INCHOATE OFFENCES: A CRITICAL ANALYSIS

A DISSERTATION SUBMITTED WITHIN THE PARTIAL FULFILLMENT FOR THE DEGREE OF MASTER OF LAWS

SUBMITTED BY

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LIST OF CASES

22. *United States* v. *Ragland*, 375 F.2d 471 (2d Cir. 1967).

23. *Kelley* v. *United States*, 364 F.2d 911 (10th Cir. 1996).

24. *Kastigar* v. *United States*, 406 U.S 441 (1972).

25. *R* v. *West* (1948) 1 K.B, 709,720.

26. *R* v. *Boulton* (1871) 12 Cox, 87, 93

27. *State* v. *Kudangirana*1976(3) SA 565

28. *R* v. *Osborn* (1919) 84 J.I 63.

29. *Foster* v. *Commonwealth*, 96 Va. 306, 31 S.E. 503 (1898).

30. *Booth* v *State of Oklahoma* (1964) 398 P.2d 863. (Court of Cri. App., Oklahoma).

31. *Munah Binte Ali* v *Public Prosecutor*1958) 24 MLJ 159.

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CHAPTER-I

INTRODUCTION

All laws including the criminal law is designed as a mechanism for achieving 'social control' by regulating human conduct but the role of criminal law in attaining this objective seems to be much more imperative than other existing laws. What criminal law seeks to prevent is the resulted harm to the society at large or to any individual. However, for the purpose which criminal law performs, results are neither always necessary nor sufficient for blameworthiness or punishability. Nevertheless the question still lie here is what type of action is necessary for any person to be said to have acted culpably. This problem of criminal law has been traditionally addressed within the dubious requirement of *actus reus* and *mens rea* element, to make any person's act indictable.

For any crime, elements of *actus reus* and *mens rea* are always required, but there may be crimes even where whole of the intended *actus reus* has not been consummated. A person who starts a criminal path but who is checked before he accomplishes his purpose may commit what is in it an offence conveniently called an 'inchoate crime'. The word "inchoate crime", though not much used in ordinary discourse, means 'just begun', or 'un-developed'. An attempt fails, a conspiracy comes to nothing, and words of incitements are ignored- in all these instances, there may be liability for committing inchoate crime. However, the reasons for punishing inchoate offenses have been well summarized. Inchoate offences, such as attempt, conspiracy, and solicitation offer a legal basis for police intervention to prevent consummation of a crime. It provides a means to isolate those who have demonstrated their general disposition to commit crime, and promote equality of treatment between those whose conduct accomplishes criminal results and those whose similar conduct fails because of a fortuity. More importantly, there appears to be sound reasons for including inchoate offences within the criminal law on the desert ground that the threshold of culpability can be crossed. But, howsoever strong the argument may be to defend inchoate crime as a preventive means of criminal law the discrepancies involved in the very nature and the strange outcomes by the application of inchoate crimes mandates an extensive scrutiny.

The rationale behind criminalizing inchoate crimes has proved to be a much preferred area for the criminal law experts, as the issues attached to inchoate crimes cannot be easily resolved. Issues like over-extending the reach of criminal law, impossibility of crime intended, status of *mens rea* in inchoate crimes, requirement of substantial *actus reus* in inchoate crimes etc. still exists as an unclear hurdle for them. Further issues of thin line between preparation and attempt, lack of precise definition of attempt, chance of abusing conspiracy charges by the prosecution etc. though have been in existence since the time immemorial but so far no feasible solution has been made out. Thus, this relationship between an inchoate crime and completed crimes proves to be difficult one at times.

A statute may forbid an attempt to commit a specified crime. An attempt to commit a crime, when punishable, is an offense that is separate and distinct from the crime that was attempted. To qualify as a substantial step, something more than mere preparation should be done. Preparation alone, or a mere statement of the person's intent to commit a crime, is not sufficient to constitute an attempt. However, the step should be lesser than the actual commission of the crime. To establish attempt, the alleged conduct must support the person's criminal intention to commit the crime. The person must have engaged in some activity that is a substantial portion of the crime. An attempt must be an action on the part of the person that comes very close to the accomplishment of the desired results. A person who fails to commit the attempted crime is also regarded to have attempted to commit the crime.[1]Intent is an important element when determining whether an attempt to commit a crime has occurred. The person making the attempt should have the intention to complete the acts that constitutes the crime. It is the intent to commit the crime, not the possibility of success that determines whether the person's act or omission constitutes the crime of attempt. A person can be convicted for an attempt to commit a crime only when such person has a direct and specific intent. Therefore, acts done as a result of negligence or recklessness cannot be considered as an attempt to commit the crime as there is no intention to commit the crime.

Review of Literature

[1] Winfield, History Of Conspiracy And Abuse Of Legal Procedure.

BOOKS

1. K. D. Gaur, *Criminal Law: Cases and Material* (2005).

Apart from the commission of offence at the spur of the moment there are four stages of the actual commission of any crime. The *first stage* is the stage of contemplation or forming intention of the commission of the offence. However, mere intention to commit a crime is not punishable. As Brian C.J also observed that "the thought of a man is not tribal for the devil himself knoweth not the thought of a man." But when such intent is expressed in words and can be inferred from his acts, the person can be held criminally responsible. The second stage is of *stage of preparation,* which consists in arranging means or measures necessary for the commission of a crime. Generally, preparation to commit an offence is not punishable. The simple reason behind this is the impossibility to prove the object of preparation. But exceptionally, there are cases where mere preparation to commit offence is punishable because sometimes such preparations preclude the possibility of an innocent offence. The *third stage* is of attempt to commit the offence. An attempt is a direct movement towards the commission of an offence after the preparation has been made. The fourth and *final stage* is the actual commission of the intended crime. When the attempt is successful the crime is said to have been accomplished.

2. PSA Pillai, *Criminal Law* (2000)

To constitute a crime two elements are always necessary, namely, *mens rea* and *actus reus.* The law does not punish a mere evil intention i.e *mens rea* or design unaccompanied by any overt act, technically called *actus reus*, in furtherance of such design. However, though *actus reus* is necessary to constitute a crime, yet there may be crime even where the whole of the *actus reus*, that was intended, has not been consummated, what is in itself an offence conveniently called an inchoate crime. The common law has given birth to three general offences which are usually termed as inchoate crimes- attempt, conspiracy, and incitement. A principal feature of these crimes is that they are committed even though the substantive offence is not successfully consummated.

Nevertheless, amongst all inchoate offences conspiracy is one of the most complicated one.

3. Glaville Wiliams, *Text Book of Criminal Law* (1999).

The law of conspiracy may seem to be arbitrary and as Glanville Williams also writes "If the mere intention of one person to commit a crime is not punishable, why should the agreement of two people to do it make it criminal? The only possible reply is that the law is fearful of numbers, and the act of agreeing to offend id regarded as such a decisive step as to justify its own criminal sanction" On the contrary, the House of Lords has declared that the purpose of making such agreements punishable is to prevent the commission of substantive offence before it has even reached the stage of an attempt

ARTICLES

1. The Mental Element In Crimes *At* Common Law. -j. w. c. turner

ACTUS non Facit *reum nisi mens sit rea* is one of the best-known maxims of our Common Law. It is regarded at the present day as a statement in general terms which indicates the essentials of liability to criminal punishment. The maxim sharply contrasts the *conduct* of the wrongdoer, *i.e.* his physical acts or omissions, with the *state of his mind* at the time, *i.e.* what he was thinking when he so acted.In the discussion which follows the words *'actus reus* ' will be used to denote *such result* of *human conduct as the law* seeks to *prevent,* that is to say, a specific crime.' The expression *'actus reus '* is in itself clumsy, but it has long been justified by its usefulness. This human conduct may either be active, or may consist of an omission, in the case where there is a legal duty to act.' It may be well at this point to remind students that there are cases in which it is not forbidden by law for a man to act so as to produce unpleasant or fatal results to others, *i.e.* where the result of his conduct is not regarded as an *actus reus.* Examples occur in the execution of public justice,' in self defense, in defense of property,' in proper surgical treatment, in lawful sports and pastimes, and so on. The association of the words *actus* and *mens rea* seems first to have occurred in connexion with perjury, but the origin and early history of the whole phrase are obscure, and there is need for research in this field. The present article is concerned with the state of the law to-day, and only a brief outline of the history of the matter will be presented.

2. CRIMINAL ATTEMPTS-THE RISE AND FALL OF AN ABSTRACTION-THURMAN W. ARNOLD

A discussion of the law of criminal attempts usually commences with the statement that the problems involved are in-tractate and difficult to solve and that the cases are hopelessly confused. Legal problems are spoken of as confused under two different sets of circumstances. First, where courts are doing inconsistent things with similar fact situations, and second, where courts are attempting to make the same rule cover utterly dissimilar situations. In the first case the legal writer usually attempts to justify one treatment or the other. In the second case he makes an effort to reformulate the rules so that all or a great majority of the cases may appear reconciled with them. This often involves the making of generalizations even broader and vaguer than the original ones. It also usually involves the creation of elaborate logical machinery for sorting the dissimilar situations without exposing their complete dissimilarity. Once this is done the opportunity is given to ingenious attorneys to search far and wide for cases which no one would ever consider treating the same as the case being argued except for the fact that they come under the same so-called general principles and the court speaks of them all in the same general language. These cases must be distinguished, and of course the court has great difficulty in doing so. In the attempt, how-ever, hundreds of pages of legal literature are written. The result is a statement like this.

3. MENS REA AND INCHOATE CRIMESLARRY- ALEX&ND* KIMBERLY D. KESSLER

When a defendant engages in proscribed conduct or in conduct that brings about a forbidden result, our interest focuses on his state of mind at the time he engages in the proscribed conduct or the conduct that causes the result. We usually are unconcerned with his state(s) of mind in the period leading up to the conduct. The narrative of the crime can begin as late as the moment defendant engages in the conduct (or, in the case of completed attempts, believes he disengaging in the conduct).Criminal codes do not restrict themselves to proscribing harmful conduct or results, however, but also criminalize various acts that precede harmful conduct. Thus, codes punish agreeing to engage in criminal conduct, soliciting such conduct, and taking a substantial step toward engaging in such conduct.

Codes also elevate the seriousness of some crimes if they are committed with the purpose of committing some further crimes. Thus, trespass or breaking and entering become burglary if committed with the intention to commit other crimes on the premises. Or simple assault can become a more aggravated offense if committed with the intent to kill, to rape, or to maim. What mental states are required for these "inchoate crimes"-i.e., crimes that are preliminary to bringing about the harms that are the criminal law's ultimate concerns? The mental states cannot be identical to those required for completed crimes and completed attempts, for the defendant committing an inchoate crime is aware or believes that there is still time to desist and renounce.

4. GROUP THINK: THE LAW OF CONSPIRACY AND COLLECTIVE REASON JENS DAVID OHLIN

Although vicarious liability for the acts of co-conspirators is firmly entrenched in federal courts, no adequate theory explains how the act and intention of one conspirator can be attributed to another, simply by virtue of their criminal agreement. This Article argues that the most promising avenue for solving the Pinkerton paradox is an appeal to the collective intention of the conspiratorial group to commit the crime. Unfortunately, misplaced skepticism about the notion of a " (group will" has prevented criminal scholars from embracing the notion of a conspiracy 's collective intention to commit a crime. However, positing group intentions requires only that the criminal law recognize the rational relationships between individuals who decide to collectivize reason to pursue a common criminal goal; no burdensome theory of corporate animals with unified minds is required. After exploring the different rational structures that a conspiracy can have, the Article outlines the circumstances when vicarious liability could be justified. Specifically, liability must be limited to participants in tightly knit conspiracies who engage in the kind of common deliberation that is capable of yielding collective intentions. A further consequence of this theory is that liability must be restricted to acts that fall within the scope of the criminal plan, not just acts that should have been reasonably foreseeable to members of the conspiracy.

5. LAW REFORM COMMISSION REPORT- I PUBLISHED NOVEMBER 2010

That awareness or beliefs at least one qualitative distinction between the mental states of completed and inchoate crimes. For an inchoate crime such as conspiracy, solicitation, or incomplete attempt, criminal codes usually require that the defendant must have the purpose to engage in the forbidden conduct. This requirement ambiguous in two respects. First, purposes with respect to future conduct can be conditional, unlike the purposes that accompany completed conduct, which, however conditional they once were, become unconditional at the point of decision. The conditions attached to purposes regarding future conduct can be either internal (subjectively entertained by the defendant) or external (factors that, given defendant's dispositions, would cause him to alter his purposes once he becomes aware of them). If some but not all conditional purposes satisfy the purpose requirement of inchoate criminality, which do and which do not? Orthodox doctrine conceals this difficulty. Second, the requirement that defendant have as his purpose the commission of future criminal conduct is ambiguous with respect to the requisite mental states for the various elements of the future crime.

Statement of Problem

The common law has given birth to three general offences which are usually termed as inchoate crimes- attempt, conspiracy, and abetment. As far as offence of abetment is concerned the law is clear and justifiable on its point. But, with regard to other two inchoate offences (i.e. conspiracy and abetment) there are several issues with is yet to be settled. Some of the issues can be summarized as-

(i) Whether by making conspiracy a distinct offence, the basic principles of criminal jurisprudence gets contravened.

(ii) Whether a specific definition of 'attempt' is required.

(iii) In cases of attempt the demarcation line between preparation and attempt is not only blurred but keeps shifting with the contemporary development in criminal law.

(iv) Law dealing with offence of impossible attempt is still vague.

(v) Whether at this developing stage of criminal jurisprudence, when issues like "de-criminalization of certain offences" are being debated, incorporation of inchoate offences, specifically conspiracy, is justified.

(vi) Lastly, the inconsistency of judicial interpretations dealing with inchoate offences.

Hypothesis

***** Inchoate offences, instances of over criminalization are threatening the legitimacy of criminal law.

Research Questions

1. What are the justifications for criminalising conspiracy and criminal attempt when the basic requirement for declaring them as offence is not present?

2. What is the validity of the normative theories in contemporary times that support criminalizing these conducts?
3. What are the potential threats to the legitimacy of criminal law, through this way of over criminalization?

Objective of Study

Different Types of Offences which lead to over criminalization .Study of Inchoate Offences and Criminal jurisprudence. Judicial Prnousment in interpreting the laws related to Inchoate Offences.

Research Methodology

The proposed research paper will be doctrinal in nature with a comparative analysis of effectiveness of inchoate offences laws implemented in various countries like U.S.A, U.K, Australia The approach is Doctrinal in nature and the researcher will use Quantitative method of Descriptive research and data collection such as Journals, Books, Internet, Case studies, Records, Reports, Manuals, Acts and general observation.

Tentative Chapterisation

The proposed research paper will be divided into following chapters-

1. Introduction
2. General Principles of Criminal Law & Inchoate Offences
3. Conspiracy
4. Conspiracy: A Critical Appraisal in Indian Perspective
5. Criminal attempt
6. Attempt Law in India
7. Conclusion and suggestions

CHAPTER-II

General Principles of Criminal Law & Inchoate Offences

The issue of *mens rea* in inchoate crimes provides a perfect legal problem[2] existing from its inception. When an accused is engaged in forbidden conduct, criminal law focuses on his state of mind at the time he engages in such proscribed conduct or the conduct that causes the result. Criminal law is usually not concerned with his state of mind in the period leading up to the conduct.[3] However, functionality of criminal law starts as late as the moment accused engages in the proscribed conduct, as criminal codes does not restrict themselves to proscribe harmful conducts or results but also criminalizes various acts that precede harmful conduct.[4] Thus, most of the criminal codes punish agreeing to engage in criminal conduct, soliciting such conduct, and taking a substantial step towards engaging in such conduct. Criminal codes of most jurisdictions also elevate the seriousness of some crimes if they are committed with the purpose of committing some further crimes.

But apart from this above undisputed fact the main issue which still remains unsolved is - what mental state is required for imposing liability in inchoate crimes i.e. crimes that are preliminary in bringing about the harm that are the criminal law's ultimate concern? The mental state in these sorts of crimes cannot be identical to those required for completed crimes since the accused committing an inchoate crime is aware/believes that there is still time to desist and denounce.[5] This awareness or belief is at least one qualitative distinction which separates the mental states of completed and inchoate crimes.

For an inchoate crime such as conspiracy, solicitation or attempt, criminal codes usually require that the accused must have the 'purpose' to engage in the forbidden conduct.[6] However, this requirement of 'purpose' is ambiguous in two respects. *Firstly*, purposes with respect to future conduct can be conditional unlike the purposes that accompany completed conduct, which however, conditional they once were becomes unconditional at the point of decision. *Secondly*, the requirement that accused has his purpose; the

[2] David Ormerod, "Making Sense of Mens Rea in Statutory Conspiracies", 59 *Current Legal Problems* 221 (2006).
[3] Larry Alexander & Kimberly D. Kessler, "Mens Rea and Inchoate Crimes", 87 *Criminal Law and Criminology* 1138 (1996-97).
[4] Ashwort and Andrew, *Principles of Criminal Law* 169(2nd edn. 1995).
[5] *Supra* note 1 at 1139.
[6] For example Sec 2.02, The Model Penal Code- General Requirements of Culpability**:** A person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

commission of future criminal conduct is ambiguous with respect to the requisite mental state and for the various elements of the future crime. These two ambiguities in the requirement of purpose for inchoate crimes are obviously linked together whenever the defendant's purpose is conditional on the existence or non-existence of a particular element. This can be better explained by an illustration- assume that A and B agrees to buy a lottery ticket and eventually agreed that if they win the same, they would kill their wives and live lavishly. But this criminal agreement to kill their respective wives is subject to the condition of winning a lottery that is of very less probability. In this case does the accused have the requisite purpose for the inchoate liability? Or they have sufficient *mens rea* to indict them at such an early stage of crime?

Thus, to understand role of *mens rea* or to analyze the requirement of purpose for imposing inchoate liability, one has to clarify these two ambiguities. Further the issue of conditional purpose is in itself debatable. Lastly, the distinct role of *mens rea* as to completed crimes and *mens rea* required for inchoate crime also call for a fresh look, in order to justify the culpability for inchoate crimes. This chapter separately deals with all such issues and draws a conclusion accordingly.

2.1 Conditional Purpose

Conditional purposes in a strict sense are purposes that the defendant subjectively holds to be conditional on the occurrence or non-occurrence of some event, including acquiring certain beliefs. Here conditional purposes, in strict sense, can be said to be as 'internally conditional purposes' because the conditions are part of actor's own under-standing of his mental state. On the other hand, 'externally conditional purposes' are purposes that will in fact be renounced by actor if some event occurs but which at present are viewed by the actor, as unconditional. The conditionality of defendant's purpose is of interest only in cases of inchoate crimes. In completed crimes[7] the conditionality of actor's original purpose is immaterial because those purposes have become unconditional by the time of

[7] Completed crimes for this purpose will include completed attempts, those in which the actor has taken the last act, he believes to be necessary to complete the crime and in which he believes he has lost the power to prevent the crime from occurring.

the crime. In an inchoate crime, the defendant's purpose is to bring about a future crime and that purpose can be internally and externally conditional in sort of ways.

2.2 The Significance of Purpose Being Conditional

Now the question arises that what significance should be attached to the fact that defendant's purpose to engage in future criminal conduct in consciously conditional? In the following sub-sections an attempt has been made to explore the possibilities attached with the conditional purpose in connection to inchoate crimes.

Approach Adopted by the Penal Codes of U.S and India-

a) The Model Penal Code Approach-

The Mode Penal Code, in section 2.02 (6), states:

> "When a particular purpose is an element of an offense, such element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offence."

In other words, the Model Penal Code treats conditions attached to criminal purpose as immaterial unless they negate the criminality of the purpose. It seems that the Model Penal Code adopts an extremist approach to conditional purpose in case of inchoate offense. This can be better understood by an illustration i.e. suppose A and B who agree, after buying a lottery ticket that if they win the jackpot they will kill their wives and live their lives lavishly. The Model Penal Code would consider this agreement as a conspiracy to murder, despite the fact that their chance to win a lottery ticket is infinitesimal. In further example consider X, who points a loaded gun at Y and threatens her with death unless she gives him her purse. This is a lucid case of armed robbery. The Model Penal Code, however, would also appear to deem this an assault with intent to kill or even an attempted murder, despite the fact that X hopes and expects that Y will hand over her purse.

b) Indian Penal Code approach-

Section 120-A of the Indian Penal Code states that-

When two or more persons agree to do, or cause to be done-

(i) An illegal act, or

(ii) An act which is not legal by illegal means

Provided that no agreement except an agreement to commit offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

It seems that the Indian Penal Code approach towards the mental element involved in inchoate crimes is somewhat analogous to the Model Penal Code. Bare reading of the sections of the Code gives the impression that the conditional purpose of the defendant while committing an inchoate crime is trivial and the culpability of the actor is unaffected by the purpose being conditional or unconditional.

But the question lies here is that why the drafters of Model Penal Code and Indian Penal Code took such an absolutists position on conditional purpose? The comments on both the codes do not disclose the underlying reasoning. At this juncture it would be significant to discuss the alternatives available; before approving it as the only possible approach to the conditional approach.

1. *Remote Chances, Hopes and the Absence of True Purpose*

One possible reaction to an example of A and B agreeing to kill their respective wives if they won the lottery ticket is that the extremely low probability of the condition's being realized, which casts serious doubt on the existence of purpose to kill. In other words, if a purpose is conditional on an event or fact that the actor realizes is highly improbable, one can reasonably doubt that his conditional purpose is really a purpose at all.[8] What we really intend to do in circumstances that are quite unlikely to occur may be opaque to us, even if we think that we know. After all, our awareness of the improbability of the event disengages us from serious consideration of what we would do if it occurs. Two billionaires who agree that they will turn to a life of robbing banks if they should ever find themselves

[8] *Craddock* v. *State*, 37 So. 2d. 778 (Miss. 1948).

destitute cannot really know that they intend to do so and thus cannot really at present intend to do so. In such conditions it can be said that improbability of triggering condition can serve as an epistemic ground for skepticism about the existence of a conditional purpose.[9]

However, one may argue that the improbability of a condition does not conclusively negates a criminal purpose. For instance, in addition to A and B's agreement to kill their wives if they hit the jackpot, what if, they have bought guns and tickets to any foreign country for themselves for the day after the jackpot winner is announced. One might then conclude that they do have a serious conditional purpose to kill their wives despite the improbability of the condition being realized.

Thus, in conclusion it may be said that it is not only the improbability which distinguishes conditional purpose from a targeted purpose rather than it is also the actor's desire to attain the improbable result, which makes him culpable. However, this proposition may be justified on the ground that in the above case the actor has done some act in furtherance to realize the conspired object. But subjecting mere conspiring (immaterial of being conditional or unconditional purpose) to commit an offence to a punishment cannot be justified on any ground whatsoever. That is the case where second condition of section 107[10] of the Indian Penal Code, 1860 becomes relevant.

2. Intending the Improbable

Another possible reaction to the example of A and B agreeing to kill their wives if they could win the lottery ticket is that improbability negates the purpose in a stronger sense. The assessment of probability in our case is to be construed from the point of actor's view for it is his estimate of the possibility of the triggering condition that bears on whether he

[9] *Supra* note 2 at 1139.

[10] Sec. 107, Indian Penal Code-Abetment of a thing- A person abets the doing of a thing who-

First- Instigates any person to do that thing.

Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing.

Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.

can be said to be intended or not. Now it cannot be said that A and B have a purpose to kill their respective wives if they believe that their chance of winning the lottery is infimistical.

Thus, improbability of any desired consequence negates the purposive theory of criminal conspiracy, which can be tested on the threshold of conditional purpose theory, as in our case concept of purpose extends to the improbable events.

3. Dangerousness

While considering the conditional purposes it is worthy to discuss that whether 'dangerousness of the accused' (with regard to his conditional purpose) be one of the criteria to impose a criminal liability? However, it has been well recognized by the criminal law authors that dangerousness of the accused is one of the reason to inflict inchoate liability upon him. But still one may find certain difficulties in rationalizing such argument. For example, in our example of A and B agreeing to kill their wives after winning the lottery, it is unlikely to win the lottery and thus unlikely to kill their wives. But, on the other hand, in another example of X, who points a loaded gun at Y and threatens her with death unless she gives him her purse; in such a case X is likely to be resisted by Y, whom he then have to kill. In such situations imposing criminal liability can be justified in the case of X but not to A and B.

