

## Past records for the application of arbitrary accomplice regulations to Accomplice-essential crimes

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### [Abstract]

The view of not fully denying the application of accomplice regulations to non-punishable opponents has fallen into a formal and logical circular argument that only provides formal grounds for non-punishment and has failed to provide practical grounds. In addition, it can be said that it has a criminal policy problem contrary to the legal sentiment of the general public by not punishing the active government travel activities of non-punishable accomplices. Therefore, in order to solve this problem, it is necessary to respect the legislator's intention that general non-punishment accomplices can be punished if they exceed the 'minimum government travel commission'. Therefore, if an unpunishable accomplice acts at least within the act required to realize the constituent requirements, the application of the accomplice regulations shall be excluded, and the accomplice regulations shall be applied only if they exceed that extent. In addition, if the indispensable counterparty is a protected person or has no responsibility (possibility of expectation), it can be said that it has provided a practical basis for the inability to punish, so it can be understood as impossible to punish. This interpretation method is thought to be able to present concrete validity in marginal cases where the counterparty is more responsible by substantially presenting the basis for an unpunishable accomplice.

▶ **Key words:** Accomplice-essential crimes, Essential accomplices, Voluntary accomplices, Punishment for accomplices, Unpunishable accomplices

### [요 약]

처벌규정이 없는 불가벌적 대상자에 대한 공범규정 적용을 부정하여 처벌하지 않는다는 논거는 적극적인 관여행위까지 처벌하지 않는다는 문제점을 가지고 있다고 볼 수 있다. 이를 해결하기 위해서는 일반적인 불가벌적 대상자가 대항범 구성요건을 실현하기 위해 최소한의 정도를 초과하지 않은 경우에는 불가벌이지만, 최소한의 정도를 초과하는 경우에는 공범으로 처벌이 가능하다고 볼 수 있다. 또한 불가벌적 대상자가 보호받는 자이거나 기대가능성이 없는 경우에는 불가벌로 파악할 수 있다. 이와 같이 해석하는 것은 일방행위자에 대한 처벌규정이 없는 불가벌적 대상자에 대한 불가벌의 근거를 설명하는데 적합하다고 생각한다.

▶ **주제어:** 대항범, 필요적 공범, 임의적 공범, 공범의 가벌성, 불가벌적 대상자

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  - Received: 2022. 02. 14, Revised: 2022. 02. 14, Accepted: 2022. 03. 22.

## I. Introduction

The issue of essential accomplices in Korea's criminal law community has not been dealt with in-depth so far. The reason for this is probably due to the general notion that the discussion on punishment for accomplices was mainly limited to the content of arbitrary accomplices to which the general principles of accomplices apply, and that the issue of criminal law, that is, the problem of punishment arising from the inside of essential accomplices, should be resolved individually.

However, essential accomplice theory's significant and fundamental problem remains an open task. The problem is the applicability of the accomplice provisions in the general rules between necessary accomplices in the constituent requirements of the Accomplice-essential crime in which only one party is punished.

For example, from the system and interpretation of the crime of selling obscene products (Article 243 of the Criminal Act), it can be seen that only the seller of obscene products can be punished. However, controversy may arise over whether the buyer can affirm the possibility of punishment as a helper or teacher for selling obscene products if the buyer actively assists or abets the seller in selling negative coins, which is not punished by the law.

If punishment is impossible even if the buyer of obscene products actively participates in the realization of the constituent requirements, criticism may emerge that this. On the other hand, the only thing that can be recognized by interpreting the constituent elements of the essential accomplice-essential crime that cannot be punished is that an unpunished accomplice cannot be a "principal offender" of the crime, so the components of the Accomplice-essential crime under each criminal law do not give any answer to whether even the provisions on arbitrary accomplices in the general rules are excluded from the application. Therefore the question arises as to what type of responsibility cannot be attributed to

an indispensable adversary in the criminal law's accomplice-essential crime constitution, which stipulates an indispensable accomplice, and under what conditions should it be attributed.

In Germany, the applicability of voluntary accomplices to unpunishable accomplices has long been reviewed for these problems raised in connection with essential accomplices, especially accomplice-essential crimes. However, in Korea, it is almost conclusive that there is no room for voluntary accomplices to be applied to non-punishable accomplices, giving the impression that the importance of the problem surrounding the legal structure of the accomplice-essential crime is overlooked.

The Supreme Court has so far also issued several precedents related to essential accomplices[1]. However, it is not only difficult to derive the essence of essential accomplices from these precedents, but it does not provide a satisfactory answer, especially as to why voluntary accomplices are excluded in the case of the constituent requirements of the Accomplice-essential crime in which only one party is punished, an unpunished counterparty participates in the realization of the constituent requirements of the penalized counterparty[2].

Considering that there are a number of criminal composition requirements that presuppose a relative relationship in the criminal law, especially in the special criminal law, the approach of theories and precedents so far on essential accomplices needs to be reviewed from a more essential point of view.

