



PILLAR II
ADMINISTRATIVE AND PRACTICAL CASES

Aspects of the offense of smuggling
By Jola Frasheri

I. ABSTRACT

The purpose of this article is to analyze the criminal offenses in the customs field and the particular elements that each figure carries. Crimes in the customs area are becoming more and more commonplace in national and European courts. Their special feature is that they are always in development and the legislator should try to preserve the pace of the dynamic time we are living. Styding these crimes is essential, in order for them to be prevented, as well as to be able to adopt the rehabilitative measures for their authors. Criminal offenses of smuggling undermine the interests of the country by affecting the State Budget and therefore affect the financial security in the country. Also, peculiar types of smuggling also violate our national cultural and archaeological assets. It is very important to strengthen the mission of the three powers, legislative, executive and judicial in the ongoing fight against smuggling, in the framework of the fight against informality.

Key words: *smuggling, customs, customs code, criminal offense, import, export.*

ABBREVIATIONS:

CC	Criminal Code, 1995, amended by Decision of Council of Ministers No. 89/2017, dated 22.5.2017
CuC	Customs Code, 2014, amended by law No. 32/2015, dated 2.4.2015
EU	European Union
NGOs	Non-Governmental Organizations
RA	Republic of Albania

II. INTRODUCTION

The criminal offenses of smuggling have been known in our country since ancient times, but they have not been regulated and defined as they are today. Albania, being a connecting path to some of the Empires of the time, (e.g. the Roman Empire and the Byzantine Empire) was consequently a territory from which the goods have been passed unlawfully. After the declaration of independence and the creation of the first Albanian state, smuggling was mentioned specifically in the issued Albanian legal acts, which were based on the provisions drafted by the Austro-Hungarian Command.¹ The word smuggling meant the export or import of goods in illegal and prohibited ways. Even in the Criminal Code of the Albanian Kingdom, smuggling is mentioned as a criminal offense, but not extensively.² Again this offense is included in the codification of 1952 and 1977, the Criminal Code of the Socialist Republic of Albania.

¹Jano J. "Historia e Doganave "Politikat Doganore të Shtetit Shqiptar" në vitet 1912-2002, House Publishers "ADS" 2002, pg. 20.

²Selenica T. "Shqipëria në vitet 1927", Printing Tirana, 1928, fq 97-98.



Smuggling as a term was originally used in English language in the early 1500's. It was literally borrowed from Latin. If we trace its origin in Medieval Latin, we encounter the word '*contrabannum*' which is a combination of "*contra*" (against) and "*bannum*" (decree).

In addition to the classic smuggling that is the customs smuggling -the irregular movement of goods -new forms of contrabands are developing nowadays, such as the "economic" one. This type of smuggling aims the concealing of the real costs of import or export of the goods. There are also other forms of smuggling, such as political smuggling, war contraband, archaeological or even artistic and cultural.³ In such cases, smuggling is also carried out at the state level where smuggling states want to gain information, power or dominate other states.

In our country, the businesses that use the method of smuggling, are constantly trying to find new mechanisms to smuggle goods. Mostly, they smuggle excise goods in order to avoid customs duties because the obligation to pay for these goods is relatively high. When these goods are sold in the black market they provide high profits to such businesses. The most preferred products to be smuggled are cigarettes, however petroleum is also smuggled due to the great benefits it provides.⁴

Nowadays it's getting even harder to fight smuggling around the world because of the sophistication of smuggling methods. Currently, more than two billion consumers, consume smuggled products, which are a major source of profit for international criminal organizations or the local mafia.⁵

Community legislation has set out strict rules against smuggling. Everyone who is conscientiously smuggling goods that are prohibited by law and goods that were illegally passed through the custom by taking, selling, transporting or assisting in such acts, may be accused for this criminal offense and may be charged with civil damages.

