

## Summary

Since 1886, the Dutch Penal Code has defined and differentiated between liability for perpetration and liability for participation. In a thesis dating from 1998, M.M. van Toorenburg argued that an *Einheitstätersystem* is preferable to this system. An *Einheitstätersystem* is a monistic system characterized by the fact that all persons involved are regarded as perpetrators and the same maximum penalty applies to each person. The role of each individual is not considered until sentencing takes place. Austria has an *Einheitstätersystem*, which Van Toorenburg discusses. Van Toorenburg's analysis is the starting point for this study, which focuses on the functioning of existing Dutch legislation on perpetration and participation.

Following an introductory chapter that sets out the background, structure and limitations of the study, the second chapter describes Dutch law relating to perpetration and participation. First, the legal history of the current provisions is discussed. This discussion shows that, at the time, there were extensive deliberations regarding the relationship between co-perpetration and complicity. It becomes apparent that there was broad support at the time for the distinction between the two modes of participation. Members of parliament, in particular, were evidently aware that it was not possible to make a clear distinction in advance. They trusted that this would develop in legal practice.

The intent of the participant was also the subject of extensive discussion. It is apparent from the discussion that, according to the legislator, the co-perpetrator should not be treated differently from a (sole) perpetrator. Elements of the offence for which intent does not need to be established on the part of the perpetrator, are also excluded from the co-perpetrator's intent. The approach to a person who incites a crime was somewhat different. The main principle is that the instigator is only liable for the offences that he has knowingly incited. Aggravating consequences are a statutory exception to this. These are also 'taken into account' with regard to the instigator/inciter. In the case of an accomplice, the legislator has chosen a similar approach but the procedural aspects are different. The less far-reaching intent of the accomplice is not reflected in the legal qualification of the offence, but is taken into account when the penalty is determined.

The means of incitement were a further point of attention for the legislator. The limitative enumeration of means of incitement was discussed in the plenary sessions, but Minister Modderman did not agree that the limitative character should be discarded. The means of incitement were extended anyway in 1924, when certain means of complicity (the provision of opportunity, means and information) also became means of incitement.

According to the legislator, Article 51 of the Penal Code, which was implemented in 1976, did not contain a significant change of principles. In legal history there is not actually a further definition of cases in which an act committed by the legal entity or by natural persons in control of the acts of a corporation, can be assumed.

The case law relating to perpetration and participation is then discussed. The main point to emerge from this discussion is that the commission of a crime is not only a matter of perpetrators fulfilling the description of the offence 'with their own hands'. Functional perpetration by natural persons (in short, causing another person to commit a criminal

offence) is a possibility in many offences. And there are many offences that legal entities can commit. The criteria for functional perpetration and perpetration by a legal entity are not completely clear, but it is clear that the criteria of the Drijfmet ruling (Dutch Supreme Court, 21 October 2003, NJ 2006, 328 m.nt. P.A.M. Mevis) allow for a case-by-case approach when establishing the liability of legal entities. A limitation to perpetration still lies in the requirement of the presence on the part of the perpetrator of an implicit or explicit quality required by the description of the offence. Further, the role of the implementer can be so independent that the 'processor' of the offence cannot be designated as the person who committed it. The *mens rea* required by the description of the offence must be present in the committer himself. The intent of a legal entity can be established by means of attribution of intent of natural persons. But it can also derive from a course of events involving acts that are chargeable to the legal entity.

'*Doen plegen*' is a Dutch mode of participation where an offender does not carry out the *actus reus* himself, but instead uses an innocent agent. This mode can only be assumed if the agent is indeed not criminally liable. The scope of co-perpetration has been increasingly extended since the Dutch Penal Code came into force. The 'Container Theft' ruling (Dutch Supreme Court, 17 November 1981, NJ 1983, 84 m.nt. ThWvV) was an important milestone because since then, physical presence is no longer a requirement for establishing co-perpetration. Later case law accepts that a conscious and close cooperation is sufficient. Not disassociating oneself from a criminal offence is, in itself, not sufficient grounds for presuming that the accused is a co-perpetrator, but can play an important role in substantiating evidence of co-perpetration. With regard to the intent of the co-perpetrator, the Dutch Supreme Court ('Hoge Raad') works with a form of general intent whereby establishing a conscious and close cooperation sometimes appears to include *dolus eventualis*.

