

The Complicity in the Criminal Law of Republic of Serbia

Dragan Jovašević*, Ph.D.

Law Faculty, University of Niš
Republic of Serbia

Abstract

The main characteristics of complicity are in the fact that each of accomplices is shown as a perpetrator of a criminal offense, while the criminal offense itself is their joint act. It means that every person that participate in undertaking of activities that commit a criminal offense, in order to be an accomplice, must possess all those features that are required according to the law for a perpetrator of that criminal offense. For existence of complicity it is necessary, beside the presence of several persons, to exist an objective and subjective relation between participants in perpetration of the criminal offense in order to classify that offense as a joint act.

The objective relation means that every accomplice undertakes some activity, which commits a criminal offense. Without undertaking of the activity there is no perpetration so that there is no complicity either because it considers attainment of the activity by all participants. In addition, it is not necessarily that all the accomplices participate from the very beginning in accomplishing the act of perpetration. In such a way, complicity will exist even when some of the accomplices undertake initial activities and others continue them but under the condition that there is a conscience about joint activity. It is so called successive complicity. In the same way, it is not necessary that all of them participate in perpetration of all activities from which the act of perpetration is consisted of. The complicity exists when a single person undertakes a single activity and the other one undertake some other activity. Accomplices can divide activities in advance but they also can join in perpetration without any previous agreements. In this paper the author has analyzed notion, characteristics and forms of complicity in Serbian criminal law from 2005.

Key words: criminal offense, perpetrator, more persons, complicity, responsibility, penalty.

1. Notion and types of complicity

Complicity exists if several persons jointly perpetrate a criminal offense. Persons who perpetrate a criminal offense are called accomplices. Thus, the complicity implies participation of several persons in perpetration of one criminal offense and the accomplice is every person who participated in perpetration of that criminal offense¹.

* E-mail: jovas@prafak.ni.ac.rs.

¹ Many modern foreign criminal codes define on similar way a notion and characteristics of complicity. In such a way the Criminal code of Slovenia in the article 40 considers that the complicity exists if two or several persons jointly commit a criminal offense so that they participate in perpetration or by some other activities they decisively contribute to its perpetration. (Lj. Selinšek, Kazensko pravo, Ljubljana, 2007.); the Criminal code of Spain, in the article 29, defines a notion of accomplice. So that

Complicity² is not only a special type of criminal offense perpetration but also a special type of criminality, *i.e.* collective criminality, which is more dangerous for a society than a solitary crime. The collective criminality represents accumulation of criminal energy (criminal volition) due to joint volition of numerous persons in perpetration of one or several forbidden acts³.

This joint volition of numerous persons in joint perpetration of a criminal offense gives this offense a special aspect of social jeopardy. Due to its special meaning, the complicity represents an institute that is regulated by definitions of general offense according to the new Criminal code of Republic of Serbia⁴ from 2005. (articles 33-37)⁵.

For existence of the complicity⁶, beside participation of several persons in perpetration of a criminal offense, it is necessary to be fulfilled another two conditions: objective and subjective relation. The objective relation means that every accomplice initiates some activity that contributes to perpetration of a criminal offense. All these activities that are initiated by accomplices, no matter to the fact whether they are perpetrated contemporaneously or not, and on the same place or not, must be related so that it leads to the same result – to cause a consequence. The consequence of a criminal offense must be a result of a joint activity of all accomplices. It means that a causal relation must exist between a consequence of criminal offense and every undertaken activity of several persons⁷.

The subjective relation means that all accomplices possess knowledge about a joint activity that is directed towards perpetration of a certain criminal offense. It means further that accomplices know about each other and they know about perpetrators of that criminal offense. But they do not necessarily need to know each other personally. Personal acquaintance may, or may not exist, but it is not relevant for existence of complicity. The most important is that every accomplice knows that beside him/her there are other certain persons participating in perpetration of a criminal offense and a perpetrator of the criminal offense is from that circle of persons⁸.

persons are being considered as accomplices if participate in perpetration of a criminal offense, and also persons who undertake activities that precede to perpetration of a criminal offense, and in that way participate in perpetration of the criminal offense. (N.F. Kuznjecova, F.M. Rešetnikov, *Ugolovnij kodeks Ispanii*, Zercalo, Norma, Moscow, 1998.).

² D. Jovašević, *Criminal law, General part*, Belgrade, 2016. pp. 256-261.

³ D. Toth, L.I. Gal, L. Kohalmi, *Organized crime in Hungary*, *Journal of Eastern European Criminal Law*, Timisoara, No. 1/2015. pp. 22-26.

⁴ Official gazete of Republic of Serbia No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 108/2014 i 94/2016. More: D. Jovašević, *The Criminal code of the Republic of Serbia*, Belgrade, 2007. pp. 43-50.

⁵ D. Atanacković, *Complicity in a criminal offense*, *Yugoslavian magazine for criminology and criminal law*, Belgrade, No. 1-2/1995, pp. 5-69.

⁶ A. Bošković, Z. Pavlović, *Special Evidentiary Actions in the Function of Combating Organized crime*, *Journal of Eastern European Criminal Law*, Timisoara, No. 1/2015. pp. 40-56.

