

RECENT CASES

R V. JOGEE: A CASE FOR COMPARATIVE STUDY

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Criminal cases, being almost entirely domestic in their nature, rarely draw comparative attention. But R v. Jogee, decided by the UK Supreme Court in 2016, is exceptional in its nature. It provoked a new discourse on a mental element in complicity in a highly controversial situation where the principal went beyond the scope of what was agreed, or in civil law language, excessu mandati. Following Jogee, common law is likely to move in the direction of implementing in a more coherent way the idea of a subjective fault standard for a mental element in complicity. Paradoxically, civil law systems are now much closer to pre-Jogee jurisprudence so there is good reason to conduct comparative analysis at this point.

Keywords: complicity; foresight; intention; secondary party's liability; mental element; principal; comparative criminal law.

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Introduction

Over the 16 years that I have taught a course on comparative criminal law, I have found it as difficult to explain the concept of “parasitic criminal liability” and its legal intricacies in English common law as the tripartite structure of crime in Germany (*Tatbestand – Rechtswidrigkeit – Schuld*) or the notion of criminal deed in Eastern legal

philosophy. Born in *R v. Chan Wing-Siu*,¹ coined in *R v. Powell; English*,² left untouched as “a matter for the legislature, not the courts” in *R v. Rahman and others*,³ it has now, finally, been ruined by the courts in the landmark decision of *R v. Jogee; Ruddock*.⁴

The subject matter of *Jogee* is “the secondary party’s liability where the principal has allegedly gone beyond the scope of what was agreed or encouraged,”⁵ or more precisely, the exact nature of the mental element necessary for a secondary party to be convicted in such a situation. After *Chan Wing-Siu*, foresight was “the Gordian knot” of this mental element but now it is construed as evidence of intent to assist⁶ and not as a proper *mens rea* for a crime charged.

Although I must leave the extensive discussion of *Jogee*’s effects to more learned scholars,⁷ it can be mentioned here that foresight in complicity is probably one of those points of common comparative interest which creates a certain “unity amongst diverse systems of criminal justice.”⁸ While post-*Jogee* jurisprudence in England and Wales (and some other common law jurisdictions) has taken one direction, other jurisdictions have taken another, for instance, my native civil law tradition⁹ which is now more favourable to foresight in complicity.

1. Civil Law System: Outline of Accomplice’s Liability in Excessu

Looking back at the history of continental criminal law, detailed analysis of an accomplice’s liability in a set of cases concerning non-liability was proposed in Tiberio Deciani’s “*Tractatus criminalis*” (1590).¹⁰ In another famous practice book of that time, Giulio Claro’s “*Sententiarum*” (1568), an attempt was made to distinguish cases of instigation to acts lethal and not in their nature and to differentiate liability on this basis.¹¹

¹ [1985] AC 168 (PC).

² [1999] 1 AC 1 (HL).

³ [2008] UKHL 45, [2009] 1 AC 129 [103].

⁴ [2016] UKSC 8, [2016] UKPC 7, [2016] 2 WLR 681.

⁵ [2016] UKSC 8 [17].

⁶ *Jogee* [2016] UKSC 8 [87], [100].

⁷ See Jeremy Horder, *Ashworth’s Principles of Criminal Law* 446–459 (8th ed., Oxford: Oxford University Press, 2016); Matthew Dyson, *Shorn-Off Complicity*, 75(2) Cambridge Law Journal 196 (2016); Damian Warburton, *Supreme Court and Judicial Committee of the Privy Council Secondary Participation in Crime: R v Jogee* [2016] UKSC 8 *Ruddock v The Queen* [2016] UKPC 7, 80(3) Journal of Criminal Law 160 (2016).

⁸ George P. Fletcher, *Basic Concepts of Criminal Law* 4 (New York: Oxford University Press, 1998).

⁹ Taking as an example two cornerstone jurisdictions, France and Germany, and Russian criminal law which I am familiar with.

¹⁰ Tiberio Deciani, *Tractatus criminalis*. Vol. 2 238–241b (Turin, 1593).

¹¹ Giulio Claro, *Receptarum sententiarum opera omnia* 258 (Geneva, 1625).

