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LEGAL NATURE OF COMPLICITY IN CRIME IN THE CRIMINAL LAW OF THE UNITED STATES OF AMERICA

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Abstract. Comparative criminal law is a stage in the development of national criminal law. In view of the fact that national legislations are very different and changing, it is very important and necessary to consider legal problematics from their comparative and legal perspective. Modern integration processes and the deepening of mutual cooperation with foreign academic centres make it relevant to learn about the legislation of different legal systems, especially in the areas of relations between states, such as criminal liability and punishment. A significant part of this article is dedicated to *comparative and systematic methods*. The provisions adopted in the common law system are compared with a respective legal position of continental Europe from the perspective of a comparative and legal approach. Based on that, a respective conclusion is suggested taking into consideration achievements in academic research, legislation and practice.

Keywords: complicity, abetment, comparativism

1. Introduction

The issues of complicity in crime are regulated differently in the criminal legal doctrine and legislation of common law countries and continental European countries. This is caused by the significant particularities characteristic of these legal systems. In English and American criminal law, the problematics of complicity in crime are characterised by a number of specificities. Unlike countries which have Romano-Germanic legal systems, the comparative research approach acquires even greater importance in English and American criminal law systems. Such particularities in the common law system are demonstrated by a comparison of the legislation of different US states in terms of the problematics of complicity in crime. The purpose of comparative and legal research is to determine common and distinguishing features characteristic of the American legal system. Only this approach allows us to determine how good or bad a national criminal law system is, what its recognised values and priorities are, and the prospects for its development.

In this regard, *Mindia Ugrekhelidze*'s review of the particularities of comparative jurisprudence in relation to law, as a system of dimensions, is very interesting: 'law is primarily a legimetry

in its essence and purpose, while comparative jurisprudence studies the particularities of different legal 'families' in their interrelationship, thus leading to an inevitable conclusion that comparative jurisprudence represents a double legimetry: first is the legimetry of state values, and the other is their systemic integrity in the international extent and relativity. *M. Ugrekhelidze* figuratively refers to it as '*a legimetry of legimetries*'[1].

2. Complicity in Crime in the Criminal Legal Doctrine and Legislation of the United States of America

2.1. Complicity in crime according to the criminal legal doctrine of the United States of America

In American law, the problematics of complicity in crime are characterised by a number of specificities. Unlike countries with a Romano-Germanic legal system, the comparative research approach acquires even greater importance in the American criminal law system. Such particularities in the American legal system are demonstrated by a comparison of the legislation of different US states in terms of the problematics of abetment. The reasoning by *Mindia Ugrekhelidze* is interesting in this regard, who reviews the work by a famous American criminalist *Cherif Bassiouni* 'Substantive Criminal Law'[2]. 'American legislation is essentially a conglomerate of 53 independent legal systems that are not subject to each other, each individual system of which is characterised by a number of historically conditioned particularities. The comparative analysis of these particularities is a primary objective of American legal studies. An American jurist either merely '*does not have time*' to carry out the academic comparison of a complex American legal system with other systems, or has carried out independent research in that respect in his special work'[3].

According to American criminal legal doctrine, complicity in crime is possible only in the case of a completed crime, but it does not mean that accomplices will be exempted from criminal liability if a crime has not been committed. Before committing a crime, an abettor may be subject to criminal liability for abetment, as a separate crime[4]. It is notable that

1. *Ugrekhelidze, M.*, Introduction to Legimetry (Law as a System of Dimensions), Works II of the Faculty of Humanities and Law of St. Andrew the First-Called Georgian University of the Patriarchate of Georgia, Publishing House 'Meridiani', Tbilisi, 2015, p. 153.
2. *Ugrekhelidze M.*, the fundamental work by a famous American criminalist *Cherif Bassiouni* 'Substantive Criminal Law'. Bulletin of the Academy of Sciences of the Georgian Soviet Socialist Republic, Series of Economics and Law. Publishing House 'Metsniereba', Tbilisi, No 3, 1980, p. 102. See also: *Liber Amicorum – Mindia Ugrekhelidze 80* (Attempt to Introduce the Personality of Law), edited and prepared for publication by *B. Kantaria*, Publishing House 'Universali', Tbilisi, 2022, pp. 495-496.
3. *Ugrekhelidze, M.*, referred paper; p. 102, *Никифоров Б. С.,* К вопрсу о реформе уголовного законодательстве в США (Политический аспект), Прававые исследования. Сборник научных статей, посвященных 70-летию *Тинатина Васильевна* Церетели, Тбилиси, 1977. p. *189* referred to based on the paper by *Ugrekhelidze, M.*
4. *For example*, before committing a crime, an aider may be subject to criminal liability for abetment, as a separate crime. See *Gventsadze, E.*, Subjective Element of Complicity in Crime. A dissertation paper for obtaining an academic degree of a Doctor of Law, Tbilisi, 2012, p. 116.

