

Case Study

CRIMINAL RESPONSIBILITY OF ACCOMPLICES IN COMMITTING A CRIMINAL OFFENCE: ALBANIAN EXPERIENCE

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ABSTRACT

Background: When a criminal offence is committed by a single person, the problem of criminal responsibility is clear, whereas when the criminal offence is committed jointly by two or more people, the problem of responsibility is discussed. In this paper, the issues related to the problems of the responsibility of accomplices participating in a criminal activity will be addressed, such as the special subject, the excess of the executor, the cooperation and complicity of the case, the use of irresponsible persons in the commission of the criminal offence, and cooperation with unidentified persons. This article will answer the question of whether the criminal offence committed in cooperation would qualify in cases of cooperation with unidentified or irresponsible persons. The conclusions deal with the fact that if the criminal offence is carried out with the will, desire, and joint contribution, it is a product of the joint criminal behaviour, so the persons will be held accountable as accomplices. Also, collaborators are not responsible for other actions of the executor during the commission of the criminal offence, or for actions that go beyond the agreement. Albanian criminal law does not accept objective responsibility in the commission of a criminal offence, it also requires the subjective element. Regarding acceptance of cooperation, there is no cooperation with irresponsible persons. It would not be enough to prove only that in the commission of the crime other persons also participated, be they all adults, but it must be proven simultaneously that the unidentified persons are criminally responsible.

Methods: In this study, a comprehensive legal analysis approach was employed to delve into the intricate issues surrounding the criminal responsibility of accomplices engaged in joint criminal activities. The methodology involved a meticulous examination of Albanian criminal law, jurisprudence, and relevant legal principles. The study focused on various aspects, including the special subject, the concept of cooperation, the excess of the executor, cooperation, complicity within specific cases, the utilisation of irresponsible individuals in the commission of criminal offences, and collaboration with unidentified persons. This method allows for gaining a profound understanding of the legal framework governing joint criminal behaviour and accomplice liability.

Results and conclusions: *The findings of the research shed light on the complex issues surrounding the criminal responsibility of accomplices in cases of joint criminal activities. Through an in-depth analysis of Albanian criminal law and jurisprudence, answers to critical questions concerning the qualification of criminal offences committed in cooperation, especially in cases involving unidentified or irresponsible persons, are provided. The results confirm that when a criminal offence is executed with the shared intent, desire, and joint contribution of individuals, it unequivocally constitutes joint criminal behaviour, leading to accountability for all involved accomplices. Furthermore, the research elucidates that collaborators cannot be held responsible for actions by the principal offender that exceed the scope of their agreement. Additionally, emphasis is given regarding Albanian criminal law adhering to a subjective element requirement for criminal responsibility, ruling out objective responsibility in the commission of criminal offences. Regarding the acceptance of cooperation, the findings underscore that the mere participation of other individuals in the commission of a crime, even if they are adults, does not establish criminal responsibility for unidentified persons. Instead, it necessitates the concurrent demonstration of their individual criminal liability. The results provide valuable insights into the legal principles governing the responsibility of accomplices in joint criminal activities within the Albanian legal context.*

1 INTRODUCTION

For the determination of criminal responsibility and that of the punishment of accomplices in the execution of the criminal offence, the exact definitions of the circle of accomplices, their role, and the level of participation of each in the relevant criminal activities are of particular importance. In this context, the term “autonomy of responsibility of accomplices who participate in the execution of a criminal offence” is often used in legal literature, linking the principle of autonomy with the influence of guilt, personal, and real circumstances in the assessment of responsibility and its degree.¹ The problem of the autonomy of responsibility is discussed when the criminal offence is committed in collaboration by two or more people, where the need arises to determine the criminal activity of each one, since the degree of participation and the role of collaborators are generally different, and even more so when the forms of cooperation themselves provided for in the law differ. In this paper, some issues related to the problems of the responsibility of participants in a criminal activity will be addressed, such as the special subject, the excess of the executor, cooperation, and complicity of the case. It will also clarify issues such as:

- If it is proven that the criminal offence was committed by two or more persons, of whom only one has been identified, will the offence committed in cooperation without identifying the second person, or the other persons if there are several, qualify?
- Will it be considered a criminal offence committed in cooperation, given a lack of identification of the accomplice or the use of irresponsible persons in the commission of the criminal offence and cooperation with unidentified persons?