III. ANALYSIS OF THE CRIMINAL OFFENSE OF SMUGGLING

Criminal offences in the area of customs include those acts (acts or omissions) that are illegal, affecting state interests, carried out intentionally and for the purpose of material benefit.⁶

Criminal Code of RA provides 13 different figures of criminal offenses in the area of customs.⁷ The division of the general figure of the crime of smuggling into special smuggling figures is made by the

³ Atty. Filamer Miguel D. "Smuggling", <https://businessmirror.com.ph/smuggling-101/>, 2015

⁴ Prof. Dr. Shabani S., Dr. Hyseni A. "Ligji doganor dhe Praktika Gjyqësore", House Publishers "Dita 2000", 2007, pg. 15

⁵ Delval, P. "An Effective Anti-Counterfeiting Policy Alternative", WAITO, 2011

⁶ Customs Code, 2014, amended by Decision No. 32/2015, dated 2.4.2015

⁷ Article 171 - Smuggling of prohibited goods; Article 172 - Smuggling of goods to which excise duty apply; Article 173 - Smuggling of goods requiring license; Article 174 - Smuggling of other goods; Article 175 - Smuggling committed by custom officials; Article 176 - Smuggling of goods with cultural value; Article 177 - Smuggling of goods holding intermediate status; Article 178 - Trading and transportation of smuggled goods; Article 179 - Storing smuggled goods; Article 179/a - The non-declaration of money and of valuable objects; Article 179 / b Breach, removal, replacement of security signs by the customs authorities; Article 179 / c Removal of goods from customs



legislator bearing in mind firstly, the nature of the smuggled goods and secondly their legal regime, the degree of social risk produced by each type of smuggling and most recently, the subject – the person who conducts the act of smuggling.

The Albanian Customs Code has described only the elements included in the objective part of the smuggling, while the Criminal Code is broader, including all figures of the criminal offense of smuggling with all the elements starting with the object, subject, objective and subjective elements as well, as they will be analyzed further in the paragraphs below.

3.1. The object of Smuggling

The general object of all particular figures of the crime of smuggling is the legal relationship established for the normal functioning of customs in the Republic of Albania and for the protection of its economic interests from any activity aimed at avoiding the payment of customs duties to the state budget calculated in specific amounts of money.⁸

Referring to criminal law, any criminal offense (including criminal offenses in the customs area) affects, or threatens, a particular object protected by law. In the case of criminal offenses of smuggling, as well as for other criminal offenses, in addition to the general object mentioned above, the doctrine also recognizes “the group object”. These include criminal offenses in the area of customs, that have as their own object a group of social relationships, similar or equal values and interests.⁹

In each of the figures of the criminal offenses of smuggling the object is variable. In the offense of smuggling of prohibited goods¹⁰, the object is direct and it consists in the legal relationship established to secure the prohibition on importation and exportation of prohibited or restricted goods. Goods prohibited under the Customs Code are weapons, radioactive materials, dual-use goods¹¹, wastes, ozone-depleting substances, endangered species of fauna and wild flora, narcotic and psychotropic substances. While in the criminal offenses of smuggling of goods to which excise duty applies¹², of licensed goods¹³ or of

areas without payment of duties; Article 179 / ç Smuggling of Captain, Pilot or Crew. Criminal Code, 1995, amended by Decision No. 89/2017, dated 22.5.2017

⁸ Elezi I. “E Drejta Penale”, Pjesa e posaçme, House Publishers “Kumi”, 2016, pg. 270

⁹ Elezi I. Kaçupi S. Haxhia M. “Komentari i kodit penal të Republikës së Shqipërisë”, House Publishers “Kumi”, 2013, pg. 107-108

¹⁰ Criminal Code Article 171 Illegal import, export or transit of prohibited goods entering or leaving the Republic of Albania, committed through any means or ways, is sentenced up to ten years of imprisonment.