abetment does not have an independent substance in American criminal legal doctrine. Based on *Cherif Bassiouni's paper, Mindia Ugrekhelidze* examines the concept and types of inchoate crime and states his opinion, according to which an attempted crime (which also includes the planning stage), criminal conspiracy and abetment are all '*newly-conceived crimes*'[5]. The criminal legal doctrines of countries with a common law system have many common and distinctive features. As for an attempted crime, conspiracy, and abetment, according to *Cherif Bassiouni*, in American criminal law their interconnection is caused by the integrity of the subjective element of a crime: a criminal wants the crime to be committed, while the corresponding objective element is not finalised. In the case of an attempted crime, a criminal is liable for his/her own actions, while in the case of conspiracy and abetment, a criminal is liable for others' behaviour[6]. *Mindia Ugrekhelidze* rightly criticises Bassiouni's understanding of complicity, and states that the ground for the punishment of complicity is not the fact that someone else committed a crime, but the fact that an abettor or a conspirator personally contributes to the commission of the crime[7]. Unlike Georgian criminal law, in American criminal law the subjective element of complicity in crime does not distinguish between eventual intent and recklessness, and introduces a legal category of recklessness which combines both of these forms[8]. Thus, unlike Georgian law, in English and American criminal law, eventual intent and recklessness represent a single form of a subjective guilty mind (*mens rea*)[9].

2.1.1. Grounds for the punishment of complicity according to the so-called 'theory of equivalence'

From the perspective of the systematic method, overall, American jurisprudents support the so-called '*theory of equivalence*', according to which all accomplices are principals and must be equally liable. Based on the comparative and legal analysis of the norms of criminal

5. *Ugrekhelidze, M.*, referred paper; p. 104; wouldn't it be more appropriate to name that phenomena 'conceived crime', instead of 'a newly-conceived crime'?
6. *Bassiouni Cherif M.,* Substantive Criminal Law, Springfield, Illinois, 1978, p. 203; cited from a paper by *Ugrekhelidze, M.*; the fundamental work by a famous American criminalist *Cherif Bassiouni* 'Substantive Criminal Law'. Bulletin of the Academy of Sciences of the Georgian Soviet Socialist Republic, Series of Economics and Law. Publishing House 'Metsniereba', Tbilisi, No 3, 1980, p. 104.
7. *Ibid*., p. 104.
8. About the legal figure of recklessness in English criminal law see: *Safferling C.,* Vorsatz und Schuld, Subjektive Täterelemente im deutschen und englischen Strafrecht, Publishing House Mohr Siebeck, 2008, pp. 360-368; also, according to American criminal law see: *Dubber M.D.,* Einführung in das US-amerikanische Strafrecht, Publishing House C.H. Beck, 2005, pp. 66-71.
9. *Mansdörfer M.,* Die Allgemeine Straftatlehre des common law: eine Darstellung unter besonderer Berücksichtigung des englischen Strafrechts. Publishing House Duncker & Humblot, 2005, pp. 73-76. *Richard Vogler*, a Professor of Criminal Law at the University of Sussex, suggests moving from the German, French, and Georgian two-element system, which implies *intent and recklessness (Vorsatz und Fahrlässigkeit)*, to a three-element system, which implies *intent, eventual intent/recklessness and negligence*. In this regard, see: Turava, M., Certain Issues of the Development of Georgian Criminal Law and the German-Georgian Cooperation in the Area of Criminal Law. German-Georgian Criminal Law Journal, Tbilisi, 2021, No 3, p. 82.

