, tengan por finalidad o por objeto subvertir el orden constitucional o alterar gravemente la paz pública mediante la perpetración de cualquiera de los delitos previstos en la Sección siguiente.*

1. Whosoever promotes, constitutes, organises or directs a terrorist organization or group shall be punished with imprisonment from eight to fourteen years and specific disqualification from holding public office for a period of eight to fifteen years.

...

3. For the purposes of this Code terrorist organizations or groups is considered to comprise of those that bring together all the characteristics set forth respectively in the second subparagraph of paragraph 1 of Article 570 bis) and in the second paragraph of Article 570 paragraph 1 *ter*, whose purpose or intention is to subvert the constitutional order or seriously alter the public peace by the perpetration of any offense provided for in the next section. [The next section refers to Section II on TERRORISM AND RELATED CRIMES added by Law 5/2010 of 22 June].

under the Spanish criminal code. However, certain fundamental differences can be identified.<sup>293</sup> First, while only two persons form a conspiracy, a criminal organisation ought to consist of more than two persons, even though, two people may be considered to form a criminal group. Second, punishment of conspiracy is restricted to only certain crimes specifically proscribed by law, whereas a criminal organisation or group may have the goal to commit any crime. Third, while punishment for conspiracy is more dependent on its target crime, the law proscribes specific punishment for participants in a criminal organisation or group independent of punishment proscribed for their target crimes. Fourth, whereas the concept of conspiracy under the Spanish criminal code is punishable only while its target crime remains unexecuted, the criminal organisations and groups offences are autonomous and are punishable irrespective of their target crimes. The elements of criminal organisation in the Spanish criminal code sufficiently resemble those of illicit associations, which also include organisation in a hierarchical structure and have a fairly permanent structure (established for an indefinite period), it is admitted that indeed an overlap exists between both crimes.<sup>294</sup>

### 2.3.3 France

The French Penal Code<sup>295</sup> has several provisions that proscribe conduct carried out through criminal association. Chapter II makes punishable certain offences involving co-operation for criminal purposes against the institutions of the Republic. This chapter falls under the fourth book of the penal code, which proscribes felonies and misdemeanours against the nation, the state and public peace.<sup>296</sup> Conspiracy as a distinct crime does not exist under French law, but conduct of conspiracy nature is made punishable in two concepts, that of '*complot*' and '*association de malfaiteurs*'.

#### 2.3.3.1 Complot

Article 412-2 proscribes *complot*. This offence has also been referred to in other forums as conspiracy.<sup>297</sup> The translation of Article 412-2 reads:

<sup>293</sup> Muñoz Conde and García Arán, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 910.

<sup>294</sup> Muñoz Conde and García Arán, *Derecho Penal Parte Especial*, 18th edn. (2010), p. 911. It is argued that the crime of illicit associations was not sufficient to accommodate all possible types of criminal organisations.

<sup>295</sup> Referred to as *Code Pénal*.

<sup>296</sup> *Livre IV Des crimes et délits contre la nation, l'État et la paix publique (Code Pénal)*.

<sup>297</sup> See *Musema*, ICTR (TC), para 186.



Plotting consists of a resolution agreed upon by two or more to commit an attack where the resolution was put into effect by one or more material actions.

Plotting is punished by ten years' imprisonment and a fine of € 150,000.

The penalty is increased to twenty years' criminal detention and a fine of € 300,000 where the offence was committed by a person holding public authority.<sup>298</sup>

The term 'attack' means 'the commission of one or more acts of violence liable to endanger the institutions of the Republic or violate the integrity of the national territory'.<sup>299</sup> Use of the terms 'resolution agreed upon by two or more persons' equates *complot* or 'plotting' to punishing conduct of conspiracy nature, under which an agreement to commit a crime is punishable. *Complot* becomes punishable only when one or more material acts in relation to it are carried out. This requirement of performance of 'one or more material acts' may be equated to the Anglo-American common law conspiracy 'overt act' requirement. *Complot* is only punishable if it is proved that it was a precisely determined concrete plan.<sup>300</sup> In the first case that *complot* is punished with 10-years' imprisonment it is considered to be a misdemeanour (*délit*), and in the second case of 20-years imprisonment it is punished as a felony (*crime*).

### 2.3.3.2 Association de malfaiteurs (Criminal Associations)

The provisions that create criminal responsibility for participation in a criminal association also make punishable conduct of conspiratorial nature.<sup>301</sup> Article 450-1 defines a criminal association as any group formed or any conspiracy ('*entente*') established with a view to prepare for the commission of a felony or a misdemeanour punishable by at least five years. The preparation must be marked by one

<sup>298</sup> The article reads: *Constitue un complot la résolution arrêtée entre plusieurs personnes de commettre un attentat lorsque cette résolution est concrétisée par un ou plusieurs actes matériels.*

*Le complot est puni de dix ans d'emprisonnement et de 150000 euros d'amende.*

*Les peines sont portées à vingt ans de détention criminelle et à 300000 euros d'amende lorsque l'infraction est commise par une personne dépositaire de l'autorité publique.* (Translation in text extracted from French Penal Code -translated version, in [www.legifrance.gouv.fr/html/codes](http://www.legifrance.gouv.fr/html/codes)).

