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COLLABORATION IN COMMITTING A CRIMINAL OFFENCE

1. THE CONCEPT OF COLLABORATION AND ITS FORMS

It is not rarely the case when more persons participate in committing a criminal offence. Practice has shown that in such cases there are many different forms of joint enterprise and different degrees of contribution by participants in committing a criminal offence. There exist well-organized criminal associations with leading structures that are engaged in criminality as a permanent type of activity, but there are other forms of joint criminal ventures with a lower degree of organization. These have mainly to do with ad hoc connections of more persons to commit a criminal offence.

Not only the theory of criminal law, but also the law and the practice have always paid particular attention to cases with more persons participate in committing a criminal offence. This is due to the fact that the accumulation of criminal energy is seen as greater social danger than in cases when a crime is committed by a single perpetrator.

It is not rare that in situations of collaboration in a criminal offence, organized crime comes on the surface which for every country and for the whole mankind represents the most dangerous form of criminality⁴³. Different forms of trafficking, terrorism, politically motivated assassinations etc. are

⁴³ Salihu, Criminal Law, general part, Prishtinë, 2005, p.372; Petar Novoselac, General part of Criminal Law, Zagreb, 2007, p.318.-

some of the criminal offenses that are usually committed in collaboration. Collaboration in modern criminal law is considered as an institute which is regulated by the general part of the criminal code. Due to the danger the collaboration in committing a criminal offence represents, in our Criminal Code, special incriminations are foreseen as the most severe forms of basic criminal offenses, for a perpetrator if he/she acts as a member of a group.

In order for the collaboration in committing a criminal offence to exist, participation of two or more persons is not enough, but an objective and subjective connection between collaborators must exist. This is because there could be a situation when two or more persons commit a criminal offence of theft, but their activities are independent. Thus, for example, one perpetrator breaks a window of a shop and takes away several items, and in the meantime, another person passes by and takes away also some items.

Objective connection of collaboration lies in the fact that each collaborator should undertake an action which contributes to the execution of a criminal offence, with an intention to cause certain effects as a result of joint actions of collaborators.

Subjective connection lies in the fact that all collaborators should be aware that they act in different ways with a common goal, and it is not necessary to know each other.

According to the Criminal Code of the Republic of Albania (CCRA), collaboration is called the execution of a criminal offence by two or more persons with an agreement among them⁴⁴.

2. FORMS OF COLLABORATION

Forms of collaboration in committing a criminal offence are defined in the provisions of Articles 23, 24, 25 and 26 of the Criminal Code of Kosovo such as complicity, incitement, assistance and criminal association. These four forms of collaboration, due to their important features, in the science of the criminal law are divided in collaboration in a broad sense, including

44 I. Elezi, etc "Commentary to the Criminal Code of the Republic of Albania, Tiranë, 2006, pg.176.

all forms of collaboration: complicity, incitement, assistance and criminal association, and in collaboration in a narrow sense, which includes only incitement, assistance and criminal association⁴⁵.

2.1 CO-PERPETRATION

Co-perpetration exists when two or more persons jointly commit a criminal offence by participating in the commission of a criminal offence⁴⁶. According to CCRA, co-perpetrators are persons who commit a direct action for commission of a criminal offence⁴⁷. For example, two or more persons fire their weapons at another person and cause death. It happens to be difficult the distinction between co-perpetration and other forms of collaboration, therefore it is very important to make a clear distinction between them. In order to make a distinction between co-perpetration, as the most severe form and other forms of collaboration, there exist three theories: Formal-Objective theory; subjective theory and the theory of sharing an action (role).

Formal-Objective theory considers as co-perpetrator a person who has undertaken the action of committing an action or part of an action. So, this theory takes into account only objective elements of the criminal offense and considers as co-perpetrator only the person who has taken an action of commission, by not taking into account other forms of contributing to the commission of the criminal offence, as for example the chief of a criminal gang who, at the scene of the event, leads the operation of bank robbery.

Subjective theory considers as co-perpetrator all participants in the commission of a criminal offence. This theory represents an extensive concept of the notion of perpetrator, according to which, inciter and assistant are also considered perpetrators (co-perpetrators) in a criminal offence, however, having a special treatment in case of punishment. According to subjective theory, co-perpetrator is considered every person who has wanted the effects and considered the criminal offence as his or acted cum animo auctoris. Subjective theory does not take into account sufficiently objective contribution and minimizes the effects of this contribution.

45 Ibid, pg.374.-

46 Ibid, pg.375.-

Theory of sharing action (role) considers as co-perpetrator the person who jointly with another person, and based on the agreement to divide actions, executes his/her part in the process of the commission of the criminal offence, and in such cases he/she wants the act as his/hers or as a joint one. This theory qualifies as co-perpetrator any participant who has taken action under a previous agreement with other persons and wanted the commission of that criminal offence. Let's say that our court practice has largely adopted the theory of sharing roles.

Contemporary theories of criminal law and judicial practice have adopted the objective-subjective theory or synthesis of these two theories to determine the notion of co-perpetrator and other forms of collaboration. This is because the action, in its essence, is an indivisible whole of objective and subjective elements.

