

## **Parties to Crime: Development and Comparison**

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### **Abstract**

*This article discusses parties to crime which are an important part of substantive criminal law. This concept is related to the involvement of more than one person in a criminal offence. Problems in participation include its definition, forms of participation, timing of implementation and criminal responsibility of the person involved in the participation. The debate over parties to crime has started from its definition since the formulation the Criminal Code is very short and need interpretation and the differences among the forms of participation. This article also discusses the arrangement of participation in several.*

**Keywords:** *parties to crime; indonesian criminal law; development; comparison*

### **1. Introduction**

The issue related to parties to crime or complicity have been written in many international criminal law journals, such as "The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got it Wrong, and Why it Matters",<sup>1</sup> "Complicity, Proportionality, and Serious Crime Act"<sup>2</sup> and "Individual Complicity in Collective Wrongdoing".<sup>3</sup> There are many issue discussed, among other related to the requirement of the parties. One example can be said here is the article written by Glanville William who analysis the issue several court decisions. He mentioned that on many occasions the courts have said that an accessory must know the facts, but there have been some contrary decisions. Meanwhile, in Indonesia this issue is mostly discussed in criminal law text book. In several books the discussion are related to the definition, the form or kinds of complicity, and the liability of the every person involved in a particular offence.<sup>4</sup>

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<sup>1</sup> Daniel M.Greenfield, (2008), "The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got it Wrong, and Why it Matters", *The Journal of Law and Criminology*, Vol. 98 (3), 921-952.

<sup>2</sup> Dennis J. Baker (2011), "Complicity, Proportionality, and Serious Crime Act", *New Criminal Law Review: An International and Interdisciplinary Journal*, Vol. 14 (3), pp. 403-426.

<sup>3</sup> Lawson, Brian (2013)."Individual Complicity in Collective Wrongdoing", *Ethical Theory and Moral Practice*, Vol. 16 (2), pp. 227-243.

<sup>4</sup> Glanville Williams, (1975), "The Extension of Complicity", *The Cambridge Law Journal*, Vol. 34 (2), pp. 182-185.

There are laws in our criminal law that regulate the involvement of a number of persons, such as article 170 Indonesian Criminal Code.<sup>5</sup> In this condition, even though some people were involved in a crime, it was sufficient that they were charged with Article 170 of the Criminal Code, and Article 55 or Article 56 of the Criminal Code was not necessary. In other words, for matters such as those regulated in Article 170 of the Criminal Code, it is not necessary to use provisions concerning Complicity. However, in many other criminal offenses if more than one person is involved, the provisions of complicity are required. According to Jonkers, the discussion on complicity was called *de leer der deelneming* or *de deelnemingsleer*<sup>6</sup> (the doctrine on complicity).

According to Van Hamel, the doctrine of *deelneming* is general in nature, which is basically a "*leer der aansprakelijkheid en aansprakelijkheidsverdeling*" or a doctrine of responsibility and division of responsibility, that is, in cases where a crime which according to the formulation of the law can actually be committed by a person alone, but in reality it has been committed by two or more people in an integrated collaboration both intellectually and substantially.<sup>7</sup>

Chapter V of the Criminal Code of the Dutch East Indies is entitled *Deelneming aan Strafbare Feiten* which is identical to the title of the same chapter in *Wetboek van*

<sup>5</sup> Article 170 paragraph (1) of the Indonesian Criminal Code states: "Anyone who overtly acts **together** violates a person or property, is punishable with a maximum imprisonment of five years and six months (bold letters from the author).

<sup>6</sup> J.E. Jonkers, (1946), *Handboek Van Het Nederlandsch-Indische Strafrecht*, Leiden: EJ Brill, p. 105.

<sup>7</sup> P.A.F. Lamintang and Franciscus Theojunior Lamintang, (2019), *Fundamentals of Criminal Law in Indonesia*, Second Edition, Jakarta: Sinar Grafika, p. 605.

*Strafrecht* in the Netherlands today. The term *Deelneming aan Strafbare Feiten* was then translated in the Indonesian Criminal Code differently. Dali Mutiara, specifically, translated it to "Participating in Committing Punishable Offense".<sup>8</sup> R.Soesilo translated it as "Participating in Committing Punishable Offense".<sup>9</sup> The Bill of Indonesian National Criminal Code itself uses the term "Complicity" as regulated in Book 1 Paragraph 5.

