ТЕОРИЯ И ПРАКТИКА УГОЛОВНОГО ПРАВА

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ПРЕСТУПНЫЙ ЗАГОВОР В СРАВНИТЕЛЬНОМ ПРАВЕ

Аннотация. Заговор происходит, когда два или более лица договариваются о совершении преступления, где следствием правонарушения по заговору является расширенная ответственность, предусматривающая уголовное наказание за этап планирования (или договоренности о) совершения уголовного преступления. Заговор также может повлечь за собой состав преступления даже в том случае, если не началась подготовка преступного акта, хотя во многих юрисдикциях требуется действие, способствующее сговору (договоренности о совершении преступления) (так называемое *действие в осуществлении заговора*). Криминализация заговора способствует предотвращению преступлений и позволяет органам уголовного правосудия иногда осуществлять вмешательство еще до того, как фактически совершается попытка преступления или преступление завершено. Поскольку несколько лиц могут быть вовлечены в преступный бизнес, то правонарушение предусматривает ответственность за участие в сговоре о совершении преступления, что позволяет привлечь к ответственности лиц, которые организуют и планируют преступление, но сами не исполняют эти планы. Существует такое определение, как *незавершенное преступление* (преступление с усеченным составом), или действие, причастное к совершению уголовного акта даже несмотря на то, что основное преступление не завершено и никакого вреда не повлекло.

Ключевые слова: заговор, уголовное право, правовая доктрина, подготовка преступления, действие в осуществлении заговора

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CRIMINAL CONSPIRACY IN COMPARATIVE LAW

Abstract. Conspiracy occurs when two or more persons agree to commit a crime, where purpose of the conspiracy offence is extended liability by criminalizing the planning (or agreement) stage of a criminal offence. Conspiracy can create culpability even if no preparation of the offence has begun, although in many jurisdictions, an act in furtherance of the agreement is required (*overt act*). Criminalization of conspiracy serves to prevent crime and allows criminal justice agencies to intervene some time before an offence is actually attempted or completed. Since multiple persons can be involved in a criminal enterprise, the offence attaches liability to agreements to commit crime, which enables the prosecution of persons who organize and plan crime but do not themselves execute those plans. It is defined as an *inchoate crime*, or an act engaged in toward the commission of a criminal act, even though the substantive offence is not completed and no harm results.

Keywords: conspiracy, criminal law, legal doctrine, preparation for a crime, overt act

1. Introduction

The modern doctrine of conspiracy renders criminal any agreement between two or more persons to commit a crime. The idea that an organization itself is criminal could have led to punishment of the conspiracy as an entity in itself, but in fact it led to the creation of a separate crime. In every case, therefore, in which two or more individuals agree to carry out a crime, the conspirators are guilty both of the substantive crime they commit and of the additional crime of conspiracy. Even if only one party actually carries out the crime, they are equally guilty of conspiracy. It need not follow from this equality of liability under the criteria of conspiracy that multiple actors would also be equally guilty of the substantive offence, regardless of how much they contributed to the final result. To illustrate, both driver D and intending robber R would be liable for a conspiracy to commit robbery. Their liability for conspiracy would attach as soon as they made the agreement and, as required

in some legislations, one of the parties engaged in an “overt act” in furtherance of the conspiracy.

In criminal law, an overt act is the one that can be clearly proved by evidence and from which criminal intent can be inferred, as opposed to a mere intention in the mind to commit a crime. Such an act, even if innocent *per se*, can potentially be used as evidence against someone during a trial to show participation in a crime. For instance, the purchase of a mask, which can conceal identity, is generally a legal act, but may be an overt act if it is purchased in the planning of a bank robbery¹.

When it comes to a number of legislations of the Euro-Continental legal system, criminal conspiracy is one of the cases of criminalization of the crime preparation as an independent criminal offence (*delicta sui generis*), and the reasons primarily has criminal policy nature. The incrimination of the agreement itself, due to its particular social danger, can have a preventive effect on the future commission of criminal offences.

In that sense, this incrimination falls within the so-called crimes-barriers. Act of criminal offence is an agreement for the commission of a criminal offence, which implies the agreement between two or more persons to jointly commit one or more criminal offences. The agreement can be reached by oral or written bargaining, but the consent in the commission of the crimes can also be expressed „per facta concludentia“. It is a necessary presence of undoubted will for joint commission of a particular criminal offence. In terms of guilt, intent is required, which include awareness that an agreement has been reached with other individuals on the commission of a particular crime. Participants in the agreement have the capacity of joint principals². The content of intent is qualitatively determined by two components: intellectual and volitional — as segments of one entirety, in the sense of unity of the knowledge and will. In that context, the presence of awareness is a condition for the existence of will for making a decision³. On the other hand, the analyzed legislations of the Eastern European legal system, regulate criminal conspiracy in the general part of the criminal code, as a form of uncompleted criminal offence (*delicta preparata*).

The article also analyzes a „criminal association“, which is characterized by organizing a group in order to commit criminal offences. The act of organizing, which is preparatory, ie. complicity, is regulated as the commission of

¹ Fletcher G. Basic concepts of criminal law. New York — Oxford, 1998. P. 191–192.

² Lazarević Lj. Komentar Krivičnog zakonika. Beograd, 2006. P. 1002–1003.

³ Delić N. Voljainamera u srpskom krivičnom pravu // Kaznena reakcija u Srbiji. 2016. Vol. 6. P. 5.

an independent criminal offence, due to the manifested danger. If a member of the group discovers this organization before he has committed a criminal offence for the purpose of which this group was organized, the possibility of remitting from punishment is also provided⁴.