The most straightforward application of this argument would be to look at the probability or defeating conditions obtaining and gauge dangerousness on that basis alone. However, there are two methods of assigning probability to the condition.

First, one may asses the relevant probability in the form of *subjective probability*, that the defendant himself assigns to the conditions. For example, suppose defendants intends to kill a woman X, who just walked into the bar, but if and only if X is Margret Thatcher and suppose defendant believes- at the point when he is arrested for an inchoate crime[11]- that the chance of X being Margret Thatcher is one-in-five. Now, whether a one-in-five chance

[11] Perhaps the defendant has agreed with an under-cover cop that he will kill X, so that the charge is conspiracy to murder or perhaps he has taken some substantial steps towards killing X, such as obtaining a gun to kill her, so that the charge is attempted murder.

of the triggering conditions renders defendant sufficiently dangerous to justify his inchoate liability.[12]

It seems that there are several problems with the subjective probability approach to dangerousness. A serious problem lies in the fact that the defendant's estimate of the probability has really nothing to do with how dangerous he is in fact. The probability he estimates to be low may in fact turn out to be probability of one; and the probability that he estimates to be high may in fact turn out to be probability of zero. If he truly possesses a firm intention to act if the condition obtains and to refrain from acting if it does not, then whether he is dangerous or not is moreover a function of how the reasonable man takes it and not what he belief it to be. Thus, subjective approach to assessing dangerous conditional purposes appears unpromising. Therefore it is worthwhile to discuss available objective available.

The difficulty with an objective approach lies in assessing the objective probability that the condition will obtain. Probability is best thought of an epistemic motion. For human observers, probabilities are relative to some stock of information and lack of other information.[13] If X looks like Dolly, then it may appear quite improbable to those in the bar, including the defendant that X is in fact Margret Thatcher. But if X is Margret Thatcher and has been dressed by her maid to look like Dolly then to the maid and other servants of the house it will appear almost certain that X is Margret Thatcher, though not to the defendant and persons present in the bar.

In short, if one says and as most criminal law writers propose that conditional purposes may suffice for inchoate criminality, if the conditions are not too improbable, then from what vantage point one assesses the probability of the conditions? Is it enough that X is not Margret Thatcher? What if she is, but it is unlikely that the defendant will believe she is, or conversely, what if she is not, but it is unlikely that the defendant will believe she is not? What course of action, prior to defendant's consummating completed attempt to murder

[12] As per the *Subjective Probability Test.*
[13] *Supra* note 2 at 1149.

can one predict, that defendant will take? However, the vantage point for assessing probabilities in this context would be that of the authorities (court)

This approach shifts the focus from defendant's state of mind- his conditional purpose - to defendant's dangerousness, a matter regarding which his state of mind is only one of many relevant factors. Why criminal law should then selects out from among all who are dangerous, only those who are dangerous with certain intentions or purpose? Criminal law commentators do not provide sufficient explanation for adopting such approach. Thus, imposing inchoate criminal liability, that too on the ground of dangerousness cannot be suggested to be an appropriate measure.

2.3 Inchoate Crimes & Mens Rea as to Circumstances

There is an ongoing controversy in the criminal law over the *mens rea* required for inchoate crimes. Although almost all criminal codes require that the accused act with the purpose that some future crime be committed, the scope of this purpose requirement is what is controversial.[14] The controversy can best be illustrated through examples.

The Problem

Assume that the crime in question is assaulting a police officer, and the law makes the status of the victim (as a police officer) a matter of strict liability. In other words, if one carries out an assault on someone who is in fact a police officer, he is guilty of the crime even if he did not know or have reason to know (was non-negligent in not knowing) that the victim was a police officer. Or, assume that sexual intercourse with a girl under 18 years of age is a crime even if accused non-negligently believes the girl is over 18. Finally, assume that driving a vehicle with an expired registration is a crime irrespective, of the driver's purpose, beliefs, or reasonableness.

These examples of strict liability elements and strict liability crimes are, of course, problematic even when we are dealing with completed crimes. Many believe strict liability elements and crimes unjustifiably sacrifice non-culpable or less culpable accused at the altar of social welfare. But however, much strict liability in criminal law is nothing which

[14] Ian H. Denis, "The Rational of Criminal Conspiracy", 93 *Law Quarterly Review* 342 (1997).

is conceptually problematic. Except once we turn from completed crimes, to inchoate crimes things get murkier. To demonstrate this, let us take three types of inchoate criminality and apply them to the three different crimes -assault on a federal officer, statutory rape, and driving with an expired registration-that serve as our examples.

Examples

a) *Conspiracy*

(1) D1 and D2 agree that they will assault V, who they do not know or have reason to know is a federal officer.
(2) D1, and D2 agree that they will have sexual intercourse with V, who they do not know or have reason to know is under 18.
(3) D1 and D2 agree that D1 will drive his car to the store. Neither knows or has reason to know that D1's car registration has expired.

b) *Incomplete Attempt*

(1) D1 buys a blackjack and lies in wait with the purpose of assaulting V, who D**,** does not know or have reason to know is a federal officer.
(2) D1 entices Dolly, who he does not know or have reason to know is under 18, into a motel room with the purpose of having sexual intercourse.
(3) D1 takes out his car keys and opens his car door with the purpose of driving his car. He neither knows nor has reason to know his car's registration has expired.

c) *Solicitation*

(1) D1 encourages D2 to assault V, who D, does not know or have reason to know is a federal officer.
(2) D1 encourages D 2 to have sexual intercourse with Dolly, who D1 does not know or have reason to know is under 18.
(3) D1 encourages D2 to drive D2's car to the store. D1 neither knows nor has reason to know that D2's car registration has expired.

Analysis of the Examples

All of the examples raise the same issue: Should elements that are matters of strict liability for completed crimes can also be matters of strict liability for inchoate crimes, so that the mere existence of the element is sufficient for conviction of the inchoate crime?

a). *The Model Penal Code's Approach*

The approach of the Model Penal Code to attempt liability is to require accused to have as his purpose-the commission of conduct that will in fact be the *actus reus* of a crime- or, if the crime is a result crime, to have as his purpose-the bringing about of the forbidden result[15] (or to believe the forbidden result will occur as a consequence of the conduct) -but then the approach of Model Penal Code for all other crimes is to let the *mens rea* to be identical to the *mens rea* required for the completed crime.[16] D1 would satisfy the requirements for liability in all of the examples since his purpose in all of them is either to commit the *actus* reus-assaulting V, having sex with Lolita, or driving the car-or to have D2 commit the *actus reus.* However, the Code, while it does not reject the approach it adopts for attempts but for other forms of inchoate criminality, it does not endorse that approach. Instead, it leaves the matter unresolved.[17]

b). *Indian Penal Code's Approach*

From the bare reading of the sections[18] of Indian Penal Code, it seems that the Code does not marks any difference in imposing liability while committing an inchoate crime, which if would have been completed would attract a strict liability. Conspiring to commit an offence (which is in the form of strict liability) would definitely construe a similar liability in committing such conspiracy (whether accused is aware or negligent of such strict

[15] Kenneth W. Simons, "Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay", 81 *Journal of Criminal Law and Criminology* 447 (1990).

[16] With respect to attempts, the Model Penal Code requires that defendant (accused) act "with the kind of culpability otherwise required for commission of the crime." [Sec. 5.01of Model Penal Code]. The Comment on this section makes it clear that the *mens rea* for circumstances-every element other than the conduct that is the actus reus-is governed by the target crime's *mens rea* requirements.

[17] With respect to conspiracy, solicitation, and complicity, Model Penal Code, Sec. 2.06,5.02, and 5.03 self-consciously leave the issue in question to the courts to resolve. Model Penal Code Sec. 2.06 commentary at 311 n.37 (1985); Sec. 5.02 commentary at 371 n.23; Sec. 5.03 commentary at 408-14.

[18] Ss 120-A, 511 and 116, The Indian Penal Code, 1860.

liability). Similarly attempting to commit such offence would lead to similar strict liability beyond the reasoning of requisite *mens rea.*

c) *Case Law*

The case law on this issue is not enough and that too conflicting. In the federal courts, the leading case is *United States* v. *Feola*[19] in which the Supreme Court upheld a federal conspiracy conviction despite the accused lack of knowledge regarding a jurisdictional issue (the victim's status as a federal officer). The Court emphasized the dangerousness and blameworthiness of the conspiracy, though their connection to the jurisdictional issue was left opaque.

In *Feola*, the Court distinguished *United States* v. *Crimmins*[20], a Second Circuit case in which Judge Learned Hand overturned a conviction for conspiracy to transport stolen securities in interstate commerce. The accused did not know the source of the securities and thus was unaware of their connection to interstate commerce, the touchstone of federal jurisdiction. Although such absence of knowledge would have been immaterial had the offense been completed, Judge Hand regarded it as quite material to the conspiracy charge, arguing by analogy that one cannot be guilty of conspiracy to run a traffic light that one does not know exists. Oddly, only one year before, in *United States* v. *Mack*[21], Judge Hand, himself had upheld a conviction for conspiracy to violate a law requiring notification of the United States government of a prostitute's status as an alien even though the accused was unaware that the prostitute in question was an alien. However, the state conspiracy cases, though rare, seem to align with *Crimmins* rather than *Feola.* In a New York case, *People* v. *Powell*[22], a conviction for conspiracy to violate a *malum prohibition* criminal law of which accused was ignorant was struck down. The court argued that accuser's ignorance meant that he lacked the requisite "corrupt motive" for the conspiracy conviction. And

[19] 420 U.S. 671 (1975).
[20] 123 F.2d 271 (2d Cir. 1941).
[21] 112 F.2d 290 (2d Cir. 1940).
[22] 63 N.Y. 88 (1875).

courts in both Pennsylvania and Massachusetts followed the reasoning in *Powell* in similar cases.

However, outside the conspiracy area, the case law on the relation between inchoate crimes and strict liability offenses or elements is almost completely non-existent. One English case, *Gardner* v. *Akenroyd*[23], rejected attempt liability in the context of a strict liability crime. Another English case, *Johnson* v. *Youden*[24], took the same approach to a charge of complicity in a strict liability offense.

c) *Scholar's Viewpoint*

The few scholars who have addressed the issue of the requisite *mens rea* for inchoate criminal liability with respect to the crime's strict liability elements have disagreed with one another. Robinson and Grall supports importing the degree of *mens rea* with respect to circumstances required for the strict liability offense into the inchoate offense.[25] Under that approach, D would have committed inchoate crimes in all of our examples. Model Penal Code drafters Wechsler[26], Jones, and Kom support the Code's delegation of the matter to the courts (except with respect to attempts). Smith also approves the Model Penal Code's approach to the issue in the context of attempts.[27]

On the other hand, there are commentators who are doubtful of automatically transporting strict liability elements in completed offenses into the counterpart inchoate crimes. LaFave and Scott oppose such a move. Enker, however, opposes the move-at least in the context of attempts-on a different basis.[28] Enker agrees that when a crime is completed, strict liability (or negligence liability) for various elements may serve a deterrent function. On the other hand, when the crime is inchoate, neither strict liability nor negligence liability is necessary for either general or specific deterrence. Enker gives an example of a man about

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[23] 1952 II. Q.B. 743.
[24] 1950 I. KlB. 544.
[25] Paul H. Robinson and Jane **A.** Grall, "Element Analysis in Defining Criminal Liability" 35 *Stanley Law Review* 681 (1983).
[26] Herbert and Wechsler *et. al.*, "The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy: Part Two", 61 *Columbiia Law Review* 957 (1961).
[27] J.C. Smith, "Two Problems in Criminal Attempts", 70 *Harvard Law Review* 422, 435 (1957).
[28] Arnold W. Enker, "Mens Rea and Criminal Attempt", *American Bar Foundation Research Journal* 845, 874-79 (1977).

to drive a car; unknowingly that it has defective brakes. Enker asks what would be accomplished by prosecuting the driver rather than warning him. Indeed, Enker would even make the strict liability element of knowledge inapplicable (at that level of "*mens rea*") to inchoate crimes. In essence, Enker proposes making recklessness the minimum level of culpability for all elements of inchoate crimes.[29]

Finally, Fletcher argues that D1's false beliefs in our examples should be exculpatory-even though they would not be so were the crimes completed-if those false beliefs are causally relevant to D1's conduct. In other words, if D1 would not assault V if he knew V was a federal officer, have sex with Dolly, if he knew her age, or drive the car if he knew its registration had expired, then D1 should not be deemed guilty of the inchoate offense.

Summary-

It is clear that neither the case law nor the scholarly literature unequivocally resolves the issue of D1's liability in above mentioned examples. However, both Enker and Fletcher provide useful insights to this issue. Enker's objection -why arrest rather than warn?-and Fletcher's-why arrest if, upon discovering the facts, defendant would not be motivated to commit the crime?-points to the significance of conditional purposes. If D1's purpose is internally conditional on the non-criminality of his conduct-that is, if his purpose is to assault V only if V is not a federal officer, to have sex with Dolly, only if she is over eighteen, and to drive the car only if its registration is current-and he intends the conduct that is the *actus reus* of the completed crimes, only because his factual premises are mistaken, then, if he is made aware of his factual mistakes, it is highly probable that he would desist from carrying out the completed crime. This point gets further weight from the section 2.02(6) of the Model Penal Code which states that a "conditional purpose does not count as the statutorily required 'purpose' if the condition negatives the criminality of the conduct." Thus, it's a high time to re-think while imposing an inchoate criminal liability on such a conditional purpose, as in above mentioned case D1 has.

[29] *Ibid.*

CHAPTER-III

CRIMINAL CONSPIRACY

"Conspiracy, that darling of the modern prosecutor's nursery."

Learned Hand[30]

Apart from the commission of offence at the spur of the moment there are four stages of the actual commission of any crime. The *first stage* is the stage of contemplation or forming intention of the commission of the offence. However, mere intention to commit a crime is not punishable. As Brian C.J also observed that "the thought of a man is not tribal for the devil himself knoweth not the thought of a man.[31]" But when such intent is expressed in words and can be inferred from his acts, the person can be held criminally responsible. The second stage is of *stage of preparation,* which consists in arranging means or measures necessary for the commission of a crime. Generally, preparation to commit an offence is not punishable. The simple reason behind this is the impossibility to prove the object of preparation. But exceptionally, there are cases where mere preparation to commit offence is punishable because sometimes such preparations preclude the possibility of an innocent offence. The *third stage* is of attempt to commit the offence. An attempt is a direct movement towards the commission of an offence after the preparation has been made. The fourth and *final stage* is the actual commission of the intended crime. When the attempt is successful the crime is said to have been accomplished.

To constitute a crime two elements are always necessary, namely, *mens rea* and *actus reus.* The law does not punish a mere evil intention i.e *mens rea* or design unaccompanied by any overt act, technically called *actus reus*, in furtherance of such design. However, though *actus reus* is necessary to constitute a crime, yet there may be crime even where the whole of the *actus reus*, that was intended, has not been consummated, what is in itself an offence conveniently called an inchoate crime. The common law has given birth to three general offences which are usually termed as inchoate crimes- attempt, conspiracy, and incitement. A principal feature of these crimes is that they are committed even though the substantive offence is not successfully consummated.

[30] *Harrison* v. *United States*, 7 F.2d 259, 263 (2d Cir. 1925).
[31] K. D. Gaur, *Criminal Law: Cases and Material* 249 (2005).

Nevertheless, amongst all inchoate offences conspiracy is one of the most complicated one. The law of conspiracy may seem to be arbitrary[32] and as Glanville Williams also writes[33]-

> "If the mere intention of one person to commit a crime is not punishable, why should the agreement of two people to do it make it criminal? The only possible reply is that the law is fearful of numbers, and the act of agreeing to offend id regarded as such a decisive step as to justify its own criminal sanction"

On the contrary, the House of Lords has declared that the purpose of making such agreements punishable is to prevent the commission of substantive offence before it has even reached the stage of an attempt.[34] Conspiracy in common law started its career primarily as a civil injury but was later punishable on an indictment. In its earlier meaning conspiracy was the agreement of persons who combined to carry on legal proceedings in a vexatious or improper way. The Star Chamber gave it more concrete form and the agreement was indictable as a substantive offence, even when no act was done in pursuance of it.

3.1 Criminal Conspiracy: Essentials & Scope

As with most crimes conspiracy requires proof of an *actus reus* (i.e. an act) and a *mens rea* (i.e. a mental element or "a guilty mind"). The *actus reus* in a conspiracy is the agreement itself which forms the basis of the conspiracy. The *mens rea* for this crime is the intent to carry out the agreement and *not* the intent to agree.

The Agreement:

Defining the concept of "agreement" has been a difficult task in the context of conspiracy, but there continues to be some uncertainty as to its precise meaning. There is a general consensus that neither writing nor the speaking of words that expressly communicate agreement is required. Although the agreement need not be formal and can be either expressed or implied, courts have stressed that "something more is required than

[32] PSA Pillai, *Criminal Law* 262(2000).
[33] Glaville Wiliams, *Text Book of Criminal Law* 420(1999).
[34] Kenny, *Outlines of Criminal Law* 89(2004). See, also *Board of Trade* v. *Owen* (1957)2 WLR 351 at 357.

acquiescence or knowledge of a plan." There is also no requirement that the parties physically meet or even know of each other's existence. Courts have also summarily rejected any analogy to a contractual agreement. English judges have also drawn a distinction between the concept of "agreement" and its confusingly similar sibling "negotiation." Although as a result of the ambiguous definition of "agreement" the precise difference between the terms is open to question. However, for the existence of a conspiracy one has to be involved in more than criminal negotiation.

The *actus reus* requirement for conspiracy is also faced with what many commentators have described as an "overriding evidentiary problem." The clandestine nature of the crime makes the gathering of direct evidence to prove an "agreement" extremely difficult. However, courts have been sympathetic to this problem, and as a result it is well established that "inferences drawn from the course of conduct of the conspirators" is enough to serve as evidence of an agreement. This evidentiary presumption often becomes necessary to prove the existence of an agreement. However, it can be seen as an anomaly that although the evidentiary requirements for the proof of conspiracy rests upon overt acts done in pursuance of the conspiracy, the offence itself requires no overt act besides the agreement.[35] Some commentators have argued that it is possible to become part of a crime directly committed by another without any agreement or communication of any kind between the two parties. The predominant view is that the crime of conspiracy is separate from its object. Thus one may become a conspirator without agreement only if the assistance provided is the bringing together of the other conspirators with the intention that they reach an agreement to commit a crime.

The Mental Element:

A primary distinction that must be made with regard to the *mens rea* requirements of the crime of conspiracy is one that exists between the intention of the actors to agree, and the intention of the actors to achieve the object of the crime. This problem arises because conspiracy involves two crimes, namely the object of the conspiracy, and the conspiracy

[35] H.F.S, "Criminal Law: Conspiracy: Overt Act", 13(6) *California Law Review* (Sept 1925).

itself which is intimately connected with the former. There are deviations between jurisdictions over whether *an intent to agree* is necessary for the performance of the crime. The United States has taken the view that the intent to agree is "without moral content." Thus in the US, "only if there is a common purpose to attain an objective covered by the law of conspiracy" is there liability. In Canada on the other hand judges do not always distinguish between these two forms of *mens rea* and have often suggested that both an intent to agree as well as an intent to carry out a common objective are necessary for the commission of the crime.

Although there are variations over the intent to agree requirement among jurisdictions, it is generally accepted that the intent to achieve the particular objective of the conspiracy is the mental state required for the crime. It has been suggested that the intent required for conspiracy is at least that degree of the criminal intent necessary for the substantive offence that is its object. Thus since conspiracy requires "an intent to achieve an objective" it implies that there can be no such thing as a conspiracy to commit a crime that is defined "only in terms of recklessly or negligently causing a result."

While dealing with the extent and scope of criminal conspiracy the Indian Supreme Court in case of *State* v. *Nalini*[36] have laid down following broad principles governing the law of conspiracy:

1. Offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or a legal act by illegal means. Where it is a legal act by illegal means overt act is necessary. Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute a crime. It is intention to commit crime and joining hands with persons having the same intention. Not only has the intention but there had to be the agreement to carry out the object of the intention, which is an offence. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever horrendous it may be that offence be committed.

[36] (1999) SCC 253.

2. Acts subsequent to the achieving of the object of conspiracy may tend to prove that a particular accused was a party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

3. Conspiracy may for example be enrolled in *chain*- A enrolling B, B enrolling C and so on; and all will be members of a single conspiracy if they so intended and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. However, there may be a kind of umbrella spoke enrollment, where the single person at the centre does the enrolling and all other members are unknown to each other, though they know that there are to be other members. There are theories and in practice it may be difficult to tell which conspiracy in a particular case falls into which category. It may even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse roles to play. It is not a part of crime of conspiracy that all the conspirators need to agree to play the same or an active role.

4. When two or more persons agree to commit the crime of criminal conspiracy, then regardless of making or considering any plans for its execution, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement.

5. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play is may be not known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

6. A person may join conspiracy by word or deeds. However, criminal responsibility for a conspiracy requires more than a mere passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

7. Criminal conspiracy is a kind of partnership in crime, and there is in each conspiracy a joint or mutual agency for the prosecution of the common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefore. This mean that everything said, written or done by any of the conspirators in execution or in furtherance of the common purpose is deemed to have been said, done or written by each them. And this joint responsibility extends to not only what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purpose. A conspirator is however, is not responsible for the acts done by the co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create new conspiracy nor does it change the status of the other conspirators, and the mere fact that the conspirators individually or in groups performs different tasks to a common end does not split up a conspiracy into several different conspiracies.

8. Conspiracy is hatched in privacy or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objectives have to be inferred from the circumstances and the conduct of the accused.

9. It is the unlawful agreement and not its accomplishment which is the gist of the offence of criminal conspiracy. Offence of criminal conspiracy is complete even

> though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement which is the gravemen of crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not to be formal or express but may be inherent in and inferred from the circumstances, especially declarations, acts and conducts of the conspirators. The agreement need not be entered by all the parties to criminal conspiracy at the same time, but may be reached by successive actions evidencing their joining of conspiracy.

3.2 Justification for Criminalizing Criminal Conspiracy

To examine the logic of criminal conspiracy, one must realize that the offence of conspiracy serves two different functions in the legal system. In the first place, it is an inchoate crime, complementing the provisions dealing with criminal attempt and solicitation in reaching preparatory conduct before it has matured into commission of a substantive offence. Secondly, it is a means os striking against the special danger incident to group activity, facilitating prosecution of the group.[37] The crime of conspiracy is an incompletely formed or an inchoate crime, which like attempt, reaches the preparatory conduct prior to the crime rather than the resulting substantive crime itself. Conspiracy, however, goes further back into the preparation than attempt; for combination and overt act may be present without amounting to criminal attempt.

> An attempt in the stricter sense, is an act expected to bring about a substantive wrong by the forces of nature, but combination, intention and overt act may be present without amounting to criminal attempt. For attempt there must be dangerous proximity to success, on the other hand, the essence of the conspiracy is being combined for an unlawful purpose it does not matter how remote the act may be from accomplishing the purpose.[38]

Conspiracies are also made punishable because of the increased danger involved in group offences where collective action is possible. The conspiracy statute was designed to punish

[37] Francis Bowes Sayre, "Criminal Attempts", 41(7) *Harvard Law Review* (1928).
[38] *Hyde* v. *United States*, 225 U.S. 347 (1912).

concerted action which makes 'crime easier to perpetrate and harder to detect'.[39] This assumption that collective or concerned action towards an unlawful end involves a greater risk to society is based on the idea that the combination, once have started the illegal act, will make harder to stop, since it will now take at least two minds to stop the plot. Additionally, the collective action magnifies the risk to society by making greater the likelihood that the plot will be consummated by enhancing the labor and resources available to the combination. The conspirator who has joined the combination will be less likely to back out of his agreement than if he were the only one involved; likewise, the members of the combination can lead strength and encouragement to one another and thereby aid the perseverance of each member. In fact the increased risk to society has been linked to the advantages of division of labor and organization characteristic if a modern economic enterprise.

