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Participation in Special Offences within the Austrian Monistic Model of Perpetration²

Udział w przestępstwie na podstawie austriackiej
monistycznej teorii sprawstwa

The following considerations concerning the participation in a special offence were presented at the Jagiellonian University, Krakow, in the course of an international seminar on criminal law. Within the subsequent discussion, several aspects of the Polish law are included, which led to new findings. These will be discussed on the following pages³.

1. Problem

The law knows an exception to almost every rule. In general, one should only digress from its general principles as far as the individual case requires. The need for uniform treatment of cases is more than a mere dogma; much rather is it precisely the consistent application of a rule that guarantees equal treatment of equal matters. Therefore, it is for jurisprudence to reveal contradicting evaluations of cases and try to standardize them. Accordingly, any deviation from the general participation model by the model of participation in special offences appears to require justification.

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If one considers an amendment to the special rule of Section 14 of the Austrian Criminal Code⁴, one has to take into account that, in Austria, the general model of participation is shaped by the system of single offenders⁵. Therefore, one must first outline the margins determined by this system, which are laid down in Section 12 ACC. More precisely, one has to examine whether the sentencing range for a special offence can be reduced for external offenders⁶ without infracting the rules of the general model of participation. However, if the reduction of the sentencing range implies a breach of the principles of the system of single offenders, the necessity for such reduction requires justification.

2. The system of uniform offenders in Austria

The ACC treats all participants in a criminal offence as offenders and thus conforms to the system of single offenders⁷. Hence, the distinction between different types of offenders (Article 18 § 1 of the Polish Criminal Code⁸), on the one hand, and separate crimes for an inciter and assistant (Article 18 § 2 and 3) on the other hand, which both appear to be core concepts of the PCC, become superfluous in Austrian criminal law⁹.

In contrast to the model of participation realized, e.g., in Germany¹⁰, in the system of single offenders, any relevant participation is enough

⁴ Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB), original version BGBl. Nr. 60/1974, latest amendment BGBl. I Nr. 242/2021, hereinafter: ACC. Text available at < <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296> >.

⁵ This is not disputed, instead of many: D. Kienapfel, *Erscheinungsformen...*, p. 26 ff.

⁶ Those offenders who themselves have the special personal qualities or met the circumstances of a special offense, are called intranei, those in whom these subject features are not present, are called extranei or external offenders – E. Fabrizy, in: *Wiener...*, § 14, nr. 1; E. Steininger, in: *Salzburger...*, § 14, nr. 7; O. Leukauf, H. Steininger, S. Öner, H. Schütz, *Strafgesetzbuch...*, § 14, nr. 6 ff; D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 37.4; O. Triffterer, *Die Österreichische...*, p. 83.

⁷ For example D. Kienapfel, *Erscheinungsformen...*, p. 26 ff; D. Kienapfel, *Die Einheitstäterregelung...*, p. 121.

⁸ Polish Criminal Code – Act of 6 June 1997 – Criminal Code, Journal of Laws 2020, item 1444, consolidated text as amended, hereinafter: PCC. Text available at < <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970900557/U/D19970557Lj.pdf> >.

⁹ For example D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 32.15.

¹⁰ Compare §§ 25 ff dStGB (Strafgesetzbuch; German Criminal Code); D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 32.7.

to commit the offence in question; therefore, there is no need to assign to the other participants the harm done by the main perpetrator¹¹. In this respect, the Austrian rule seems to resemble the Polish concepts of incitement and assistance; in Austria, however, participation in a criminal offence is quantitatively accessory¹².

In the case of offences where the sentencing range is tied to a certain act (a form of behaviour), the respective **act** has to be extended to include the abetting and aiding **acts** in the statutory elements of the offence¹³. This extension is laid out in Section 12 ACC¹⁴.