2. Criminal regulation of criminal conspiracy in comparative law

The criminal offence of criminal conspiracy requires special precision in interpretation and therefore it is desirable to explore all types of responsibility involved in the mechanism of legal regulation of social relations. Positive law is wholly „posited“ by some society or institution, though not necessarily by a legislature. But there is a contrary view, that behind positive law there is natural law, that some legal principles are valid in themselves without having to be made, and are therefore valid at all times and in all communities, that they can be discovered by reason, and moreover that they control and limit positive law. Therefore, in this part of the article, in addition to the legislation of a number of countries, common law was analyzed. What purports to be the law of the country is really so only if it is made in ways that agree with principles of natural law, no matter what the legislature or anyone else has said, if it is shown to violate natural justice⁵.

2.1. Sweden

*The Criminal code of Sweden*⁶ Chapter 23 entitled „On attempts, preparation, conspiracy and complicity“ in Article 2 defines criminal conspiracy: „In cases specifically provided for, a person is guilty of conspiracy to commit an offence. Conspiracy means that a person decides on the act in concert with another person, or that a person tries to instigate another person to commit it, or undertakes or offers to commit it“.

The function of this crime preparatory is to enable or facilitate commission of a criminal offence. They are being undertaken with the aim of creating suitable conditions for the effective and successful commission of a criminal offence. This Article also provides that „the penalty for preparation or conspiracy is set at less than the highest limit applicable to the completed offence, and may be set at less than the lowest limit. A more severe penalty than imprisonment for two years may only be set if the completed offence can re-

⁴ Jovašević D. Leksikon krivičnog prava. Beograd, 2006. P. 162–163.

⁵ Mackie J. Ethics: Inventing Right and Wrong. London, 1977. P. 233.

⁶ Criminal code of Sweden (1962), Brottsbalken, SFS1962:700

sult in imprisonment for six or more years. If the danger of the offence being completed was minor or the act was of a less serious nature in view of other circumstances, the person is not held responsible“⁷.

According to Chapter 23 Article 3 of the *Swedish Criminal Code* it is possible to withdraw from preparation, conspiracy and attempt. Responsibility for attempting, preparing or conspiring to commit a crime shall not exist if a person voluntarily, by breaking off the execution of the crime or otherwise, has prevented its completion. Even if the crime was completed, a person who has unlawfully had to do with means to that end may not be held criminally responsible for that reason if he has voluntarily prevented the criminal use of the means⁸.

Regarding criminal legislation, the importance of implementing the EU Council framework decision on combating terrorism was emphasized⁹. The main features of the new regulations were an extension of the scope of national jurisdiction in cases of terrorist offence and a general extension of the criminal provision on the preparation of crimes. The *Act on Criminal Responsibility for Terrorist Offences 2003* contains a list of certain actions that may lead to penalties under the Swedish Criminal Code or other statutes. Under special circumstances these offences are to be considered terrorist offences instead. (SWEDEN — Code — Council of Europe). Corresponding to Article 1 of the EU Framework Decision, Section 2 of the Act states that a list of offences under Section 3 including murder, kidnapping, spreading poison or a contagious substance, seizure of aircraft amount to a terrorist offence, where the act in question might seriously damage a state or an intergovernmental organization and the intent of the act is to:

- 1) seriously intimidate a population,
- 2) unduly compel a public authority or an intergovernmental organization to perform an act or abstain from acting, or
- 3) seriously destabilize or destroy fundamental political, constitutional, economic or social structures in a state or in an intergovernmental organization.

If it is not possible to prove special intent, regular criminal law in the Criminal code is applicable. Any attempt, preparation or conspiracy to commit a terrorist offence or failure to disclose such an offence is also deemed an offence under this Act (Section 4)¹⁰.

⁷ Slavković V. Rubikon zločina: pokušaj u krivičnom pravu. Novi Sad, 2019. P. 78–79.

⁸ Reed A., Bohlander M. Participation in crime: domestic and comparative Perspectives. Abingdon, 2016. P. 447.

⁹ EU Council framework decision 13 June 2002 (2002/475/JHA).

¹⁰ Whittaker D. The Terrorism Reader. London, 2012. P. 320.

EU Council Framework states that “each Member State shall take the necessary measures to ensure that the terrorist offences referred to in Section 1(1) and offences referred to in Section 4, inasmuch as they relate to terrorist offences, are punishable by custodial sentences heavier than those imposable under national law for such offences”. Section 2 prescribes imprisonment for a fixed term of at least four and at most eighteen years, or for life. If the offence is less serious, imprisonment for at least two and at most six years shall be imposed. If a higher minimum penalty for the act has been prescribed by the Penal Code, the provisions of the Code shall apply regarding the minimum penalty. (Sweden Act on Criminal Responsibility for Terrorist Offences).

2.2. Netherlands

In Dutch law, contrary to some systems of general law, criminal conspiracy is not considered as uncompleted criminal offence. Nevertheless, the agreement to commit particularly serious criminal offences is punishable, e.g. the agreement to commit criminal offence against the security of the state (Articles 96. and 103. of *Dutch Criminal Code*)¹¹. According to Part II (Serious Offences against Royal Dignity), Article 108, Section 1. “An attack on the life or liberty of the King’s consort, of the King’s heir apparent or his spouse, shall be punishable by a term of imprisonment not exceeding fifteen years or a fine of the fifth category (Section 1)”. “If the attack on the life of any of the aforementioned persons results in death or is committed with premeditation, it shall be punishable by life imprisonment or a term of imprisonment not exceeding thirty years or a fine of the fifth category (Section 2)”. Article 114b states that “Conspiracy to commit any of the serious offences defined in Article 108 with terrorist intent shall be punishable by a term of imprisonment not exceeding ten years or a fine of the fifth category”.

