Czasopismo Prawa Karnego i Nauk Penalnych
Journal of Criminal Law and Penal Studies
ISSN: 1506-1817 e-ISSN: 2719-6569
Rok/Volume XXV: 2021 Zeszyt/No. 3

Vukan Slavković[1]

Comparative Legal Analysis of Complicity in a Crime

Analiza prawnoporównawcza współdziałania
w popełnieniu przestępstwa

Should he be a wicked man, he becomes more careless when he finds a partner in his wickedness.

Saint John Chrysostom[2]

1. Introduction

Questions of criminal participation arise when more than one person is in some way involved in the commission of a crime. In some cases, there may be no single individual who, in his own person, fulfills all the definitional elements of the criminal offense. Even if there is one such individual, the criminal law may want to tie other persons to the commission of the offense on the basis that they are complicit and therefore share responsibility for its commission[3].

In most jurisdictions, incitement offenses require that the defendant have a specific intention to incite the end harm.[4]. There are two basic criteria for grading crimes and determining proportional labeling and sentencing, culpability and harmfulness. When we are considering complicity or inchoate liability, the best marker of harm is to consider the nature of the primary offense that is being assisted or encouraged. As far as

[1] Vukan Slavković – Ph.D., College of criminalistics and security, Nish, Serbia; University of Montenegro, Kotor, Montenegro; ✉ vukan.s@ucg.ac.me.

[2] Saint John Chrysostom, *The Homilies*..., p. 65.

[3] A. du Bois-Pedain, *Participation*..., p. 94.

[4] The intervening choice of a fully autonomous human agent distances the assister's wrongful acts from the end harm and makes them less dangerous, even if they have masterminded the crime – D.J. Baker, *Reinterpreting*..., p. 29.

the culpability element is concerned, it is necessary to examine whether the defendant not only intentionally committed the acts of assistance, but also intended to use those acts to further the perpetrator's criminal goal, or did so with either extreme recklessness or reckless foresight of that possibility. The degree and gravity of the defendant's participation and his or her state of mind during participation should affect the way wrongdoing is labeled and punished[5].

The paper provides a historical and comparative introduction to different theoretical approaches to the liability of participants in a crime. The analysis points to the historical affinity between certain approaches to complicity in a crime. The text aims to provide an overview of the main liability systems used in different jurisdictions in order to lay the ground for their subsequent evaluation. It focuses on the Anglo-American and Eurocontinental system but also draws on examples from legislations of some jurisdictions in the context of clarifying distinctive elements of the two main approaches under discussion.

2. Complicity in the Anglo-American criminal law

The current criminal law of England and Wales provides an example of a simple bifurcated system that only recognizes the basic distinction between principals and secondary parties and channels the liability of everyone who is not a direct perpetrator through the accessorial route. The accessorial route thus includes not only standard secondary parties (those who aid, encourage, or instigate the principal's offense),but also those who acted with a common purpose but did not commit the entire *actus reus* of the offense in their own person[6].

Since 2007's Serious Crime Act[7], it is possible to become liable for conduct that could assist or encourage an offense, when the aider or assister intends the assistance or encouragement, and also intends that the criminal act occur, when the person believes, or is reckless, that the principal will act with the relevant *mens rea* for the complete offense (Article 44). However, it is not necessary that this actually happens.

---

5 D.J. Baker, *Complicity...*, p. 405, 423.

6 A. du Bois-Pedain, *Participation*..., p. 103–104.

7 Government gazette, c. 27. Royal assent- 30 October 2007; Commencement- 15 February 2008.

Similarly, there is an offense of engaging in conduct that is capable of encouraging or assisting, in the belief that the offense will be committed and in the belief that the conduct will encourage or assist (Article 45). This also applies to where there is a list of offenses, any of which might be committed (Article 46). These have considerable overlap with complicity, but, importantly, these offenses are inchoate as the main offense need not actually be committed[8].

Under the current *common law*, the core of complicity lies in intentionally encouraging or assisting the principal offender[9]. The Model Penal Code requires that the accomplice helps with „the purpose of facilitating the commission of the offense" (Article 2.06(3)). Most other Anglo-American jurisdictions adopt knowledge as the relevant mental element for complicity. The majority of criminal systems inspired by the civil law tradition treat *dolus eventualis* as a sufficient condition for complicity. The MPC, however, facially requires „purpose", and many have interpreted this as bravely forging a new path that requires an accomplice to have a positive desire for the criminal outcome that his or her assistance helps to bring into the world[10].

2.1. England and Wales

Common law doctrine has historically developed three legal concepts associated with unfinished criminal activity: attempt, conspiracy, and incitement. They have distinguishing features because all three are independent criminal offenses, united under the general name „inchoate crime"[11].

2.1.1. Statutory complicity

In England and Wales, legislation on complicity has been introduced by the Accessories and Abettors Act 1861[12], applied in accordance with a number of precedents. In its modern form, the institution of complicity

---

8 R. Cryer, *Imputation*..., p. 278.
9 R. Sullivan, *First*..., p. 274.
10 J.G. Stewart, *Complicity*..., p. 15.
11 V. Slavković, *Rubikon*..., p. 28.
12 Government gazette, 24 & 25 Vict. c.94. Royal assent- 6 August 1861; Commencement- 1 November 1861.

includes the perpetrator and accomplices of the crime, i.e. those who „aid, abet, advise or procure the commission of any indictable offence"[13].