The first general provision on non-liability of an accomplice *in excessu* was also seen early on, at least as early as Benedict Carpzov's "*Practica*" (1638).¹² The roots of this rule can be traced to the Roman law on liability of an agent for a breach of a principal's instructions.¹³

However, until the end of the 19th century the non-liability rule was not definitely established despite having been much discussed in scholarly works. For example, one of the leading French scholars of that time, Joseph Ortolan, generally relied on knowledge as a basis for aggravation or mitigation of liability and proposed different rules with regard to personal or factual circumstances of a deed as accordingly non-imputable or imputable to an accomplice.¹⁴ However, he conceded that practice was, in general, ignorant of such finely-tuned theoretical distinctions. Following Art. 59 of the *Code pénal* of 1810,¹⁵ French case law extended responsibility of an accomplice for all aggravating circumstances of the planned deed.¹⁶ However, a completely new crime, committed by a principal outside of an agreed plan, relieved an accomplice from criminal liability for this new crime. In 1896, the court acquitted as an accomplice in a murder a man who lent another a gun only for hunting.¹⁷

The leading Russian scholar of late Imperial Russia, Nikolay Tagantsev (the principal co-author of the Criminal Code of 1903) on the one hand limited criminal liability of accomplices by their prior arrangement with a principal but on the other, as a general rule, admitted responsibility of accomplices in a case where a principal committed a crime that was aggravated by some circumstance more than was agreed upon except in a situation where this aggravation was not and could not be foreseen by an accomplice.¹⁸ An intensive discussion was also concerned with the possibility of the liability of an accomplice for a negligent crime *in excessu*.¹⁹ Only by enrooting individual fault as a proper basis for liability did criminal legislation begin to take a modern shape in this area.

Nowadays, in the civil law system an accomplice is not usually responsible for crimes committed outside the scope of what was aided or instigated. French criminal

¹² Benedict Carpzov, *Practica nova imperialis Saxonica rerum criminalium. Pars I* 22 (6th ed., Wittenberg, 1670).

¹³ Cf. D. 17.1.5.pr. et seq.

¹⁴ See Joseph Ortolan, *Éléments de droit pénal* 566–570 (Paris: Plon frères, 1855).

¹⁵ This Article provided that: "*Les complices d'un crime ou d'un délit seront punis de la même peine que les auteurs mêmes de ce crime ou de ce délit, sauf les cas où la loi en aurait disposé autrement.*"

¹⁶ See Ortolan 1855, at 576–577.

¹⁷ Cited by Catherine Elliott, *French Criminal Law* 90 (Abingdon and New York: Routledge, 2011).

¹⁸ See Таганцев Н.С. Уголовное уложение 22 марта 1903 г. [Nikolay S. Tagantsev, *Criminal Code of 22 March 1903*] 111–112 (St. Petersburg, 1904).

¹⁹ See Колоколов Г.Е. О соучастии в преступлении [Georgy E. Kolokolov, *On Complicity in a Crime*] 191–198 (Moscow: University Printing House (M. Katkov), 1881); Жиряев А.С. О стечении нескольких преступников при одном и том же преступлении [Alexander S. Zhiryayev, *On the Confluence of a Number of Criminals with the Same Crime*] 69–71 (Derpt: Tip. G. Laakmanna, 1850).

law excludes criminal liability of an accomplice if the committed offence had different *éléments constitutifs*, or *actus reus*.²⁰ In the widely-cited case of *Nicolaï* in which the appellant gave the principal two revolvers only for intimidation, the appellant was not convicted for the murder as an accomplice in it because of lack of knowledge.²¹

In Germany, the rule on *Mittäterexzess* does not allow the aggravation of the liability of a co-principal (a similar rule is applicable also to aiders and abettors) if the other “carries or uses a weapon that differs substantially from what was agreed upon... acts in an excessive manner not agreed by the others or commits another offence altogether.”²²

The Russian Criminal Code of 1996 provides (Art. 36):

The commission of a crime that is not embraced by the intent of other accomplices shall be deemed to be an excess of the perpetrator. Other accomplices to the crime shall not be subject to criminal liability for the excess of the perpetrator.

“The excess of the perpetrator” is divided into qualitative (i.e., other offence)²³ and quantitative (i.e., the same offence with aggravating or mitigating circumstances).²⁴

2. Extending the Scope of Accomplice’s Liability

However, there is also evident erosion of the rule of non-responsibility and a trend to lowering the *mens rea* standards of an accomplice’s liability. In France, the courts have upheld the difference between *éléments constitutifs* (an act (omission) and a result) and secondary circumstances of the same deed, e.g., aggravating circumstances.²⁵ In the latter situation, the accomplice is criminally responsible and his responsibility is based on a duty to foresee all circumstances which might follow from a deed without the need to know them. In 1996, an accomplice was held liable for an armed assault despite his request not to go further than assaulting the victim with insulting words because “*le complice encourt la responsabilité de toutes les circonstances qui qualifient*

²⁰ Jean Pradel, *Droit penal* 491 (11th ed., Paris: Dalloz, 1996).

²¹ Cour de cassation, Crim, 13 January 1955.

²² Michael Bohlander, *Principles of German Criminal Law* 165 (Oxford: Hart, 2009). See also Johannes Wessels et al., *Strafrecht: Allgemeiner Teil* 218–219 (44th ed., Heidelberg: C.F. Müller, 2014).