⁷ J. Tahović, *Criminal law. General part*, Beograd, 1961, page 287, D. Jovašević, *Criminal law, General part*, Beograd, 2016. pp. 187-213.

⁸ F. Ciopec, *Disorganized Crime*, *Journal of Eastern European Criminal Law*, Timisoara, No. 1/2015. pp. 110-114.

Participation of several persons in perpetration of a criminal offense may be realized by different activities and on several ways⁹. In such a way, accomplices are all persons who equally participate in perpetration of a criminal offense in a way that they jointly carry out an activity of perpetration of criminal offense or undertake some other activity that decisively contributes to perpetration of that criminal offense. In this case there is complicity. Several persons may participate in perpetration of a criminal offense in a way that some of them guide a perpetrator to undertake an activity of perpetration of a criminal offense while the others help him/her to undertake the activity and cause a consequence of the criminal offense. In the first case, there is incitement, and in the other case there is accessory. Unlike some other foreign criminal codes,¹⁰ which define organizing in criminal organization as a type of complicity, this type of complicity does not exist in the legislation of Republic of Serbia.

All these types of accomplices may but also may not be represented in perpetration of one criminal offense taking into consideration the fact that complicity is optional in a process of perpetration of a criminal offense. From everything that was earlier mentioned one can conclude that there are three types of complicity: co-perpetration, incitement and accessory¹¹.

A law theory distinguishes complicity in narrower and broader sense. The complicity in narrower sense is incitement and accessory, while the complicity in broader sense, beside the earlier mentioned forms, is a co-perpetration¹².

2. Criminal responsibility of accomplices

A criminal responsibility of accomplices is based on accountability and guilt and is the same as that of perpetrator of a criminal offense. There are no special rules for

⁹ M. Tomić, *Types of participation in perpetration of a criminal offense*, Collection of papers at Law Faculty in Mostar, Mostar 2002, pp. 85-98.

¹⁰ Organizing in criminal organization is known by articles 20-21 of the Bulgarian criminal code or the article 26 of the General criminal code (former Criminal code of SFR Yugoslavia from 1976.). The French Criminal code from 1992 in the article 450-1 defines a malicious criminal organization as organized group inclined to perpetrate criminal offenses for which was threaten a punishment in prison and forced labor of 10 years (F.S. Piera, *Le Guide de la défense pénale*, Dalloz, Paris, 2003). On the contrary, organizing a criminal organization as a type of complicity is not known to criminal codes of Macedonia, Croatia, Montenegro, Slovenia or Germany.

¹¹ Different types of complicity are known to a series of modern criminal codes. So that the French criminal code in the article 121-4-7 defines the following forms of complicity: 1) incitement, 2) managing a perpetration of a criminal offense, 3) production, acquiring and delivery of means for perpetration of a criminal offense, 4) providing accessory while perpetrating a criminal offense and 5) mutual cooperation towards perpetration of a criminal offense in a way of cooperation in activities that precede to action of perpetration and collaboration in that action; The Bulgarian criminal code in the articles 20-21 defines: incitement, accessory, organizing in criminal organizations and co perpetration; The Spanish criminal code anticipates in the article 17. a specific way of complicity under the name of "agreement or proposal for perpetration of a criminal offense". This type of complicity is punishable only when it is explicitly anticipated by the criminal code. The agreement exists when two or several persons agree or plan to perpetrate a certain criminal offense, and the proposal exists when a person who made a decision on perpetration of a criminal offense propose to another person or group of persons to perpetrate that criminal offense.

¹² I. Celina Pasca, *Evolution of the Legislation on Preventing and Combating Organized crime*, Journal of Eastern European Criminal Law, Timisoara, No. 1/2014. pp.128-133.

accountability, which would be valid only for accomplices. But as for the guilt, there are certain differences that do not refer on content of guilt elements but on forms of its demonstration. Namely, a perpetrator of a criminal offense, no matter is it one or more of them, i.e. accomplices, is always responsible for a criminal offense that was perpetrated with premeditation and as for carelessness only when it is defined by the law. However, an inciter and helper as well as accomplices, in narrower sense, are responsible only when a criminal offense was perpetrated with premeditation, what means that the premeditation is the only form of guilt for the accomplices in narrower sense.

The criminal responsibility of accomplices is a personal matter. Namely, every accomplice is independently and personally responsible. It means that criminal responsibility of one accomplice does not depend either on responsibility of offense perpetrator or responsibility of other accomplices. Thus, the criminal responsibility of accomplices is related to undertaking of an act of perpetration by the perpetrator but it is not related to his responsibility as well as responsibility of other accomplices¹³. The responsibility of accomplices, especially of inciters and helpers, is based on two principals:

- 1) everybody is responsible within the limits of own premeditation and it can not go above that, and
- 2) everybody is responsible up to the limit achieved by the perpetrator but also not below that.

These limits of responsibility of accomplices come from the article 36. of Criminal code of the Republic of Serbia.

Responsibility of accomplices within limits of own premeditation. The accomplices are criminally responsible only for premeditated participation in perpetration of a criminal offense. Their responsibility exists only within boundaries of their premeditation. It means that the accomplice will be criminally responsible for a consequence that was caused by a perpetrator only if it is comprehended by his own premeditation and in such way that he had anticipated. If the perpetrator commit a heavier criminal offense of the same type than the one that was comprehended by premeditation of accomplices, then the accomplice will not be responsible for that heavier criminal offense, but for the easier one that was supposed to be perpetrated by his premeditation.