<sup>299</sup> Article 412-1 French Penal Code states: *Constitue un complot la résolution arrêtée entre plusieurs personnes de commettre un attentat lorsque cette résolution est concrétisée par un ou plusieurs actes matériels.*

<sup>300</sup> See decision of the French High Court (Criminal Division), 12 mai 1980: *Bull. Crim.*, no. 153.

<sup>301</sup> T. Godefroy in, C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 769, actually refers to this offence as criminal conspiracy; also see H. Donnedieu de Vabres, in G. Mettraux, *Perspectives on the Nuremberg Trial* (2008), p. 245.

or more material actions.<sup>302</sup> This essentially means that simple membership in a criminal association will not create criminal responsibility unless it is tied to the preparation of an offence.<sup>303</sup> This provision especially targets conduct preliminary to commission of serious crimes carried out by criminal associations.<sup>304</sup> The crime of illicit associations has undergone a number of transformations since its inception after the French Revolution.<sup>305</sup> The first provisions that proscribed organised criminal groups were contained in the Napoleonic Penal Code of 1811.<sup>306</sup> It was adopted to punish the gangs of rural bandits that emerged after the revolution and

---

<sup>302</sup> Article 450-1 states: *Constitue une association de malfaiteurs tout groupement formé ou entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un ou plusieurs crimes ou d'un ou plusieurs délits punis d'au moins cinq ans d'emprisonnement.*

*Lorsque les infractions préparées sont des crimes ou des délits punis de dix ans d'emprisonnement, la participation à une association de malfaiteurs est punie de dix ans d'emprisonnement et de 150000 euros d'amende.*

*Lorsque les infractions préparées sont des délits punis d'au moins cinq ans d'emprisonnement, la participation à une association de malfaiteurs est punie de cinq ans d'emprisonnement et de 75000 euros d'amende.*

(A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment.

Where the offences contemplated are felonies or misdemeanours punished by ten years' imprisonment, the participation in a criminal association is punished by ten years' imprisonment and a fine of € 150,000.

Where the offences contemplated are misdemeanours punished by at least five years' imprisonment, the participation in a criminal association is punished by five years' imprisonment and a fine of € 75,000).

<sup>303</sup> T. Godefroy in, C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 770.

<sup>304</sup> See decision of the French High Court (Criminal Division), 29 December 1970: *JCP* 71, II, 1670, affirming the application of this provision to situations where members of such association had not yet committed the crimes.; T. Godefroy in, C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 769.

<sup>305</sup> See Alexander D. Tripp, 20 *Fordham Int'l. L. J.* (1996), p. 263, pp. 304–310 for a brief account of the history.

<sup>306</sup> *Code Pénal* Articles 265–68 (1811) (Fr.). The respective articles stated:

Article 265: Every association of those who would commit crimes against persons or property is a crime against the public peace.

Article 266: The crime is complete when the group is organised, or there is correspondence between the groups and their leaders or commanders, or by gatherings to settle accounts or to distribute or divide the gains from their misdeeds.

Article 267: When no one else has joined or followed in the crime, the principals, the directors of the association, and the commanders in chief or those of lower rank, shall be punished by forced labour.

Article 268: All other individuals who provided any service whatsoever to the gangs, and those who freely and knowingly provided the gangs or their divisions with arms, munitions, instruments of crimes, lodgings, hiding places, or meeting places, shall be incarcerated. (Extracted from Alexander D. Tripp, 20 *Fordham Int'l. L. J.* (1996), pp. 305–306.

terrorised the French countryside.<sup>307</sup> Any association of persons with a criminal goal directed towards person or property was declared to be a crime against the public peace (Article 265). This law only applied to criminal organisations with a hierarchical or formal structure constituting of leaders and subordinates (Article 266), and membership in such organisations was punishable although no crimes had yet been executed following their establishment (Article 267). The requirement that such organisation had to be large, have a fairly permanent structure, be organised in a hierarchical manner and have members with a criminal past proved to be ineffective with the increase of loosely organised criminal groups otherwise referred to as anarchist groups.<sup>308</sup> These anarchist groups by their very nature and philosophical ideologies were opposed to hierarchical organisations.<sup>309</sup> In response to this new phenomenon, the French Parliament revised the criminal association statutes, removing the requirement that a criminal association must have a formal structure. The revised laws no longer required a specified number of members, hierarchy, or division of spoils, and a criminal association could be created by an agreement to commit serious crimes.<sup>310</sup> A requirement that defendants must commit at least one overt act in furtherance of the criminal association was further, added by parliament in 1981.<sup>311</sup> The revised French Penal Code that came into effect on 1 March 1994 expanded the target offences of criminal associations to include misdemeanours punishable by 10-years imprisonment.<sup>312</sup>

Criminal association is an offence independent of its target offences.<sup>313</sup> As currently defined in the French Penal Code, the offence of illicit associations refers to a group offence whose main elements include, a collective understanding of the criminal purpose, an aim to prepare for certain criminal acts and an intention that the criminal acts be carried out.<sup>314</sup> The members do not need to know every activity of the group; all that is necessary is that they are aware of the criminal

<sup>307</sup> T. Godefroy, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 769.