The *common law* crime of incitement punished actions remote from the completed offense, and was stretched in extraordinary ways to compensate for the limitations of the law on accessory liability. In 1993, the Law Commission proposed and consulted new offenses of assisting and encouraging crime, but it was not until more than a decade later that the Law Commission produced their *Report on Inchoate Liability for Assisting and Encouraging Crime*[14]. This report was swiftly enacted into the Serious Crime Act 2007, which replaced the common law offense of incitement with three new offenses. The provisions were brought into force on 1 October 2008.

Incitement as a common law offense has been abolished by section 59 of the Serious Crime Act 2007, although there are a number of specific statutory offenses of incitement that remain, such as Article 4 of the Offences against the Person Act 1861[15] (incitement to murder), Article 8 of the Sexual Offences Act 2003[16] (causing or inciting a child under 13 to engage in sexual activity), and Article 26 of that Act (inciting a child family member to engage in sexual activity)[17].

The courts have developed incitement rather differently from attempt and conspiracy, both of which have been put into statutory form in 2007. The Law Commission of England and Wales[18] gave several reasons for regarding the offense of incitement in its present form as unsatisfactory and, rather than proposing a revised statutory version of the offense, recommended its abolition and replacement with new and broader offenses of assisting and encouraging crime („Encouraging or assisting crime" – Serious Crime Act 2007, Part 2)[19].

According to Serious Crime Act 2007 (Article 44): „Intentionally encouraging or assisting an offence", a person commits an offense if he

---

13 Г.А. Есаков, Н.Е. Крылова, А.В. Серебренникова, *Уголовное*..., p. 236.

14 Law Com No. 300, Cm. 6878 (2006).

15 Government gazette, 24 & 25 Vict c 100. Royal assent- 6 August 1861; Commencement- 1 November 1861.

16 Government gazette, 2003 c. 42. Royal assent- 20 November 2003; Commencement- 1 May 2004.

17 N. Padfield, *Criminal*..., p. 181, 184.

18 *Inchoate Liability*…

19 Serious Crime Act 2007, < https://www.legislation.gov.uk/ukpga/2007/27/contents >.

or she does an act capable of encouraging or assisting the commission of an offense and intends to encourage or assist its commission. Many of the features also apply to the other two offenses from Articles 45 and 46. The element of conduct is the commission of „an act capable of encouraging or assisting the commission of an offence". Therefore, Ashworth noted that any act will satisfy the Article, no matter how small or insignificant, as long as it is *capable of* amounting to encouragement or assistance. Regarding the fault element, according to Article 44, Section 1, Paragraph b, the defendant must intend by his or her act to encourage or assist the commission of the anticipated offense, and Section 2 states that it is not enough that encouragement or assistance „was a foreseeable consequence of his act".

Whereas the essence of the Article 44 offense is the defendant's purpose to assist or encourage, the Article 45 offense is committed when the defendant believes that the anticipated offense will be committed when he or she does an act capable of encouraging or assisting it (Article 45: „Encouraging or assisting an offence believing it will be committed"). According to Article 46 („Encouraging or assisting offences believing one or more will be committed"), a person commits an offence if he or she commit an act capable of encouraging or assisting the commission of one or more of a number of offenses and he or she believes that one or more of those offenses will be committed[20].

2.1.2. *Common law* complicity

An inciter must encourage or persuade someone to commit an offense. If that other person commits the crime, then the inciter is liable for that crime as an accessory. If an instigator communicates his or her encouragement, the incitement is complete, even if it has no influence: the incitement need not have any effect[21]. There must be an element of persuasion or en-

[20] A. Ashworth, *Principles*..., p. 457–461.

[21] In accordance with Article 8. („Abettors in misdemeanors") of the Accessories and Abettors Act 1861: „Whosoever shall aid, abet, counsel, or procure the Commission of any Misdemeanor, whether the same be a Misdemeanor at Common Law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal Offender" – < https://www.legislation.gov.uk/ukpga/Vict/24-25/94/enacted >. According to Criminal Law Act 1977, Article 65(7), Schedule 12, for „any

couragement: just offering to supply someone with equipment for a burglary that they already intend to commit would not constitute incitement[22].

Incitement requires the presence of an element of provocation or persuasion[23] that must reach the mind of the person being incited, although it need not be in any way effective. Incitement requires an intention that the incited offense be committed, and it must be proved that the inciter knew of all the circumstances which would render the incited act the crime in question. Among these circumstances is the mental element of the person incited to do the act without which that person would not commit an offense, and it is clear that the inciter must believe that the incited person has the mental state necessary to make what he or she is being incited, that is to do an offense[24].

For old-style *common law* incitement, the inciter had to intend that the crime be committed and to know the circumstances of the act which made it an offense. The incited person did not need to have the *mens rea*, but the inciter had to believe that they would commit the crime.