The anti-social potentialities of a conspiracy, unlike those of an attempt, are not confined to a particular object at a particular given time. The existence of a combination for unlawful ends provides a continuing focal point for further crimes related to or unrelated to those immediately envisioned.[40] Additionally, an uneasiness, produced by consciousness that such combination exists, is an important anti-social effect. Consequently it has been held that the state has an interest in stamping out conspiracy above and beyond its interest in preventing the commission of any specific offence.[41]

Besides these differences, the concept of conspiracy allows official intervention at an earlier stage in the preparation of an unlawful act than attempt because of the greater risk to the society. Again, a further distinction between conspiracy and attempt is possible when both are viewed as a means of deterring potential criminal conduct. to deter, the law attempts to make the disadvantages of unlawful activity appear to outweigh its advantages. The individual who has set his mind to commit a crime does not weigh the disadvantages of attempt because the deterrent functional of attempt is not additional to that of the completed offence. This is not so with conspiracy because the penalties for conspiracy can be combined with those of completed crimes; this in theory, discourages even those who

[39] *Woods* v. *United States*, 240 F.2d. 41 (D.C. Cir. 1956).
[40] *United States* v. *Rabinowich*, 238 U.S. 78 (1915).
[41] *Id.* at 88.

have not been deterred by the penalty for the completed crime from acting in combination as a route upon their criminal adventure.[42]

3.3 Criminal Conspiracy: Historical Perspective

In the long category of crimes there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than conspiracy.[43] It covers the field of crimes and makes unlawful agreements among individuals to commit any crime[44]; it extends to agreements to commit some torts[45] and some breaches of contract, and, finally, it shades into the horizon with agreements to do acts, which, though not unlawful when done by the parties separately, may, nevertheless, become unlawful if done collectively.

The crime probably was unknown to the early common law.[46] The first definite trace of it emerged from the enactment of three statutes in the reign of Edward I[47], the final one of which, known as the *Ordinacio de Conspiratoribus,* was passed in 1304[48]. However, no precise definition of conspiracy is afforded in these statutes, but the *Ordinacio de Conspiratoribus* is explicitly directed against combinations or confederacies for false and malicious promotions of indictments and pleas, for embracery and for maintenance. Further, these statutes do not treat conspiracy as a substantive crime but enact a writ, which came to be known as the 'writ of conspiracy', to aid litigants to determine whether their cause of action was repressible. The writ lay only for a conspiracy to indict or appeal for felony; the conspiracy itself "was incomplete until the party had been actually indicted and

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[42] Ian H. Dennis, "The Rational of Criminal Conspiracy", 93 *Law Quarterly Review* (1977).

[43] Allbert J. Harno, "Intent in Criminal Conspiracy", 89(5) *University of Pennsylvania Law Review and American Law Register* 235 (Mar 1941).

[44] Sayre, " Criminal Conspiracy" ,35 *Harward Law Review* 393 (1922).

[45] *Supra* note 5.

[46] Percy H. Winfield, "Early History of Criminal Conspiracy", 36 *Law Quarterly Review* (1920).

[47] *Id.* at 28.

[48] *Supra* note 7 at 624;This statute provides: "Conspirators be they that do confider or bind themselves by oath covenant or other alliance that every of them shall aid and support the enterprise of each other falsely and maliciously to indict, or cause to be indicted, or falsely to acquit people, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries and fees for to maintain their malicious enterprises and to suppress the truth; and this extendeth as well to the takers as to the givers. And stewards and bailiffs of great lords, which by their seignory office or power undertake to bear or maintain quarrels, pleas, or debates for other matters than such as touch the estate of their lords or themselves."

acquitted". It was not until 1611 in the *Poulterers' Case*[49], decided in the Court of Star Chamber, that a mere agreement to commit a crime became a substantive offence.[50]

The *Poulterers' Case* is a landmark in the history of criminal conspiracy, for it departed from the doctrine that the conspiracy must actually be carried into effect before a writ of conspiracy would lie. The Court of Star Chamber ruled in that case that the agreement was itself indictable though nothing was executed. "And it is true," says Coke in his observations on the case[51], "that a writ of conspiracy lies not, unless the party is indicted, and *legitimo modo acquietatus*, for so are the words of the writ; but that a false conspiracy betwixt divers persons shall be punished, although nothing be put in execution, is full and manifest in our books." A new development in the law stems, in fact, from that decision. The modern crime of conspiracy, says Holdsworth[52] "is almost entirely the result of the manner in which conspiracy was treated by the Court of Star Chamber."

Too little, in fact, is known about the development of law under the guiding hand of the Court of Star Chamber.[53] There can be no doubt, however, that with its establishment a creative and potent factor was introduced into the scene of English judge-made law. But the Star Chamber, once having gained the vantage of a new conception, did not limit its operations to conspiracies to indict; a new field in the criminal law of vast potentialities had been opened up. If these combinations were criminal, why restrict the doctrine to offences relating to legal proceedings?[54] What did it matter that historically the crime was closely related to offences against the administration of justice?[55] With the decision in the *Poulterers Case* a new crime was in the making. It became an inchoate crime similar to attempt. And just as it punished all kinds of attempts to commit wrongful acts, the Star Chamber punished all kinds of conspiracies to commit the many varied offences punishable either by it or by the common law courts.

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[49] 9 Co. Rep. 55b, 77 English Reports 813 (Court of Star Chamber 1611).
[50] Digby, "The Law of Criminal Conspiracy in England and Ireland", 6 *Law Quarterly Review* 129 (1890).
[51] *Supra* note 13 at 815.
[52] *Supra* note 7 at 625.
[53] Jerome Hall, "Criminal Attempts: A Study of Foundations of Criminal Liability", 49(5) *Yale Law Journal* 798 (Mar 1940).
[54] *Supra* note 7 at 626.
[55] *Ibid.*

But the acceptance of this doctrine, in its broad implications, by the Common Law courts did reflected some misgivings. In *Starling's Case*[56] it was held that a confederacy by the brewers of London to put down the "gallon trade" by which the poor were supplied and to cause the poor to mutiny against the farmers of the excise was illegal, since to impoverish the farmers of the excise would prevent them from rendering to the King his revenue.

A few years later, however, Lord Holt said a conspiracy "is odious in the law"[57], and in *Regina* v. *Daniell*[58] he sought to limit the implications of Starling's Case and, in fact, to restrict the expanding scope of the crime itself. The gist of the offence in Starling's Case, he said, "was its influence on the public, and not the conspiracy, for that must be put in execution before it is a conspiracy." In 1717 Hawkins' *Pleas of the Crown* was published[59]. In that work the assertion was made that "there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law." And four years later in *Rex* v. *Journeymen Taylors of Cambridge*[60], the court said, "a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it." These principles, as stated by Hawkins and in the Journeymen Taylors Case, although they were followed by some fluctuation in views, were the ones that prevailed in later law.

3.4 Substantive & Procedural Dilemma of Criminal Conspiracies

The literature on the subject of criminal conspiracy reflects a sort of rough consensus. Conspiracy, it is generally said, is a necessary doctrine in some respects, but also one that is overbroad and invites abuse. Conspiracy has been thought to be necessary for one or both of two reasons. *Firstly*, it is said that a separate offense of conspiracy is useful to supplement the generally restrictive law of attempts. Plotters who are arrested before they can carry out their dangerous schemes may be convicted of conspiracy even thought they did not go far enough towards completion of their criminal plan to be guilty of attempt.

[56] 174, 82 English Reports 1039 (I664).
[57] *Roberts* v. *Savill*, 87 English Reports 733 (I699).
[58] 87 English Reports 856 (I704).
[59] *Supra* note 7 at 627.
[60] 88 English Reports 9 (1721).

Secondly, conspiracy is said to be a vital legal weapon in the prosecution of 'organized crime', however defined[61]. As Mr. Justice Jackson put it, "the basic conspiracy principle has some place in modern criminal law, because to unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer." To deal with such dangerous criminal combinations the government must have the benefit of special legal doctrines which make conviction easier and punishment more severe.[62]

One principal theme of criticism, best illustrated by Mr. Justice Jackson's opinion in *Krulewitch* v. *United States*[63], emphasizes the difficulties which the ordinary criminal defendant may face when charged with conspiracy. The advantages which conspiracy provides the prosecution are seen as disadvantages for the defendant so serious that they may lead to unfair punishment unfairly determined.[64] Critics taking this approach typically propose to trim conspiracy doctrine just enough to provide protection for defense interests without disturbing those rules deemed genuinely important for effective law enforcement. The law of conspiracy is intended, after all, to make it easier to impose criminal punishment on members of groups that plot forbidden activity. Insofar as it accomplishes this end, it unavoidably increases the likelihood that persons will be punished for *what they say* rather than for *what they do*, or for associating with others who are found culpable**.** Critics who are alarmed at the resulting threat to freedom of speech and freedom of association typically have proposed new doctrines to curtail the misuse of conspiracy charges. But unfortunately, the proposals for reforms of conspiracy laws are inadequate. It is not sufficient enough to reform conspiracy laws (legislatively) by removing its most widely deplored over-extensions, or to reform it judicially. Such measures are appropriate for improving a doctrine that is basically sound, but in need of some adjustment at the edges. The law of criminal conspiracy is not basically sound. It should be abolished, not reformed.

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[61] Philip E. Johnson,"The Unnecessary crime of Criminal Conspiracy", 61(5) *California Law Review* 1137 (Sept 1973).
[62] James Ball, "Criminal Conspiracy: A Balance Between the Protection of Society and the Rights of the Individual", 16 *St. Louis University Law Journal* 225 (1971).
[63] 336 U.S. 449- 458 (1949).
[64] *Id.* at 449.

3.5 Doctrines Related to Criminal Conspiracy

The central fault of conspiracy law and the reason why any limited reform is bound to be inadequate can be briefly stated as what conspiracy adds to the law is simply confusion, and the confusion is inherent in the nature of the doctrine.[65] The confusion stems from the fact that conspiracy is not only a substantive inchoate crime in itself, but the touchstone for invoking several independent procedural and substantive doctrines. In such background, it would be imperative to ask whether a person who agrees with another, to commit a crime, whether he may be convicted of the offense of conspiracy even when the crime itself has not yet been committed and where still exists a great possibility that the defendant may renounce such agreement**.**[66] If the answer to that question is in the affirmative, we also have to answer a number of other questions that would otherwise have to be considered independently**.** For example, where there is evidence of conspiracy, the defendant may be tried jointly with his criminal partners and possibly with many other persons whom he has never met or seen, the joint trial may be held in a place he may never have visited, and hearsay statements of other alleged members of the conspiracy may be used to prove his guilt. Furthermore, a defendant who is found guilty of conspiracy is subject to enhanced punishment and may also be found guilty of any crime committed in furtherance of the conspiracy, whether or not he knew about the crime or aided in its commission.

Each of these issues involves a separate substantive or procedural area of the criminal law of considerable importance. However it can be argued that although it is true that the confusion which conspiracy introduces into the law has tendency to benefit the prosecution, but some-times it has the opposite effect.[67] Occasionally, use of a conspiracy charge converts a relatively simple case into a conceptual complexity, giving the defense substantial grounds for an appeal.

The subsequent sections will discuss the numerous roles of conspiracy in the criminal law and will argue that each of the problems with which conspiracy purports to deal could

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[65] Paul Marcus, "Criminal Conspiracy Law: Time to turn Back From an Ever Expanding, Even More Troubling Area", 1(1) *William & Marry Bill of Rights Journal* 432 (1992-1993).
[66] *Ibid*.
[67] Peter GIllies, "The Indictment of Criminal Conspiracy", 10 *Ottawa Law Review* 448 (1978).

better be resolved by reference to other doctrines and principles. An analysis of conspiracy divides naturally into two parts: (i) conspiracy as a set of *substantive rules*, and (ii) conspiracy as a set of *procedural rules*. However, most of the theoretical discussion of conspiracy and attempts to defend the doctrine, centers upon the substantive rule.

3.6 The Substantive Doctrines of Conspiracy

The existing law of conspiracy contains several distinct substantive doctrines. Conspiracy is an inchoate crime, supplementing the law of attempt where more than one person is involved in plotting or preparing a crime. One is guilty of conspiring to commit a particular crime if, with the intention or purpose of furthering its commission[68], he agrees with some other person to commit it[69]. However, certain penal codes require in addition that one or more of the conspirators have performed some overt act in furtherance of the criminal agreement. Technically any act will come under conspiracy; even though that carries the conspiracy no closer to accomplishing its object (acts in furtherance of conspiracy of impossible objects). Moreover, an act by one alleged conspirator suffices for all.

Conspiracy is also a device for expanding the substantive criminal law and for enhancing punishment. In theory, at least, the object of a conspiracy need not be a crime: it is criminal to conspire to commit a civil wrong, or to do anything else that is immoral or dangerous to the public health and safety.[70] Furthermore, if conspirators actually carry out the crime they agree to commit, they may be convicted and sentenced for both the conspiracy and for the substantive crime.[71] All these rules are said to be based on the theory that combinations of wrongdoers are more dangerous than individual offenders. Hence, the outcome of the argument is that, wrongful conduct by such combinations should be criminally punished

[68] *People* v. *Powell*, 63 N.Y. 88, 92 (1875).

[69] Because an agreement requires at least two persons, the case law has en-forced a requirement of 'plurality'. Under this requirement, A could not be convicted of conspiring with B if B for some reason could not be convicted of conspiring with A. For example, if B merely pretended to agree, never intending to carry out the criminal venture, then A had to be acquitted, however serious his own intent. However, the Model Penal Code does not agree with this plurality requirement.

[70] Sayre, "Criminal Conspiracy", 35 *Harvard Law Review* 393 (1922).

[71] *Callanan* v. *United States*, 364 U.S. 587, 593 (1961).

even when the same acts would be excused if performed by an individual; in short, group criminal conduct calls for enhanced punishment.[72]

Finally, conspiracy provides a means of expanding the law of complicity in crime. Furthermore, each participant in a conspiracy is criminally liable for all the crimes committed by any of the participants in furtherance of the common enterprise, even if he would not otherwise be liable as an accessory.[73] Conspiracy thus permits any member of a large-scale organization to be punished for all the crimes committed by its members.

Thus, one rarely sees a defense of existing conspiracy law as it has been described. For example, no informed body of opinion today supports the rule that a conspiracy may be criminally punishable even if its object is only a civil wrong, or some other form of conduct that would not be criminal if undertaken by an individual.[74] Indeed, certain forbidden acts, such as agreements by competitors to fix prices, by definition require concerted action. However, it doesn't connotes that the courts should have the authority to declare certain activities criminal whenever they find it immoral, wrongful, or violative of some principle of tort or contract law. There is simply no need for modern, comprehensive penal codes to place such broad legislative authority in the courts. The legislature can easily enact more specific statutes stating the types of concerted activity to be held criminal.

Statutes which punish conspiracy similarly as if the forbidden act had been committed, are probably obsolete.[75] The theory underlying such statutes is the "group danger" rationale i.e. those persons who combine to commit petty crimes are more dangerous than those who commit them individually. Moreover, one does not have to be involved in any continuing criminal activity to be a conspirator.

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[72].Philip E. Johnson quotes: "Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has 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." This argument is generally termed as "Group-Danger Rational". *Supra* note 1 at 1154.

[73] *Pinkerton* v. *United States,* 328 U.S. 640 (1946).

[74] J. Goldstein, "Conspiracy to Defraud the United States", 68 *Yale Law Journal* 441 (1959).

[75] *Supra* note11 at 396.

Conspiracy as an Inchoate Crime

Conspiracy is also an inchoate or preparatory crime, permitting the punishment of persons who agree to commit a crime even if they never carry out their scheme or are apprehended before achieving their objective. It is in this role that the crime of conspiracy has been most strongly defended. Indeed, almost the only justification offered by the drafters of most of the criminal justice systems, may it be Model Penal Code or the Indian Penal Code, was the need to punish groups which engage in preparatory conduct which cannot be reached by the law of attempt.[76]

However, the Model Penal Code offers perhaps the most carefully stated justification for a doctrine of conspiracy that reaches further back into preparatory conduct than attempt:

First: The act of agreeing with another to commit, like the act of soliciting, is concrete and unambiguous; it does not present the infinite degrees and variations possible in the general category of attempts. The danger that truly equivocal behavior may be misinterpreted as preparation to commit a crime is minimized; purpose must be relatively firm before the commitment involved in agreement is assumed.

Second: If the agreement was to aid another to commit a crime or it otherwise encouraged its commission, it would establish complicity in the commission of the substantive offense. It would be anomalous to hold that conduct which would suffice to establish criminality, if something else is done by someone else, is insufficient if the crime is never consummated. This is a reason, to be sure, which covers less than all the cases of conspiracy, but that it covers many is the point.

Third: In the course of preparation to commit a crime, the act of combining with another is significant both psychologically and practically, the former since it crosses a clear threshold in arousing expectations, the latter since it increases the likelihood that the offense will be committed. Sharing lends fortitude to purpose. The actor knows, moreover,

[76] *Supra* note 1 at 1157.

that the future is no longer governed by his will alone; others may complete what he has had a hand in starting, even if he has a change of heart.[77]

Unfortunately, this entire argument is based on an unsound premise. It seems to justify the Code's conspiracy provision as a supplement to the traditional law of attempt. One of the most important traditional limitations upon attempt prosecutions has been the proximity doctrine, which requires that one go beyond 'mere preparation' and come somewhere near success in order to be guilty of attempting to commit a crime. The proximity doctrine seems to have originated in 1855 in the famous English case of *Regina* v. *John Eagleton*[78]. Later in the same year, the same court cited *Eagleton* in upholding the conviction for attempted counterfeiting of a man who had obtained dies engraved for manufacturing Peruvian coins, although he had not made any coins or even obtained all the necessary supplies. Since that time, the courts of several nations have attempted to specify how one can determine when a defendant's actions have gone beyond 'mere preparation' and become 'sufficiently proximate' to the completed act for conviction of attempt, with the result that considerable confusion has been added to the original uncertainty. An English court held that a jeweler who faked a robbery for the purpose of defrauding his insurer was not guilty of attempting to obtain money by false pretenses, because he had not yet filed a claim[79]. A New York court held that a gang of armed robbers who were apprehended as they drove around the city in search of a particular payroll clerk they intended to rob were not guilty of attempted robbery because they had not yet found the clerk.[80] A California court reversed the conviction for attempted theft of a swindler who tried to induce his victim to withdraw his money from the bank in the course of a 'Bunco' scheme known as the 'Jamaica switch.' Because the victim luckily met his wife in the bank and did not withdraw his savings, the swindler's acts amounted only to preparation.[81]

As these cases show, the proximity approach does not consider the dangerousness of the defendant but only how close he came to completing the particular crime. A person

[77] Goldstein, "Conspiracy to Defraud the United States", 68 *Yale Law Journal* 405 (1959).
[78] 169 English Reports 826 (Crim. App. 1855).
[79] *Rex* v. *Robinson* [1915] 2 K.B. 342.
[80] *People* v. *Rizzo* 246 N.Y. 888 (1927).
[81] *People* v. *Orndorff* ,261 Cal. App. 2d 212 (1968).

carrying a bomb into a public building with the intent to set it off is plainly very dangerous to the community even if by chance he is apprehended before lighting the fuse. A doctrine that leads to the acquittal of such persons is justifiable only if one views the criminal law to be dominated by the goals of retribution. The community's desire for punishment is weaker when the potential criminal does not succeed, or nearly succeed, in completing his crime and inflicting harm upon an identifiable victim. Punishment for attempts is also relatively less important in deterring crime, because the would-be criminal ordinarily expects to succeed and is deterred, if at all, by the punishment for success.

It can be argued that though retribution and deterrence theory of punishment are not irrelevant to modern criminal law, but today we tend to emphasize the restraint or rehabilitation of dangerous individuals. We see the primary task of law enforcement as the identification and isolation or supervision of those persons who are likely to offend repeatedly unless rehabilitated or at least safely locked away. With this change in emphasis have come discretionary and indeterminate sentences, probation and parole systems, rehabilitative prison programs and a wider law of attempts.[82] The law is conservative enough not to discard the old rules every-where, but modern statutory reform proposals have increasingly taken the view that the crucial issue is the clarity and strength of the defendant's criminal purpose rather than the proximity of his actions to the completed crime.

Pursued to its logical conclusion, the modern approach would permit the conviction of anyone shown to have had a firm intention to commit a crime, whether or not he had taken any steps towards its commission. The limiting factor, however, is our reluctance to put so much trust in either the omniscience or the benevolence of those who administer the law. It is difficult to determine what someone intends to do before he does it, or at least prepares to do it. Even when an individual has plainly said what he intends to do, there remains the question of how serious or definite his intent is. Many of us at times contemplate or even

[82] Glanville Williams quoted in his book that-so long as the law was purely deterrent or retributive in its aim, this circumscription of the offense of attempt [by the proximity doctrine] was perhaps justified. At the present day, when courts have wide powers of probation, there is much to be said for a broader measure of responsibility. The rational course would be to catch intending offenders as soon as possible, and set about curing them of their evil tendencies: not leave them alone on the ground that their acts are mere preparation . (Glanville Williams, *Textbook on Criminal Law* 125(1983)).

talk about committing a crime without ever doing anything to carry out the design. But if we refrain from criminal conduct, we are not dangerous, and the deterrent purposes of the criminal law are fully satisfied

For this reason the modern codes retain the requirement that a defendant go beyond merely planning or contemplating a crime before he can be convicted of an attempt. He must engage in conduct that is a sufficiently 'substantial step' towards completion of the crime to indicate his firm criminal intent, and to identify him as a dangerous individual who would probably have gone on to complete the crime if his design had not been frustrate. The crucial term 'substantial step' is defined only negatively: a step is not substantial 'unless it is strongly corroborative of the actor's criminal purpose.[83]

Under the conspiracy sections of the penal codes of USA and India, the act of agreement is the forbidden conduct whether or not it strongly corroborates the existence of a criminal purpose. In justifying this per se rule, the commentary on such penal codes relied heavily on the argument, that the act of agreeing is so decisive and concrete a step towards the commission of a crime that it ought always to be regarded as a 'substantial step'. The importance of this point depends upon how restrictively one defines the term 'agreement'. Hiring a professional killer to commit murder is an agreement, and surely few would doubt that it is a substantial step toward accomplishing the killing. But the language of the conspiracy sections of both penal codes and is broad enough to reach conduct which is far less dangerous or deserving of punishment than letting a contract for murder. Furthermore,

[83] Sec. 5.01(2) of Model Penal Code- Conduct shall not be held to constitute a substantial step under sub section (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;
(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
(c) reconnoitering the place contemplated for the commission of the crime;
(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its com-mission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

the term "agreement" may connote anything from firm commitment to be engaged in criminal activity by oneself- to reluctant approval of a criminal plot to be carried out entirely by others. It would be pertinent to mention that penal codes also requires that person entering into the agreement with the purpose of promoting or facilitating the crime is sufficient enough to be held liable for the offence of criminal conspiracy, but the existence of that purpose need not be substantiated by any conduct beyond the express or implied agreement and performance in some cases of a single overt act by any party to it. This point is of particular importance in conspiracy cases involving political activity or agitation. Members of radical societies may be likely to discuss or even to begin to plan criminal activities that they have no serious intention of carrying through. In short, insofar what conspiracy adds to the attempt provisions of the penal codes- is only overly broad criminal liability.

Conspiracy and Rule of Complicity

One who enters into a conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission.[84] At first glance, the conspiracy complicity rule seems to add little to the law of complicity[85] or accessorial liability. No one would question that all the persons who plot together to commit a crime are guilty of the crime if one or more of them commits it. However, some authorities limit the accomplice's liability to those crimes of the principal which he (accomplice) intended to assist or encourage[86], but, on the other hand, other authorities, have indulged in the legal fiction by saying that, one intends the natural and probably consequences of his acts, and thus have held the accomplice for the crimes of the principal which he should have foreseen but perhaps did not, making it an absolute liability.[87] Thus, every member of a robbery or burglary gang is liable for any killing committed by any member in the course of the

[84] *Anderson* v. *Superior Court*, 78 Cal. App. 2d 22 315 (1947).