However, the accomplice will be responsible for a heavier consequence that comes from the basic offense (offense qualified with a heavier consequence), if that heavier consequence can be imputed to his negligence. The accomplice will be responsible also for a qualified offense with special circumstances if those circumstances were known to him while participating in a basic offense, i.e. when he was undertaking his own activities in perpetration of a joint offense.

Responsibility of accomplices within limits of what was perpetrated. A perpetrator can do more than an accomplice wanted to do, but also he can do less than that. If the perpetrator do less than it was comprehended by premeditation of the accomplice, then the accomplice will be also responsible for the offense that was perpetrated or tried to be perpetrated by the perpetrator, and will not be responsible for the offense that had been comprehended by his premeditation. The accessory nature of complicity is fully

¹³ B. Čejović, *Some questions that concern limits of responsibility and punishability of accomplices*, Serbia and European law, Book 3, Kragujevac, 1998, pp. 17-29.

expressed here, whereby the accessoriness is related to the perpetrated criminal offense¹⁴.

If a criminal offense remained as an attempt, responsibility of accomplices will be also limited to the attempt. Therefore, less is done by the perpetrator, better will be for the accomplice. An exception to this rule exists if incitement is failed, but responsibility of inciter here is not based on accessory but on principal conception. In case that the perpetrator perpetrates completely another criminal offense, *i.e.* a criminal offense that is not homogenous with the one that was comprehended by premeditation of the accomplice, then the perpetrator will be the only one responsible for a such criminal offense.

Influence of personal features and circumstances. A personal reference, features and circumstances because of which the law excludes a criminal responsibility or permits a possibility for acquitting from a sentence or mitigating the one, can be taken into consideration only to a such perpetrator, accomplice, inciter or helper whom is found with such reference, features, and circumstances (article 36. of the Criminal code of the Republic of Serbia). However, there are exceptions where personal features or references that exist with a perpetrator can be a reason for establishing a criminal responsibility of accomplices. These are the cases when a personal feature is an element of nature of a criminal offense. Thus, in such cases, the personal features, references or circumstances that exist with a perpetrator can have an influence at the criminal responsibility of participants.

3. Complicity

The heaviest form of complicity is a co-perpetration¹⁵. It exists in a way, according to the article 33. of the Criminal code of the Republic of Serbia, when several persons participate in perpetration of a criminal offense or in some other decisive way jointly commit a criminal offense¹⁶. It is consciously and willingly a joint participation in perpetration of activities that commit a criminal offense.

The main characteristics of complicity are in the fact that each of accomplices is shown as a perpetrator of a criminal offense, while the criminal offense itself is their joint act. It means that every person that participate in undertaking of activities that commit a criminal offense, in order to be an accomplice, must possess all those features that are required according to the law for a perpetrator of that criminal offense¹⁷. For

¹⁴ A. Schonke, H. Schroder, *Strafgesetzbuch, Kommentar*, 22.Auflage, Munchen, 1995, page 364; E.Foregger, E.Serini, *Strafgesetzbuch StGB*, 9.Auflage, Wien, 1989, page.56 and further on.

¹⁵ B. Petrović, D. Jovašević, A. Ferhatović, *Criminal law of Bosnia and Herzegovina, General part*, No. 1, Sarajevo, 2015, pp. 253-259; D. Jovašević, *The commentary of the Criminal law of FR Yugoslavia*, Belgrade, 2002, pp. 213-215.

¹⁶ D. Jovašević, Lj. Mitrović, V. Ikanović, *Criminal law of Republic of Srpska*, General part, Banja Luka, 2017, pp. 214-126.

¹⁷ Some other understandings about complicity can be found in the theory. In such way, S. Frank is of the opinion that complicity exists always when some person perpetrates some action that would have been done by the perpetrator if he would commit the offense alone. (S. Frank, *Criminal law theory, General part*, Zagreb, 1955, page 180); According to D. Atanacković, accomplice is a person that perpetrates an action without which there would be no perpetration of a criminal offense and which the perpetrator was not able to perform alone. (D. Atanacković, *Complicity in a criminal offense*, Yugoslavian magazine for criminology and criminal law, Belgrade, No. 1-2/1995, page 30). Again, Lj. Lazarević is of

existence of complicity it is necessary, beside the presence of several persons, to exist an objective and subjective relation between participants in perpetration of the criminal offense in order to classify that offense as a joint act¹⁸.

The objective relation means that every accomplice undertakes some activity, which commits a criminal offense. Without undertaking of the activity there is no perpetration so that there is no complicity either because it considers attainment of the activity by all participants. In addition, it is not necessarily that all the accomplices participate from the very beginning in accomplishing the act of perpetration. In such a way, complicity will exist even when some of the accomplices undertake initial activities and others continue them but under the condition that there is a conscience about joint activity.

It is so called successive complicity. In the same way, it is not necessary that all of them participate in perpetration of all activities from which the act of perpetration is consisted of. The complicity exists when a single person undertakes a single activity and the other one undertake some other activity. Accomplices can divide activities in advance but they also can join in perpetration without any previous agreements.