From case law regarding incitement, it is evident that the means of incitement are interpreted in a broad sense. A certain difference between the criminal offence intended by the inciter and the offence actually committed does not affect liability *per se*. This also applies to complicity: the criminal offence must fall within a certain range in respect of the crime that the accomplice intended to commit. Article 49 paragraph 4 of the Penal Code fulfils a correcting function when determining the penalty.

In the case of natural persons in control of (criminal) acts of a corporation, case law shows that the 'Slavenburg criteria' (accepted in the Slavenburg ruling, Dutch Supreme Court 16 December 1986, NJ 1987, 321 en 322 m.nt. 'tH) are still decisive. Central to these criteria are the failure to take measures to prevent conduct and accepting the significant chance that such conduct will occur.

Following this, in the final section of Chapter 2 procedural law is discussed that governs the application of the provisions on perpetration and participation. Under Article 6 of the ECHR, the court is bound to the charge(s) to a certain degree. Ultimately, the rights of the accused are decisive, i.e. whether the information given to the accused regarding the accusation against him enabled him to defend himself against the facts for which he was convicted.

In the Netherlands, a system of principles is used that implies that the court is more strictly bound to the charges. The mode of participation with which a person is charged, is expressed in the charge and the court cannot declare any other mode of participation proven. In this context it is understandable that in many cases all forms of perpetration

and participation to be taken into account, are processed in the form of alternative or subsidiary charges.

The third chapter deals with the Austrian *Einheitstätersystem*. In this system, the perpetrator is not only, as in a traditional *Teilnahmesystem*, anyone who independently and directly fulfils all counts of the offence, but all persons involved in bringing about the criminal offence. The concept of an *Einheitstätersystem* differs fundamentally from the concept of the *Teilnahmesystem* in a number of respects. All those participating in the offence are deemed perpetrators, and the emphasis is on differentiated sentencing. In addition, participators are not punished on the basis of their contribution to the offence committed by the perpetrator, but on the basis of the wrongs they have caused themselves. In the *Einheitstätersystem*, conceptual distinctions are of little significance and incorrect qualifications have few, if any, procedural consequences.

In the *Einheitstätersystem*, a distinction can be made between the formal system (that does not differentiate) and the functional system (that distinguishes between different types of perpetrator). The Austrian system was designated as a functional *Einheitstätersystem* in 1993 by the Supreme Court of Justice (*Oberster Gerichtshof*). Section 12 of the Austrian Penal Code recognizes three types of perpetrator: the *unmittelbarer Täter* (direct perpetrator), the *Bestimmungstäter* (instigator) and the *Beitragstäter* (accessory). All three forms of perpetration apply to all offences. The *unmittelbare Täter* can be an *Alleintäter* (sole perpetrator) or *Mittäter* (co-perpetrator). This requires that the person has committed either the act of the offence (*Alleintäter*) or one of the acts of the offence (*Mittäter*). This is a formal and relatively straightforward criterion. Since this involves 'internal boundaries' in the *Einheitstätersystem*, and all forms of perpetration are equal, there is no need for a delineation based on an assessment of someone's contribution to the offence.

*Bestimmungstäterschaft* and, above all, *Beitragstäterschaft* cannot be delineated without an evaluating criterion. *Bestimmungstäterschaft* presumes two actions: inciting another person to the act, and the act itself (quantitative accessoriness). The *Beitragstäter* is the person who contributes to the commission of the criminal offence in another way. The contribution must promote the act. It can involve an omission, but only if an obligation to act exists on the basis of a *Garantenstellung* (guarantor position). The *Bestimmungstäter* and *Beitragstäter* respectively must have the required mode of culpability for the fulfilment of the offence. Whether the person carrying out the act has that mode of culpability, is irrelevant. This is because, in the case of *Bestimmungstäterschaft* as well as *Beitragstäterschaft*, it is not a requirement to establish *qualitative* accessoriness: the (objective) act committed by the other person does not need to be a criminal offence, and the other person does not need to be a punishable (direct) perpetrator. Each person is punished in accordance with *eigenes Unrecht und Eigene Schuld* (own wrongdoing and culpability).

