



The Principal Offender in Algerian Law

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Abstract:

This study examines the subject of principal participation in crime as one of the most important concepts upon which the legal structure of the offense in Algerian legislation is based, as it constitutes the essential element without which the offense cannot be conceived. It is concerned with the role of the offender who directly executes the criminal act or contributes to it fundamentally. The Algerian legislature has attached great importance to this concept by distinguishing between the principal offender, who commits the material act constituting the offense, and the accomplice or accessory participant, whose role is limited to assistance or instigation, as outlined in Articles 41 and 45 of the Penal Code. The study aims to analyse the legal framework of principal participation as organised by the Algerian legislature and to review its forms, represented by the material perpetrator, the instigator, and the moral perpetrator, while clarifying the bases on which the law relies in determining the criminal liability of each of them. It further seeks to highlight the balance that the legislature has attempted to achieve between the protection of society and the guarantee of criminal justice by precisely delimiting the scope of principal perpetration while clarifying the fundamental difference between it and the forms of complicity or accessory participation.

Keywords: participation; offender; instigator; moral perpetrator.

Le principal auteur en droit algérien

Résumé :

Cette étude examine la question de la participation principale à un crime comme l'un des concepts les plus importants sur lesquels repose la structure juridique de l'infraction dans la législation algérienne, car elle constitue l'élément essentiel sans lequel l'infraction ne peut être conçue. Elle s'intéresse au rôle de l'auteur qui exécute directement l'acte criminel ou y contribue de manière fondamentale. Le législateur algérien a accordé une grande importance à ce concept en distinguant l'auteur principal, qui commet l'acte matériel constitutif de l'infraction, et le complice ou le participant accessoire, dont le rôle se limite à l'assistance ou à l'instigation, comme le précisent les articles 41 et 45 du Code pénal. L'étude vise à analyser le cadre juridique de la participation principale tel qu'il est organisé par le législateur algérien et à passer en revue ses formes, représentées par l'auteur matériel, l'instigateur et l'auteur moral, tout en clarifiant les bases sur lesquelles la loi s'appuie pour déterminer la responsabilité pénale de chacun d'entre eux. Elle cherche en outre à mettre en évidence l'équilibre que le législateur a tenté d'atteindre entre la protection de la société et la garantie de la justice pénale en délimitant précisément le champ d'application de la participation principale tout en clarifiant la différence fondamentale entre celle-ci et les formes de complicité ou de participation accessoire.

Mots clés : participation ; délinquant ; instigateur ; auteur moral.



Introduction

Principal participation in the offense is one of the most important concepts upon which the legal structure of the criminal system is based, as it constitutes the essential pillar on which the criminal act rests. The offence cannot be conceived in the absence of a principal offender who directly undertakes its execution or contributes directly to the realisation of its result. The principal offender is the cornerstone of the criminal structure, being the person primarily responsible for the commission of the offense, whether he commits it alone or in conjunction with others who have assumed essential roles in its execution. The importance of this concept lies in its determination of the legal framework of the offender's liability and its differentiation between the principal offender, who performs the material act constituting the offense, and the accomplice or accessory participant, whose role is confined to assistance or instigation.

The Algerian legislature has been keen to set out this distinction with precision through the provisions of the Penal Code, particularly Articles 41 and 45, which have broadened the scope of perpetration to include everyone who participates directly or indirectly in the execution of the criminal act, including the instigator and the moral perpetrator. This legislative approach reveals a profound awareness on the part of the legislature of the nature of the offense in its modern form, in which roles may become intertwined and responsibilities may be distributed among those who plan, those who execute, and those who direct.

Consequently, the offender is no longer confined to the person who performs the material act alone; instead, the concept has expanded to encompass everyone who has contributed effectively and influentially to the realisation of the criminal result.

This study aims to analyse the legal framework of principal participation as regulated by the Algerian Penal Code and to highlight its theoretical and practical dimensions while clarifying the distinction between it and the forms of accessory participation in light of legal provisions, judicial precedents, and doctrinal opinions. The research problem is encapsulated in the following central question:

To what extent has the Algerian legislature succeeded in formulating a precise conception of the notion of principal participation that ensures the achievement of criminal justice and clearly distinguishes between the principal offender and the accomplice in the offense? The study employs an analytical method to examine this topic by analysing relevant legal provisions and a comparative method by linking them to doctrinal opinions and specific practical applications to arrive at a comprehensive and precise understanding of the subject.