<sup>308</sup> See E. M. Wise, 27 *Syracuse J. Int'l L. & Com* (2000), p. 315.

<sup>309</sup> Alexander D. Tripp, 20 *Fordham Int'l. L. J.* (1996), p. 307.

<sup>310</sup> *Code Pénal* Article 265 (1893) (Fr.). "Toute association formée, quelle que soit sa durée ou le nombre de ses membres, toute entente établie dans le but de préparer ou de commettre des crimes contre les personnes ou les propriétés, constituent un crime contre la paix publique".

(Every association, regardless of the number of its members, every understanding made with the goal preparing to commit or committing crimes against people or property, is a crime against the public peace) [Extracted from, Alexander D. Tripp, 20 *Fordham Int'l. L. J.* (1996), p. 307].

<sup>311</sup> Law no. 81-82 of 2 February 1981, 1981 B.L.D., 86 (Fr.).

<sup>312</sup> Loi n. 92-1336 of 16 Dec. 1992, Article 373, J.O at 17,586, 23 Dec. 1992, (Fr.) modified by loi n. 93-913 of 19 July 1993, J.O. at 10,199, 20 July, 1993 (Fr.); see Articles 450-1 to 450-3 *Code Pénal*.

<sup>313</sup> See decision of the French High Court (Criminal Division), 22 January 1986: *Bull. crim.*, no. 29; decision of the French High Court (Criminal Division), 30 April 1996: *Bull. crim.*, no. 176; also Alexander D. Tripp, 20 *Fordham Int'l. L. J.* (1996) 263, p. 308.

<sup>314</sup> Decision of the French High court (Criminal Division), 26 May 1999: *Bull. crim.*, no. 103; T. Stenson, 1 *The Journal of International Law & Policy* (2003-2004), p. 23.

nature of such association.<sup>315</sup> It is not necessary that the crimes that constitute such an association's objective are clearly defined or determinable; it suffices that the members of such an association carry out one or more preparatory acts in relation thereto.<sup>316</sup> The members do not need to have personally carried out the offences or preparatory acts to be considered liable under this offence.<sup>317</sup> These requirements resemble common law conspiracy, and the provision has also in some instances been referred to as a conspiracy provision.<sup>318</sup> Although conspiracy constitutes an integral part of what may be defined as a criminal association, it is not the agreement that creates criminal responsibility but rather the criminal association created as a result of such criminal agreement ('*entente*').

The French Penal Code also gives an opportunity to a renouncing member of the criminal association to be exempted from liability. Any person, who has participated in a criminal association and discloses the existence of such group or conspiracy to competent authorities, enabling its members to be identified before any prosecution is instituted, will be exempted from punishment.<sup>319</sup> Under the French Law one is only criminally liable for his own conduct.<sup>320</sup> This provision negates the possibility of having an expansive conspiracy theory, which allows for attribution of liability for conduct carried out by other members of such criminal association or co-conspirators.

Certain circumstances under the French Penal Code are considered to lead to heavier sentences.<sup>321</sup> Among these special circumstances are included crimes committed by organised gangs and agreements made to carry out certain offences.<sup>322</sup> This is a clear indication of how serious such conduct is considered to be, in terms of endangering society. An organised gang is defined as any group formed or association established with a view to the preparation of one or more criminal

<sup>315</sup> Decision of the French High Court (Criminal Division), 11 June 1970: *Bull. crim.*, no. 199.

<sup>316</sup> Decision of the French High Court (Criminal Division), 22 August 1959: *Bull. crim.*, no. 389; decision of the French High Court (Criminal Division), 20 June 1989, *Martin*, inédit; decision of the French High Court (Criminal Division), 15 déc. 1993: *Dr. pénal* 1994, comm. No 131.

<sup>317</sup> Decision of the French High Court (Criminal Division), 4 July 1989, inédit.

<sup>318</sup> See the translated French Penal Code, the Code actually uses the term 'conspiracy' for the term '*entente*' which refers to agreement in [www.legifrance.gouv.fr/html/codes](http://www.legifrance.gouv.fr/html/codes); also see *Musema*, ICTR (TC) para 186.

<sup>319</sup> Article 450-2 French Penal code.

<sup>320</sup> Article 121-1 French Penal Code.

<sup>321</sup> Section III of the French Penal Code ('*De la définition de certaines circonstances entraînant l'aggravation, la diminution ou l'exemption des peines*').