The Dutch conspiracy offences are substantive offences, but the gist of conspiracy is laid down in a provision in the general part of the Criminal Code. Article 80 defines conspiracy as the situation where “two or more persons have agreed to commit an offence”. In the literature, it is emphasized that it is not a definition, as the description only contains minimum requirements, but a Dutch conspiracy case will probably focus on these requirements, as Dutch criminal law has other offences to deal with subsequent crimes committed in the furtherance of the conspiracy. Dutch conspiracy consists of three elements: (1) an agreement between at least two parties, (2) to commit a substantive offence, (3) where the parties have a double intent, i.e. the agreement to commit

¹¹ *Slavković V. Rubikon zločina: pokušaj u krivičnom pravu*. Novi Sad, 2019. P. 75.

as well as the intention of committing the substantive offence. Conspiracy is a continuing offence, which is complete as soon as the agreement is made. Dutch criminal law does not require an overt act in furtherance of the conspiracy. A proposal to introduce an overt act requirement was explicitly turned down by the Minister of Justice during the parliamentary debate on the *Terrorist Offences Act 2004*¹²¹³. In September 2003, the Government proposed criminalizing conspiracy to commit the most serious terrorist offences. Some parties strongly objected to this because it would extent the scope of criminal responsibility too much. Nevertheless, the Parliament passed the bill on terrorist offences by a slim majority on June 24, 2004, and the new legislation entered into force on August 10, 2004¹⁴¹⁵.

The Dutch legislature adopted measures that criminalize conspiring to commit terrorism, meaning before any harmful acts have taken place. Moreover, *The Terrorist Offences Act* increased the severity of sentences for certain common crimes committed with a terrorist purpose¹⁶. That includes two new provisions in the general part of the Criminal code (“Book One. General provisions, Part IX. Definition of Some of the Terms and Expressions used in this Code”). Firstly, Article 83 refers to a number of penal provisions in the specific part of the Code, as well as in the special legislation and define them as terrorist offences if committed with a terrorist intent. Correspondingly, these provisions were given a higher maximum penalty when constituting a

¹² The Minister argued that such a requirement would not only fit poorly with the gravity of the offence, but would also make the offence difficult to prove (Kamerstukken I /Parliamentary Papers/ 2003–2004, 28463, C, P. 8–9.). The agreement itself is the *actus reus*, he said. The lack of an overt act requirement seems to be contrary to the basic idea underlying Dutch criminal law that criminal sentences should penalise criminal acts or behaviour (*Rutgers M. Strafbbaarstelling van voorbereidingshandelingen: een onderzoek naar de grenzen van het strafrecht*. Arnhem, 1992. P. 45–46). Even so, the Minister opposed the view that conspiracy is a “thought” crime where mere ideas are penalised. He argued that a conspiracy agreement is “reprehensible and dangerous conduct”. Yet, he admitted that the emphasis is more on the idea than on its result (*Pelser C. Preparations to commit a crime — The Dutch approach to inchoate offences // Utrecht Law Review*. 2008. Vol. 3. P. 76–77).

¹³ *Pelser C. Preparations to commit a crime — The Dutch approach to inchoate offences // Utrecht Law Review*. 2008. Vol. 3. P. 76.

¹⁴ *Wet terroristische misdrijven (The Terrorist Offences Act)*, Stb. 2004, 373.

¹⁵ *Erling J.H., Ingvald B. Fighting Terrorism through Multilevel Criminal Legislation: Security Council Resolution 1373, the EU Framework Decision on Combating Terrorism and their Implementation in Nordic, Dutch and German Criminal Law*. Boston, 2009. P. 89.

¹⁶ *Van Sliedregt E. European approaches to fighting terrorism // Duke Journal of Comparative and International Law*. 2009. Vol. 20. P. 419.

terrorist offence. Secondly, new Article 83a contains a definition of “terrorist intent”. This term is used in Article 176a to increase the severity of sentences for commission of some criminal offences. The same expression can also be found in Article 176b: “Conspiracy to commit with *terrorist intent* the serious offences defined in sections 157, 161(2)° and (3°), 161bis(3°) and (4°), 161quater, 161 sexies(3°) and (4°), 162, 164, 166, 168, 170, 172, 173a and 174 shall be punishable by a term of imprisonment not exceeding ten years or a fine of the fifth category”. The Act included a new provision on participation and directing of terrorist organizations (Article 140a), providing a higher maximum penalty for crimes relating to a terrorist group, than to other criminal organizations (Article 140)¹⁷.

The Terrorist Offences Act also expanded investigatory and prosecutorial powers by lowering the threshold that triggers special investigative powers: authorities may investigate or prosecute suspects if they have “indications” (of a terrorist crime) instead of a “reasonable suspicion” as is required for ordinary, non-terrorism crimes. Moreover, the Act permits pre-trial detention for terrorism charges on the basis of an “ordinary” suspicion instead of the more stringent requirement of “incriminating evidence” as is required for ordinary, non-terrorism crimes¹⁸.

2.3. Germany

The concept of criminal conspiracy under Swedish law does not have a counterpart in German theory, because German law does not recognize an inchoate offence category of conspiracy. Nevertheless, the need to cover certain preparatory acts and other stages of criminal behaviour has led to a similar concept, which is, however, more closely modeled on the general concept of attempts.

According to Paragraph 30, Absatz 1 of the German criminal code¹⁹ („Attempted complicity” — „Versuch der Beteiligung“) „A person who attempts to induce another to commit a felony or abet another to commit a fel-

¹⁷ Erling J.H., Ingvild B. Fighting Terrorism through Multilevel Criminal Legislation: Security Council Resolution 1373, the EU Framework Decision on Combating Terrorism and their Implementation in Nordic, Dutch and German Criminal Law. Boston, 2009. P. 88–89.

¹⁸ Van Sliedregt E. European approaches to fighting terrorism // Duke Journal of Comparative and International Law. 2009. Vol. 20. P. 419.

¹⁹ Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 1 of the Law of 24 September 2013, Federal Law Gazette I p. 3671 and with the text of Article 6(18) of the Law of 10 October 2013, Federal Law Gazette I p 3799.

ony shall be liable according to the provisions governing attempted felonies²⁰. The sentence shall be mitigated pursuant to Paragraph 49 (Absatz 1). Paragraph 23 (Absatz 3) shall apply *mutatis mutandis*.