## II. Concept of the Accomplice-essential crime

While The term "arbitrary accomplice" refers to a case where one person is scheduled to realize the constituent requirements in the form of regulations, but in reality, two or more persons are

involved and realize the constituent requirements, "essential accomplice" refers to a crime in which the constituent requirements themselves are already established on the premise of two or more participants or the actions of an organization [3].

In the nature of essential accomplices, many theories deny the applicability of arbitrary accomplice regulations to non-punishable accomplices in the internal relationship of the accomplice-essential crime, where only one side is punished. An essential accomplice is a practically necessary principal offender, and it is a concept that stipulates the purpose of non-punishment for an indispensable opponent in an essential accomplice. Therefore, a person who is not punished as a principal offender cannot be punished as an accomplice, and the application of an arbitrary accomplice within an essential accomplice is not a problem from the beginning. This position of majority theory should be considered valid from the essential point of view of the essential accomplice, which is the accomplice-essential crime.

In an essential accomplice, which is an accomplice-essential crime, the subject for the development of its characteristics and independent theories should be a criminal-forming processing act that cooperates against the constituent requirements. Therefore, if there is a lack of criminal cooperation of an unpunishable accomplice or if there is cooperation of the accomplice but it is merely a criminal reduction cooperation, it does not have the characteristics to be treated as an essential accomplice. In the end, an approach in terms of the characteristics of essential accomplices, the Accomplice-essential criminal, and the resulting development of special theories, despite the counterparty's criminal cooperation, is needed in terms of legislators' intention to treat them as special.

An essential accomplice, an accomplice-essential crime, is a crime that requires criminal cooperation in opposing relationships. In addition, in the case of such an essential joint crime, it

should be understood that despite the criminal cooperation between one counterparty and the other counterparty, the same statutory sentence for each counterparty is also defined as a different statutory sentence or an indispensable punishment for one. For example, even if a bribe donor actively teaches the recipient, the legislator only stipulates punishment as a bribe donor. This is because it should be evaluated that all means sought by bribery donors to provide bribes are merely bribery travel. This is the same in the case of the accomplice-essential crime, which punishes only one side. Therefore, even if the buyer of pornography actively taught the seller, it should be considered that this is only a means sought to purchase pornography. It is a double evaluation to treat bribery teachers, aiding or selling pornography teachers, and aiding and abetting acts included in the act evaluated by legislators for bribery or non-punishable pornography purchases. The essence of an essential accomplice, an accomplice-essential crime, must be found in the decision of such a legislator.

### **III. Applicability of voluntary accomplices to Accomplice-essential crime**

There is no theory that voluntary accomplice rules apply to external participants of essential accomplices. This is because this external participant is not an essential accomplice, so it is possible to apply the voluntary accomplice regulations under the general rules.

The problem of the application of arbitrary accomplices to accomplice-essential crimes arises when opposing collaborators exceed the actions naturally planned in the provisions of accomplice-essential crimes. Strictly interpreted, the accomplice-essential crime applies only when the constituent elements stipulated in the provisions of each law are practiced, and the act is simply an act of becoming a counterpart. Therefore, in the case of more active teachers and

aiding beyond such cooperative acts, it should be judged differently because there are no related regulations in each rule.

### 1. A view that completely denies punishment for an unpunishable accomplice

The Supreme Court affirmed that "In the case of accomplice-essential crimes that require cooperative actions of two or more people, the general provisions of the Criminal Code on accomplices cannot be applied" [4], but does not provide specific reasons for this judgment. The theory presents the following arguments: ① For essential accomplices, the legislator considers those involved in the realization of the relevant constituent requirements as principal offenders and determines whether or not to punish each person[5]. ② The purpose of the law, which does not stipulate the punishment of buyers for selling obscene products, lies in the argument that it is not desirable for the criminal law to intervene in the purchase of obscene products based on human sexual and natural instincts and human nature[6].

The following criticism is raised for the negative theory: ① Excluding the act of active participation of the indispensable counterpart from punishment results in contradiction to legal appraisal[7]; ② The failure to impose punishment regulations on the counterpart means that the minimum act inevitably required for the establishment of the counter criminal will be indispensable, and it cannot be seen as the effect that all other acts will be indispensable[8]; ③ If there are no special provisions for crimes in each criminal law, the provisions of the general criminal law apply (Article 8 of the Criminal Act). Therefore, unless there are special regulations, only punishment for one of the opponents should be regarded as stipulating "punishment for one party" rather than "punishment for one party", and the punishment for those who participated in it should be considered to be left to the accomplice regulations[9].

### 2. Limited positive theory of the application of accomplice regulations according to the principle of minimum involvement.