The subjective relation consists of in existence of conscious of all perpetrators to jointly perpetrate an act of perpetration. If there is no conscious then there is no so-perpetration, but every person is occurred as an individual perpetrator of a criminal offense. The subjective relation between accomplices must be distinguished from guilt. The subjective relation between accomplices is a conscious on collaboration in a joint act, while the guilt is a psychical relation of each of them towards the act on which perpetration they worked. These relations must exist in the moment of perpetration of that act.

According to the article 33. of the Criminal code the complicity exists when several persons jointly perpetrate a criminal offense, by participating in the perpetration of a criminal offense or by taking some other act by which a decisive contribution can be made to its perpetration. It means that the Criminal code of Republic of Serbia accepts the objective-subjective theory. Therefore, two categories of persons can be considered as accomplices:

1) persons that participated in the act of perpetration no matter if they wanted to commit that offense as their own or as somebody else's achievement, and

2) persons that have not participated in the act of perpetration but they participated in some other action by which a decisive contribution was made to the perpetration of that act and who consider the act as their own and as a mutual achievement¹⁹.

Important element of complicity is in the fact that several persons jointly perpetrate a criminal offense. That joint perpetration is being made in a way that some of the participants perpetrate an action of perpetration described as a criminal offense, while

the opinion that complicity is a conscious and willing joint accomplishment of a criminal offense by several persons. (Group of authors, Comment on the Criminal code of SRJ, Belgrade, 1995, page 138).

¹⁸ M. Đorđević, *Complicity*, Yugoslavian magazine for criminology and criminal law, Belgrade, No. 1/1988, pgs. 29-36.

¹⁹ D. Jovašević, *Institute of complicity in the criminal law*, Law, theory and practice, Novi Sad, No. 11/2002, pgs. 14-26.

the others participate “in some other decisive way”. That way of participation “in some other decisive way” by which is being contributed to perpetration of a criminal offense means that persons who perform such activities that belong to a field of accessory, but which are narrowly related to the act of perpetration so that together they make a whole, will be considered as accomplices. The complicity as a conscious and willing joint participation of several persons in perpetration of a criminal offense may exist in almost all criminal offenses. However, there are such criminal offenses in which the complicity is not possible. They are: *delicta propria* and personal criminal offenses.

As for the *delicta propria* or criminal offenses with a special subject, the complicity can exist only when several persons, who have special features that are required by the law for a perpetrator of such offense, participate in its perpetration. It is the case of real official and military criminal offenses, especially where is required a feature of plenipotentiary or commanding officer. The complicity is not also possible with personal criminal offenses, i.e. those offenses that can be perpetrated just by a certain person and only personally. So that, the complicity is not possible with a criminal offense of making a false statement because of that agreed false testimony is not considered as complicity due to the fact that everybody make a statement individually. It is a similar case with infanticide that can be perpetrated only by mother of the child.

A law theory distinguishes several forms of complicity: illusory, successive and unavoidable complicity:

1) Illusory, unreal or parallel complicity exists when several persons participate in perpetration of a criminal offense but without decision on joint perpetration of the activity, so that every person is shown individually as an independent perpetrator,

2) Successive or subsequent complicity exists when several persons who participate in perpetration of a criminal offense replace each other in perpetration of the criminal offense, i.e. when the offense is being perpetrated in phases or shifts or if one person who started perpetration of a criminal offense is joined by another person before the criminal offense is completed, then there is a successive complicity and

3) Unavoidable complicity, the complicity is an institute of optional nature in the most of criminal offenses, it means that it may exist or not. But there are some criminal offenses that can not be perpetrated by one person and it is necessary for two or several persons to participate in its perpetration. Then, there is an existence of unavoidable complicity. With some criminal offenses of unavoidable complicity, actions that are perpetrated by necessary accomplices are being carried out opposite to each other, i.e. it encounters each other. Those are criminal offenses of encountering or divergent criminal offenses (bigamy, incest). Second group criminal offenses of unavoidable complicity make offenses where actions of complicity are being carried out in the same direction and blend together. Those are so called criminal offenses of attainment or convergent criminal offenses (mutiny in arms, mutiny of persons deprived of freedom).

An accomplice is criminally responsible within the limits of premeditation or negligence. Even if the complicity is by rule a willing, i.e. agreed joint perpetration of a criminal offense, in other words premeditated, but it does not mean that a negligible complicity is not possible to occur. The negligible complicity is possible to happen not only compared to a heavier consequence as qualified circumstance, but also compared to basic consequence. Responsibility is within boundaries of premeditation, i.e. negligence, it means that one accomplice either is not responsible for an excess of

another accomplice or for actions that the one has perpetrated outside of an agreement. A negligible responsibility may exist only when the law anticipates it to exist for the offense in question.

Criminal responsibility of an accomplice is independent. Responsibility of one accomplice is not dependable on responsibility of other accomplices. All perpetrators do not have to have the same type of guilt, therefore some of the perpetrators act with premeditation and other with negligence while perpetrating the same criminal offense. The guilt must be independently established for every accomplice. It means that form and level of responsibility must be established for every accomplice. Personal relations, features, and circumstances may benefit or jeopardize only to such perpetrator who possesses all of that but not to the other accomplices. So that, an accomplice who voluntarily prevent perpetration of a criminal offense may be relived from a sentence issued by the law.