[85] Law of complicity rests on the premise that someone whom the law interchangeably calls an accessory, accomplice, aider and abettor, secondary party, or helper in his principal's offense is derivatively, not vicariously, liable for that offense. The difference between derivative and vicarious liability is that derivative liability is based partly on the defendant's own actions, not merely on his relationship with someone else.

[86] Model Penal Code adopts this approach.

[87] *Supra* note 23.

robbery or burglary.[88] Here, the difficulty lies not in the conspiracy-complicity rule itself, but in the tendency of courts to regard a conspiracy as an ongoing business relationship of indefinite scope and duration, and to consider the conspirators, as "general partners" in crime.[89] In a famous case of *United States* v. *Bruno*[90], the Circuit Court of appeals ruled that a single, immense conspiracy to distribute narcotics included smugglers, middlemen, and retail sellers operating in two different parts of the country. Although the defendants were charged only with conspiracy, in theory such holding implied that each smuggler was guilty of every retail sale and each retailer of every act of smuggling, a pyramiding of liability that seems to be justified by no conceivable penological principle.

Once it is established that all participants conspired generally to further all the crimes of the organization, it should not be surprising for anyone that each should be held responsible for all crimes actually committed in furtherance of that agreement. The fundamental conceptual error that leads to such absurd results is the assumption that all the major and minor participants in a criminal enterprise are guilty of the same conspiracy. In such cases, extended liability of each accomplice flows from the basic absurdity of considering each of the contributors to act as a principle.

It is in this context it would be worthy to mention that the Model Penal Code defines conspiracy in terms of one person agreeing with another, rather than two or more persons entering into an agreement. This semantic change was intended, among other things, to make it possible to find each of the member's liability of a criminal enterprise guilty of a different conspiracy, depending upon what he individually agreed to do. For example, on the facts of the Bruno case, a court might find that the smugglers conspired to commit the retail sales but the retail sellers did not conspire to commit the smuggling. On the other hand, it might very well find that all the parties in the chain of distribution conspired to operate the entire chain, just as it could under the old, "bilateral" or "multilateral" definition of conspiracy. All that would be necessary to justify such a finding is the evidence that the

[88] W. Lafave& A. Scott, *Criminal Law* 453 (1972).
[89] *Supra* note 14 at 655.
[90] 105 F.2d 921 (2d Cir. 1939).

parties (principle and the accessories) were aware of the scope of the operation and intended to assist the business as a whole.

In *Blumenthal* v. *United States*[91], a salesman who agreed to sell illegally a part of a lot of whiskey was held to have conspired to sell the whole lot because "he knew the lot to be sold was larger and thus that he was aiding in a larger plan.[92]" This approach of the court can be justified on the point that the salesman was aware of the fact that there was a larger part which has to be sold out and he is assisting in selling a part of it. Thus, in this case the "unilateral approach" of conspiracy-complicity doctrine was not adopted.

The difference in the wording of these judgments is of doubtful significance because the 'unilateral theory' is unreliable as a means of limiting the scope of conspiratorial liability. A far better way to determine the scope of one individual's liability for the conduct of another would be to abandon conspiracy altogether, with its notions of business enterprises and general partnerships, and look instead to the policies underlying the specific criminal prohibitions at issue.

Conspiracy and Cumulative Punishments

If the object of the conspiracy is achieved, can the conspirators be convicted of both the substantive offense committed and the conspiracy to commit it? Or does the conspiracy 'merge' in the completed crime, losing its identity as an inchoate crime in its consummation? At common law, conspiracy, like attempt, was said to 'merge' into the completed substantive offense so that conspirators could be convicted either of agreeing to commit a crime or of committing it, but not of both. The modern rule is otherwise. Because collective criminal action is thought to create a greater public danger than individual crime[93], the Supreme Court held in *Callanan* v. *United States*[94], that conspirators may be convicted and sentenced consecutively for both the crime and the agreement to commit it.

[91] 332 U.S. 539 (1947).
[92] *Id.* at 599.
[93] *Supra* note 13.
[94] 364 U.S. 587, 593 (1961).

In *D.P.P.* v. *Doot*[95], the defendants were convicted of importing prohibited goods into the United Kingdom without a license and of conspiracy to import dangerous drugs. Two of them were given consecutive terms of imprisonment in respect of two convictions.

Further in case of *R* v. *O'Connell*[96] Lord Campbell observed:

> "A conspiracy to effect an unlawful purpose, or to effect a lawful purpose by unlawful means, is by the Common Law of England, an indictable offence; and it is fit that, if several persons deliberately plot mischief to an individual or to the State, they should be liable to punishment, although they may have done no act in execution of their scheme. Where they have actually done what they intended 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."

The *Callanan rule* is subject to the same objections as the rule which makes conspiracy to commit a misdemeanor a felony. Undoubtedly some criminal combinations are more dangerous than individual criminals, but it takes more than agreement between two persons to create a dangerous combination.[97] The Supreme Court undoubtedly had organized professional criminals in mind when it invoked the group danger rationale to support consecutive sentencing in the *Callanan case*, but its rule is equally applicable to two boys (first time offenders) who agree to steal a car.

Thus, no doubt the principle behind the cumulative punishment is well acceptable in criminal law jurisprudence but in the case of criminal conspiracy this principle does not seems to be appropriate as the purpose of criminal law cannot be stretched too far to make various stages of crime indictable in one case. Even if one attempts to justify cumulative punishments in cases of criminal conspiracies on the ground of deterrence philosophy, it

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[95] (1973) A.C. 807.
[96] (1844) 11 Cl. & F. 155, 402.
[97] Jens David Ohlin, "The Law of Conspiracy and Collective Reason", 98(1) *Journal of Criminal Law and Criminology* (2007).

may be said that it is wholly unrealistic to suppose that conspirators will be deterred from the commission of the crime by the thought that they thereby run the risk of conviction and sentence for both the completed offence and conspiracy.

The law of attempt further reinforces this argument. The commission of a substantive offence necessarily embraces an attempt to commit the offence; in fact it could also be characterized as a successful attempt. But it may happen that the commission of the complete offence cannot be proved, but that an attempt can be established on the evidence. Alternatively, where only an attempt is charged, it may turn out that the full offence can be proved. In these situations it has never been suggested that a conviction for both the offence should be allowed. It is assumed that the attempt is necessarily comprised within the substantive offence, its identity and its significance for the criminal law disappears when its success is proved. If conspiracy is viewed as analogous to or even type of attempt, the same result should obtain. A and B agree to rob a bank, and subsequently carry out their plan. Both are guilty of complicity in the robbery, and the robbery on this view is simply the consummation of their plans and preparations. The making of agreement is merged into its performance.

Conspiracy as an Alternative to Prosecution for the Substantive Crime

When a prosecutor does not desire cumulative punishment, he may still charge a defendant with conspiracy as an alternative to prosecution for the substantive offense. He may do so in order to take advantage of the procedural rules associated with conspiracy. He may also, however, feel that the very generality and vagueness of the concept of conspiracy makes a conspiracy conviction easier to obtain than a conviction for complicity in substantive offenses.

Where the prosecution is of organized criminals of the traditional variety, this advantage seems more apparent than real. It is true that the leaders of large gambling or narcotics enterprises are careful to keep their distance from the individual criminal acts of their employees, so that it may be easier to prove their connection with the overall enterprise than their direct participation in any specific criminal act.[98] Once a defendant is shown to

[98] *United States* v. *Aviles* 274 F.2d 179 (Cir. 1960).

be the leader of a criminal enterprise, however, any rational view of the law of complicity would hold him guilty of the narcotics sales or gambling transactions committed under his general supervision, however indirect his participation may have been. Moreover, once it is established that a particular defendant is one of the leaders of a continuing commercial criminal operation, there are inevitably specific criminal acts with which he may be charged. In fact, many of the greatest triumphs of organized crime prosecution have been achieved without the use of a conspiracy charge.[99] Thus, the charge of conspiracy can be easily used by the prosecution against the accused by abusing the procedural laws of any jurisdiction which is not appropriate

Procedural Approach to Conspiracy

Apart from its substantive significance, conspiracy doctrines have some important procedural consequences, especially in three areas: 'joinder', 'the statute of limitations', and 'the admission of hearsay evidence'.

Conspiracy and Joinder

Possibly the most important procedural issue affected by conspiracy doctrine is the joinder of defendants for trial. Starting with the position of joinder of charges in United States, some states in US grant defendants a right to separate trials upon demand, but most states and the federal government does not. Rule 8 of the Federal Rules of Criminal Procedure contains the federal standards for joinder of offenses and offenders. Rule 8(a), governing joinder of offenses, provides that two or more offenses charged against a single defendant may be tried together if they are "of the same or similar character" or if they are "based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Further, Rule 8(b) allows two or more defendants to be joined for trial when they are charged with participating in "the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." However, even in cases when joinder is proper under Rule 8, the trial court may order a severance under Rule 14[100], if it concludes that justice so requires. Similar

[99] *People* v. *Luciano,* 277 N.Y. 348 (1938).

[100] Rule 14 of the Federal rules of Criminal Procedure provides that- "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by

provisions regarding the joinder or charges can be found under the Indian Criminal Procedure Code, 1973 (henceforth Cr.P.C). Section 219[101] and 220[102] of Cr.P.C, 1973 is analogous to Rule 8 (a) of Federal Rules of Criminal Procedure which provides for "Three offences of same kind within year may be charged together" and 'Trail for more than two offences'. However section 223[103] seems to be corresponding to Rule 8(b) of the Federal Rules of Criminal Procedure, which provides for the conditions in which persons may be charged jointly.

This distinction between the joinder of charges in cases of criminal conspiracy is vital. Case laws have made clear that these two sub-divisions are mutually exclusive. Subdivision (a) controls only joinder of two or more charges against a single defendant; the permissibility of joining one or more charges against multiple defendants is governed only by subdivision (b) of Rule 8.[104] The importance of this distinction is that charges involving separate defendants may not be joined simply be-cause they are "of the same or similar character" for purposes of sub-division (a). If A commits one robbery with B and also a

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such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires."

[101] Sec. 219, Criminal Procedure Code, 1973- "When a person is accused of more offences than one of same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of same person or not, he may be charged with and tried at one trial, any number of them not exceeding three."

[102] *Id.*, sec. 220 - "If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial, any such offence."

[103] *Id.*, sec. 223- What persons may be charged jointly- The following persons may e charged and tried together, namely-

(a) persons accused of the same offence committed in the course of the same transaction;
(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;
(c) Persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;
(d) Persons accused of different offences committed in the course of same transaction;
(e) Persons accused of an offence which includes theft, extortion, cheating or criminal misappropriation and the persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last named offence;
(f) Persons accused of offence under section 411 and 414 of the Indian Penal Code, 1860 or either of those sections in respect of stolen property the possession of which has been transferred by one offence;
(g) Persons accused of any offence under Chapter XII of the Indian Penal Code, 1860 relating to counterfeit coin and persons accused of any other offence under t said Chapter relating to same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply t such charges.

[104] Similar findings are followed in Indian context with regard to *id.*, ss. 291, 220 & 223.

separate robbery with C, B and C may not be tried together merely because both offenses are of the same character and involve a common defendant.

Most cases, in which joinder by conspiracy is disputed reflect a variation or combination of two familiar models, the "wheel" and the "chain". In a *wheel conspiracy*, various defendants accused of individual criminal transactions are linked together by the fact that one defendant or one group of defendants participated in every transaction. The defendant or defendants implicated in every charge are described as the *hub of the wheel* and those charge with individual crimes as the *spoke.*

The United States Supreme Court discovered such a wheel in unusually pure form in *Kotteakos* v. *United States*[105] In this case, a number of persons were convicted of conspiring together to obtain loans from the Federal Housing Authority by means of applications that fraudulently misrepresented the uses to which the borrowed money would be put. The evidence showed eight distinct loan transactions, each involving defendants who had no connection with the other loans. The only connecting element was that all the loans were obtained through the services of a single broker, Simon Brown, who pleaded guilty and testified against all the others. The Supreme Court over-ruling the trail court's verdict of treating it as a single conspiracy held that the charge of a single conspiracy would prejudice the defendants because it forced them into a joint trial and because at that trial the jury was instructed that it could consider the entire mass of evidence against every defendant, as it properly could have if there actually had been a single conspiracy. It further indicated that mere knowledge that the hub defendant was doing similar criminal business with others was not sufficient to implicate that it is a single conspiracy.

Subsequently, in *Blumenthal* v. *United States*[106], the Court found a single conspiracy to sell whiskey at unlawful prices in a case involving two salesmen, the distributing company that supplied them, and an unknown person who supplied the whiskey to the distributor. The unifying factor, or the rim of the wheel, was the single lot of whiskey that all aided in distributing. Although each salesman "aided in selling only his part", he "knew the lot to be sold was larger and thus that he was aiding in a larger plan."' The Court distinguished

[105] 328 U.S. 750 (1946).
[106] 332 U.S. 539 (1947).

Kotteakos case[107] because in that case "each loan was an end in itself," and, except for the hub i.e. the defendant Brown, 'none aided in any way, by agreement or otherwise, in procuring another's loan.' However, the distinction seems to be unconvincing, because neither of the salesmen in Blumenthal assisted, by agreement or otherwise, in selling more than his own part. There was no evidence that the sales by one salesman in any way facilitated or encouraged the sales of the other.

Perhaps the result in Blumenthal can best be explained by classifying the case as an example of the other principal model of an extended conspiracy, the "*chain*." As the name indicates, a chain conspiracy involves the chain of distribution of some commodity, such as narcotics, from the initial manufacture or smuggling to the ultimate consumer. A chain conspiracy is similar to a wheel conspiracy in that the participants at opposite ends of the chain may not know or have any dealings with each other, but the two are different in that the participants in a chain conspiracy deal with the same goods. A chain may, and frequently does, incorporate one or more subsidiary wheels. Thus in *United States* v. *Bruno*[108], the most famous chain case, the conspiracy consisted of smugglers who brought narcotics in to New York, middlemen who purchased from the smugglers and resold to retailers, and two groups of retailers, one operating in New York and the other in Texas and Louisiana. Neither group of retailers dealt with the smugglers at the other end of the chain, or with the other group of retailers. However, the *per curiam* opinion in Bruno is not very authoritative as a precedent, but subsequent cases have cited it as establishing that a chain of distribution of a single commodity constitutes a single conspiracy because each member of the chain, however limited his own purposes, contributes to the profitability of the entire venture. However, distinguishing *wheel* from the *chain* is not the point of discussion, because the weakness lies not in their details but in their starting point.

The implied consequences of referring question of joinder in cases of criminal conspiracy such as *Kotteakos* and *Bruno* cases (as discussed earlier) can be said to be plainly absurd. Finding eight conspiracies rather than one in *Kotteakos* means, at least in theory, that the hub defendant was guilty of conspiring eight conspiracies rather than once. Further

[107] *Supra* note 46.
[108] 105 F.2d 921 (2d Cir. 1939).

allowing joinder in *Bruno* case resulted in establishing each defendant liable for all the crimes of his codefendants which furthered the distribution of the commodity. Even if these theoretical absurdities may not significantly affect the sentencing process, but for the scope of imposing criminal liability it is desirable to have a separate trail, at least in cases where conspiracy is not for effectuating a common design.

Commenting on the purposes which the joinder promotes is no doubt to improve efficiency in the trial process. It is obviously convenient for the prosecutor, courts and for the witnesses if the evidence need to be presented at only one trial rather than several separate trials. On the other hand, separate trials increase the likelihood of inconsistent verdicts, because different juries may take different views of the same evidence or the same issues, and also because subsequently tried defendants have the advantage of a preview of the prosecutor's case. But looking at the scope of joint trial one might agree that the potential efficiency of a joint trial is not always realized in practice. Some observers have noted a tendency for prosecutors to over-try a case involving many defendants, particularly when conspiracy is charged. It is quite possible for a single joint trial to be as long and drawn out as separate trials if each defendant separately exercises his right to cross-examine and to put on a defense, or if a large amount of evidence is introduced against some defendants which could not be used against others, if they were tried separately.

Joint trails exist to serve the convenience of the prosecutor, the court, and the convenience of the defendant. This may be the reason enough to resist them, for the defendants have little to gain by making the process of conviction cheap and efficient for the prosecution. The defendant at a joint trial may also have to sit with his lawyer through a substantial amount of testimony immaterial to his own case. A trial lasting several weeks can be an enormous burden, financially and otherwise, upon a defendant who may be a comparatively minor participant in an elaborate scheme involving many. Additionally, the jury may convict all the joint defendants as a group with-out considering the evidence against each separately. The normal difficulties of a joint trial for the defense are exacerbated when the defendants or their counsel do not agree on a common strategy. When the best defense for each individual is not the best defense for the group, the defendants may face the choice of either hanging together or hanging separately. The most

spectacular examples occur when some defendants attempt to cast the entire blame on others.[109] Further, one attorney may direct his cross-examination at bringing out facts that another would prefer to deemphasize, and the other's argument may present a theory that is utterly incompatible with the approach taken by the first.[110] It can be argued that joint trials promote efficiency only when the evidence against two or more defendant substantially overlaps. When the evidence against each defendant is distinct trying several defendants together does not save any significant amount of time or money, or further any of the other policies underlying joinder law, regardless of any connection between the defendants' criminal activity.[111]

Coming to the Indian context, Supreme Courts observation in *State* vs. *Nalini*[112] (Rajiv Gandhi Assasination case) is of vital importance. In this case the Supreme Court dealt at length the law of conspiracy, reviewed case law and culled out several principles governing conspiracy. However, specifically dealing with the joinder issue involved in conspiracy the Indian Supreme Court is of opinion that:

> "A charge of conspiracy may prejudice the accused because it forces them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of agreement. In the charge of conspiracy the court has to guard itself against the danger of unfairness against the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence, prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise

[109] *Supra* note 1 at 1147.
[110] *Ibid.*
[111] A similar view was taken in *King* v. *United States*, 355 F.2d 700, 704 (1st Cir. 1966), wherein it has been held that "Where, however, there are no presumptive benefits from joint proof of facts relevant to all the acts or transaction, joinder is impermissible."
[112] (1999) 5 SCC 253.

> contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy."

To conclude the issue of joinder involved in conspiracy trials, it may be suggested that joinder, no doubt, may promote efficiency in particular cases, however the court should still grant a severance if it seems likely that a joint trial will place a particular defendant at a serious disadvantage. Joinder should be allowed where several defendants commits various criminal acts pursuant to the common scheme, because proof of the common scheme itself may constitute a substantial part of evidence against each participant. Nevertheless, it is important to keep in mind that it is not the existence of a common plan itself that justifies joinder but the overlap in the evidence that result from its existence.

Conspiracy and Law of Limitation

Amongst all the procedural doctrines related to conspiracy, the rule governing the law of limitation is most effective. The period of limitation in a prosecution for conspiracy does not begin until the conspiracy is either abandoned or successfully accomplishes its objectives.[113]

If conspirators agree to commit a number of crimes over a period of time, prosecution for the overall conspiracy is permitted even if prosecution for some of the earlier substantive crimes is barred by the statute of limitations. Despite the statutory bar, the prosecution may prove that they are overt acts in furtherance of the conspiracy.

Under existing law[114], the use of a conspiracy theory may lengthen the limitation period in certain cases. In U.S, the prosecution has frequently argued that any conspiracy to commit a crime includes a subsidiary conspiracy to conceal the crime committed, so that the criminal combination remains alive during the period of concealment after the attainment of the criminal objective.[115] This argument may be used to justify a claim that the period of limitations does not begin until the termination of the subsidiary conspiracy to conceal.

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[113] *Fiswick* v. *United States*, 329 U.S 211 (1946).
[114] Especially in Federal Rules of Criminal Procedure (U.S.A) and most other jurisdictions.
[115] *Supra* note 1 at 1181.

However, in justification of a rule extending the life of a conspiracy throughout the concealment phase, one might argue that in certain cases a strict application of the statute of limitations permits organized criminals to escape punishment by concealing their misdeeds for the necessary length of time. Crimes which involve fraud or other concealment arguably should not be subject to the same period of limitations as crimes which occur more openly and can be discovered with due official diligence. Nevertheless, this argument has nothing to do with conspiracy. The leading case of *Grunewald* v. *United States*[116] illustrates this point in a better way. In this case the defendants were charged with conspiring to defraud the government by using improper influence to obtain "no prosecution" rulings from the Bureau of Internal Revenue. The rulings were obtained in 1948 and 1949; the prosecution was brought in 1954. When the defendants urged the three-year statute of limitations as a bar to prosecution, the prosecution asserted the existence of an implied subsidiary conspiracy to conceal the improper conduct, which had continued to exist for several years after 1949. The Supreme Court held that the mere fact that some of the conspirators had taken active steps after 1949 to conceal their guilt did not establish the existence of such an implied subsidiary conspiracy, because "every conspiracy will inevitably be followed by actions taken to cover the conspirators traces", and therefore "sanctioning the prosecution theory would for all practical purposes wipe out the statute of limitations in conspiracy cases." In addition, extending the life of a conspiracy to avoid the statute of limitations automatically extends the period during which the coconspirator hearsay exception operates. It may also lead to increased substantive criminal liability for conspirators whose own activity ceased long before the acts of concealment.[117]

Conspiracy and Hearsay

The most controversial of all the procedural doctrines associated with conspiracy is the coconspirator hearsay exception. A hearsay statement of a defendant's alleged coconspirator is admissible against the defendant if the statement was made during the pendency of the conspiracy and in furtherance of its objectives. This exception to the hearsay rule is a particular application of the more general principle that statements of an

[116] 353 U.S 391 (1957).
[117] *Supra* 1 at 1182.

agent concerning matters within the scope of the agency relationship and made during the existence of that relationship are admissible against the principal. Some authorities have found the analogy to the substantive liability of the principal for his agent acts. Because the employer is liable for the torts of his servant, committed within the scope of the employment, and the conspirator for the crimes of his coconspirator committed in furtherance of the common objective, these authorities have reasoned that the principal should bear the risk of what his agents say as well as the risk of what they do.[118] However, it does not seem that hearsay statements of agents are admitted merely because they are regarded as carrying some particular guarantee of trustworthiness. Nevertheless, there are some views adopted by the writers that an agent is not unlikely to make statements against his principal's interest unless they are true.[119]

Considering the general rules of hearsay evidence, there may be an objection against the application of this rule in conspiracy law. In cases of group crimes the existence of the agency relationship is precisely what the prosecution has to prove. For example, when a truck company is sued over a highway accident, hearsay statements of its driver are not used to prove that he was employed by the company but that he was responsible for the collusion.[120] Thus, in criminal conspiracy cases the existence of a criminal agency relationship is likely to be the main point at issue, but the coconspirator statements are admissible only on the premise that this relationship exists. However, it is requires from the prosecution to produce independent evidence of the existence and membership of the conspiracy in order to obtain the admission of the hearsay testimony, but this too is not required to prove beyond a reasonable doubt.[121] The result is that hearsay evidence is often used to prove the validity of the premise upon which it was admitted in the first place. Despite this objection the coconspirator hearsay exception survives in most of the criminal justice systems. It would be worthy enough to mention that the doubts as to the legality of coconspirators hearsay exception has been settled by the United States Supreme Court in *Dutton* v. *Evans* [122]. Supreme Court on several other occasions has also approved the

[118] *Van Riper* v. *United States*, 13 F.2d 961, 967 (1926).
[119] C.T. Mc Cornick & J.W.Strong, *McCornick on Evidence* 110 (1992).
[120] *Murphy Auto Parts* v. *Ball*, 249 F.2d 508 (D.C. Cir. 1957).
[121] *United States* v. *Ragland*, 375 F.2d 471 (2d Cir. 1967).
[122] 400 U.S. 74 (1970).

coconspirator hearsay exception stating that "the exception's survival is probably due to in part to tradition and in part to the leeway it gives the prosecution in overcoming the formidable difficulties involved in convicting organized criminals."[123] Despite the views adopted by the Supreme Court it may still be argued that can a coconspirator exception be made applicable, whether or not the declarant is available to testify in person, as the declarant testimony is usually unavailable because he exercise his privilege against self-incrimination.[124] Nonetheless, the hearsay exception is a rule of evidence that applies with equal force whether or not the defendant is charged with conspiracy[125] and there is no reason to expect that abolishing the crime of conspiracy would change it in any way. But if such exception results in admission of unreliable evidence which cannot be tested by cross-examination and which may therefore lead to the conviction of innocent persons, then it ought to be challenged whether or not agreement to commit a crime is a crime in itself.