<sup>322</sup> T. Godefroy, in C. Fijnaut and L. Paoli (eds.), *Organised Crime in Europe, Concepts, Patterns and Control Policies in the European Union and Beyond* (2004), p. 770.

offences.<sup>323</sup> Such preparation should be marked by one or more material actions. The definition of an organised gang includes a criminal association, which may be constituted by an agreement and also includes conduct of conspiracy nature itself ('*entente*'). The penal code also makes it criminal to participate in a group formed or an agreement established with a view to preparation of certain serious crimes.<sup>324</sup>

## 2.3.4 Italy

### 2.3.4.1 Criminal Agreement

As a general principle of law, preparatory acts under Italian law are not punishable if their underlying crime is not committed, unless the preparatory acts in themselves are considered to be crimes.<sup>325</sup> In Italian criminal law, when two or more people agree to carry out a crime and fail to execute it, they are not liable for punishment for the mere act of agreement (conspiracy), unless the law specifically provides otherwise.<sup>326</sup> The exceptional cases in which criminal agreements may be punishable relate to offences directed against the state that are subversive in

---

<sup>323</sup> Article 132-71 French Penal Code states: *Constitue une bande organisée au sens de la loi tout groupement formé ou toute entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'une ou de plusieurs infractions.* (An organised gang within the meaning of the law is any group formed or association established with a view to the preparation of one or more criminal offences, preparation marked by one or more material actions) (Translation from the translated French Penal Code).

<sup>324</sup> These crimes include felonies defined by Articles 211–1 (Genocide) and 212–2 (Crimes against humanity) and crimes punished by criminal imprisonment for life (Article 212–3 French Penal Code); (Article 214–4) participation in an organised gang to carry out eugenic practice aimed at organising the selection of persons or carrying out any procedure designed to cause the birth of a child identical to another person, is punished by criminal imprisonment for life and a fine of €7,500,000.00; (Article 222–4) where an organised gang subjects a person to torture or to acts of barbarity the penalty is aggravated and the persons involved will be liable to 30 years criminal imprisonment; (Article 222–34) leading or organising a group with the objective to produce, manufacture, import, export, transport, retention, offer, sale, acquisition or unlawful use of drugs is punished by criminal imprisonment for life and a fine of €7,500,000.00; (Article 225–4–1) when human trafficking is carried out by an organised gang it is punishable by 20 years imprisonment for life and a fine of €3,000,000.

<sup>325</sup> See Article 56 *Codice Penale* (The Italian Penal Code); G. Marinucci and E. Dolcini, *Manuale di Diritto Penale, Parte Generale* (2009), p. 376.

<sup>326</sup> Article 115 *Codice Penale* states:

*Salvo che la legge disponga altrimenti, qualora due o più persone si accordino allo scopo di commettere un reato, e questo non sia commesso, nessuna di esse è punibile per il solo fatto dell'accordo.* (Except as the law provides otherwise, whenever two or more persons agree to commit an offence, and it is not committed, none of them shall be punishable for the mere fact of agreement). [Translation from. THE ITALIAN PENAL CODE 40 (American Series of Foreign Penal Codes vol. 23, Edward M. Wise & Allen Maitlin trans., 1978 extracted from E. M. Wise, 27 *Syracuse J. Int'l L & Com* (2000), p. 312]; also see G. Marinucci and E. Dolcini, *Manuale di Diritto Penale, Parte Generale* (2009), pp. 377–378.

nature.<sup>327</sup> The rationale behind this is that conspiracy is considered to be a mere state of mind, which causes no harm. Although conspiracy in itself is not punishable, the judge may make an order for security measures (*libertà vigilata*).<sup>328</sup> Security measures are applied if a person shows the capability of being socially dangerous. This however, is not considered to be punishment. Criminal liability only begins after an attempt of the crime is carried out.<sup>329</sup>

Instead of the concept of conspiracy like in the common law countries, to deal with situations in which crimes are committed through the cooperation of more than one person, the Italian law recognises the concept *IL CONCORSO DI PERSONE NEL REATO* (Persons working together in crime).<sup>330</sup> To be punishable under this concept there must be a plurality of persons, the commission of a crime, the accused's conduct must have some causal influence to the crime committed, and an accused must participate with knowledge and intention to contribute to perpetration of the crime.

### 2.3.4.2 Criminal Associations

To deal with the problem of crimes committed by a group of people acting in concert, the Italian penal code provides for the crime *Associazione per delinquere* (Criminal Association) under part IV on crimes against public order.<sup>331</sup> Italy has a long history of criminal organisations, and provisions against criminal groups exist from the time of Roman law.<sup>332</sup> The current Italian Penal Code promulgated in 1931 introduced Article 416, which provides that where three or more persons combine to carry out criminal acts they shall be punishable for this reason alone.<sup>333</sup>

<sup>327</sup> These include: Article 270 Associazioni sovversive (Subversive associations); Article 271 Associazioni antinazionali (Anti-national associations); Article 304 Cospirazione politica mediante accordo (Political conspiracy by agreement); Article 305 Cospirazione politica mediante associazione (Political conspiracy through association); Article 306 Banda Armata: Formazione e partecipazione (Armed gang: Training and participation). [Translation by Author].