law of different US states, it has been established that the '*theory of equivalence*' is quite dominant in American criminal legal doctrine and legislation. As an illustration, Chapter 31 of the Penal Code of the State of California can be cited, according to which all persons 'concerned in the commission of a crime, ... whether they directly commit the act constituting the offense, or aid and abet in its commission, ... are principals in any crime so committed.'. *D. Fletcher* believes that the American legal system, like any common law system, considers the problematics of complicity in crime from the perspective of the '*theory of equivalence*'[10]. American jurisprudents explain their commitment to the '*theory of equivalence*' based on a doctrine which '*imposes liability equally on principals and accomplices*' *(vicarious liability).* According to this doctrine, a person must be liable for a criminal act committed by another person, as if it were an act committed by him/her[11]. An accomplice (as a co-principal) is an *alter ego* of a principal[12]. Thus, an act of an accomplice is transformed into the act of a principal[13]. It should be stated that the concept of the unity of crime is supported not only in countries with a common law system, but also in the family of Romano-Germanic legal systems. Austrian criminal law scholar and jurisprudent D. Kienapfel was one of the first to support the concept of the unity of crime[14].

In the doctrines of comparative criminal law, a dominating position is that a principal and an accomplice need not be separated. The well-known English jurisprudents *Coke* and *Blackstone* played an important part in the formation of the common law system, the references to which can be found in their works. A direct reflection of the '*theory of equivalence*' is that complicity is not a form of committing a crime with consequences, but rather a risk creating a form of committing a delict. According to this opinion, all accomplices should be liable only for the risk creating acts they committed, while the consequence is irrelevant[15]. *According to the civil agency doctrine*, an accomplice (abettor) agrees to an act of a principal, as his/her agent, and he/she is personally liable for that act, that is, 'the accomplice allows the principal to act and undertakes responsibility for such act'. *According to the forfeited personal identity doctrine*, one who chooses to aid a criminal forfeits their own personal identity and their identity becomes bound to that of the principal. According to the theory of complicity in a crime committed by another, whose representative is *Sanford Kadish*, an accomplice is punished because he/she aids a principal in the violation of law[16]. *According to the theory of complicity as omission*, complicity is a severe form of omission, based on which an accomplice, due to his/her

10. *Флетчер Д., Наумов А.В.,* Основные концепции современного уголовного права, Moscow, Publishing House 'Юрист', 1998, p. 454.
11. *Quo facit per alium facit per se* (latin sentence: he who acts through another does the act himself).
12. *Alter ego* (lat., another self).
13. Fletcher, D., Naumov, A. V., p. 452.
14. *Kienapfel D., Höpfel F.,* Grundriß des österreichischen Strafrechts, Allgemeiner Teil, 8th Edition, 2000, pp. 192-195.
15. *Dresler J.,* Reforming Complicity Law, Trivial Assistance as Lesser Offence, Ohaio State journal of Criminal Law, 2008, p. 444.
16. *Kadish S. H.,* Complicity, Cause and Blame, Study in the Interpetation Doctrine, California Law Review, Vol. 73, Issue 2, 1985.

specific connection with a crime, is separated from all other persons who did not prevent the commission of the crime, and is subject to criminal liability[17].

2.2. Complicity in a crime in the criminal law of the United States of America

In the criminal law of the United States of America complicity in a crime is represented as a '*criminal agreement*'. In the United States of America, the problematics of complicity in a crime have been significantly influenced by English common law, thus the theoretical and practical issues of complicity in a crime are mostly resolved in the same manner as in English criminal legal doctrine. Thus, for example, a person who commits a crime with his/her own hands and is present at the crime scene is considered *a first-degree principal*, although a person who is '*constructively*' present at the crime scene can also be considered as such. For example, a person who left a poisoned drink for a victim to drink later. The same applies to *a second-degree principal* as well, only under the condition that the latter must necessarily be present at the crime scene: 'if a person contributes to the commission of a crime by aiding, counselling or any other means, but is not present at the crime scene, he/she is considered an aider before the actual commission of a crime'[18].

It is notable that the division of an accomplice into a principal (first and second degree principal) and an abettor prior to the commission of a crime, which is characteristic of common law countries, has actually been abolished in the legislation of all US states. Basically, all the above has been conditioned by the Model Penal Code of the United States of America. Article 2(6) of the Model Penal Code determines the types of accomplices, however the definition of complicity in crime is not provided for in the same Code. A person is considered an accomplice to a criminal act committed by a principal if he/she intends to aid in or ease the commission of a crime, or if he/she abets the principal to commit the crime, aids or intends to aid another person in the planning and commission of the crime, or if he/she was legally obliged to prevent a criminal infringement but failed to take appropriate measures. Abetment, aid and omission are all considered as complicity in crime according to the Model Penal Code of the United States of America[19]. The liability of accomplices is equal to the liability of a principal. The subjective part of complicity is expressed in direct intention. American doctrine rejects complicity by negligence[20].