The following example illustrates the extension pursuant to section 12 ACC. Coercion pursuant to Section 105 ACC includes the offender coercing the victim to act by use of force, e.g., physical violence, or „dangerous”¹⁵ threat. Due to the extension specified in Section 12 ACC, coercion includes not only the previously described scenario but also, e.g., cutting off the victim’s path and thus enabling another participant to use violence. In this case, both participants commit coercion, although one of them does not actually use physical violence.

3. Participation in a special offence

Most offences described in the Special Part of the Criminal Code are general offences that can be committed by anyone. Special offences differ from general offences insofar as the former require special personal characteristics possessed by the person of the offender and thereby restrict the circle of possible offenders¹⁶. While some offences can only be committed through specific **acts**, special offences restrict the commission of an offence to a specific type of offender¹⁷. If more than one person commits the offence jointly, the liability of those who do not possess

¹¹ Cf. D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 32.29 and O. Triffterer, *Beteiligungsslehre...*, p. 34.

¹² E. Fabrily, in: *Wiener...*, § 12 nr. 13; D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 32.41 and nr. 36.42; O. Leukauf, H. Steininger, S. Öner, H. Schütz, *Strafgesetzbuch...*, § 12 nr. 4.

¹³ Impliedly for example E. Fabrily, in: *Wiener...*, § 12 nr. 18: „Tatbestandserweiterung”.

¹⁴ O. Triffterer, *Beteiligungsslehre...*, p. 30.

¹⁵ Cf the legal definition in Section 74 para 1 nr. 5 ACC.

¹⁶ For example H. Fuchs, I. Zerbis, *Strafrecht...*, chapter 10 nr. 36; E. Steininger, in: *Salzburger...*, § 14 nr. 1.

¹⁷ D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 9.46.

the special personal characteristics has to be considered, e.g. the question has to be asked whether a person who is not a public official can be liable for abetting a public official to malpractice (Section 302 ACC)¹⁸. Section 14 ACC standardizes criminal liability for external offenders involved in a special offence¹⁹. The existing rule differentiates whether the perpetrator's special characteristics affect only his guilt or the harm of the offence as well.

If the special personal characteristics that establish or aggravate liability affect the harm of the offence, Section 14 (1) No 1 ACC lays out the liability of all participants for the special offence, even if the special personal characteristics that establish the perpetrator's liability are possessed only by one of them. In some cases, the harm is dependent on whether the perpetrator who exhibits these characteristics directly commits the crime or otherwise participates in it in a certain way. In these cases, all participants are liable only if the internal offender himself directly commits the offence or participates in a way Section 14 (1) No 2 ACC lays out as liable for this offence.

In the case that the special personal characteristics which establish the perpetrator's liability concern guilt only, the special offence is only applicable to the one participant who possesses these characteristics [Section 14 (2) ACC].

In contrast to the Polish rule, the Austrian system excludes participation in guilt-related special offences, e.g., only a mother will be convicted of infanticide; the participating doctor, however, will be convicted of murder²⁰.

4. Does section 12 ACC already oblige to equal treatment of external and internal offenders?

In literature, it is partly assumed that for harm-related special offences criminal liability of the external offender is derived from the general rules of liability of participants, even without Section 14 ACC²¹.

¹⁸ For example H. Nordmeyer, in: *Wiener...*, § 302 nr. 7 and nr. 179 ff.

¹⁹ ErläutRV 30 B1gNR, 13. GP 81.

²⁰ A. Birklbauer, in: *Wiener...*, § 79 nr. 55 ff. Murder and infanticide constitute two separate offences in the ACC, with the latter having a significantly lower sentencing range than the former.

²¹ For example K. Schmoller, *Grundfragen...*, p. 23 f with further evidence.

In the other opinion, however, this assumption stands in contrast to the law²².

In the context of participation in a criminal offence, Section 12 ACC lays out that the realisation of an offence should be extended to **acts** of abetting and aiding²³. However, Section 12 restricts this extension solely to the **act** (a form of behaviour) itself, not to the other elements of the offence²⁴. This becomes clear in the formal differentiation between the various types of offenders as a result of the respective **act** committed: the perpetrator differs from the aider and the abettor insofar as he directly commits the very **act** that realizes the offence²⁵.

