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RESEARCH ARTICLE

Models of Criminal Liability of a Plurality of Perpetrators under Polish and German Criminal Law: Comparative Approach

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Abstract

Polish-German history goes back centuries. The long-lasting relationship of the two countries also becomes apparent looking at their regimes of criminal liability as a perpetrator. The article presents these models focusing on the phenomenon of cooperation of criminals of more than one perpetrator. The purpose of this study is to consider co-perpetration as a form of committing a prohibited act. The article seeks to capture the entirety of criminal lawlessness of committing prohibited acts in the form of co-perpetration and perpetration by means, through the analysis of the currently functioning regulations of the Polish and German Criminal Codes and their comparative approach, as well as determining the scope of legal liability in this regard. An analysis of the possibility of liability for committing a prohibited act in the form of co-perpetration in the light of philosophical and psychological concepts of criminal law was also carried out. The article also presents a historical analysis of Polish and German regulations in the field of criminal liability. The article presents a historical analysis of Polish and German regulations in the field of criminal liability for committing a crime in the form of complicity, based mainly on the post-partition and post-war history of Poland. Due to their common heritage to the Prussian Landrecht and criminal code as well as Feuerbach's Bavarian Criminal Code, it is proved that the models of criminal liability of a plurality of perpetrators under Polish and German criminal law share many similarities.

Keywords

Criminal law, Perpetration, Criminal cooperation, Liability of co-perpetrators, Polish criminal law, German criminal law

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I. Preliminary Remarks. Outline of the Problem

The German Penal Code of 1871[1] punishes the criminal act itself rather than the person committing it.[2] Its provisions describing the types of offenses are created by using verbs expressing an executive action in such a way as to suggest that one person implements them. Although there were aspirations in the 1930's to depart from this focus on the action and introduce a new focus on the criminal person. After the defeat of the Nazi regime, these changes were rolled back and the last traces of a focus on a normative type of criminal perpetrator can be found in §§ 211, 212 of the German Penal Code which punish 'a murderer'[3].

The provisions of the Polish Criminal Code[4] similarly describe the punishable behavior instead of the perpetrator. Exceptions can be made to Art 158 § 1 of the Code: 'Who is involved in a fight or beating in which he exposes himself to the immediate danger of loss of life' and Article 197 § 3 of the Code, where cooperation with another person becomes a specific qualifying mark – 'If the perpetrator commits rape together with another person'.

Practice shows that committing crimes often occurs with the cooperation of many people. And this interaction is organized, with the distinct roles of individual participants. Individual behaviors acquire a specific meaning only when they are evaluated in the context of the behavior of other cooperatives. Often only the sum of individual actions taken in accordance with a specific plan result in an infringement or a threat to a legal right. Moreover, these behaviors, assessed in isolation from the behavior of other cooperatives, do not have to constitute the elements of a crime or be particularly reprehensible.

Based on both German and Polish Criminal Codes, collective responsibility should be distinguished from criminal cooperation, i.e. situations where a certain group of persons associated with the act itself or the perpetrator by a specific objective criterion, independent of the causal offense itself, is held criminally liable for a specific criminal act. Collective responsibility may historically have affected the perpetrator's family members (on the basis of blood ties), people living in the area where the offense was committed, or persons belonging to a given organization.[5] Particularly in the latter case, where the organization was illegal or had the aim of committing criminal offenses, it was sometimes assumed that participation in such an organization itself is the basis for liability for any offense committed by its members.

1 'German Penal Code of 15.05.1871 in the Adaption of 13.11.1998 (BGBl I S 3322), Last Amended by Art 4 of the Act to Amend the Federal Central Register and the Penal Code of 04.12.2022 (BGBl I S 2146)'.

2 See for a detailed historical overview Claus Roxin and Luís Greco, *Strafrecht Allgemeiner Teil Band I Grundlagen – Der Aufbau Der Verbrechenslehre* (CH Beck 2020) § 6.

3 English translation by Michael Bohlander, *The German Criminal Code: A Modern English Translation* (Hart Publishing 2008).

4 'Ustawa z Dnia 6 Czerwca 1997 r – Kodeks Karny (Dz. U. z 2022 r Text No 1138).'

5 Juliusz Bardach, *Historia Ustroju i Prawa Polskiego* (LexisNexis 2005).

Group liability is contrary to the principle of individualization of punishment and the principle of guilt adopted under the Polish and German Criminal Codes.

It should be emphasized that the scope of criminal liability of persons who in one way or another cooperate in committing a criminal act is culturally variable. It covers those who engaged in conduct both in the period preceding the criminal act and subsequently. The substantive link between the act which implements the characteristics of the type of prohibited act and other conduct as the general criterion of cooperation therefore needs to be clarified.

This study attempts to capture the entirety of criminal lawlessness of committing prohibited acts when more than one perpetrator acts. To do so, the article analyzes the currently functioning regulations of the Polish and German Criminal Codes and their comparative approach, as well as determines the scope of legal liability in this regard. An analysis of the possibility of liability for committing a prohibited act in the form of cooperation between criminals in light of philosophical and psychological concepts of criminal law will be carried out. The analyzes are intended to demonstrate the adopted assumption in the form of similarities between both law regimes which are to be derived from the common history of both legislative orders.

II. Basics of Responsibility for Criminal Cooperation – A Historical and Philosophical Outline

Historically, the grounds for criminal liability for criminal cooperation depended on the adopted concept of perpetration, i.e. on determining what features must be met by the behavior of a person to be considered as the implementation of the element of an executive act indicated in the description of the prohibited act.

A. Distinction between Primary and Secondary Liability

In the formal-objective approach, the perpetrator is the person whose behavior is the designation of this executive action, regardless of in whose interest and for what purpose he does it.[6] In the material-objective approach, the perpetrator is the person whose decision or behavior significantly determines the event that fulfils the constituent elements of a prohibited act[7]. Thus, the concept of perpetration includes any behavior that itself is a designation of an executive act or conditions the performance of such an act by another person. The criterion of perpetration based on this concept will be the objective relationship of a given behavior to the determination of the executive act, and this relationship includes all behaviors conditioning the commission of a

6 Włodzimierz Wróbel and Andrzej Zoll, *Polskie Prawo Karne. Część Ogólna* (Znak 2013); Wolfgang Joecks and Jörg Scheinfeld, 'Vor § 25 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 1 (4th edn, CH Beck), mn. 10–11.

7 Ibidem.

prohibited act. It should be noted that this concept introduces additional criteria that help to distinguish proper agency from instigation and aiding and abetting, but these considerations are not the subject of this study.[8]

Subjective concepts of perpetration indicate that the basic criterion for distinguishing is the attitude of a given person to the committed act. This means that the perpetrator is the one who has the will to carry out a given prohibited act as his own – *animus auctoris*. Thus, the perpetrator will not be the one who wants another person to commit a prohibited act. Therefore, even the one whose behavior fulfils all the elements of a crime can be an accomplice if he acted with the will only to participate in another's crime – *animus socii.*[9] The strict version of the subjective approach has been historically very influential on German jurisprudence. Today however, it is rare to rely on the strict subjective theory which only serves as a starting point to understand the discussion between the objective approaches and a moderate understanding of the subjective concept.[10]

Departing from the strictly objective or subjective theories, the theory of 'power over the act' or 'control over the crime' tries to take objective and subjective elements into account.[11] According to this theory, the perpetrator is the one who controls the behavior of other people, having control over the course of the event that has the characteristics of a crime.[12] Consequently, the principal participant can be described as the 'central figure' of the crime whereas secondary participants just 'stand aside'.[13]

This theory has been so successful that even advocates of a subjective approach have started to take the power over the act into account when determining the *animus auctoris.* In the moderate-subjective theory, control over the crime or at least the will thereto serves as one indicator of the principal's will next to the degree of interest in the crime to succeed or the extend of involvement in the commission of the crime.[14]

B. Accessorial and Unitary Participation

Bearing in mind the general concepts of perpetration outlined in this way, it is possible to indicate at least several general models for determining the principles of criminal liability for criminal cooperation.

8 Władysław Wolter, *Nauka o Przestępstwie* (PWN 1973).

9 In the famous 'bathtub case' of the Reichsgericht (*RGSt 74, 84*.), the accused was the sister of a woman who gave birth to a child outside a marriage. She drowned the newborn child to help her sister avoid social stigma. The Reichsgericht found that the accused acted solely in the interest of the young mother and was thusly to be held accountable as a secondary accomplice even though she fulfilled all the elements of the crime in her own person.

10 Kristian Kühl, *Strafrecht Allgemeiner Teil* (8th edn, Verlag Franz Vahlen 2017) § 20, mn. 20–23.

11 Harro Otto, 'Täterschaft, Mittelbare Täterschaft Und Mittäterschaft' [1987] Juristische Ausbildung 246, 248.

12 Wróbel and Zoll (n 6).

13 Kristian Kühl, 'Täterschaft Und Teilnahme' [2014] Juristische Arbeitsblätter 668, 669.

14 *BGH, NStZ-RR 2016, 6,* 7.

According to the concept of participation in someone else's crime, only the perpetrator alone or jointly and in agreement with another person, conducts all the features of a prohibited act commits his or her own crime. Others who cooperate do not then commit their own crimes, but only participate in the main crime, which is also a source of reprehensible behavior of other cooperating parties. The liability then results from the principle of accessory and as such depends on the responsibility of the proper perpetrator.[15] In a variety of this principle – known as the principle of limited accessory – it is sufficient that the principal perpetrator commits an intentional and unlawful, but not necessarily guilty act.[16]

The concept of uniform perpetration treats all cooperating parties, regardless of the nature of their actions or the criminal liability of others, as responsible perpetrators. Therefore, it does not matter whether the main perpetrator has committed the constituent elements of a prohibited act and whether he even attempted to commit a crime at all, or whether he can be blamed. Consequently, each of the cooperating parties commits his or her own crime, for which he is liable under general rules. The basis for differentiation of the penalty is the degree of actual or alleged contribution to the commission of the crime.