Thus, to conclude it may be said that unless the above mentioned issues involved in conspiracy is resolved, the problem is likely to increase in significance since the shift to intelligence led policing is likely to produce greater reliance on conspiracy and other inchoates. The advantages in relying on conspiracy charges also suggest that it will remain firm favorite with prosecutors as it allows for earlier arrests, is easier to indict, allows for more evidence to be adduced, and most importantly for trial, allows the prosecutor to roll together the events of a continuing course of conduct into single charge more easily packaged to the court. No wonder it is a charge often called the "prosecutor's darling".

[123] Levie, "Hearsay and Conspiracy: A Re-examination of the co-conspirators Exception to the Hearsay Rule", 52 *Michigan Law Review* 1159 (1954).
[124] *Kastigar* v. *United States*, 406 U.S 441 (1972). It has been held that "if the declarant is unavailable solely because he asserts the privilege against self-incrimination, the prosecution can obtain his testimony by granting him use of immunity."
[125] *Kelley* v. *United States*, 364 F.2d 911 (10th Cir. 1996).

CHAPTER-IV

CONSPIRACY: A CRITICAL APPRAISAL IN INDIAN PERSPECTIVE

The definition of criminal conspiracy in section 120-A has been taken from Lord Brompton, who defined conspiracy in a case of *Quinn* v. *Leatham*[126], in the year 1901. He defined criminal conspiracy by holding that-" if two or more persons agree together to do something contrary to law or wrongful or harmful towards another person or to use unlawful means in the carrying out of an object not otherwise unlawful, the person who so agree commits the crime of conspiracy." No overt act in pursuance of the conspiracy is necessary, the illegal combination itself being the gist of the offence. In *Mulcahy* v. *R,*[127] Willis J. has also stated that:

> "A conspiracy consists not merely in the intention of the two or more but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is only indictable. When two agree to carry it into effect, the very plot is an act in itself and the act of each of the parties promise against promise *actus contra actum* capable of

[126] (1901) Ac. 495.
[127] (1868) LR 3 HL 306. See, also *Barendra Kumar Ghosh* v. *Emperor*, 14 C.W.N. 1114.

being enforced if lawful, punishable if for a criminal object or for the use of criminal means."

Coming to the Indian context, originally the Indian Penal Code, 1860 (hereinafter IPC) made conspiracy punishable only in two forms i.e. conspiracy by way of abetment and conspiracy involved in certain offences.[128] In the former case, an act or illegal omission must take place in pursuance of conspiracy in order to be punishable. The latter is a conspiracy by implications and the proof of membership is enough to establish the charge of conspiracy. But, in the early part of this century in India, specially in Bengal, some anarchical crimes were committed on a large scale. Therefore the then Government of India thought it advisable to amend the law on conspiracy and as a result Chapter V-A was added to the Penal Code expressly providing for the punishment for the conspiracy for all types whether an overt act has been done or not. This was done by passing of the Criminal Law (Amendment) Act, 1913[129]. The necessity to widen the scope of the law of conspiracy has been explained in the statement of object and reason[130] of the Criminal Law (Amendment) Act, 1913, which may be quoted in *extenso*:

"The section of Indian Penal Code which deal directly with the subject of conspiracy are those contained in Chapter-V and section 121-A of the Code. Under the latter provision it is an offence to conspire to commit any of the offences punishable by section 121 of the Indian Penal Code or to conspire to deprive the king of the sovereignty of India or any part thereof, or to overawe by means of criminal force or the show of criminal force, the Government of India or any local government and to constitute a conspiracy under this section it is not necessary that any act or illegal omission should take place in pursuance thereof. Under section 107 abetment includes the engaging with one or more persons in any conspiracy for the doing of a thing if an act or illegal omission takes place

[128] Sec.107, IPC-A person is said to abet the doing of a thing by conspiracy if he engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing..
[129] Act VIII of 1913.
[130] Vide Gazette of India, 1913, Part V.

in pursuance of that conspiracy, and in order to the doing that thing. In other words, except in respect of the offences particularized in section 121-A, conspiracy *per se* is not an offence under the Indian Penal Code.

On the other hand by the common law of England, if two or more persons agree to do anything contrary to law, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons who so agree, commits the offence of conspiracy. In other words, conspiracy in England may be defined as an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means, and the parties to such a conspiracy are liable to indictment.

But experience has shown that dangerous conspiracies are entered into India which has, for their objects, aims other than the commission of the offence specified under section 121-A of the Indian Penal Code and the existing law is inadequate to deal with modern conditions. The present Bill is designed to assimilate the provisions of Indian Penal Code to those of the English law with the additional safeguard that in case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence and when such a conspiracy is to commit an offence punishable with death, rigorous imprisonment for a term of two years or upwards, and no express provision is made in the Code, provides punishment of the same nature as that which might be awarded for the abetment of such offence. In all other cases of criminal conspiracy the punishment contemplated is imprisonment of either description for a term not exceeding six months or with fine or with both."

Thus, criminal conspiracy after 1913 has been dealt with in the Penal Code in the following forms-

i. Where overt act is necessary

ii. Where overt act is not necessary and an agreement *per se* is made punishable.

By the reading of the objects and reasons of the Criminal Law (Amendment) Act, 1913, it seems that the main object was to assimilate the Indian law with that of England. But a deep study of the law as incorporated in Chapter V-A of the Indian Penal Code reveals that it is really wider in many respects than the English law of criminal conspiracy and has even led to certain absurd results. In the words of a learned commentator, "The statement of objects and reasons appears in this respect to be inaccurate, since it goes beyond merely assimilating the criminal law of India so that in force in England."[131] Before the enactment of sections 120-A & 120-B IPC, conspiracy was treated as an abetment. Now it has been defined separately but major conspiracies still continue to be punished as abetment.[132] In criminal conspiracy as defined in section 120-A IPC four ingredients are required:

i. An agreement between persons.
ii. To do an illegal act.
iii. To do a legal act by illegal means.
iv. An overt act done in pursuance of the conspiracy.

However, under English law only first three ingredients are required and an agreement itself is treated as an overt act and no separate overt act is necessary unless the rule is limited by statute. While, under section 120-A IPC, overt act in furtherance of conspiracy is also required if the act to be done or cause to be done is not illegal (proviso to section 120-A IPC).

Thus, prior to the Amending Act of 1913, conspiracies under the Indian Penal Code could be punished only under section 107 as an abetment and only when the conspired act took place, except under the special provisions,[133] where they were specially punished. But after 1913 the commission of the conspired act is not necessary. Now therefore there are two kinds of conspiracies punishable under the Indian Penal Code, though they are not wholly exclusive of each other. These conspiracies are: (i) conspiracies falling under section

[131] K.D.Gour, *The Penal Law* 508 (2004).
[132] Y.P.Singh, "What is Conspiracy", 93 *Cri.L.J*. 57 (1997).
[133] Ss. 121-A, 311, 400, 401 and 402, IPC.

107(2), and (ii) conspiracies which are outside the definition of abetment under section 107 but which fall within section 120-A of the Indian Penal Code.

The concept of punishing conspiracy has been one of the most controversial issues, still existing in the criminal law jurisprudence. While supporting the concept of inflicting punishment for conspiracy, Willis J. has observed that, conspiracies are punished because-

> The number and the compact give weight and cause danger and this is more specially the case in a conspiracy *the gist of the offence of conspiracy then lies*, not in the doing of the act or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but *in the forming of the scheme or agreement between the parties.* The external or overt act of the crime is the concert by which mutual consent to a common purpose is exchanged. In an indictment, it suffices if the combination exists and is unlawful, because it is the combination itself which is mischievous and which gives the public an interest to interfere by indictment.[134]

So long as the design to do a wrongful act rests in the intention only, it is not criminal, but as soon as two or more persons agree to carry it out, the agreement goes beyond mental concept of a design and therefore is an offence of conspiracy. As observed by Mukherjee J.-

> The offence of criminal conspiracy is of a technical nature and the essential ingredient of the offence is the agreement to commit the offence and not actually committing an offence.[135]

But on the contrary there are jurists who have vehemently criticised the concept of punishing the offence of conspiracy. Accordingly, jurists like Russell say that "The crime of conspiracy affords support for any who advance the proposition that criminal law is an

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[134] *Mulcahy* v. *R.* (1868),L.R.3 H.L,306,317. Approved by House of Lords in *Queen* v. *Leatham*, 1957S.C,648.

[135] *B.N.Mukherji* v. *Emperor*, AIR 1945, Nag. 163,166 ; *F.N.Roy* v. *Collector of Customs*, AIR1957 SC 648.

instrument of government."[136] The opportunity, which the vagueness of this crime can offer, to governmental oppressions has been recognized also by an independent judiciary. The law of conspiracy may serve as an easy handle for the oppression in the hands of the executive. As Fitzgerald J. has also stated "the law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be zealously regarded and never to be pressed beyond its true limits"[137] In modern times the tendency of the English and the American courts has been to keep within bounds the employment of charges of conspiracy. Humphery J.[138] observes-

> "There is a growing tendency to charge persons with criminal conspiracy rather than with the specific offences which the evidence shows them to have omitted. The stringent observations of Cockburn C.J. in the case of *Boulton & Others* are in a danger of being overlooked."

The observation of Cockburn C.J.[139] referred by Humphery J. are-

> "I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of the crime, it is not the proper course to charge the parties with conspiracy to commit it, for that course operates, it is manifest, *unfairly* and *unjustly*, against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of the other and which deprives defendant of the advantage of calling their co-defendants as witnesses."

Huda, being very critical on the Amending Act of 1913, criticized the inclusion of conspiracy as a separate offence. His criticisms has mainly four-folds-

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136 *Russell, On Crimes* 213(1964).
137 Irish State Trials (1867) quoted in *id.* at 216.
138 *R* v. *West* (1948) 1 K.B, 709,720.
139 *R* v. *Boulton* (1871) 12 Cox, 87, 93.

Firstly, A conspiracy, on principles should be punished only when its object is very serious like waging war against the government (sec.121-A, IPC) and the other cases of conspiracies should be punishable only when they fall under section 107.

Secondly, this Amending Act of 1913 introduces a law which punishes a person, even before the stage of preparation which should not be punishable. This law has thus created an anomaly.

Thirdly, preparations are not punished because they do not cause alarm to the society as also because ordinarily they do not disclose the existence of a criminal intent. Similarly, he argues, a conspiracy though it may itself technically be an overt act, has not the publicity of an overt act and does not produce the same disturbing effect on society, as an ordinary overt act towards the commission of a crime. Conspirators often work in secret and it is seldom that a conspiracy is revealed unless something is done in pursuance of that conspiracy. Therefore, there would be no danger and no inconvenience, if the existing law related to criminal conspiracy were left exactly where it had been before the Amendment Act of 1913.

Fourthly, Huda argues that, it is not the policy of the law to create offences that cannot ordinarily be proved. An individual attempting to commit an offence is given a *locus paenitentia*, while a conspirator has none. The conspiracy is complete as soon as the agreement or combination is formed. Bret J. observed that the crime of conspiracy is completely committed; if it is committed at all, the moment two or more have agreed that they will do, at once or at future time, certain things. No repentance, no desire to withdraw can protect him from punishment under Indian criminal law. On the contrary, it may be noticed that in cases of attempts, the adoption of means absolutely un-adopted to the end excuses the criminal. For example, a person to kill his enemy by black-magic or witchcraft is not punishable, but once an agreement is entered into to commit murder, even if the means agreed upon are absolutely insufficient, that will not be accepted as an excuse.

However, in defense of this Amending Act, three arguments have been advanced. *Firstly*, that the combination of two or more persons to commit an illegal act gives a momentum to

the act and therefore the punishment at the earliest possible stage is justified. Bowen J. in *Moghul case*[140]

> Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal among several, there can be no doubt. The distinction is based on the sound reason, for, a combination may make oppressive and dangerous that which if it proceeded only from a single person would be otherwise and the fact of the combination may show that the object is simply to do harm to the exercise of one's just right.

The argument may appear to be sound in regard to the offences of rioting or the like relating to the disturbance of the public peace, but may have no force in relation to the offences like forgery and still less in relation to acts which are merely illegal. Similarly, in *Pulin Bihari Das* v. *Emperor*[141], it was held that-

> "The combination is the gist of the offence. There is nothing in the word conspiracy; it is the *agreement*, which is the gist of the offence. The rational of the crime of conspiracy as an inchoate crime is thus, that act of agreeing with another person to commit a crime is a sufficiently decisive act on the road of criminality to make a person subject to the discipline of the law."

Secondly, all kinds of inchoate crimes are punished on the basis of the reasoning which has been propounded by Bentham, who observes:

> "The more these preparatory acts are distinguished for the purpose of prohibiting them, the greater the chance of preventing the execution of the principal crime itself. If the crime not stopped at the first step of his career, he may at the second, or the third. It is thus that a prudent legislator, like a skilful general, reconnoiters all the external post of his enemy with the intention of stopping his enterprises. He places in all the defiles, in all the winding of his rule, a chain of works, diversified according to

[140] *Moghul Steamship Co.* v. *McGregor & Co.*, 23 Q.B.D,598.
[141] 16 C.W.N. 1105.

> circumstances, but connected among themselves in such a manner that the enemy finds in each new dangers and new obstacles."[142]

But the policy outlined in the observations of Bentham has not been consistently followed in our Code.

Thirdly and finally, it has been suggested that the secrecy with which the conspirators generally act is another ground for departing from the ordinary principles in dealing with the few that are caught.

But however plausible the explanation may be, it is hardly convincing that there is any justification for treating as an offence, an agreement to commit an act that is merely illegal and not an offence when done by a single individual. Russell on crimes observes:

> "The application of this theory has caused much difficulty and controversy, especially as to combination with reference to trade or of employees against workmen or of workmen against employers; and the rule has been altered by statute with respect to certain acts done legitimately and not maliciously in furtherance of trade disputes."[143]

It may be of interest to note that conspiracy as a distinct offence has been taken away from the revised codes of Russia, Bavaria, Austria, Germany and many other countries. It will cause no inconvenience if the law of conspiracy in our country is amended and the limits to which it has been extended, be curtailed. The framers of the Indian Penal Code must have realized the difficulties in incorporating in the Indian law, the very vague provisions of the English law. But the jurists responsible for the Amending Act of 1913 in their enthusiasm to assimilate Indian law with English law overlooked many things at that time and therefore the change made by them seems hardly justified specially in the context of the modern development of the political and the social structure of the society. At present, the abuse of the law of criminal conspiracy in the hands of Government creates a genuine fear in the minds of its citizens. In this context, it would be worthy to quote Prof. Sayre. He has rightly pointed out that, "A doctrine so vague in its outlines and uncertain in its

[142] Bentham, *Principles of Legislation* 442(1823).
[143] *Supra* note 11 at 1715.

fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a variable quicksand of shifting opinion and ill-considered thought."[144] He further emphasizes that, "it would seem, therefore of transcendent importance that judges and legal scholar should go to the heart of this matter, and with eyes resolutely fixed upon justice, should reach some common and definite understanding of the true nature and limits of the elusive law of criminal conspiracy."[145]

Thus, conspiracy is an inchoate crime and is punishable primarily because an agreement to commit is a decisive act, fraught with potential dangers; but to bring an agreement to commit a civil wrong within the range of criminal conspiracy is to stretch the rationale of criminal law to the farthest limit. It has been reiterated that Indian Criminal Law Amendment Act, 1913, was passed as an emergent piece of legislation and this measure was motivated by political expedience. No efforts were made to deal with the matter in the ordinary and regular way. It was neither circulated for opinion among the judicial and executive officers of the Government nor the representative public men and bodies were consulted. The result was that a piece of legislation was hurriedly enacted and inconsistent and unintelligible principles of law were put in action. It may be suggested that the provisions of section 120-A, IPC needs re-examination.

[144] Francis B. Sayre, "Criminal Conspiracy", 35 (4) *Harvard Law Review* 393 (Feb 1922).
[145] *Id.* at 394.

CHAPTER-V

CRIMINAL ATTEMPT

> *There is, perhaps, no more unsatisfactory branch of our criminal law, than the law relating to attempt, and there is not the slightest prospect that with the passage of time it will become less satisfactory.*[146]

Throughout the spectrum of inchoate crime spanning the concepts of attempt, conspiracy and solicitation or incitement, the most notorious[147] and indictable problems have arisen in the area of attempts. A culprit first intends to commit an offence, then prepares for it and thereafter attempts to commit the offence. If attempt succeeds, he has committed the offence; if fails due to some reason beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, begins with preparation. When they are complete, the culprit commences to do something with the intention of committing the offence. And then is the step towards the completion of the offence.

With regard to attempt, it may be said that there may be a crime where the whole of *actus reus* that was intended has not been consummated. But, the liability begins only when the offender has done some act, which not only manifests *mens rea*, but goes to some extent in carrying it. As long as crime lies in the mind it is not punishable, because mere criminal

[146] *State* v. *Kudangirana* 1976(3) SA 565.
[147] D.Stuart, The *Actus Reus* in Attempts, 505, *Criminal Law Review*(1970).

thoughts do not guarantee an act of crime. They might not be executed. What constitutes the offence of criminal attempt is a mixed question of law and fact. It depends largely upon the circumstances of the particular case. Attempt defies a precise and exact definition.

5.1 Criminal Attempt: Historical Perspective

Criminal Attempt falls in the category of inchoate crimes[148]. The problem related to law of attempt continues to be somewhat enigmatic and notorious for its intricacies.[149] The problem of attempt has eluded solution as its history has been neglected so far. According to Prof. Hall, the social and psychological factors have great influence upon the law of Criminal Attempt, especially with regard to relevant harm or at least, what was regarded as sufficiently harmful to warrant penalization. The legal history also disclose that there is an irreducible element of experience in law that cannot be persuasively dissolved in logical analysis and which penal theory must somehow take into account[150].

A brief historical survey of the law of criminal attempt may thus be useful in the formulation of this problem. The earliest record of the official repression of attempts as an exercise of criminal policy is to be found in the measures adopted by the Star Chambers to suppress the practice of dueling. The common law at the time could deal adequately with the principal parties (or survivors of them) and their accessories if the duel actually took place; but this was felt to be insufficient. Accordingly the Star Chamber exercised its arbitrary jurisdiction and punished with fine and imprisonment any person proved to have participated in the preliminary arrangement for a duel even if the contest never took place. In tracing the early history of these preliminary crimes it is not possible to disentangle the development of incitement from that of attempt.

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[148] Though Turner editor of Kenny book does not agree and says "these preliminary crimes have sometime described as 'inchoate' crimes. This is misleading because the word 'inchoate' connotes something which is not yet completed, and it is therefore not accurately used to denote something which is itself complete, even though it be link in a chain of events leading to some object which is not yet achieved. J.C. W. Turner *Kenny's Outline of Criminal law*, 99 (Universal Law Publishing, New Delhi, 19th edn 2002.)

[149] Criminal Attempt "*is more intricate and difficult of comprehension than any other branch of criminal law*". *Hicks* vs. *Commonwealth,* 86 Va. 223, 9 S.E. 1024 (1889).

[150] R.B Tiwari "Criminal attempt" *Essays on the Indian Penal Code* 111 (2005).

In *R* v *Johnson*[151] an attorney was convicted of offering money to a person to come forward and to give evidence to prove that a deed was false. Though his act was attempted to procure evidence but the Judges did not go upon any general principle that attempt to commit a crime itself was a crime. They merely declared it to be an offence because "witnesses ought to come unbiased and affected with money.

Language used in the early cases clearly reflects intermingling of attempt, conspiracy and incitement. Indeed it was not until about the end of eighteenth century that incitement, conspiracy and attempt broke off into distinct and separate offences.[152]

In the offence of attempt the grave men is measured by the kind of crime intended, and this means that the essence of attempt lies in the intention rather than in the acts done in furtherance thereof. In other words criminality is constituted more by the *mens rea* than the *actus reus*. Yet, since *mens rea* alone is not crime the court require physical element also[153]; but in the case of *R* .v *Sutton*[154] so much was necessary as could establish *mens rea*. In this case a strong resemblance to the crime of treason, which in the form encompassing the King's death consists mainly in the rebellious and evil thought of the traitor which needs only the physical support that the person accused be thereof provably attained of open deed, can be observed.[155]

As late as 1769, when the case of *R* v *Vaughan*[156] was decide there still seems to be no thought of the modern doctrine that attempts generally to commit crime are as such criminal.

The modern doctrine may be said to date from Lord Mansfield opinion, in *R.* v. *Scofield*[157] decided in 1784 "when an act is done, the law judges, not only of the act done, but of the intent with which it is done: and if it is coupled with unlawful and malicious intent though

[151] 167 A 344 Penns. (1933).
[152] J.C. W. Turner, *Kenny's Outline of Criminal law*, 100 (2002).
[153] *Ibid.*
[154] (1736) 2 Str. 104, this case though was overruled in the case of *R.* v *Heath* (1810) R. and R. 104
[155] *Supra* note 3 at 102.
[156] (1769) All ER 311.
[157] (1784) Cald. 397.

the act itself would otherwise have been innocent, the intent being g criminal, the act becomes criminal and punishable. [158]

The first case in which it was clearly decided that an attempt to commit a crime is at common law itself a crime was *R.* v *Higgins*[159] in 1801. After this case it is now indictable misdemeanor to attempt to commit any felony, or any misdemeanor, whether such felony or misdemeanor is an offence at common law or by statute.[160]

These cases provide an important clue to the necessity of development of the law of criminal attempts, namely that standard technique of 'assault plus aggravation' a species of attempt; in common law could not be literally applied to check all harms. These suggest that harmful tendency to aggravated nature was to be made punishable as criminal attempt and this remain the underlying criminal policy of the law even today.[161]

5.2 Criminal Attempt under Common Law

We know that as long as a crimes lies merely in the mind it is not punishable, because criminal thoughts often occur to people without any serious intention of putting them into execution. [162] An evil intention unaccompanied by an overt act is not punishable as the devil himself does not know the thought of man, so it is absolutely difficult to define the contemplation in the mind of an individual and punish him for idea in his head.[163] The position is different when steps are taken to put the desire into effect. A man who starts on a criminal path but who is checked before he can accomplish his purpose may commit what itself is called an attempt.[164] The word attempt, as stated by Cockburn CJ 'conveys with the idea that if the attempt has succeeded the offence charge would have been committed'[165]. For example A fires at B in order to kill him, but B survive because injuries do not prove fatal, or A misses the mark. A, is said to have attempted murder.

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[158] *Ibid.*
[159] (1801) 2 East 5 (T. A. C.).
[160] *Supra* note 3 at 102.
[161] *Supra* note 2 at 218.
[162] Glanville William, *Text Book of Criminal Law* 402 (2003).
[163] K. D. Gaur, *Criminal Law: Cases and Material* 249 (2005).
[164] *Supra* note 13 at 402.
[165] *Supra* note 14 at 248.

The section 1 (1) of Criminal attempt act 1981 defines criminal attempt as:

"*If, with intent to commit an offence to which this section applies a person does an act which is more than preparatory to the commission of the offence, he is guilty of attempting to commit the offence"*[166]

Mens Rea and *Actus Reus* in Attempt

Further, since an attempt to commit a crime is itself a crime, it follows that the essentials of crime that is *mens rea* and *actus reus* must be satisfied. Therefore it must be proved-

(a) That the offenders physical conduct reached the point which the law prohibits, in other words it must be proved that something has been done by the offender. A deed which the law regard as making the commission of this particular offence, and[167]

(b) That in pursuing this line of conduct his conduct was actuated by intention (*mens rea)*, to go further and achieve a definite end which is a specific crime.[168]

Mens rea in Attempt

It is implicit in the concept of an attempt that the person acting intends to do the act attempted; so the *mens rea* of an attempt is essentially that of the complete crime. This proposition however requires qualification. It has been seen generally that, though not invariably, recklessness as well as intention is a sufficient *mens rea* to ground liability for common law. Paradoxically, but inevitably, the law's requirement on charge of attempting to commit crime are stricter than on charge of actually committing it; for the concept of attempt involves the notion of intended consequence.[169]

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[166] S.1 of criminal attempt act 1981.
[167] *Supra* note 3 at 177.
[168] *Ibid.*
[169] Smith and Hogan, *criminal law*, 163 (Butterworth, London 2nd edn, 1969).