An interesting question under the old law of incitement was whether the incitement had to come to the attention of the incitee. If the encouragement (e.g. in the form of a letter) was intercepted, then the inciter was probably guilty of only attempted incitement[25]. *Most* (1881) was followed in *Jones*[26], where it was held that the criminality of the offense defined in Article 8 of the *SOA 2003*[27] was the incitement of children under the age of 13 to engage in sexual activity, and it did not matter whether it was directed at a particular child, or whether a particular child could be

---

misdemeanor" substitute „any indictable offence", and for „a misdemeanor" substitute „an offence". Lord Chief Justice Widgery stated that the words in Article 8 should be given their ordinary meaning. The natural meaning of „to abet" is „to incite, instigate or encourage" and this can only be committed by an accessory who is present when the crime is committed. This does imply either an express or implied agreement between the parties although there is no need to prove any causative link between what the abettor did and the commission of the offence – Attorney-General's Reference (No. 1 of 1975) (1975) QB 773.

22 N. Padfield, *Criminal*..., p. 182.

23 R. v. Christian (1913) 78 J.P. 112.

24 *Inchoate Offences*...

25 In *Most* (1881) a defendant wrote an article in a newspaper advocating the assassination of the crowned heads of Europe – N. Padfield, *Criminal*..., p. 182.

26 *Regina v Jones*, England and Wales Court of Appeal, 15 May 2007, Crim 1118 All ER (D) 235.

27 Sexual Offences Act 2003, < https://www.legislation.gov.uk/ukpga/2003/42/contents >.

identified[28]. According to the Law Commission of England and Wales, it is irrelevant that incitement is not directed to a particular person but is addressed to people in general[29].

2.2. The USA

Under *common law*, all persons were recognized as perpetrators in the absence of a definition of complicity. However, the perpetrators themselves, depending on their role in the commission of the crime, differed into a principal in the first or second degree, and an accessory before or after the fact[30]. The institution of complicity in the United States has been greatly influenced by English common law. The common law contains complex distinctions covering varying degrees of involvement of parties in a crime.

A person may be principal in an offense in two degrees. A principal in the first degree is someone who is the actor or absolute perpetrator of the crime; and in the second degree a person who is present, aiding, and abetting the fact to be done. His presence does not always have to be an actual immediate standing by, within sight or hearing of the fact, but it can also be a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance. This rule has also other exceptions: for, in the case of murder by poisoning, a man may be a principal felon by preparing and laying the poison or giving it to another (who is ignorant of its poisonous quality) for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed.

An accessory is someone who is not the chief actor in the offense nor present at its performance, but is somehow involved, either before or after the fact committed. An accessory before the fact is one, who being absent at the time of the crime committed, does procure, counsel, or command another to commit a crime. If A advises B to kill another, and B does it in the absence of A, B is principal and A is accessory to the murder.

An accessory after the fact may consist of a person who knows that a felony has been committed and receives, relieves, comforts, or assists the felon. Any assistance given to a felon to hinder his or her

---

28 N. Padfield, *Criminal*..., p. 182.

29 *Inchoate Offences*...

30 Л.С. Аистова, Д.Ю. Краев, *Уголовное*..., p. 236.

apprehension, trial, or serving punishment, makes the assistor an accessory after the fact[31].

The *Model Penal Code* considerably simplified the doctrine of complicity (of „parties to crime," or „accessorial liability") under the common law. Its text, without giving a general definition of complicity, defines the types of accomplices. A person is an accomplice of another person in the commission of an offense if he or she, with the purpose of promoting or facilitating the commission of the offense:

a) solicits such other person to commit it,
b) aids or agrees or attempts to aid such other person in planning or committing it,
c) having a legal duty to prevent the commission of the offense, fails to make a proper effort so to do (Article 2.6, Section 3, Paragraph a); or (b) his conduct is expressly declared by law to establish his complicity.

The Code rejects the accessory nature of complicity. This conclusion follows from paragraph 7 of Article 2.06 which states that an accomplice may be convicted on proof of the commission of the offense and of his or her complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted[32].

Liability for complicity is equated with responsibility for perpetration and is possible only if there is direct intent. An accomplice may be convicted if the commission of the completed crime and his or her participation in it is proved (Article 2.06 Sections 1 and 2).

The *actus reus* of complicity differs from its interpretation under English law, according to which responsibility for complicity is limited to assisting the perpetrator or to the willingness to aid even if it was not required or was insignificant. Under the *Model Penal Code*, a person is also recognized as an accomplice when he or she „agrees or attempts to aid" the perpetrator[33].

There are two criteria for the *mens rea* of complicity–knowledge and purpose. By some federal and state authorities on *mens rea* complicity,

---

31 W. Blackstone, *Commentaries*..., p. 22–24.
32 *Model*..., p. 30–31.
33 И.Д. Козочкин, *Уголовное*..., p. 213.

a helper does not have to have intent for the principal to commit his or her crime. It is enough that he or she knows that the principal will commit it. Thus, as the Fourth Circuit held in *Backun v. United States*, someone who sells something knowing that it will be put to felonious use can be counted as an accomplice in a felony simply because „he could refuse to give the assistance by refusing to make the sale"[34]. Several state statutes include similarly low *mens rea* requirements[35]. According to *Indiana code* (§ 35-41-2-4), a person who knowingly or intentionally aids, induces, or causes another person to commit an offense, commits that offense, even if the other person:

a) has not been prosecuted for the offense,
b) has not been convicted of the offense,
c) has been acquitted of the offense[36].

Wyoming Code (§ 6-1-201(a)) stated that a person who knowingly aids or abets in the commission of a felony, or who counsels, encourages, hires, commands, or procures a felony to be committed, is an accessory before the fact[37].