17. The doctrine by *Sanford Kadish* is analysed based on a very interesting and relevant article by *K. Tsikarishvili* 'Causation in Complicity in a Crime According to Georgian and Anglo-American Law', Journal of Law, No 1, 2016, p. 321.
18. General principles of Criminal Law, by *Hall, J.,* Indiana University, 1960, p. 102. See also: *Hall, J.,* General principles of Criminal Law, Second Edition, 2010, p. 135.
19. *See* Примерный уголовный кодекс США. Official project of the American Law Institute, revision and foreword by Nikiforov B. S., Moscow, 1969.
20. *Kadish S. H.,* Complicity, Case and Blame, Study in the Interpretation Doctrine, California Law Review, 1985, p. 112.

The Model Penal Code and the case law of the United States of America clearly reject the accessory nature of complicity. A reference to the mentioned provision is provided in *Article 2(7) of the Model Penal Code (emphasis ours – G. K.)*, which states that an accomplice is subject to liability, even if an alleged principal has not been charged with criminal liability or convicted of committing another crime, or if he/she enjoys immunity from prosecution, and/or he/she has been acquitted as a result of judicial investigation. It is not accidental that for punishing complicity in a crime, the criminal legal doctrine and judicial practice in common law countries do not require the establishment of causality between the actions of an accomplice and the consequence. It is interesting that, in American criminal proceedings, the prosecution does not have to prove that the contribution of an accomplice was substantial in the criminal consequences. Also, the prosecution does not have to prove in which form of complicity the accused acted. Moreover, no reference is made to complicity when delivering a verdict. An accomplice is found guilty in exactly the same way as a principal. The same applies in England[21]. The voluntary abandonment of a crime is a circumstance that exempts an abettor from liability and that must be expressed in an active form. In addition, the abandonment must take place before the commission of the crime, and a person must prevent the commission of the crime and/or notify in a timely manner the appropriate authorities of the planning of the crime or, as a last resort, of an attempted crime[22]. The ground for the exemption of an abettor from liability is the circumstance where the abettor refuses to commit a punishable act and, ultimately, voluntarily abandons the commission of such an act. Thus, an accomplice must do his/her best to prevent a crime[23].

American criminal law does not recognise the unified federal criminal code, in its generally accepted sense. Unlike the model code, the criminal codes of a number of US states provide for a general definition of the concept of complicity; thus, for example, according to Article 20 of the Penal Code of the State of New York: ‘when one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct’. As for a principal, according to the Penal Code of the State of New York, a principal is a person who participated in the commission of a crime, regardless

21. *Lippman, M.,* Contemporary Criminal Law, Concepts, Cases and Controversies, Sage Publications, 2007, p. 158; *Dressler, J.,* Reforming Complicity Law: Trivial Assistance as Lesser Offence? Ohaio State Journal of Criminal Law. *Horder, J.,* Ashworth’s Principles of Criminal Law, in *Gianetto* (1977), the court specified in the verdict that the accused either killed his wife himself or hired someone to kill her. This rule, which has been established in the common law, has so far withstood the filter of Article 6(3) of the European Convention on Human Rights, according to which everyone charged with a criminal offence has the right to be informed in detail of the nature and cause of the accusation against him/her. Cited, Tsikarishvili K., in article ‘Causation in Complicity in a Crime According to Georgian and Anglo-American Law’. Journal of Law, No 1, 2016, p. 319.
22. *Лясс А.,* Проблемы вины и уголовной ответственности в современных буржуазнных Теориах, Petersburg, 1997, pp. 105-107.
23. The 1967 Penal Code of the State of New York, paragraph 1, pp. 40-10.

of whether he/she directly participated in the commission of *corpus delicti*, or merely abetted or aided other persons in the commission of a crime[24]. The legislation of the same state specifies that the liability of an accomplice is not excluded when a principal is not guilty of committing a crime, or the principal has not been prosecuted under the Penal Code. The issues of complicity in crime are slightly different in the Penal Code of the State of Ohio. An accomplice is a person who: 1) abets or aids another person in the commission of a crime; 2) gives consent to another person to commit a crime; 3) incites or forces a non-culpable or insane person to commit a crime[25]. The statutory definition of complicity in crime covers all acts that, in the common law, fall under the influence of the concepts of a second-degree principal and an aider. According to Article 5(2) of the Criminal Code of the State of Illinois, a person is legally accountable for the conduct of another when either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he/she abets, aids, solicits, agrees, or attempts to aid that other person in the planning or commission of the offense[26]. According to the Criminal Code of the State of Pennsylvania, a person is guilty of conspiracy with another person to commit a crime, if with the intent of promoting or facilitating its commission he/she: (a) contacts another person in order to commit an act, which constitutes a crime or an attempted crime, or abetment to commit a crime; or (b) abets or aids such other person at the stage of the planning or attempt of such crime, in order for criminal liability to be imposed on the principal[27].