Absatz 2 of Paragraph 30 provides that „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“.

According to Paragraph 31 („Withdrawal from attempted complicity” — „Rücktritt vom Versuch der Beteiligung”) „A person shall not be liable under Paragraph 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 declared his willingness to commit a felony, gives up his plan;

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

We may conclude that the stated concept has little in common with the criminal conspiracy and much more similarities to the institutes of complicity, criminal attempt and withdrawal²¹. Incitement and conspiracy are closely related. Paragraph 30 (Absatz 1) refer to inducement regarding an offence, which, itself, for some reason remains unperformed. Concerning Paragraph 30 (Absatz 2) conspiracy is an agreement to commit an offence, resulting in concurrence of intent to act in concert with respect to some ulterior criminal offence. It is immaterial whether the conspirators may repent and stop, or may have no opportunity, or may be prevented. Nevertheless, the crime is complete: it was completed when they agreed²².

On the other hand, German law recognizes analogous criminal offence of „Forming criminal organizations“, i.e. organization aimed at committing crimes („Bildung krimineller Vereinigungen”)²³. According to Absatz 1. Of Paragraph 129 „Whosoever forms an organization the aims or activities of which are directed at the commission of offences or whosoever participates in such an organization as a member, recruits members or supporters for it

²⁰ The criminal law of Germany, originally codified in 1871, in its present form is mainly based on a major reform in the 1970s and several less fundamental, but still major subsequent reforms.

²¹ *Bohlander M.* Principles of German Criminal Law. Oxford and Portland, 2009. P. 175.

²² *Diening J.A.* On Reasonable Liability: A Comparison of Dutch and Canadian Law regarding the limits of criminal liability. Arnhem, 1982. P. 97.

²³ *Fletcher G.* Basic concepts of criminal law. New York — Oxford, 1998. P. 204.

or supports it, shall be liable to imprisonment not exceeding five years or a fine“. Absatz 2 provides that Absatz 1 will not apply:

1) if the organization is a political party which the Federal Constitutional Court has not declared to be unconstitutional;

2) if the commission of offences is of merely minor significance for the objectives or activities;

3) to the extent that the objectives or activities of the organization relate to offences under Articles 84 to 87.

The protected legal good is public order. However, considering that criminal organization is more dangerous than the gang, in literature is stressed that it creates a greater danger to important protected legal goods, due to its internal dynamism. Paragraph 129 is basically concentrated on politically motivated criminal organizations. Nevertheless, it is noted that investigation and convictions in this sphere vary rarely²⁴.

About the hallmarks of the structure of criminal offence

1. Organization.

It is an organizationally expressed and calculated, for a certain period, the agreement of at least three persons, who strive for common aims, in conditions of subjugating the will of each member to the will of organization and who are in such interactive relations to share the feeling of a unique alliance²⁵.

2. Organizationality of the agreement. This hallmark is very important, because it makes one group an organization; i.e. gives it a special organizationality. According to prevailing opinion, based on judicial practice, that hallmark must be expressed in coordination with the performed acts necessary to achieve the aim, partly in the presence of unique rules for forming a will, which could be based on certain hierarchy, majority decision making, but simply authoritative imposition of the will of one „authority“ (leader) is not enough.

3. The criminogenicity of the organization. The organization is considered criminal if, in accordance with leader's will, it strives to the commission of criminal offences or commit them²⁶.

4. Acts.

There are three alternatives in Absatz 1 of Paragraph 129, whereby it is considered that some of them create a material, and others a formal criminal offence. In this case, the alternatives contain terms such as:

a) „forming“, which can be defined as creating of a new organization,

²⁴ Tröndle H., Fischer T. Strafgesetzbuch und Nebengesetze. München, 2003. P. 843.

²⁵ Lenckner T. Festschrift zum 70 Geburtstag. München, 1998. P. 1202.

²⁶ Joecks W. Steuerstrafrecht. Köln, 2003. P. 231.

b) „participate as a member of an organization“, which implies consent to the aims of the organization, expressed through active acts directed at supporting the development, preservations and realization of the criminal activity of society. If it is just joining an organization or a formal membership, that is not enough.

c) „recruiting members of an organization or support their activities“: it is considered insufficient only to induce so-called supporters²⁷.

2.4. France

Book IV (Felonies and misdemeanors against the nation, the state and the public piece) Chapter II, Section 1. of the Criminal code of France provides Article 412-1, called „Attack“ (*l'attentat*), which consists of 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. An attack is punished by thirty years criminal detention and a fine of € 450,000, which can be increased to life criminal detention and a fine of € 750,000 where the attack was committed by a person holding public authority.

According to Article 412-2, „Plotting“ (*le complot*) 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. It is punished by ten years imprisonment and a fine of € 150,000, which can be increased to twenty years criminal detention and a fine of € 300,000 where the offence was committed by a person holding public authority.

Criminal offence has been called „Plotting“, to preserve crispness of expression, but has little in common with the general concept of conspiracy.

When the potential principal offender has started to carry out the principal offence but has voluntarily chosen to desist and thus avoided liability, the accomplices will also avoid liability even though they were not party to this voluntary decision. The case law has partly got round this potential gap in criminal liability by imposing instead liability for „conspiracy“. In one case²⁸ a man was found in possession of notes concerning the movements of a woman described at the trial as „blond and attractive“. He admitted to the police that he had been contacted by a third party who had been abandoned by the woman and wanted to get revenge against her. The third party had paid him money to attack her and driven him to the place where he was to carry out the attack. He

²⁷ Жалинский А.Е. Современное немецкое уголовное право. М., 2006. С. 529–531.