²³ In case S. and B., both were convicted, *inter alia*, for an armed robbery and murder; the Supreme Court quashed B’s conviction for murder because the agreed plan was only to use a weapon for intimidation of the victim and an intention to murder was secretly held by S. (SupCt, No. 74-009-1, 2 April 2009).

²⁴ In case D., G. and I., all three were convicted for an armed robbery with infliction of serious bodily harm; in the superior court, conviction of D. and G. was reduced to a lesser included crime, an armed robbery, because using a metallic tube for infliction of serious bodily harm by I. was not agreed beforehand (BelgorodRegCt, No. 22-2140/2014, 8 December 2014).

²⁵ This practice has an evident analogy with division of “an excess of the perpetrator” in Russian law into two types (see *supra* notes 23, 24 and accompanying text), although in Russia in both cases an accomplice is not responsible.

l'acte poursuivi, sans qu'il soit nécessaire que celles-ci aient été connues de lui."²⁶ This distinction, based on the foreseeability of a circumstance (or a consequence), may be traced back to the early history of criminal law. It was considered for the first time in the 18th century with reference to Claro's "*Sententiarum*"²⁷ in the last classic treatise on criminal law of the *Ancien Régime* written by Daniel Jousse.²⁸ Later, it was refined by Ortolan and through the case law of his time.²⁹

German law is more self-restrained in allowing exceptions (if any) to this. It admits the responsibility of the co-principal if he is aware of the risk of committing an excess and decides to go ahead, ignoring the risk, because in this case he has *dolus eventualis* – a sufficient *mens rea* for complicity.³⁰ In a typical case concerning a violent crime, the Federal Supreme Court considered the situation of violent robbery (§ 250(2)(3)(a) StGB). The court held that all the co-principals were rightly convicted of this crime despite the fact that only two of them used the serious violence which had clearly not been agreed upon before entering the dwelling. The reasoning was that, although a person is responsible only for his or her intent, the acts which may be expected according to the circumstances of the case should be treated as covered by such intent. In this case, the defendants did not meet the victim before and did not know whether he was armed or not so the court held that the serious violence covered by § 250(2)(3)(a) StGB was admitted by all of them.³¹ The more interesting rule relates to "neutral contributions to the crime," or *neutral Handlung*.³² Here, criminal responsibility of the assistant, who is simply exercising professional functions, will be based on his knowledge that the crime will be committed and the presence of clear evidence of the principal's intention. However, it is not necessary for the assistant to wish for or approve the deed.³³

Russian criminal law requires intentional support, i.e., an intention to assist and an intention as to the crime committed (Arts. 32, 36 of the Criminal Code of the Russian Federation). Usually, the last intention is explained as knowledge of the essential elements of the crime designed and either a wish to commit this crime (*dolus directus*) or a conscious allowance or indifference to its commission (*dolus eventualis*). In case law, there is a strong evidentiary rule which states that using a different weapon is indicative evidence in favour

²⁶ Cour de cassation, Crim, 21 May 1996.

²⁷ See *supra* note 11 and accompanying text.

²⁸ See Daniel Jousse, *Traité de la justice criminelle de France. Vol 1* 27–28 (Paris, 1771).

²⁹ See *supra* notes 14–17 and accompanying text.

³⁰ Kai Ambos & Stefanie Bock, *Germany in Participation in Crime: Domestic and Comparative Perspectives* 323, 332 (A. Reed & M. Bohlander (eds.), Farnham and Burlington: Ashgate, 2013). See also Ingeborg Puppe, *Der gemeinsame Tatplan der Mittäter*, *Zeitschrift für Internationale Strafrechtsdogmatik* 234, 242–243 (2007).

³¹ See BGH 5 StR 575/12, 19 March 2013.

³² See Ambos & Bock 2013, at 335, and *cf.* with *Jogee* [2016] UKSC 8 [10], an example in the last two sentences.

³³ See interesting case on assistance by bank officer in transferring assets abroad, BGH 5 StR 624/99, 1 August 2000, BGHSt 46, 107.

of “an excess of the perpetrator” that is not imputable to other accomplices (e.g., the liability of an assistant for murder is excluded because of the unexpected use of an axe during a theft;³⁴ all accomplices are liable for robbery except for the one who used a knife and who is liable for armed robbery³⁵). However, there is also an obvious tendency to a wide interpretation of an intention as to the crime committed where the foreseeability of another crime as possible (and not knowledge of it as certain, or definitely agreed upon) becomes a sufficient mental element for an accomplice’s liability. Therefore, and in contrast to “a different weapon” rule where an accomplice knows about a specific weapon which may be used during the crime, he is held responsible for all violent crimes because all of them are treated as foreseeable and embraced by his intent.³⁶ This tendency is more clearly demonstrated by the courts in organized criminality cases. According to Art. 35(5) of the Criminal Code of the Russian Federation:

A person who has created an organized group or a criminal community (criminal organization), or has directed them, shall be subject to criminal liability for their organization... and also for all the offences committed by the organized group or the criminal community (criminal organization), if they have been embraced by his intent.