Since Section 12 ACC only extends the **act** (a form of behaviour), it is, under this section, unresolved if, and in which way, an external offender can participate in a special offence²⁶. This is because Section 12 only allows for the extension of the **act**, and it cannot be applied to special offences where the law distinctly restricts the circle of possible offenders²⁷. Thus, the importance of Section 14 ACC is clearly recognizable: without this rule, participation of an external offender in a special offence would not be subject to prosecution as he lacks one of the statutory elements of the offence²⁸.

5. Equal treatment of participants in a special offence within the system of single offenders

Even though Section 12 ACC only extends the **act**, this rule indicates a general commitment to the system of single offenders in the Austrian

²² E. Steininger, in: *Salzburger...*, § 14 nr. 14 ff („konstitutive Strafausdehnungsnorm“, bold print cancelled by the author) and others.

²³ For example E. Fabrizio, in: *Wiener...*, § 12 nr. 3; O. Triffterer, *Beteiligungslehre...*, p. 49; regarding financial criminal law cf. also H. Winkler, in: *Finanzstrafgesetz...*, § 11 nr. 9 („extensiver Täterbegriff“).

²⁴ Cf. E. Steininger, in: *Salzburger...*, § 14 nr. 14 to § 14 ACC: „konstitutive Strafausdehnungsnorm“ (bold print cancelled by the author) with further evidence (especially in fn 12).

²⁵ E. Fabrizio, in: *Wiener...*, § 12 nr. 18 with further evidence.

²⁶ Cf again E. Steininger, in: *Salzburger...*, § 14 nr. 14: „konstitutive Strafausdehnungsnorm“ [bold print cancelled by the author] with further evidence (especially in fn 12).

²⁷ Cf. ErläutRV 30 BlgNR, 13. GP 79 (andere „Wertungsfrage“).

²⁸ E. Steininger, in: *Salzburger...*, § 14 nr. 14; at least impliedly H. Fuchs, I. Zerbes, *Strafrecht...*, chapter 35 nr. 8; M. Burgstaller, in: *Finanzstrafrecht...*, p. 41 f; different: K. Schmoller, in: *Finanzstrafrecht...*, p. 23 f with further evidence.

legislature²⁹. In this system, however, the concept of the perpetrator is understood more broadly than defined under Section 12 ACC, i.e. not restricted to the extension of the **act**; in this broad understanding, the statutory elements of the offence generally have to be realised, and the respective participant personally has to exhibit the *mens rea* to its full extent³⁰. It is therefore in conformity with the system to accept participation in a special offence also for external offenders when the crime has actually been committed³¹. If the *actus reus* of a special offence is fully realized, due to the internal offender participating in a certain way, the system of single offenders requires the same sentencing range for all participants³². Differentiating in accordance with to the severity of the harm done by the different kinds of participation appears in this system to be the exception³³ and needs to be justified.

The principles of the system of single offenders were systematically implemented in Section 14 ACC: all participants are liable if the *actus reus* of the special offence is fully realized according to their personal *mens rea*³⁴. Since contributions to an offence are generally considered equal³⁵, the same sentencing range can be applied to external and internal offenders as well³⁶. The same pertains to Poland if special personal characteristics that raise the sentencing range are possessed by the perpetrator: according to Article 21 § 2 PCC, the external participant merely has to be familiar with the internal offender's special personal characteristics to be liable to prosecution for a special offence. The two regulations only differ insofar as in Poland the sentence for the external offender can be mitigated extraordinarily (Article 21 § 3 PCC), while in Austria the external offender's lack of the required special personal characteristics is not an explicit mitigating circumstance³⁷.

²⁹ For example D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 32.42 regarding Section 12 ff ACC.

³⁰ O. Triffterer, *Beteiligungstheorie...*, p. 30 f. With regards to section 12 ACC also K. Schmoller, in: *Finanzstrafrecht...*, p. 24.

