

Igor Zduński¹

<https://orcid.org/0000-0002-2566-3105>

Aiding and abetting against phenomenal forms of crime

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Summary: Considering the comprehensive issue of aiding and abetting, several preliminary remarks should be made with regard to the concept of perpetration. The term of perpetration in relation to an event (act, deed, effect) is also used in praxeology². The conclusions of praxeology and the process of framing the Polish criminal law put perpetration as a model concept with respect to the concept of co-perpetration and incitement or aiding and abetting. This reference has an impact on mutual relations between perpetration and other phenomenal forms including aiding and abetting as described in the doctrine and jurisdiction. The nature of these relations has varied. Can the perpetration ground, common for other phenomenal forms, provide the source of analyses for particular phenomenal forms? Perhaps just the full understanding of the essence of perpetration can facilitate comprehending other phenomenal forms. To my mind, depicting other phenomenal forms especially aiding and abetting seems highly reasonable from the perspective of perpetration because it may provide constructive conclusions.

Key words: aiding and abetting, perpetration, co-perpetration / complicity, phenomenal forms.

Pomocnictwo na tle zjawiskowych postaci przestępstwa

Streszczenie: Złożona problematyka pomocnictwa przestępczego sprawia, iż należy poczynić kilka wstępnych uwag odnoszących się do pojęcia sprawstwa przestępstwa. Pojęciem sprawstwa w odniesieniu do zdarzenia (czynu, dzieła, skutku) operuje także nauka prakseologii³. Wnioski płynące z nauki prakseologii oraz kształtowania się polskiego prawa karnego stawiają sprawstwo jako pojęcie wzorcowe w stosunku do pojęcia współsprawstwa oraz podżegania lub pomocnictwa. Ta wzorcowość rzutuje na wzajemne relacje opisywane w doktrynie i orzecznictwie pomiędzy sprawstwem a innymi postaciami zjawiskowymi, w tym również pomocnictwem. Charakter tych relacji był zróznicowany. Czy płaszczyzna sprawstwa może stanowić wspólne dla innych postaci zjawiskowych źródło analiz poszczególnych

¹ Dr Igor Zduński – Kujawy and Pomorze University in Bydgoszcz, Institute of Law.

² T. Kotarbiński, *Treatise on Good Work*, Wrocław 1965, p. 36; T. Kotarbiński, *The issue of the essence of perpetration*, „Państwo i Prawo” 1971, No. 3-4, p. 445-449.

³ T. Kotarbiński, *Traktat o dobrej robocie*, Wrocław 1965, p. 36; T. Kotarbiński, *Zagadnienie istoty sprawstwa*, „Państwo i Prawo” 1971, nr 3-4, p. 445-449.

postaci zjawiskowych? Być może właśnie pełne zrozumienie istoty sprawstwa pomaga zrozumieć pozostałe postaci zjawiskowe? Moim zdaniem opisywanie innych postaci zjawiskowych, w tym zwłaszcza pomocnictwa z perspektywy sprawstwa wydaje wysoce uzasadnione, gdyż może dostarczyć konstruktywnych wniosków.

Słowa kluczowe: pomocnictwo, sprawstwo, współsprawstwo, formy zjawiskowe.

Aiding and abetting developed in the bosom of perpetration. It grew and evolved over time as an independent, separated and typified in the penal law, phenomenal form, frequently deprived of accessory features even to a certain extent. Before such a transformation of the described phenomenon took place, aiding and abetting relied only on the concept of perpetration. Aiding was embedded in the very essence of the idea of perpetration and awaited for full recognition in the eyes of the legislator. For a long time, concerns had regarded difficulties with proper and unambiguous normative regulation of particular phenomenal forms including perpetration and aiding. Problems related to distinguishing between individual phenomenal forms and the risk of gaps in the penalization of the behaviour of persons involved in a crime. Besides, doubts were also raised in relation to determining the boundaries of the accessory character concerning the aider and abettor as well as the perpetrator. What the legislator was not able to conduct, patterning himself on a particular theory of the concept that individualized the roles of co-operators or adhering to the principle of the accessory character, was modified by life itself through judicial practice and the case law of the Supreme Court. The issue of aiding and abetting illustrates interrelationships between theory and practice.