1. Definition of criminal participation:

It is the concerted effort of two or more persons to commit a single offense, or, as Dr. Mohamed Sami al-Shawwa has defined it, 'it is the situation in which there is a plurality of offenders who commit the same offense, or several persons commit a single offense which each of them could have committed individually'.¹



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Participation may also arise without prior agreement, whereby the offenders contribute to a criminal project without any preexisting accord. Evidence of this is found in offences committed by participants in acts of rioting, as well as in theft and homicide. In such a case, criminal proceedings are brought in proportion to each person's contribution to the offense and are not based on prosecuting them for a single offense.²

We may also face a situation where necessary participation is required for the commission of the offense; otherwise, there would be no offense at all. An example of this is the offense of bribery and that of adultery, in which the presence of two persons is required for the constituent elements of the offense to be complete. In the offense of adultery, there must be a man and a woman; similarly, in the offense of bribery, there must be a briber and a bribe and, at times, an intermediary who has brought them together.

2. The elements of participation are as follows:

The elements of criminal participation consist of two basic components, namely, the unity of the offence and the plurality of offenders. If either of them is lacking, there is no criminal participation.

A Unity of the offence:

Unity of the offense means that the offenders—despite their plurality—commit a single offense that is unified in its legal structure such that their acts converge on one criminal result. This is exemplified in cases where several people cooperate in carrying out a theft; the final result remains the

offence of theft itself. However, if the acts lead to multiple and distinct results (as in theft coupled with homicide, for example), then we are not dealing with the unity of offense but with a plurality of offenses.

For unity to be realised, two essential elements must be present: material unity and moral unity.

Material unity of the offence:

Material unity presupposes that the acts committed by the participants lead to a single result and that each of them has a role in achieving the criminal result for which they came together, necessitating a causal link between their respective roles and the result.

An example of this is the offense of homicide, where several participants join together to commit a killing: the role of the first is to instigate the person to kill, the second purchases a firearm, and the third goes on to carry out the killing. Through these acts, the result is the same, on the basis of the causal relationship connecting the acts they have performed.³

Moral unity:

This form of unity is realised where there is a prior agreement among the participants or an understanding between them, even only a few moments before the commission of the offense, that they are all prepared and resolved to commit the agreed-upon offence.⁴

3. The distinction between the act of the accomplice and principal participation is as follows:

It is well established among jurists that the act of the accomplice is derived from the act of the principal offender;



however, they differ in nature and are divided into two groups: those who support the theory of independence, which calls for the autonomy of the accomplice's act from that of the principal offender regardless of the consequences arising from these acts, and those who call for the dependence of the accomplice upon the principal offender, since the acts derived by the accomplice are merely a corollary of the act of the principal participant.

The theory of independence:

The proponents of this theory consider that the act of the accomplice is independent of the principal offender's actions and that each is independent of the other with respect to punishment. The consequences resulting from this theory are as follows:

1. The accomplice is criminally liable according to one's own degree of danger, regardless of the danger of the principal offender.
2. The accomplice is liable according to his own intent and the extent to which it was directed towards the commission of a particular offence rather than another.
3. If the principal offender benefits from grounds excluding liability or punishment or from limitations on public prosecution, the accomplice is not thereby affected.
4. The accomplice is treated as independent of the principal offender with respect to civil liability.

– The theory of dependence:

According to this theory, the fate of the accomplice is linked to that of the principal offender in terms of criminalisation

and punishment, and accordingly, the following consequences ensue:

1. The accomplice is not liable except within the scope of the criminal dangerousness of the principal offender.
2. The accomplice is often affected by new offences committed by the principal offender.
3. The accomplice is affected by the grounds excluding liability, the grounds excluding punishment, and the limitations on public prosecution from which the principal offender benefits.
4. In civil liability, the accomplice is treated in the same manner as the principal offender.⁵

The position of the Algerian legislature on these two theories is as follows:

The Algerian legislature has adopted both theories, as he has punished the accomplice with the same penalty prescribed for the felony or misdemeanour with which the principal offender is punished, except for petty offences, for which the accomplice is not punished at all, pursuant to Article 44 of the Penal Code, save for an exception to this exception in the case of affray offences provided for in Articles 441 bis 1 and 442 bis of the Penal Code.⁶ On the other hand, the Algerian legislature has moved towards the independence of each participant or principal offender when they benefit from personal or situational circumstances that affect punishment, pursuant to Article 44, paragraph 2, of the Penal Code.⁷

He also provides for the punishment of the moral perpetrator with the same penalty prescribed for the offense, even if it has not been committed, under Article 45 of the Algerian Penal Code; likewise, he punishes instigation with



the same penalty prescribed for the offense, even if it has not been carried out owing to the abstention of the person who intended to commit it, under Article 46 of the Algerian Penal Code.