³¹ For example E. Fabrizy, in: *Wiener...*, § 14 nr. 4.

³² Section 14 ACC fits into monistic model, E. Fabrizy, in: *Wiener...*, § 14 nr. 4.

³³ D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 37.13.

³⁴ Compare D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 37.13.

³⁵ D. Kienapfel, *Der Einheitstäter...*, p. 25.

³⁶ E. Fabrizy, in: *Wiener...*, § 14 nr. 4.

³⁷ Compare Section 34 ACC.

6. Necessary adaptations to the system of single offenders

The decision of the Austrian legislature to adopt the system of single offenders as a participation concept has to be taken into account in statutory interpretation. As a model, the system of single offenders does not have an end unto itself; it can only be a means for accomplishing a legitimate judicial purpose, i.e. regulating the sentencing range for participants in a special offence. *De lege ferenda*, the aim should be to digress from single offender principles where this serves the purpose of the law. The advantage of such a digression needs to be carefully considered, as the resulting inconsistency within the participation model might cause possible disadvantages. It is the case, however, that under certain circumstances, adjustments are not only legitimate but necessary, as is shown by established versions of the system of single offenders as is adopted and practiced e.g., in Denmark, Norway, and Italy³⁸.

The necessity for diverging from the system of single offenders is evident when it comes to the liability of attempted aiding [section 15 (2) ACC e contrario]³⁹. The aider is only liable if the main perpetrator at least attempts to commit a crime⁴⁰, which is the consequence of a restricted quantitative accessoriness of contribution to the main offence⁴¹. This rule stands in contrast to the system of single offenders that generally avoids any accessoriness when it comes to contribution⁴². Nevertheless, the legislature rightly considered that the limitation of liability for taking part in an offence is necessary and adapted the principles of attempted participation to the concept of limited liability of an attempted crime, which is traditional in Austrian legislature (insofar, the result is consistent with the German legal position)⁴³. In this respect, the PCC conforms to the version of the system of single offenders that penalizes attempted participation in a crime⁴⁴.

³⁸ K. Schmoller, *Erhaltenswertes...*, p. 367.

³⁹ E. Fabrizy, in: *Wiener...*, § 12 nr. 13.

⁴⁰ For example, D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 36.34 ff.

⁴¹ A. Bauer, F. Plöchl, in: *Wiener...*, § 16 nr. 21.

⁴² E. Fabrizy, in: *Wiener...*, § 12 nr. 13.

⁴³ D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 36.36.

⁴⁴ According to the contributions in our joint seminary.

7. Mitigating the sentencing range for external offenders – divergence from the system of single offenders

Because of the severity of its sanctions, criminal law has a special interest in legal certainty⁴⁵. This can only be guaranteed if the sanctions are predictable and protection against the abuse of discretion is provided⁴⁶. Additionally, the principle of proportionality demands a differentiated consideration of the complex manifestations of criminal offences and a thorough assessment of the individual factual circumstances⁴⁷. Like no other legal field, criminal law deals with the tension between compulsory prosecution and the principle of proportionality with the aim of creating a balance between legal security and justice in individual cases⁴⁸. Judicial discretionary powers, however, should be curtailed where necessary, lest they endanger the application of justice in the individual case. The compromise laid out by the Austrian legislature includes sentencing ranges that differentiate between harm, guilt, and other elements relevant to criminal law⁴⁹. These compromises should only be departed from in specific cases.

Therefore, the sentencing range of an offence is to be understood as an attempt to create a balance between legal security and justice in the individual case⁵⁰. This balance can only be realized if all manifestations of the respective offence are considered in the sentencing range. Hence, the maximum limit of the sentencing range is represented by the offence that involves the maximum of harm and guilt on part of the perpetrator⁵¹. The harm reflected in the internal offender's special personal characteristics constitutes a crucial part of the harm of the offence as a whole. This means that, when committing a special offence, the external offender

⁴⁵ H. Fuchs, I. Zerbes, *Strafrecht...*, chapter 4 nr. 46 f with reference to Welzel.