4. Incitement

The incitement is premeditated inciting of another person to commit a certain criminal offense (article 34. of the Criminal code of the Republic of Serbia). An action of inciter must be directed to provoke or determine a decision at another person to undertake an action by which will be caused a consequence of a criminal offense. Therefore, there is no incitement if the perpetrator already had a firm decision for perpetration of a criminal offense.

However, if there was a decision that was not firm enough, *i.e.* hesitation, and such decision had to be firmed up, then there is an incitement. From the point of view of causality, the incitement occurs as causing of decision of perpetrator to undertake an action of perpetration and accomplish a consequence of a criminal offense. But, if incitement is a reason for decision, it is not a cause for consequence itself. The cause of consequence is an action of perpetration so that the incitement is shown compared to a consequence as its condition.

An action of incitement is consisted of undertaking of activities by which is being influenced on will of other person with an aim to make him perpetrate a criminal offense²⁰. Activities by which the incitement is being carried out can be different. So that, the incitement can be made by persuading, showing an interest, giving gifts and promises, abuse of position or special relation towards a person that is being incited, misleading a person or keeping a person mislead, threat, pointing out a situation that might be unfavorable for a person that is being incited if such person does not perpetrate a criminal offense, etc. Sometimes, the incitement can be made by illusory dissuading from undertaking an action of perpetration but in such way by which it foments to its perpetration.²¹

An incitement is an active activity so that it can be made only by doing it. It can be done by words (in written form or orally), gestures, signs, mimics and concludent

²⁰ The incitement is, according to the article 18, of the Spanish criminal code, direct motivation of a person to perpetrate a criminal offense by public publications, radio and other means for mass communication or popularization of a criminal offense in front of gathered citizens on a public place.

²¹ D. Jovašević, *Incitement as form of complicity in criminal law*, Law collection, Podgorica, No. 1-2/1999-2000, pgs. 118-134.

actions. In order to have an incitement there must be a certain relationship between inciter and person that is being incited as well as between inciter and criminal offense that is being incited.²²

Inciting on perpetration of a criminal offense must be directed towards one certain person or certain group of people taking into consideration that incitement cause or make firmer a decision of another person so that an inciter must have a possibility to influence on such decision. Such possibility may be if an inciter comes in contact with one certain person or with a certain group of people. Thus, it is not necessary that the inciter has to know exactly the person who is about to perpetrate a criminal offense that is incited by him, but it is sufficient to know that one of the persons from the group, anyone, will perpetrate the criminal offense. On contrary, there is no incitement if an invitation was directed to uncertain group of people, e.g. by advertisement. This type of incitement can have a character of independent criminal offense or propaganda but in that case it is not considered as incitement.

The incitement must be directed towards perpetration of a certain criminal offense. There is no incitement if the incitement refers to perpetration of uncertain criminal offense. Then, there must be a criminal offense of propaganda but not incitement as a form of complicity²³. Finally, for existence of incitement it is necessary that incitement of some person on perpetration of a certain criminal offense is done with premeditation. It means that negligible incitement that may exist in practice does not come under criminal responsibility.

The incitement can be direct and indirect. The direct incitement exists when an inciter alone incites another person (incited one) on perpetration of a criminal offense, and the indirect incitement exists when an inciter uses other persons for inciting of the incited person on perpetration of a criminal offense. With the indirect incitement, one person (inciter) incites another person to incite the third person (incited one) to commit a certain criminal offense.

The direct incitement can be made not only by one but several persons. In the case that several persons consciously make a joint incitement of one person to perpetrate a certain criminal offense then a co-incitement exists. For the existence of the co-incitement two elements are necessary: joint participation in incitement of another person to perpetrate a certain criminal offense and conscious about that joint action. The indirect incitement occurs always as a co-incitement, especially as successive co-incitement.

There may be also a co-incitement on accessory. Considering the fact that the law considers as an inciter a person who incites on perpetrator to perpetrate a criminal offense, in such way this case is considered as accessory.

²² For existence of incitement it is necessary that the incited person did not have a firm decision on perpetration of a criminal offense at the time of perpetration and that decision was formed just under influence of the inciter while the incited person does not have to be aware of the fact that the decision was made under influence of the inciter (sentence of the Supreme Court of Serbia, Kž. 875/86 dated October 14, 1986).

²³ Incitement can be made by leading only on perpetration of a certain criminal offense. Therefore, in the situation when the inciter and perpetrator of a criminal offense are on the opposite sides in conflict and have different interests, the inciter could not influence on decision of the perpetrator to perpetrate the criminal offense. (Sentence of the Supreme Court of Kosovo, Kž. 174/78 dated September 6, 1979).

The inciter is criminally responsible only for premeditated incitement, inciting of another person on perpetration of a criminal offense. Premeditation of the inciter must have a conscious about the incitement of another person to make a decision to perpetrate a certain criminal offense and a wish to make such decision and then to perpetrate an action that commits a criminal offense. Besides the conscious on incitement, inciting of another person to perpetrate a criminal offense, the premeditation of inciter must consist a conscious of all actual circumstances (attributes) of a criminal offense on which the incitement is referred to.

