Gabriel Hallevy

The Matrix of Derivative Criminal Liability

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To my dear daughter

Harel

"And I gave my heart to seek and search out by wisdom concerning all things that are done under heaven: this sore travail hath God given to the sons of man to be exercised therewith. I have seen all the works that are done under the sun; and, behold, all is vanity and vexation of spirit. That which is crooked cannot be made straight: and that which is wanting cannot be numbered"

Ecclesiastes 1:13-15

Preface

Since the dawn of humanity, derivative criminal liability has played an important role. In the biblical story of the original sin, the serpent incites the woman to taste of the forbidden fruit and to incite Adam as well. The first recorded human sin in the monotheistic tradition was that of incitement, which was already considered to be a severe offence. As a result, the serpent was punished for the incitement although the fruit had never been prohibited to it, and all three parties to the offense were punished:

> Now the serpent was more subtil than any beast of the field which the God had made. And he said unto the woman, Yea, hath God said, Ye shall not eat of every tree of the garden? And the woman said unto the serpent, We may eat of the fruit of the trees of the garden. But of the fruit of the tree which is in the midst of the garden, God hath said, Ye shall not eat of it, neither shall ye touch it, lest ye die. And the serpent said unto the woman, Ye shall not surely die. For God doth know that in the day ye eat thereof, then your eyes shall be opened, and ye shall be as gods, knowing good and evil. And when the woman saw that the tree was good for food, and that it was pleasant to the eyes, and a tree to be desired to make one wise, she took of the fruit thereof, and did eat, and gave also unto her husband with her; and he did eat.
>
> Genesis 3:1-6

Derivative criminal liability is still relevant in the modern era. In March of 2001, Bernd Juergen Brandes, a 43-year-old computer engineer, answered an ad on the Internet that looked for volunteers to be slaughtered and eaten. The advertiser was Armin Meiwes, a 44-year-old technician. Brandes told Meiwes that he was interested in being slaughtered and accepted Meiwes's offer. A week later Brandes asked one of his friends to give him a lift to Rotenburg, Germany. Brandes told the friend what the purpose of the ride was, and the friend agreed. Brandes arrived at Meiwes's home in Rotenburg.

The two had sexual intercourse, Brandes drank alcohol to ease the pain, after which Meiwes cut off parts of Brandes's body, cooked them, and both of them ate. Minutes later, Brandes became unconscious because of loss of blood. Meiwes kissed him on the lips and slaughtered him with a knife. Later Meiwes cut Brandes's body into several parts and put them in the freezer. Meiwes videotaped

the entire event. In the course of the following months Meiwes defrosted the body parts, cooked them, and ate them.

Should Meiwes be indicted for murder despite the fact that Brandes agreed to be slaughtered? Should Brandes be considered as joint-perpetrator in his own murder, and should his friend, who knowingly gave him a ride, be considered an accessory to murder?

A 20-year-old man has sexual intercourse consensually with a 16-year-old girl. In most western legal systems this is considered statutory rape. The man is therefore indicted and convicted as a sexual offender. What would be the legal state if the girl incited the man to have sex with her, he refused, and eventually agreed reluctantly only after she threatened to leave him for another man who would not refuse her? Should the girl be indicted as well? Would it make a difference if both parties (20- and 16-year-old) were female? Or if the 20-year-old person were female and the 16-year-old male?

A married couple enjoys consensual sadomasochist relations. Are they joint-perpetrators of assault, battery, and injury?

A wishes to kill D, but lacks the necessary skills. He knows about C, a professional assassin, but cannot approach him directly because C might think it is a trap laid by the police. A asks B, a common friend of his and of C's, to ask C to kill D. C kills D. This is a common situation both in organized and unorganized crime. Would A be indicted for incitement to incite to murder, despite the fact that no legal system explicitly defines an offense of incitement to incite? Should A be exempt of criminal liability, although he initiated the crime? What should be the appropriate punishment for such conviction?