Principal participation consists of undertaking a principal role in the commission of the offence, as an offence cannot be conceived in the absence of a principal offender. A single person may commit this act, in which case the offense is the product of his activity, and he is thus the sole offender. The act may also be shared, in which case they are all principal offenders.⁸ These roles may be undertaken by a single person alone: he is the one who devises, plans, and executes, and in this situation, he is considered an offender in his own right. He may also seek the assistance of several people who appear to the public to be merely accessory participants in the offence. In contrast, the Algerian legislature has explained and distinguished between acts of participation and acts of complicity. Article 41 states, 'A perpetrator is anyone who has taken a direct part in the execution of the offense or who has instigated the commission of the act by a gift, promise, threat, or abuse of authority or power, or by deception or fraudulent conduct.'⁹

Article 45 also provides that 'Whoever causes a person who is not subject to punishment by reason of his situation or personal status to commit the offense shall be punished with the penalty prescribed for it.'¹⁰ From the two provisions set out above, it is apparent that the acts of principal participation in Algerian law are the perpetrator, the instigator, and the moral perpetrator.

A. The perpetrator: What is meant is the direct perpetrator, that is, the person who personally performs the

material acts constituting the offense, 'and it is of no importance whether they are performed by one person or by several persons';¹¹ for the perpetrator, either commits his or her offense alone or others participate with him or her in its commission.¹²

The perpetrator assumes two forms: the perpetrator in his own right and the coperpetrator.

The perpetrator in his own right: This is the person who performs the acts constituting the material element and performs all the components of the offence by himself; he is the one who plans and executes. An example of this is the person who stabs the victim and thereby kills him, or the person who purchases a firearm with the intention of committing homicide.¹³ The Algerian legislature does not attach importance to whether the offender planned the offense or decided to commit it on his own or whether he was under the influence of instigation by another, nor does it matter whether the offense was carried out with the participation of others, so long as the material acts were performed at the same time.

In omission offences—that is, offences of a negative character—the material perpetrator is the person upon whom the duty to act rests. He is likewise deemed a material perpetrator in the case of an attempt to commit the offence, even if it has not been fully executed, thereby also covering abortive offences. However, criminal doctrine considers that the criterion of attempt alone is not sufficient to determine the direct perpetrator, as his presence at the scene of the offence is also needed.¹⁴ Thus, if the perpetrator has not performed all the acts constituting the offense but is present at the scene of the offense, he is regarded as a principal offender. An example of this is where three persons agree to



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kill someone: the first strikes the victim, the second carries the body, and the third buries it with them; they are all considered principal offenders because of their presence at the scene of the offense.¹⁵

The material perpetrator together with others:

This is the person who performs the material acts but does not commit the offense alone; instead, they enlist the assistance of one or more persons to complete the offense, and all are material perpetrators of the same offense.

An example of this is where two people kill the victim; they are both considered principal offenders. However, if each of them performs only a secondary role – such as where the first stabs the victim and the other provides shelter to the offender – they are not both material perpetrators; in this case, we are dealing with a principal offender and an accomplice.

B. The instigator:

In the amending Law 82-04 of 13 February 1982, the Algerian legislature regarded as a perpetrator 'anyone who instigates the commission of the act by a gift, promise, threat, or abuse of authority or power, or by deception or fraudulent conduct'.¹⁶ This is what distinguishes it from other legislative systems worldwide. Article 41 of the Penal Code provides that a perpetrator is the person who instigates by the means set out above.