This mode of liability is a constructive crime because there is no requirement for the conduct element in order to impute the crime committed. As such, the courts easily interpret the “embracement” element as satisfied by the simple probability of the crime’s commission. In case B., the accused was the leader of an organized group. In May 2011, he was also a fence for some stolen goods and informed the principals that in future he would help them again. In July 2011, they again committed a theft, and the court held that the past promise (i.e., probability of future crime) was a sufficient mental element to bear responsibility for this theft too.³⁷

Conclusion

It is not realistic to explain the reasons behind these exceptions in a universal way. However, two points must be mentioned especially. Firstly, in cases of an accomplice’s liability *in excessu* a requirement of intentional support is often treated as fulfilled by assistance with knowledge or even with foresight of the possibility of another crime. However, following the common line of mental element analysis in the civil law tradition, knowledge and foresight are only one of the constituent parts of this mental element. *Dolus* (required for complicity) consists of *conscientia* and *voló*.

³⁴ SupCt, No. 208-O13-1, 16 April 2013.

³⁵ Moscow CityCt, No. 10-13441, 6 October 2015.

³⁶ See, e.g., Moscow CityCt, No. 4y/6-2671, 22 June 2015; No. 10-5733, 22 July 2013; Sverdlovsk RegCt, No. 22-7106, 16 July 2008.

³⁷ Orenburg RegCt, No. 22-2882, 10 July 2012.

Knowledge and foresight constitute only the first part of *dolus*, being usually used as one of the elements in defining of different types of *dolus*. As only one of these elements, they are combined with will and its variances, and only thereafter is *dolus* constructed as a legal concept.³⁸ By construing on the basis of knowledge or foresight a sufficient mental element for an accomplice's liability, this inevitably admits a lower standard for such an element. The second constituent part of *dolus* may be tacitly implied on the basis of knowledge or foresight³⁹ but *post hoc* reconstruction through scholarly analysis alone is not the same as proving this in court.

Secondly, one of the strongest reasons for such an approach emerges today more clearly than ever. Complicity (and especially organized criminality) is considered a matter for serious concern both for politicians and for society.⁴⁰ The idea to "push on criminality" is easily accepted by ordinary people not inclined to delve into the legal intricacies. As such, the mental element in complicity is often sacrificed in this politically motivated fight with criminality.

To summarise, in my opinion, the subjective element of "foreseeability" is one of the yardsticks not of intention⁴¹ but of the repressiveness of criminal law, when strict requirements of fairness and legality are sacrificed in favour of being tough on criminality. Moreover, it is evident that to find a proper balance here is a real puzzle both for legislatures and for courts in different jurisdictions.⁴² *Jogee* represents a step in the right direction towards a truly subjective mental element as a proper fault requirement for criminal liability and that is why it is a good case for comparative study.

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³⁸ In German law, *dolus directus* of both types and *dolus eventualis* are defined with regard to different combinations of *conscientia* (*Wissenselement*) and *voluntas* (*Willenselement*). Moreover, recklessness (*bewussten Fahrlässigkeit*) and *dolus eventualis* having the same element of *conscientia* are separated in case law according to their element of will. See Wessels et al. 2014, at 91–100. In Russia, both types of *dolus* are a combination of knowledge, foresight and will. *Dolus directus* is defined (Art. 25(2) of the Criminal Code of the Russian Federation) as a case where "the person was *conscious* of the social danger of his acts (omission), *foresaw* the possibility or the inevitability of the onset of socially dangerous consequences, and *willed* such consequences to ensue" (emphasis added); *dolus eventualis* (Art. 25(3) of the Criminal Code of the Russian Federation) refers to cases where "the person was *conscious* of the social danger of his acts (omission), *foresaw* the possibility of the onset of socially dangerous consequences, *did not wish but consciously allowed these consequences or treated them with indifference*" (emphasis added).

³⁹ Or inferred in most cases of such type; cf. the critical approach to this in *Jogee* [2016] UKSC 8 [40], [65]–[66], [73], [95].

⁴⁰ Cf. *Powell* [1999] 1 AC 1 (HL) 14, 25–26.

⁴¹ Cf. *Jogee* [2016] UKSC 8 [87].

⁴² Cf. also the *ad hoc* international criminal tribunals jurisprudence on the issue, poisoned by the abovementioned rules and based on concepts of natural and foreseeable consequences and willingly taking the risk of their occurrence. See Gerhard Werle, *Principles of International Criminal Law* 175 (2nd ed., The Hague: T.M.C. Asser Press, 2009).