Can a bachelor be convicted of bigamy because he assisted another person to marry a second wife? (The answer is yes.) Can the second wife be convicted in bigamy although this is the first time she marries anyone? (The answer is yes.) Can a company be convicted of theft because one of its employees has stolen some goods from the company itself? (The answer is yes.) Can a maid who left the window open in the house, exactly the way it was initially, be convicted as an accomplice to burglary? (The answer is yes.) Can a person be convicted for attempted murder for using a voodoo puppet against someone, or for cursing someone? (The answer, again, is yes.)

These questions and many more can be answered only by derivative criminal liability, which includes major parts of the modern criminal liability. Derivative criminal liability includes inchoate offenses (criminal attempt, conspiracy, preparatory offenses, etc.), complicity (joint-perpetration, perpetration-through-another, incitement, solicitation, accessoryship, etc.), organized crime, probable consequence liability, post-crime aid and many more forms of criminal liability. Derivative criminal liability is clearly a major pillar of the modern criminal law.

Although derivative criminal liability is common worldwide, there is still no general legal theory that covers this issue as one unique framework. The objective of the present book is to develop a comprehensive, general, legally sophisticated, and at the same time *practical* theory of derivative criminal liability. The book emphasizes the practicality of the theory to enable courts, lawyers, legislators,

attorneys, students, and academics to apply it in their daily professional occupations.

The present book outlines a modern general theory of derivative criminal liability in six moves. As derivative criminal liability is derived from the principle of personal liability, Chap. 1 discusses in detail the principle of personal liability and its applicability to derivative criminal liability. To ensure the accuracy of the discussion of derivative criminal liability, Chap. 2 presents the typology of derivative criminal liability. The first two chapters form the background for the general principles of the derivative criminal liability matrix, introduced in Chap. 3. Chapter 4 discusses the factual element requirement and Chap. 5 the mental element requirement. Finally, Chap. 6 discusses the boundaries of derivative criminal liability in order to solve possible problems of under-inclusion and over-inclusion of the matrix.

The general theory of the derivative criminal liability matrix presented in this book is based on lectures I delivered in the past few years in the Criminal Law course of the Faculty of Law at Ono Academic College. I wish to thank Ono Academic College for supporting this project, Gabriel Lanyi for his comments, and Anke Seyfried for guiding the publication of the book from its inception to its conclusion. Finally, I wish to thank my wife and daughters for their staunch support along the way.

Gabriel Hallevy

Contents

List of Figures

List of Tables

Chapter 1
The Principle of Personal Liability and Its Applicability to Derivative Criminal Liability

Contents

1.1 The Principle of Personal Liability As Part of the General Theory of Criminal Law

The principle of personal liability in criminal law is the fourth fundamental principle in the general theory of criminal law. The other three are the principle of legality, the principle of conduct, and the principle of culpability.[1] The principle of personal liability relates to the personal aspects of the imposition of criminal liability, including the identity of those involved in the perpetration of the offense as well as the course of the offense itself, from planning to full completion. The most important application of the principle of personal liability in criminal law is derivative criminal liability.

[1] See in general in Gabriel Hallevy, A Modern Treatise on the Principle of Legality in Criminal Law 1-5 (2010).

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1.1.1 *Historical and Comparative Development of the Principle Personal Liability*

The principle of personal liability in criminal law has developed gradually. **Early Mesopotamian law** did not accept the basic values of this principle. The general concept in Mesopotamian law was that it is legal to punish a person for offenses committed by another. In certain specific cases this was only an alternative for punishing the true perpetrator, but in most cases it was demanded *ex ante*. For example, a creditor who tried to collect on a lien from the son of the debtor and tortured him to death was punished by the death of his own son, although the creditor's own son had nothing to do with the death of the debtor's son.[2] As the son was considered the property of the father, the loss of the son was a punishment of the father even if the son did no wrong.