Conditions of instigation

For instigation to be established, certain conditions must be fulfilled, as follows:

- Instigation must take place by one of the means exhaustively prescribed by law in Article 41 of the Penal Code.
- Instigation must be direct, that is, the explicit implantation of the idea of the offence in the mind of the person instigated.
- Instigation must be personal and directed at a specific individual.¹⁷

The specified means of instigation are as follows:

- **Gift:** This is where the instigator gives a gift to the person being instigated, whether in the form of immovable property, cash, or a car. It is required that the gift be offered before the commission of the offense and not afterwards; once the offense has been committed, it is regarded as a reward.¹⁸
- **Promise:** This is where the instigator promises a financial reward upon the commission of the offence; the promise may also relate to something of pecuniary value, for example.¹⁹
- **Threat:** This consists of exerting pressure on another's will to persuade him to commit the offence, as the instigator threatens to disclose a particular secret.²⁰
- **Abuse of authority:** This is understood to mean the authority of a superior over his subordinate at work, compelling him to commit an offense.

Guardianship refers to the guardianship of a father over his minor children; it also encompasses the moral authority and reverence enjoyed by certain groups in society, such as the obedience of worshippers to the imam and the obedience of schoolchildren to their teacher.²¹



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Fraud or criminal deceit: instigation of another to commit an offence may occur by misleading him with false information that stirs his instinct to commit an offense. An example of this is where someone leads a person to believe that his brother has quarrel with someone he hates and has assaulted him so that the person who was engaged engages in aggressive acts that lead to the commission of the offense of assault and battery.²²

Direct instigation:

This is where the instigator addresses the offender or several offenders to incite them to commit a specific offence or offense.²³

Personal instigation: This is instigation directed at the person whom it is sought to persuade to commit the offence; if it is directed at the general public, we are faced with a special type of instigation that does not amount to instigation within the meaning of Article 42.²⁴

What distinguishes the Algerian legislature from other legislative systems is that he does not require the person actually instigated to commit the offense; instigation alone is sufficient. This is laid down in Article 46 of the Algerian Penal Code, which provides that if the contemplated offense is not committed solely because the person who intended to commit it has refrained from doing so of his own free will, the instigator is nevertheless punished. This gives effect to the principle of the independence of the instigator's liability from that of the material perpetrator. Article 41 of the Penal Code provides this by treating the instigator as a principal offender rather than as an accomplice. This is reflected in the Ordinance of 23 August 2005 on combating smuggling,

which excludes the instigator of the offense from the benefit of mitigating circumstances at a time when the material perpetrator may benefit from them.²⁵

C. Moral perpetrator:

Article 45 of the Penal Code states, 'Whoever causes a person who is not subject to punishment by reason of his situation or personal status to commit the offense shall be punished with the penalty prescribed for it.' Recourse is invariably had to a person who is not criminally responsible for his condition or age and who is thus not criminally liable, such as a minor, a person lacking discernment, or a person of unsound mind. An example of this is where the offender resorts to a person of unsound mind and exploits him to transport explosives and place them in a crowded area, thereby killing a large number of innocent people.²⁶

Moreover, the means used by the moral perpetrator to carry out the offence are not specified, which means that the legislator considers all means through which the condition of the perpetrator may be influenced to commit the offence; the moral perpetrator seeks every possible means to influence the offender and place him under his sway.²⁷

The moral perpetrator must also be fully aware of all the elements of the offense contemplated, extending even to the consequences arising from instigating a person who is not criminally responsible, since such a person does not realise what he is doing by reason of the condition in which he finds himself.



Conclusion

From what has been set out in this study, it is apparent that principal participation in the offense constitutes the cornerstone in determining criminal liability, as the offense cannot be conceived without the presence of a principal offender who contributes, directly or indirectly, to the realisation of the criminal result. The Algerian legislature has acted wisely in distinguishing between the forms of principal participation and acts of complicity, treating the perpetrator, the instigator, and the moral perpetrator as principal offenders whenever their role is decisive in the commission of the offence.

The analysis has shown that the Algerian legislature has adopted a broad concept of criminal perpetration that keeps pace with the development of modern crime, which has evolved into more complex forms and increasingly intertwined roles. The legislator has considered that instigation, even if it does not lead to the commission of the offence, is in itself sufficient to establish criminal liability and has equated the material and moral perpetrators in terms of punishment within a framework of justice aimed at preventing any evasion of responsibility.

It has also become clear that the distinction between principal participation and accessory participation constitutes a fundamental pillar for ensuring the justice of the penalty and its proportionality to the degree of involvement in the criminal act, as reflected in Articles 41, 44, and 45 of the Algerian penal Code. In this context, the legislature has relied on a combination of the theories of independence and dependence, bringing them together to

achieve a delicate balance between the unity of the offense and the independence of liability.