<sup>328</sup> See Article 228 *Codice Penale*; M. Maiwald, *Einführung in das italienische Strafrecht und Strafprozessrecht* (2009), p. 139.

<sup>329</sup> See Article 56 (*Delitto tentato*) *Codice Penale*.

<sup>330</sup> G. Marinucci and E. Dolcini, *Manuale di Diritto Penale, Parte Generale* (2009), p. 394 et seq.

<sup>331</sup> Provided in *Codice Penale* titled '*Dei Delitti Contro L'ordine Pubblico*'.

<sup>332</sup> See A. D. Tripp, 20 *Fordham Int'l. L. J.* (1996), pp. 297–304 for a brief overview of history.

<sup>333</sup> I. *Quando tre o più persone si associano allo scopo di commettere più delitti, coloro che promuovono o costituiscono od organizzano l'associazione sono puniti, per ciò solo, con la reclusione da tre a sette anni.*

II. *Per il solo fatto di partecipare all'associazione, la pena è della reclusione da uno a cinque anni.* (I. When three or more people associate for the purpose of committing more than one crime, those who promote or constitute or organise the association shall be punished, for that alone, by imprisonment from three to seven years.

II. For the act of participating in the association alone, the punishment shall be imprisonment from one to five years) (Translation extracted from E. M. Wise, 27 *Syracuse J. Int'l L. & Com* (2000), p. 316).

In this provision the agreement that underlies such combination is not punished, but rather the product of it, which is the criminal association.<sup>334</sup> The criminal association is not required to have a specific hierarchical structure, only that it should be of a permanent nature, consisting of at least three persons committed to carrying out an open ended series of criminal conduct.<sup>335</sup> Membership to such an association or organisation should be voluntary, with its members agreeing to pursue the shared criminal goal of such association.<sup>336</sup> It is not sufficient for the members to plan only a fixed number of crimes or commit isolated criminal acts they must intend to engage in a continuous series of criminal conduct, otherwise, they would only be considered liable as accomplices in the case of the isolated or fixed number of crimes committed, as opposed to being guilty as members of a criminal association.<sup>337</sup> The criminal association is punished in such circumstances, for the additional danger it poses to the society with its indeterminate criminal programme.

To further reinforce the provision on criminal associations, in 1982, Article 416 *bis* was added into the Italian Penal Code, making anyone who forms a mafia type organisation liable to a penalty of imprisonment.<sup>338</sup> A group of three or more people who use intimidation to commit crimes, or gain control over businesses or

<sup>334</sup> A. D. Tripp, 20 *Fordham Int'l. L. J.* (1996) at p. 300; E. M. Wise, 27 *Syracuse J. Int'l L. & Com.* (2000), p. 317.

<sup>335</sup> 7 Manzini, *Trattato Di Diritto Penale Italiano* (1986), p. 195.

<sup>336</sup> 7 Manzini, *Trattato Di Diritto Penale Italiano* (1986), p. 195.

<sup>337</sup> 7 Manzini, *Trattato Di Diritto Penale Italiano* (1986), pp. 194, 195, 202.

<sup>338</sup> Law no. 646 of 13 September 1982, 9 *Racc. Uff.* 2537 (1982) (It.); Article 416 *bis* states in part:

I. *Chiunque fa parte di un'associazione di tipo mafioso formata da tre o più persone, è punito con la reclusione da cinque a dieci anni*

II. ...

III. *L'associazione è di tipo mafioso quando coloro che ne fanno parte si avvalgano della forza di intimidazione del vincolo associativo e della condizione di assoggettamento e di omertà che ne deriva per commettere delitti, per acquisire in modo diretto o indiretto la gestione o comunque il controllo di attività economiche, di concessioni, di autorizzazioni, appalti e servizi pubblici o per realizzare profitti o vantaggi ingiusti per sé o per altri,...*

...

VII. *Le disposizioni del presente articolo si applicano anche alla camorra e alle altre associazioni, comunque localmente denominate, che valendosi della forza intimidatrice del vincolo associativo perseguono scopi corrispondenti a quelli delle associazioni di tipo Mafioso.* (Whoever belongs to a mafia-type association comprised of three or more persons shall be punished by imprisonment from five to ten years...

An association is a mafia-type association when those who belong to it rely on the intimidative force of associative ties, and on the discipline and code of silence resulting therefrom, in order to commit crimes, to acquire directly or indirectly the management or control of economic activities, of concessions, permits, public contracts and services, or to obtain unjust profits or benefits for themselves or others....