¹¹ ‘Dual-use goods’ means specific types of equipment, materials, software and technology, not specifically designed for military purposes, as well as for works and related services which, in addition to civilian use, may be used for military or terrorist purposes or in the design, production, use of weapons predetermined for military purposes, weapons of mass destruction, their propagation or nuclear explosive devices, including certain types of nuclear materials, chemical agents, bacteriological, biological and toxic preparation’ according to Law No. 9707, dated 5.4.2007 “On state control of the activity of import and export of military goods and dual-use goods and technologies”.

¹² “Products to which excise duty apply are: a) energy products; b) alcohol and alcoholic beverages; c) tobacco and tobacco products. According to Law no. 61/2012 On Excise In the Republic of Albania.

¹³ Goods that are licensed by the Ministry of Trade and Industry.



goods under an intermediary regime¹⁴ the object of smuggling is the legal relationship that is imposed for the importation, exportation or transit of excise duty goods, licensed goods or intermediary regime goods.

The fundamental difference between these offenses lies in the fact that smuggling with prohibited goods has as object illegal goods that are not allowed to enter the RA market. While smuggling with other goods is related to allowed goods that can be freely circulated in the market, but how they enter and how these goods circulate on the RA market is in contravention of the customs law. The perpetrators of these criminal offenses intend to avoid customs duties or to cheat about the quantity or quality of the products while attempting to reduce their customs obligations.

3.2. The subject of Smuggling

Usually the 'subject' in the criminal offenses in the area of customs is general. The subject of the offense may be every person that has reached the age of criminal responsibility¹⁵ and has not mental incapacity.

However, there are criminal offenses of smuggling where the subject is special due to its specific characteristics. In the offense of smuggling by customs employees¹⁶, the subject is special because it must be a customs officer, such as the general director of customs, inspector, director of regional directorates, head of customs offices or customs agent. The peculiarity of this crime figure falls on the subject of the act, who has not only reached the age of criminal responsibility and does not have mental incapacity, but also has special qualities and responsibilities and uses them while committing a criminal offense. Persons, who are favoured by the customs officers for the passage of smuggled goods, shall also be punished under the article of smuggling by customs employees. The subject is also considered special in the other offenses of smuggling of the captain, the pilot or the crew¹⁷.

Legal persons, whether Albanians, or foreigners may be subject to criminal liability for smuggling in cases when: the offense of smuggling has been committed by the representative bodies in their name or in their behalf; by a person authorized by a legal person and; when this offense is committed in their name or in their behalf due to the lack of control or supervision by the leadership of the juridical person.

¹⁴Customs procedure where goods may pass: transit; in customs warehousing; active processing; processing under customs control; in temporary allowance; passive processing or export. According to Article 16, KD

¹⁵"A person shall be held criminally liable if, at the time of committing the crime, he has reached the age of fourteen. A person committing a criminal contravention shall be held liable if he has reached the age of sixteen". Article 12, CC.

¹⁶"Smuggling carried out by custom officials, or by other employees having a working relationship with the activity of customs, even when in collaboration with other persons, is punishable by three to ten years of imprisonment" Article 175, CC.

¹⁷"Carriage of goods without a manifest, or absence or refusal of presentation of the manifest and of the relevant documents, loading, unloading or transport of goods, passengers and their baggage without the permission of the customs authorities, stay in places where there is no customs office or detention near port or airport without the permission of the customs authorities, the removal or transfer of the goods in contravention of the customs legislation, the absence on board of the means of goods to be found therein, on the basis of the manifest and other customs documents carried out, as appropriate, by the captain, pilot or crew, shall be punished by imprisonment of up to seven years. This offense, when committed in co-operation or more than once, is sentenced to five to ten years of imprisonment". Article 179/ç, CC.



According to Law No. 9754, dated 14 June 2007, "*On the criminal liability of legal persons*", mainly commercial companies and NGOs, are known as active and passive subjects of the criminal offense. The legal person has the responsibility for the criminal offence carried out in its name or in its behalf by: its bodies and representatives; by a person, who is subject to the authority of the person who represents, directs and manages the legal person; or due to lack of control or supervision by the person who directs, represents and manages the legal person.