In the frame of co-perpetration, we have to distinguish the necessary co-perpetration. In cases when the criminal offence can be committed by a person, but in its commission, two or more persons take part, then we talk about optional co-perpetration. However, there are some criminal offenses which, because of their nature, can be commissioned only if more persons participate in its commission. This form of co-perpetration is known as necessary co-perpetration. We have to distinguish fictive co-perpetration from the necessary co-perpetration which exists when two or more persons participate in the commission of the criminal offense but who have not acted consciously or wanted or accepted the effects. Criminal offenses commissioned through necessary co-perpetration are divided into convergent and divergent criminal offenses. Convergent criminal offences exist when co-perpetrators have a joint aim, while the divergent criminal offence exists when co-perpetration is necessary, but co-perpetrators do not have a joint aim, or have opposite interests. Such cases are successive co-perpetration, co-perpetration in complex criminal offences and co-perpetration in criminal offences with non-action.

According to Article 23 of the CCK, each co-perpetrator is punished with the foreseen sentence for the commission of the criminal offence within the limits of intent or negligence, which means that co-perpetrator is not liable for the excessive criminal offence.

2.2 Incitement

Incitement is one of the forms of collaboration in a strict sense.

In theory and in practice incitement is defined as undertaking such actions which intentionally cause or strengthen the decision of another person to commit a criminal offence. According to CCRA, inciter is a person who incites other collaborators to commit a criminal offence. Incitement is a psychic influence on the main perpetrator to take the decision to commit a criminal offence.

Thus, in order for the incitement to exist, it is necessary that the perpetrator had no intention to commit a criminal offence, or has not taken the decision to commit a criminal offence, but the inciter with his/her actions has influenced in strengthening the decision for him/her to commit the criminal offense.

Incitement can be committed only with intent, meaning that the inciter has to be aware that with his/her action he/she is inciting the other person to commit a certain criminal offence. Incitement can be committed also out of neglect, but this form of incitement is not punishable.

According to Article 24 of the CCK, inciter is convicted for a criminal offence as if he/she had committed it himself/herself, provided that the criminal offence was committed under his/her influence.

Incitement is foreseen as a specific criminal offence in the special part of CCK, as it is the case with the incitement of hatred, discord or national, racial, religious or ethnic intolerance (Article 115), then, the incitement for the aggressive war (Article 130) etc.

Unsuccessful incitement exists when a person who had been incited gives up from committing a criminal offence for which he/she was incited to commit, when a person was prevented by objective circumstances to commit a criminal offence for which he/she was incited to, when the incited person has undertaken other preparatory actions to commit a criminal offence but those preparatory actions are not punishable, when the incited person had already taken the decision to commit a criminal offence even

without being influenced by the inciter, and when the incited person commits a completely different offence from the one he/she was incited to commit.

2.3 Assistance

Assistance is the second form of collaboration in the strict sense.

Assistance means undertaking actions by which a person intentionally assists another person to commit a criminal offence. According to CCRA, an assistant is considered a person who assists a perpetrator by giving advice, guidance, providing tools, removing obstacles, giving promises to conceal the criminal offence, the perpetrators, traces or objects derived from the criminal offence. In contrast to incitement, assistance can exist only after a person has decided to commit a criminal offence; otherwise such actions would be considered as incitement.

Assistance can be committed physically and psychologically. Physical assistance may be considered making available or providing tools to the perpetrator to commit a criminal offence or removing obstacles in view of committing a criminal offence, while psychological assistance is considered provision of advice or guidance how to commit a criminal offence and promises to conceal the criminal offence, the perpetrator or traces of a criminal offence.

Unsuccessful assistance exists when a person who has been given assistance has not committed a criminal offence or has made no attempts to commit it, or has not undertaken preparatory actions which are punishable. Unsuccessful assistance exists also when the perpetrator did not use the assistance of the other person to commit a criminal offence, but has committed the offence regardless of the actions of his/her assistant. Unsuccessful assistance is not punishable, because it does not represent a causal contribution in committing the criminal offence. However, unsuccessful assistance can be incriminated as a specific criminal offence, such as the cases of criminal offences for assisting in suicide (Article 151 of the CCK), assistance to pregnant women to terminate pregnancy (Article 152 of the CCK), assisting a perpetrator after a criminal offence was committed (Article 305 of the CCK), etc.

2.4 Criminal Association

Criminal association is the fourth form and most serious form of collaboration in committing a criminal offence in the strict sense.

Criminal association as a form of collaboration differs from other forms of collaboration in committing criminal offences. Based on the Kosovo Criminal Code, criminal association refers to criminal organizations or a group of persons who have made an agreement to commit a criminal offence. The issue of criminal networks has come on the surface particularly after World War II.

Criminal Code of Kosovo, under the influence of model criminal codes of some countries in Western Europe and Anglo-American concept, has included criminal association under the general part (article 26). According to paragraph 1 of this Article, persons enter in a criminal association if they have agreed to commit a criminal offence which is punishable by at least five years of imprisonment and if they have undertaken preparatory actions to execute the agreement. Attempts to reach an agreement are not punishable.

Criminal association, according to the Criminal Code of Kosovo, exists also as a specific criminal offense, such as organization, support and participation in terrorist groups, organization of a group to commit a criminal offence of genocide, crimes against humanity and war crimes, organization of persons or participation in human trafficking, unauthorized production and processing of narcotics, etc.

3. CONCLUSION

Criminal offense may be committed by one or more persons. If the offense is committed by two or more persons, it constitutes a higher degree of danger for the society. When a criminal offense is committed by two or more persons, criminal law and judicial practice is faced with the problem of determining the role and contribution of each collaborator in committing a criminal offence.

In order to exist collaboration in committing a criminal offence, objective and subjective connection has to prevail.

There exists collaboration in a broader sense, such as co-perpetration, incitement, assistance and criminal association, as well as, collaboration in a strict sense such as incitement, assistance and criminal association.

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