The provisions of this article also apply to the Camorra, and other associations regardless of their local titles, that use the force of intimidation of the associative bond to follow the same goals as a mafia-type association).

public contracts may be labelled a Mafia association. A person who gives assistance to the Mafia organisation without intending to join it may be held criminally responsible for aiding and abetting the organisation under the doctrine of external complicity. Such a person is liable for the same penalties that a member of such an organisation would receive.<sup>339</sup>

### 2.3.5 Summary

The act of merely agreeing to commit a crime is expressly punished only in the German and Spanish Criminal Codes, and even so the offence of criminal agreement (“conspiracy”) in both instances is not a distinct crime, but a general form of liability dependent on its target offence. While in common law jurisdictions conspiracy is utilised as the main legal tool for dealing with the challenges of criminal enterprises, the countries under civil law jurisdiction prefer to use the concept of punishing participation in a criminal association (organisation/group) or what is otherwise referred to as the ‘criminal association rule’.

Under the German criminal code when two or more people agree to commit a crime or jointly instigate commission of a crime they shall be liable for punishment. Unlike in common law jurisdictions, the offence of criminal agreement here is applied more restrictively. It only applies to felonies and once the contemplated crime is realised, it merges into the substantive crime. Whereas conspiracy under common law jurisdictions may in some cases be considered equally serious as or more serious than its contemplated criminal act, under the German criminal code the mere participation in a criminal agreement is considered to attract less culpability than the substantive crime. A participant in a criminal agreement is only liable for his personal contribution to such agreement, and will not be held criminally responsible for other acts, which he did not contemplate, consent, or in any way contribute to, although carried out in pursuance of the criminal agreement. This is in contrast to the doctrine of Pinkerton or accessorial liability under the common law concept of conspiracy.

To combat crimes carried out by criminal groups the German criminal code prohibits the formation, membership, recruitment or supporting activities of armed groups (§127 StGB), criminal organisations (§ 129 StGB) and terrorist organisations (§ 129 a StGB). These crimes, like the common law concept of conspiracy, extend criminal responsibility to the preparatory stages of criminal participation. A criminal organisation ought to have at least three people who subordinate their will to that of the organisation. It needs to exist for a certain period of time and have a certain level of organisation. This definition excludes cases where persons

---

<sup>339</sup> A. D. Tripp, 20 *Fordham Int'l. L. J.* (1996), p. 304. By virtue of Article 110 *Codice Penale*, accomplices are held liable as principals in commission of a crime; also see G. Marinucci and E. Dolcini, *Manuale di Diritto Penale, Parte Generale* (2009), p. 408.



spontaneously come together to execute a certain crime, a situation that common law conspiracy would address. The offence of participation in a criminal organisation, like common law conspiracy, is a distinct offence, creating separate criminal responsibility from its contemplated crimes. Participation in a criminal organisation does not act as a form of complicity like in the case of common law conspiracy. It requires that the alleged accused through some personal act promoted the criminal objectives of the organisation, and such participant is only liable to the extent of their contribution.

The Spanish criminal code also makes punishable the act of two or more people agreeing to commit a crime. Similar to the offence of criminal agreement under German criminal law, conspiracy here is not a distinct crime but is classified as attempted participation. Punishment for conspiracy is restricted to only those crimes specifically proscribed by law. Conspiracy under Spanish law does not also act as a form of complicity. Group criminal activity is preferably dealt with under the offences on illicit associations (Articles 515 to 521), criminal organisations (Article 570 *bis* 1) and criminal groups (Article 570 *ter*). The crimes on criminal association require a combination of more than two persons with a long-term goal of committing crimes, and with exception of the crime of criminal groups, which requires a minimum of two persons, such an association should have some form of hierarchical organisation. Like the common law conspiracy, the crimes on criminal association are independent crimes punishable irrespective of commission of their underlying crimes. Whereas punishment of conspiracy under the Spanish criminal code is restricted to only some crimes, criminal organisations are punishable regardless of the crimes they intend to pursue.

Conspiracy as a distinct crime does not exist under French law, but punishment for conduct of conspiracy nature may be inferred from punishment of two forms of crime, *complot* and *association de malfaiteurs*. A resolution by two or more people to carry out acts of violence that endanger institutions of the republic or violate the integrity of the national territory is punishable under *complot* (Articles 412-2). *Association de malfaiteurs* creates criminal responsibility for participation in a criminal association (Articles 450-1). A criminal association is created either by a group or by an agreement ('*entente*') to commit serious crimes that is, felonies or misdemeanours, punishable by a minimum sentence of five years. The offence of illicit associations does not require a specified number of members or structure, all that is needed is a collective of persons with a common understanding of the criminal purpose, who aim to prepare for certain crimes and have an intention that they be committed. To prove criminal agreement (either as *complot* or *entente*) the prosecution must show the carrying out of an overt act or some physical evidence aimed at procuring a certain criminal end. The elements of the offence of illicit associations closely resemble common law conspiracy, however, this offence does not punish the criminal agreement itself but rather the criminal association that it creates. The offence of criminal association like common law conspiracy is a distinct crime independent of its target offences. Unlike common law conspiracy, which also acts as a form of complicity, the offence of criminal associations under French law is distinct from complicity. Under French criminal law carrying out

certain crimes by organised gangs whose definition includes criminal associations is seen as a circumstance that may lead to aggravation of penalty. A clear indication of how serious the act of combining for criminal purposes is considered.