²⁸ Crim., 30 avril 1996, B., no. 176, R.S.C., 1977.100 et obs. B. Boulloc, 113 et obs. J.P. DelmasSaint-Hilaire.

had taken the money and spent it, but had subsequently changed his mind and not carried out the attack. The two men were both convicted of conspiracy.

There are two inchoate offences in French criminal law:

- 1) attempt (*la tentative*),
- 2) participation in a criminal association (*la participation à une association de malfaiteurs*), which French academics rather treat as an ordinary autonomous offence²⁹.

According to Article 450-1, 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 misdemeanors punished by at least five years imprisonment. Where the offences contemplated are felonies or misdemeanors punished by ten years imprisonment, the participation in a criminal association is punished by ten years imprisonment and a fine of € 50,000. Where the offences contemplated are misdemeanors 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.

According to Article 450-2, „Any person who has participated in the group or the conspiracy defined by article 450-1 is exempted from punishment if, before any prosecution is instituted, he discloses the existence of the group or conspiracy to the competent authorities and enables the other participants to be identified“³⁰.

Under the original drafting of the 1810 French Criminal code, participation in a criminal association only arose where there was a clear hierarchical structure to the criminal organization³¹, of a type associated with the Italian Mafia, but this legislative practice proved ineffective. The Code was therefore amended to cover more loosely organized groups.

In order to establish the existence of a „participation in a criminal association“ three elements must exist:

a) Conspiracy

The legislation states that either a group must have been formed or any conspiracy established between wrongdoers. In fact, the emphasis of the case law is on the existence of the conspiracy, which can be very informal, and the offence will be committed where one individual simply recruits another to assist him in the commission of an offence. The existence of this conspiracy must be supported by physical evidence, in order to avoid a potential

²⁹ Elliott C. French Criminal Law. London and New York, 2011. P. 86, 95.

³⁰ Головки Л.В., Крылова Н.Е. Уголовный кодекс Франции. СПб., 2011. С. 466.

³¹ Articles 265–268 of the 1810 French Criminal Code.

miscarriage of justice. This evidence could consist of, for example, a vehicle containing weapons, balaclavas, surgical gloves, registration documents and documents relating to the reconnoitering of the premises or the fact that the defendants purchased weapons and explosives³².

b) Aim to prepare certain offences,

In order for there to be a conspiracy, the defendants must have reached a conspiracy relating to the preparation of one or more felonies (*lecrime*) or misdemeanors (*ledélit*)³³. It is not sufficient that the group simply shares the same ideas, they must have resolved to act together in a criminal enterprise. In one case³⁴, the defendants had driven to the proposed scene of the crime equipped with weapons and then decided against carrying out the offence due to the high risks involved and returned to their car. The offence of conspiracy had been committed.

c) Intention

Each participant in the conspiracy can only be liable if he joined the criminal group knowingly and with the intention to provide the other members of the group with effective help in the pursuit of the criminal enterprise. The members of the group do not need to intend to commit a specific crime, though a fairly precise plan is required³⁵.

2.5. Criminal conspiracy as a particular form of preparatory acts in the legislation of the Eastern European legal system

According to Article 16 Section 1 of the Criminal code of Poland³⁶, „preparation only occurs when the perpetrator, in order to commit a prohibited act, undertakes activities aimed at creating the conditions for effecting an act leading directly to commission of the prohibited act, particularly when, for this purpose, he enters into an arrangement with another person, acquires or makes ready the means, gathers information or concludes a plan of action“. Within the preparatory activities, as activities that create the conditions for the commission of a criminal offence, their special forms are single out, such as: criminal conspiracy, acquiring or making ready the means, gathering information or concluding a plan of action“. Mentioned forms, except for acquiring or making ready the means, according to the Criminal

³² Crim. 15 déc. 1993, *Dr. pén.* 1994, comm. 131.

³³ Penalties for felonies (*Les crimes*) imply ten years of criminal imprisonment or criminal detention, as a minimum period. The penalties for the commission of misdemeanors (*Les délits*) imply a maximum of ten years imprisonment.

³⁴ Crim. 22 janv. 1986: *B.* no. 29.

³⁵ *Elliott C.* French Criminal Law. London and New York, 2011. P. 101–103.

³⁶ Criminal Code of Poland (1997), nr 88. 553.

code of Belarus³⁷ (Article 13.) fall under the concept of „other intentional creation of conditions to commit a crime“.

The Criminal Code of Russian Federation (Article 30) provides special forms of crime preparation, such as the finding of accomplices for a crime and the conspiracy to commit a crime, while the Criminal Code of the Ukraine (Article 14) provides removing of obstacles to an offense. According to the Criminal Code of Russian Federation³⁸ (Article 30 section 1) „The looking for, manufacturing, or adapting by a person of means or instruments for committing a crime, the finding of accomplices for a crime, the conspiracy to commit a crime, or any other intentional creation of conditions to commit a crime shall be deemed preparations for a crime, if the crime has not been completed owing to circumstances outside the control of this person“. Section 2 provides that „criminal liability shall ensue for preparations to commit only grave or especially grave crime“.

According to Article 14 of the Criminal Code of the Ukraine³⁹ „The preparation for crime shall mean the looking out or adapting means and tools, or looking for accomplices to, or conspiring for, an offense, removing of obstacles to an offense, or otherwise intended conditioning of an offense“. This code contains a broader version of crime preparation than other legislations of the Eastern European legal system, because they include looking for accomplices, criminal conspiracy, removing of obstacles or otherwise intended conditioning of an offense“⁴⁰.

*The Criminal Code of Serbia*⁴¹ criminalizes the crime preparation as an independent criminal offence in Article 345 (“Conspiracy to commit a crime”). According to Section 1, “whoever conspires with another to commit a particular offence punishable by imprisonment for five or more years, shall be punished by fine or imprisonment up to one year. If the agreement from Section 1 of this Article relates to the commission of a certain criminal offence punishable by life imprisonment, the perpetrator will be sentenced for a term of at least three months and at most three years”. (Krivičnizakonik).