The concept of treating instigation as well as aiding and abetting as *delictum sui generis* took quite different assumptions. Instigation as well as aiding and abetting would be included in the specific part of the Code as separate types of offences, the commission of which would be punishable by a separate sanction[17]. According to the authors of this very article, this concept encounters difficulties at the level of defining the limits of this sanction. It would have to include behaviors with such varying degrees of social harmfulness as incitement to destroy property of little value and abetting to murder.

One of the variations of this concept was the introduction to each type of prohibited act from the special part of such an approach to the executive act that, apart from the actual perpetration, it included instigation, aiding and abetting, or supplementing a given type of prohibited act with a related provision specifying the criminal sanction for instigation, aiding, or abetting to carry out this type of prohibited act. Importantly, the Polish Criminal Code of 1997 currently in force sometimes directly introduces, in the specific part, criminal liability for behavior of an instigation, aiding, or abetting nature. As examples can serve Art 151 of the Polish Criminal Code ('Whoever by persuasion or by providing help leads a man to take his own life') or Art 152 § 2 of the Criminal Code ('The same penalty applies to anyone who assists a pregnant

15 Lech Gardocki, *Prawo Karne* (CH Beck 2021); Wolfgang Joecks and Jörg Scheinfeld, 'Vor § 26 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 1 (4th edn, CH Beck), mn. 18.

16 Günter Heine and Bettina Weißer, 'Vor. §§ 25ff StGB' in Albin Eser (ed), *Schönke/Schröder* (30th edn, CH Beck) mn. 22–24.

17 Kazimierz Buchała, *Polskie Prawo Karne* (PWN 1997).

woman in terminating her pregnancy in violation of the provisions of the Act or who induces her to do so.'). This solution has been applied in situations where the behavior of the main perpetrator, for various reasons, is not a crime.

III. The Polish Criminal Code

A. Historic and Current Understanding of Perpetration

The original Polish concept of recognizing the criminal liability of cooperating persons was to define perpetration, instigation, abetting and aiding as general phenomenal forms of committing a crime. The creator of this concept was Juliusz Makarewicz, and it was reflected in the regulations of the Polish Criminal Code of 1932[18]. It should be noted that this concept evolved over time and its current statutory interpretation differs from the original version. Makarewicz assumed that the types of prohibited acts included in the special part of the Criminal Code referred only to perpetration. Instigation, abetting and aiding were included in the general part of the code as special forms of committing a crime and referred to each of the types appearing in the special part. Perpetration, instigation, abetting and aiding were thus equated and treated as technical forms of committing a crime – phenomenal forms. They were independent in nature, i.e., it did not matter for the criminal liability of the instigator whether the perpetrator had committed the act he was abetted to do at all. The aider or abettor committed a separate crime from the perpetrator and was responsible for it within the limits of his intent and guilt. The criminal and political circumstances leading to the repeal of criminality also referred to each form of committing a crime separately.[19]

It seems that consistent treatment of instigation, abetting and aiding as phenomenal forms of committing a crime, equivalent to perpetration, would lead to the conclusion – contrary to J. Makarewicz – that in the case of individual crimes, an aider or abettor should have the subjective characteristics specified in each type of prohibited act, as a rule related to perpetrators. The absence of such a feature would therefore have to result in impunity. As early as 1937, the Polish Supreme Court ruled that an instigator or an accomplice is liable for an individual crime, regardless of whether the perpetrator possesses the characteristics required by law.[20]

A similar remark applies to prohibited acts to which circumstances of a subjective nature, related to limited guilt, e.g., murder of passion, were introduced – they could only refer to the perpetrator in the strict sense. As a departure from the principle of full independence of phenomenal forms, it was necessary to link the limits of the

18 Juliusz Makarewicz, *Kodeks Karny z Komentarzem* (1938).

19 ibid.

20 *Decision of the Supreme Court of Poland I K 736/36 of 20/03/1937*.

penal sanction, which was threatened by instigation, abetting and aiding to commit a specific prohibited act, with the amount of the statutory threat provided for in the special part for perpetrating this act.

B. General Approach to Perpetration Under the Polish Criminal Code

The term perpetration *(sprawstwo)* appears in the content of the Polish Criminal Code in many provisions with two meanings: narrower, omitting instigation, abetting and aiding (e.g. Art 21 § 2 of the Criminal Code: 'If a personal circumstance concerning the perpetrator, affecting even only higher punishment, is a constituent element of a prohibited act, the cooperating party is liable for the penalty provided for this prohibited act, if he knew about this circumstance, even if it did not apply to him)', and a broader one, applicable to all forms of criminal cooperation (most provisions of the general part of the Criminal Code).

Pursuant to Art 18 § 1 of the Criminal Code, not only the one who performs the prohibited act alone or jointly and in agreement with another person is responsible for the perpetration, but also the one who directs the performance of the prohibited act by another person or taking advantage of the dependence of another person on himself, instructs him to perform such an act. Therefore, this provision provides for four causative forms: perpetration, co-perpetration, ordering perpetration and commanding perpetration. In practice, this means that based on the Polish Criminal Code, a broad understanding of perpetration has been adopted, including also behaviors that only indirectly lead to the implementation of the characteristics of an executive act described in the type of prohibited act in the special part of the Criminal Code. The regulation of Art 18 § 2 of the Criminal Code is an interpretative rule, according to which the verbal act expressed in the description of the type of prohibited act also includes the behaviour described in this provision as co-perpetration, commanding perpetration, and ordering perpetration. This means that the constituent element of an executive act can be realized in four ways – by undertaking the behavior constituting the designation of this element on your own, by jointly carrying out this behavior with another person, by issuing an order to perform such a behavior and by directing the execution of such behavior by another person. As an example, one can mention Art 148 § 1 of the Criminal Code – 'Whoever kills a man is to be punished.' Due to the content of Art 18 § 1 of the Criminal Code, killing may also include killing a person jointly and in agreement with another person, issuing an order to kill or directing a killing performed by another person.

The forms of perpetration mentioned in Art 18 § 1 of the Criminal Code are, however, only technical ways of implementing an executive act, and in order to perform it, it is necessary to perform all the constituent elements of a prohibited act,

in particular the occurrence of an effect or the implementation of a specific behavior by the person to whom the order was given.[21] In this sense, the responsibility of a co-perpetrator, an ordering perpetrator or commanding perpetrator depends on the other person's undertaking behavior that directly refer to the executive action specified in the type of prohibited act. The construction of the causative figures adopted based on this provision therefore refers to the concept of J. Makarewicz. They take over the elements of the concept of participation in someone else's crime (accessory nature) and elements of the concept of uniform perpetration (assigning a separate crime to each of the perpetrators).

IV. The German Penal Code

Individual responsibility for criminal actions under the German Penal Code is laid down in §§ 25–27 of the Penal Code. On one hand, § 25 contains individual direct perpetration (subpara 1 alt 1), individual indirect perpetration (subpara 1 alt 2) and co-perpetration (subpara 2) for three different definitions of perpetration. On the other hand, § 26 defines instigation and § 27 aiding and abetting as forms of participation in another person's crime. The German legislator thus opted for a differentiated approach to criminal responsibility by distinguishing these forms of participation already on the level of their contribution and a restrictive understanding of perpetration.[22] Doing so, the Penal Code adheres to the principle of limited accessory when it demands that the principal perpetrator 'intentionally commit[s] an unlawful act' in § 26 of the Penal Code and the 'intentional commission of an unlawful act' in § 27 subpara 1 of the Penal Code. This can be said at least about any criminal offense which requires some form of intentional commission. Since § 26 and § 27 of the Penal Code both require an intentional contribution, negligent instigation or negligent aiding and abetting is not possible under the current scheme of the German Penal Code.[23] This leads to the use of a restrictive understanding of perpetration when it comes to intentionally committing a crime, whereas in the field of negligence an extensive understanding is applied.[24]

A. Types of Criminal Offenses

The distinction between the types of crimes is crucial for determining the possibilities of different ways of commission. Firstly, there are crimes which can be committed by anybody, for instance causing bodily harm as in § 223 of the Penal Code which reads 'Whosoever physically assaults or damages the health of another

21 Piotr Kardas, 'Przypisanie Skutku Przy Przestępnym Współdziałaniu' [2004] Przegląd Prawa Publicznego nr 4.

22 Kühl (n 10)§ 20, mn. 7.

23 Claus Roxin, *Strafrecht Allgemeiner Teil Band II – Besondere Erscheinungsformen Der Straftat* (CH Beck 2003) § 25, mn. 9.

24 Heine and Weißer (n 16) mn. 9.

person, shall be liable […].' These so called 'anybody-offenses' *(Jedermansdelikte)* are the majority of offences contained in the special part of the Penal Code. In dealing with them, no peculiarities need to be observed as they only describe an act which is prohibited by law. All three variations of commission as a principal perpetrator of § 25 of the Penal Code can be applied to anybody-offenses just as someone can instigate or aid or abet another person to commit an anybody-offense.

Secondly, there are crimes that require an action, which can only be fulfilled by the perpetrator himself.[25] Similar to special offenses, the possibilities to cooperate with another person as a perpetrator are limited in cases of these single-handed offenses *(eigenhändige Delikte)*. One instance of a single-handed offense is false testimony as in § 153 of the Penal Code: 'Whosoever as a witness or expert gives false unsworn testimony before a court […] shall be liable […].' The behavior under punishment is lying before a court. Only the person speaking in that moment can be lying and therefore giving false testimony.