Prof. Sayre[170] say "however grossly negligent and therefore, criminal, the defendant's conduct may be, without proof of specific intent to effect the particular criminal consequence for attempting which he is indicted, there can be no liability of criminal attempt." He further gives example where the defendant's conduct is such as to amount utter recklessness to human life but where no life is taken. . For instance, a defendant hoping sincerely that no one will be hit, runs a car at fifty miles an hour in a crowded city street and miraculously avoids killing anyone. It would seem that there should be no conviction of attempt in these kinds of cases. Like the case where defendant points out what he supposes to be an empty gun at his friend, pulls the trigger and bullet narrowly misses his friend, since there was no intent to cause death of a human being.

According to writers like Russell[171] and Kenny[172] the consideration of mental attitude which have been described as recklessness have no place in law of criminal attempt; still less it is relevant to discuss negligence. For whatever man attempt to do he must intend to achieve if he is able to do so. A man may be doubtful of his power or of his chances to success, yet it is clear that the word 'attempt' cannot be correctly used to denote his action unless he intends thereby to reach the mark at which he is aiming , if it be possible for him.

The law stated above seems to be supported by the *Whybrow case*[173]**.** It was here held that on a charge of attempted murder it is not sufficient to prove an intention to cause grievous bodily harm- though it is well established and suffice for a complete crime- but that an intention to cause death is required.

Dr Williams[174], however, disagrees and puts a case through his lens in which the writer respectfully concurs, "*common sense seems to suggest a wider extension of responsibility for attempt"*. For example D posts a letter to P asking for money on representation which, as far as D knows, may be true and false. If P receives the letter and relying on the

[170] *Supra* note 8 at 842.
[171] *Supra* note 3 at 177.
[172] *Supra* note 4 at 103.
[173] (1951) 35 Cr. App. R. 141.
[174] Glanville Williams, *Criminal Law* 123 cited in J. C. Smith, "Two Problems in Criminal Attempt" 70 *Har. L. Rev.*429 (1957)

representation gives D the money, and if the representation turns out to be false, D will be guilty of obtaining money by false pretence, his deceit being of reckless variety. Now suppose the letter is not received by P. It may be thought that D is guilty of attempt to obtain money by false pretence. His state of mind, as to the falsity of pretence, is reckless not intentional. But does this negative an attempt? Here he questions, why it should not be legally possible to attempt a crime of recklessness?

For Smith[175] an act is said to be "intended" in the full sense of the term only when the consequences are foreseen and desired, or foreseen as substantially certain from the willed muscular action, and the relevant circumstances both pure and consequential are known to exist or hoped to exist. He puts further instances to show that it is desirable than the proposition that "intention" is essential to attempt should be modified –

(i) D, not knowing whether his wife (whom he has left a year ago) is alive or dead, attempts to marry P.

ii) D owns an umbrella of a common pattern. He has mislaid it, but on leaving his club he sees a similar umbrella which may be his but, he realizes, most probably is not. Just as he tries to put out his hand to take it, true owner arrives.

In all these cases D could be convicted of attempt without destroying the general principle that intention is required in attempt. [176]

Dr Smith say the true position, it is suggested is that, is that D's act must be intentional with respect only to the consequences and, as a necessary corollary of that, the 'consequential circumstances'. That is, it must be shown that D desires and foresees, or foresee as substantially certain consequence of his act; and in order to do that, it must be shown that he either hopes or believes in the existence of consequential circumstances. With regard to the pure circumstances, however recklessness will suffice, provided only that recklessness will suffice for the complete crime.[177] Like D intended the consequence-

[175] J. C. Smith, "Two Problems in Criminal Attempt" 70 *Har. L. Rev.*426 (1957)
[176] *Id at 430.*
[177] *Supra* note 26 at 430-431.

marriage with his proposed new partner- and was reckless as to the pure circumstance of the existence of his wife.

Thus according to Smith, recklessness will suffice for ground liability for an attempt when there is recklessness as to both consequences and the pure circumstances. We see that Criminal Attempt act 1981 has define *mens rea* of a an attempt as simply "intent to commit an offence" this mean an intent require as to every aspect of the offence: attempted rape requires intention as to the woman's lack of consent- intention in this context being understood as the hope or knowledge that she does not consent[178]. The Court of appeal, however, has continued to hold that recklessness as to the woman's consent should suffice for attempted rape.

The courts, in most cases, are in agreement. In *Pigg*[179] decided under pre 1981 common law the court has simply assumed that recklessness as to the woman's consent sufficed for attempted rape as it did for rape; the issue was what "recklessness" means in this context. Likewise in *Breckenridge*[180] decide under the 1981 Act, the court offered "no criticism" of the judge's ruling that "recklessness in attempted rape bore same meaning as it had in case of full offence of rape", and thus clearly assumed that such recklessness sufficed for the attempt.[181]

In *Millard and Vernon*[182] as well as *R* v *khan*[183] it was said that for the offence of attempted rape-

(1) the intention of the offender is to have sexual intercourse with woman

(2) The offence is committed if, but only if the circumstances are that

i) The woman does not consent and

[178] *Supra* note 20.
[179] (1982) 2 All E. R. 591.
[180] (1984) 79 Cri. Appeal. Rev. 244 269.
[181] R. F. Duff ,"The Circumstances of an Attempt" 50 *C. L. J.* 101 (1991)
[182] 1987 Crim LR 393.
[183] (1990) 2 All E R 763.

ii) The defendant knows she does not consent or is reckless as to whether she consents.

In attempt to rape it is said that there has to be some act which is more than preparatory to sexual intercourse. In that sense the intent of the defendant is precisely same in rape and in attempt to rape and *mens rea* is identical, namely intention to have intercourse plus a knowledge of or recklessness as to the woman's absent of consent[184].

It is not clear whether, or how far, the court will extend this doctrine of recklessness beyond d the cases of attempted rape. and the 1989 draft code marks a change and in clause 49(2) an attempt requires " *an intention with respect to all the elements of the offence other than fault element, except that recklessness with respect to a circumstance suffices where it suffice for the offence itself.*[185]

Thus when we talk about *mens rea* in cases of attempts, it not only includes the mental fault or knowledge but covers in its ambit recklessness as well as negligence. As explained by Prof. Williams, when a terrorist places a bomb on the front door of cabinet minister's house, knowing him to be in residence, and knowing that he occasionally opens the door himself. The bomb is triggered to go off so that it may kill the minister or any person opening the door. The bomb is discovered and is rendered harmless. The terrorist will be guilty of attempt to murder, even in the case where his intention is only to damage the property.[186]

Actus reus in Attempt

It has been repeatedly been declared difficult, if not impossible, to establish a principle by which to decide, for the purpose of common law, at what stage in the preparation of crime the *actus reus* of the offence of attempt has been reached. The solution of this problem according to Kenny is not difficult if some fundamental points are kept in mind.

These are in all crimes an *actus reus* must consist in a deed, and in attempt the deed must be performed in actual furtherance of crime intended. And in addition, the deed must be

[184] *Supra* note 24 at 524.
[185] *Supra* note 34 at 102.
[186] Glanville Williams, "Intent in the Alternative" 50 *C. L. J.* 123 (1991).

such that it raises a presumption that the accused was aiming at the crime in question.[187] Parker, B., in *Eagleton* (1855):

"The mere intention to commit a misdemeanor is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not indictable as attempt to commit it, but immediately concerned with are…."[188]

In *Roberts*[189] three of the four judges held that if the act is proximate to the offence shall be attempt to commit the particular offence. Since then the doctrine of proximity seems to have been strictly applied.

The court while distinguishing between preparation and attempt in the case of *Robinson*[190] held that a person cannot be held for obtaining money on false pretence unless some specific act is done on his part, a confession on his part is no *actus reus*. And his act only amounts to preparation.

Also in *Hope* v *Brown*[191] held that giving instruction to servant to sell meat in excess of the permitted price is mere preparation and not an attempt to sell in excess off the permitted price. The most interesting effort to lay down a clear and satisfactory test whereby a line could be drawn between preparation and attempt was made by laying down a test what has been called as "equivocality theory" this was propounded by Salmond [192]in the case of *King* v *Barker*[193] as follows:

"An attempt is an act of such a nature that it is itself evidence of criminal intent with which it is done. A criminal attempt bears criminal intent upon its face; *Res Ipsa Locquitor.* An act, on other hand, which is in itself and on face of it innocent, is not criminal attempt , and cannot be made punishable by evidence *aliunde* so as to purpose with which it is done". Further this theory was applied by Turner and received approval in the case of

[187] *Supra* note 4 at 104.
[188] *Supra* note 20 at 167.
[189] Ibid.
[190] (1915) 2 KB 342.
[191] (1954) 1 All E R 330.
[192] P. J. Fitzgerald, *Salmond on Jurisprudence* 366 (2004).
[193] (1924) NZLR 865, 877.

Davey v *lee*[194] where D was convicted of attempting to steal copper on evidence that he had cut the wire of compound in which were a copper store , and other buildings. Though the copper store was situated at the end of the compound where the cutting took place, it is difficult to see that this act might not reasonably regarded as having been done in order to steal money from the office or goods from one dwelling houses or the other stores.

Already the inadequacies of the test are appearing; and in *Jones* v *Brooks*[195] the divisional Court upheld a conviction although the act was equivocal; the intention of the accused expressed at the time of the offence and latter was not to be disregarded as part of the evidence of *actus reus.*

Lord Edmund Davies[196] is of the view that a man must be guilty of an attempt if he has done the last act which he expects to do and which it is necessary for him to do to achieve the consequence aimed at. According to him it is the nature of full offence alleged to have been attempted. Like in the instant case of *Stonehouse*[197] "it would not have been that by deception the appellant dishonestly obtained a cheque from insurance company by falsely pretending that he had died, for such a charge would ne manifestly ridiculous, an even if it were not, one can well imagine it being argued on the line, that what appellant did in Miami did not go to beyond mere preparation. But the charge actually laid was based on the extended meaning of 'obtain' contained in s. 15(2) of the Theft Act 1968. So it had been carried out through completion and not been interrupted by his being recognized and arrested in Australia , the full offence charge would have been that the appellant dishonestly and by deception enabled his wife to obtain insurance money by the false pretence that he has been drowned

[194] (1967) All E R 423.
[195] (1968) 52 Cr. App. Rep. 614.
[196] While giving decision in the case of *DPP* v *Stonehouse* (1977) 2 All E R 909. In this case the appellant was a well-known figure, who was convicted on charges of dishonesty and attempting deception. He has insured his life for $125,00 with five different insurance company. On 24th November 1974 he faked his death by drowning in Miami so his wife, who was not party to the plan, can claim money. His wife did not claim the money. Five weeks later he was discovered in Australia and extradited. His appeal for conviction was dismissed by Court of Appeal.
[197] (1978) AC 55.

R. A. Duff in his book[198] says "*what relates agent's conduct to the commission of an offence is partly her intention to commit that offence, but it also matter show close she has come to fully actualizing that intent. The conduct of someone who has so far reconnoitered a building from which he plans to steal, for example, or only obtained a poison with which he intend to kill someone, is still 'remote' from the commission of theft or murder. This not to say that we should see her conduct simply as, for instance, 'walking round a building'. Or 'buying arsenic', which is indeed remote from the commission of theft and murder she intends to commit; we understand it. And respond to it, as by her intention, and her commission of the crime has so far shadowy existence in the public world: it exists in thought but has yet to acquire very concrete in her action. Her action connects her more closely to the commission of crime, and in the end that crime becomes something she is doing, rather than merely something she is intending or preparing to do."*

Further whether the act was mere preparatory or attempt : the court in the case of *A. G's Reference (No1 0f 1992)*[199] here the point of law referred was 'whether, on charge of attempted rape, it is incumbent on the prosecution, as a matter of law, to prove that defendant physically attempted to penetrate the woman's vagina with his penis''. The court answered, 'No', it is sufficient if there is evidence of intent to rape and of acts which a jury would properly regard as more than merely preparatory to the commission of the offence. For example in this case, the respondents act of dragging P up some steps, lowering his trousers and interfering with her private parts.

In other words as Kenny[200] says the accused must have actually done things which are steps intentionally taken in furtherance of some specific aim, and which themselves are enough to suggest clearly what the specific aim was.

5.3 IMPOSSIBILITY IN ATTEMPT

No aspect of the criminal law is more confusing and confused than the common law of impossible attempts.

JOSHUA DRESSLER

[198] R. A. Duff, *Criminal Attempts,* 386 (1996.)
[199] (1993) 2 All E R 190.
[200] Kenny & J.W.C. Turner, *Outlines of Criminal Law*212 (2004).

An important problem in the law of attempt can be perceived in the form of impossible attempts i.e. when the accused tries to commit crimes which are impossible to accomplish. With regard to the nature of impossible attempt, Stephen J. once said that the drafting of a statute should aim at a degree of precision which a person reading in bad faith cannot misunderstand; and it is all better of he cannot pretend to misunderstand it.[201] Courts and criminal law commentators have struggled for generations over the question whether an accused should be punishable for attempt when, for reasons unknown to the defendant, the intended offense could not possibly be committed successfully under the particular circumstances. With regard to intricacies involved in the nature of impossible attempts, it is praiseworthy to mention the concern of Graham Hughes[202] who once said:

> *The relevance on a charge of criminal attempt of the impossibility of the accused attaining his objective has for some time been a subject of sharp dispute among jurists of the criminal law . . . . That teachers of criminal law and writers in the field should devote time and energy to this question is perfectly proper, for it is an important question in a number of ways. It raises very basic interrogatories concerning the aims and purposes of the criminal law; it compels us to focus attention on concepts such as "intention" and "purpose," an analysis of which is indispensable to criminal law scholarship; and it provides an excellent opportunity for reflecting on the pervasive and difficult distinction between mistake of fact and mistake of law. For these reasons the problem is a splendid set-piece which exhibits in a short space some of the most difficult issues of criminal law analysis.*

The defense of impossibility with regard to attempt crimes applies to those instances where a defendant's action could not possibly result in the commission of underlying crime. The crime is not prevented by some intervening event, such as detection by the authorities, nor

[201] Glanville Williams, "The Lords and Impossible Attempt", 45 *C.L. J.* 33 (1986).
[202] Graham Hughes, "One Further Footnote on Attempting the Impossible", 42 *New York University Law Review*, 1005 (1967).

is it prevented only by some accident, such as firing a gun at the intended victim but missing. Impossibility is raised as a defense when the crime is not committed because, given the factual or legal context, it was impossible for the action to have resulted in the commission of the intended principal crime.

But before tackling these intricate problems of impossible attempts, it may be of interest to note that until the time of Feurbach[203] 'impossible attempts' were not treated as punishable because they were held to be on the footing of mere preparation or of mere intention. Therefore, in *Q* v. *Collins*[204] it was held that if the persons puts his hand in the pocket of another with the intention of steal but the pocket was empty, he could not be convicted for an attempt to steal. So also in *R* v. *McPherson*[205] it was held that a person could not be properly convicted of breaking and entering a building and attempting to steal goods which were not there. The principles laid down in above two cases were applied in a later case of *R* v. *Dodd*[206]. However, all these cases were reviewed in *R* v. *Brown*[207] where Lord Coleridge declared that these cases were decided on a mistaken view of the law. Finally in *R* v. *Ring*[208] the accused was convicted for an attempt to steal from the pocket of a woman, though the pocket was empty, and all the cases to contrary which have been noted above, were overruled, though no reason was given for this decision.

Suppose a man, believing a block of wood to be his deadly enemy, struck it with a blow intending to murder, could he be convicted of attempting to murder the man he took it to be? Or could someone be convicted of attempted theft if he took an umbrella which was in fact his, believing it to belong to someone else? These hypothetical cases might be distinguished from *R* v. *Ring* on the ground that in neither of them would the accused have taken what from the objective point of view of a reasonable man, could be regarded as a step towards the commission of a crime in question. This point is answered by Rowlatt J.[209] by saying that the accused in such cases is not *on the job although he thinks he is*. In this

[203] Syed Shamshul Huda, *Principles of Law of Crimes in British India* 231(1982).
[204] (1864) 168 E.R. 1477.
[205] (1857) 7 Cox 281.
[206] (1868) 17 L.T. (N.S) 89.
[207] (1889) 24 Q.B.D. 357.
[208] (1892) 17 Cox C.C 491.
[209] *R* v. *Osborn* (1919) 84 J.I 63.

case D had sent some pills to a pregnant woman in order to cause an abortion. She took them, but they appeared to be innocuous. D was tried for attempting to administer a noxious thing to the woman. He was held not to be guilty as he had attempted nothing. The learned Rowlatt J. observed:

> It is well known that the impossibility of a thing does not prevent an attempt being made. If you try to burst open the very best kind of steel safe with a wholly insufficient instrument, you are still guilty of an attempt, although you never could have completed it because you are at the very thing and trying to do it. But where a man is never on the thing itself at all, it is not a question of the impossibility, he is not on the job; if he fires his gun at a stump of a tree thinking it is his enemy and his enemy his miles away, and there is nobody in the field at all, he is not near enough to the job to attempt it; he has not begun it; he has done it all under a misapprehension. If the thing was not noxious, though he thought it was, he did not attempt to administer a noxious thing by administering the innocuous thing. The real question is whether it was noxious.

However, some theories have been propounded to reconcile these inconsistencies. *Firstly*, it has been suggested that an impossible attempt is not punishable and therefore it is not an offence to shoot a shadow, to administer sugar mistaking it for arsenic or to try to kill a person by witchcraft. The impossibility, however in such cases is absolute not relative, so that it could not cover the case of an adequate dose of arsenic. But, is this theory is accepted in all these cases, it cannot be said that there is any want of evil intent or *mens rea* nor is there the *actus reus* lacking. The only ground on which this theory may be defended is that the act in such cases does not cause an alarm or sense of insecurity to the society. Since no consequence follows the act, a vast majority of such cases would remain undetected or unknown. *Secondly*, another theory that has been propounded to reconcile these cases has been to differentiate between cases where the object is merely mistaken and cases where the object is merely absent. Huda observes that the liability in each of the above cases is different. However, to understand it in a better way one has to look into the nature of impossibilities, which might occur/exist, while committing a prohibited act.

5.4 Nature of Impossibility

Since sane men do not attempt what they know to be impossible it is assumed in all those cases that they were laboring under a mistake of some kind. The reason for impossibility of completing substantive crime ordinarily falls into two categories:

(1) Where the act if completed would not be criminal, a situation which is usually described as "Legal Impossibility"[210].
(2) Where the basic or substantive crime is impossible of completion simply because of some physical or factual conditions unknown to the defendant, a situation usually described as "Factual Impossibility".

Legal Impossibility or Where Objective is not Criminal:

The grounds for the defense of legal impossibility can be conceptually divided into two general categories i.e. (i) the intended result is not a crime[211] and (ii) the consummation of the intended crimes is rendered unattainable by virtue of some rule of law[212]. This distinction cannot be said to be semantic but conceptual. In the first category, the desired result is not prohibited, for example, to steal one's own goods from one's lawful possession. Therefore, an attempt to commit theft of owns goods are not crime. In the second category, although the final result may be a crime, a rule of law based upon policy or logic makes the crime legally impossible.[213] For example in a jurisdiction that presumes a fourteen year old boy is legally incapable of committing rape, the presumption prevents the commission of an attempt to have intercourse with a woman against her will.[214]

The defense of legal impossibility does not deny the existence of the accused evil intent or the occurrence of certain acts of the accused pursuant to that intent. Rather, the defense vitiates the criminality of the attempt if the final result would not be a crime or would be legally impossible to accomplish. Furthermore, if the defense of legal impossibility applies,

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[210] *Booth* v *State of Oklahoma* (1964) 398 P.2d 863. (Court of Cri. App., Oklahoma).
[211] Glanville Williams, *Textbook on Criminal Law* 224 (1983).
[212] *State* v. *Taylor* , 133 SW 2d. 336 (1939).
[213] The justice in allowing the defense of legal impossibility in the second category lies in the fact that the impossibility was a consequence of the conceptualization of the consummated crime and has the same legal effect as if the accused intended to achieve a result which is no crime at all.
[214] *Foster* v. *Commonwealth*, 96 Va. 306, 31 S.E. 503 (1898).

the accused's failure to consummate his plan is irrelevant, despite the fact that an essential element of an attempt is the failure to achieve the anticipated result.

However, it seems that there are serious discrepancies among the views of different writers as to where, due to certain reason, act may not be criminal-can the person be tried for attempt? It is worthy to mention here that there is no authority under the law which states the exact position.

So the question here to be determined is-can D be convicted of an attempt where he produces all the consequences which he sets out to produce and does so with the *mens rea* of a substantive crime, but where owing to the existence of a certain circumstances unknown to D those consequences do not constitute the *actus reus* of the crime? Like in the case of Lady Eldon who while travelling with her husband on the continent, bought what she supposed to be French lace, which she hided in the coach intending to smuggle it in London. But the lace turned out to be an English manufactured article. Can she be guilty of an attempt to smuggle French lace?

According to Prof. Sayre, though he has not talked about legal impossibility in clear words, the act of Lady Eldon will certainly amount to an attempt to smuggle French lace in England as "in this case lady Eldon not only intended to smuggle genuine French lace across the border, but committed act which any reasonable person might well suppose would result in that consequence." He supports his argument by stating the case of *State* v *Mitchell*[215] where the defendant believing his victim to be sleeping in his bed into the bed, one bullet hitting the pillow and another dresser close by. In fact the victim, unknown to the defendant has gone to sleep in a different room. He was held guilty of attempted murder.

Whereas according to J. C. Smith[216] if Lady Eldon has been successful in concealing the lace, she would have achieved all the consequences which she intended to achieve and she would have committed no substantive crime. In these circumstances she cannot be held

[215] (1902) 170 MO 633.
[216] Smith and Hogan, *Criminal Law: Cases and Material*, 520 (2006).

guilty of attempt as the Court of Criminal Appeal answered in this question in the negative in *Percy Dalton Ltd*[217] Court said:

> *Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempt to commit that crime, to which, unless interrupted, they would have led; but steps on the way to doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit crime.*

He further approves of the common-law decision given in *Jaffe case*[218]. In this case he is only having a *mens rea* and in absence of external realities he cannot be convicted. He submits that though there does not appear to be any direct authority in English law on the subject but there are several sub-silentio precedents which supports it, like the case of *Schmidt*[219], *Villensky*[220] and *Walter* v. *Lunt*[221]

He concludes by saying that the result reached by the cases is right in principle. It is fundamental to our law that the man is not punished because he has a criminal mind. It must be shown that he has, with that criminal mind, done an act which is forbidden by the criminal law.[222]

The House of Lords also expressed a similar view in the case of *Roger Smith*[223] that a person cannot be convicted of an attempt to handle stolen goods if the goods had, unknown to him, come into the possession of the police, so that they ceased to be stolen. They said no attempt is committed as the act was lawful.

After this case it was said that the Common law on impossible attempt was impolite and irrational and therefore Criminal Attempt Act 1981 was enacted which stated under section 1(2) that "A person may be guilty of attempting to commit an offence to which this section

[217] 33 Cr. App. R. 102, 110 (1949).
[218] 185 N. Y. 497; 78 N.E. 169 (1906).
[219] L. R. Cr. Cas. Res. 15 (1866).
[220] (1892) 2 Q. B. 597.
[221] (1951) 2 All E R 645 (K. B.).
[222] *Infra* note 22 at 447.
[223] (1975) A. C. 476.

applies even though the facts are such that the commission of the offence is impossible." Despite the enactment of Criminal Attempt Act which clearly laid down that it makes no difference whether the attempted crime is possible or not the person with a knowledge doing an act will be guilty of attempt. Yet in *Ryan* v *Anderton*[224] Mrs. Ryan who was convicted of attempt to receive stolen good, though it was found that it was not stolen. Therefore the conviction was quashed by House of Lords, though the lords never gave a satisfactory reason for the quashing of the conviction and how to reconcile the judgment with Criminal Attempt Act 1981.