In criminal law textbooks, almost all scholars discussed one chapter concerning *deelneming*. Satochid, for example, still used the Dutch term "Daderschap and Deelneming".<sup>10</sup> Lamintang translated "*Daderschap en Deelneming*" to "On Offenders and Complicity".<sup>11</sup> A.Z. Abidin and Andi Hamzah used a different term namely "Commission of an Offense and Forms of Complicity".<sup>12</sup> R.Tresna used the term "Intervention in Criminal Offense".<sup>13</sup> Wirjono Prodjodikoro used the term "Participation in Criminal Offense".<sup>14</sup>

Similar to Dali Mutiara and R. Soesilo, Utrecht translated "*deelneming*" to "Participation" which may confuse with

<sup>8</sup> Dali Mutiara, (1951), *KUHP Indonesian Criminal Code (Wetboek van Strafrecht voor Indonesia, which has been amended)*, Seventh Edition, Jakarta: Suar, p. 40.

<sup>9</sup> R.Soesilo, (1995), *Indonesian Criminal Code (KUHP) And Its Complete Annotation Article By Article*, Bogor: Politeia, p. 72.

<sup>10</sup> Satochid Kartanegara, (n.d.), *Criminal Law Collection of Professor Satochid Kartanegara's Lectures and Opinions of Notable Legal Experts, Part One*, Jakarta: Student Literature Center, p. 418.

<sup>11</sup> P.A.F. Lamintang and Franciscus Theojunior Lamintang, op.cit., p. 594.

<sup>12</sup> A.Z. Abidin and Andi Hamzah, (2010), *Indonesian Criminal Law*, Jakarta: Yarsif Watampone, p. 425.

<sup>13</sup> R. Tresna, (1959), *Principles of Criminal Law*, Jakarta: PT. Tiara, p. 88.

<sup>14</sup> Wirjono Prodjodikoro, (2003), *Principles of Criminal Law in Indonesia*, Third Edition, Bandung: Refika Aditama, p. 117.

other terms such as "commit the offense jointly with the offender / participate to commit a crime/ participated offender / taking part in the commission of a criminal offense" which is a translation of "medeplegen".<sup>15</sup> Though *medeplegen* itself is part of *deelneming* (complicity). Some other scholars simply used the term Complicity, such as Kanter and Sianturi,<sup>16</sup> Barda Nawawi Arief,<sup>17</sup> and Eddy O.S. Hiarij.<sup>18</sup>

So there are two terms above that are used: (a) Complicity in the Commission of a Criminal Offense (originating from *deelneming aan Strafbare Feiten*); and (b) Offenders and Complicity (originating from *Daderschap en Deelneming*). Van Bemmelen preferred the term "*Daderschap en Deelneming*"<sup>19</sup> or "Offenders and Complicity". This is also in line with the views of Schaffmeister, Keijzer and Sutorius.<sup>20</sup> Satochid also agreed with this, as I explained above, Satochid used the terms "Daderschap and Deelneming".<sup>21</sup> Likewise, Lamintang used the term "On Offenders and Complicity".<sup>22</sup>

<sup>15</sup> E. Utrecht, (1962), *Series of Criminal Law Lecture II*, Bandung: University Publishing, p. 5.

<sup>16</sup> E.Y. Kanter and S. R. Sianturi, (2018), *Principles of Criminal Law in Indonesia*, Third Edition, Jakarta: Stora Grafika, p. 336.

<sup>17</sup> Barda Nawawi Arief, (1993), *The Essence of Criminal Law Lecture II*, Semarang: Agency for Provision of Lecture Materials at the Faculty of Law, Diponegoro University, p. 28.

<sup>18</sup> Eddy O.S. Hiarij, (2016), *Principles of Criminal Law*, Revised Edition, Yogyakarta: Cahaya Atma Pustaka, 2016, p. 349.

<sup>19</sup> J.M. van Bemmelen, (1987), *Criminal Law 1, Substantive Criminal Law General Section*, translated by Hasnan, Second Edition, Bandung: Binacipta, p. 265.

<sup>20</sup> D. Schaffmeister, N. Keijzer and E.P.H. Sutorius, (2007), *Criminal Law*, edited by J.E. Sahetapy and Agustinus Pohan, Bandung: Citra Aditya Bakti, p. 245.

<sup>21</sup> Satochid Kartanegara, op.cit., p. 418.

<sup>22</sup> P.A.F. Lamintang and Franciscus Theojunior Lamintang, op.cit., p. 594.