However, compared to a conscious of perpetrator that comprehends concrete forms of some characteristics in its realization, the conscious of inciter must comprehend only basic contours of some characteristics and even the whole criminal offense itself. In other words, the conscious of inciter must refer to perpetration of a certain criminal offense by comprehending the action, causative relation and causing of a consequence in its general form and not in its concrete accomplishment with all the details.

An element of will at premeditation of the inciter is represented in a wish of the inciter to provoke, by his actions, a decision of the incited person to perpetrate a criminal offense, *i.e.* in acceptance that under his influence such decision is being made by the incited person and then in his wish to undertake such action and cause a consequence of a certain criminal offense. For existence of premeditation of the inciter is not important whether an immediate perpetrator, while committing a perpetration, was acting with premeditation or with negligence.

It is possible that the inciter with premeditation incites the perpetrator to perpetrate a criminal offense but the perpetration was made with negligence. In the case when the law seeks an intention or motive as an element of a criminal offense, then such intention or motive does not have to exist at the perpetrator but it is sufficient to exist at the incited perpetrator while the inciter is aware of its existence only. If such intention does not exist at the perpetrator but exists at the inciter, then the inciter is considered as indirect perpetrator of a criminal offense.

The inciter, according to the article 34. of the Criminal code will be punished for a criminal offense on which the perpetrator was incited as if the inciter had perpetrated such offense. In other words, the inciter is being punished for a criminal offense by punishment that was anticipated for a perpetrator. This equalization in punishment of inciter with perpetrator comes from the fact that the inciter is intellectual author of a criminal offense while the perpetrator is only physical, factual implementer. Punishing of inciter depends on perpetrated criminal offense in boundaries of its premeditation.

So that, if a criminal offense was perpetrated on which the perpetrator was incited then the inciter will be punished by a sentence that was anticipated for perpetration of such offense. If the offense remained as an attempt then the inciter will be punished for an attempt if an attempt of such offense is punishable. In such case the inciter and perpetrator may be punished less severe then it would be in the case of perpetration. The inciter may be relieved from a sentence in the case if he voluntary prevents perpetration of a criminal offense.

Negligible incitement that is practically possible is not punishable.

An unsuccessful incitement exists in the following three cases²⁴:

1) when the inciter with his incitement fails to create, *i.e.* to make firmer a decision of the incited person,

²⁴ D. Jovašević, *Criminal law*, General part, Belgrade, 2006. pp. 188-189.

2) when the inciter succeed to create or make firmer a decision of the incited person, but the person never perpetrated a criminal offense for any reason, and

3) when the inciter creates or make firmer a decision of the incited person but the person perpetrate completely some other criminal offense independently from the action of incitement.

According to the article 34. paragraph 2. of the Criminal code of the Republic of Serbia²⁵ the unsuccessful incitement is punishable if for a criminal offense, which was incited to be perpetrated, can be imposed a punishment of imprisonment for a term of three years or even more severe punishment. According to the article 34., paragraph 2. of the Criminal code, the unsuccessful incitement is punishable only if the action of inciter was directed towards perpetration of a criminal offense for which can be imposed a punishment of imprisonment for a term of five years or even more severe punishment, and the criminal offence has never even been attempted. Then, the unsuccessful inciter is being punished as if he had attempted to perpetrate a criminal offense.

In some cases the criminal codes anticipates that leading to perpetration of a criminal offense is the same as an action of perpetration of independent criminal offense. In such cases the incitement is not considered as a form of complicity, but as a form of independent criminal offense.

Such criminal offenses are the following: organizing of a group and incitement on perpetration of criminal offenses of genocide, crimes against humanity and war crimes, incitement on suicide and accessory in a suicide, calling for a violent change of constitutional structure. If the incitement is considered as a criminal offense by the law then the action of incitement itself represents an independent criminal offense that can be achieved as an accomplished offense or it can remain as an attempt.

The criminal offense is accomplished if the action of incitement is completed and that is in the case when the incitement was made on a incited person while at this matter it is not significant if that incitement was successful or not. Thus, successful and unsuccessful incitement is considered as an accomplished criminal offense of incitement. An attempt of incitement exists in the case when the action of incitement is undertaken, but for any reason it has not made an influence on a will of a person who was incited (*e.g.* when a written letter was addressed and sent but it never reached hands of addressee).

5. Accessory

The accessory is a premeditated undertaking of action by which is contributed to a perpetrator to perpetrate a certain criminal offense²⁶ (article 35. of the Criminal code of the Republic of Serbia). The action of helping is consisted of undertaking such activities by which the action of perpetration is not accomplished, but it is contributed to its accomplishment. Compared to perpetration, helping does not cause a reason but a

²⁵ Lj. Lazarević, B. Vučković, V. Vučković, *Commentary of Criminal code of Montenegro*, Cetinje, 2004. pp. 94-97; D. Jovaševuć, *Criminal code of the Republic of Serbia*, Belgrade, 2007. pp. 49-50.