Similarly, a person who struck the pregnant daughter of another, and as a result she miscarried and the fetus died, was punished by the death of his own daughter.[3] A builder who built a house that collapsed on its habitants killing a son was punished by the death of his own son.[4] A person who seduced a girl and had sexual intercourse with her had to send his wife to the girl's father to prostitute herself.[5] At times the punishment of the perpetrator was converted into punishment of his relatives who were dependent on him economically. For example, the laws of the Hittites forced the murderer to send a relative of his to the family of the murdered, and Assyrian law allowed converting the capital punishment of the murderer into the death of one of his sons, daughters, or slaves.[6]

The criminal law of **ancient Greece** accepted some of the principles of derivative criminal liability starting with the seventh century BC. Greek law did not fully accept the principle of personal liability, but only its implications on partial participation. Thus, if the perpetrator intended to kill the victim, but the victim was not killed owing to specific circumstances beyond the perpetrator's control, the perpetrator was to be indicted for attempted murder (*trauma ek pronoias*), which is

[2] Law 116 of the Code of Hammurabi (L. W. King trans.) provided: "If the prisoner dies in prison from blows or maltreatment, the master of the prisoner shall convict the merchant before the judge. If he was a free-born man, the son of the merchant shall be put to death; if it was a slave, he shall pay one-third of a mina of gold, and all that the master of the prisoner gave he shall forfeit".

[3] Laws 209-210 of the Code of Hammurabi (L. W. King trans.) provided: "209. If a man strikes a free-born woman so that she loses her unborn child, he shall pay ten shekels for her loss. 210. If the woman dies, his daughter shall be put to death".

[4] Laws 22-230 of the Code of Hammurabi (L. W. King trans.) provided: "229. If a builder builds a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death. 230. If it kills the son of the owner the son of that builder shall be put to death".

[5] Law 5 of the Assyrian Laws. See James B. Pritchard, Ancient Near Eastern Texts Relating to the Old Testament (3rd ed., 1969).

[6] Laws 1-4 and 44 of the Hittites Laws. See *ibid*.

similar to assault with intent to kill.[7] The criminal law of ancient Greece therefore accepted the idea of criminal attempt long before it was accepted in the Western Europe.[8] General defenses were applicable for indictment in cases of criminal attempt, in the same way as they were in the case of regular offenses. Thus, if the perpetrator was able to persuade the court that the intended killing was just, the perpetrator was exonerated.[9]

Roman law accepted the principle of personal liability with some exceptions. In general, the criminal liability could be imposed upon individuals but not collectively (Roman law accepted the idea of corporations, but only in the context of civil law).[10] Roman law did not accept the punishability of a corporation, only of individuals in a specific corporation, but it did recognize the legality of collective punishment as part of laws relating to war. For example, it was legal to impose collective punishment on enemy cities.[11]

Another aspect of the principle of personal liability in Roman law was the legal recognition of complicity. All persons who have participated in the commission of an offense were considered accomplices (*ope et consilio*).[12] Roman law distinguished between complicity in action (*socius*) and in thought (*conscius*) on one hand, and complicity as instrument (*minister*) on the other.[13] The first type of complicity related to groups of individuals who collaborate between themselves in committing an offense. The second type related to the dominant hierarchy between the accomplices, in which one accomplice serves as an instrument in the hands of another who controls him entirely.[14] This type of complicity was more relevant to organized crime rather than to spontaneous complicity.

At the core of the criminalization of complicity in Roman law was the liability of the principal perpetrator, as long as he was legally competent[15] and committed

[7] Mogens H. Hansen, *Graphe or dike traumatos?*, 24 GRBS 307, 308 (1983); N. R. H. Fisher, *The Law of hubris in Athens*, Nomos: Essays in Athenian Law, Politics and Society 123, 133 (Cartledge, Millett and Todd eds., 1990).

[8] Plato, Laws 876a-877a.