Nowadays the criminal liability and sanctioning of legal persons is an indisputable fact. It goes beyond traditional legal schemes and finds its roots in specific criminal justice solutions.¹⁸ The main sanctions adopted for a legal person are fines or the termination of the legal person. The additional sanctions are: the termination of one or more of the activities or structures of the legal person; the placement of the legal person under controlled administration; the prohibition to participate in public procurement procedures; the revocation of the right to obtain or use licenses, authorizations, concessions or subsidies; the prohibition of publicly seeking funds and financial resources; the revocation of the right to exercise one or more activities or operations and the obligation to publish the judicial decision.

3.3. The objective aspect of Smuggling

The objective aspect of smuggling is realized through a variety of illegal acts or omissions such as: importation, exportation, transit, passage through the customs, full or partial concealment, inaccurate declaration to customs or other forms such as by exerting active and passive corruption (e.g. smuggling committed by custom officials who are corrupt for not declaring or assisting).

In the offense of smuggling, concealment may include the concealment of part of smuggled goods or may go further to cover the concealment of the whole transport by avoiding border controls¹⁹, carrying out transportation through small vessels, through private aircrafts, via land routes or tunnels.

3.4 The subjective aspect of Smuggling

Smuggling is generally carried out with direct intent, but there are cases where it is also carried out through recklessness (e.g. smuggling of the captain, pilot or crew when they are unaware due to negligence and lack of control, that illegal goods or illegally entered goods are on board of the vehicle directed by them).

There are two forms of recklessness in criminal offenses: (a) recklessness due to excessive self-confidence or b) recklessness due to negligence. In the first case the person foresees the possibility of the realization of the consequence, but does not want it and frivolously hopes to avoid it. Whereas in the case of recklessness due to negligence the person does not foresee the harmful consequences despite his / her obligation and possibility to do so. The main distinctive element of this form of recklessness is the lack of anticipation of the consequence. In cases where it is not proven that the criminal offense was committed intentionally, the court argues in its decision that the offense is committed by negligence and it is in its

¹⁸ Dr. Av. Bozheku N.; Prof. Dr. Elezi I. "Përgjegjësia penale e personave juridikë", House Publishers "Toena", 2012, pg. 35-36.

¹⁹ These illegal crossings are also valid for the illegal migration.



discretion to consider recklessness when determining the sentence. Yet, recklessness cannot provide immunity to the author from his/her criminal liability.

The motive behind smuggling, are the desires or psychological impulses²⁰ to carry out such action surging the subject to commit the crime with determination. These actions are intended to realize the passage of goods or other objects, in violation of the law, in / and out of the state border (customs). In close connection to the motive is also the purpose. The purpose means what someone wants to achieve through a criminal offense. With regards to smuggling its purpose consists in the mental activity of imagining the desired result, which is the opportunity to possess smuggled goods or the benefits derived out of smuggled goods, which might be obtained only by illegally passing goods through the customs border²¹.

Guilt is the indispensable element of the smuggling offense, the presence of which creates the subjective conditions of criminal liability for smuggling. Guilt despite of its degree, has always been evaluated in the ancient and current Criminal Law, as a fundamental element, without which a criminal offense cannot exist. In principle, the person acting with guilt is to be penalized. Until the legal demonstration of guilt, the suspect of a customs offense is presumed innocent, thus any undertaking of repressive actions, such as the interdiction of the person or the seizure or the freezing of goods, and of the means of transport, etc, which brings about the risk of reparation damages due to the suspected subject when found innocent.²²

IV. CONCLUSIONS AND RECOMMENDATIONS

The controls of the last few years has demonstrated that informality and smuggling in the field of customs has been rapidly spreading. Thus fight against smuggling and measures to prevent it is now on the forefront of steps and actions conducted by state institutions. It is known that the state, through taxes and customs duties, generates considerable revenue for the budget, therefore any kind of smuggling of goods reduces the state budget revenues. Our Criminal Code in force, has made major changes in the area of customs crime, compared to the previous codes, thus providing a more effective legal protection against criminal offenses.