⁴⁶ EGMR 22.1.2013, 42931/10; cf. Regarding this decision J. Meyer-Ladewig, S. Harrendorf, S. König, in: *Europäische...*, Art 7 nr. 16; also compare C. Roxin, L. Greco, *Strafrecht...*, § 5 nr. 80 and G. Muzak, *Bundes-Verfassungsrecht...*, Art 18 nr. 12.

⁴⁷ Compare H. Fuchs, I. Zerbes, *Strafrecht...*, chapter 4 nr. 47. For this principle, compare Art 1 para 3 Bundesverfassungsgesetzes zum Schutz der persönlichen Freiheit.

⁴⁸ Compare for this problem H. Fuchs, I. Zerbes, *Strafrecht...*, chapter 4 nr. 47.

⁴⁹ C. Graf, K. Schmoller, *Entsprechen...*, p. 103.

⁵⁰ Although hardly mentioned explicitly, this seems to be an undisputed assumption in criminal law doctrine. C. Graf, K. Schmoller, *Entsprechen...*, p. 104 f.

⁵¹ M. Burgstaller, *Grundprobleme...*, p. 147 and F. Pallin, *Die Strafzumessung...*, nr. 107, on the other hand, believe that the upper limit only covers cases of very high wrongdoing and very high culpability, not the maximum amount of wrongdoing.

does not cause as much harm as the internal offender⁵². However, since harm indicates guilt, this also applies to the amount of guilt of the internal and external participants, e.g. an Austrian civilian does not have a particular relationship of loyalty with the Austrian Armed Forces⁵³. Only the violation of the relationship between army and soldier defines the extensive amount of harm and guilt in military offences⁵⁴. Consequently, the liability of civilians is highly restricted by the Austrian Military Criminal Code⁵⁵. As is the case with military offences, the different maximum limits of harm and guilt for internal and external offenders should, in my opinion, result in an extenuated sentencing range for external offenders not only in cases regarding military crimes but all special offences⁵⁶. This could be implemented by specifying a special norm in the general part of the Austrian criminal code, stating that the sentencing range for the external offender is reduced depending on the sentencing range of the respective special offence⁵⁷.

Following these arguments, one could also advocate for differing sentencing ranges for different types of participation in offences where the sentencing range is tied to a certain act, since those who participate in an offence mostly do not realize the maximum harm of the offence⁵⁸. This, however, is contradicted by the fact that the amount of harm of the act, in contrast to the harm reflected in the special characteristics of the offender, is fluent. Especially the harm of abetting is often similar to the extent of the harm of perpetrating, which is usually not the case with aiding, e.g. when someone convincingly confirms the threat of another person and therefore enables coercion. Differentiating between the harm of actions, however, requires more judicial flexibility than differentiating according to the perpetrator's characteristics. Therefore, treating all participants in a crime as equally liable proves to be convincing, since

⁵² Compare D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 37.12 with reference to Schick: „höheres Pflichtenpotential“; H. Roeder, *Der Unbegriff...*, p. 565.

⁵³ ErläutRV 30 BlgNr. 13. GP, 400 f.

⁵⁴ ErläutRV 30 BlgNr. 13. GP, 400.

⁵⁵ To be more precisely by Section 259 ACC; ErläutRV 30 BlgNr. 13. GP, 400 f.

⁵⁶ Also H. Roeder, *Der Unbegriff...*, p. 564 ff.

⁵⁷ H. Roeder, *Der Unbegriff...*, p. 568 made a concrete proposal for a general reduction of one third of the sentencing range for external offenders.