Glanville Williams[225] criticizing the decision said that it is absurd to say that a person cannot be guilty of attempt where his act becomes lawful due to reason unknown to him. He say that the question here to be identified is whether the law of criminal attempt is or should be based on the supposed facts (plus the defendant's efforts to commit the crime acting on facts as he believed them to be), or whether it require and should require all or some of the forbidden elements to be actually or (in the case of future facts) potentially present. He called these two approaches as the 'putative fact theory' and 'actual fact theory'.[226]

Williams further criticizes the view expressed by Prof. Smith and supported by many[227]with some variations that an attempt may generally be judged on the facts as he mistakenly believes them to be but only if his mistake relates to his "purpose" or "objective" or "motive". He regards the motivational theory to be that it does not rest on the ground of Policy. Secondly the human motivation is difficult to handle and man's motivation does not affect his moral guilt. He gives the example where based on this theory it is said that a person who attempted to have sex with a girl under 16 though it was found that she was 18 , his desire was merely to have sex and not particularly sex with girl under `16, and is not guilty of attempt. He hold the view that punishing him for attempt hold

[224] (1985) A. C. 560.
[225] *Supra* note 11 at 265.
[226] *Supra* note 10 at 36.
[227] Lord Halishman , Lord Bridge and Lord Reid in *Roger case*.

good as whether his motive was one thing or other. Commenting on the theoretical foundations for imposing responsibility he said[228]:

> The *actus reus* of attempt is of a most peculiar kind. Most crimes specify their *actus reus* directly, they tell us what it is that we must do or not to do. Criminal attempt is different, it specifies the *actus reus* chiefly by reference to the crime attempted. It tell us that we must not seek to trace a certain distance towards the commission of the *actus reus* of some other crime. If the defendant is under some serious mistake, no par of what he does may be the *actus reus* of another crime. So it may seem plausible to say that his criminality exists only in his own mind. However, the conclusion overlooks the special feature of criminal attempt. In an attempt, by hypothesis, the full crime has not been committed, or need not be proved to have been committed. So, by hypothesis, there need be no full *actus reus* of the completed crime. The *actus reus* is that of the attempt, it is forbidden by reason of the law of attempt, and not by reason of any other penal law.

In the same year though in the case *R.* v *Shivpuri*[229] the accused was convicted of attempting to wrongfully dealing with heroin by the Court of Appeal, though he has imported a harmless powder believing it to be heroin. He fails in his effort to consummate the crime by reason of mistake of fact and not mistake of law, and ought to be guilty of attempt. Similarly a person dealing in good wrongly believing to be stolen is on equal footing with person dealing with innocuous article wrongly believing to be heroin. A person who fails to consummate the crime, due to his mistake as to the fact is guilty of attempt.

Although on the foregoing argument, as is submitted there are difficulties of legal principles involve in these cases of impossibility as when if all which the accused person intended would, had it been done, constituted no substantive crime, it cannot be a crime under the name 'attempt to do'. But after the enactment of Criminal Attempt Act this

[228] *Supra* note 1 at 33.
[229] (1985) 2 W. L. R. 476.

argument has no ground. Legal impossibility cannot absolve a person from criminal liability as the reason for punishing attempt is to allow the investigative agency to intervene before the harm involve is caused and to control the dangerous conduct of a person. In all these cases there is existence or non-existence of a fact does not affect the criminal intent and these cases are no different from the cases where a person is trying to pick pocket an empty pocket.

Where Accused's Objective is Impossible to Achieve or "Factual Impossibility":-

It was earlier thought at one time that there could be no conviction for an attempt to do an act which was impossible. This doctrine resulted from faulty understanding of *R.* v. *McPherson* where the decision was simply that, where an indictment charged D with stealing specific goods, he could not be found guilty of stealing other goods.[230] Further it was held in the case of *R.* v. *Collins* that a conviction to steal from a pocket must be quashed because the question whether the pocket was empty or not was not left to the jury. However in *R.* v *Brown and others*[231] the Court of Crown held that *Collin* was no longer a law. In *R.* v *Ring*[232] it appeared that Ring and other man had were trying to pick pocket, but no evidence was adduced as to the pockets containing anything. The court convicted them and said that *Collin* has been overruled by *Brown*.

So where the defendant erroneously believing that the gun is loaded points it at his wife and pulls the trigger or if D attempts to poison P, using a dose which is far to week to kill anyone; in all these cases the thing attempted is impossible, yet a conviction for an attempt to commit it would be proper as in all these cases the accused fails to complete the crime because of his mistaken belief as to the existence of certain facts or situation.

Thus on the foregoing discussion, it is submitted that there is no real difficulties of legal principle involved in the cases of factual impossibility and the person is guilty of attempt in all these cases. The disallowance of this event as a defense is justified because in such cases the act, done in pursuance of an evil intent, presents a threat to the society. Also, contrary to the legal impossibility, the completed act, in cases of factual impossibility,

[230] *Ibid.*
[231] (1892) 61 L. J. M. C. 116.
[232] (1889) 24 Q. B. D. 357.

would have constituted a punishable crime. Therefore, the ignorance of the accused as to the probability of his success does not vitiate the criminality of his attempt.[233] However, one justification for convictions in which factual and not legal impossibility is pleaded is termed as the "*reasonable man test*"[234]. Under this view, if the defendant has failed, but a reasonable man acting under the same circumstances might have expected his act to be a crime, the failure is attributed to factual or physical occurrences.

5.5 Impossible Attempts under Indian Penal Code

Another difficult area in the law relating to attempt is that of impossible attempt. The question here arises that whether impossible attempt is included under the provision of Indian Penal Code. If we study section 511 we cannot make out whether it talks about impossible criminal attempt or not, but the study of illustration to Section 511 shows that it is inclusive of impossible attempts. As the illustration goes:

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

On reading of the illustrations it can be said that impossible attempts are covered, though there is confusion as the example only show that factual impossibility is covered but there is no reference as to the legal impossibility.

Under the common law we have already seen that most of the writers as well as Criminal Attempt Act, 1981 includes both factual and legal impossibility, with the exception of few writers like Smith and Brian Hogan, in whose view if the ultimate act is not an offence a person cannot be guilty of an attempt. As he gives the example where A is going to be

[233] In cases of legal impossibility, the accused is ignorant either as to a rule of law which renders consummation of a specific crime incapable or as to the absence of prohibition on certain results. On the other hand, in cases of factual impossibility the accused is ignorant of the existence or absence of circumstances which are essential to the consummation of his plan.

[234] Sayre, "Criminal Attempt", 41 *Harvard Law Review* 821 (1928).

married to B, despite been married to C, but unknown to him C has died just 10 minutes before the ceremony. According to Brian and Smith, A cannot be convicted of attempted Bigamy, as penultimate act would not be an offence. Williams Does not agree with this view and regard A to be guilty of attempt.

In India, there is no authority as to what will be the decision of the Indian Courts. In the *Asghar Ali Pradhan* v *Emperor*[235], the appellant in order to cause miscarriage of the victim, administered her liquid of copper sulphate. He was stopped by the victim's father when she made noise. He was charged for an attempt to cause miscarriage. On investigation it was found that the copper sulphate administered to him was less in quantity than sufficient for causing miscarriage. The court here made a distinction as to the illustration provided in the section as what he wanted to do was impossible of commission. The court explained by giving an example where men intend to hurt another by administrating poison prepares and administers some harmless substance. He cannot be convicted of attempt to do so. So in this case also as the neither the liquid nor the powder being harmful, they could not have caused miscarriage. The conviction was set aside.

But in a similar case in Malaysia whose penal code is very similar to Indian Penal Code , in the case of *Munah Binte Ali* v *Public Prosecutor*[236] it was held that in an attempt to cause miscarriage it is not necessary that woman should be pregnant, if the accused is unaware of the fact. The court observed that the evidence clearly showed that it was the intention of the appellant to cause miscarriage and he could not have made attempt unless he believed the complainant to be pregnant. He is in exactly same position as the would-be pick-pocket who, believing that there is, may be something capable of being stolen in the pocket. The circumstances of the present case seem to be exactly covered by the illustration to s. 511 of the Penal Code.

Thus, the problem of impossible attempts appears to defy solution and a close examination of the whole matter is, therefore, called for.[237]

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[235] AIR 1933 Cal 893.
[236] (1958) 24 MLJ 159.
[237] Two different tests have been suggested by Prof. Sayre and Prof. Hall in this connection:

However, dealing with the issue the Law Commission of India[238] has proposed the deletion of section 511 and insertion of a new Chapter VB entitled 'Of Attempt' consisting of the two sub sections 120C and 120D after Chapter VA dealing with 'Criminal Conspiracy' with a view to group inchoate crime together. The proposed section 120C gives a comprehensive definition of attempt as-

Section 120C. Attempt- A person attempts to commit an offence punishable by this Code, when-

(a) He with the intention or knowledge requisite for committing it does any act towards its commission;
(b) The act so done is closely connected with, and proximate to, the commission of the offence; and
(c) The act fails in its object because of facts not known to him or because of circumstances beyond his control.

Section 120D- Punishment for attempt- Whoever is guilty of an attempt to commit an offence punishable by this Code with imprisonment for life, or with imprisonment for a specified term, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life, or as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence or with both.

This proposal is an attempt to clear the uncertain law of attempts under the Indian Penal Code. However it is suggested that it would add clarity if sub-clause (b) is deleted and the rest retained. Whether the act is sufficient proximate or not is a question of fact which should be left to the courts to decide. Further revision of our law on the lines of Criminal

Prof. Sayre says-"If from the point of view of a reasonable man in the same circumstances as the defendant, the desired criminal consequences could not expected to result from the defendant's act, it cannot endanger social interests to allow the defendant to go unpunished, no matter how evil may have been his intentions." According to Prof. Hall- "Attempt is not determined by reference to the actual facts in the external situation…In sum, the material facts referred to in the definition of criminal attempt are those supposed to exists by a person manifesting the requisite *mens rea.* Here, unlike the above situations there was a mistake of fact, and the crucial issue concerns *mens rea.*

[238] Law Commission of India, 42nd Report on Indian Penal Code, (Ministry of Law) (1971).

Attempts Act, 1981 may help our courts to resolve the conflicts and strengthen the law of criminal attempt. However, till date there has been no clear cut distinction as to rule in cases of impossible attempts either by legislative enactment or in the judicial pronouncements which reflects the imperfection of our criminal justice system.

CHAPTER-VI

ATTEMPT LAW IN INDIA

6.1 Defining "Attempt"

The law attempt is regarded as an intellectual minefield owing to its intricacies. The factors that contribute to the unusual state of the law at present are: first, a lack of precise legislative definition of the inchoate offence; second, mental and physical ingredients varying considerably with nature of the substantive offence attempted; and third, the possibility of a 'broad' and 'narrow' interpretation of the offence by court in view if prevailing penal policy[239]

After consideration the provision relating to attempt in the Indian Penal Code, it is revealed that there can be four kinds of attempt[240]:-

(i) When attempt and main offences are punished in same manner without distinction;
(ii) When the attempts are merged in the main offences;
(iii) When attempts are separately made punishable; and
(iv) When attempts are made punishable as general.

The first category of attempts includes offences against state[241], offence relating to force[242], public tranquility[243], offences relating to election[244], false evidence[245] coins and stamps[246] ,offence against public moral and decency[247] etc,.

Second category of attempts includes acts or series of act forming part of the transaction. They have been made punishable without using the word "attempt". Offences like

[239] B. B. Pandey, "An Attempt on Attempt", (1984) 2 *SCC (Jour)* 42.
[240]Mool Singh "Law Relating to Attempt: Need for Fresh Look", 33 *JILI* 398 (1991).
[241] Ss. 122, 124, 124A 125 and 130, IPC.
[242]*Id.*, s. 131.
[243] *Id.*, ss.152 and 154.
[244]*Id.*, ss.171B, 171C and 171D.
[245] *Id.*, ss. 23, 240, 241 and 251.
[246]*Id.*, ss. 292 and 293.
[247] *Id.*,ss. 239, 240, 241,and 251.

abatement[248] conspiracy[249]are made punishable at criminal stage of attempt. These acts are made punishable at the stage of attempt but they are not attempts. They are punishable as substantive offence.

Thirdly, there are certain attempts which side by side of the main offence are dealt with entirely separate to that of offence. Like:

(i) Attempt to commit murder (307)
(ii) Attempt to commit suicide (309)
(iii) Attempt to commit culpable homicide (308)
(iv) Attempt to commit robbery (393).

Fourth category of attempt contain general attempt as provided in section 511 which provides:

> "Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempts does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both."

Thus there is no positive definition of attempt in the Indian Penal Code though the common law principle creating criminal liability for offence in the attempt stage is fully subscribe by the provision relating to attempt in the Code. The difficulties in defining attempt stem from the fact that by its very nature in case attempt has to derive its form and content from the nature of the offence attempted and its essential ingredient.[250]

[248] *Id*., ss.107, 120.
[249]*Id.*, ss. 120A.
[250] *Supra* note 1 at 48.

This renders the task of precisely laying down the boundaries of attempt, in a generalized way, extremely intricate and sometime even futile. Since, however, in every case relating to attempt involves the resolution of the definition issue or what constitute an attempt, either explicitly or implicitly, the decision makers has in each case to rely either on scholarly definitions or judicial pronouncements[251]

Sir James Fitz James Stephen has defined attempt in his book 'Digest of Criminal law' as

> "an attempt to commit crime is an act done with an intent to commit crime, and forming part of a series of act, which would constitute its actual commission if it were not interrupted."

Mayne has defined Attempt thus:

> "attempt is direct movement towards the commission after the preparation has been made."[252]

Justice Chinnapa Reddy defined attempt in the illustrious case of *Mohd. Yaqub*[253] defined as:

> "In order to constitute an 'attempt' first, there must be an intention to commit a particular offence, second some, act must have been done which would necessarily have to be done towards the commission of the offence and, third, such act must be proximate to the intend result. The measure of proximity is not in relation to time and place but in relation to intention."

Justice Sarkaria in the same case defined attempt as:

> "What constitutes an 'attempt' is a mixed question of law and fact depending upon the fcact and circumstances of a particular case. 'Attempt' defies precise definition. When an act is done toward the

[251] R.B Tiwari "Criminal attempt" in K. N. Chandershkeran Pillai and Shabistan Aquil (eds.), *Essays on the Indian Penal Code* 111 (2005.)
[252] P. S. A. Pillai, *Criminal Law* 184-185 (2000).
[253] (1980) 3 SCC 57.

commission of the crime, it need not be a penultimate act. It is sufficient is such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonable proximate to the consummation of offence."

6.2 Imaginary Line Between Preparation & Attempt

The intricate problem often arises in cases of attempts is how to draw a dividing line between a preparation and attempt. In other words, what are the tests to ascertain when an act has crossed the boundary of preparation and travelled ahead to the point of becoming an attempt? Indeed, it is a difficult task. No clear dividing line has so far been drawn between the two. The Code is silent on the point. Every case has to be judged according to the facts and circumstances of its own. However in due course of time certain test has been evolved by courts to determine at what stage an act or series of act done towards the commission of the intended offence would become an attempt

One of the most important cases where an attempt was made by the Apex court to draw distinction between preparation and attempt was *Abhyanand Mishra* v *State of Bihar*[254] it was observed that it is to be borne in mind that the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and steps necessary to take in order to commit it. Further it was laid down it is not correct to say that the 'act towards the commission of such offence' must be 'an act which leads immediately to the commission of the offence'. It was said a person commits the offence of 'attempt to commit particular offence' when:

(i) He intends to commit the particular offence; and

(ii) He having made preparation and with the intention to commit the offence does an act towards its commission; and such act need not be penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

[254] AIR 1961 SC 698.

In order to determine whether the act in question amounts to attempt the courts in course of time has evolve certain test: Proximity Rule, Doctrine of *Locus Penitentae*, Equivocality Test, and Social Danger Test.

Proximity Rule

An act or series of acts constitute an attempt if the offender has completed all or at any rate all the more important steps necessary to constitute the offence but the consequence which is the essential ingredient of offence has not taken place. The rule has been stated thus "it seems that the act of the accused is necessarily proximate, though it is not the last act that he intended to do, it is last that is legally necessary for him to do if the result desired by him is afterwards brought about without further conduct on his part."[255]

The rule is a combination of principles laid down in a number of decided cases e.g. an act of attempt must be sufficiently proximate to the crime intended[256], it should not be remotely leading towards the commission of an offence[257], it must contribute an antepenultimate act and that the act done should place the accused in a relation with his intended victim.[258] The test of proximity at common law was expressed in various ways.[259]

Referring to Indian cases, the principle of proximity founded in *Abhyanand Mishra* v. *State of Bihar*[260] case. In this case the accused applied to the university, for admission to appear at the M.A examination as a private candidate representing that he was a graduate and that he had been teaching in a certain school. In support of his application he attached certain certificate purporting to be from the head master of the school and Inspector of the schools. The university authorities accepted the accused's statement and he was permitted to appear in the examination. Subsequently, on receiving information and inquiry thereafter the university found out that the accused was neither a graduate nor a teacher. Thereupon he was held to be guilty under section 429 read with section 511, IPC. It was observed by the court that preparation was complete when the accused prepared the application for

[255] Glanville William, *Text Book of Criminal Law* 471 (2003.)
[256] *Id* at 477.
[257] *Eagleton* (1855) 169 E.R.
[258] *White*, (1910) 2 K.B. 99.
[259] For example, Graphic Test, Rubicon Test etc.
[260] AIR 1961 SC 1698.

submission to the university and the moment he dispatched it, he entered the realm of commit the offence of cheating. Proximity rule as discussed in *Abhyanand Mishra case* was reaffirmed in the case of *Sudhir Kumar Mukherjee* v *State of W. B.*[261] by the Supreme Court.

Mens rea enquiry in case of attempt is easier to determine. But when the question of liability is to be resolved on the basis of 'what is done by the accused', the identification of crucial act (*actus reus*) becomes vital. The real issue in the context of sufficiency of overt act is the relationship of the overt act to the offence attempted. What is done by the accused should be sufficiently proximate to the intended consequence. Thus, where the act is still remote to the actual offence the overt act cannot be rightly described as the *actus reus.*

Again, the rule of proximity is explained in State *of Maharashtra* v *Mohd. Yaqub*[262] , in this case the accused was convicted of attempt to smuggle silver out of India. The accused pleaded to still been in preparation. Justice Sarkaria disagreeing did not find any difficulty in holding that the overt act in the instant case was proximate because:

> "They had reached close to the shore and had started unloading the silver there, near a creek from which the sound of the engine of sea craft was also heard. Beyond the stage of preparation, most of the steps necessary in the course of export by the sea, had been taken. The only step that remained to be taken towards the export of the silver was to load it on a sea-craft for moving it out of territorial water of India."

Thus Justice Sarkaria considered proximate in terms of actual physical proximity to the objective of exporting silver out of India.

But, Justice Reddy's concept of proximity is somewhat different from that of Justice Sarkaria. He advocated the novel approach to resolve the proximity issue in these terms[263]

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[261] AIR 1973 SC 2655.
[262] (1980) 3 SCC 57.
[263] *Ibid.*

"the measure of proximity is not in relation with time and action but in relation to intention". He observed:

> "the fact that truck was driven up to a lonely creek from where silver could be transferred into a seafaring vessel Was suggestive or indicative, though not conclusive, that the accused wanted to export silver …… the circumstances that all this was done in a clandestine fashion, at dead night, revealed, with reasonable certainty the intention of the accused that the silver was to be exported. [264]

This view is certainly quite distinct from the traditional understanding of the concept of proximity. According to this view an overt act from which an intention can be inferred with reasonable certainty is a proximate act. Nevertheless it can be said that attempt is the direct movement towards the commission after preparations are made. The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. It can be said that there is a greater degree of determination in attempt as compared to preparation. What is simply necessary to prove for an offence of attempt is that the accused has gone beyond the stage of preparation. An attempt to commit a crime is to be distinguished from an intention to commit it and from preparation made for its commission. Thus, in order that a person may be convicted of an attempt to commit a crime, he must be shown, first, to have had an intention to commit an offence, and secondly, to have done an act which constitutes the *actus reus* of a criminal attempt. The sufficiency of *actus reus* is a question of law which had led to difficulty because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiently proximate to it to amount to an attempt to commit it.[265]

Doctrine of Locus Penitentae

An act would amount to preparation and not an attempt, if a person voluntarily gives up the idea of committing a crime before the criminal act is carried out; so long as the steps taken by the accused leave room for a reasonable expectation that he might, either of his

[264] *Id*. at 67.
[265] *Malkiat Singh* v. *State of Punjab,* AIR 1970 SC 713.

own accord, or because of the fear of consequence that might befall him as a result, desist from the act to be attempted he would still be treated on the stage of preparation.[266]

A, intending to murder Z by poising, purchases poison and mixes the same with food, which remains' in A's keeping; A is not guilty of an attempt to murder, because there is still time when better reason might prevail any moment and A might change his mind and desist from Z. [267]

Huda observes in similar lieu "it is not, therefore, merely proximity to the completion of the intended offence in point of time or space which may negate any reasonable expectation of a change of intention, that determines the line between the preparation and attempt, but also the consideration arising from the act up to a particular stage being per se innocent."[268] Thus, abandonment is a defense if further action if freely and voluntarily abandoned before the act is put in process of final execution.[269] Thus, in tune with Huda's observation, it has been held in *Raisat Ali*[270] that a person attempting an offence may abandon it at some stage before completion though initially he had the attention.

Further, the Supreme Court taking recourse of this doctrine ordered acquittal of the driver and the helper of a truck convicted of attempting to smuggle paddy outside Punjab in *Malkiat Singh* v. *State of Punjab*[271].The Supreme Court while acquitting the accused observed:

> "The test for determining whether the act of the appellant constituted an attempt or preparation is whether the overt act already done is such that

[266] *Supra* note 17 at 401.
[267] R. C. Nigam, *Principles of Criminal Law 45*(1965).
[268] *Ibid.*
[269] *Empress* v. *Vinayak*, (1900) 2 Bom. L.R. 287,291. Repentance expressed by the perpetrator through the voluntary withdrawal from an already criminal attempt coupled with the utmost exertion to oust the harm, never did constitute an exculpation at common law, but a California court has recognized this excuse which is sound and commendable penal policy. (1958, American Survey of Annual Law,19).
[270] (1881) 7 Cal. 352.
[271] AIR 1970 SC 713. In this case, the accused driver and cleaner were intercepted at samlakha barrier post in Punjab, which is about 14 miles from Punjab-Delhi Border, driving a truck containing 75 bags of paddy. They along with others, were charged with offence of attempting to export paddy in violation of Punjab (Export) Control Order, 1959.

if the offender changes his mind, and does not proceed further in its progress, the acts already done would be completely harmless."

However, a different view was taken by the Supreme Court in the Year following the *Malkiat Singh* case. section 7 of the Essential Commodities Act(henceforth EC Act) provided that an offence under section 7 of the EC Act would be held liable to be committed, only when a person intentionally contravene any order made under section 3 of the Act, prohibiting export of fertilizers. Section 7 providing penalties was amended by Parliament in 1967 (as consequence of the ruling in *Nathu Lal*[272]) to stipulate that if any person contravenes whether knowingly or intentionally, or otherwise, any order made under S. 3., then he would be liable to for punishment. This implied that contravention of the rules, even at the preparatory stage, would be considered as an attempt to commit an offence.

The changed rule was considered by the Apex Court in the case of *State of M. P.* v *Narayan Singh.* [273] The issue in the instant case was whether the driver and cleaner of two lorries carrying fertilizers without license and, intercepted on the highway between Madhya Pradesh and Maharashtra would be liable for contravention of Fertilizer (Movement Control) Order, 1973 read with S.3 and S. 7 of the EC Act, 1955 for attempting to smuggle fertilizers. The Supreme Court held that it was not a case of mere preparation, *viz*., the respondent trying to procure fertilizer bags from someone or trying to engage a lorry for taking these bags to Maharashtra. It is difficult to say that the respondents were taking the lorries with the fertilizer bags in them for innocuous purpose or for the mere thrill or amusement and they would have stopped well ahead of the border and taken back the lorries and fertilizer bags to the initial place of dispatch or to some other place in Madhya Pradesh itself. Therefore, it is a clear case of attempted unlawful export of the fertilizer bags and not a case of mere preparation alone.