²⁶ B. Pavišić, V. Grozdanić, P. Veić, *Commentary of Criminal code*, Zagreb, 2007. pp. 169-173; K. Turković et al., *Commentary of Criminal code*, Zagreb, 2013, pp. 78-83.

condition of a consequence. Activities that make accessory are outside of action of perpetration²⁷. Thus, helper does not participate in perpetration of a criminal offense but it contributes to a successful accomplishment of the perpetrator. That contribution consists of making favorable conditions and assumptions for undertaking the action of perpetration and causing a consequence of a criminal offense²⁸.

The accessory can exist only when a perpetrator already had a decision to perpetrate a criminal offense. From there, if there is no such decision then there is any accessory. In such case there could be an incitement but not the accessory. From there, the basic difference between incitement and accessory comes from, because of the fact that the incitement can exist until a decision for perpetration of a criminal offense is not made and the accessory can exist only after such decision was made by the perpetrator of a criminal offense. From the other side, the accessory may exist before and during perpetration of a criminal offense but not later. Exceptionally, the accessory can exist even after the action of perpetration is undertaken, but before occurrence of a consequence of a criminal offense. It is so called inter-accessory. Helping that is provided after perpetration of a criminal offense has a character of independent criminal offense. But in this case it can be accessory if that accessory was promised in advance before perpetration of a criminal offense²⁹.

Even for the accessory it is necessary that a certain relationship exists between helper and perpetrator of a criminal offense as well as between helper and the criminal offense, which is being assisted. The helper must know that there is a person who will perpetrate a criminal offense and who is a person to be provided with accessory by undertaking activities that will enable or make easier to a perpetrator to perpetrate a criminal offense. While at that matter it is not necessary that he knows personally a perpetrator, it is sufficient to know that it would be a person from a certain circle³⁰.

From the other side, the accessory must be directed towards perpetration of one certain criminal offense. A helper should know that he contributes to perpetration of a certain criminal offense. Finally, for existence of accessory it is necessary an existence of premeditation of helper.

Considering the fact that accessory can be undertaken by different activities, the criminal code defined in the paragraph 2. that the following, in particular, shall be considered as helping in the perpetration of a criminal offence:

- 1) giving advice or instructions as to how to perpetrate a criminal offence,
- 2) supplying the perpetrator with tools for perpetrating a criminal offence,
- 3) removing obstacles to the perpetration of criminal offence and
- 4) prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or items acquired by perpetration of the criminal offence.

²⁷ D. Jovašević, *Lexicon of criminal law*, Belgrade, 2011, pp. 390-395.

²⁸ See: D. Petrović, *Accessory as a form of complicity*, Belgrade, 1994.

²⁹ Lj. Selinšek, *Criminal law*, Ljubljana, 2007. pp. 216-219.

³⁰ For the accessory in perpetration of criminal offense it is not necessary that helper personally knows a perpetrator of a criminal offense but it is sufficient to know that there is a conscious of helping other persons in perpetration of a criminal offense, i.e. it is not significant if the previous agreement between perpetrator and helper existed or not as well as whether they had a mutual relation or not (sentence of the Supreme Court of Serbia, Kž. 232/86 and sentence of the Supreme Court of Montenegro, Kž. 240/80).

In the matter of undertaking the activity by which is contributed to perpetration of a criminal offense, helping is accomplished and several persons may participate in perpetration of a criminal offense so that there is so called co-accessory³¹.

There are several types of helping considering the following: character of activity, way of extending a help, time of help and way of perpetration of the helping activity.

Considering the character of activity, helping can be physical and psychical. The physical helping exists when activities of physical, material character are undertaken by which is contributed to perpetration of a criminal offense (acquiring means for perpetration of a criminal offense, removing obstacles, surveillance of facilities where will be perpetrated a criminal offense, accommodation of a perpetrator before perpetration of a criminal offense). The psychical accessory exists when the activities of psychical nature are undertaken (giving advices and instructions for perpetration of a criminal offense, encouraging a perpetrator to persist in perpetration of criminal offense, giving promises in regard with concealing the traces of the criminal offense or items acquired by perpetration of the criminal offense)³².

According to the way of extended help, the accessory can be direct and indirect. The direct accessory exists when a helper alone undertakes activities by which he enables, make easier or contribute to a perpetrator to perpetrate a criminal offense. The indirect accessory, however, exists when a helper provides accessory through somebody else, i.e. indirect helper. The indirect accessory exists even when one person provides help to indirect helper or indirect inciter. So that, the indirect helper will be a person who gives advices and instructions to an indirect helper how to assist a perpetrator in perpetration of a criminal offense. The incitement on helping is also an indirect helping as well as helping in the incitement.

Considering the time of helping, one can distinguish a previous, simultaneous and subsequent accessory. The previous accessory exists when a helper undertake activities on providing a help to a perpetrator of a criminal offense before the perpetrator undertook an action of perpetration. The simultaneous accessory exists when a helper provides a help to a perpetrator during perpetration of a criminal offense. The subsequent accessory exists when a helper, after a perpetrator perpetrated a criminal offense, provides a shelter, hide things, remove traces etc. This subsequent accessory is considered a complicity only if it was promised in advance.