The *Model penal code* in Article 5.02 (Section 1) contains the following definition of solicitation: „A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission". It is irrelevant that the actor fails to communicate with the person he or she solicits to commit a crime if his or her conduct was designed to effect such communication (Section 2). In other words, attempted solicitation is also punishable[38].

The Model Code retained the substantive core of common law complicity. What the common law had called „aiding or abetting" the Model Code called „aiding or soliciting". Rather than limiting accomplice

---

34 Backun v. United States, United States Court of Appeals (4th Circuit),10 June 1940, 112 F.2d 635, 637.
35 S. Girgis, *The Mens*..., p. 468.
36 Indiana Code – Justia Law, < https://law.justia.com/codes/indiana/2020/title-35/article-41/chapter-2/section-35-41-2-4/ >.
37 State Statutes & Constitution – Wyoming Legislature, < https://wyoleg.gov/statutes/compress/title06.pdf >.
38 *Model*..., p. 76–77.

liability to cases in which the principal would not have been able to commit the offense without the accomplice's assistance, the common law required merely that the accomplice's assistance was a contributing factor[39]. The Code, by contrast, extended accomplice liability even to those cases where the accomplice was of no use to the principal whatsoever. From the perspective of penal treatment, the penological diagnosis of dangerousness is the same regardless of whether an actor succeeds in crime, or merely does everything he or she can to succeed but then fails in the end, for one reason or another[40].

Solicitation focuses on the person's subjective view of the world that need not be successfully communicated; it is sufficient that the solicitor's „conduct was designed to effect such communication". The solicitation offense includes no special requirement that the person's conduct strongly corroborates his or her criminal purpose[41].

In most U.S. jurisdictions specific intention is required for solicitation offenses; furthermore, solicitation is graded and punished as less serious than the substantive offense[42].

3. Complicity in the Eurocontinental criminal law

There are many similarities between the law on accomplice liability in France and in England and Wales. Both systems have the same starting point, what the French scholars would describe as *l'emprunt de la responsabilité*, which can literally be translated as 'the borrowing of liability'. This is a way of explaining that the liability of the accomplice is dependent on the liability of the principal offender: without a principal offense there can be no liability for complicity. While the terminology is different, the law in both systems essentially covers help or encouragement provided before or at the time of the principal offense. Once found liable, accomplice is punished as if he or she was the principal offender[43].

German criminal code recognizes standard secondary parties of two kinds:

---

39 State v. Tally, Supreme Court of Alabama, 09 August 1894, 15 So. 722, 738–39.
40 M. Dubber, *An introduction*..., p. 89–90.
41 K.J. Heller, M. Dubber, *The handbook*..., p. 580.
42 J.D. Baker, *Complicity*..., p. 423.
43 A. Reed, M. Bohlander, *Participation*..., p. 273.

a) instigators, who intentionally induce the principal to commit a crime of intent (§ 26 StGB: Anstiftung),
b) aiders and abettors, who intentionally help the principal to commit a crime of intent (§ 27: Beihilfe).

Historically, an influential view insisted that only a person who had performed the behavior that meets the description of the offense could be recognized as a perpetrator ('formal-objektive Theorie'). This approach lost ground after the legislator explicitly recognized the possibility that a person who acts 'through another' can be a principal. One type of theory ('materiell-objektive Theorie') focuses on external criteria, such as causation, dominance, or control over the performance of the objective element of the main offense. Another type of theory ('subjektive Theorie') puts the emphasis on the mindset/attitude of the persons involved in the commission of the crime and regards as a perpetrator someone who treat the crime as his or her own[44].

3.1. France

Regarding „borrowed responsibility", it should be understood that a physical act that constitutes complicity does not have its own inherent criminality, but borrows the criminality of the act committed by the perpetrator. Thus, the conduct of an accomplice becomes a crime when the crime has been completed by the principal offender. The accomplice does not commit an independent crime, but only facilitates the criminal activity committed by the other[45].

Joint principals are known as *coauteurs*. Exceptionally, the law will occasionally treat people who cause the commission of a principal offense but do not actually personally carry out the *actus reus* of that offense as the principal offender known as *l'auteur intellectual* or *l'auteur moral*[46].

French law, like Anglo-American, struggled to accommodate the notion of co-perpetrator or „coauteur" because of the derivative nature of its complicity theory based on the notion of *L'emprunt de criminalité*. „Coauteurs" are distinguished from accessories in that they are liable in

[44] A. du Bois-Pedain, *Participation*..., p. 113.
[45] L'emprunt de criminalité, < https://www.doc-du-juriste.com/droit-prive-et-contrat/droit-penal/dissertation/droit-penal-emprunt-criminalite-478473.html >.
[46] C. Elliott, *French*..., p. 84.

their own right. „Coauteur" is considered to have performed the acts which constitute the offense, whereas the accessory performed ancillary acts intending to assist the offense[47].

It is also known as the so-called theory of the „division of labor", according to which the concept of co-perpetration is associated with a previous contract of several participants because each of them performs part of the crime[48].

The accessory nature of complicity was legislated in the Code penal of 1810. Jean-René Garraud noted: „Complicity depends on the perpetration and borrows its criminal character from it"[49]. Accomplices were generally subject to criminal liability only if the crime was committed by the perpetrator. The complicity provisions of the French criminal code limited both the number of persons falling under the liability of accomplices and the borders of their liability. A necessary prerequisite for criminal responsibility of the accomplices is the commission by the perpetrator of a crime or an attempt to commit it[50].