[9] Douglas M. MacDowell, Athenian Homicide Law in the Age of the Orators 62-63 (1963); Michael Gagarin, Drakon and Early Athenian Homicide Law 30-37 (1981); Raphael Sealey, The Athenian Republic: Democracy or the Rule of Law? 70-77 (1987).

[10] Digesta, 4.3.15.1; Ulpian, 11 ad ed; Olivia F. Robinson, The Criminal Law of Ancient Rome 15-16 (1995).

[11] Digesta, 9.1; Institutions of Justinian, 4.9.

[12] Laurent Chevailler, *Contribution à l'Étude de la Complicité en Droit Pénal Romain*, 31 RHD 200 (1953).

[13] Digesta, 50.16.53.2.

[14] See e.g., Digesta, 42.8.10.2; Codex Justinianus, 9.13.1.3; Ulpian, 73 ad ed.

[15] Digesta, 47.2.91.1; Joseph A. C. Thomas, *Delictal and Criminal Liability of the Young in Roman Law*, 38 Rec. Bodin—L'Enfant 9, 17 (1977).

an act (*actus reus*)[16] intentionally (*mens rea*).[17] This core liability was essential for imposing criminal liability on the accomplices. Roman law did not create general frames of accomplices (e.g., accessories, inciters, etc.), but any person who was involved somehow in the commission of the offense, actually or constructively, was considered an accomplice, dependant on the severity of the specific relevant offense. For example, a person who knew the identity of the murderer of his father but failed to cooperate with the authorities and refused to turn him in was considered an accomplice to parricide. But if the offense was not murder (parricide) but theft, he was not considered an accomplice.[18]

Slaves whose master was murdered were indicted as accomplices to the murder because they failed to keep their master alive even if they did not commit the murder, knew nothing about it, and had no specific duty to keep their master alive. In the period of the late Roman Republic, the law recognized a general duty of all slaves to keep their masters alive.[19] In offenses of high treason, a prayer for the peace of the suspect was considered complicity.[20] In offenses of theft, all actions contributing to the theft were considered complicity, as for example causing a coin to fall on the ground where another person could steal it, or causing the cattle to escape by waving a red flag before it, so that another person may capture it.[21]

Incitement alone was not sufficient ground in Roman law for criminal liability, except in cases of high treason.[22] But the advice to commit an offense was considered an offense itself if it was specific enough to persuade the perpetrator to commit the offense.[23] Moreover, consent and ratification of the offense,[24] as well as a request to commit the offense were also considered offenses.[25] Incitement differed from perpetration-through-another (*minister*) in the relationships between the accomplices. If the relationship was based on hierarchy, and the decision to commit the offense was not the actual perpetrator's, the offense was not incitement but perpetration-through-another.[26]

Roman law also criminalized actions that had an indirect relation to the core offense, including concealment of the offender, of the loot, and of the offense.[27] Landowners were criminally liable for offense committed on their land and for the

[16] Digesta, 47.2.36.1,3; Ulpian, 36 ad Sab., 41 ad Sab.

[17] Digesta, 47.2.50.2; Ulpian, 37 ad ed., 56 ad ed.; Codex Theodosianus, 9.16.3; Codex Justinianus, 9.8.4.1.

[18] Digesta, 48.9.2; Codex Theodosianus, 9.29.2; Codex Justinianus, 9.39.1.1.

[19] Digesta, 29.5.1; Ulpian, 50 ad ed.

[20] Codex Theodosianus, 9.14.3.1; Codex Justinianus, 9.8.5.2.

[21] Digesta, 9.2.27.21; Ulpian, 18 ad ed., 37 ad ed.

[22] Digesta, 47.2.36; Ulpian, 41 ad Sab.

[23] Digesta, 47.2.50.3; Ulpian, 37 ad ed.

[24] Digesta, 50.17.152.2; Ulpian, 69 ad ed.