1 Vllado Kambovski, *E Drejta Penale: Pjesa e Përgjithshme* (Furkan ISM 2007) 381.

2 THE CONCEPT OF COOPERATION AND CRIMINAL RESPONSIBILITY FOR ACCOMPLICES

Referring to the Albanian Criminal Code, cooperation is considered the commitment of a criminal offence by two or more persons with an agreement between them, as well as the types and duties of collaborators.² In order to have cooperation in the execution of a criminal offence, the objective element is not enough. The subjective element is also required, consisting of the existence of an agreement between the participating persons for its performance. The autonomy of the criminal responsibility of the accomplice means the individual responsibility that lies within the limits of his guilt, in those dimensions and to the extent of the contribution he made in the commission of the crime. This definition is underlined because national or international criminal law do not recognize collective guilt and responsibility. No one is responsible for another, but only for his actions or omissions committed with guilt.

As a rule, the responsibility of accomplices, in the sense of the legal definition of the criminal offence, is the same for everyone regardless of the designation as organiser, executor, instigator, or assistant. The degree of responsibility or, in other words, the measure of punishment, can vary depending on the degree of participation and the role played by each party in the commission of the criminal offence or with other circumstances provided for in the law, such as the exemption from punishment or its reduction due to the assistance it provides for the recognition of other collaborators, for the discovery of their wealth derived from criminal activity, and organised criminal structures, etc. The accomplice bears criminal responsibility regardless of the responsibility or degree of responsibility of the other accomplices.³ In this regard, there are some specific problems with the limits of participants' responsibility in a criminal activity, when the responsibility is not the same for everyone, but is either different, or extends only to some of them, or only to him or those who committed the criminal act.

2.1. Responsibility in terms of cooperation between the general and the special subject

In the investigative and judicial practice, there are cases when, for different collaborators who participate in a criminal offence, different legal qualifications of the offence are made, and therefore different responsibilities also arise. This situation is created or complicated due to the peculiarities of the subjects of the criminal offence, particularly when among the accomplices there are also persons with special qualities (special subjects), for whom the criminal law provides for a special figure of the same criminal offence. That is, when we are simultaneously for one or several accomplices before the general figure, and for one or several other accomplices before those figures who are called special or specific figures of the criminal offence (*delictum proprium*).

2 Criminal Code of the Republic of Albania 'Kodi Penal i Republikës së Shqipërisë' Law no 7895 of 27 January 1995 (as amended of 4 May 2021) arts 25-26 <<https://qbz.gov.al/preview/a2b117e6-69b2-4355-aa49-78967c31bf4d>> accessed 22 October 2023.

3 Shefqet Muci, *E Drejta Penale: Pjesa e Pergjithshme* (Dudaj 2017) 222.

In the conditions of cooperation between the general subject and the special subject, when for these subjects their work is provided by special provisions, the question arises as to which provision will be applied, the one that provides for the performance of the work by the general subject, the special provision, or if the relevant provision will be applied to each subject?

There are different opinions regarding this issue.⁴ According to one point of view, priority is given to the special provision that, as a rule, provides for heavier punishment. Its supporters base their reasoning on the fact that the actions or omissions of the perpetrators aim at the same criminal result and that the offence is one, indivisible, which dictates and requires the unity of their responsibility. The joint criminal activity cannot be separated and leads to the same criminal responsibility, otherwise differentiated and unfair attitudes would be held towards the accomplices and the principle that the accomplices are equally responsible would be violated.