One of the possible approaches to perpetration and aiding was the proposal of J. Makarewicz who assumed equality of all forms of criminal co-operation. According to the protocols of the Codification Committee involved in drafting the penal code of 1932 the question of the program questionnaire (23a) “whether the penal code should include the term of a perpetrator”, a negative answer was passed by the majority of seven votes against four⁴. The word “perpetrator” used in the penal code of 1932, e.g. in art. 14, 15, 17, 18, 54, referred to each of the persons of criminal co-operation: the perpetrator, accomplice, instigator and aide. This regulation was in line with the concept of J. Makarewicz treating perpetration, instigation, aiding and abetting as phenomenal forms of crime, technical way of committing a crime. Juliusz Makarewicz assumed equality of all forms of criminal co-operation. As stated in the justification for Chapter IV concerning instigation and aiding and abetting in the penal code of 1932: “There are terms adopted in life, established in the practices of the courts, without which law cannot exist. These include: instigation and aid provided to the perpetrator (...). It is advisable not to determine the role of the perpetrator in the law; firstly, so that the autonomy of the action of the instigator and the aide would occur even more vividly, secondly, because this is completely unnecessary as both science and practice usually support objective theory and demand from the perpetrator to undertake this action which directly changes the external world. In view of the fact that instigation and aiding and abetting comprise separate technical forms of committing a crime, combinations

⁴ *Codification Commission of the Republic of Poland. Criminal Division, Volume I, collection 1, p. 193.*

of both types are possible, e.g. incitement to aiding”⁵. The view represented by W. Wolter also corresponded with this standpoint. W. Wolter justified silence on the penal code’s part with regard to perpetration *sensu stricto*, because first of all, more precise specification of perpetration is unnecessary, and secondly, the authors of the code were right to emphasize the fact that both instigation and aiding and abetting account for perpetration”⁶. Instigation and aiding and abetting, not being generic types of perpetration, comprise only peculiar forms of completing a crime⁷. The penal code of 1932 did not introduce the construction of the involvement of “the aide” and “the instigator” in an offence, as an antiquated construction based on the ground of collective guilt and dependent responsibility of participants for the perpetrator’s action. The view that the instigator and the aide are involved in the perpetrator’s offence was connected with the accessory concept which had already been questioned under the penal code of 1932. Thus, using such words as “participation”, “involvement”, “participant” addressed to the aide can be very misleading. A much more appropriate term referred to the aide seems to be the concept of “the associated person”. In fact, this viewpoint was also consistent with the contemporary idea of aiding. However, before the definition of aiding and abetting was normatively developed, the science of criminal law had remained influenced by the sociological school. The perpetrator who was under the watchful eye of the representatives of the sociological school was actually a point of reference for further considerations, including those concerning the nature of particular phenomenal forms. The opinion of this school claiming that it is not the act but above all the perpetrator that is punished corresponded to the uniform concept of the perpetrator. Franz von Liszt, the major advocate of the school, during the sixth congress Internationale Kriminalistische Vereinigung, clearly stated that: “The difference between perpetration, instigation, aiding and abetting should be absolutely abolished”. It was a proposal of breaking with traditional terms of perpetration, instigation, aiding and abetting and replacing them by a uniform concept of the perpetrator⁸. The suggestion of a uniform term of the perpetrator and the accompanying assumption of equality of individual phenomenal forms did not mean adopting the accessory principle, according to which only the main perpetrator was the perpetrator of a crime while other co-operating people participated in his offence. From the very beginning, both J. Makarewicz and the legislator adopted the concept of individualizing the roles of co-operators and creating the so-called phenomenal forms according to which an offence can be committed in different forms. Each co-operator commits a separate crime and bears individual responsibility for it, regardless of other persons, and regardless of the main perpetrator. Under the influence of J. Makarewicz, it was attempted in the Polish jurisprudence to accept this concept in its pure form. Yet, it turned out that it was not possible for individual offences. This concept, consistently carried out, separates individual participants of the

⁵ A. Grześkowiak, K. Wiak (Ed.) J. Makarewicz, *The Penal Code with notes*, Lublin 2012, p. 129.

⁶ W. Wolter, *The outline of criminal law, the general part*, Volume I, Kraków 1933, p. 228 quoted from A. Wąsek, *Co-perpetration in the Polish criminal law*, Wydawnictwo Prawnicze, Warszawa 1977, p. 7

⁷ J. Makarewicz, *The Penal Code with notes*, [in:] A. Grześkowiak, K. Wiak, Lublin 2012, p. 129 – Judgement of 8 Jan 1934, collection No. 91/34.

⁸ A. Wąsek, *Co-perpetration in the Polish criminal law*, Wydawnictwo Prawnicze, Warszawa 1977, p. 19.

crime, thus making them completely independent of each one another. This leads to the conclusion that the aide, without specific individual characteristics, shall not be responsible for crimes which in their statutory nature of act, require the presence of this type of individual marks. Such an assumption was initially adopted by the Supreme Court. However, this standpoint did not endure the test of life. The Supreme Court changed its earlier position and allowed for auxiliary penalty to individual crimes. Motivation was going in two directions. First, there are arguments indicating that applying the current principle of no conviction of aiding and abetting to individual offences leads, in practice, to unreasonable findings. Then, the justification includes a polemic with the viewpoint represented by J. Makarewicz and the indication that this concept cannot be comprehended in a rigorous manner. It is impossible in practice to entirely eliminate the aide's dependence on the main perpetrator. The aide "borrows" certain features from the main perpetrator. Another argument of the judges of the Supreme Court, from the level of punishment, was art. 29 § 2 of the penal code of 1932, stating: "if an offence was not attempted, the instigator and the aide shall be responsible in the same way as for the attempt, yet, the court may apply extraordinary mitigation of penalty to them or release them from penalty". Under this provision, the legislator makes the aide dependent on the perpetrator and introduces the accessory element. This shows that the accessory concept under the penal code – as emphasized by the judges of the Supreme Court – has not been completely erased⁹.