Thirdly and finally, there are certain offenses, which require the perpetrator to possess a specific characteristic – so called special offenses *(Sonderdelikte)*. Someone who does not possess this characteristic cannot be characterized as having fulfilled any of the three forms of perpetration and can therefore be a secondary participant only.[26] One example can be found in § 339 of the Penal Code which deals with perversion of justice. It states: 'A judge, another public official or an arbitrator who in conducting or deciding a legal matter perverts the course of justice for the benefit or to the detriment of a party shall be liable […].' The wording of the provision requires the perpetrator to hold a specific position in a trial or other legal proceeding. If defense counsel lies about the facts of the case, this might lead to a wrong acquittal of the defendant. Nonetheless, the defense attorney is neither a judge nor another public official[27] and therefore lacks the required position to be prosecuted as a perpetrator of § 339 of the Penal Code. They might be tried for obstruction of prosecution (§ 258 of the Penal Code) or as a participant in the judge's crime of perverting the course of justice if they applied the incorrect factual basis pursuant to a common plan.

In cases where the elements of a crime stipulate the existence of a special personal characteristic, the absence of the required characteristic excludes the possibility participation as a primary. Secondary participation is possible and regularly the case.

25 For a detailed discussion see Helmut Satzger, 'Die Eigenhändigen Delikte' [2011] Juristische Ausbildung 103.

26 Johannes Wessels, Werner Beulke and Helmut Satzger, *Strafrecht Allgemeiner Teil* (52nd edn, CF Müller 2022)§ 1, mn. 55.

27 Even though a lawyer is an independent agent of the administration of justice according to § 1 of the Federal Code of Lawyers (BRAO), they are not covered by the definition of a public official of § 11 subpara. 1 no. 2 of the penal code. See e.g. Matthias Korte, '§ 339 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 6 (4th edn, CH Beck) mn. 56.

B. Levels of Criminal Behavior

Determining criminal responsibility under the German Penal Code requires three steps.[28] Firstly, an act which fulfils the definition of a crime needs to have been committed. This level comprises the *actus reus* as well as the *mens rea* of the offense. Secondly, the perpetrator must have acted unlawfully. On this level grounds for excluding the illegality of the action – e.g., self-defense according to § 32 of the Penal Code – might come into play. Thirdly, the action must be blameworthy. This is the case if the perpetrator is guilty, i.e., the legal order can personally reproach him for his action and no ground excluding the guilt such as § 35 of the Penal Code is applicable.

V. Forms of Perpetration

Both provisions governing perpetration provide different forms of perpetration. For the purpose of this study, the modes of perpetration as in Art. 18 § 1 of the Polish Criminal Code and of § 25 of the German Penal code shall be divided into three groups. The first one briefly deals with one single perpetrator, the second one being about two or more perpetrators co-acting in agreement and the last group is concerned with one perpetrator using another person to commit the act.

A. Individual Perpetration (sprawstwo pojedyncze and Alleintäterschaft)

The basic and most intuitive form of perpetration encapsulates a single perpetrator committing a crime by himself. In this regard, no materially significant differences can be observed between the Polish *(sprawstwo pojedyncze)* and the German approach *(Alleintäterschaft).*

Individual perpetration means that an individual perpetrator must fulfil the conduct prohibited by the *actus reus* of a crime and possess the requisite *mens rea* in his own person. This term can be given two meanings. On one hand, it will emphasize that there were no other cooperating persons apart from the perpetrator. On the other hand, it indicates the independent implementation of the features, which does not automatically exclude that other cooperating person committed the crime together with that person. The phrase 'alone' will therefore not mean 'alone' but 'by one's own behavior.' In German criminal law theory, this so-called parallel perpetration (Nebentäterschaft) is particularly common in cases of negligence.[29] This comes as no surprise due to the extensive understanding of the word 'perpetration' as simply causing the required effect of a crime in this area of commission.

28 Detailed Thomas Rönnau, 'Grundwissen – Strafrecht: Drei- Oder Zweistufiger Verbrechensaufbau?' [2021] Juristische Schulung 499.

29 Rudolf Rengier, *Strafrecht Allgemeiner Teil* (14th edn, CH Beck 2022)§ 42, mn. 3–6.

The understanding of 'by one's own behavior' results in a single perpetrator being a person who committed a prohibited act because of issuing an order, who was incited to it or who was assisted in doing so. However, it will not cover cases of parallel co-perpetration in the Polish understanding.

B. Co-perpetration (*współsprawstwo* and *Mittäterschaft*)

Co-perpetration describes a situation in which two or more people act together and fulfil parts of the definition of the crime. Only when looking at the acts of all co-perpetrators together, can the crime be seen.

1. Polish Approach

Pursuant to Art 18 § 1 of the Criminal Code, co-perpetration occurs when a prohibited act is committed jointly and in agreement with another person. The meaning of this phrase over time has become a significant problem of interpretation, especially the terms *'jointly'* and *'in agreement.'*

It leaves no doubt that the term *'jointly'* is objective in nature and describes situations where the characteristics of a prohibited act are realized through complementary behaviors of individual persons. This will most often occur in two-act crimes, such as burglary. One of the accomplices performs one of the executive actions indicated in the provision (breaks the security), and then the other performs the other action (taking possession). It is only when these behaviors are combined that they constitute the features of a prohibited act, and this type of complicity is referred to as proper or complementary complicity.

The joint implementation of the features of a prohibited act should also be understood as a situation in which each of the cooperating partners implements all the features of a prohibited act (each cooperating in the theft enters the room and takes things from it). The functional link connecting the actions of individual accomplices is the size of the jointly created potential threat to the legal good or violation of the legal good. This type of complicity is referred to as parallel complicity.

It is controversial in the legal doctrine whether the joint performance of the characteristics of a prohibited act can also be considered when a given person has not performed any of the statutory characteristics of a prohibited act by their behavior, but only facilitated the performance of the prohibited act by another person (e.g. providing transport and enabling escape). In light of the formal and objective concept, such a person could never be treated as an accomplice, but only as an assistant. Supporters of this concept emphasize that to recognize a given behavior as co-perpetration, it is necessary to formally recognize this behavior as a designation of at least part of

the feature defining the executive act. On the other hand, supporters of the material-objective concept assume that the requirement of joint implementation of the features of a prohibited act is also met when the assessed behavior is a necessary condition for undertaking a behavior directly implementing the features of a prohibited act or a particularly significant facilitation or significant reduction of the risk of such implementation. This view is also supported by the jurisprudence of common courts and the Polish Supreme Court. The assessment of how important a particular behavior was in the perspective of the implementation of the features of a prohibited act by another cooperating party must be made in the context of the concluded agreement and the conviction of the other co-perpetrators.

Another element constructing co-perpetration is an agreement between persons jointly conducting the features of a prohibited act. However, this agreement cannot be identified with the intention characterizing the intentional implementation of the characteristics of a prohibited act. The intention must be present at the moment of the act, whereas the agreement occurs at an earlier stage. It is characterized by the acceptance of joint implementation of the features of the type of prohibited act and often combined with the division of roles and agreement on the essential elements of the act being performed. It does not matter whether it is formal, oral, written, or implied. All that is required is the appearance of all the co-operators in the awareness of joint action. Such an agreement may precede the commission of a prohibited act, but it may also occur during the implementation, when another person joins the person carrying out the agreement, and only from the moment of joining the agreement or concluding the agreement, the behavior of the persons participating in it can be treated as co-perpetration. This means that it is not possible to be held criminally liable for the behavior of the other co-perpetrators undertaken before entering into the agreement and commencing joint implementation of the features of a prohibited act. Lack of agreement precludes complicity both when individual perpetrators simultaneously conduct the constituent elements of a prohibited act and when objectively these behaviors complement each other, jointly constituting the performance of the constituent elements of a prohibited act.

The agreement is so important in the perspective of the rules of liability for complicity that it sets the limit of liability for the joint performance of a prohibited act. Individual accomplices may also be held responsible for what other accomplices did only if it was within the scope of the agreement. The accomplice is not responsible for the excess of another accomplice, i.e., behavior that goes beyond the content and scope of the agreement.

In addition to the agreement itself, an extra condition of co-perpetration, allowing to distinguish it from instigation, aiding and abetting, is the so-called *animus auctoris,*

which means perceiving an act committed jointly with other people as one's own. This may be evidenced by, for example, involvement in determining the content of the agreement, the division of roles, participation in the loot. Undoubtedly, this is the least measurable feature of co-perpetration, but in dubious cases it can be an auxiliary criterion allowing for adequate qualification of certain behaviors as complicity.

The provisions of the specific part of the Polish Criminal Code treat co-perpetration as a qualifying mark – for example in the wording of Art 197 § 3 of the Criminal Code: 'If the perpetrator commits rape: 1) together with another person, 2) against a minor under the age of 15, 3) against an ascendant, descendant, adopted, adoptive parent, brother or sister, he shall be subject to the penalty of deprivation of liberty for a period of not less than 3 years.' The phrases used in the special part should then be understood in the same way as under Art 18 § 1 of the Criminal Code.

2. German Approach

'If more than one person commits the offense jointly, each shall be liable as a principal (joint principals).' This short sentence sets the definition of co-perpetration in § 25 subpara 2 of the Penal Code. The Federal Court of Justice ('FCJ', German: 'BGH') described co-perpetration as a case in which someone, in a situation of participation of several people who do not all materialize all the criteria of a crime, acts jointly, if he or she incorporates his or her own contribution into the offense in such a manner that it appears as part of the act of another person and conversely that person's act as the first one's offense.[30] Co-perpetration thus is a form of attributing different acts to form the commission of an offense. It stems from this that a suitable perpetrator for co-perpetration can only be who could commit the crime on his own.[31] Regarding special offenses each joint principal has to possess the special criterion that characterizes the special character and in regard to single-handed offenses each co-perpetrator has to show the prohibited behavior himself.[32]

The nature of the relationship between the joint principals is characterized as a partnership between equals.[33] Joint commission requires a common plan to commit the offense on the subjective side and a common commission on the objective side.[34]

30 *BGH, BeckRS 2020, 10990,* mn. 4; Jörg Eisele, 'Strafrecht AT: Abgrenzung von Mittäterschaft Und Beihilfe' [2020] Juristische Schulung 1081, 1082.