With regard to accomplices (*les complices*), the key rules of the current French Criminal Code are found in Title II („Of criminal liability": Chapter I–General provisions). The accomplice to the offense is punishable as a perpetrator (Article 121-6). According to Article 121-7 (Section 1), the accomplice to a felony or a misdemeanor is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Section 2 state that: „Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice"[51].

Articles 121-7 prescribe two forms of complicity:

a) aiding,
b) abetting.

Code penal of 1810, along with aiding and abetting, describes another offense, rather similar to those mentioned above: „the knowingly furnishing arms, instructions, or any other means, for the commission

---

47 E. Van Sliedregt, *Individual*..., p. 96.
48 Lj. Lazarević, *Komentar*..., p. 181.
49 Д.А. Кузьмина, *Акцессорная*..., p. 73.
50 Э.В. Георгиевский, Р.В. Кравцов, *Совместное*..., p. 80–81.
51 Code penal, < https://www.legislationline.org/download/id/8546/file/France_CC_am012020_fr.pdf >.

of the offence" (Article 60)[52]. Under the current French Criminal Code, this form of complicity is covered by the afore mentioned broader concept which seems more correct to French scholars.

In French criminal law, aiding or abetting has traditionally been characterized by two important features: they must consist of acts, not omissions, and precede the perpetrator`s act (aiding) or, in extreme cases, completion of a crime (abetting).

As a rule, aiding or abetting is expressed by activities: the provision of weapons for murder, counterfeit keys for theft, etc. At the same time, for the responsibility of the accomplice, it is not necessary that these items has these items don't need to be actually used by the perpetrator. This is because the provision of means or arms for the commission of a crime predetermines the decision of the perpetrator and his or her willingness to commit the offence. Thus, both subjective and objective grounds for the criminal liability of an accomplice exist[53].

Article 121-7 specifies that the help or assistance must take place in order to facilitate the preparation or completion of the offense. The instigation, help, or assistance must have been provided prior to or at the time of the principal offense. Thus, acts carried out after the principal offense has been committed do not give rise to secondary party liability. There is an exception where help was provided after the commission of the offense but has been promised before the crime was committed[54].

For an accomplice to be held liable, a crime must have been committed by the principal offender. Accomplices will avoid liability if potential principal offenders have a defense that justifies their conduct (for example the provisions of Article 311–12 offer an immunity to be imposed on the accomplice.Contrary to American legislation,accomplices will be liable for the offense of theft). Complicity is not punishable if the acts of the principal offender can no longer be punished due to the expiration of the limitation period, or due to a general amnesty for offenses of that type (as opposed to an amnesty for the principal offender personally). Contrary to American and German criminal law,the principal offense

---

52 Penal Code of 1810, < https://www.napoleon-series.org/research/government/france/penalcode/c_penalcode2.html >.

53 И.Д. Козочкин, *Уголовное*..., p. 332–333.

54 A. Reed, M. Bohlander, *Participation*..., p. 279.

can be an attempt, although a person cannot be liable for attempting to be an accomplice[55].

When the potential principal offender has started to carry out the principal offense but has voluntarily chosen to desist and thus avoided liability, the accomplices will also avoid liability even though they were not a party to this voluntary decision. The case law has partly got around this potential gap in criminal liability by imposing liability for „conspiracy" instead[56].

Contrary to English *common law*, the provocation must be directed at a specific individual rather than being addressed to the world at large[57]. Section 2 of Article 121-7 makes express reference to the fact that accomplices include people who have incited an offense or given instructions for its commission. Both these forms of the offense must be directed at a particular individual. Incitement on its own is not enough, it must be accompanied by a gift, promise, threat, order, or abuse of authority. The promise might be, for example, a promise to pay a hitman if he kills the victim. General advice on how to commit a crime is not sufficient. If the advice is detailed, it can amount to instructions for the purposes of Article 121-7. Giving instructions is different from provocation because there is no need for pressure to be placed on the principal offender[58].

Incitement (*L'instigation*) can be carried out in two ways: by provocation or by giving instructions. Provocation is considered complicity only if three conditions are met. First, provocation must be accompanied by the providing of means specified in Section 2 of Article 121-7 of the Criminal Code (gift, money, etc.) or by methods that are named there (promise, threat, order, etc.). To recognize such actions as complicity, one of the listed circumstances is sufficient, although often the court ascertains them in their totality. The actions of a lover who incited a woman who became pregnant with him to perform an abortion by promising to provide her with material assistance in case of an agreement to terminate the pregnancy and threatening to leave her without help in case of refusal were considered provocation in judicial

---

55 C. Elliott, *French*..., p. 85–86.
56 V. Slavković, *Criminal*..., p. 89.
57 C. Elliott, *French*..., p. 88.
58 A. Reed, M. Bohlander, *Participation*..., p. 276.

practice[59]. Inducing another person to commit a criminal offense by other means or in the presence of circumstances other than those specified in Article 121-7 of the Criminal Code is not considered a provocation[60].

A positive act is usually required, an omission will not be enough. As in English law, mere presence at the crime scene is not sufficient to constitute complicity. Simply abstaining from acting is not sufficient. In the one case, a defendant was not considered liable for complicity when he found several individuals in the process of committing a crime[61] and agreed to remain silent on the payment of a sum of money[62].