The Customs Code provides administrative penalties for smuggling, while these types of sanctions are also foreseen for commercial companies or NGOs in a specific law, as mentioned above. In this way, the Criminal Code and the Customs Code have a set of norms that provide criminal liability for crimes committed in one of the most important branches of the domestic economy, namely the economic activity of importing, exporting, transit of goods, as well as placing under a special customs procedure.

Our state authorities should work to meet the recommendations of the “Moneyval” report and the standards suggested by the Financial Action Task Force (FATF)²³, aiming on combating money

²⁰ Elezi I Kaçupi S Haxhia M. “Komentari i kodit penal të Republikës së Shqipërisë “House Publishers “Kumi”, 2013, Pg. 132-133

²¹ Muça Sh. “E Drejta Penale, pjesa e përgjithshme”, House Publishers ‘Dudaj’ 2007, pg. 53-54.

²² Elezi I Kaçupi S Haxhia M. “Komentari i kodit penal të Republikës së Shqipërisë “House Publisher “Kumi”, 2013, pg. 126-127

²³ The Financial Action Task Force (FATF) is an intergovernmental body established in 1989 by the Ministers of its member jurisdictions. The FATF's objectives are to set standards and promote the effective implementation of legal,



laundering and corruption, and confiscation of criminal wealth. In the latest European Commission²⁴ strategy for the Western Balkans it has been emphasized that the fight against money laundering is one of the most important elements in the area of rule of law and in the fight against organized crime and corruption of public officials and that this should be as well a strategic priority for Albania. Also the Law No. 10192, dated 03.12.2009 "*On the prevention and control of organized crime, trafficking and corruption through preventive measures against property*", as amended, details the approach for the execution of the seizure decisions and final confiscation decisions. This law was approved to serve as an efficient mechanism for the execution in a complete and timely manner of court decisions on confiscation of assets. This law had a positive impact on the better functioning of the justice system, but yet there is need of a better cooperation and coordination between the executive and legislative powers, and among all the justice system actors.

The new customs legislation²⁵ is very much aligned with that of the European Union,²⁶ within the framework of Albania's EU integration. Meanwhile, on the other hand, the aggravation of criminal penalties in the Criminal Code does not comply with the Council of Europe Recommendations²⁷ and the guidelines on criminal policy which call for the liberalization of the Code and the replacement in several cases of imprisonment sentences with alternative sentences²⁸. Despite the fact that in national legislation alternative sentences are foreseen, unfortunately, they are rarely used in practice. Thus the mentality of punishment is predominant compared to that of re-education.

Addressing alternative sentences changes the focus of punishment, from punishing and isolating, towards a restorative and integrative justice. Contemporary criminal law is increasingly detaching from the punishment and is focusing on restorative justice. Already under the influence of the principle of humanity that pervades criminal law, it is widely accepted that the criminal punishment pursues the purpose of education, re-socialization and reintegration of the perpetrator along with the rehabilitation / reparation of the injured party. I believe that orientation of the courts towards this type of punishment, it will be an effective solution to the strengthening of fundamental rights and freedoms.

regulatory and operational measures to combat money laundering, terrorist financing and other threats related to the integrity of the international financial system.

²⁴https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf

²⁵ CuC

²⁶ EU Directive 952/2013

²⁷ Recommendations of the Council of Europe R (92) 16, R (97) 12 and R (2000) 22, which focus on the alternatives of punishment of imprisonment.

²⁸ CHAPTER VII ALTERNATIVES TO IMPRISONMENT SENTENCES

1. Article 58 Open prison
2. Article 59 Suspension of the execution of an imprisonment sentence and placing the convict on probation
3. Article 59/a Home confinement
4. Article 63 Suspension of enforcement of imprisonment sentence and compulsion to perform community work
5. Article 64 Release on parole