In light of this, the Algerian legislature has, to a large extent, succeeded in establishing the legal framework for principal participation. However, practical application may require further clarification and judicial interpretation to define the limits of perpetration, particularly in complex offences or those committed by unconventional means.

Accordingly, the study recommends the following:

- 1) The legal training of judges and justice-sector institutions should be strengthened to distinguish between the various forms of participation.
- 2) Development of legal provisions to keep pace with modern criminal developments.
- 3) Encouraging legal scholarship to deepen research into the notion of the moral perpetrator and indirect instigation.

¹ Mohamed Sami al-Shawwa, *Exposition of the Penal Code, General Part* (Menoufia: Menoufia University Press, 1996), p. 429.

² See Hassan Bousqiaa, *A Concise Guide to General Criminal Law* (Algiers: Dar Houma Publishing, 2019), p. 199.

³ See Abd al-Rahman Khalfi, *General Criminal Law: A Comparative Study*, 6th ed. (Dar Balqis Publishing, 2024), p. 309.

⁴ Abd Allah Sulayman, *Exposition of the Algerian Penal Code, General Part: The Offence*, vol. 1 (Algiers: Diwan al-Matbu‘at al-Jami‘iyya), p. 205.

⁵ See “The Concept of Criminal Participation, Part One of Criminal Participation, Lectures in Criminal Law,” YouTube video, https://www.youtube.com/watch?v=bIMZB0_V5YM&t=1019s

⁶ See Hassan Bousqiaa, *A Concise Guide to General Criminal Law*.

⁷ *Penal Code*, Ordinance No. 1.

⁸ Abd al-Rahman Khalfi, *General Criminal Law: A Comparative Study*, p. 314.

⁹ *Penal Code*.

¹⁰ *Penal Code*, art. 45.



¹¹ Abd al-Azim Mursi Wazir, *Exposition of the Penal Code, General Part: The General Theory of Crime*, vol. 1 (Cairo: Dar al-Nahda al-‘Arabiyya, 2006), p. 509, quoted in Abd al-Rahman Khalfi, *General Criminal Law: A Comparative Study*, p. 315.

¹² Ashraf Tawfiq Shams al-Din, *Exposition of the Penal Code, General Part: The General Theory of Crime and Punishment*, 6th ed. (2009), p. 114.

¹³ Hassan Bousqiaa, *A Concise Guide to General Criminal Law*.

¹⁴ See Hassan Bousqiaa, *A Concise Guide to General Criminal Law*, pp. 201–2.

¹⁵ See Khattir Masoud, “Criminal Participation in Omission Offences,” *Dafater al-Siyasa wa al-Qanun* [Politics and Law Notebooks], no. 10 (2014), Kasdi Merbah University, Ouargla, p. 290.

¹⁶ Abd Allah Sulayman, *Exposition of the Algerian Penal Code, General Part* (Algiers: Diwan al-Matbu‘at al-Jami‘iyya), p. 205.

¹⁷ See Abd al-Azim Mursi Wazir, *Exposition of the Penal Code, General Part: The General Theory of Crime*, p. 533; and Abd al-Rahman Khalfi, *General Criminal Law: A Comparative Study*, p. 317.

¹⁸ Hassan Bousqiaa, *A Concise Guide to General Criminal Law*, p. 204.

¹⁹ See Abd al-Rahman Khalfi, *General Criminal Law: A Comparative Study*, p. 317.

²⁰ Abd Allah Sulayman, *Exposition of the Algerian Penal Code, General Part*, p. 207.

²¹ Hassan Bousqiaa, *A Concise Guide to General Criminal Law*, p. 204.

²² See Abd al-Rahman Khalfi, *General Criminal Law: A Comparative Study*, p. 317.

²³ Abd Allah Sulayman, *Exposition of the Algerian Penal Code, General Part*, p. 206.

²⁴ Hassan Bousqiaa, *A Concise Guide to General Criminal Law*, p. 206.

²⁵ See Hassan Bousqiaa, *A Concise Guide to General Criminal Law*, pp. 206–7.

²⁶ Abd Allah Sulayman, *Exposition of the Algerian Penal Code, General Part*.

²⁷ Abd Allah Sulayman, *Exposition of the Algerian Penal Code, General Part*, p. 210.

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