However, accomplice liability will be imposed on an individual who did not carry out a positive act when its abstention was blameworthy. His mere presence encouraged the principal offender, which was the case when a woman's lover was present at the scene of her illegal abortion[63]. Alternatively, it may be that there was a prior agreement with the principal offender. This was the position in a case where an inspector of taxes had agreed to turn a blind eye to the dishonest acts of the principal offender[64]. Another example arose when a police officer was found to be a secondary party to theft[65] when he failed to stop his colleague from committing theft while they were on duty together[66].

The accomplice must know the criminal nature of the principal offender's conduct and voluntarily participate in its commission. Article 121-7 specifies that the help or assistance must be given 'knowingly'. It also states that the instructions must be given 'in order to commit' the crime. Thus, the person who lends his car to a third party without knowing that the car will be used to commit an armed robbery is not an accomplice.

Contrary to the criminal law of the USA and Germany, the act of complicity must have been accomplished and not merely attempted.

---

59 Chambre criminelle de la Cour de cassation française du 25.02. 1942. D.A., 1942, 91.

60 И.Д. Козочкин, *Уголовное*..., p. 334.

61 Chambre criminelle de la Cour de cassation française du 15 janv. 1948, Sirey 1949, 1, p. 81; Décision de l'Assemblée plénière de la Cour de cassation française du 20 janv. 1964, JCP, 1965, II, 13.983.

62 A. Reed, M. Bohlander, *Participation*..., p. 280.

63 Chambre criminelle de la Cour de cassation française du 5 nov. 1941, Sirey 1942, 1, p. 89.

64 Chambre criminelle française du 27 oct. 1971, Bull. crim. n° 284.

65 Tribunal correctionnel, Aix-en-Provence, 14 janvier 1947; JCP, 1947, II, 3465.

66 C. Elliott, *French*..., p. 87–88.

For example, a person offered to lend a principal offender a weapon to commit a crime but his or her offer was rejected, or intended to drive the principal offender to the scene of the crime but his or her car broke down[67].

3.2. Germany

The Criminal Code of the Federal Republic of Germany[68] does not contain a general definition of complicity. In the doctrine of criminal law complicity means the participation of several persons in various ways in the commission of an intentional criminal offence. This is indicated in Article 24 by one general concept (*Täterschaft und Teilnahme*), which translates as perpetration and participation, although they are independent institutions[69].

In German criminal law, a participant (*Teilnehmer*) is a person who takes part in the act of the perpetrator (inciter or accessory). All persons involved in the commission of the act (perpetrators in all forms and participants) are considered to be accomplices (*Beteiligte*)[70].

According to Article 25 Section 1, „whoever commits an offence themselves or through another incurs a penalty as an offender". Section 2 prescribes that „if several persons commit an offence jointly, each person incurs a penalty as an offender (joint offenders)". Based on this definition, the science of criminal law distinguishes three forms of co--perpetration (or perpetration): direct perpetration, indirect (through another) commission of a crime, and joint perpetration in which each perpetrator is punished as a principal offender[71].

According to Article 26, whoever intentionally induces another to intentionally commit an unlawful act, incurs the same penalty as an offender. In Article 27, Section 1, an aider is defined as a person who intentionally assists another in the intentional commission of an unlawful

---

67 A. Reed, M. Bohlander, *Participation*..., p. 279–281.

68 Criminal code of Germany in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 19 June 2019 (Federal Law Gazette I, p. 844), hereinafter: StGB.

69 Л.С. Аистова, Д.Ю. Краев, *Уголовное*..., p. 16.

70 П.В. Головненков, *Уголовное*..., p. 77.

71 Л.С. Аистова, Д.Ю. Краев, *Уголовное*..., p. 16.

act. Section 2 prescribes that the penalty for the aider is determined in accordance with the penalty prescribed for the offender. It must be mitigated pursuant to section 49 (1) of the Criminal code[72].

The distinction between these five forms of complicity is sometimes difficult. Problems arise, in particular, when it becomes necessary to distinguish perpetrators through another from instigators, and co-perpetrators from aiders. The courts have long relied on subjective factors to draw distinctions: in order to be a perpetrator of any kind, it is necessary, according to long-standing jurisprudence, to have the mindset of a perpetrator (*animus auctoris*) or the will to commit the offense oneself. The characteristic of a mere accomplice, by contrast, is that person's will to support another (*animus socii*).

In recent years the courts have moved away from this strictly subjective approach toward a holistic one, evaluating all objective and subjective elements of the situation[73].

According to the followers of the subjective theory, a person acting under the influence of *animus socii* is a secondary offender, and a person who acted under the influence of *animus auctoris* is the principal offender. Therefore, the elements of *animus auctoris* were the independence of intent and self-interest in the commission of a criminal offense, and the elements of *animus socii*, on the contrary, are non-independence (conditionality) and lack of self-interest[74].

In the original version of the German Criminal Code, the condition of complicity was a criminal offense committed by the perpetrator (§ 48 f. StGB a. F.). This was understood in the sense that the actions of the principal offender need to be unlawful and must accomplish the objective element of the offense; besides, he or she must act with a guilty mind. If the perpetrator was, for example, mentally incompetent, the accomplice would not be subject to criminal liability for incitement or assistance. However, this so-called strict accessoriness was quickly recognized as unsatisfactory.