2.2. Albanian judicial jurisprudence regarding the liability of accomplices

The jurisprudence of recent years on the responsibility in the conditions of cooperation between the general subject and the special one refers to the view that the definition of the offences will depend on the subject type of the criminal offence. Therefore, even though the work is done in cooperation between them, different settings will be made.⁵ The special subject, in accordance with the general principles of the criminal law doctrine, will in any case answer based on the provision that punishes the offence committed by him, while the others according to the general provision. Partisans of this view rely on the difference between the criminal offence and its figures, underlining that a criminal offence can be envisaged with several figures and that the legal definition must be made according to the relevant figure. Its special figures can be formed both due to objective circumstances and subjective elements or entities that participate in the commission of the offence, both in cases where the criminal offence is committed in cooperation by general entities, and when its performance also includes subjects with special qualities. For example, an offence that is provided for in two or more figures is smuggling, specifically in articles 171 - 179/ç of the Criminal Code, where article 175 provides for smuggling by employees related to customs activity, that is, by a special subject.

This issue is regulated by a unifying decision of the United Colleges of the Supreme Court, where it is justified that "*the legislator has included the smuggling activity carried out by customs employees or employees related to customs activity in Article 175 of the Criminal Code even in cases where smuggling, by these employees, is carried out in collaboration with other*

4 ibid 222-4.

5 Case no 7/6, decision no 4 (United Colleges of the Supreme Court of the Republic of Albania, 15 April 2011) <http://www.gjykataelarte.gov.al/web/vu_4_penal_date_15_04_2011_749.doc> accessed 22 October 2023.

persons, who lack the element of special qualities to be a special subject of this type of crime, that is, they are not customs employees or employees related to customs activity."⁶

Another issue for discussion surrounds how to act in cases where the criminal offence is committed by the special subject with the help or encouragement of persons who are not subject to this activity, whose actions are not prescribed by any other provision as a criminal offence.

Such cases are typically encountered in crimes against state activity committed by state employees or public service. For example, an ordinary citizen influences the clerk to commit the crime of abuse of duty, committing arbitrary actions or violating the equality of citizens. Opinions are divided on this issue as well. Some reason that the responsible entity in these cases does not bear criminal responsibility, since the law has limited the responsibility to the special entity, for example, in the form of the criminal offence of abuse of office.⁷ Others consider them co-authors with the special subject on the grounds that no individual can be exempted from criminal responsibility if, in one form or another, he is involved in criminal activity.

However, judicial practices, in the cases of "Delin Hajdaraj & Leo Osmani"⁸ or "Mirdash Osmani, Bujar Leza, Leonard Xhixha & Vilson Cami"⁹ considered them collaborators with the quality of instigator or helper because their actions, of any nature, were done to encourage the special subject or to create facilitating conditions for him in achieving the criminal result. In this case, the criminal offence is carried out with their will, desire, and joint contribution. Thus, it is a product of their joint criminal behaviour, so they will be held accountable as accomplices.

3 EXCESSES OF THE EXECUTOR

Cooperation in the commission of a criminal offence requires the existence of an agreement between the participating persons for its commission. This legal requirement leads to the conclusion that co-conspirators bear criminal liability for conduct that falls within the bounds of their agreement. Thus, they are responsible only for their own actions that have contributed, in any form, to the achievement of the criminal objective, as well as for those actions or omissions committed by other collaborators arising from the agreement, to which they have given consent, and which are within the measure necessary for the implementation of the decision or the goals included in their joint criminal plan.

6 Case no 1, decision no 1 (United Colleges of the Supreme Court of the Republic of Albania, 12 March 2002) <http://www.gjykataelarte.gov.al/web/nr_1_dt_12_03_2002_p_67.doc> accessed 22 October 2023.

7 Criminal Code (n 2) art 248.

8 *Delin Hajdaraj dhe T*, decision no 00-2022-1812 (273) (United Colleges of the Supreme Court of the Republic of Albania, 27 October 2022) <http://www.gjykataelarte.gov.al/vendim_download.php?id=2016-06669> accessed 22 October 2023.