As a general rule, conspiracy is not punishable under Italian law unless the law expressly provides otherwise. It may be inferred from this principle that in certain circumstances conduct of conspiracy nature will be punished. These exceptional circumstances refer mainly to crimes considered to be a threat to public order. Although conduct of conspiracy nature is not punishable *per se*, a Judge may make an order on security measures to ensure the goals of such conduct do not materialise. Such measures are applied only if a person shows capability of being socially dangerous. Like in most civil law countries, criminal enterprises under the Italian criminal code are combated through the offences on criminal associations. The combination of three or more persons committed to carrying out an open-ended series of crimes is subject to punishment by imprisonment (Article 416). Although it can be inferred that agreement is the underlying factor behind such combination, the crime of criminal association does not target the agreement but rather the product of it. Such an association need not have any specific hierarchical structure, but it ought to be of a permanent nature and must have an indeterminate programme for the commission of several criminal acts. The offences on criminal associations are independent crimes and are also distinct from complicity. To deal with the issue of complicity like in the situations envisaged by the common law conspiracy, the Italian criminal law prefers to analyse such conduct under the concept of 'Il Concorso Di Persone Nel Reato', a concept of complicity that deals with situations where two or more persons are involved in commission of a crime.

## 2.4 Evaluation

The above analysis shows that express punishment for the offence of criminal agreement or conspiracy is only found in the United Kingdom, United States, Germany and Spain. The constitutive elements of conspiracy as defined by both systems are similar. These elements include an agreement, concerted will to act, and the common goal to achieve the contemplated criminal act. In the United States, there is the added requirement that there is need for proof of an overt act carried out in furtherance of the conspiracy, for such conspiracy to be punishable. This requirement can be compared to the legal requirements under Spanish law, where a conspiracy is only punishable on the evidence of a complete and concrete plan aimed towards commission of its underlying crime. This overt act requirement is often to ensure that the conspiracy being punished is not an act that still rests in the minds of its participants, but is actually an act already being implemented. Although, the other jurisdictions do not expressly provide for an overt act requirement, this is an element that can be inferred from the practical cases.

Whereas under common law jurisdictions conspiracy is an independent inchoate crime, in Germany and Spain conspiracy is a mode of attempted

participation that merges into the crime once it is attempted or committed. Conspiracy under the common law jurisdictions has special evidential and procedural advantages and also acts as a form of complicity. The civil law countries do not provide any exceptional rules for charges relating to the offence of criminal agreement, and the principle of liability for personal conduct is strictly adhered to. Therefore, under civil law jurisdictions, participation in a conspiracy does not conclusively act as a form of complicity for crimes committed pursuant to it. The conspiracy offence under common law jurisdictions is considered serious enough to at times attract a penalty almost equivalent to that of its contemplated crime. This contrasts to the perception of the conspiracy offence in civil law countries, where it is seen to involve the least culpability, with the law directing that punishment thereof be considerably low in comparison to that required for its target offence.

Unlike common law countries, which use conspiracy as the main legal tool to deal with the special challenges presented by crimes carried out by organised criminal groups, most civil law countries prefer to use the “criminal association rule”. Here, the focus is in the formation of a criminal gang for purposes of carrying out criminal acts. The relevant laws that deal with criminal association mainly place emphasis on the criminal organisation or group rather than its underlying criminal agreement. Criminal responsibility here arises as a result of participation in an organisation or group with a criminal objective. Like conspiracy under common law jurisdictions, the offences related to criminal associations are independent crimes. This means they are distinct from their target offences, with criminal liability arising although none of the crimes that form part of their criminal objective have been committed.

While it would be sufficient for two persons to form a conspiracy, in most cases participation in criminal association offences require a minimum of at least three participants and should have some form of hierarchical structure. A conspiracy exists from the moment an agreement is made. Therefore, a combination of individuals spontaneously formed to commit a crime might be held criminally responsible under the concept of conspiracy. In contrast, most offences on criminal association are punishable only from the moment that such an association is functionally and organisationally capable of realising its criminal goals. This often requires that such association has existed for a certain period or has a long term goal to commit crimes. Participation in a criminal association requires involvement in activities of forming and supporting such organisation or group. This means that a mere declaration indicating that one agrees with the aims of such an association might not suffice to create criminal responsibility, one must through some personal act support the objectives of such association.

Under the concept of conspiracy, because all participants are considered to have equally contributed in reaching the agreement, the only form of participation is that of a conspirator. Common law conspiracy also acts as a conclusive form of complicity, making participants in such conspiracy liable for all offences carried pursuant to it. The offences on criminal associations recognise that participants can have different roles in their operation and often prescribe different punishment for

the various roles, with the highest penalties being proscribed for those who participate in the formation and leadership roles. Participation in a criminal organisation does not form an automatic basis to be held liable for crimes carried out pursuant to it, for an accused has to have specifically contributed to such offence to be found culpable. Most civil law countries instead prefer to use their specific complicity provisions to deal with such conduct.