Therefore, already in the reform projects of the early 20th century, the accessoriness of complicity was limited. From a legislative point of view,

---

72 G. Freund, F. Rostalski, *Strafrecht*..., p. 378.

73 K.J. Heller, M. Dubber, *The handbook*..., p. 265.

74 Д.А. Безбородов, *Виды*..., p. 13–14.

this restriction was introduced, first, by the provision of § 4 of the *Juvenile Justice Act* (1923)[75], which established the age of criminal capacity, and then by the introduction of other conditions for sanity. Since 1943 § 29 StGB is in force and codifies the principle of limited accessoriness according to which any accomplice is punished in accordance with personal guilt without taking into account the guilt of others[76].

According to Article 30, Section 1 of the German Criminal Code („Attempted complicity" — „Versuch der Beteiligung") „A person who attempts to induce another to commit a felony or abet another to commit a felony shall be liable according to the provisions governing attempted felonies. The sentence shall be mitigated pursuant to Article 49 (Section 1)"[77]. Indirect intent (*dolus eventualis*) is sufficient, just as with completed incitement. Nevertheless, intent must necessarily be directed towards the completion of the act[78].

Conclusion

In the doctrine of criminal law, complicity means the participation of several persons in various ways in the commission of an intentional criminal offense. Participation is characterized by accessoriness, i.e. it is conditioned by the presence of an intentional and unlawful act of another person.

According to Serious Crime Act 2007, a person commits an offense if he or she does an act capable of encouraging or assisting the commission of an offense and he or she intends to encourage its commission or assist in it. The defendant must intend by his or her act to encourage or assist the commission of the anticipated offense. It is not enough that encouragement or assistance „was a foreseeable consequence of his act". In *common law*, incitement requires the presence of an element of provocation or persuasion that must reach the mind of the person incited, although it need not be effective in any way. Incitement requires an intention that the offense incited should be committed, and it must

---

75 Jugendgerichtsgesetz – 16. Februar 1923, (RGBl. I S. 135).
76 H. Frister, *Strafrecht*..., p. 526–527.
77 V. Slavković, *Conatus*..., p. 86–87.
78 H. Frister, *Strafrecht*..., p. 643.

be proved that the inciter knew of all the circumstances which would render the act incited the crime in question.

The institution of complicity in the United States has been greatly influenced by English common law. The common law contains complex distinctions covering varying degrees of involvement of parties in a crime. The Model Code considerably simplified the doctrine of complicity (of „parties to crime," or „accessorial liability") under the common law. Its text, without giving a general definition of complicity, defines the types of accomplices. The MPC requires that the accomplice helps with „the purpose of facilitating the commission of the offense". Most other Anglo-American jurisdictions adopt knowledge as the relevant mental element for complicity.

There are many similarities between the law on accomplice liability in France and Great Britain. Both systems have the same starting point, what the French scholars would describe as *l'emprunt de la responsabilité*, which can literally be translated as 'the borrowing of liability'. In French criminal law, aiding or abetting has traditionally been characterized by two important features: they must consist of acts, not omissions, and precede perpetration`s act (aiding) or, in extreme cases, completion of a crime (abetting). A crime must be committed by the principal offender in order for liability to be imposed on the accomplice. Accomplices will avoid liability if potential principal offenders have a defence that justifies their conduct. The provocation must be directed at a specific individual rather than being addressed to the world at large. Contrary to American and German criminal law, the principal offense can be an attempt, although a person cannot be liable for attempting to be an accomplice.

The Criminal Code of the Federal Republic of Germany does not contain a general definition of complicity. It is indicated by one general concept (*Täterschaft und Teilnahme*) which translates as perpetration and participation, although they are independent institutions. In Germany, the courts have long relied on subjective factors to draw distinctions between forms of complicity: in order to be a perpetrator of any kind, it is necessary, according to long-standing jurisprudence, to have the mindset of a perpetrator (*animus auctoris*) or the will to commit the offense oneself. The characteristic of a mere accomplice, by contrast, is that person's will to support another (*animus socii*).

Summary

The paper analyses the main provisions of complicity in the criminal law of Great Britain, the United States, France, and Germany. The norms on responsibility for crimes committed by a group of persons, regardless of whether they are regulated by the common law or the Romano-Germanic legal system, were largely influenced by the accessory theory of complicity. The criminal legislation of Great Britain and the United States considers incitement, conspiracy, and attempt not as stages of committing crimes but as independent criminal offenses entailing punishment. There are many similarities between the British and French laws on accomplice liability. Both systems have the same starting point, what French scholars would describe as *l'emprunt de la responsabilité*, which can literally be translated as 'the borrowing of liability'. This is a way of explaining that the liability of the accomplice is dependent on the liability of the principal offender: without a principal offense, there can be no liability for complicity. Although the terminology is different, the law in both systems essentially covers the help or encouragement provided before or at the time of the principal offense. Once found liable, the accomplices are punished as if they were the principal offenders. Contrary to the criminal law of the United States and Germany, in French law, the act of complicity must have been accomplished and not merely attempted. In Germany, courts have long relied on subjective factors to draw distinctions between the forms of complicity: In order to be a perpetrator of any kind, it is necessary, according to long-standing jurisprudence, to have the mindset of a perpetrator (*animus auctoris*) or the will to commit the offense oneself. The characteristic of a mere accomplice, in contrast, is that a person has the will to support another (*animus socii*).