31 Klaus Geppert, 'Die Mittäterschaft (§ 25 Abs. 2 StGB)' [2011] Juristische Ausbildung 30, 32; Thomas Fischer, *Strafgesetzbuch Mit Nebengesetzen* (70th edn, 2023)§ 25, mn. 28.

32 Wolfgang Joecks and Jörg Scheinfeld, '§ 25 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 1 (4th edn, CH Beck) mn. 223; Günter Heine and Bettina Weißer, '§ 25 StGB' in Albin Eser (ed), *Schönke/Schröder* (30th edn, CH Beck) mn. 89.

33 Ingeborg Puppe, 'Wie Wird Man Mittäter Durch Konkludentes Verhalten? (NStZ 1991, 571)' [1991] Neue Zeitschrift für Strafrecht 571, 571–572.

34 *BGHSt 48, 52,* 56; *BGH, NJW 2020, 2900,* 2902; *BGHSt 37, 289,* 292; Kristina Peters and Anna Bildner, 'Die Mittäterschaft Gem. § 25 II StGB Und Ihre Herausforderungen in Der Fallbearbeitung' [2020] Juristische Schulung 731, 731.

The common plan to commit a crime can take many forms. Joint principals can agree to it explicitly or implicitly, before or after the start point of an attempt to commit the crime. However, it is necessary that each perpetrator intentionally acts pursuant to the common plan. Therefore, it is insufficient if a person 'joins' someone in their crime without that person even noticing it. Thus, some form of communication between the co-perpetrators is required to assume the existence of a common plan.[35] Without a common plan there is no co-perpetration. It forms the basis and the boundaries of the joint commission of the prohibited act. If one joint principal substantially exceeds the boundaries of the common plan and does something which their fellow joint pricipals did not reasonably forsee, the excessive conduct cannot be attribted to them.[36]

Anybody who originally had to be seen as co-perpetrator but later retracts his agreement to the common plan before the phase of an attempt in the meaning of § 22 of the Penal Code has been reached cannot be held liable as joint principle even if the other co-perpetrator commits the offense according to the common plan. This stems from the principle of coincidence and can restrictively be said only if the retracting person informs the other perpetrator.[37] If the acting co-perpetrator acts under the impression that he still is supported, he envisages his behavior as part of the common plan and is at least psychologically encouraged. Liability as a secondary participant remains possible. It should be noted that the FCJ in its application of a subjective theory does not come to the same conclusion and asks whether the retreating person still wanted the result as his own act, if his or her action influenced the commission of the offense.[38]

When it comes to the objective part of joint perpetration, the distinction between primary and secondary participation becomes most crucial. While scholarly debate strongly argues in favor of the objective approach of control over the crime,[39] jurisprudence applies a moderate subjective theory.[40] In their application, both theories reach the same conclusion in most cases. According to the control over the crime theory, control over the prohibited act is required to be seen as the central figure and thus a principal whereas a minor figure can be a mere secondary participant.[41] It is this ability to frustrate the execution of the common plan by simply not performing the assigned role that distinguishes the principle from the secondary participant.[42]

35 Kühl (n 10)§ 20, mn. 104, 106.

36 Geppert (n 43) 32.

37 Rudolf Rengier, 'Täterschaft Und Teilnahme – Unverändert Aktuelle Streitpunkte' [2010] Juristische Schulung 281, 287; Puppe (n 45) 573. This is disputed by e.g. Kühl (n 10)§ 20, mn. 105.

38 *BGHSt 28, 346,* 348–349; *BGH NStZ 1987, 364,* 364. The FCJ explicitly continues the jurisprudence of the Reichsgericht, e.g. *RGSt 54, 177,* 178.

39 Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 188; Rengier (n 49) 281–282; Heine and Weißer (n 44) mn. 64, with further references.

40 *BGHSt 37, 289,* (n 46) 291–293; *BGHSt 48, 52,* (n 46) 56; *BGH, NStZ-RR 2016, 6,* (n 14) 7.

41 Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 10–13.For a short summary of the development see Joecks and Scheinfeld, '§ 25 StGB' (n 44) mn. 10–13.

42 Wessels, Beulke and Satzger (n 38) mn. 806.

Each co-perpetrator hence provides an essential contribution to the commission of the crime. Other than its predecessor the *Reichsgericht* as Supreme Court of the German Reich,[43] the FCJ does not apply a strict subjective theory. It incorporates elements of the control over the crime theory into its subjective approach and thus advocates for a normative combined theory. Criteria to establish criminal liability as a principal perpetrator are the level of interest in the success of the crime, scale of the contribution and the control over the crime or at least willingness to exert control.[44]

If a joint perpetrator contributes to the commission of the offense before it reaches the phase of an attempt – for instance by buying the weapon which is later used by the second co-perpetrator to shoot the victim – a strict application of the control over the crime theory comes to the conclusion that the first co-perpetrator cannot influence the commission decisively once he provided the weapon and hence lacks control over the crime.[45] A functional understanding of the control over the crime theory interprets the criterion of an essential contribution in such a way that a contribution in the phase of mere preparation can convey control over the crime if it still effects the commission.[46] A controversial example is found in the case of a gang leader who plans a crime and assigns the roles to those gang members who later act according to their leaders planning. The strict interpretation would have to treat the gang leader as a secondary participant while the functional understanding of control over the crime could see him as a principal. The latter one seems favorable to avoid offering the criminal mastermind a loophole by simply deferring the execution to someone else. Distributing tasks is inherent to joint perpetration. To reach equal control as the committing party, the planning party must provide an especially high valued contribution to the criminal undertaking since preparing contributions do indeed convey a lower degree of control.[47] Hence, the gang leader must play a pivotal role in the preparation to outweigh his minor role in the phase of commission but can still be classified as a co-perpetrator. The obligatory reduction of punishment stipulated by § 27 subpara 2 of the Penal Code could lead to an unjust lower sentence for the person who showed high criminal energy which can well exceed the one of the acting perpetrators. The subjective approach reaches the same result as control over the crime is just one factor in evaluating the *animus auctoris* and therefore covers a contribution in the phase of preparation.[48]

43 See e.g. *RGSt 3, 181,* 182–183; *RGSt 74, 84* (n 9) 85.

44 *BGHSt 28, 346,* (n 50) 348–349; *BGHSt 37, 289,* (n 46) 291; *BGHSt 48, 52,* (n 46) 56; Fischer (n 43)§ 25, mn. 27 with further references; *BGH, NStZ-RR 2016, 6,* (n 14) 7.

45 In this vein Christian Becker, *Das Gemeinschaftliche Begehen Und Die Sogenannte Additive Mittäterschaft* (2008) 46–55; Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 198–203; René Bloy, 'Grenzen Der Täterschaft Bei Fremdhändiger Tatausführung' [1996] Goltdammer's Archiv für Strafrecht 424, 432–437.

46 Heine and Weißer (n 44) mn. 67; Wessels, Beulke and Satzger (n 38) mn. 822–823; Kühl (n 10)§ 20, mn. 110–111.

47 Rengier (n 41)§ 44, mn. 43.

48 *BGH, NStZ-RR 2016, 6,* (n 14) 7; *BGHSt 48, 52,* (n 46) 56; *BGHSt 28, 346,* (n 50) 348; *RGSt 58, 279,* 279.

3. Comparison

Under Polish and German law, attributing someone else's behavior to a person requires a subjective and an objective link. The agreement or common plan as the subjective part of co-perpetration sets out the limits for the attribution. It is distinct from the intention to commit the crime and serves as the guiding plan for the commission of the prohibited act. A co-perpetrator who leaves the ground of the agreement destroys the link to the other co-perpetrator(s) and can be found criminally liable as an individual perpetrator of his excess. The implementation of the common plan requires each co-perpetrator to perform an act of his own. The behavior in question, however, need not meet the definition of the crime itself if a functional understanding of control over the crime is preferred by the authors of this article. This result can also be achieved by considering the *animus auctoris* of the co-perpetrator.

C. Perpetration by Means (*sprawstwo kierownicze, sprawstwo polecające* and *mittelbare Täterschaft*)

The final group of the study encompasses situations in which a perpetrator's behavior does not fulfil the definition of the crime. Criminal liability can be assumed if this kind of perpetrator uses another person to commit the criminal act. Polish and German criminal law have found different constructions to deal with this group. While the Polish Criminal Code relies on commanding perpetration (*sprawstwo kierownicze)* and ordering perpetration *(sprawstwo polecające),* the German Penal Code uses the concept of indirect perpetration *(mittelbare Täterschaft).*

1. Polish Approach

Commanding perpetration and ordering perpetration share some of the same features. Both see the commanding/ordering perpetrator influencing another person to commit the crime as an individual perpetrator. Differences emerge in this influence. Exerting influence, especially in the beginning of the criminal activity, is what renders the commanding/ordering perpetrator criminally liable.

a. Commanding Perpetration (sprawstwo kierownicze)

As follows from the content of Art 18 § 1 of the Criminal Code, commanding perpetration is directing the performance of a prohibited act by another person. The causative figure defined in this way appeared for the first time in the Polish Criminal Code of 1969[49] and was supposed to cover the organizer of the crime, whose behavior does not have to directly implement the constituent elements of a prohibited act. It is impossible to reduce commanding perpetration solely to the dominant role of

49 'Ustawa z Dnia 19 Kwietnia 1969 r Kodeks Karny (Dz U 1969.13.94)'.

one of the accomplices, because it also includes behaviors consisting of initiating criminal activity of other persons. However, this type of perpetration does not stop with incitement, because in the next phase it includes actual control over the implementation of a prohibited act performed by other persons.[50] The judicature indicates that this control means that the decision of the person in charge is dependent on the initiation, conduct, change and discontinuation of a criminal action[51] – this approach to commanding agency seems to refer to the previously described theory of power over the act.