The subsidiary character of this offence is expressed in the following case. If a certain criminal offence, punishable by imprisonment of five or more years, explicitly criminalizes criminal conspiracy or crime preparatory, incrimination

³⁷ Criminal Code of Belarus, (1991), No 275-Z

³⁸ Criminal Code of Russian Federation (1996), NO. 63-FZ.

³⁹ Criminal Code of the Ukraine (2001), No 25–26.

⁴⁰ *Slavković V.* Rubikon zločina: pokušaj u krivičnom pravu. Novi Sad, 2019. P. 89–96.

⁴¹ “Sl. glasnik RS”, br. 85/2005, 88/2005 — ispr., 107/2005 — ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019.

from Article 345 will not be applied if a more severe punishment is foreseen for the preparation of such offence. Thus, for example, the conspirators of criminal offence of sabotage (Article 314) shall not be held liable under this Article, but under Article 320, which prescribes that the perpetrator shall be punished by imprisonment for one to five years for preparing this offence⁴².

2.6. Criminal conspiracy in Anglo-American law

The doctrine of Anglo-American criminal law specifically analyzes three legal concepts related to uncompleted criminal activity: criminal attempt, criminal conspiracy and incitement. Their main characteristic is that they constitute independent criminal offences merged under the general name (*inchoate crime*)⁴³.

Criminal conspiracy takes one of two forms. *Statutory* conspiracy occurs when two or more people agree on a course of conduct which amounts to a criminal offence. *Common law* conspiracy differs from statutory conspiracy in allowing punishment where the course of conduct agreed will not necessarily amount to a criminal offence but will amount to an act involving:

- (a) the corruption of public morals or outraging public decency, or
- (b) fraud.

In both forms it is not necessary that each conspirator has agreed to commit the offence so long as the offence will be committed by at least one of the parties to the agreement⁴⁴. According to Lord Denman, “the indictment must charge a conspiracy to do an unlawful act, or a lawful act by unlawful means”⁴⁵.

2.6.1. Statutory conspiracy

In England and Wales, a statutory conspiracy is defined by Section 1, Subsection 1⁴⁶ of the *Criminal Law Act 1977*⁴⁷.

If a person agrees with any other person 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

⁴² Lazarević Lj. Komentar Krivičnog zakonika. Beograd, 2006. P. 1002–1004.

⁴³ Есаков Г.А., Крылова Н. Е., Серебrenникова А.В. Уголовное право зарубежных стран. М., 2009. С. 214–215.

⁴⁴ Wilson W. Criminal law. Harlo, 2017. P. 532.

⁴⁵ R. v. Jones, 4 B. & Ad. 345, 349 (1832).

⁴⁶ S. 1(1) substituted (with saving) by Criminal Attempts Act 1981 (c. 47, SIF 39:1), s. 5(1)

⁴⁷ Criminal Law Act (1977), c. 45.

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

According to Subsection 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 Section 1 Subsection 1, unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place”. (Legislation.gov.uk).

The 1977 Act abolished common law conspiracy (with a few exceptions, including conspiracy to defraud) and restored the requirement that the object of the conspiracy must be the commission of a criminal offence by one or more of the parties to the criminal agreement⁴⁸. Analyzing Section 1., D.C. Ormerod has defined the *mens rea*: Participants in the conspiracy have to be proved to have a direct or oblique intention, or knowledge (including “willful blindness”⁴⁹), that the circumstances will be such that when they perform their agreed conduct in accordance with their intentions, it will necessarily involve the commission of a criminal offence. It might seem implicit in Section 1 that a conspirator must have an intention:

- (a) that the agreement shall be carried out, and
- (b) that the substantive offence shall be committed.

An intention that the substantive offence shall be committed is not central to liability for conspiracy. So, in *R v Anderson (1986)*⁵⁰ a person who agreed to supply tools designed to cut through prison bars was held properly convicted of conspiracy to effect an escape. His argument that he had no other intention than collecting his fee was rejected by the House of Lords, who held that it was not necessary to show that each party to the agreement intended the agreement to be carried out⁵¹.

⁴⁸ *Jarvis P., Bisgrove M.* (2014). The Use and Abuse of Conspiracy // Criminal Law Review. 2014. Vol. 4. P. 261.

⁴⁹ When it comes to “willful blindness”, defendant knows that there is a risk that a prohibited circumstance exists, but refrains from checking it. An example is *Westminster City Council v Croyalgrange Ltd (1986)* where The House of Lords held that: “when guilty of a defendant is required to be proved, the court always can to base it on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from enquiry, because he suspected the truth, but did not want to have his suspicion confirmed” (Slavković, 2017: 14).

⁵⁰ (1986) AC27.

⁵¹ *Wilson W.* Criminal law. Harlo, 2017. P. 542–544.

Section 1 of the Act does not require any intention on the part of defendant that the offence be committed, unlike the *common law*. Rather, it is enough that defendant make him party to an agreement for *course of conduct* the pursuit of which will necessarily give rise to the offence in question. In substance, it is sufficient that defendant knows that this course of conduct will give rise to the offence. Were it not for the presumption of *mens rea*, it could even be argued that this provision does not create an offence of full *mens rea* — defendant being implicated not because he apprehends that this course of conduct will generate the offences in question, but simply because he agrees to the perpetration of this conduct, without more. That the provision does not require that defendant act with actual intent, or purpose, in relation to the criminal object was confirmed by the House of Lords in *R v Anderson*. Lord Bridge commented: an essential element in the crime of conspiring to commit a specific offence or offences under Section 1 (1) is that accused should agree that a course of conduct be pursued which he knows must involve the commission by one or more the parties to the agreement of that offence or those offences. But, beyond the mere fact of agreement, the necessary *mens rea* of the crime is established 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. Nothing less will suffice; nothing more is required. This legislation requires no more than that the criminal objectives of the agreement be foreseen as necessary concomitant of the conduct agrees to be committed⁵².