Keywords

complicity, criminal law, liability, incitement, aiding

Bibliography

Аистова Л.С., Краев Д.Ю.,*Уголовное право зарубежных стран*, Санкт-Петербург 2013.

Ashworth A., *Principles of criminal law*, New York 2009.

Baker D.J., *Reinterpreting Criminal Complicity and Inchoate Participation Offences*, Abingdon 2016.

Baker D.J., *Complicity, Proportionality, and the Serious Crime Act*, „New Criminal Law Review: An International and Interdisciplinary Journal" 2011, 14 (3).

Безбородов Д.А., *Виды соучастников преступления*, Санкт-Петербург 2013.

Blackstone W., *Commentaries on the Laws of England*, Oxford 2016.

du Bois-Pedain A., *Participation in Crime*, in: *Core Concepts in Criminal Law and Criminal Justice*, ed. K. Ambos, Cambridge University Press 2019.

Cryer R., *Imputation and Complicity in Common Law States: A (Partial) View from England and Wales*, „Journal of International Criminal Justice" 2014, 12 (2).

Dubber M., *An introduction to the Model Penal Code*, New York 2015.
Elliott C., *French Criminal Law*, London – New York 2011.
Есаков Г.А., Крылова Н.Е., Серебренникова А.В., *Уголовное право зарубежных стран*, Москва 2010.
Freund G., Rostalski F., *Strafrecht Allgemeiner Teil*, Berlin 2019.
Frister H., *Strafrecht Allgemeiner Teil, 5. Auflage*, Berlin – Москва 2013.
Georgievsky E.V., Kravtsov R.V., *Joint Crime in the Legislation of Some Foreign Countries of New and Modern Times (Part One)*, „Siberian Law Herald" 2019, 85 (2).
Георгиевский Э.В., Кравцов Р.В., *Совместное совершение преступления в законодательстве некоторых зарубежных государств Нового и Новейшего времени (Часть первая)*, „Сибирский юридический вестник" 2019, Т. 85, № 2.
Girgis S., *The Mens Rea of Accomplice Liability: Supporting Intentions*, „Yale Law Journal" 2013, 123 (3).
Головненков П.В., *Уголовное уложение Федеративной республики Германия – Strafgesetzbuch (StGB)*, Potsdam 2021.
Heller K.J., Dubber M., *The handbook of comparative criminal law*, Stanford 2011.
Inchoate Liability for Assisting and Encouraging Crime, < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc300_Inchoate_Liability_for_Assisting_and_Encouraging_Crime_report.pdf >.
Inchoate Offences Conspiracy, Attempt and Incitement, < http://www.lawcom.gov.uk/app/uploads/2016/08/No.050-Codification-of-the-Criminal-Law-General-Principles-Inchoate-Offences-Conspiracy-Attempt-and-Incitement.pdf >.
Юрченко И.А., *Уголовное право зарубежных стран*, Москва 2015.
Козочкин И.Д., *Уголовное право Соединённых Штатов Америки: успехи и проблемы ресформирования*, Санкт-Петербург 2007.
Козочкин И.Д., *Уголовное право зарубежных государств, Общая часть*, Москва 2003.
Крашенинникова Н.А., Трикоз Е.Н., *Формирование института соучастия в уголовном праве Индии XIX в.*, „Вестник Российского университета дружбы народов. Серия: Юридические науки" 2018, Т. 22, №1, DOI: 10.22363/2313-2337-2018-22-1-66-90.
Кузьмина Д.А., *Акцессорная теория соучастия*, „Вестник научных конференций" 2017, Т. 20, № 4–3, DOI: 10.17117/cn.2017.04.03.
Lazarević Lj., *Komentar Krivičnog zakonika*, Beograd 2011.
Model penal code, Official draft and explanatory notes, The American law institute, Philadelphia 1985.
Padfield N., *Criminal law*, Oxford 2012.
Reed A., Bohlander M., *Participation in Crime: Domestic and Comparative Perspectives*, London and New York 2016.
Saint John Chrysostom, *The Homilies of S. John Chrysostom: Archbishop of Constantinople, on the Statues, Or to the People of Antioch*, Oxford 1842.
Slavković V., *Criminal Conspiracy in Comparative Law*, „Труды Института государства и права РАН" 2021, 16 (5), DOI: 10.35427/2073-4522-2021-16-5-slavkovic.
Slavković V., *Conatus delicti: korak ka zločinu*, Beograd 2020.
Slavković V., *Rubikon zločina: pokušaj u krivičnom pravu*, Novi Sad 2019.

Stewart J.G., *Complicity*, in: *The Oxford Handbook of Criminal Law*, ed. M.D. Dubber, T. Hörnle, Oxford 2014.

Sullivan R., *First degree murder and complicity—conditions for parity of culpability between principal and accomplice*, „Criminal Law, Philosophy" 2007, 1.

Шаргородский М.Д., *Избранные труды*, Санкт-Петербург 2004.

Тарбагаев А.Н., *Уголовное право. Общая часть*, Москва 2015.

Van Sliedregt E., *Individual Criminal Responsibility in International Law*, Oxford 2012.

Зубкова В.И., *Уголовное законодательство европейских стран : сравнительно-правовое исследование*, Москва 2013.