9 *Mirdash Osmani dhe T*, decision no 00-2023-1149 (138) (United Colleges of the Supreme Court of the Republic of Albania, 25 April 2023) <http://www.gjykataelarte.gov.al/vendim_download.php?id=2017-06069> accessed 22 October 2023.

Collaborators are not responsible for other actions of the executor during the commission of the criminal offence, for actions that go beyond the agreement or outside the general plan of cooperation, which violate other legal-criminal relations, causing unwanted criminal consequences from them.¹⁰

In criminal law, these excesses are called the executor's excess, and only the executor or co-executors who committed them are responsible for the criminal offences formed by them. For example, there will be excess in the case where the agreement was for beating or slightly injuring the opponent while the executor kills him, that is, commits a crime of a different, more serious quality. Another example is when one accomplice, without the consent of the other accomplice, performs another act not provided for in the agreement, that is, adds to the number of acts. As a rule, excess occurs between either the executor and collaborators who do not take direct action on the object, or between the executor and others such as organisers, instigators, and helpers, but it can also occur in the relationship between co-executors.

4 COOPERATION AND COMPLICITY OF THE CASE

Cooperation and complicity of the case exclude cooperation and, automatically, the responsibility of the authors of the work as collaborators. The random numerical union in the commission of a criminal offence and the action of these persons until its completion without agreement between them does not legitimise cooperation and does not justify the status of each collaborator as a collaborator since the will to cooperate is absent.

Albanian criminal law does not accept objective responsibility in the commission of a criminal offence, rather, it connects it with numerous other elements, also requiring the subjective element. This position applies both to the case when the act is committed by a single person as well as to the case when the act is committed in collaboration. The existence of cooperation is not only related to the objective side with the participation of two or more persons in the performance of actions that coincide by chance in the commission of a criminal offence, but also requires the mens rea, the intention expressed in the agreement to achieve the criminal consequence with concerted actions. For example, persons unknown to each other see a truck with cargo parked on the side of the road. Then each, on his own account and without agreement with the others, steals goods from the truck. In this case, even though the guilt of each one is created and exists in the realisation of the theft, the presence of cooperation is not found. Each of them will be responsible only for the actions performed by him, unrelated to the actions of others, since there is no subjective connection between the participants in the formation of their complicity. This example demonstrates a random numerical union of persons participating in the commission of the criminal offence and, consequently, shows a random, formal, inorganic union of their guilt.

10 *ibid*, para 24.

5 THE USE OF IRRESPONSIBLE PERSONS IN THE COMMISSION OF THE CRIMINAL OFFENCE

In recent years in Albanian criminal law, one of the most controversial issues is the use of mentally irresponsible persons or minors who have not reached the age of criminal responsibility. The minimum age of committing a crime is 14, and the age of committing a criminal offence is 16,¹¹ i.e., these individuals are not subject to the criminal offence, in the commission of the criminal offence. The theory and practice of criminal law have not accepted the cooperation between responsible persons and mentally irresponsible persons or between responsible persons and minors who had not reached the age of criminal responsibility, in cases where the latter were used to commit the criminal offence.

The unifying decision Nr. 4, dated 15.04.2011,¹² of the United Colleges of the High Court of the Republic of Albania changed many years of judicial practice, accepting cooperation even in cases where the author of the criminal offence carries it out through mentally irresponsible persons or minors under the legal age for criminal responsibility. There are reservations regarding the unifying decision, including the legal basis and the theoretical reasoning of the problems addressed in it, since its reasoning contradicts the conclusions drawn. In such a situation, the question arises:

How can cooperation between a responsible person and an irresponsible person due to mental incapacity or due to the age of a minor be justified, in other words, between a subject of criminal law and another who is not subject to it?