In the discussion on attempt to commit a crime, it becomes apparent that the distinction between the forms of perpetration is not entirely irrelevant. Attempted direct perpetration and *Bestimmungstäterschaft* is punishable, attempted *Beitragstäterschaft* is not. The Austrian Penal Code has separate provisions for offences requiring a certain quality on the part of the perpetrator, whereby participation in such offences is punishable in certain cases. In Austrian criminal law, legal entities are also punishable. Liability to punishment is statutorily based on punishable acts by *Entscheidungsträgers*

(decision-makers) and *Mitarbeiters* (employees). Paragraphs 33 and 34 set out the grounds for reducing and increasing a penalty. Some of these grounds relate directly to the forms of perpetration. It is an aggravating circumstance if the perpetrator has incited someone else to commit the offence (*zur strafbaren Handlung erführt hat*), and it is a mitigating circumstance if he committed the offence under the influence of a third person, out of fear or obedience (*unter den Einwirkung eines Dritten oder aus Furcht oder Gehorsam verübt hat*), or had only a subordinate involvement in the offence (*nur in untergeordneter Weise beteiligt war*).

With regard to Austrian criminal procedure, it is above all important that, in the context of legal equivalence (*rechtliche Gleichwertigkeit*), complaints to the Austrian Supreme Court of Justice regarding the mode of perpetration deemed applicable by the court in the first instance, are unlikely to succeed if another mode of perpetration is involved. It also became apparent that the concept of *Wahlfeststellung* ('alternative findings') exists in Austrian law. This can be applied, for example, when on the basis of the facts it can be established that there is either *unmittelbarer Mitäterschaft* or *Beitragstäterschaft*, without the judge being able to specify which of the two is involved.

A central question in this study was whether Dutch law relating to participation is perceived as opaque and cumbersome in legal practice. The functioning of current legal provisions regarding perpetration and participation were explored in interviews with twelve persons from criminal law practice: lawyers, public prosecutors and members of the judiciary. The fourth chapter is a report of these interviews.

Many of the interviewees indicated that persons are rarely charged with incitement. From this perspective alone, the limitative enumeration of means of incitement is not perceived as restrictive. The respondents were almost unanimous in the opinion that *'doen plegen'* (where someone uses an innocent agent to commit the offence) can be dispensed with as an independent mode of participation. If this mode were abolished, more cases could be brought as incitement. A number of respondents indicated that the means of incitement should therefore be abolished or supplemented with abuse of power or of a position of vulnerability. In various interviews, the opinion was expressed that the mode of functional perpetration could be applied much more frequently, particularly in the case of general offences.

The respondents claim that it is sometimes unclear whether a case involves co-perpetration, or whether the scales should tip towards complicity. Other interviewees claimed that there is a lack of clarity regarding the role that not disassociating oneself from the offence plays in proving co-perpetration, and regarding the question of whether co-perpetration can be established despite the absence of one of the parties from the actual commission of the punishable offence. The members of the judiciary who were interviewed are surprised at the fact that, in many cases, the charges do not include complicity as a subsidiary charge. It is certainly not the case that complicity is always filed as a subsidiary charge automatically. Because it is bound to the charge(s), the court cannot establish and qualify a form of participation other than that specified in the charge(s). One respondent pointed out that, if this were made possible, important advantages of this principle would be lost. This could well be too high a price. The members of the Public Prosecution Service who were interviewed preferred to charge co-perpetration as generally as possible. In cases in which there is no subsidiary charge of complicity, many a court has looked to stretch the boundaries of co-perpetration.