Intention in conspiracy is directed to the agreement and target crime, while intention in criminal associations is mostly directed towards the criminal association and not its underlying offences save for the instances where members demonstrate their membership through commission of offences that form part of the association's criminal objective.

Of the two concepts, the common law conspiracy model seems obviously to have a broader scope of application. The restrictive requirements on what constitutes criminal associations have proved insufficient in combating all circumstances involving group criminal activity. This situation is created by the ingenious ways used by such groups to circumvent the law continuously. To deal with these challenges, some civil law jurisdictions have been forced to reform their law. As a result, they choose to enact laws that broadly define what constitutes criminal associations, making the constitutive elements closely resemble those of conspiracy under common law jurisdictions. This is reflected in the French criminal law, where an illicit association can be formed by an agreement marked by some form of material action. In Spain, a criminal group can be constituted by a union of two persons excluding the need for a hierarchical structure. The illicit association crime under Italian law also excludes the hierarchical structure requirement. The German law goes to the extent of even making criminal the mere attempt to form a criminal organisation. In fact, some German scholars criticise German laws on what may create criminal responsibility for supporting a criminal organisation, which is seen to go as far as criminalising the mere mental attitude. This criticism reflects similar views that have been raised against the conspiracy offence. All these reforms are an indication of the continuous need to deal with potential criminal activity at the most earliest possible opportunity. The aim is to achieve this goal by use of a legal tool that can adequately deal with all forms of criminal outfits that present potential danger to the public.

If one looks at conspiracy as a group of persons cooperating for criminal purposes, it may be correct to draw an inference that the concept of punishing participation in a criminal association is equivalent to criminal responsibility that arises under conspiracy. Those persons come together in a criminal association agreement must be an important underlying factor for such cooperation. Both conspiracy and participation in criminal association offences extend criminal responsibility into the earliest preparatory stage of committing crimes and are generally justified on grounds of prevention. Whereas conspiracy under common law jurisdictions generally has the goal of preventing all crimes, prevention under the offences on criminal association is directed towards protecting the integrity and security of the state from specific dangerous groups seen to pose a threat to public order.

## 2.5 Conclusion

In conclusion, it may be observed that criminalisation of the mere act of agreeing to a commit a crime is not a general principle of law in all jurisdictions. However, there seems to be a gradual acceptance, albeit with much criticism, that in certain instances the punishment of an agreement to commit serious crimes is necessary. The concept of conspiracy as a distinct crime is predominantly accepted in common law jurisdictions. Although in Germany and Spain agreeing to commit a crime is expressly made punishable with regard to certain serious crimes, such an offence is not a distinct crime but rather a form of attempted participation. Therefore, under common law jurisdictions when two or more people agree to carry out a crime and execute it, in principle, they are liable for both conspiracy and its underlying offence. In contrast, for the aforesaid civil law jurisdictions, liability for the criminal agreement only stands if its underlying offence is not executed or even attempted. The practice in common law countries, however, shows an increase in policy and practice that discourages the prosecution of conspiracy and its complete underlying offence, save for specific cases where the interests of justice may so demand.

As an inchoate crime, conspiracy provides the state with a legal tool, which allows it to intervene early before the criminal object of the conspiracy is even attempted. Apart from its preventive relevance, it is also seen to address the inherent danger, which crimes carried out by combinations pose to the society. The judiciary in common law jurisdictions has interpreted the elements of conspiracy expansively. Thus, conspiracy has acquired certain distinct features, which make it an especially attractive tool for law enforcers in combating collective criminality. A defendant charged with conspiracy faces the possibility of his liability being extended to other criminal acts carried out in pursuance of the conspiracy by co-conspirators, although these were carried out without his knowledge, consent or participation. The expansive features of common law conspiracy theory are often criticised for violating the criminal law principle, which demands that there can be no punishment without personal fault.

To deal with the danger of group criminality, the offences on participation in a criminal association in civil law jurisdictions can be considered to perform the analogous function of the conspiracy doctrine under common law jurisdictions. Originally, the constitutive elements of such criminal organisations required that they be organised in some form of hierarchical structure to be considered punishable, but continuous reforms show that in some jurisdictions, such as France, such organisations are constituted upon merely agreeing to engage in certain criminal conduct, accompanied by some material action towards their preparation. These reforms are instigated by the need to adopt a model of criminal liability that sufficiently deals with criminal collectives. Such a model needs to create criminal responsibility for such conduct, early enough before fairly advanced plans are made, and ensure that all associated with such collectives, both at the leadership and merely supportive level, are held accountable. Towards this goal, the conspiracy concept seems to be the more flexible model.



<http://www.springer.com/978-94-6265-016-9>

The Crime of Conspiracy in International Criminal Law

Okoth, J.

2014, IX, 219 p., Hardcover

ISBN: 978-94-6265-016-9

A product of T.M.C. Asser Press