The above statements show that aiding and abetting has been remaining in a specific relation to perpetration from the very beginning and its complete independence was impossible. However, this did not mean that the concept of J. Makarewicz lost its relevance after putting it into practice. This can be also confirmed by the regulation of the penal code of 1969 according to which the aide was in charge "within the limits of his intention", irrespective of the main perpetrator's responsibility. The relation of the main perpetrator to the accessory at the level of punishment was the same as in the penal code of 1932. In accordance with the provisions of art. 20 § 2 of the penal code of 1969 "if a prohibited act was not attempted, the Court could apply the extraordinary mitigation of penalty to the instigator or to the aide, and even refrain from imposing it". This was an exception to the principle of the aide's independence on the main perpetrator and meant that the accessory had been responsible since the start of his action and not the action of the main perpetrator. According to S. Stomma, pursuant to art. 28 of the penal code of 1932 and art. 19 and 20 § 2 of the penal code of 1969, the following conclusions can be drawn:

- the degree of guilt, and thus the severity of the sentence shall be assessed in relations to the aide irrespective of the perpetrator's fault;
- the aide shall not be responsible for the perpetrator's excess;
- if the perpetrator commits less than intended by the aide, he shall be held liable for the crime he gave assistance, more serious than the perpetrator;
- if there are circumstances that exclude penalization in relations to the perpetrator, this shall not affect the aide's liability;

⁹ Decision of the Supreme Court of 20 March 1937, Collection 1937, Item 149.

- the aide shall become punishable immediately after undertaking his actions¹⁰.

Like J. Makarewicz, the advocate of individualized phenomenal forms of committing a crime was Getz whose assumptions were implemented in Norwegian penal code of 1902. The Norwegian construction of co-perpetration differed from generally applied schemes. In the general part, art. 58 of the Norwegian penal code of 1902 mentioned responsibility of people involved in crime. This provision stipulated that if co-perpetration was insignificant, penalty may be mitigated. However, the detailed part of articles stipulated that those who co-perpetrate shall be subject to that penalty provided for. Such a limitation of the legislator to the short mention "who co-perpetrates" without any clarification as to whether and how co-perpetration should be differently treated, resulted in blurring the boundary between aiding and abetting and perpetration. Therefore, the Court had to so treat aiding as perpetration. This way the Norwegian penal code of 1902 equated aiding and abetting with perpetration *sensu stricte*. The Norwegian legislature was more maximalist and included its concept in a strict form in the code. Yet, laxity affected the severity of this concept and also allowed a broad interpretation of provisions in search of a solution consistent with the purposefulness of the case-law. Thanks to regulating aiding and abetting in the detailed part of the penal code which included the clause establishing penalization of aiding and abetting, the contested issue of co-perpetration in individual crimes was solved. In this way, thanks to the mention in detailed provisions, the penalization of aiding was established with regard to offences that were individual by nature like white collar crimes (articles 125 and 128), incest (article 207 and 208), neglect of children by their parents (art. 216), misappropriation of the guardian to the detriment of persons under care (article 218), non-alimentation (art. 219). Further limitation of the pure theory concerning individualized phenomenal forms was the work of doctrine. If the perpetrator committed a crime, it is assumed that the aide shall be liable in the same way as in case of a performed act. If the crime is not committed, they are liable in the same way as for the attempt. If one supposed total separation of aiding and abetting from perpetration, such a solution is not consistent then as the act of aide accomplished. If assistance was rejected, the aide shall be liable of the attempt. If the aide is separated from the perpetrator and they are made, *sui generis*, perpetrators, no reliefs shall be applied to them on account of the perpetrator's behaviour. Avoiding liability is not an option even if the aide is only at the stage of preparation which is not punishable. If the perpetrator committed less than intended by the aide, the latter one shall be held liable of attempting the crime which had been intended.