I myself also use the word "Complicity" as a translation of "*deelneming*". The term "Complicity" is already well known in the academic and practical world in Indonesia, and is also the term chosen in the Indonesian Criminal Code. Thus, I agree with van Bemmelen, Schaffmeister, Keijzer and Sutorius, Satochid, and Lamintang where the term for the discussion of Chapter V of the Criminal Code is "*Daderschap en Deelneming*" which is translated as "Offenders and Complicity". One study conducted by B.F. Keulen et al from the Rijksuniversiteit Faculty of Law, Groningen in the Netherlands in 2010 also used the term "*Daderschap en Deelneming*".<sup>23</sup>

What is the concept and scope or forms of complicity in Indonesian criminal law above similar with the concept and forms of complicity in other countries? This is interesting to discuss in the context of the reformation of Indonesian criminal law that is being carried out. There are two issues that the author will discuss, namely: (1) What essentially is the concept of the complicity and (2) What are the forms of complicity in criminal offense in Indonesia if compared to other countries.

## 2. Analysis and Results

### 2.1. Definition of Complicity

According to Wirjono Prodjodikoro, the term *deelneming* in Book 1 Chapter V of the Indonesian Criminal Code can be translated as the participation of one or

<sup>23</sup> See B.F.Keulen et.al, (2010), "Daderschap en deelneming doorgelicht, Onderzoek naar het functioneren van de regeling van daderschap en deelneming in de rechtspraktijk tegen de achtergrond van een bespreking van het Nederlandse en Oostenrijkse recht", Groningen: Rijksuniversiteit Groningen. [https://www.rug.nl/research/portal/files/13141234/1919\\_volledige\\_tekst\\_tcm44\\_303993.pdf](https://www.rug.nl/research/portal/files/13141234/1919_volledige_tekst_tcm44_303993.pdf) accessed on May 22, 2020.

more persons when someone else commits a crime.<sup>24</sup> Meanwhile, according to Kanter and Sianturi, participation is that there are two or more persons who commit a crime or in other words there are two or more people taking part to fulfill a complete crime.<sup>25</sup> According to Moeljatno: "... it can be said that there is a complicity in the event that there is not only one person involved in a criminal offense, but a number of persons."<sup>26</sup> However, not every person who is involved in a criminal offense can be qualified as a participant in the meaning of Articles 55 and 56 of the Indonesian Criminal Code. For that, he must fulfill the conditions as stated in such articles.<sup>27</sup>

In the past, criminal law was only focused on the offenders of a criminal offense. Dutch criminal law makers, as in Indonesia and other countries, in formulating criminal offense generally start from the simplest event where one person commits a crime, because he is the one who demonstrate the substantive offense as formulated in the legislation, therefore he is considered as the criminal offender.<sup>28</sup> It is also apparent that we see in most formulations of the Indonesian Criminal Code articles that start with the words "whoever" or "any one" which may be concluded that there is only one criminal offender and who will be convicted when proven guilty.<sup>29</sup>

However, in reality there are a number of criminal offenses which involve more than one person or there are a number

of people who collaborate.<sup>30</sup> According to Jonkers, "A deed (*feit*) can be done by one person (*een persoon*) or by a number of persons (*meerdere personen*)."<sup>31</sup> For example, there is an offender and there is one or a number of other people who participate in committing a crime. There are times when an offender commits a crime, but the crime is committed because the offender is given a reward or promised something by someone else. So in this case, there are two people involved namely the offender and the accomplice who persuades or instigates or induces the offender. It could also be that a person commits a crime (for example robbery by violence) and in order to enable him committing the crime the offender needs a vehicle or a weapon and the offender is procured a vehicle or a weapon from someone else who aids him. In this case, it means the criminal offense involves more than one person; they are the offender and the accomplice who aids him.

In such case, the actual vehicle or weapon owner does not participate in the robbery by violence, because the offender is the person who physically commits robbery by violence. Can the owner of the vehicle and the weapon be convicted of the crime of robbery by violence which he does not commit? Even though he does not, he still has an important role in the commission of robbery by violence which is undertaken by the offender. So if he is acquitted without being convicted at all, it will certainly cause injustice. To what extent is he criminally liable? How does he share liability for the robbery by violence? Is the criminal sentence subject to the offender's punishment? Or is it different? These things are already regulated in criminal law.

Article 55 paragraph (1) of the Indonesian Criminal Code in the original

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<sup>24</sup> Wirjono Prodjodikoro, *Op.Cit.*, p. 117.

<sup>25</sup> E.Y. Kanter and S. R. Sianturi, *Op.Cit.* p. 336.

<sup>26</sup> Moeljatno, (2017), *Criminal Law, Attempts and Complicity in Crime*, Second Edition, Jakarta: Bina Aksara, p. 63.

<sup>27</sup> Moeljatno, *Ibid.*, p. 63-64..

<sup>28</sup> J.M. van Bemmelen, *Op.Cit.*, p. 263.