The point of view that accepts this type of cooperation is found in the criminal law of some countries, such as Germany, where it is known as “joint perpetration” (Täterschaft) and “accessoryship” (Teilnahme),¹³ in the Netherlands, known as the principle of “common purpose” (dolus eventualis).¹⁴ This law generally associates cooperation with the objective side, and even accepts its execution with carelessness, which does not foresee the agreement between collaborators as a necessary element of its existence. According to its proponents, the pushing or pulling of irresponsible persons and children (under the legal age) in criminal offences can be treated as complicity if *“the irresponsible person or minor acts willingly, with premeditation in the natural sense.”*¹⁵

Albanian judicial practice has been unique and in accordance with modern contemporary criminal legislations that do not accept cooperation in these cases. In the criminal codes before 1995, pushing or pulling minors into crime was assessed as an aggravating

11 Code of Criminal Justice for Minors ‘Kodi i Drejtësisë Penale Përtë Mitur’ Law no 37/2017 of 30 March 2017, art 3 <<https://qbz.gov.al/share/p7xMm3JTTG6NT5kWGTF2Og>> accessed 22 October 2023.

12 Case no 7/6, decision no 4 (n 5).

13 ‘Täterschaft und Teilnahme – Übersicht : Strafrecht Allgemeiner Teil I: Online-Kurs’ (Juracademy, 2023) <<https://www.juracademy.de/strafrecht-at2/taeterschaft-teilnahme-uebersicht.html>> accessed 22 October 2023.

14 Elies van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’ (2007) 5(1) Journal of International Criminal Justice 193, doi:10.1093/jicj/mql042.

15 Shefqet Muci, *E Drejta Penale: Pjesa e Pergjithshme* (Dudaj 2012) 243.

circumstance for the perpetrator or perpetrators of the criminal offence, while in the current code, it is provided as a separate criminal offence: "*Pushing or pulling minors under the age of fourteen years for committing a crime, is punished with imprisonment of up to five years.*"¹⁶

Many years of judicial practice is based on the legal definition of cooperation, according to which its existence is related and conditioned not only with the objective element and with the participation of two or more persons in the commission of the criminal offence, but also inseparably with the subjective element, which is expressed in the term "by agreement between them."¹⁷ When talking about an agreement, the legislator has in mind its connection between the subjects of criminal law, between criminally responsible persons, not between the subjects and irresponsible persons, who are not subjects and are not subject to criminal liability.

All institutes of criminal law, including cooperation, are foreseen to be implemented by its subjects, by persons who are subject to criminal liability. The agreement, in all disciplines of law, means the existence of awareness of what one does, the anticipation of what will be achieved, the desire, the will, the control of oneself, and the direct will of its authors towards their behaviour and the consequences that come or desired. The word agreement itself implies the will of all its participants. On the other hand, volition is an attribute of responsible persons.

According to the decision,

‘when it is objectively proven that the criminal offence was committed by two or more persons, the offence will be considered committed in collaboration. This applies both to cases where accomplices are not identified for criminal liability. Special qualities that increase, reduce or exclude punishment are taken into account only for the accomplice in whom they exist.’¹⁸

It seems clear that the subjective side is overlooked here, if not abandoned. So, this new position of the United Colleges of the Supreme Court contradicts the notion of cooperation provided for in Article 25 of the Criminal Code as it only evaluates the objective element and excludes the subjective element in the realisation of cooperation, while the criminal law requires both these elements. The unifying decision in question distorts the meaning of the agreement and strips it of its subjective side.

Thus, on the one hand, the Supreme Court admits that "*the subjective side is one of the structural components of the institution of cooperation, which requires as a necessary element the existence of an agreement.*" The Supreme Court also states that "*the characteristic of the criminal offence committed in cooperation is the unity of the side subjective*" and that "*the*

16 Criminal Code (n 2) art 129.

17 *ibid*, art 25.