Therefore, the question arises whether it is required to completely reject the so-called accessory concept of participation in crime and perhaps its elements may be useful in constructing a relationship between aiding and abetting and perpetration? The French penal code of 1810 adopted in art. 59 the accessory concept of participation in crime. In accordance with the wording of that provision, the participants of a crime or transgression shall suffer the same punishment as the perpetrator of this crime or transgression, except for cases specifically listed in the law. In this way, ar-

¹⁰ S. Stomma, *Co-perpetration before committing a crime*, Wydawnictwo Prawnicze, Warszawa 1975, p. 26.

ticle 59 showed that participants borrowed offences from the main perpetrator. Consistently, there was adopted a far-reaching dependence of the co-perpetrator (the aide) on the main perpetrator. It could be observed that co-perpetrators shall not be subject to penalty, if there are objective conditions excluding the perpetrator's punishment. Liability of co-perpetrators depended on committing a crime by the offender, but only the perpetrator's attempt was enough. However, there is no criminal liability in case of aiding and abetting, if the offender has not taken a punitive action. The adoption of the accessory principle was mitigated by, as the provision stipulated: "(...), with the exception of cases specifically mentioned in the law". Such numerous exceptions have been sanctioned by science and long-standing case-law. For example, such situations as death, failure to detect the perpetrator or when the offender acted through no fault. Then, co-perpetrators became independent at the cost of the accessory principle. In this regard, legislator "inclined himself" to the concept of individualizing the roles of co-operators and creating the so-called phenomenal forms of crime.

As S. Stomma rightly points out, there appears certain distinctness between the Polish-Norwegian systems and the accessory ones, yet they are not so far-reaching as though it should abstractly result from the doctrine. This is because, in accessory systems, criminal action is also understood as an attempt. If the perpetrator has not entered the attempt stage, the court may apply extraordinary mitigation of punishment or even not impose any sentence at all. Therefore, it is within the court's power to limit liability to the situations when the perpetrator at least makes an attempt. Then the said discrepancy disappears¹¹.

Considering the above, it is not possible for the legislator to rely only on one theoretical concept and modifications are required to be made in practice based on the competitive theory.

Before the Penal Code of 1969 was adopted, which normatively defined the form of perpetration, there had been a discussion in the doctrine as to whether such a procedure was necessary. In the criminal law doctrine of the People's Republic of Poland, W. Wolter proposed a resignation from distinguishing incitement from aiding and abetting in the penal code of 1969. Then the former instigators and aides would operate under the name of "participant" or "co-perpetrator" and their responsibility would be based on any contribution to intentional offences. Likewise, at the end of 1960s, D. Kienapfel emphasized that a waiver from the institution of perpetration, instigation, aiding and abetting in favour of "participation" is expected to simplify the application of law.

Examples of European legal acts, whose regulation of co-perpetration relied on the concept of the uniform and broad concept of the perpetrator, include the Italian penal code of 1930, Ordnungswidrigkeitsgesetz of 1968 that was in force in the Federal Republic of Germany, the Norwegian penal code of 1902, the Danish penal code of 1930, the Icelandic penal code of 1940, and the Austrian penal code of 1975¹². Other legislation of the European countries in the 1960s including Czechoslovakia,

¹¹ S. Stomma, *Co-perpetration before committing a crime*, Wydawnictwo Prawnicze, Warszawa 1975, p. 37.

¹² *Ibidem*, p. 19-20.

Hungary, Romania, Bulgaria, the Federal Republic of Germany and Poland did not adopt this concept.

The proposal made by W. Wolter and at the same time the position of D. Kienapfel were critically assessed by P. Zakrzewski who accused the concepts, among other things, that the terms of “the participant” and “contribution” were too broad and imprecise, and therefore, they did not correspond to the needs of the justice system. According to P. Zakrzewski, the proposal of W. Wolter resulted in leaving an attempt to contribute to an offense unpunished; besides, without the terms of “incitement” and “aiding and abetting” the penal code of 1969 would not be communicative enough, and judicial decisions would do not provide such accurate information about the perpetrator’s act¹³.

The analysis of the relationships between perpetration and aiding in the development of the science of criminal law reveals not only terminology doubts regarding the role aiding and abetting or the role of the aide who paves the way becoming a subject that takes criminal responsibility irrespective of the main perpetrator, but also the need to fully understand aiding and abetting on the basis of the specific part of criminal law. A reference to legal descriptions of particular types of crime, which are conducted while committing a crime, gives a full picture of the aide and aiding and abetting, namely, a behaviour that facilitates committing a given type of criminal act. In this way, the approach of the aide to a certain type of behaviour that violates a certain criminal-law standard is outlined.