<sup>29</sup> Wirjono Prodjodikoro, *Principles of Criminal Law in Indonesia*, Third Edition (Bandung: Refika Aditama, 2003), p. 117.

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<sup>30</sup> See Wirjono Prodjodikoro, *Ibid.*, p. 117. Also see JM van Bemmelen, *Op.Cit.*, p. 263.

<sup>31</sup> J.E. Jonkers, *Op.Cit.*, p. 105.

text of WvS voor Nederlandsch-Indie (WvS voor Indonesia / Indonesian Criminal Code) reads as follows:

*Art. 55. (1) Als daders van een strafbaarfeit worden gestraft:*

*1<sup>o</sup> zij die het plegen, doen plegen of medeplegen;*

*2<sup>o</sup> zij die door giften, beloften, misbruik van gezag of van aanzien, geweld, bedreiging of misleiding of door het verschaffen van gelegenheid, middelen of inlichtingen het feit opzettelijk uitlokken.*

Article 55. (1) The following persons shall be criminally liable (*worden gestraft*) as offenders (*als daders*) of a criminal offense (*strafbaarfeit*):

1. any persons who commit (*plegen*) the offense, solicit the commission of a criminal offense (*doen plegen*) or commit the criminal offense jointly (*medeplegen*);
2. any persons who, by means of gifts (*giften*), promises (*beloften*), abuse of authority (*misbruik van gezag of van aanzien*), use of force (*geweld*), threats or deception (*bedreiging of misleiding*) or by providing opportunity (*verschaffen van gelegenheid*), means (*middelen*) or information (*inlichtingen*), deliberately abetting the commission of a criminal offense (*het feit opzettelijk uitlokken*).

Article 55 paragraph (2) of the Indonesian Criminal Code in the original text of WvS voor Nederlandsch-Indie reads as follows: "*Ten aanzien der laatsten komen alleen die handelingen in aanmerking die zij opzettelijk hebben uitgelokt, benevens hare gevolgen*" which translates to "With respect to abetting, only those acts they intentionally solicited, shall be taken into account, along with its consequences."

Article 56 of the Indonesian Criminal Code in the original text of WvS voor Nederlandsch-Indie (WvS voor Indonesia / KUHP) reads as follows:

*Art. 56. Als medeplichtigen aan een misdrijf worden gestraft:*

1. zij die opzettelijk behulpzaam zijn bij het plegen van het misdrijf;
2. zij die opzettelijk gelegenheid, middelen of inlichtingen verschaffen tot het plegen van het misdrijf.

The following persons shall be criminally liable as accomplices to a criminal offence:

1. any persons who intentionally aid and abet the commission of a criminal offense;
2. any persons who intentionally provide opportunity, means or information for the commission of a criminal offense.

We are talking about complicity in the event of other than the "principal" offender of a crime there is other person also involved. The latter person participates in the commission of criminal offense so intensively and plays an important role in a series of causes and effects to complete such offense so that they must be held criminally liable either as offender or accomplice, even though he himself is only carrying out a part of the whole formulation of criminal offense.<sup>32</sup>

We also talk about complicity in the event there are a number of people in a particular connection, where one person together with others have completed the commission of a criminal offense, while each of them only carries out a part (of the portions) of the crime. However, with their respective roles in fulfilling some parts of a criminal offense, all of the parts of a crime are finally completed or fulfilled.<sup>33</sup>

By using the provisions regarding complicity, a criminal offense that has been completed, for example theft, can result in a public prosecutor filing more than one indictments against a number of people, for

<sup>32</sup> D. Schaffmeister, N. Keijzer and E.PH. Sutorius, Op. Cit., p. 245-246.

<sup>33</sup> D. Schaffmeister, N. Keijzer and E.PH. Sutorius, Ibid., p. 246

example: (1) against Person A under Article 362 of the Indonesian Criminal Code; against Person B (the person who participates in the commission of the criminal offense) then is charged based on Article 362 in conjunction with Article 55 of the Indonesian Criminal Code (the Person B participates in the theft); against the Person C (person who aids the commission of the criminal offense) is charged based on Article 362 in conjunction with Article 56 of the Indonesian Criminal Code (the Person C assists the theft); (2) Against Person A and Person B (those participating in the commission of a criminal offense) are subject to Article 362 in conjunction with Article 55 of the Indonesian Criminal Code.<sup>34</sup>