18 Case no 7/6, decision no 4 (n 5).

subjective side in the commission of a criminal offence in cooperation consists of two elements: - the conscience and will of the person to commit the criminal offence and - the will to cooperate with other persons for its commission, with the condition that each of authors to be aware of the actions of others."¹⁹ On the other hand, contrary to these submissions and fair reasoning, the United Colleges draw wrong conclusions, effectively eliminating the subjective side.

Can we discuss the "conscience and will" of irresponsible persons or children to commit a criminal offence, the "will to cooperate with other persons"? Can these individuals "be aware of the actions of others"? Of course not. A person who is irresponsible by reason of his mental state has a completely disturbed mental balance, lacks intellect to such an extent that he is unable to realise that he is committing a criminal offence, and has no conscience to exercise his will or to control his conduct. Article 17 of the Criminal Code, which provides for irresponsibility due to mental state, leaves no room for discussion in this regard. It is written there in black and white that such a person does not have criminal responsibility because "*...he was not able to control his actions or inactions, nor to understand that he committed a criminal offence.*"²⁰ Whereas in a minor, consciousness has not yet developed to the appropriate degree to understand the severity of his actions and to act with controlled and free will. They, not being subjects of criminal law, neither can nor are able to make agreements to commit criminal acts.

6 COOPERATION WITH UNIDENTIFIED PERSONS

When several people participate in the commission of a criminal offence in cooperation, of which at least two of them are identified, the problem of the existence of cooperation is not disputed. Its existence is discussed only in the case when one of them is identified while the other participants remain unidentified. Even for this case, the Albanian judicial practice, until the above unifying decision of the United Colleges of the Supreme Court, did not accept cooperation on the grounds that the status of the unidentified persons was not known. Now, with this unifying decision, the judicial practice is changed by accepting the institute of cooperation even when the offence is committed by two or more persons, of whom only one is identified, while the others remain unknown. Therefore, for the identified person who is subject to trial, the offence will be reported as having been committed in cooperation with unidentified persons, and he, the defendant, will answer as an accomplice. "*Not knowing the personal characteristics of the unknown accomplice - say the United Colleges in the unifying decision in question - does not avoid the existence of cooperation and does not make the provision of the general part of the Criminal Code inapplicable.*"²¹

It would not be enough to prove only that other persons participated in the commission of the crime, be they all adults, but it must be proven simultaneously that the unidentified

19 *ibid.*

20 Criminal Code (n 2) art 17.

21 Case no 7/6, decision no 4 (n 5).

persons are criminally responsible. Hence, if the above statement is not proven, Article 4 of the Code of the Criminal Procedure will be applicable, which states that any doubt about the charge is evaluated in favour of the defendant.

7 CONCLUSIONS

In cases where the criminal offence is committed by the special subject with the help or encouragement of persons who are not subject to this activity and their actions are not provided by any other provision as a criminal offence, opinions are divided. In these cases, some reason that the responsible entity does not bear criminal responsibility since the law has limited the responsibility to the special entity. Others consider them co-authors with the special subject, on the grounds that no one can be exempted from criminal responsibility if, in one form or another, he is involved in criminal activity. The criminal offence is carried out with their will, desire, and joint contribution, thus, it is a product of their joint criminal behaviour, so they will be held accountable as accomplices.

Collaborators are not responsible for other actions of the executor during the commission of the criminal offence, for actions that go beyond the agreement, outside the general plan of cooperation, which violate other legal-criminal relations, causing unwanted criminal consequences from them. In criminal law, these excesses are called the executor's excess, and only the executor or co-executors who committed them are responsible for the criminal offences formed by them.

Albanian criminal law does not accept the objective responsibility in the commission of a criminal offence; it also requires the subjective element. This position applies both to the case when the act is committed by a single person as well as to the case when the act is committed in collaboration.

Acceptance of cooperation, in the case when the status of unidentified persons is not known and their status is important, if we adhere to the variant that there is no cooperation with irresponsible persons, it would not be enough to prove only the fact that in the commission of the crime other persons also participated, be they all adults, but it must be proven at the same time that the unidentified persons are criminally responsible.

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