This is not a proper relationship for the perpetrator who performs a criminal act on his own, but the relationship of the aide’s deep conviction that thanks to him it will be easier for the perpetrator to achieve the features of a criminal act. But also, in this point we return to the stage of perpetration which is conceivable only with reference to the constituent elements of particular types of crimes. It could be observed already in the 1960s, when in the German science the concept of extensive comprehension of perpetration paved its way. The views for extensive understanding of perpetration, the punishment for aiding and abetting are combined with the provisions of the specific part of the penal code, establishing to life certain types of crimes. The perpetrator is the one who in any way contributes to the implementation of Tatbestand. It concerns a behaviour contributing to the violation of legally and penally protected interests. Therefore, the same provisions of the general part of the Criminal Code concerning participation in crime do not justify penalization of the aide, but they simply narrow the field of the punishment scope¹⁴. Developing the extensive concept of perpetration by science of criminal law was not without effect on the outcome of certain specific issues regarding co-perpetration. Such an approach to perpetration remains very close to the concept presented by R. Dębski in the Polish science of criminal law. The author points out “permanent” and “variables” signs that occur in the construction of the types of criminal acts committed by the aide. The author describes the Polish construction of aiding and abetting in the following

¹³ P. Zakrzewski, *In the defense of instigation, aiding and abetting. On the margins of an article by prof. W. Wolter*, No. 4/1956, p. 66-70.

¹⁴ *Ibidem*, p. 18.

way: „The aide is held liable for torts of signs other than the ones that characterise generic types of offences specified in the specific part of the penal code. The criminal act committed by the aide has verbal signs specified in the general part of the code, namely, in the provisions describing aiding and abetting as “facilitating” the act of the perpetrator. Thus, an aide’s offence is characterized, in addition to the set of “permanent” signs referred to in art. 18 § 3 of the penal code of 1997, by – adopted from the specific part of the code – the set of “variable” signs that support this characterization by the description of the criminal act to which aid was given. It is only about an act covered by the aide’s knowledge, a conceived act and not the one conducted by the perpetrator”¹⁵. A set of signs consists of signs that characterize the entity, the executive action, subject matter of the action or properties of the subjective party that belong to the permanent characteristics of aiding and abetting, as well as the signs of a criminal act of this type provided for in the specific provisions, in the situation when the aide facilitates committing the act and which in this sense, complement their statutory closer determinacy¹⁶.

The mentioned provision of art. 18 § 3 of the penal code does not only play a constitutive role in determining the regulatory signs of aiding and abetting, but also provides the basis for the adoption of its illegality. Illegality cannot be resolved only by the sanction standard expressed in the provisions of the special part, defining the type of a criminal act to which the aide gives assistance. The standard is not exceeded by the behaviour that exclusively relies in giving assistance to another person to commit such a transgression. To read the full content of the sanction standard relevant for aiding and abetting, it is necessary to link art. 18 § 3 of the penal code and the relevant provision of the specific part, determining the criminal act which is a subject of facilitation. As highlighted by T. Kaczmarek, it could be added that in order to read, appropriate in this case, the sanction standard, for which a ban of providing assistance in this scope, occurs with a risk of punishment characteristic of criminal law, and for this reason, not only the provision of art. 18 § 3 of the penal code in combination with a relevant provision of the specific part is important, but also, associated with it, the provision of art. 19 of the penal code¹⁷. In this way, aiding and abetting is actually displayed as a separate type of a criminal act which in the set of its signs has a clearly defined own autonomous causative action, through which the aide assists committing such an act to another person. According to T. Kaczmarek, presentation of aiding and abetting as a secondary form of co-perpetration is illegitimate¹⁸. A similar approach to the issue is represented by A. Zoll¹⁹.

The fallacy of assuming the equality of all forms of co-perpetration adopted

¹⁵ R. Dębski, *On the theoretical rudiments of the regulation of co-perpetration in the penal code of 1997*, “Studia Prawno-Ekonomiczne” 1998, Volume LVIII, p. 124.

¹⁶ T. Kaczmarek, *Disputable issues around the concept of the so-called secondary forms of criminal acts*, [in:] J. Majewski (ed.), *Stadium form and phenomenal forms of committing a crime*, Materials III Bielańskie Kolokwium Karnistycznego, Toruń 2007, p. 92.

¹⁷ T. Kaczmarek, *Disputable issues around the concept of the so-called secondary forms of criminal acts*, [in:] J. Majewski (ed.), *Stadium form and phenomenal forms of committing a crime*, Materials III Bielańskie Kolokwium Karnistycznego, Toruń 2007, p. 93.

¹⁸ *Ibidem*, p. 94.

¹⁹ A. Zoll, *Are incitement and aiding the phenomenal forms of crime...*, op. cit., p. 722-726.

by J. Makarewicz was shown by W. Maçior writing that the equality of phenomenal forms of crime takes place only and exclusively if incitement, aiding and abetting were not subordinated to perpetration in the same way as perpetration is not subordinated to incitement, aiding and abetting, leaving aside the mere fact that the negative social content is demonstrated differently as to its significance in individual forms of criminal behaviour even when the perpetrator and all the people that co-perpetrate with him, are held liable for the same type of a criminal act²⁰.