An agreement is the objective element (*actus reus*) of criminal conspiracy. The agreement must be established between two or more parties and may be express or implied. In many cases, since conspiracies tend to be hatched in private, the agreement can only be inferred from the conduct of the defendants. Proof of conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them⁵³. The *actus reus* does not differ from solution regulated by *common law* — conspiracy to commit a crime requires the formation of agreement, and no more: overt acts done in pursuance of the agreement are not technically part of the crime of conspiracy⁵⁴.

Where no overt act has taken place, a major problem will be adducing sufficient evidence both of the fact of agreement and of its scope. Although it is not necessary for the prosecution to show that all the details had been

⁵² Gillies P. The Law of Criminal Conspiracy. Sydney, 1990. P. 30–31.

⁵³ Wilson W. Criminal law. Harlo, 2017. P. 535

⁵⁴ Gillies P. The Law of Criminal Conspiracy. P. 39.

agreed, it will be necessary to show that an agreement to effect a criminal purpose had been reached as opposed to being merely known, discussed or fantasized about. So in *Goddard and Fallick*⁵⁵ a conviction for conspiracy to rape a child under 13, was quashed as, although the prosecution were able to adduce evidence that the matter had been discussed, it was not able to prove that it was the defendants settled intention to commit the rape⁵⁶.

Regarding criminal legislation of the USA, 18. *United States Code*⁵⁷, (Article 371) for conspiracy to commit a substantive offense requires proof that one of the conspirators committed an *overt act* in furtherance of the conspiracy⁵⁸. According to this provision “If two or more persons conspire either to commit any offense 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 of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor” (U.S. Code: Title 18. CRIMES AND CRIMINAL PROCEDURE). In a number of states in USA, some overt act must be shown before a conspiracy is complete. More than a few federal statutes, however, have a conspiracy component that does not include an explicit *overt act* requirement. (Federal Conspiracy Law: A Brief Overview).

2.6.2. Common law conspiracy

The features of certain criminal offences, which originate from the old common law system, are not determined by law, but have been shaped by the practice in the long-term process of judicial decision making⁵⁹. Conspiracy, being an offence at common law requires that defendant must act with criminal *mens rea*. This involves that not only must defendant have agreed upon the effectuation of the criminal or other unlawful purpose, but also that de-

⁵⁵ *R v Goddard & Fallick* (2012) EWCA Crim 1756 CA.

⁵⁶ *Wilson W.* Criminal law. Harlo, 2017. P. 535.

⁵⁷ United States Code(OCLC: 2368380) is the official codification of the general and permanent federal statutes of the United States. Title 18 (*Crimes and Criminal Procedure*) covers the field of criminal offences and criminal procedure.

⁵⁸ *United States v. Ngige*, 780 F.3d 497, 503 (1st Cir. 2015); *United States v. Salahuddin*, 765 F.3d 329, 338 (3d Cir. 2014); *United States v. Mathis*, 738 F.3d 719, 735 (6th Cir. 2014).

⁵⁹ *Đokić I.* O pojmu umušljaja u engleskom krivičnom pravu // *Pravni život*. 2014. Vol. 9. P. 266.

fendant and the least one confederate must appreciate that this purpose is a criminal or unlawful one, i.e. that it is of a factual character required by the definition of the substantive crime or by the definition of other unlawful purpose. This means in effect that the parties must contemplate that the act will be done in the circumstances disclosing its criminal or otherwise unlawful nature. In these terms two elements of conspiratorial *mens rea* are clearly discernible: (1) The primary element, i.e. the intention to agree upon the commission of the physical act constituting the criminal or other unlawful object of the crime; (2) the secondary element of *mens rea* which is concerned with the degree of knowledge the conspirators must have as to the precise nature of this contemplated act, which knowledge will generally be concerned with the material circumstances surrounding the prospective commission of this act and from which its criminal or other unlawful nature may be inferred⁶⁰.

In his *Pleas of the Crown*, published in 1716 concerning the crime of conspiracy W. Hawkins said: "There can be no doubt, but that all conspiracies whatsoever, wrongfully to prejudice a third person, are highly criminal at *common law*"⁶¹. What did Hawkins mean by "wrongfully"? If he meant by criminal means it was exceedingly unfortunate that he did not choose terms confined to such a meaning; if he meant by tortuous or merely immoral means, the authorities which he cites in support of his statement by no means sustain him, and almost his only support is to be found in the loose dicta of seventeenth-century courts and in the arguments of counsel. Nevertheless, his erroneous statement lived on, partly because of the acknowledged authority of the writer, partly because of the seventeenth and eighteenth century confusion of law and morals, partly because of the very ambiguity of the statement which rendered it the less liable to be challenged and the more difficult to disprove.

The doctrine that a combination to commit a noncriminal act may constitute a criminal conspiracy was discussed in judicial practice. In the case of *Lindsay and Company v. Montana Federation of Labor*⁶², the court squarely rejects such a doctrine in these words: "There can be found running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes by some sort of legerdemain criminal when done by two or more persons acting in concert, and this upon the theory that the concerted action amounts to a conspiracy. But with this doctrine we do not agree. If the act done is lawful, the combination of several persons

⁶⁰ Gillies P. The Law of Criminal Conspiracy. Sydney, 1990. P. 20.

⁶¹ Hawkins W. Treatise of the Pleas of the Crown. Vol. I. of criminal offences. London, 1824. P. 446.

⁶² 37 Mont. 264, 96 Pac. 127 (1908).

to commit it does not render it unlawful. In other words, the mere combination of action is not an element which gives character to the act”.