[25] Digesta, 2.10.1.1; Ulpian, 7 ad ed.

[26] Digesta, 9.4.2; Ulpian, 18 ad ed.

[27] Digesta, 47.2.48.1; Ulpian, 42 ad ed., 50 ad ed.

offense committed by offenders hiding on their land.[28] Similarly, the giver of a bribe was criminally liable as an accomplice of the taker, although the prohibition extended only to taking the bribe.[29] The criminal liability and the punishments of all accomplices in the same offense were identical.[30] Under the late republic, the leaders of the complicity were punished more harshly than were the accomplices to the same offense.

The criminal attempt was criminalized under Roman law in light of the general concept that there is no difference between the complete offense and the wish to complete it if the offense was not completed because of circumstances beyond the attempter's control.[31] The dominant element of the criminal attempt was the mental one, which included the specific intent to complete the commission of the offense. The factual element could have been minimal because the intent was taken for the deed (*voluntas reputabitur pro facto*).[32] The dominance of the mental element in criminal attempt was so great that many Roman legal scholars confused the mental element of the offense with the attempt to commit the offense.[33] As a result, Roman law had difficulty creating a coherent doctrine of the criminal attempt.

Hebrew law carried out a radical reform in the understanding of the principle of personal liability in criminal law. The early biblical point of view, as expressed in the Ten Commandments[34] and in later biblical sources,[35] contained significant deviations from the principle. For example, in certain cases Hebrew criminal law allowed the imposition of criminal liability and punishment not only on the direct perpetrator but on other parties as well, even if they did not participate directly in the perpetration of the offense. In some cases, it was sufficient to be a relative of the direct offender to be liable. This early position of Hebrew law was not different that

[28] Codex Theodosianus, 9.21.2.4-5, 9.21.4.1, 9.39.2, 16.5.21; Codex Justinianus, 9.24.1.4, 6-7.

[29] Digesta, 47.16.1.

[30] Digesta, 43.24.15.2, 47.10.15.8; Ulpian, 29 ad ed., 71 ad ed., 77 ad ed.; Codex Theodosianus, 9.29.1; Codex Justinianus, 9.14.3,6.

[31] Robinson, *supra* note 10, at p.19; Jerome Hall, General Principles of Criminal Law 559 (2nd ed., 1960, 2005).

[32] Robinson, *ibid*, at p.18.

[33] Allan Chester Johnson, Paul Robinson Coleman-Norton and Frank Card Bourne, Ancient Roman Statutes 27 (2003).

[34] Exodus 20:2-5: "I am the Lord thy God, which have brought thee out of the land of Egypt, out of the house of bondage. Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, nor serve them: for I the Lord thy God am a jealous God, *visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me*".

[35] Jeremiah 31:28-29: "And it shall come to pass, that like as I have watched over them, to pluck up, and to break down, and to throw down, and to destroy, and to afflict; so will I watch over them, to build, and to plant, saith the Lord. In those days they shall say no more, *the fathers have eaten a sour grape, and the children's teeth are set on edge*".

of early Mesopotamian law, which accepted even larger deviations from the principle of personal liability.[36]

From the seventh century BC onward, however, the position of Hebrew law changed radically, to full acceptance of the principle of personal liability. The book of Deuteronomy, written in the time of King Josiah as part of social and religious reforms under way in Judea around 640 BC (this book is later than the other four books of Moses),[37] reflects already the new attitude toward the principle of personal liability and restricts the imposition of criminal liability and punishment to the direct perpetrators of the offense. This is the first instance of the essence of the principle of personal liability becoming part of criminal law, as expressed by the words: "*The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin.*"[38]

The new and radical point of view of the principle of personal liability in criminal law was embraced by the Jewish kingdom of Judea from the seventh century BC onward, as well as by the prophets Jeremiah, Ezekiel, and their followers.[39] Therefore, criminal law had to develop specific offenses of complicity in order to impose criminal liability and punishment on all relevant parties—direct perpetrators as well as indirect inciters and accessories. At that time, Hebrew law did not develop a general theory of complicity, but formulated specific offenses of complicity, as did early Mesopotamian law, in parallel with deviations from the principle of personal liability. In many respects, however, Hebrew law and early Mesopotamian law were vastly different.