It is impossible to consider the organization of a criminal action itself as commanding perpetration, without the possibility of further influence in its course. The legislator clearly indicated that commanding perpetration is to consist of directing the performance of a prohibited act, and thus the existence of at least potential power over the actions of another person at the time when the characteristics of a prohibited act are directly implemented. For these reasons, it is impossible to recognize the commanding perpetrator as a managerial principal who offers a financial benefit to the contractor for committing a specific prohibited act, unless he has actual control over the course of the commissioned criminal action.

Commanding perpetration is most often associated with relations of subordination occurring between given persons – both in formalized relations, such as military services or a workplace, and in actual ones, such as peer groups.

Similarly, as in the case of complicity, the commanding perpetrator's liability is limited to those behaviors undertaken by the contractors that coincide with the content of the instructions issued by the commanding perpetrator. Therefore, he is not responsible for the excesses of contractors whose behavior goes beyond the scope of the issued order. The commanding perpetrator may, however, be held responsible for the actions of persons subordinated to him, if, when ordering their execution, despite his obligation, he did not control the course of the ordered actions and did not issue an order to modify or stop them in a timely manner, which could have prevented the commission of the prohibited act.

b. Ordering Perpetration (sprawstwo polecające)

Pursuant to Art 18 § 1 of the Criminal Code, the person who, taking advantage of the dependence of another person on himself, instructs him to perform a prohibited act, is responsible for the commission. From a subjective point of view, there must be a relationship of dependence between the ordering perpetrator and the contractor that justifies the high probability of performing the prohibited act covered by

50 *Decision of the Supreme Court of Poland II KK 289/19 of 18/06/2020.*

51 *Decision of the Supreme Court of Poland V KK 375/18 of 24/10/2018.*

the instruction – e.g., subordination, employment relationship, a special factual relationship or emotional relationship, as well as the use of a threat by the ordering perpetrator. However, it is not necessary that this dependence be permanent.

As for the issue of the order itself, its form is arbitrary, and the content is to be the performance of behavior that objectively constitutes the implementation of the characteristics of a prohibited act. It is not sufficient to issue a general action order, which is specified later only by the executor himself (e.g., issuing an order to 'settle the matter') to accept the referrer's agency.

The difference between incitement and issuing an order is expressed in its categorical nature – therefore, it will not be a command, persuasion, or encouragement to carry out a specific act. The issuing of an order must also be accompanied with a relationship of dependence, which means that it must be objectively linked to a specific relationship of subordination that exists between the issuer of the order and the executor. Ordering perpetration differs from incitement in that it is not limited to solicitation to commit a prohibited act but is accompanied by pressure having the character of psychological coercion.[52] This relationship of dependence is not the same as full subordination of the contractor to the ordering perpetrator – this is where the boundary between the ordering and the commanding perpetration runs, because the former does not have full authority over the contractor during the performance of the characteristics of a prohibited act and cannot control the course of the implementation of the prohibited act.

A necessary condition for accepting ordering perpetration is an awareness of issuing the command and the existence of a relationship of dependence, as well as the use of this relationship. The ordering perpetrator is responsible within the limits of the issued order, which means that he cannot be held criminally responsible for the contractor's behavior going beyond the content of the order – excess.

2. German Approach

The last form of perpetration known to the German Penal Code is called indirect perpetration. § 25 subpara 1 alt 2 of the Penal Code defines it as committing an offense 'through another'. As it is in the case of joint perpetration, indirect perpetration requires at least two persons. Firstly, there is the one who acts and through his or her action realizes a criminal behavior. That person is known as the 'tool to commit the crime' *(Tatwerkzeug),* the crime conveying person *(Tatmittler)* or person in the front *(Vordermann).* And secondly, there is the indirect perpetrator. This is the person who exercises control over the crime by exercising control over the acting person. They are known as the indirect perpetrator *(mittelbarer Täter)* or person in

52 Jacek Giezek, *Kodeks Karny. Część Ogólna. Komentarz t. I (Art. 1-31)* (2000).

the background *(Hintermann)*. The key difference between joint perpetration and indirect perpetration lies within the relationship between the participants. While co-perpetration is characterized by equality – each person's contributions are attributed to each other, indirect perpetration describes the opposite phenomenon – the actions of the person in the front are attributed one way only to the person in the background.[53] This requires the acting person to possess a deficit of either the level of the elements of an offense, the unlawfulness, or guilt.[54] This deficit shields the person in front from criminal liability and would result in impunity even though an offense has been committed. Indirect perpetration as a means to attribute another person's action to the indirect perpetrator fill this void and avoids an unbearable outcome. The person in the background manages the person in the front and uses them as their human tool by superior knowledge, superior will, or the structure of a criminal organization.[55] If the acting person realizes the definition of the crime through his own behavior and cannot invoke a rule excluding responsibility (on either the level of unlawfulness or guilt), they have to be seen as a perpetrator. This conclusion stems from the principle of responsibility *(Verantwortungsprinzip)*.[56] Anybody who influences such a perpetrator can only be seen as a secondary participant. As an exception to that rule, there are the highly debated cases of 'the perpetrator behind the perpetrator.'

a. Deficit on the Level of the Definition of A Crime

The special part of the Penal Code contains offenses whose definitions describe a behavior which is criminal for most persons but not for the bearer of the legal value. § 303 of the Penal Code (criminal damage) punishes destroying 'an object belonging to another', just as § 242 of the Penal Code (theft). § 223 of the Penal Code (causing bodily harm) and §§ 211, 212 of the Penal Code (murder and manslaughter) are concerned with injuring a different person than oneself.[57] If the crime conveying person destroys his own painting, because the indirect perpetrator successfully convinced them that painting belonged to someone else, the *actus reus* of criminal damage is not realized.

Secondary participation according to §§ 26, 27 of the Penal Code requires an intentional and unlawful (not necessarily blameworthy) commission of a crime by the principal. In a case like this one, the attack on their own legal value by the person in the front falls short of fulfilling the *actus reus* of the offense and thus would lead

53 Thomas Rönnau, 'Grundwissen – Strafrecht: Der „Täter Hinter Dem Täter"' [2021] Juristische Schulung 923, 923.

54 A different systematisation is offered by Roxin, *Strafrecht AT II* (n 35)§ 25, II. who takes the kind of control over the acting person as basic criterion. Similar Otto (n 11) 254–257. Like here: Kühl (n 10)§ 20, mn. 45; Rengier (n 41)§ 43, mn. 2.

55 Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 46.

56 Claus Roxin, *Täterschaft Und Tatherrschaft* (Elfte Auflage, De Gruyter 2022) 161–165 <https://katalog.ub.uni-freiburg.de/link?kid=1794641343>; Rönnau (n 61) 924–925.

57 Detlev Sternberg-Lieben, '§ 223 StGB' in Albin Eser (ed), *Schönke/Schröder* (30th edn, CH Beck) 223 mn. 9; Albin Eser and Detlev Sternberg-Lieben, '§ 212 StGB' in Albin Eser (ed), *Schönke/Schröder* (30th edn, CH Beck) mn. 2.

to impunity for the person in the background. This result was deemed intolerable as it was the person in the background – who by his influence made the person in the front act – should be made responsible. This can be achieved by punishing the indirect perpetrator for their control over the acting person by their superior knowledge. The indirect perpetrator knew whose painting it was, and this knowledge can establish the link between the prohibited action (damaging the painting) and the person in the background. It should be noted however that not any mistake on the part of the acting person is sufficient to establish criminal liability of the person in the background. If they are mistaken about the reason they acted in a certain manner, responsibility for that action lies solely on the person in the front. A popular example would be the doctor falsely telling his patient that he has a deadly disease who later – as intended by the doctor – kills himself. In this case, the doctor influenced the patient's motive to commit suicide. The motive however is not part of the criminal intent and therefore cannot constitute a sufficient link between the person acting in the front and the one in the back.[58]

A deficit cannot just occur regarding the objective parts of a crime's definition. If the crime conveying person lacks the necessary *mens rea* to commit a crime due to manipulation by the person in the background, indirect perpetration might come into play.[59] This could be a case if a doctor tells a nurse to give the patient an injection with a painkiller and hands her the syringe with the alleged drug. However, the syringe has been prepared with poison and indeed kills the patient. The nurse does not know the deadly effect of the injection and thus does not possess the intent to kill or commit bodily harm to the patient according to § 16 subpara 1 of the Penal Code. As a result, the nurse remains unpunished. The doctor on the other hand, uses superior knowledge to use the nurse as his human tool to commit the murder in accordance with § 25 subpara 1 alt 2 of the Penal Code.

Some offenses require a special mental state. For instance, theft according to § 242 subpara 1 of the Penal Code asks for 'the intention of unlawfully appropriating [the object] for himself or a third person' which must be understood as *dolus directus* in the first degree, i.e. purpose.[60] A thief in the opera who asks a fellow guest to get 'their' coat from the cloak room, uses the guest as a human tool. The guest does not intend to unlawfully appropriate the coat for anybody else than for what they think is the rightful owner. This precludes him from being a perpetrator or even an accomplice in a theft. The indirect perpetrator, who possesses the special mental element but does not wish to act himself, exerts normative control over a human tool. Ultimately, he decides whether the crime conveying person commits the theft or not.

58 Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 71–72.

59 Uwe Murmann, 'Grundwissen Zur Mittelbaren Täterschaft (§ 25 I 2. Alt. StGB)' [2008] Juristische Arbeitsblätter 321, 325.