Thus, it can be said that the *doctrine of locus penitentae* creates difficulties in its application as to what stage can be marked as a stage where preparation ends and attempt begins.

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[272] *Nathu Lal* v. *State of Madhya Pradesh*, AIR 1966 SC 43.
[273] AIR 1989 SC 1789.

Equivocality Test

This test was first given by Salmond in the case of *King* v. *Baker*, that an act is proximate if, and only, if it indicates beyond doubt what is the end toward which it is directed. The *actus reus* of an attempt to commit specific crime is constituted when the accused person does an act which is step toward the commission of the specific crime and the doing of such act cannot be reasonably regarded as having any other purpose than the commission of the specific crime.[274] In other words the act must be unequivocally referable to commission of the crime and must speak about themselves.[275] Professor Williams, however, is of opinion that the strict application of the test would acquit many undoubted criminals. Intention followed by preparation is not sufficient to constitute an attempt but intention and then preparation must be followed by an act towards the commission of a crime.[276] The act must reveal with reasonable certainty in conjunction with other facts and circumstances an intention to commit the particular offence. Supreme Court in case of *Om Prakash* v *State of Punjab*[277] has explained that in cases of attempt to commit murder by firearms, the act amounting to an attempt to commit murder is bound to be only and the last act done by the culprit. Till he do not fires he do not commit any attempt, but after he fires and something happen to prevent the shot , the offence to attempt to commit to murder is made out.[278]Further, in case of *Aman Kumar* v *State of Haryana*[279] it has been held that an act done toward the commission of an offence which does not lead inevitably to the commission of the offence unless it is followed and perhaps, preceded by other act is merely an act of preparation

Social Danger Test

The seriousness of the crime attempted has to be one of the criteria in deciding the liability in the cases of attempt. If the facts and circumstances of the case lead to the inference that the resultant consequences would have been grave, the crime is complete. In fact it is the

[274] Turner, *Modern Approach to Criminal Law*, p.279.
[275] *Ibid.*
[276] *Supra* note 13 at 226.
[277] AIR 1961 SC 1781. .
[278] See, also *Hazari Singh* v. *Union of India*, AIR 1973 SC 62.
[279] (2004) 4 SCC 379.

apprehension of social danger which the particular crime is calculated to excite, that determines the liability of attempt.[280] The test is very similar to rule enunciated by Glanville Williams[281] with the difference that here the consequence of the circumstances and gravity thereof are inferred from the totality of facts whereas in latter case a mere fragment of action, if link with the final chain of penultimate act, makes a person liable for criminal attempt.[282]

6.3 Scope and Ambit of Attempt Defined under Section 511of Indian Penal Code

The general principles relating to the criminal attempts have been laid down in section 511 of the Indian Penal Code, which states that:

> "Whoever attempts to commit an offence punishable by this Code with [imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempts does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with [imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both."

An attempt on the part of the accused is *sine qua non* for the offence under section 511.[283] However there is a difference of opinion in regard to the language and scope of section 511. One view is that certain words in the section seem redundant because the very essence of the idea of an attempt being something done towards the commission of the act attempted to be done, the words "*and in such attempt does any act towards the commission of the offence*" seems superfluous.[284] The view gains strength from the fact that in dealing with attempts in the three other modes mentioned above no such qualifying words are used.

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[280] T.W. Arnold, "Attempt in Criminal Law", 40 *Yale Law Journal* 53(1930).
[281] *Supra* note 17 at 124.
[282] *Supra* note 13 at 227.
[283] *Satvir Singh* v. *State of Punjab*, (2001) 8 SCC 633 at 640.
[284] Huda, *The Principles of Criminal Law in British India*, 50 (1982).

But there is scarcely any evidence to show that the Indian penal Code 'intended to deal with a different and more limited class of attempts under section 511'.[285]

It appears that the Indian court's have been labouring under a confusion with respect to the exact scope of section 511 of the Indian Penal Code, that is, whether or not section 511 is wide enough to include all kinds of attempts punishable under the Code, including attempts to murder specifically provided under section 307, Indian Penal Code[286] or whether these sections are exclusive of each other.[287]

However, there are conflicting and diverse opinions of different High Courts on this issue:

(i) According to Allahabad High Court[288], section 511 does not apply to attempts to commit murder which is fully and exclusively provided for by section 307.

(ii) The Bombay High Court has, however, held otherwise in a case.[289] In addition to this former chief court of Punjab had laid down that section 511 was in terms much wider than section 307.[290]

(iii) Mayne's view is that cases not covered by section 307 will be covered by section 511 as held in *Cassidy's* case.[291]

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[285] *Id* at 50.

[286] "Whoever does any act with such intention or knowledge, and under such circumstances, that if he by that act causes death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to (imprisonment to life), or to such punishment as is herein before mentioned."

[287] K.I.Vihbhuti, *Criminal Law* 241(2008)

[288] *R* v. *Niddha* (1892) 14 All. 38.

[289] *R.* v. *Cassidy*, (1867) 4 Bombay High Court (Cr. C.)17. Couch C.J held that in order to constitute an offense under section 307 it was necessary that there must be an act done under such circumstances (i) that death might be caused if the act took effect (ii) that the act complained must be of capable of causing death in natural and ordinary course of things. If the act was not of such description, a person could not be convicted of an attempt to murder under section 307 though the act was done with the intention of causing death, and was likely, to belief of the prisoner to cause death.

[290] *Jiwan Das* (1904) P.R.No. 30 of 1904; Cr.L.J 1078.

[291] Referring to *Cassidy's* case, Mayne observes: "Upon this part of the judgment it may be remarked, as to the first reason, that murder is punishable with transportation as well as death. This is the case as regards every offence punishable with death, except in the single instance of murder by a person under transportation of life, which under S. 303 can only be punishable with death. *Cases of murder, therefore, do come within the letter of S. 511.* It seems obvious too that those words in S. 511 are not intended to exclude the very few cases where the penalty of death is added to that of transportation but to exclude the numerous cases which are only punishable with fine. Further, the part of the learned judge's reasoning would not apply to S. 308, which is in *pari material* with section 307 and wondered in the same way, and can hardly admit of different treatment. As to the second reason, it is of course clear that any attempt

In this way there seems to be a great controversy on this problem which we may not be able to appreciate unless we study the cases decided by the different High Courts in detail.

Starting with what Bombay High Court held in *R.* v. *Private Cassidy*[292]. The accused in this case, in a state of some intoxication, loaded his gun with powder and ball and aimed at the Drum Major of his regiment, but the gun failed to discharge as he had omitted to cap the nipple. He had been previously heard to utter t against the Drum Major. He was tried for an attempt to murder and the jury found that the prisoner has levelled his gun at Drum Major with intent to murder him, that the gun did not go off, as it had not been capped, and that the prisoner was seized before he could pull the trigger. Upon these facts the question of law raised was: could the prisoner in view of the state of the gun be convicted of an attempt under section 307? It was held by both the Couch C.J. and Westroop J. that he could not be convicted, for the act made punishable here must be an act, which was, in point of fact, sufficient to cause death, and that the accused must have been aware of it. Couch C.J. observed:

The words of the section are: "whosoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death he would be guilty of murder…." Now it appears to me, looking at the words of the section as well as illustration to it, that it is necessary in order to constitute an offence under it, that there must be an act done under such circumstances that death might be caused if the act took effect and the act must be capable of causing death in the natural and ordinary course of things. If the act complained of is not of that description, a prisoner cannot be convicted of an attempt to murder under this section."

But one may doubt that if in such a case the prisoner could not be convicted under this section, is he not liable at all? In the opinion of Bombay High Court he is, but under section

coming under S. 511…which is specially provided for elsewhere must be dealt with under the express provision. For instance, an attempt to wage a war against the King must be dealt under S. 121. What the Bombay case decided was, that an attempt to murder, which is not an act by which murder could be effected, came under S. 511 because it did not come under S. 307." That being so, it fell within the wording of S. 511 as being a case 'where no express provision is made by this code for the punishment of such attempt'. According to Mr.Justice Straight, such a case would go wholly unpunished."

[292] *Supra* note 51.

511 of the Code. The words of that section are undoubtedly very general, for they define attempt there under punishable to be a "an act done towards the commission of the offence" which are synonymous with "manifest over act" of English Law. However, it would be of interest to know that Bombay High Court itself has doubted Cassidy's decision in *Vasudeo Balwant Gogte* v. *Emperor*[293]. In this case, the accused fired two shots from a revolver at point-blank range at the then Governor of Bombay, but the bullet failed to take effect, owing to some defect in ammunition or by the intervention of the leather wallet and currency notes in his pocket. The High Court held the accused guilty under section 307.

Now we shall take up the view propounded by the Allahabad High Court, namely that section 511 does not apply to attempt to commit murder, which is fully and exclusively provided under section 307. This view was taken by the Allahabad High Court in *R* v. *Nidha*[294]. In this case the accused along with another, fired at a chowkidar who had attempted to arrest them. Nidha had pulled the trigger, the cap exploded but the charge did not go off. After some struggle Nidha was arrested and tried for attempted murder. He was convicted under section 307 of the Code. On appeal it was contended on his behalf that the offence of the accused must either fall under section 307 or not at all. This contention was accepted by the High Court who refused to follow *Cassidy's* case. Straight J. held that section 307 is exhaustive and observed:

"I am of opinion that section 307 of the Penal Code is exhaustive and within the four corners of that section is to be found the whole provision of law relating to attempt to murder."

His Lordship further observed that section 511 is inapplicable in cases of attempt to murder on account of the following four reasons:

(i) Because section 511 applies only to offences punishable with "transportation or imprisonment" whereas section 302 is punishable with death.

(ii) The section applies only where no express provision is made for the punishment of such an attempt, but this section is an express provision, specially and

[293] (1932) 34 Bomb. L.R. 571.
[294] *Supra* note 50. See, also *R* v. *Tulsha* (1897) 20 All. 143.

deliberately providing for the offence of attempt to murder, and this section must be held to be exhaustive.

(iii) The maxim *expressio unius est exclusio alterius*[295] should be applied in construing a penal statute of this kind

(iv) Nay other view would create an uncertainty and conflict of opinion as to what constitute an attempt to commit murder.

The court further observed that:

> No court has any right to resort to section 511 for the purpose of convicting a person of the offence of attempted murder which according to the view of the court does not come within the provision of section 307 of the Indian Penal Code.

However, Mayne[296] in his book has severely criticized Straight J.'s view and supported the Bombay High Court decision in *Cassidy's* case thus:

> As to the *first reason,* that murder is punishable with transportation as well as death. This is the case as regards every offence punishable with death, except in the single instance of a murder by a person under transportation for life, which under, section 303 is only punishable and, in fact, only be punished with death. Cases of murder therefore do some within the letter of section 511. It seems obvious that those words in section 511 are not intended to exclude the very few cases where the penalty of death is added to that of transportation, but to exclude the numerous cases which are only punishable with fine. Further, that part of the learned judges would not apply to section 308 which is *parimateria* with section 307 and worded in the same way, and can hardly admit of different treatment. As to the *second reason,* it is of course clear that any attempt coming under section 511, which is specifically provided for else-where must be dealt with under the express provision. For instance an attempt to wage war against the King must be dealt with under section 121. It is also quite clear that any attempt to commit culpable homicide, which falls under section 307 or section 308 must be dealt with

[295] "The specific mention of one is the exclusion of another."
[296] Mayne, *Criminal Law of India*532 (1914).

under them and not under section 511. What the Bombay case decided was that an act done towards the commission of an attempt t murder, which was not an act by which murder could be affected, came under section 511, because it did not come within section 307. That being so it fell within the words of section511, as being a case "where no express provision is made by this court for the punishment of such attempt".

According to Straight J. such a case would go wholly unpunished. Gour[297] has also observed that the second objection stated above is no more insuperable, for section 511 speaks of such attempt as is therein described and which is *ex hypothesi* not provided for by this section at all, but pious precepts, which are by no means universal. At any rate, they could not by themselves refuse any other construction if it was reasonably plain.

However, to conclude it may be said that the view taken by the Straight J. in *Nidha's* case seems to be the better one as it is consistent with common sense as also the general scheme of the sections of Penal Code. Section 307 specifically punishes attempts for murder, then why should one take away a *prima facie* attempt to murder out of section 307 and include in section 511. The Supreme Court has also observed that the very policy underlying section 511 seems to be providing it as a residuary provision. The corollary therefore is that once as act is expressly made punishable by the Code it stands lifted out of the purview of section 511.[298]

CHAPTER – VII

Conclusion and suggestions

The reasons for punishing inchoate offenses have been well summarized. Inchoate offences, such as attempt, conspiracy, and solicitation offer a legal basis for police

[297] K.D. Gaur, *The Penal Law of India* 646-47(2006).
[298] *Supra* note 46 at 54.

intervention to prevent consummation of a crime. It provides a means to isolate those who have demonstrated their general disposition to commit crime, and promote equality of treatment between those whose conduct accomplishes criminal results and those whose similar conduct fails because of a fortuity. More importantly, there appears to be sound reasons for including inchoate offences within the criminal law on the desert ground that the threshold of culpability can be crossed. Thus, criminal law need not be dependent on the occurrence of the harm if it can be related to its prospective occurrence. But the determination of which harm should attract criminal liability still remains a major step in determining the ambit of law. This relationship between an inchoate crime and completed crimes proves to be difficult one at times. With these lines of argument following reforms in cases of inchoate liability can be suggested:

Reforming Criminal Conspiracy-

Lord Coke[299] in 1611 said, " '*a false conspiracy betwixt divers*' persons shall be punished, although nothing be put in execution……" Generations of lawyers ever since have learnt that the essence of conspiracy is an agreement. The crime is complete on proof of an agreement between two or more persons to effect an unlawful purpose. The question then is why should this form of conduct be criminalized? Why should an agreement between two persons to commit a crime itself be a crime? The anomaly behind conspiracy law can be best shown by an example. Suppose if A buys a poison and then announces to the shopkeeper that he intends to use it next week to poison his wife, it is unlikely that he has committed a sufficient proximate act to be convicted for attempting murder. But if A buys the poison in the company of B and then announces that he and B intends to use it to murder A's wife, there is a clear case of conspiracy to murder. It may be argued that if purpose of criminal law is to prevent all intended murder, then why this difference? It has been at times contended that what is about an agreement that permits the law to step in to prevent crime where it could not do so without such agreement.

Thus, the criminal conspiracy law can be challenged on following grounds-

[299] The *Poulterers' Case* (1610) 9 Co. Rep. 55b.

Firstly, as it is an established rule of law of conspiracy that there should be at least two persons. One person alone cannot conspire.[300] However, anomalous results follows from certain cases where either one of the conspiring parties is incapable of committing the crime or is immune or is pardoned.[301] In such cases the desirability of punishing mere conspiracy not followed by an overt act calls for a close examination. For example- A and B conspire to commit an illegal act. A & B both are unaware of the fact of immunity available to B. Considering the fact that in conspiracy charges single persons cannot be prosecuted, is it justified to hold A criminally liable in case where no overt act has been committed? If yes, then criminal conspiracy cannot be justified on the ground of 'social danger test'.

Secondly, the stage at which person becomes liable to be punished for criminal conspiracy is much earlier than the stage when attempt to commit an offence becomes punishable under the penal codes. In cases of criminal conspiracy, a mere agreement to commit an offence is enough, no physical act need to take place, no consummation of the crime need to be achieved or even attempted. In fact, even preparation, in the sense of devising and arranging means for the commission of offence is not required. The indispensable question arises that whether it is proper for criminal law to intervene and use criminal sanctions at such an early stage of crime, which may or may not likely to be committed.

Thirdly, as it has been discussed in the paper that law of criminal conspiracy has several awful consequences pertaining to the substantial and procedural laws of criminal law. Issue of cumulative punishment, as propounded in case of *Challan* v. *United States*[302] seems to be is highly debatable. No doubt the principle behind the cumulative punishment is well acceptable in criminal law jurisprudence but in the case of criminal conspiracy this principle does not seems to be appropriate. The purpose of criminal law cannot be stretched too far to make various stages of crime indictable in one case. Further the issues relating to joinder, limitation, acceptability of hearsay evidence in cases of criminal conspiracy makes it much preferable for the prosecution, which in itself is highly debatable.

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[300] Topan Das v. State of Bombay, A.I.R 1956 S.C. 33.

[301] It has been held in English law that the personal immunity of one in respect of a prosecution for crime is a defense to a charge against the other for conspiring with the former to commit it. See *Sharp* (1936) All. E.R. 48.

[302] 364 U.S. 587, 593 (1961).

Fourthly, it has also been reiterated[303] that the law of criminal conspiracy is an instrument of the governmental oppression. Commenting on the insertion of provisions of criminal conspiracy provision in Indian Penal Code, it can be said that the Indian Criminal Law Amendment Act, 1913,[304] was passed as an emergent piece of legislation and this measure was motivated by political expedience[305] during British regime. It would be worthy enough to quote one of the reason behind the Amendment Act of 1913 and as also mentioned under the statement of object and reason of the Act. It states that[306]:

> *Experience has shown that dangerous conspiracies are entered into India which has, for their objects, aims other than the commission of the offence specified under section 121-A of the Indian Penal Code and the existing law is inadequate to deal with modern conditions.*

Thus, after a close examination of statement of object and reason of 1913 Act, it can be said that the purpose behind incorporating section 120-A under the Penal Code was just to tackle the revolutionary activities prevalent at that time. This form of criminal liability cannot be justified at this developed stage of criminal jurisprudence.

It is also put to the notice that no efforts were made to deal with the matter in the ordinary and regular way. It was neither circulated for opinion among the judicial and executive officers of government nor the representative public men and bodies were consulted.[307] The result was that a piece of legislation was hurriedly enacted and inconsistent and unintelligible principles of law were put into action. It is suggested that the sweeping provisions of section 120-A, IPC needs re-examination and irrationality which has imperceptible crept into the Indian law requires elimination. Further, the conspiracy to do an "illegal act" is uncertain and covers a wide area with regard to the commission of

[303] Russel on Crime, Vol.1 (11th Ed.) pg.213.
[304] Act III of 1913.
[305] See statements of Objects and Reasons, Indian Criminal Law Amendment Act, 1913.
[306] *Supra* note 7.
[307] Dissenting note of Pt. M.M Malviya in *Alim Jan Bibi*, (1937) 1 Cal. 484.

offences. The law also needs statutory modification in this respect and its use may be limited to determinate heads of offences only.[308]

Finally, it may be argued that we are at such a developed stage of criminal jurisprudence when debates are going on over-criminalization i.e. whether criminalizing each and every human conduct is the only way out to maintain peace and harmony in the society. If that is the position then the need of moral culpability demands a serious consideration. Provisions sanctioning conspiracy strikes a vital blow on this ongoing debate.

Reforming Attempt Laws-

To start with the issue of criminalizing impossible attempt, it is clear that the criminal codes pertaining to attempt law lacks uniformity. Nevertheless, the Indian Penal Code provides two illustrations under the head of section 511, which clearly states that impossibility is no defense. Though, it does not give a clear impression that whether it covers both (factual and legal) impossibilities or not.

If we take legal impossibility first, it can be suggested that there is no justification for criminalizing it, as the ultimate "intended" act is not criminal though the attempter thought it to be. For example- A attempts to steal an umbrella, being unaware of the fact that it belongs to him. In such cases, attempt, even if would have been completed, does not attract any sanction. Thus, criminalizing legally impossible attempts is not proper.

But, if we talk about factual impossibility in cases of attempt, there exist much controversy between the criminal law commentators. However, after discussing the issue of impossible attempts it is suggested that in cases of factual impossibility much discretion should be conferred to the judiciary. As in, for example, if A attempts to murder B with a gun, unaware of the fact that the gun is unloaded, he can surely be convicted for attempt to murder. But the problem arises where by the methods used it is not possible to kill some. For example- A attempts to kill B by witchcraft. Though he has guilty mind i.e. the required

[308] The Draft Code of 1879 in England classified the objects of conspiracy as: (i)Treasonable (ii)Seditious (iii)To bring false accusation (iv) To prevent justice (v) To defile women (vi) To murder (vii)To defraud (viii)To commit indictable offences (ix) To prevent by force the collection of rates and taxes.

mens rea and also committed the act. But, whether his act done is sufficient enough to justify his criminal liability, as no one can be harmed by such act. Therefore it is up to the judiciary to decide on given facts and circumstances that whether the act done can be labeled as a criminal attempt or not.

Secondly, the issue of thin demarcation line between attempt and preparation has also made the attempt law doubtful. The general rule is that no criminal liability should arise for an offence in contemplation and preparation stages. This is in consonance with the basic policy of keeping the incident criminal liability within meaningful limits. Indeed, Supreme Court in variety of its judgments has tried to give a definition of attempt and to distinguish between preparation and attempt. But, the dilemma arises from the fact that nowhere in the code has the word 'attempt' been defined and this has facilitated the Supreme Court in delivering similar judgments in dissimilar situations and vice versa. Even though the courts have evolved a number of tests yet it could be seen that still there exist a very thin line of distinction between an act amounting to preparation and an attempt. Consider a case where a wife wanted to kill her husband. While husband is in another room, she puts a poisonous apple near his bedside. The question here is whether this is an attempt or not? Here if we apply the tests propounded, different results would come. To some it would amount to an attempt and to others it may be that she is still at the preparation stage.

It is suggested that amongst various test, to determine whether the case is of preparation or an attempt, 'Proximity Test' seems to be the best way out to determine the accused liability. In other words, the code should adopt, as the *actus reus* element of attempt, the test requiring a substantial step strongly corroborative of the accused purpose. However, it can be suggested that the proximity should not only be judged co-relating it to the time and action of the 'objective intended' rather, it should also be judged on the proximity of the intention of the accused. Justice Chinnapa Reddy's definition of attempt also reflects this point.[309] Though, it is still required by the legislature to formulate a precise definition of attempt in tune with the Criminal Attempt Act, 1981 so as to minimize the confusion and ambiguity with regard to the required specific intent in cases of criminal attempt.

[309] *State of Maharashtra* v *Mohd. Yaqub* (1980) 3 SCC 57. According to him: "*the measure of proximity is not in relation with time and action but in relation to intention.*"

Thirdly, with regard to scope of section 511 under the IPC and its application in cases of attempted murder (which has been specifically provided under section 307 of IPC), it is suggested that the view taken by Straight J. in case of *R* v. *Nidha's* [310], seems to be appropriate as it is in consonance of the general interpretation of criminal statutes.[311] Supreme Court has also rightly observed that the very policy underlying section 511 seems to be providing it as a residuary provision.

Finally, to conclude this paper it is suggested that if inchoate crimes are to become a viable part of criminal codes of any jurisdiction, then the existing vague elements in such crimes must not only be clarified but also be related more closely to the rationales for punishing the underlying conduct. The task is not easy. Attempt, conspiracy, and solicitation combine policy justifications, unique to anticipatory conduct with the concepts of *mens rea* and *actus reus* developed with substantive criminal conduct in mind. The law of inchoate crimes should be especially clear and specific. Specifically, laws related to conspiracy, and attempt lack the touchstone of measureable substantive harm which lends regularity to the treatment of other crimes. A substitute is necessary to ensure an acceptable degree of accountability, consistency, and fairness. Because inchoate crimes involve often ambiguous activity, it is essential to define the requisite acts in a manner which avoids risk of punishing mere guilty state of mind. It is certainly arguable that the reach of inchoate offences should increase with the seriousness of harm- meaning for example, the law should stretch further against crimes of violence than against mere offences related to property. Further, the inchoate offences should be subjected to more restrictive principles than to other crimes, so that the anomalous results of imposing inchoate liability could be restricted.

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[311] He stressed on the application of the rule of interpretation, according to which: "The specific mention of one is the exclusion of another." (*expressio unius est exclusio alterius*).

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