For example, laws 15, 16, and 227 of the code of Hammurabi decree that accessories to the escape of a slave and accessories after the fact (guilty of concealment) were sentenced to death.[40] By contrast, the book of Deuteronomy prohibits turning in escaped slaves,[41] and refusal to conceal an escaped slave is in itself a criminal offense. The difference between the two legal systems derives from differences in their social outlooks. Nevertheless, neither legal system created a

[36] P. J. Verdam, *On ne Fera Point Mourir Les Enfants pour Les Peres en Droit Biblique*, 3 Revue Internationale des Droits de L'antiqué 393 (1949).

[37] 2 Kings 22.

[38] Deuteronomy 24:16.

[39] Jeremiah 31:28-29; Ezekiel 18:1-17.

[40] Law 15 of the Code of Hammurabi (L. W. King trans.) provided: "If any one takes a male or female slave of the court, or a male or female slave of a freed man, outside the city gates, he shall be put to death"; Law 16 of the Code of Hammurabi (L. W. King trans.) provided: "If any one receives into his house a runaway male or female slave of the court, or of a freedman, and does not bring it out at the public proclamation of the major domus, the master of the house shall be put to death"; Law 227 of the Code of Hammurabi (L. W. King trans.) provided: "If any one deceives a barber, and have him mark a slave not for sale with the sign of a slave, he shall be put to death, and buried in his house. The barber shall swear: 'I did not mark him wittingly', and shall be guiltless".

[41] Deuteronomy 23:15: "Thou shalt not deliver unto his master the servant which is escaped from his master unto thee".

general theory of complicity with regard to the parties involved in the escape of slaves. The slave, the accessories, and the accessories after the fact were not considered accomplices in either legal system.

Between the third and the seventh centuries AD Hebrew law developed a general theory of derivative criminal liability. The approach is expressed in the Babylonian Talmud, the foremost Jewish creation of the early Middle Ages. The general rule stated in the Talmud is that partial criminal liability is not legal. In other words, the offender must be responsible for the perpetration of all parts of the offense for criminal liability to be imposed. If any component of the offense was not perpetrated by the offender, no criminal liability can be imposed on that offender.[42] A famous example is a case of ten people together beating a victim to death. If the prosecution fails to prove which one of these people was directly responsible for the death, all ten are exonerated.[43]

The Talmud prohibits imposition of criminal liability on accessories because they are indirect and secondary accomplices.[44] This rule derives from the general concept of the criminal liability of the perpetrator, described above. If the perpetrator, who is the direct and primary accomplice, is exonerated if he cannot be found responsible for any one part of the offense, the accessories are exonerated as well because they are not responsible for any part of the offense.[45] If the legal system wishes to impose criminal liability on accessories, it must create offenses that prohibit their specific conduct, as exceptions to the rule regarding the criminal liability of the perpetrator.

The Talmud accepts the criminal liability of the inciter, however, because the inciter is a primary accomplice, albeit an indirect one. The Talmud is influenced in this respect by the book of Deuteronomy, which accepts the incitement in certain cases as complicity.[46] Under Hebrew law, incitement is similar in its structure to modern incitement, and it refers to conduct intended to cause another person to commit an offense. The inciter is criminally liable independently of the criminal liability applicable to the incited person. Thus, even if the incitee does not commit the offense or is not convinced of committing the offense, the inciter is still criminally liable for incitement. Moreover, the inciter does not need to commit the offense himself; the incitement is sufficient in itself to impose criminal liability on the inciter.