## 2.2. Time of Complicity

When does Complicity occur? Complicity may occur before or precede the criminal offense that is the principal crime or it may also be simultaneous or at the same time as the commission of the principal crime. The types of Complicity that occur before or precede the principal crime are: (1) soliciting (*doen plegen*), (2) abetting (*uitlokking*) dan (3) aiding (*medeplichtige*) the commission of a criminal offense before the principal crime is committed. Types of Complicity that occur simultaneously or at the same time with the principal crime are: (1) committing the criminal offense jointly (*medeplegen*) dan (2) aiding the commission of a criminal offense at the time when the principal crime is committed.<sup>35</sup>

Thus, Complicity cannot take place after the completion of the principal crime. By using an explanation from Jonkers "Is het feit eenmaal voltooid, dan kan, naar het systeem onzer wet, van deelneming niet meer worden gesproken."<sup>36</sup> [After the deed (*feit*) is

done, then according to our legal system, *deelneming* / complicity can no longer be said].

For elaboration, I present the following illustration. After Person A had finished (*voltooid*) committing a theft (*diefstal*) to steal a new laptop belonging to Person B with the value of IDR 20 millions (punishable under 362 Indonesian Criminal Code), then Person A sold the laptop to Person C for IDR 2 millions (here Person C should be able to suspect that the laptop is a proceed of crime). The act of Person C buying a stolen laptop from Person A cannot be called complicity because the theft itself is already completed (*voltooid*). So, there is no complicity in the event. The act of Person C buying the proceed of crime from Person A is not qualified a complicity, but a whole different criminal offense, namely the trafficking or possession of property obtained by crime (*begunstiging*) (Articles 480-481 of the Criminal Code).

Other example is as follows. Person D sold narcotics to Person E. It was known by Person F who then reported it to officers of the Indonesian National Narcotics Agency (*Badan Narkotika Nasional* – BNN). A number of officers from the BNN immediately went to the apartment where Person D lived to conduct inspections and arrests. Upon knowing the arrival of the officers, Person D hid in his friend's room namely Person G who was willing to help him hide to escape law enforcement. The action of Person G was **not a complicity** in the narcotics case committed by Person D, because the sale of narcotics has been completed (*voltooid*). This Person G's act is a criminal offense of its own namely "intentionally hiding a person who has committed a crime or charged with a crime, or helping that person escape from an investigation and examination..." as provided for in Article 221 of the Indonesian Criminal Code.

There is also another article, Article 223 of the Indonesian Criminal Code which

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<sup>34</sup> Compare with D. Schaffmeister, N. Keijzer and E.P.H. Sutorius, *Criminal Law*, Ibid., p. 246.

<sup>35</sup> J.E. Jonkers, Op.Cit., p. 106-107. See also E. Utrecht, Op.Cit., p. 14-15.

<sup>36</sup> J.E. Jonkers, Ibid., p. 106.



reads: "Anyone who intentionally releases or provides assistance when escaping to a person who is detained by order of the general authority, under the order or decision of the judge, is punishable with a maximum of two years and eight months in prison." So, intentionally releasing or providing assistance to people who are detained by law enforcement, is not complicity, so it is not related to Article 55 or 56 of the Indonesian Criminal Code, because the act is occurred after the person he helped has completed committing a crime. So his action is a separate crime as regulated in Article 223 of the Indonesian Criminal Code.

### 2.3. Forms of Participation in Other Countries

As comparisons, we will look at the forms of complicity in a number of countries, all of which are from the Civil Law legal systems, namely the Netherlands, Germany, France, Thailand and Japan.

#### 2.3.1. Complicity in the Netherlands

In Wetboek van Strafrecht Netherlands 1881 which was amended in 2017, Complicity is regulated in Title V, entitled *Deelneming aan strafbare feiten*, Articles 47 and 48. The formulation of the Articles is almost similar with Articles 55 and 56 WvS voor Indonesia (Indonesian Criminal Code). The title of the chapter is identical with WvS voor Indonesia (Indonesian Criminal Code) which is still effective today in our country. As I explained above, even though it has been in force since 1886, the Criminal Code has not been undergone a change regarding complicity. However, there is a slight difference on the literal formulations of the Dutch WvS with WvS voor Indonesia (Indonesian Criminal Code), as seen below:

Article 55 and 56 WvS voor Indonesia (Indonesian Criminal Code)

Art. 55. (1) *Als daders van een strafbaarfeit worden gestraft:*

1. *zij die het plegen, doen plegen of medeplegen;*
2. *zij die door giften, beloften, misbruik van gezag of van aanzien, geweld, bedreiging of misleiding of door het verschaffen van gelegenheid, middelen of inlichtingen het feit opzettelijk uitlokken.*

Art. 55 (2) *Ten aanzien der laatsten komen alleen die handelingen in aanmerking die zij opzettelijk hebben uitgelokt, benevens hare gevolgen.*