60 Roland Schmitz, '§ 242 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 4 (4th edn, CH Beck) mn. 129.

The final group, which can appear on the level in the definition of a crime, is limited to special offenses. § 203 subpara 1 of the Penal Code (violation of private secrets) can serve as an example. The offense requires that a perpetrator have a special position which allows them knowledge of a secret due to a professional relationship with the victim. The pharmacist who leaks a famous athlete's prescription for a substance on a doping list to a journalist, can be prosecuted as an individual perpetrator in the meaning of § 25 subpara 1 alt 1 of the Penal Code. The pharmacist's husband however lacks the required personal criterion for this special offense. This also rules out joint perpetration of the couple if the pharmacist asks her husband to leak the information instead of her. And since the husband did not commit a crime, the pharmacist cannot even be prosecuted as an instigator according to § 26 of the Penal Code. The result would be impunity for both. In accordance with § 25 subpara 1 alt 2 of the Penal Code, the pharmacist can be treated as an indirect perpetrator if they had sufficient control over the crime. The case portrays another example of normative control over the acting person and therefore the commission of the crime.[61] It is the pharmacist's discretion which decides whether the husband will leak the information or not. The husband's participation in the pharmacist's crime can in turn be classified as aiding and abetting in accordance with § 27 subpara 1 of the Penal Code.

b. Deficit on the Level of Unlawfulness

The indirect perpetrator makes use of a human tool that does not act unlawfully when he creates a situation in which the acting person can rightfully invoke a ground to exclude the unlawfulness of their action. A man whose flirting attempts get rejected by a woman at Oktoberfest and calls the nearby police to report that the woman stole his wallet, can be guilty of unlawful imprisonment as an indirect perpetrator in accordance with §§ 239 subpara 1, 25 subpara 1 alt 2 of the Penal Code in case the police bring the woman to a holding cell. The police officer acts lawfully as he can invoke § 127 subpara 2 of the Code of Penal Procedure. This man knowing that the woman never stole anything while the police officer may think so, becomes the indirect perpetrator who exerts control over the crime by superior knowledge.

The indirect perpetrator can also create a situation in which the crime conveying person acts in self-defense and therefore not unlawfully. For example, a person might tell their strongly intoxicated and thus easily influenced friend that a stranger just insulted them. If that friend – as predicted – starts to attack the third person, that third person acts in self-defense according to § 32 of the Penal Code and may lawfully defend themself against the attack by the drunk friend of the perpetrator. In a case like this, it is necessary that the perpetrator create a situation in which his human tool acts appear to be justified. Additionally, he must be in a position to be superior to the

61 Murmann (n 67) 322.

attacker.[62] This can easily be assumed when the tricked person is in a state of insanity which excludes criminal responsibility according to § 20 of the Penal Code.

c. Deficit on the Level of Guilt

The human tool can possess a deficit on the third level of criminal liability. These cases need to be distinguished from cases of secondary liability, since the principle of limited accessorial liability requires a principal perpetrator who acts intentionally and unlawfully but does not necessarily act guiltily.[63] The distinction between a principle and a secondary liability can be made asking whether the participant knew about the deficit of the acting person and systematically and intentionally takes advantage of it. If this is the case, indirect perpetration must be applied.

According to §§ 17, 19, 20 of the Penal Code, a person acts 'without guilt' when they suffer an unavoidable mistake of law, are under the age of fourteen, or are in a condition where they are mentally not able to comprehend what they are doing due to mental illness or intoxication. If an indirect perpetrator uses a human tool, which is unable to be blamed by the legal order, he can exercise control either by superior will or by coercion.[64] The former is illustrated in the case when the indirect perpetrator pays a ten-year-old fifty euros to steal a laptop; the latter, if he threatens a thirteen-year-old to expose his secret smoking to his parents and forces him to beat up a classmate. In both cases, the child does not bear any criminal responsibility due to the legislative will which is laid down in § 19 of the Penal Code.[65]

Acting 'without guilt' is a person who usually can foresee the consequences of their actions and act in accordance with such insight, i.e. is able to be legally blamed, if they are under duress in accordance with § 35 subpara 1 of the Penal Code. If the person in the background threatens to kill the husband of the person in the front if that person does not steal a diamante from a jeweler, the crime conveying person commits the crime intentionally and unlawfully but can invoke § 35 subpara 1 and therefore acts without guilt. The indirect perpetrator who steers the human tool through their threat exercises control by coercion. This constitutes the requisite link between the commission by the person in the front and the person in the back who then commits the theft 'through another' in the meaning of § 25 subpara 1 alt 2 of the Penal Code. Prerequisite of this form of control over the crime is however that the threshold of § 35 subpara 1 of the Penal Code is met in order to maintain the principle of responsibility.[66] If the person in the back for example threatened to kill a random

62 Kühl (n 10)§ 20, mn. 59.

63 Wessels, Beulke and Satzger (n 38), mn. 850.

64 Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 139–140.

65 Rengier (n 41)§ 43, mn. 29.

66 ibid§ 43, mn. 44–46; Koch, 'Grundlagen Zur Mittelbaren Täterschaft, § 25 I Alt 2' [2008] Juristische Schulung 496, 496; Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 49; Otto (n 11) 254. This however is disputed for example by Heine and Weißer

colleague if the crime conveying person did not commit the crime, the person in the front could not invoke § 35 subpara 1 because work colleagues are not 'a relative or person close to him'. As a result, the person in the front commits the theft without a deficit and in accordance with the principle of responsibility is solely responsible for the crime. This leaves room for secondary liability only on the end of the person who made use of the threat.

d. The Perpetrator Behind the Perpetrator

The construction of a 'perpetrator behind the perpetrator' has been developed as an exception to the principle of responsibility in cases where the acting person does not possess any criminal deficit.[67] Groups of cases which are discussed under this construction are an avoidable mistake of fact according to § 17 sentence 2 of the Penal Code, diminished responsibility under § 21 of the Penal Code, a mistake regarding the sense of an action, and control over the crime through an organization.

To be granted impunity under § 17 sentence 1 of the Penal Code, the mistake of fact – i.e., 'the awareness that he is acting unlawfully' („Einsicht, Unrecht zu tun") – must have been unavoidable. This poses a high standard because most mistakes of law can be avoided by obtaining legal advice by a professional.[68] For this reason, § 17 sentence 2 of the Penal Code offers the court the possibility to mitigate the sentence. This means that the perpetrator still acted guilty and may be blamed for their action by the legal order. The amount of guilt however is reduced because the appellative function of the criminal provision does not reach the perpetrator. If a person in the background knows about the mistake of law of the person in the front and uses this mistake to control them, indirect perpetration by virtue of superior knowledge is established.

Like § 17 sentence 1 of the Penal Code, § 21 alt 1 of the Penal Code requires that 'the capacity of the offender to appreciate the unlawfulness of his actions' („die Fähigkeit des Täters, das Unrecht der Tat einzusehen") is diminished. Therefore, a case involving a crime conveying person with diminished responsibility according to § 21 alt 1 of the Penal Code can be construed parallel to the case of an avoidable mistake of law.[69]

§ 21 alt 2 of the Penal Code on the other hand is concerned with the 'capacity […] to act in accordance with any such appreciation' („die Fähigkeit, […] nach dieser

(n 44) mn. 40; Friedrich-Christian Schroeder, *Der Täter Hinter Dem Täter. Ein Beitrag Zur Lehre von Der Mittelbaren Täterschaft* (Duncker & Humblot 1965) 123–125.

67 Detailed Rönnau (n 61).

68 Wessels, Beulke and Satzger (n 38) mn. 735–737.

69 Roxin, *Täterschaft Und Tatherrschaft* (n 64)§ 25, mn. 150; Bernd Schünemann, 'Die Rechtsfigur Des „Täters Hinter Dem Täter" Und Das Prinzip Der Tatherrschaftsstufen' [2006] Zeitschrift für internationale Strafrechtsdogmatik 301, 303; Schroeder (n 74) 120–122.

Einsicht zu handeln"). In such a case, the normative appeal does reach the perpetrator, but they do not let it dissuade them from acting, nonetheless. This situation is closer to the cases of coercion below the threshold of § 35 subpara 1 of the Penal Code. For that reason, the principle of responsibility does not need to be broken through and the acting person in the front bears sole responsibility as a perpetrator.[70] The influencing person in the back can be punished as a secondary.

Highly debated are cases in which the acting person errs about the sense of their actions. These cover cases for errors regarding the quantification of injustice and the qualification of injustice. In the first case, the person in the background manipulates their human tool as to the amount of damage to the protected value they commit. The person in the front for instance damages a painting by Claude Monet worth 50.000.000 euros believing it was a worthless fake. In the second case, the human tool commits a crime (e.g.,§ 212 of the Penal Code) while only the indirect perpetrator knows that a qualified offense (§ 211 of the Penal Code) is committed. The final nuance of the error regarding the sense of action occurs in cases where the crime conveying person suffers from an *error in persona vel obiecto,* i.e., hits the object or person that they were aiming for but is mistaken about the identity of that target. The identification of the target can influence the perpetrator's *mens rea.* If the identity is part of the crime's definition or in relation to part of that definition – e.g., the property that an object belongs to another for § 303 subpara 1 of the Penal Code – § 16 of the Penal Code can negate the mental element. If the perpetrator is mistaken about the exact owner, but still knows that the object does not belong to himself, the mistake is irrelevant and § 16 of the Penal Code is inapplicable.[71] The setting of an *error in persona* combined with indirect perpetration sees the crime conveying person shooting at someone who the indirect perpetrator switched for another person. The person in the front is liable for manslaughter as an individual perpetrator in accordance with §§ 212 subpara 1, 25 subpara 1 alt 1 of the Penal Code because the error about the identity of the person shot is irrelevant to their intention. The indirect perpetrator is liable according to §§ 212 subpara 1, 25 subpara 1 alt 2 of the Penal Code since he controlled the course of event by deciding which person gets shot.

The last form of control over the crime an indirect perpetrator can possess is exercised by having a controlling position inside a criminal organization. Roxin developed this kind of control over the crime to find a link between the officers of the Nazi regime who gave the orders to commit the Holocaust from behind their desks but left the execution to others.[72] The idea behind this kind of control over the crime is that the indirect perpetrator can – from behind his desk – set a course of action in

70 Rengier (n 41)§ 43, mn. 46c.

71 This is a simplified summary. For a detailed analysis of the *error in persona vel obiecto* see Roxin and Greco (n 2)§ 12, mn. 193–201.