The approach to the signs of aiding and abetting already suggests that committing aiding may cover a wide range of cases. Aiding and abetting occurs already at the time of creating a situation which can be considered as assistance to committing a criminal act by another person, and the absence of any further behaviour specifically intended to commit a prohibited act by a direct perpetrator. Secondly, aiding and abetting occurs the direct perpetrator's behaviour is connected with attempting to commit a prohibited act which was assisted. Thirdly, if a direct perpetrator, assisted by the aide, committed such a criminal act. With this approach, P. Kardas and T. Kaczmarek rightly suggest that "aiding and abetting" constitutes a formal offence only in the sense that it does not require committing a prohibited act by the person to whom aiding actions are addressed, in order to complete the signs. Formality of aiding and abetting means something else than formality of common on-effect crimes as aiding and abetting requires specific results, without which one shall not mention the completion of the signs of these forms. Aiding and abetting occurs already at the moment of causing a decision (intention) about committing a criminal act or at the time of creating a situation that can be regarded as facilitating committing a criminal act by another person and the absence of further behaviour intended to commit a prohibited act²¹.

It does not change the provisions of art. 22 § 1 of the penal code which only shows that if the perpetrator only attempted to commit a criminal act, then the aide is held liable in the same way as for attempting to commit an offence. By using the wording "in the same way as for attempting", the legislator only expresses the view that the aide's liability should be mitigated when as a result of facilitating an offence the perpetrator only attempted to commit it, which neither prejudices the absence of aiding nor the fact that the substantive nature of these phenomenal forms should be determined by the effect of committing a crime by the perpetrator. To adopt the commitment of aiding and abetting, if the aide intending another person to conduct a criminal act, triggers such a situation that could facilitate a potential offender to commit such an act, even if the latter one did not even attempt to commit the act²². Such a view corresponds to the provisions of § 2 art. 22 of the penal code which stipulates that if a criminal act was not attempted, the court may apply extraordinary mitigation of penalty to the aide or even refrain from imposing the penalty. From the

²⁰ W. Maçior, *Penal responsibility for co-perpetration*, "PiP" 1977, no 4, p. 60.

²¹ T. Kaczmarek, *Disputable issues around the concept of the so-called secondary forms of criminal acts*, [in:] J. Majewski (ed.), *Stadium form and phenomenal forms of committing a crime*, Materials III Bielańskie Kolokwium Karnistycznego, Toruń 2007, p. 97; P. Kardas, *Theoretical rudiments of penal responsibility for co-perpetration*, Zakamycze, Kraków 2001, p. 856-857.

²² J. Giezek, *The Penal Code with notes*, Vol. 1, (art. 1-31) Kolonia 2000, p. 117-118.

point of view of the situations referred to in this provision, one can only say that this provision, for crime and political reasons, only modifies the aide's liability depending on what he committed or not, and that is why, we can say that the content of this provision has preserved a certain reflection of accessory liability.

Another problem is the relation of aiding and abetting to supervising perpetration. The penal code of 1969, art. 16 sentence 3 extended the concept of perpetration by introducing a form of perpetration - supervising perpetration. It relies in supervising the execution of a prohibited act by another person. The supervising perpetrator is the one who, although does not behave in a prohibited manner under special provisions of the Criminal Act, directs the commitment of an offence by another person. Andreyew states that the intention of article 16 of the penal code is to impose responsibility for perpetration on the one, who although has not himself contributed to an offence, but actually with his will and intellect plays just as important, if not more important, role than the role of the perpetrator²³. The authors of the code have notice that such an approach allows the qualification, corresponding to the reality, of the criminal organiser's role which exceeds the framework of aiding and abetting²⁴. Considerable controversy aroused by the phrase: "directs the commitment of a criminal act". Already then, W. Wolter expressed concerns as to whether due to this wording the construction of the direct perpetrator can be revived, because of "the absence of the direct perpetrator's guilt". A. Zoll, K. Mioduski did not see any obstacles to talk about indirect perpetration²⁵. Therefore, discussion was a question of whether there a shift occurred in the penal code of 1969 towards participation in a crime committed by someone else. Doctrine and case-law faced a clarification as to when assistance given to the perpetrator who did not bear criminal liability due to lack of guilt (insanity, underage, error) was aiding and abetting, and when was supervising perpetration. In this respect, the case-law was willing to regard as the supervising perpetrator the person who acted with predominance of information as well as with the dominant intellect and will over the direct perpetrator. According to J. Waszczyński, the supervising perpetrator is the person who manages the commitment of a criminal act by another person, for which not only the supervising perpetrator is held liable but also the direct perpetrator. If, in turn, the direct perpetrator is not held liable, then the supervising person shall bear responsibility as an instigator²⁶.