⁵⁸ Compare the differentiation in the German system of participation and the arguments of C. Roxin, *Strafrecht...*, § 25 nr. 2 ff.

it allows for a precise differentiation in the assessment of punishment, e.g. by reducing charges in case of minor participation [Section 34 (1) No 6 ACC]⁵⁹. If a sentence is dependent on the form of participation in the offence, i.e. perpetrating, abetting, or aiding, treating all three as equally liable allows for differentiation according to formal criteria⁶⁰. Thus, it is possible to renounce the delicate differentiation between types of perpetration and types of participation that causes considerable problems in the participation model⁶¹. When it comes to special offences, however, it is still easy to distinguish the different types of perpetrators (extraneous and intraneous).

8. Additional regulations for mitigating the sentencing range

In the course of the discussion concerning the presentation of this paper's topic, it was emphasized that the mitigation of the sentencing ranges would come with further substantive and procedural consequences, especially because they are affected by numerous other regulations. In these cases, the question of whether the individual range is the original or the extenuated one has to be determined individually for each of the respective rules. Thus, concerning jurisdictional rules in the Austrian Code of Criminal Procedure, it might appear appropriate to adduce the higher sentencing range that is standardized in the offence. However, regarding regulations concerning the type of sanction, e.g. imposing fines instead of prison time, Section 37 ACC, the mitigated sentencing range could be decisive.

9. Increased liability of the external offender?

In terms of the differentiation concerning the range of sentences between internal and external offenders in a special offence, the objection was raised that the external offender's contribution to the offence, depending on the case, could result in higher liability than in the case of the internal offender⁶². This has to be agreed with; however, the difference

⁵⁹ D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 32.34.

⁶⁰ Compare E. Fabrizz, in: *Wiener...*, § 12 nr. 18 ff with further evidence.

⁶¹ D. Kienapfel, H. Höpfel, R. Kert, *Strafrecht...*, nr. 32.34.

⁶² Also: ErläutRV StGB 1975, 30 BlgNr. 13. GP, 82.

in liability could also be considered in the mitigation of the sentencing range of the external offender⁶³. Such solution as provided above allows, in certain cases, for the decision to set higher actual legal punishment for the external offender, who e.g., acted out of nefarious motives, than for the internal offender, whose contribution e.g., proves to be minor⁶⁴.

10. Conclusion

Criminal liability of the external offender in a special offence does not arise from the general rules of participation provided in Section 12 ACC⁶⁵. Nevertheless, this regulation reveals the commitment of the Austrian legislature to the system of single offenders⁶⁶. Section 14 ACC applies to the participation in a special offence the principles laid out in Section 12 and, additionally to the extension of the **act** laid out in paragraph 12, expands the circle of possible offenders⁶⁷. These two regulations have the effect that, in Austria, all participants in an offence are liable and the same sentencing range is applied to them⁶⁸. Reducing the sentencing range for external participants in a special offence, however, constitutes an exception from the system of single offenders⁶⁹.

Since a sentencing range only meets its requirements as a statutory limitation of judicial discretion if it defines the minimum and the maximum of harm and guilt, the absence of the special personal characteristics possessed by the external offender ought to have a beneficial (mitigating) effect on his sentencing range⁷⁰.

Summary

The law knows an exception to almost every rule. In general, one should only digress from its general principles as far as the individual case requires. The need for uniform treatment of cases is more than a mere dogma; much rather is it precisely the consistent

⁶³ Cf. also H. Roeder, *Der Unbegriff...*, p. 568 about the insufficiency of mitigating the sentence for the extraneous after applying the same sentencing range.

⁶⁴ Cf the example of H. Roeder, *Der Unbegriff...*, p. 565.

⁶⁵ Cf above 4.

⁶⁶ Above 4. with evidence.

⁶⁷ Above 5. with evidence.

⁶⁸ Above 5. and 6. with evidence.

⁶⁹ Above 7. with evidence.

⁷⁰ Above 7. with evidence.

application of a rule that guarantees equal treatment of equal matters. Therefore, it is for jurisprudence to reveal contradicting evaluations of cases and try to standardize them. Accordingly, any deviation from the general participation model by the model of participation in special offences appears to require justification. This paper analyses this particular problem from the Austrian perspective.

Keywords

Participation in Special Offences, Monistic Model of perpetration

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