

CALESA PROJECT
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PERPETRATION AND COMPLICITY. ATTEMPT AND INCHOATE OFFENCES. MITIGATING AND AGGRAVATING CIRCUMSTANCES

The third session of the workshop will focus on three topics related to the attribution of criminal liability in Spanish Criminal Law.

First, which subjects can be criminally liable will be addressed. In Spanish Criminal Law, two categories of subjects are criminally liable: principals and assimilated or secondary parties (article 27 Spanish Criminal Code).

According to article 28, principals are those who carry out the act by themselves, jointly or through another who is used as an instrument. So, three forms of principals exist: a) principal, the person who carries out the action made penal by law and accordingly possesses the domain of fact; b) joint principals, if more than one person commit the offence jointly sharing the functional codomain of the fact; c) mediate principal of indirect actor, any person who commit the offence through another, being this one just a non-liable instrument. In consequence, the mediate principal uses another person, who is unaware of the circumstances but directly carries out the offence.

In relation to the secondary participants Article 28 provides that will also be deemed principal those directly instigate another person or persons to carry out the act (abettor or instigator) and those cooperating in the execution with an act without which it would not have been carried out (essential co-operator). The general rule is that principal and secondary parties are punished the same way, but there are two exceptions with milder penalty (Articles 63 and 65.3). These are: a) inessential co-operator or accomplice (Article 29), which are those who cooperate in the execution of the offence with prior or simultaneous non-necessary acts; b) *extraeni* participants in a special offence (Article 65.3).

There are also some special rules for perpetration, committed through the Media (Article 30) and a special rule of acting on behalf of someone else (Article 31).

Secondly, in relation to *iter criminis* or the succession of acts starting with the criminal idea and ending with its completions, Spanish Criminal Law distinguishes several phases. The internal phase, which remains not punishable, includes the formation of the idea of committing an offence and the decision in favour of its commission. The external phase follows chronologically three moments: preparatory acts, attempt or executive acts and completion of the offence. According to Article 15 Spanish Criminal Code, both attempted and completed offence are punishable. At the same time, Article 16.1 provides that attempt exists when a person starts executing an offence directly through exterior acts, committing all or part of the acts which objectively should produce the result, however, is not produced for reasons independent of the will of that person. Thus, Law distinguishes between completed and unfinished attempt with a different treatment regarding the penalty (Article 62). At the same time Articles 17 and 18 describes some preparatory or pre-executive acts (conspiracy, proposition and provocation or

incitement) that are only punishable if the Criminal Code specifically foresees the punishment (inchoate offences). Finally, the exhaustion of the offence means that the offender achieves the final goal of the offence, but it doesn't affect the moment of consummation of the offence.

The prior overview raises some questions that will be dealt with. Among others, what criteria are applied to distinguish when an act is merely preparatory or means the start of the execution of the offence, what the legal response is when the failure to achieve the result is linked to a voluntary decision of the perpetrator (Article 16.2 and 16.3) or if attempting the impossible must be punishable.

The third part of the session will address general circumstances that may mitigate or aggravate criminal liability (circumstances modifying criminal liability). These mitigating and aggravating circumstances find a diverse ground. Some find their ground linked to the unlawfulness of the fact or in other cases in the greater or lesser culpability of the perpetrator.

Spanish Criminal Law follows a closed-list system for aggravating circumstances, included in Article 22. However, Article 21 related to mitigating circumstances, includes a final analogy clause that allows the application of other mitigating ground not expressly provided in that legal provision. Finally, Article 23 refers to family relationship as mixed circumstance that can lead to an abatement or aggravation of the penalty depending on the nature of the offence.

According to the prior overview, it will discuss a) content of each mitigating and aggravating circumstance; b) concurrence of general modifying circumstances and specific mitigating or aggravating circumstances (Article 67); c) penalty treatment for principals and secondary participants in the offence.