It is also worth considering the relationship between aiding and abetting and co-perpetration. The lack of the provision, in the penal code of 1932, regulating aiding and abetting did not mean that the jurisprudence and doctrine did not recognise this institution. Numerous decisions applied it more or less clearly. The only publication in our literature the subject of which was exclusively the institution of co-perpetration was published in 1934. The reference is to the dissertation by A. Berger (Comments to the

²³ I. Andreyew, *The Outline of the Polish Penal Law*, Warszawa 1973, p. 161.

²⁴ *Draft of the penal code*, Warszawa 1968, p. 100.

²⁵ A. Zoll, *Liability of the person managing the commitment of a criminal act by another person*, "PiP" 1970, No. 7, p. 59-61, K. Mioduski, *Penal Code. Comments...*, op. cit., p. 59-60.

²⁶ J. Waszczyński, S. Lelental, A. Zębiak, *Mater Substantive criminal law (outline). The science of criminal offence*, Łódź 1973, p. 246-247.

provision that does not already exist in the penal code of 1932)". A. Berger showed the need for introducing to the penal code a provision standardising co-perpetration.

Contrary to the penal code of 1932, the penal code of 1969 introduced the institution of co-perpetration stipulating single perpetration and supervising perpetration (art. 16 of the penal code). Already under the then-binding criminal code, it was highlighted that both doctrine and case-law assumed that committing a crime in cooperation intensified the degree of social danger of an act, which should not remain insignificant for punishment. This fact was noticed by the Polish legislator introducing the element of committing incriminating acts "in co-operation with the other persons" to the signs of the "minor" and "major" seizure of property (art. 202 and 134 of the penal code) and the customs affair (art. 135 of the penal code). An involvement in co-perpetration qualified e.g. rape as a crime (art. 168 § 2 of the penal code).

The beginning of the penal code of 1969 also within the scope of applying the provision on co-perpetration faced certain difficulties. It often happened that the prosecution or judicial decision lacked a clear statement that the accused person committed an act in co-perpetration (article 16 sentence 2 of the penal code) and at the same time used the formula that "the accused person acted jointly and in co-operation" with another person or persons. This was due to the fact that although the authorities noticed that the act of the perpetrator was actually committed in co-perpetration, however, the legal qualifications of perpetrators' behaviour may have varied. In addition, the lack of a clear statement by the authority that criminal acts of defendants were committed in co-perpetration, may also have resulted from the fact that there was no doubt as to the occurrence of co-perpetration, not aiding and abetting; besides, determining *expressis verbis* the co-perpetration was not associated with any particular legal consequences.

The provision of art. 16 sentence 2 of the penal code defined co-perpetration as committing a crime jointly with another person. The term of "co-perpetration" did not entirely correspond to the concept of J. Makarewicz. In accordance with this concept, the starting point of clarifying the essence of this term was one crime in which some people were their accomplices and other were participants. Such an approach is appropriate for the theory of co-perpetration. It is clear for this theory that in case of murder of one man there is always only one offense of murder. If it turns out that a few people contributed to the death of the victim, then it is required to determine their role in the crime. Persons who committed murder are co-perpetrators to this crime while others, if satisfy the statutory criteria of the aide, are participants of this crime. A different position, before for the adoption of the penal code of 1969, was suggested by L. Tyszkiewicz who emphasised that this act should be understood not as a single common crime, but a legal essence of a generic crime. There is one essence, but the number of acts is the same the number of co-perpetrators. These acts complete the legal essence of one generic offence. The acts are complementary²⁷.

The concept proposed by L. Tyszkiewicz proved unreliable in situations where the acts of accomplices were subject to unequal legal qualification. If one of

²⁷ L. Tyszkiewicz, *Co-perpetration and key terms related to it in the Polish criminal law*, Poznań 1964, p. 386-387.

perpetrators acted intentionally whereas another one unintentionally, each of them represented a different set of signs. One of them committed intentional murder while the second one committed manslaughter. As emphasised by T. Kotarbiński, when analysing such a behaviour praxeology uses such terms as “multi-entity act”, “collective action”, “collective act”. This does not mean, however, that it is not noticed that this “joint action” due to the multiplicity of any impulses of acting individuals, is a collection of unit acts²⁸. Yet, the full picture of the issue is given by the statement of W. Wolter that “co-perpetration” is not a pure product of offences but something peculiar²⁹. Such an approach to aiding and abetting as the phenomenon that is qualitatively different from the sum of unit offences, will be meaningful during the process of establishing an appropriate legal qualification of the acts committed by two or more perpetrators. According to A. Wąska, co-perpetration may be adopted when the joint “act” committed in co-perpetration is qualified based on the provisions specifying different varieties of the same generic crime. Therefore, aiding and abetting takes place if the acts of perpetrators are subject to the qualification of the provisions relating to the type of a basic, eligible and privileged crime³⁰.