There is one more special case of extending a help to a perpetrator after perpetration of a criminal offense, which is called a contact with a criminal offense, concealing (or supporting). A contact can be made in several ways: hiding a perpetrator of a criminal offense, traces of criminal offense, tools used for perpetrating a criminal offense, items acquired by perpetration of a criminal offense but also concealing a criminal offense itself. Concealing was considered in the earlier legal theory as accessory in the real sense of that word. But lately, this understanding was abandoned because it is practically impossible to participate in a criminal offense that was already perpetrated, where there was already a forbidden consequence. In such case any conditionality of occurred consequence is excluded.

³¹ M. Tomić, *Accessory in perpetration of a criminal offense*, Advocacy, Belgrade, No. 12/1986, pp. 27-33.

³² D. Jovašević, *Institute of accessory in perpetration of a criminal offense – theoretical and practical aspect*, Journal of AK Vojvodina, Novi Sad, No. 7-8/1999, pp. 223-241.

Concealing can be: actual (where traces or items of a criminal offense are hidden) and personal (helping a perpetrator of a criminal offense not to be discovered and arrested, i.e. convicted). Therefore, the concealing itself does not represent accessory in a criminal-law sense, but a promised concealing if it was done before perpetration of a criminal offense represents accessory as a form of complicity. If the concealing was not promised priorly, to a perpetrator, it is punishable only if the law anticipates it as an independent criminal offense.

Finally, compared to a way of perpetration of activity, it can be positive and negative. The positive accessory is achieved by doing it (active action), and the negative accessory is helping by doing nothing. Helping by doing nothing can be achieved only in a case when there is an obligation of helper to do it.

A criminal responsibility of helper according to the article 35. paragraph 1. of the Criminal code, exists only if a perpetrator acts with premeditation. A negligible accessory does not represent accessory in a criminal sense. Helping can be done with direct or possible premeditation. The direct premeditation exists only in a case when a helper knew that by his actions contributes to a perpetration of a criminal offense and he wanted to achieve his contribution by doing so. The possible premeditation exists in a case when a helper was aware that his actions can contribute to perpetration of a criminal offense so he agrees to achieve that contribution by doing so.

Premeditation of a helper must contain a conscious about all characteristics of a criminal offense. In other words, the helper must be aware of all those actual circumstances of the offense, of which the perpetrator of the criminal offense is aware of as well. A conscious about illegality of helping in a criminal offense of the perpetrator, about his personal features and circumstances, is demanded only when illegality, personal features or circumstances are shown as an element of a certain criminal offense. Criminal offenses for which is required an intention or motive, for responsibility of a helper it is sufficient that the intention or motive existed with a perpetrator and that it was known to him. If in this case the intention or motive exists with a helper and not with a perpetrator, then the helper will not be hold responsible for a such offense but for the offense that will hold a perpetrator responsible. The helper can not be indirect perpetrator of a criminal offense except in special cases anticipated by the law.

A helper has to know that his actions assist a perpetrator to achieve a criminal offense and it means that he had to know for perpetrator's presence, but he does not have to know him necessarily. But for establishing an existence of criminal responsibility of helper, it is not decisive that a perpetrator acted with premeditation while perpetrating a criminal offense. He can be criminally responsible even when a perpetrator perpetrated a criminal offense with negligence. If a perpetrator perpetrated a criminal offense then a helper will be punished that offense as if he perpetrated it alone, but he may be also punished less severe.

A possibility for less severe punishment of helper comes from the fact that he is not intellectual or factual author of a criminal offense, but a person who contributed to perpetration of a criminal offense. Less severe punishment of helper is optional. It means that its application depends on judgment of the court in each concrete case. If a criminal offense remained as an attempt, the helper will be punished for an attempt, under the condition that an attempt of that offense is punishable by the law.

Finally, the helper can be relieved from a sentence if he voluntarily prevents perpetration of a criminal offense (article 36. paragraph 2. of the Criminal code).

6. Conclusion

Unsuccessful accessory exists when a helper achieves an action of helping and the assisted perpetrator does not undertake an action of perpetration or perpetrate a criminal offense independently from the helping action. Unsuccessful accessory is not punishable.

In some cases anticipated by the law, helping is incriminated as independent criminal offense. It means that by taking an action of helping there is a criminal offense for which the law imposes a certain type and size of punishment. Such is the case of e.g. criminal offenses: leading into suicide and helping in suicide, allowing conclusion of prohibited marriage, allowing enjoyment of narcotics, financing terroristic activities, accessory to a perpetrator after perpetration of a criminal offense.

Helping may be incriminated as a criminal offense even in the case when a perpetrator is not being punished. Such is the case in helping in suicide that remained as an attempt, although a person who attempted a suicide is not being punished. Or in the case of illegal termination of pregnancy, it is incriminating to help a pregnant woman to make an abortion, although the pregnant woman is not being punished for making an abortion over herself. These two cases are exception from the rule that a helper can not be an indirect perpetrator.

The accessory as a type of complicity and accessory as a criminal offense are excluding each other and there can not be a concurrence. If the accessory was promised in advance, and even extended after perpetrated offense, then the accessory will exist as complicity, and if the accessory was not promised in advance then the accessory will exist as independent criminal offense, *i.e.* as accessory to perpetrator after perpetration of a criminal offense.

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