Canon law accepted derivative criminal liability both internally (*in rem*), e.g., criminal attempts, and externally (*in personam*), e.g., complicity. The criminal attempt required a minimal factual element but a specific intent to complete the

[42] Babylonian Talmud, Shabbat (Saturday) Chapter, pages 75B, 90B, 91A.

[43] Babylonian Talmud, Sanhedrin (Court) Chapter, page 8A.

[44] Babylonian Talmud, Shabbat (Saturday) Chapter, page 93A.

[45] George P. Fletcher, Basic Concepts of Criminal Law 188-190 (1998).

[46] Deuteronomy 13:2-19.

commission of the offense.[47] Punishments for criminal attempts were lenient compared with those for the complete offenses.[48] Accomplices were considered as such regardless their material function in commission of the offense. If the offense was carried out, all persons involved in the offense since its beginning (conspiracy to commit the offense) were criminally liable for the complete offense.[49] All the types of accomplices that were recognized in Roman law were also recognized in Canon law.

Modern criminal law, both Anglo-American and European-Continental, relies heavily on Roman law in the area of derivative criminal liability. Modern legal systems expanded and unified the basic traditional concepts.

German law accepted derivative criminal liability as part of the general principles of German criminal law. The criminal attempt (*Versuch*) includes two main elements[50]: the mental, which consists of intent to complete the offense, and the factual, which consists of the execution of the intent.[51] If the completed offense is punishable with a maximum of less than 1 year of imprisonment (*Vergehen*), the criminal attempt is not punishable. In other offenses (*Verbrechen*), the maximum punishment for the criminal attempt is three quarters of the maximum punishment of the completed offense.[52] If the offense was not completed because of factual

[47] Canon 1418(1) of the Codex Canonum Ecclesiarum Orientalium provides: "(1) Qui aliquid ad delictum patrandum egit vel omisit nec tamen praeter suam voluntatem delictum consummavit, non tenetur poena in delictum consummatum statuta, nisi lex vel praeceptum aliter cavet".

[48] Canon 1418(2) of the Codex Canonum Ecclesiarum Orientalium provides: "(2) Si vero actus vel omissiones natura sua ad delicti exsecutionem conducunt, auctor congrua poena puniatur, praesertim si scandalum aliudve grave damnum evenit, leviore tamen quam ea, quae in delictum consummatum constituta est".

[49] Canon 1329 of the Codex Juris Canonici provides: "(1) Qui communi delinquendi consilio in delictum concurrunt, neque in lege vel praecepto expresse nominantur, si poenae ferendae sententiae in auctorem principalem constitutae sint, iisdem poenis subiciuntur vel aliis eiusdem vel minoris gravitates; (2) In poenam latae sententiae delicto adnexam incurrunt complices,qui in lege vel praecepto non nominantur, si sine eorum opera delictum patratum non esset, et poena sit talis naturae, ut ipsos afficere possit; secus poenis ferendae sententiae puniri possunt"; and Canon 1417 of the Codex Canonum Ecclesiarum Orientalium provides: "Qui communi delinquendi consilio in delictum concurrunt neque in lege vel praecepto expresse nominantur, eisdem poenis ac auctor principalis puniri possunt vel ad prudentiam judicis aliis poenis eiusdem vel minoris gravitatis".

[50] Article 22 of the German Penal Code provides: "Eine Straftat versucht, wer nach seiner Vorstellung von der Tat zur Verwirklichung des Tatbestandes unmittelbar ansetzt".

[51] Hans-Heinrich Jescheck und Thomas Weigend, Lehrbuch des Strafrechts—Allgemeiner Teil 509-528 (5 Auf., 1996); Heribert Schumann, *Criminal Law*, Introduction to German Law 387, 402 (2nd ed., Mathias Reimann and Joachim Zekoll eds., 2005); Nigel Foster, German Legal System & Laws 209-210 (2nd ed., 1996).