72 Claus Roxin, 'Straftaten Im Rahmen Organisatorischer Machtapparate' [1963] Goltdammer's Archiv für Strafrecht 193.

motion which results more or less 'automatically' in the commission of the crime by the lower members of the criminal organization. According to Roxin, control over the crime by control over a criminal organization has three requirements.[73] Firstly, there must be a hierarchical apparatus of a certain size. This can be said if the there are enough members that the indirect perpetrator is sure to have enough human tools at his disposal. The head of the organization (indirect perpetrator) does not need to know the individual member down the chain of command (direct perpetrator).[74] Secondly, the apparatus must have left the grounds of the legal order. If the organization acts lawfully, the legal order and as part thereof criminal laws are paramount to any order of the head of the organization. Hence, the members of the apparatus are expected to withstand any pressure from above which does not trigger the legal ground to exclude criminal responsibility.[75] And thirdly, the direct perpetrator must be fungible, and the indirect perpetrator has to know that if the first recipient of their order refuses to act, there is another one that can take their place. This last point is central to Roxin's understanding of control over the crime by virtue of control over a criminal organization. The fungibility of the person in the front ensures the automatic implementation of the order. The Nazi regime fulfilled all the criteria, but the construction can also be applied for instance to drug cartels and terror organizations.

The FCJ applied this construction in a case against the members of the national security council of the former German Democratic Republic ('GDR') who gave the orders to kill inner-German fugitives.[76] The soldiers who shot the fugitives at the border committed murder as individual perpetrators according to §§ 211, 212, 25 subpara 1 alt 1 of the Penal Code. Therefore, it was necessary to find a way to attribute these killings to the members of the GDR's national security council. The former GDR as a dictatorship fulfilled the requirements of a criminal organization.[77] The members of the national security council had the authority to issue the order to shoot and knew that they had an entire security force which would follow their order even if an individual soldier refused to comply with the order. Therefore, they were indirect perpetrators of murder according to §§ 211, 212, 25 subpara 1 alt 2 of the Penal Code. It must be noted however that the FCJ did not apply the theory of

73 Roxin, *Täterschaft Und Tatherrschaft* (n 64)§ 44, mn. 369–377; Roxin, *Strafrecht AT II* (n 35)§ 25, mn. 105–107; Roxin, 'Straftaten Im Rahmen Organisatorischer Machtapparate' (n 80) 199–201; Leon Radde, 'Von Mauerschützen Und Schreibtischtätern – Die Mittelbare Täterschaft Kraft Organisationsherrschaft Und Ihre Anwendung Auf Wirtschaftsunternehmen de Lege Lata' [2018] Juristische Ausbildung 1210, 1213–1215.

74 This also rules out co-perpetration since there cannot be a common plan if the head of the organization does not know who his partner in crime will be. See Roxin, 'Straftaten Im Rahmen Organisatorischer Machtapparate' (n 80) 200. In favour of co-perpetration e.g. Günther Jakobs, 'Mittelbare Täterschaft Der Mitglieder Des Nationalen Verteidigungsrats' [1995] Neue Zeitschrift für Strafrecht 26, 27.

75 If the pressure reaches that point, the construction of a perpetrator behind the perpetrator is inapplicable and another form of indirect perpetration can be assumed.

76 *BGHSt 40, 218,*.

77 Claus Roxin, 'Anmerkung Zu BGHSt 40, 218' [1995] Juristenzeitung 49, 49.

control over the crime by virtue of control over a criminal organization as developed by Roxin but rather created its own understanding of it.[78] The court relies on the idea that in a criminal organization the process continues 'automatically' if started from behind the desk.[79] It combined Roxin's idea of fungibility of the human tool with the ideas of FC Schroeder.[80] He reasoned that a member of a criminal organization is more likely to commit a crime in the context of their criminal organization because they are already determined to do so.[81] Key to determining control over the crime by virtue of control over a criminal organization is according to the FCJ just the hierarchical structure of the organization resulting in the local and temporal distance between order and execution which allows automatic routines to commit the individual offense.[82] Even though having developed an understanding of this kind of control over the crime, the court did only apply it as part of its subjective theory to establish criminal responsibility as a principal perpetrator.

The FCJ later expanded the application of the doctrine of control over the crime by control over a criminal organization to economic corporations.[83] It did so – against massive criticism from legal scholarly debate –[84] by focusing (implicitly) rejecting the requirement of fungibility and that the organization must have left the grounds of the legal order and instead focusing on the unconditional determination to commit the crime. Hence, the CEO of a bankrupt company can be found guilty of committing fraud according to §§ 263, 25 subpara 1 alt 2 of the Penal Code if he instructs a knowing employee to continue ordering new materials contrary to the obligation to file bankruptcy.[85]

By relying on a subjective *animus* theory, the FCJ avoids complications for which proponents of the material-objective approach of control over the crime are critizised. Especially in cases of indirect perpetration, control over the crime cannot always be easily established. Turning to additional criteria like interest in the success of the offense may help distinguish between primary and secondary participants. It cannot be disregarded however that it blurs the lines between the perpetrators and accomplices – categories which the Penal Code clearly stipulates.

78 Radde (n 81) 1216–1217.

79 *BGHSt 40, 218,* (n 84) 236.

80 ibid 237.

81 Schroeder (n 74) 166–169.

82 *BGH NStZ 2008, 89,* 90.

83 ibid; *BGH, JR 2004, 245,* 246; *BGH NStZ 1998, 568,* 569; *BGHSt 40, 218,* (n 84) 237.

84 Roxin, *Täterschaft Und Tatherrschaft* (n 64)§43, mn. 63; Roxin, 'Anmerkung Zu BGHSt 40, 218' (n 85) 51–52; Heine and Weißer (n 44) mn. 30 with further references; Radde (n 81) 1223–1224; Alfred Dierlamm, 'Anmerkung Zu BGH, NStZ 1998, 568' [1998] Neue Zeitschrift für Strafrecht 569; Thomas Rotsch, 'Die Rechtsfigur Des Täters Hinter Dem Täter Bei Der Begehung von Straftaten Im Rahmen Organisatorischer Machtapparate Und Ihre Übertragbarkeit Auf Wirtschaftliche Organisationsstrukturen' [1998] Neue Zeitschrift für Strafrecht 491, 493–495.

85 *BGH NStZ 1998, 568,* (n 91).

3. Comparison

Compared to individual and co-perpetration, perpetration by using another person is a far more contentious form of committing a crime. Establishing a link between the people involved requires careful consideration not to stretch the ordinary meaning of 'committing a crime.'

Indirect perpetration as in § 25 subpara. 2 of the German Penal Code shares similarities with ordering perpetration. The latter one bases the criminal blame against the ordering perpetrator on the fact that they take advantage of the dependence of the direct perpetrator. If the relationship which the dependence stems from is between a father and his ten-year-old daughter, both legal orders come to the same conclusion. The daughter is not criminally responsible due to her age[86] and the father is criminally liable as an ordering/indirect perpetrator. In certain situations, when this dependence reaches the point where grounds to exclude criminal responsibility becomes applicable, this can lead to indirect perpetration in the German meaning as well. If this point is reached, a decisive difference between the two concepts comes to light. While Polish law allows for a conviction of both the direct (individual) and "indirect" (ordering) perpetration, German law can only punish the indirect perpetrator relying on the principle of responsibility. Only in the case of a perpetrator behind the perpetrator can the German Penal Code get to the same conclusion. This requires more than just dependence. It requires some sort of misperception or partial deficit on the end of the crime conveying person. And even the case of control through an organization sets the bar higher. Since indirect perpetration covers such a wide range of constellations, a case-by-case assessment is warranted.

When it comes to commanding perpetration, the involvement of the commanding perpetrator in the execution stage marks a key difference between commanding and indirect perpetration. In most cases of indirect perpetration, there is no simultaneous link between the parties involved. A commanding perpetrator who steers the direct perpetrator can also be seen as a co-perpetrator from a German perspective. The control over the commission lies in the control over the person fulfilling the *actus reus* of the offense. If both parties act in agreement with one another (voluntarily or not), German criminal law will consider it a common commission relying on the functional understanding of control.

VI. Principles of Responsibility for Causative Forms of Cooperation

As indicated earlier, the Polish structure of responsibility for causative forms of cooperation – co-perpetration, commanding perpetration, ordering perpetration – to some extent refers to both the concept of participation in someone else's crime and the concept of uniform perpetration.

86 Art. 10 of the Polish Criminal Code and § 19 of the German Penal Code.

The condition for attributing responsibility for a prohibited act is the fulfilment by the perpetrator (or jointly by the accomplices) of all the characteristics specified by the legislator in the specific part of the Criminal Code. To commit a prohibited act in the form of a commanding or ordering perpetration it is not enough to issue an order or direct the actions of other persons, but to carry out all the characteristics of a prohibited act by the performers. If such implementation does not take place, the ordering perpetrator, commanding perpetrator and co-perpetrators who have previously performed activities covered by the agreement will be liable for an attempt to commit a prohibited act both when the behavior of the contractors or other accomplices has already entered the stage of attempting, and when they did not carry out the activities covered by the order or the agreement at all.[87]

Accomplices who have not performed any activities covered by the agreement are not liable for an attempt to commit a prohibited act, even if other co-operators have performed behaviors covered by the agreement. They may then be liable for instigation, aiding, abetting, or preparation if it is punishable.

All co-operators, i.e., both co-perpetrators as well as ordering perpetrators and commanding perpetrators, are liable within the limits of their intent or negligence, as well as within the limits of their guilt. This means that the lack of liability of the contractor or one of the co-perpetrators due to the exclusion of the possibility of assigning fault is irrelevant to the liability of the other cooperating parties. Personal circumstances leading to exclusion of criminality or exacerbating this criminality are also irrelevant – this is in particular the sphere of mental experiences, mental state, maturity, active regret, recidivism.[88] Since each of the cooperating party in the causative form commits his own crime, all the conditions of criminal liability referring to the principle of time coincidence are determined for the time of action of each of the cooperating party separately – for example, the sanity of the ordering perpetrator is determined at the moment of issuing the order, and not at the moment of execution by the contractor).