The 1942 Criminal Code of the State of Louisiana also distinguishes between principals and accessories, but after the fact[28]. Principals are 'all persons who, whether present or absent, participate in the commission of a crime, aid or abet, or directly or indirectly counsel another person to commit a crime'[29]. *Accessory after the fact* is 'all persons who, after the commission of a crime, harbour, conceal, or aid the offender, think that they have committed a crime and intend to avoid arrest, trial and punishment'[30]. In most US states, all accomplices to a crime are held criminally liable as principals. The above is provided for in

24. *Угрехелидзе Н.Г.,* Криминологическая характеристика соучастия в преступлении, Мецниереба, Тбилиси, 1975. 85; See also: Уголовный кодекс штата Нью-Йорк. Translated from English by Nikiforov, B., Moscow, 1967, p. 10; Ïðèìåðíûé óãîëîâíûé êîäåêñ ÑØÀ. Official project of the American Law Institute, revision and foreword by *Nikiforov B. S.*, Moscow, 1969.
25. *Schwartz L. B.,* The American Penal System: Spirit and Technique //Annals of the American Academy of Political and Social Science//. 1962, p. 339.
26. *Samaha J.,* Criminal Law. Belmont, California, 2010, p. 16.
27. *Robinson P.H.,* Reforming the Federal Criminal Code. //Buffalo Criminal Law Review//. 1997, First Edition, No 1, pp. 233-234.
28. *Wechsler H.,* Codifcation of Criminal Law in the United States: The Model Penal Code // Columbia Law Review//, 1968, the 68th edition, No 8, p. 1425. See *Model Penal Code* and Commentaries, American Law Institute, four volumes, 1985, p. 115.
29. *Robinson P.H., Dubber M.D.,* The American Model Penal Code. Brief Review //New Criminal Law Review//. International and Interdisciplinary Journal, 2007, 10th edition, No 3, p. 323.
30. *Леже Р.,* Великие правовые системы современности: сравнительно-прававой подход. Пер. с анг. *Грядова А. В.,* Moscow, 2009, p. 147.

the federal criminal legislation of the United States of America[31]. A person who commits or aids in, abets, counsels, guides, leads, or ensures the commission of a criminal infringement against the United States of America, is subject to criminal liability as a principal. If a person intentionally encourages the commission of an act, which will be committed directly by him/her or by others, it will be considered a crime against the United States of America and such person will be liable as a principal. As the forms of guilt are not determined in the first part, decisions are made by courts, which sometimes consider 'certain deliberate participation in the commission of a crime, i.e. the understanding of the fact that the person has contributed to the commission of the crime' to be sufficient[32].

3. Conclusion

In 1962, the American Law Institute adopted a Model Penal Code. Due to and within the scope of the recommendatory nature of the Code, it became the basis for the adoption of new criminal codes by a majority of US states. Based on our observation, the adoption of the Model Penal Code has contributed to the development of both substantive and procedural institutions of criminal law in the United States of America, as it led to the merging of the particularities of Anglo-Saxon and Romano-Germanic legal systems, and this process continues to this day.

In addition, this article has outlined the inconsistency in American criminal legal doctrine. Criminal legislation and judicial practice on the one hand reject the possibility of negligent complicity (abetment), and on the other provide wide scope for the idea of the independent liability of accomplices, which also leads to the rejection of the accessory nature of complicity.

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31. Federal criminal law of the United States of America, Set of Laws, Section 8, Paragraph 2. See *Gotua, Z.*, General Review of Anglo-American Criminal Law. Georgian Young Lawyers' Association. 'Almanakhi', Problems in Criminal Law and Criminology. Author and responsible editor Professor *O. Gamkrelidze*, Doctor of Juridical Science, Tbilisi, No 13, 2000, pp. 79-80.

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