[52] Articles 23(1) and (2) of the German Penal Code provide: "(1) Der Versuch eines Verbrechens ist stets strafbar, der Versuch eines Vergehens nur dann, wenn das Gesetz es ausdrücklich bestimmt; (2) Der Versuch kann milder bestraft werden als die vollendete Tat (§ 49 Abs. 1);".

impossibility (*Untauglicher Versuch*), the attempt is punishable and the court has wide discretion in setting the punishment.[53]

If the attempter abandoned the attempt out of sincere regret (*Rücktrit*), no criminal liability is imposed upon him.[54] If the attempt involved more than one attempter, this defense applies only to the one who actually prevented the completion of the offense.[55] Complicity may be direct or indirect. Direct complicity includes perpetration (*Täterschaft*) of all types (joint-perpetration[56] and perpetration-through-another[57]). Indirect complicity includes incitement (*Anstiftung*)[58] and accessoryship (*Beihilfe*).[59] Perpetration and incitement are equally punishable, but accessoryship is punished more leniently.[60] The factual and mental elements of incitement and accessoryship are independent and different from the elements of the offense itself.[61]

[53] "Jescheck und Weigend, *supra* note 51, at pp. 529-536; Article 23(3) of the German Penal Code provides: (3) Hat der Täter aus grobem Unverstand verkannt, dass der Versuch nach der Art des Gegenstandes, an dem, oder des Mittels, mit dem die Tat begangen werden sollte, überhaupt nicht zur Vollendung führen konnte, so kann das Gericht von Strafe absehen oder die Strafe nach seinem Ermessen mildern (§ 49 Abs. 2)".

[54] Jescheck und Weigend, *supra* note 51, at pp. 536-551; Schumann, *supra* note 51, at pp. 403-404; Article 24(1) of the German Penal Code provides: "(1) Wegen Versuchs wird nicht bestraft, wer freiwillig die weitere Ausführung der Tat aufgibt oder deren Vollendung verhindert. Wird die Tat ohne Zutun des Zurücktretenden nicht vollendet, so wird er straflos, wenn er sich freiwillig und ernsthaft bemüht, die Vollendung zu verhindern".

[55] Article 24(2) of the German Penal Code provides: "(2) Sind an der Tat mehrere beteiligt, so wird wegen Versuchs nicht bestraft, wer freiwillig die Vollendung verhindert. Jedoch genügt zu seiner Straflosigkeit sein freiwilliges und ernsthaftes Bemühen, die Vollendung der Tat zu verhindern, wenn sie ohne sein Zutun nicht vollendet oder unabhängig von seinem früheren Tatbeitrag begangen wird".

[56] Jescheck und Weigend, *supra* note 51, at pp. 662-673; Article 25(1) of the German Penal Code provides: "(1) Als Täter wird bestraft, wer die Straftat selbst oder durch einen anderen begeht".

[57] Jescheck und Weigend, *supra* note 51, at pp. 673-682; Article 25(2) of the German Penal Code provides: "(2) Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)".

[58] Article 26 of the German Penal Code provides: "Als Anstifter wird gleich einem Täter bestraft, wer vorsätzlich einen anderen zu dessen vorsätzlich begangener rechtswidriger Tat bestimmt hat"; Jescheck und Weigend, *supra* note 51, at pp. 686-691.

[59] Jescheck und Weigend, *supra* note 51, at pp. 691-697; Article 27(1) of the German Penal Code provides: "(1) Als Gehilfe wird bestraft, wer vorsätzlich einem anderen zu dessen vorsätzlich begangener rechtswidriger Tat Hilfe geleistet hat".

[60] Article 27(2) of the German Penal Code provides: "(2) Die Strafe für den Gehilfen richtet sich nach der Strafdrohung für den Täter. Sie ist nach § 49 Abs. 1 zu mildern".

[61] Article 29 of the German Penal Code provides: "Jeder Beteiligte wird ohne Rücksicht auf die Schuld des anderen nach seiner Schuld bestraft".