It is called the "minimum cooperation (participation) principle" that an unpunishable opponent is punished in accordance with the accomplice regulations if he/she commits an act exceeding the minimum necessary limit. This theory states that if the counterpart's statutory sentence is the same or different, the accomplice rule does not apply between the counterpart, but if only one of the counterparties is punished, the non-punishable counterpart can be an accomplice when the process exceeds the minimum required to realize the composition requirements[10]. An unpunishable adversary is always deemed to be unpunishable when the protection legal interests of the relevant constituent requirements are the subject, when they cannot be punished as a single private offender due to necessary motives, and when they do not exceed the minimum limit required to realize the constituent requirements.

The following criticism is raised about the limited positive theory: ① Not only is the criteria for distinguishing between passive participation and active commitment unclear, but there is an error that the original legislator should convert a person who was defined as a private employee into an accomplice. ② It is contrary to the guaranteed function of the Criminal Act to argue that a person who is not punished for not punishing the active participation of an indispensable accomplice is contrary to the legal sentiment [11]. ③ It is inconsistent to affirm the application of the accomplice rule to fill the gap in punishment if there is no punishment rule for either party, while it denies the application of the accomplice rule if the opposite party has different statutory sentences[12].

### 3. Review

#### 3.1 In the case of an accomplice who cannot be punished in general

In such a case, the legislator's will that punishment can be made if it exceeds the 'minimum government travel commission' shall be judged in respect. In other words, if an unpunishable accomplice acts within the scope of an act that is minimally required to realize the constituent requirements of the accomplice-essential crime, the application of the accomplice regulations is excluded. In addition, it can be said that the accomplice rule applies only when it exceeds that extent.

As a crime corresponding to this type, a typical crime of selling obscene products is exemplified. Buyers who actively instigate pornographic product holders who are not willing to sell pornographic products to sell pornographic products can be punished as teachers for selling pornographic products.

In response, there is criticism that the criterion of 'minimum cooperative relationship' cannot be a clear criterion as a practical basis for impossibility of punishment. However, this uncertainty can be resolved by relying on the distinction between teachers and aiding and abetting as the boundary between punishment and punishment. In other words, if the degree of involvement of an unpunishable accomplice falls under aiding, the possibility of punishment is established as there is a minimum cooperative relationship, but if it falls under aiding and abetting, the establishment of an instructor can be applied

#### 3.2 In the case where an unpunishable accomplice is subject to protection,

If a particular constituent requirement stipulates a person as an object of protection, the act of involvement of the protected person is impossible to punish, even if it appears to be an instructor or accessory.

Examples of the crime corresponding to this include the crime of adultery in the detainee (Article

303 (2)), which is not an accomplice-essential crime, but has the same problem as the third type of accomplice-essential crime.

In other words, if a person detained by law actively seduces a prison guard and has sex, the detained person may be regarded as an accomplice in a crime, but in reality, they are considered unpunishable.

In this case, the purpose of protecting an individual's legal interests from the harm of another person, and the act of violating one's own legal interests is not an act to be prohibited by the constituent requirements, so the result of the infringement of legal interests cannot be attributed to the subject.

#### 3.3 In a case where an accomplice who cannot be punished is not responsible

The crime of concealing the criminal (Article 151) is not an accomplice-essential crime, but the same problem arises as the problem of an unpunishable opponent. In other words, the expression of the constituent requirements is not included in the constituent requirements from the beginning, and if the criminal teaches another person to conceal himself, it is indispensable even if it appears to be punitive as a teacher of the constituent requirements.

In the end, it can be said that it is reasonable to find the reason why the punishment law excludes the criminal himself from the subject of criminal punishment because there is no expectation for such an actor.

## IV. Conclusion

The view of not fully denying the application of accomplice regulations to non-punishable opponents has fallen into a formal and logical circular argument that only provides formal grounds for non-punishment and has failed to provide practical grounds. In addition, it can be said that it has a criminal policy problem contrary

to the legal sentiment of the general public by not punishing the active government travel activities of non-punishable accomplices.

Therefore, in order to solve this problem, it is necessary to respect the legislator's intention that general non-punishment accomplices can be punished if they exceed the 'minimum government travel commission'. Therefore, if an unpunishable accomplice acts at least within the act required to realize the constituent requirements, the application of the accomplice regulations shall be excluded, and the accomplice regulations shall be applied only if they exceed that extent. In addition, if the indispensable counterparty is a protected person or has no responsibility (possibility of expectation), it can be said that it has provided a practical basis for the inability to punish, so it can be understood as impossible to punish.

If the law stipulates punishment regulations for both parties, there is no room for the accomplices of the Criminal Code, but in the case of one of the counterparties with punishment regulations, it is a question of whether the counterpart without punishment regulations can be punished.

The precedent is that "the general criminal law regulations on accomplices cannot be applied" and the other party, such as leakage of official secrets, cannot be punished regardless of the degree of criminal involvement.

This interpretation method is thought to be able to present concrete validity in marginal cases where the counterparty is more responsible by substantially presenting the basis for an unpunishable accomplice.

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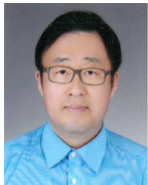
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