This co-operation with the offender may develop in a different way. It is clear that legislators try to specify and formally classify these roles. In fact, the results of the classification are different. Some legislators try to accumulate the types of co-perpetration by limiting their number, still others - vice versa - vary in detail the types of co-perpetration creating a multitude of types. The variety of perceiving the forms of co-perpetration is interesting indeed.

The Spanish Penal Code of 1944 included six forms of co-operation: co-perpetration, conspiracy, enticement, incitement (that is incitement addressed to a bigger number of individuals), instigation (i.e. accepted and agreed instigation), aiding and abetting.

Pursuant to art. 60 of the penal code of 1810, the French science and practice established five forms of co-perpetration:

- enticement using gifts, promises, threats, authoritative pressure or by means of fraudulent machinations (provocation),
- co-operation relying in giving indications and instructions to facilitate an offense (instruction),
- providing means, that is, providing tools to commit an offence (fourniture de moyens),
- other forms of assistance (aide on assistance),
- “Recel”, a very cold form of co-operation. One may differentiate between fencing (recel de choses), adherence and other forms of assistance based on regular agreement (recel de malfaiteur)³¹. Likewise, the Greek penal code of 1950 classified the forms of co-operating, which seems to be complicated. The code mentions four types of co-operators: co-perpetrators, instigators, direct accomplices and indirect accomplices. A direct accomplice is the one who directly assists

²⁸ T. Kotarbiński, *Treatise on Good Work*, Wrocław 1965, p. 93 et al.

²⁹ W. Wolter, *Lecture of criminal law on the basis of the penal code of 1969*, p. 244-245.

³⁰ A. Wąsek, *Co-perpetration in the Polish criminal law*, Wydawnictwo Prawnicze, Warszawa 1977, p. 29.

³¹ S. Stomma, *Co-operation before committing a crime*, Wydawnictwo Prawnicze, Warszawa 1975, p. 8.

in committing an offence, while an indirect accomplice is the one who assist before or after committing an offence or gives insignificant assistance. Thus, an emphasis is placed on the moment of giving assistance³².

The legislature may create any classifications that can be accepted if allowed by appropriate orientation of the case-law. Therefore, adapting to common concepts and legal traditions is clear in this regard. Yet, it is not easy to indicate any substantive binding criterion for a distinction between the forms of co-operation.

If we consider any characters of co-operation possible to imagine, it will be necessary to state that only incitement can be determined in terms of content. It relies on creating the will of a criminal action in other people. This is a more or less clear criterion that enables one to identify the facts of incitement and develop a separate class of phenomena. With other forms of co-operation, it is difficult to find any merits criteria. The difference between co-perpetration and aiding and abetting is very smooth. Comprehensive discussions have been held in science on this subject for many years. Supporters of objective and subjective criteria, separating co-perpetration from aiding and abetting. The basis for the division in case of the substantive concept is the *animus* of the perpetrator or the accomplice. With regard to the objective concept, the criteria become quantitative, not qualitative. The severity of involvement in criminal activity is determinant. The Spanish penal code of 1944 (art. 14) as well as the Luxembourg penal code of 1879 (art. 66) adopt the substantive criteria, specifying them as follows: "if co-operation is an essential condition of a criminal effect, even without this co-operation the effect would not have occurred, yet, it must be classified as abetting. If there is no condition *sine qua non*, it should be considered as aiding and abetting. The above statements suggest relativity of any divisions.

Another issue is the relationship between aiding and abetting and incitement. The development of personal criminal liability of individual phenomenal forms of crime may put in discussion the question of separating incitement from aiding and abetting. There are arguments that regard incitement as something that refers to the final effect and the instigator's will covers a full effect of the perpetrator's act and so his will always refers to the final effect. In this context, aiding and abetting appears as something that is related to a given stage of the perpetrator's action. Punishing aiding and abetting, while failing to punish criminal acts of the perpetrator, provides an unjustified and incomprehensible imbalance in the manner the perpetrator is treated. Such a situation can be observed when the prospective perpetrator has made preparations that are not punishable by law, for example, he has collected tools to be used for a crime. Why the one who assisted should be subject to punishment, if the main "actor" enjoys impunity. The paradox of this situation stems from adopting the consistently understood theory of phenomenal forms. Similar concerns may occur when recognising incitement as something far more reaching than aiding and requiring a more severe treatment. Such an approach to instigation is ungrounded. There can be different situations and both instigators and aides can appear in the foreground. This leads to the conclusion that it is unreasonable to regulate liability for these two forms

³² *Ibidem*, p. 9.

of co-operation in a different manner. The weakness of the accessory solution is that it provides co-perpetrators with impunity allowing them for persuading to commit a crime and to arrange it. The concept of phenomenal forms leads to excessive extension of penalisation. Thus, disparities appear between the situation of the perpetrator and the situation of co-perpetrators, to the detriment of the latter ones.

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