Art. 56. *Als medeplichtigen aan een misdrijf worden gestraft:*

1<sup>o</sup> *zij die opzettelijk behulpzaam zijn bij het plegen van het misdrijf;*

2<sup>o</sup> *zij die opzettelijk gelegenheid, middelen of inlichtingen verschaffen tot het plegen van het misdrijf.*

We will see below Article 47 and 48 Dutch WvS is almost identical as the formulations of Articles 55 and 56 of the Indonesian Criminal Code above. This means that both in the Netherlands and in Indonesia there has been no change in the formulation.

artikel 47

1. *Als daders van een strafbaar feit worden gestraft:*

- a. *zij die het feit plegen, doen plegen of medeplegen;*
- b. *zij die door giften, beloften, misbruik van gezag, geweld, bedreiging, of misleiding of door het verschaffen van gelegenheid, middelen of inlichtingen het feit opzettelijk uitlokken.*

2. *Ten aanzien van de laatsten komen alleen die handelingen in aanmerking die zij opzettelijk hebben uitgelokt, benevens hun gevolgen.*

Artikel 48

*Als medeplichtigen van een misdrijf worden gestraft:*

1. *zij die opzettelijk behulpzaam zijn bij het plegen van het misdrijf;*

2. *zij die opzettelijk gelegenheid, middelen of inlichtingen verschaffen tot het plegen van het misdrijf.*

So the forms of complicity in Dutch criminal law are similar with Indonesia, namely: soliciting (*doen plegen*), committing jointly (*medeplegen*), abetting (*uitlokken*), and aiding the commission of a criminal offense (*medeplichtige*). Actually this can be divided into two groups, namely: (1) Offender (*Dader*) as regulated in Article 47 and (2) Accomplice (*Medeplichtigen*) as regulated in Article 48. These articles were adopted in Articles 55 and 56 of the Indonesian Criminal Code.

### 2.3.2. Complicity in Germany

According to Moeljatno, complicity in Germany can be divided into three groups: *Mittäterschaft*, *Anstiftung* and *Beihilfe*.

<sup>37</sup> Provisions on complicity are regulated in Chapter 3 (*Dritter Titel*) of the German Criminal code (*Strafgesetzbuch*, StGB) 1998 (amended on June 19, 2019), with the chapter title: *Täterschaft und Teilnahme* which is translated in English into *Principals and Secondary Participants*. This title is similar to "*daderschap en deelneming*" (About Offenders and Complicity). This *täterschaft* is the same as "*daderschap*". While *Teilnahme* is the same as *deelneming*. The title "*daderschap en deelneming*" (About Offenders and Complicity) was proposed by a number of Dutch and Indonesian criminal law experts, as we have discussed above.

Article 25 (1) of the German Criminal Code states it is punishable as Offender (*Täter* – or in Dutch language *Dader*) any person who commits a criminal offense by himself or through another person. This formulation is in accordance with Article 55 paragraph (1) of the Indonesian Criminal Code, but German provision is added with the condition "or through someone else". Thus, this includes *plegen* and *doen*

*plegen* (committing a crime through another person). Whereas, Article 20 of the Indonesian Criminal Code is formulated as follows: "committing a crime by means of a device or soliciting another person who cannot be held liable."

Article 25 (2) of the German Criminal Code states that if more than one person / several persons commit a criminal offense together, each person is responsible for being the *Täter bestraft* (*Mittäter*). In the Dutch language it might be the same as a *mededader* which if translated in English becomes *joint principals / joint offenders* and in Indonesian becomes "*turut serta*" or committing a criminal offense jointly.

Article 26 of the German Criminal Code governs *Anstiftung*. According to this article, *Anstifter* is anyone who intentionally enables others (i.e. *abettor / the enabler / physical offender*) to commit a crime. This person is convicted as *Täter* (*dader / Offender*). The provisions of Article 26 of the German Criminal Code are very similar to the provisions regarding *uitlokker/uitlokking* or abetting as regulated in Article 55 paragraph (1) to 2 of the Indonesian Criminal Code.

Article 27 of the German Criminal Code governs *Beihilfe* or Aiding. Article 27 paragraph (1) states that any person who intentionally aids another person who intentionally commits a criminal offense is convicted as a person who aids a criminal offense. The punishment for those who aid is based on the crime charged on the offender which shall be reduced according to the provisions of Article 49 (1). This provision is similar to Article 56 of the Indonesian Criminal Code.

From the elaboration above we can conclude that the form of complicity in German criminal law is very similar to the form of complicity in Dutch and Indonesian criminal law.