There is not a great lack of clarity with regard to the definition of punishable behaviour due to complicity. The boundary between prior and simultaneous complicity is not perceived as highly troublesome; one of the judges remarked that this boundary had, in effect, already been dispensed with in the ruling of the Dutch Supreme Court on 24 March 2009, LJN BG4831. However, it emerged from the interviews that there is a lack of clarity regarding passive complicity. Some of the interviewees indicated that the trio ‘opportunity, means or information’ can be dispensed with. One respondent suggested dispensing with the distinction between complicity and co-perpetration, and another suggested that this should in any case be given serious consideration. Other respondents have objections to this, mainly based on considerations of legality and the lower punishability of the accomplice’s contribution. Very few of the respondents who expressed views on the Austrian model found it to be an attractive alternative.

With regard to legal entities, it emerged from the interviews that the ‘Drijfmet ruling’ criteria are effective guidelines in terms of establishing perpetration by a legal entity, although their significance should not be made absolute. In the view of one lawyer, the criteria are too broad. A respondent from the Public Prosecution Service claims that the conclusion that intent on the part of the legal entity cannot be established, is too hastily reached. With regard to natural persons in control of (criminal) acts of a legal entity, the respondents are of the view that the ‘Slavenburg criteria’ enable an effective and fair delineation of responsibility.

The fifth and final chapter is a concluding chapter. The overall picture emerging from the interviews is that the Dutch legal provisions relating to perpetration and participation are not perceived as problematic. However, the discussions reveal that there are grounds for examining whether improvements could be made to a number of aspects of the legal regulation of perpetration and participation and its implementation in practice.

In terms of perpetration, it is the underutilization of the mode of functional perpetration that draws attention. A possible explanation for this underutilization emerged during the interviews. When indicting for general offences, models based on participation constructions are used. In our opinion, it is advisable for the Public Prosecution Service to modify this practice.

The application of the ‘incitement’ and ‘*doen plegen*’ modes has seen a sharp decrease in criminal law practice. Moreover, the dividing line between the two modes of participation is established using a criterion for which it is difficult to find a convincing rationale. With regard to the means of incitement, some of the respondents are of the opinion that these can be dispensed with, together with the means of complicity. Other respondents see them as a useful basis for defining the liability of the instigator. This basis can, however, be maintained when breaking through the limitative character of the enumeration. The suggestion is to make two related amendments to the legal regulation of ‘*doen plegen*’ and ‘incitement’. ‘*Doen plegen*’ can be abolished. And the limitation of punishable incitement by a limitative enumeration of means to incitement can be dispensed with.

With regard to co-perpetration and complicity, the central question is whether complicity still has a right of existence as a separate mode of participation with a precisely defined scope, a more limited reach, and lower maximum penalties. Legal history shows that the legislator has been aware of the vague character of the distinction between co-perpetration and complicity. From the interviews it emerged that there is

still support for distinguishing between the two, although opposing views were also expressed. This does not mean to say that, if the distinction between co-perpetration and complicity is maintained, no improvement can be made to their definition. In the case of co-perpetration, clarification could come mainly from new case law. With regard to complicity, in our view the solution would be to simplify the legal regulation, for example by means of a formulation whereby the persons sentenced as parties to a crime are those who knowingly encouraged or facilitated the commission of that act.

With regard to the procedural law that governs the application of perpetration and participation, it is notable that there is still broad support for the principles of the Dutch system. Partly for this reason, it would not be appropriate in this report, which deals with modes of participation, to raise for discussion the merits of that system. This means that, in cases where complicity is not a (subsidiary) charge, there are no possibilities for the courts to establish complicity. Perhaps the suggested simplification of complicity will mean that this occurs less frequently.

Until now, the Dutch Supreme Court has limited the possibility for alternatives in findings of fact and qualifications to choices that are not important in terms of the meaning in criminal law of the facts found. And the choice between co-perpetration, incitement and '*doen plegen*', is considered important in the aforementioned sense. In our view, there are grounds for reviewing this choice when realizing the proposed modifications, because the differences between perpetration, co-perpetration and incitement are thereby reduced. In addition, in our view it is advisable to make possible, by means of an amendment to the relevant act, alternative judicial finding of fact and qualification as co-perpetration and complicity, and to establish statutorily that the lowest maximum penalty applies in such situations.

Finally, no amendment is proposed with regard to the criteria for perpetration by legal entities and by natural persons in control of (criminal) acts of a legal entity.