In that sense, the doctrine seems so manifestly founded upon misconceptions and erroneous applications of ambiguous statements that it is difficult to support. But many wholesome and salutary doctrines of the law have sprung up through misunderstandings of past decisions or without any historical basis whatsoever. To show the historical illegitimacy of a legal doctrine does not disprove its present right of existence or its usefulness.

An analytical examination of the doctrine raises new difficulties. If the object sought by a combination is in no way criminal, and if the means utilized are in no way criminal, just wherein lies any criminality? The mere act of combining can surely not be criminal, where no criminal end is sought nor criminal means used. It is no crime to combine to form a social club, a church, a political association.

As was said by S. Talfourd, in discussing the crime of conspiracy: “It is not easy to understand on what principle conspiracies have been held indictable where neither the end nor the means are, in themselves, regarded by the law as criminal, however reprehensible in point of morals. Mere concert is not in itself a crime. If, then, there be no indictable offence in the object, means or concert, in what part of the conduct of the conspirators is the offence to be found? Can several circumstances, each perfectly lawful, make up an unlawful act? And yet such is the general language held on this subject, that at one time the immorality of the object is relied on; at another, the evidence of the means; while, at all times, the concert is stated to be the essence of the charge; and yet that concert, independent of an illegal object or illegal means, is admitted to be blameless.”

To convict a criminal defendant, it is not necessary to prove that he was ever physically present; it is sufficient to show that the anti-social effect of his acts, committed elsewhere with *mens rea*, operated within the state. If criminality then consists, not in mere acts, but in the anti-social effect of acts, must not criminality be measured by the nature of the effect, and not by the character or number of those whose acts produce that effect? If the criminal law permits judges to determine criminality by their own individual standards and prejudices, the society will face the anxious fears and troubled insecurity. If a legal doctrine is to be tested functionally according to the degree of security which it affords to the individual and social interests which the law was created to protect, any doctrine which tends to rob the law of its predictability, therefore, must be accounted pernicious⁶³.

⁶³ Sayre F.B. Criminal Conspiracy // Harvard Law Review & 1922. Vol. 4. P. 402–413.

3. Conclusion

Criminal law imposes the need for an acceptable model of solution that argumentatively and inconspicuously achieves the social control provided by the law without violating publicly acceptable individual freedoms. Regarding criminal conspiracy, in analyzed criminal codes this intention is manifested in two various ways. When it comes to a number of legislations of the Euro-Continental legal system, criminal conspiracy is one of the cases of criminalization of the crime preparation as an independent criminal offence (*delicta sui generis*).

Sweden prescribes criminal conspiracy in Chapter 23 of the general part of the criminal code, which regulates the stages in the commission of crime. In Dutch law, contrary to some systems of general law, criminal conspiracy is not considered as uncompleted criminal offence. Nevertheless, the agreement to commit particularly serious criminal offences is punishable. The Criminal Code of the Netherlands in Article 80 prescribes the general definition of a criminal conspiracy, as the situation where “two or more persons have agreed to commit an offence”. Dutch criminal law does not require an overt act in furtherance of the conspiracy, so as the German criminal code, which states that “A person who agrees with another to commit or abet the commission of a felony shall be liable (Absatz 2. of Paragraph 30.). On the other hand, the French Criminal Code prescribes criminal offence entitled “Participation in a criminal association” (Article 450-1), where the existence of this conspiracy must be marked by one or more material actions. Each participant in the conspiracy can only be liable if he joined the criminal group knowingly and with the intention to provide the other members of the group with effective help in the pursuit of the criminal enterprise. Concerning the Anglo-American law, the mental element of a crime is different in *Criminal Law Act 1977*, which does not require any intention on the part of defendant that the offence be committed. Rather, it is enough that defendant make him party to an agreement for *course of conduct* the pursuit of which will necessarily give rise to the offence in question. The *actus reus* does not differ from solution regulated by *common law* — conspiracy to commit a crime requires the formation of agreement, and no more: overt acts done in pursuance of the agreement are not technically part of the crime of conspiracy. Regarding the criminal legislation of the USA, *18. United States Code*, (Article 371) for conspiracy to commit a substantive offense requires proof that one of the conspirators committed an *overt act* in furtherance of the conspiracy.

The analyzed legislations of the Eastern European legal system mostly regulate criminal conspiracy in the general part of the criminal code, as a form of

uncompleted criminal offence (*delicta preparata*). Every of these legislations contain a definition of crime preparatory, which necessary includes some material acts such as: acquiring or making ready the means, gathering information or concluding a plan of action, removing of obstacles to an offense etc.

By analyzing social life, we may be able to discover, and to understand intuitively, how and why any particular event came about; that we may clearly understand its *causes and effects* — the forces which occasioned it and its influence on other events. Yet we may nevertheless find that we are unable to formulate *general laws* which would serve as a description, in general terms, of such causal links⁶⁴. If a legal doctrine is to be tested functionally according to the degree of security which it affords to the individual and social interests which the law was created to protect, any doctrine which tends to rob the law of its predictability, therefore, must be accounted pernicious.

So urteilt der Verstand; denn das Naturgesetz liegt allen seinen gewöhnlichsten, selbst den Erfahrungsurteilen immer zum Grunde. Er hat es also jederzeit bei der Hand, nur daß er in Fällen, wo die Kausalität aus Freiheit beurteilt werden soll, jenes Naturgesetz bloß zum Typus eines Gesetzes der Freiheitmacht⁶⁵.

Immanuel Kant

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⁶⁴ Popper K. Beda istoricizma. Beograd, 2009. P. 23—25.

⁶⁵ «Так думает рассудок, ведь закон природы лежит в основе всех его самых обычных суждений, даже суждений опыта. Этот закон, следовательно, всегда в его распоряжении; только в тех случаях, где он должен судить о причинности из свободы, он делает этот закон природы лишь типом закона свободы».

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ДЛЯ ЦИТИРОВАНИЯ:

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