### 2.3.3. Complicity in France

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<sup>37</sup> Moeljatno, Op.Cit., p. 74.



Complicity in the French Penal Code is regulated in Articles 121-4, 121-6, and 121-7. Article 121-4 states that: "*Est auteur de l'infraction la personne qui : 1° Commet les faits incriminés ; 2° Tente de commettre un crime ou, dans les cas prévus par la loi, un délit.*" Meaning: *Est auteur* is translated as an offender (*dader*) of a criminal offense who: (1) commits a prohibited act (a criminal offense); (2) commit an attempted crime or certain violations if specified by law. It seems that the provisions in this Article are similar to the provisions concerning *plegen* and *medeplegen* in Article 55 paragraph (1) to 1 of the Indonesian Criminal Code.

Article 121-6 of the French Penal Code states that: "*Sera punie comme auteur le complice de l'infraction, au sens de l'article 121-7.*" [Participants in a criminal offense, referred to in Articles 121-7, are convicted as *Auteur* (*Dader* / Offender). It seems that what is regulated in Articles 121-6 is similar to Article 55 paragraph (1) of the Indonesian Criminal Code earlier, which is "Punishable as a *dader*..."

Article 121-7 of the Code Penal states:

"*Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation.*

*Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre.*"

[Participant of a felony or *delit* (minor crime) is any person who intentionally, by aid or assistance has facilitated in preparing or completing the commission of a criminal offense.

Any person who because of gifts, promises, threats, orders, or abuse of authority or power or instructions given commits a crime is also an *accomplice* of a criminal offense.]

Paragraph 1 of Article 121-7 of the French Penal Code is similar to Article 55 paragraph (1) number 1 except about soliciting in the commission of a criminal offense, because the French Penal Code does not separate "soliciting in the commission of a criminal offense" as a distinct category, but rather becomes integrated with the offender category. While the second paragraph of this article governs regarding abetting. Meanwhile, according to Moeljatno, the French Penal Code does not distinguish the liability between the offender and the accomplice or other participant, between "*auteur*" and "*complices*". Abettor is classified as "*complices*".<sup>38</sup>

### 2.3.4. Complicity in Thailand

In Thailand Criminal Code,<sup>39</sup> complicity is regulated in Chapter 6 regarding Offenders and Complicity. Article 83 regulates that in the event of a criminal offense is committed by two or more persons, the crime is considered to have been committed by the convicted offenders as regulated for the crime. This provision is similar to the provisions regarding the offenders stipulated in Article 55 paragraph (1) of the Indonesian Criminal Code.

Article 84 of the Thailand Criminal Code regulates abetting, with efforts similar to those stipulated in Article 55 paragraph (1) number 2 Indonesian Criminal Code. Article 84 of the Thailand Criminal Code states that any person whether due to employment, coercion, threat, hire, solicitation, or in other ways, causes others to commit a criminal offense is called an abettor.

Article 85 of the Thailand Criminal Code regulates differently from Article 55 of the Indonesian Criminal Code. Article 85 of the Thailand Criminal Code states that

<sup>38</sup> Moeljatno, Op.Cit., p. 72-73.

<sup>39</sup> Criminal Code B.E. 2499 (1956).

anyone who distributes or publishes to the general public to commit a crime that is punishable with imprisonment of not less than six months, will be subject to half of the sentence convicted on the crime. So there is a kind of abetting to the public to commit a crime, if it is not essentially aimed to a particular person whom the offender encourages. It does not seem to mean that the incitement is actually carried out by people who hear or know the incitement. If the crime he calls for is actually carried out by any person due to his incitement / propaganda or publication, then it will be subject to punishment as the offender.

Article 86 of the Thailand Criminal Code stipulates that any person and for any reason provides assistance or aids others before the other person commits a crime or shortly before the crime is committed, even though the aid is unbeknownst to the offender, the aid is considered as support in the commission of a criminal offense. The person who aids is punishable to two-thirds of the offender's sentence. The provisions of Article 86 of the Thailand Criminal Code are very similar to the provisions of Articles 56 and 57 of the Indonesian Criminal Code. But with the emphasis that the person who aids will still be convicted even though the offender he aided is unaware of the aid. There are other provisions of this Chapter which regulate further and details regarding complicity in the Thailand Criminal Code Articles 87 to 88.