Despite the recognition that each cooperating party commits their own offence, the beginning of the limitation period for criminal liability will be the moment when the performer completes the features of a prohibited act, since only the moment of completion of its activity determines the time of committing a prohibited act within the meaning of Art 6 § 1 of Criminal Code.

87 Wróbel and Zoll (n 6).

88 Agnieszka Liszewska, *Współdziałanie Przestępcze w Polskim Prawie Karnym. Analiza Dogmatyczna* (2004).

VII. Common History and Other Similarities

In the following step more differences and similarities between the different law regimes will be examined. However, in the first step, a brief history of the development of the Polish Criminal Code offers an explanation as to why the two systems have so much in common.

A. German History of the Polish Criminal Code[89]

The broad similarities between the Polish and German criminal codes that appear have a historical basis. Criminal law during the Partitions of Poland differed depending on the geographical location of the lands where it was in force. In the Prussian partition, the Prussian Landrecht of 1794 was initially in force, characterized by considerable severity, based on the idea of intimidation as a preventive measure against society. Despite the beginning of codification work at the beginning of the 19th century, the Prussian Code was adopted only in 1851. Its content shows the influence of the Napoleonic Code of 1810 and Feuerbach's Bavarian Penal Code of 1813 – it introduced solutions corresponding to the ideas of the classical school of criminal law. The solutions of this code, which had an impact on future Polish codifications, were to equate responsibility for an attempt with responsibility for committing it and accepting the same responsibility for participation in someone else's crime with perpetration. The Prussian Code of 1851 was replaced by the Penal Code of the German Reich of 1871 as a result of political transformation – this regulation was in force in the areas of the former Prussian partition until enforcement of the Polish Penal Code of 1932.

After Poland regained independence in 1918, four legal orders were in force in its territory: Austrian, German, Russian and Hungarian. Initially, the possibility of adopting a single partitioning code for the entire territory of Poland was considered, but it was decided to build a new Polish criminal code – drawing on the existing codification achievements of European countries.

VIII. Uniform Perpetration vs. Polish Approach to Phenomenal Forms of Crime

The Polish approach to phenomenal forms of crime and the resulting differentiation of criminal liability of individual perpetrators allows the implementation of the principle of individualization and the personal nature of the criminal sanction.

According to Art 55 of the Polish Criminal Code, circumstances affecting the penalty are considered only as to the person to whom they relate. Therefore, a

89 Juliusz Bardach, Bogusław Leśnodorski and Michał Pietrzak, *Historia Ustroju i Prawa Polskiego* (LexisNexis 2009).

stricter or milder liability cannot be attributed to the perpetrator with reference to circumstances concerning other cooperating persons. This applies to a reduced degree of guilt due to age, previous criminal record, reconciliation with the aggrieved party, financial situation, and a certain social status. The principle of individualization of the punishment is understood as a supplement to the principles of liability of persons cooperating in committing a crime set out in Art 20 and 21 of the Polish Criminal Code. This stems from the nature of guilt as the individual attribution and reproach of the legal order against the individual committing the prohibited act.

Pursuant to the first regulation, each of the parties cooperating in the commission of a prohibited act is liable within the limits of its intention or negligence, regardless of the liability of the other cooperating parties. At the level of punishment, this also means that circumstances beyond the characteristics of a prohibited act, influencing the assessment of the degree of social harmfulness, may be considered only in relation to the cooperating party for whom they were foreseeable. Art 21 of the Polish Criminal Code, in turn, states that personal circumstances excluding or mitigating or aggravating criminal liability are considered only as to the person to whom they refer.

The principle of individualization of a penal sanction goes beyond the wording of Art 55 of the Polish Criminal Code – in a broad sense, it also expresses the order to adjust the punishment to the degree of individual guilt of each perpetrator, as well as to limit the negative consequences of conviction only to the perpetrator. Therefore, a criminal sanction cannot refer to the rights and freedoms of persons other than the convict, and the punishment should not be carried out by anyone other than the perpetrator.

A separate solution, which is a departure from the principle of independence of liability of causative forms of cooperation, is provided for individual crimes. Pursuant to Art 21 § 2 of the Criminal Code, 'if a personal circumstance concerning the perpetrator, affecting even only a higher criminality, is a sign of a prohibited act, the collaborator is subject to criminal liability provided for this prohibited act, if he knew about this circumstance, even if it did not concern him.'

Art 21 § 2 of the Criminal Code also provides for the criminal liability of a contractor who does not have a qualifying characteristic provided for in the type specifying an individual offence, if any of the accomplices, the ordering perpetrator or commanding perpetrator has such a characteristic, and the contractor knows about it. Thus, it can be stated that cooperation in the causative form with a person who has a feature qualifying them as the perpetrator of an individual crime increases the degree of social harmfulness of this cooperation if it was covered by the person's knowledge.

Examples of such prohibited acts include infanticide, the perpetrator of which may only be the mother, all prohibited acts relating to public authorities, and all

prohibited acts specified in the military part of the Criminal Code, which may only be committed by a soldier.

The legislator also introduced into the content of the Polish Criminal Code a special rule regarding the liability of the cooperating parties for an offense completed in the preparation or attempted phase. Pursuant to Art 23 § 1 of the Criminal Code, an accomplice who voluntarily prevented the commission of a prohibited act is not punishable. It should be clearly noted that the benefit of active regret regulated in this way can only be used by the cooperating person who himself prevented the commission of the entire prohibited act. The other cooperating parties will therefore be liable for the attempt, although objectively no prohibited act has been committed.

In the same vein, the German Penal Code stipulates in § 46 subpara 1 that '[t]he guilt of the offender is the basis for sentencing.' This must be understood as each participant's guilt determines their individual punishment. This becomes most obvious when looking at the criterion of 'the offender's prior history, his personal and financial circumstances' as in § 46 subpara 2 of the Penal Code. The individual experiences a person has in their life shapes them and makes up an important part of their personality. This personality together with the events of the commission build the foundation of the sentence.[90] As § 46 subpara 3 clarifies, circumstance which are part of the legal definition of the crime cannot be considered determining the just sentence as it relates to the amount of guilt contracted by the individual.

Just like Art 20 of the Polish Criminal Code, § 29 if the German Penal Code determines that each participant – primary or secondary – must be judged upon their 'own guilt irrespective of the guilt of the others.' In the German system of limited accessory in which the secondary participant is liable for the wrong committed by the principal, § 29 of the Penal Code clarifies that there is no attribution of guilt.[91] Consequently, a participant who possesses the characteristic of grounds excusing them by eliminating the blameworthiness of the criminal act – for instance § 19 of the criminal code (lack of criminal responsibility due to young age) or § 21 of the criminal code (insanity) – cannot invoke this ground of excluding criminal responsibility.

Like Art 21 of the Polish Criminal Code, § 28 of the German Penal Code deals with special personal characteristics on the level of the crime itself. These special characteristics describe the person rather than the act.[92] § 28 of the Penal Code differentiates between characteristics establishing criminal liability (subpara 1) and those which 'aggravate, mitigate or exclude punishment' (subpara 2).

90 *BGHSt 16, 351,* 353; Jörg Kinzig, '§ 46 StGB' in Albin Eser (ed), *Schönke/Schröder* (30th edn, CH Beck) mn. 29–30.

91 Wolfgang Joecks and Jörg Scheinfeld, '§ 29 StGB' in Volker Erb and Jürgen Schäfer (eds), *Münchener Kommentar*, vol 1 (4th edn, CH Beck) 1.

92 Brian Valerius, 'Besondere Persönliche Merkmale' [2013] Juristische Ausbildung 15, 17.

In the latter case, participants will be punished based on two different violated norms. A participant without the characteristic will be punished in accordance with the basic norm violated. A participant possessing the special characteristic will be punished according to the relevant provision with a higher/lower range of punishment. As far as aggravating, mitigating, or excluding characteristics are concerned, there is no difference between the Polish and German criminal law.

Differences emerge in cases of special characteristics establishing the principal perpetrator's criminal liability – i.e., cases of special offenses. As mentioned above,[93] a perpetrator of a special offense under German law can only be a person possessing the special subjective quality defining the special character of the offense. Anyone else involved in the commission of the special offense must be deemed a secondary participant which leads to the different handling between the two investigated law regimes. On one hand, § 28 subpara 1 of the German Penal Code stipulates a mandatory reduction of the sentence for the *secondary* participant. Both participants will be sentenced according to the same norm, but their ranges of punishment will differ. On the other hand, Art 21 § 2 of the Polish Criminal Code states that one party (might it be a co-, ordering, or commanding perpetrator) is aware of the special quality of their partner and leads to everyone being sentenced on the basis of the same norm according to their individual guilt but from the same range of punishment.

IX. Summary

The article has shown that because of their common heritage to the Prussian Landrecht and criminal code as well as Feuerbach's Bavarian Criminal Code, the models of criminal liability of a plurality of perpetrators under Polish and German criminal law share similarities. In the areas of individual and co-perpetration, no major differences emerged. Equal participation in a crime committed by more than one person requires a subjective agreement and an objective common commission. Over time, different solutions for regulations of a perpetrator using another person have been developed. The Polish interpretation of commanding and ordering perpetration is seen as two convictions (one of the acting and one of the commanding/ordering of people) which offers a fine distinction for the 'wire-puller's' case. In contrast to that, the German indirect perpetrator usually convicts just the 'puppet-master' in the background while the acting person – except for cases of a perpetrator behind the perpetrator – remains unpunished. This shows that Polish criminal law sees these constructions more like cooperation while German criminal law stresses the factor of the indirect perpetrator taking advantage of his human tool.

93 *Supra* IV. 1.

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