

# Summary

The subject of this thesis is the punishment of acts of preparation. The main question regards the interpretation of art. 46 of the Dutch penal code (Sr). This is a relatively new subject in Dutch criminal law. The comparative approach is chosen to develop more theory about this subject. This comparative study is meant to lead to new perception about the criminal preparation. The preparation of crimes is not described as an isolated subject. Every description of the preparation in the four different countries is preceded by a study of the main subjects of substantial criminal law; criminal liability, participation and attempt.

Chapter 2 describes the current Dutch law on the subjects as listed above. A description is given of the development of the concepts of criminal liability and accomplishment. Both concepts were at first seen as mainly physical. Later on the doctrine has developed a more mental concept of criminal liability. It is not only the person who physically commits the crime who can be a perpetrator, but also the person who can be held responsible for that act. This development has also influenced the different forms of participation in crime. The interest of some of those forms of participation is diminished; on the other hand some forms of participation have been substantially expanded.

The concept of attempt has also changed. Both in jurisprudence and in doctrine, one has been balancing between objective and subjective theories. At the beginning of the twentieth century, the balance seemed to shift in the objective direction. Later on, the subjective elements of the attempt have become more important.

In the second chapter, the main questions according to the law of criminal preparation in art. 46 Sr have been established. Those are meant to be answered in the last chapter after the study of the three foreign law systems.

The third chapter is the first of three comparative chapters and describes the German law on the subjects of criminal liability, participation, attempt and preparation. The standard of dogmatism in German criminal law is remarkably high. There is drawn a very strict line between perpetrators (Täter) and accomplices (Teilnehmer). The distinction between perpetrators and accomplices is nowadays made on the basis of the doctrine of 'Tatherrschaft'. In this doctrine objective and subjective views on criminal liability are combined. For the distinction between perpetrators and accomplices is decisive whether or not one controls the execution of the crime and whether or not one has the willpower to control the execution of the crime.

The approach towards criminal attempts in German criminal law is a bit more subjective as in Dutch law. However this barely exerts an influence on the

boundary between preparation and attempt. This boundary is drawn at almost the same point in both countries.

The description of criminal preparation in German law is mainly confined to some forms of attempted accomplishment. The most important forms are (attempted) incitement (*versuchte Anstiftung*) and conspiracy (*Verabredung*). These forms of attempted accomplishment can only be punished if the intended offence is a severe one.

The fourth chapter concerns the Swiss criminal law. The concepts of criminal liability and participation in Swiss and German law are almost identical. The law on criminal attempts in Swiss law is more subjective. In Swiss law, the boundary between preparation and attempt is drawn at an early point, in comparison with Dutch and German law.

The Swiss law on criminal preparation provides an excellent opportunity for comparison with the Dutch law. Article 260<sup>bis</sup> of the Swiss penal code (*StGB*) resembles an earlier Dutch draft bill. It penalises some acts of preparation, aimed at a limited group of violent offences. Despite its remarkably wide range, it attempts to keep the penalisation of preparation restricted to acts which are close to the stage of execution of the intended offence. This prevents an extension of criminal liability to very early acts of preparation.

Chapter 5 is about criminal liability in English law. The English criminal law system, which is formed by both common law and statutory law, is highly different from the continental systems. It is, in particular, less dogmatic and more pragmatic.

In English criminal law, a distinction is made between primary parties (perpetrators) and secondary parties (accomplices). This distinction is, however, of minor practical importance. Another major difference between continental and English criminal law regards *mens rea*. The distinction between the most important *mens rea* in the continental law systems mentioned in this book – ‘opzet’ (*Vorsatz*) and ‘culpa’ (*fahrlässigkeit*) – is drawn in all three in almost the same way. The distinction between the most important *mens rea* in English law – intention and recklessness – differs from the continental approach. The word ‘intention’ in English law requires a higher standard of certainty depending on to the risk taken by the defendant, than the equivalent words ‘opzet’ and ‘Vorsatz’ in the other countries. These differences have great importance for the *mens rea* in the inchoate offences.

English criminal law contains three inchoate offences: attempt, incitement and conspiracy. The mainly subjective rationale of the attempt in English criminal law has only little influence on the distinction between attempt and mere preparation. Conspiracy is the main ground for punishment of acts of preparation in English law. According to the ‘Criminal Law act 1977’, conspiracy is the agreement between two or more persons, that a course of conduct shall be pursued which will necessarily involve the commission of an offence.

A remarkable aspect of the inchoate offence is the fact that the *mens rea* in the inchoate offences are stricter, compared to the *mens rea* of the completed of

fence. Where the *actus reus* of the inchoate offence requires less, it is common sense that the requirements on the *mens rea* are stricter.

In the last chapter (6), the questions posed towards the articles 46, 46a and 46b in chapter 2 are reconsidered. The results of the comparative studies are used to answer these questions of interpretation. The rationale of the penalisation of acts of preparation is of great importance for the way in which the mentioned results are used in this thesis. Also of importance is the way this penalisation is implemented in the system of substantive criminal law.

This chapter contains a critical reflection on the main elements of art. 46 Sr followed by a brief consideration of the attempted incitement in art. 46a Sr. After this, a number of pages are dedicated to the subject of withdrawal (art. 46b Sr). This reflection is focussed on the requirements which must be made to the withdrawal of the perpetrator to preserve him from punishment. A different approach towards the different inchoate offences is pleaded. Another distinction can be made towards the different forms of participation in inchoate offences. The next subject is the concurrence between the inchoate offences and the completed offence. The conclusion is drawn that the earlier stage of development of the offence expires at the moment a later stage has been reached.

The final remark contains a retrospective on the Dutch legislator's main reasons for introducing the criminal preparation in art. 46 Sr as well as the main points of criticism made at the moment of introduction of this regulation. This leads towards the conclusion that penalising acts of preparation has not only moved the border between innocent acts and criminal behaviour, but has also changed our way of thinking about criminal liability.