Looking back to earlier elaboration, we can see the forms of complicity in the Thailand criminal law is also very similar to the complicity in the Indonesian criminal law which also recognizes the forms of complicity in participation in committing a crime, aiding and abetting, with some differences that I have mentioned previously. However, the form of complicity of soliciting the commission of a criminal offense (*doen plegen*) is not specifically regulated in this chapter of the complicity of

the Thailand Criminal Code. It seems to have been covered by the above provisions specifically in Article 84 of the Thailand Criminal Code because there is no distinction that the physical offender can be held criminally liable or not. My opinion is that, if the physical offender is able to be held criminally liable then it is the same as Indonesian rule, namely abetting, if the physical offender cannot be convicted, there is the form of complicity of soliciting in the commission of a criminal offense. Another possibility is that, in the case of soliciting in the commission of a criminal offense, it is clear that the abettor is the only person who can be held criminally liable, while the physical offender is not convicted. So even though it is not regulated in this chapter, it is clear in Thailand criminal law.

### 2.3.5. Complicity in Japan

In the Japanese Criminal Code<sup>40</sup> the provisions of complicity is set forth in Chapter XI which the provisions are more straightforward. Article 60 of the Japanese Criminal Code governs complicity (*Co-Principal*) or in the concept of complicity in the Netherlands and Indonesia is called *mededader / medepleger*. In the Article, it is stated that "two or more people who committed crimes in joint action are all offenders."

Article 61 of the Japanese Criminal Code regulates regarding abetting (*instigator*). The Article states that a person who abets another to commit a crime is punishable as a criminal offender. The same thing applies to anyone who abets another to persuade. So here there is persuasion on abetting, or *multiple construction*.

Article 62 of the Japanese Criminal Code stipulates regarding aiding (*accessory*). As stated in the Article 62, someone who aids an Offender is called as *accessory* (accomplice in criminal

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<sup>40</sup> Act No. 45 of 1907 amended in 2006.

offense). Anyone who persuades others to aid a crime is criminally liable as anyone who aids the crime. It also has a double *construction*, namely abetting for aiding. I will discuss this in more detail in the next chapter.

Article 63 emphasizes that a criminal sentence for any person who aids is more lenient than the offender. We can see that the forms of complicity in Japanese criminal law are also similar to complicity in Indonesian criminal law, that is, there is participation, aiding and abetting in the commission of a criminal offense. However, as is the case in the Thailand Criminal Code, it is not expressly mentioned the distinction between abetting and soliciting in the commission of a criminal offense. In my opinion the reason is also the same as the regulation in the Thailand Criminal Code that I have discussed earlier.

### 3. Conclusion

Based on the elaboration above, it can be concluded as follows. First, we talk about complicity in the event of other than the offender of a crime there is someone else involved. The latter person is involved in the commission of criminal offense so intensively and plays an important role in a series of causes and effects leading to the commission of the crime so that he must be held responsible either as offender or accessory to crime even though he himself is only carrying out a part of the complete formulation of the criminal offense. We also talk about complicity in the event there are a number of people in a particular connection, where one person together with others have completed the commission of any criminal offense, while each of them only carries out a part (of the portions) of the crime. However, with their respective roles in fulfilling some parts of a criminal offense, all of the parts of a crime are finally completed or fulfilled. Complicity may occur before or

precede the criminal offense that is the principal crime or it may also be simultaneous or at the same time as the commission of the principal crime. Complicity cannot take place after the completion of the principal.

Second, Complicity is also regulated in the Criminal Code of various countries as we see Articles 47 and 48 of the Dutch WvS are almost identical with the formulation of Articles 55 and 56 of the Criminal Code above. This means that both in the Netherlands and in Indonesia there has been no change in the literal formulation since the beginning of its entry into force. A form of complicity in German criminal law is very similar to the form of complicity in criminal law the Netherlands and Indonesia. The main difference between complicity in the French Penal Code and the Indonesian Criminal Code is that the French Penal Code does not make "order to commit an offense" a separate category, but rather becomes one with the offender. The French Penal Code does not hold a difference in liability between the offenders and other participants, between "*auteur*" and "*complices*". An abettor or anyone who induces other to commit a crime is classified as "*complices*". The forms of complicity in Thai criminal law are also very similar to complicity in Indonesian criminal law in which there is a form of participation in the commission of an offense, aiding and abetting. However, the form of complicity in soliciting the commission of a criminal offense is not specifically regulated in the chapter of Complicity of the Thailand Criminal Code. It seems to have been covered by the provisions regarding the Offender. The Thailand Criminal Code does not distinguish that the physical offender can be held criminally liable or not. The forms of complicity in Japanese criminal law are also similar to complicity in Indonesian criminal law, they are, participation in the commission of a criminal offense, aiding and abetting t in the

commission of a criminal offense. However, as is the case in the Thailand Criminal Code, it is not expressly mentioned the distinction between abetting and soliciting in the commission of a criminal offense.

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