# Analysis Essentially Of Participating In Corruption Crimes

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**Abstract** : State officials who are charged and tried under Article 3 of the corruption law are generally strongly suspected and accused of committing abuse of authority (*misbruik van bevoegdheid* ) because of their position or position. It is not uncommon for abuse of authority to result in a criminal act of corruption, the perpetrator standing alone, but rather more than 1 (one) person who has a connection to the crime. In criminal law, it is known as the doctrine of participation as regulated in Articles 55 - 56 of the Criminal Code as a basis for classifying perpetrators of criminal acts based on the size of the role and authority they have, however, Article 55 of the Criminal Code does not qualify criminal threats either as perpetrators ( *pleger* ), people who order them. commit *(Doenpleger)*, people who participate (*Medepleger*), advocate (*Uitlokker*) or assis (*Medeplichtige* ) so that the decision against each perpetrator creates injustice in law enforcement based on the source of authority received and based on the consequences arising from the action . The problem in this research is: What is the essence of the teaching of participating in a criminal act. The research method for this dissertation is through normative juridical approaches, including a philosophical *approach* , a statutory approach , a conceptual approach *and* a case approach . This research also uses legal material sources, namely primary legal materials and secondary legal materials. In describing the discussion, we also use the techniques of collecting legal materials and analyzing legal materials. The essence of the doctrine of participating in criminal acts is to expand the perpetrators of criminal acts so that they can be held criminally responsible based on the qualifications of the act. The doctrine of participation can be applied to abuse of authority as regulated in Article 3 of the Corruption Crime Law, but it must be seen from the source of the authority obtained by each perpetrator of abuse of authority.

**Keywords:** Participation Teachings, Corruption Crimes

## 1. INTRODUCTION

Aristotle gave rise to his ideas about the principle of equality before the law. In its development, Aristotle's philosophy was formulated with the expression that justice is achieved when equal things are needed equally and unequal things are treated unequally. Aristotle differentiated justice into distributive justice and commutative justice. Distributive justice is justice that demands that everyone gets what is their right, so it is proportional. Here what is considered fair is if everyone gets what is their right proportionally. Distributive justice concerns the determination of rights and fair distribution of rights in the relationship between society and the state, in the sense of what the state should provide to its citizens, including justice in the field of law .[1] In Indonesia, equality before the law was later adopted in article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (UUD 1945) which confirms that all citizens have equal status under the law. Equality before the law means that every citizen must be treated fairly by law enforcement officials and the government. So every law enforcement officer is constitutionally bound by the value of justice which must be realized in law enforcement practices. The implementation of the rule of law in the concept of statehood in the Republic of Indonesia is the main reason for various reforms in the legal field. Like the concept of a rule of law as stated in Article 1 paragraph 3 of the 1945 Constitution, which states that 'the State of Indonesia is a State of Law', contains the meaning and responsibility for implementation as a nation and state in a noble manner.[2] Every state or authority must base its power and regulations on the law and legal will that are imbued in the state constitution, not the law as the authority of the ruler or political power.

As a country of law, of course Indonesia makes law the commander in chief (rule of law), which is of course based on the idea of achieving the goals of the state, which in essence are protecting the entire Indonesian nation, advancing general welfare, making the nation's life intelligent and participating in implementing world order, but in realizing these goals, This noble goal is

[1]Bahder Johan Nasution, *Philosophical Study of the Concept of Justice from Classical Thought to Modern Thought*, Yustitia Journal, vol. 3 no. 2, 2014 p. 121-122

[2]Hernadi Affan, *Contextuality of the Meaning of Equality in Law and Government According to the 1945 Constitution*, Padjadjaran Journal of Legal Studies 4, no. 1, 2017 p. 19-40

not easy because there are many problems arising from many other national problems. Corruption is suspected to be the cause of economic destruction which has a negative impact on the occurrence of multiple crises in almost all aspects of national and state life. Law enforcement is one way of creating order, security and tranquility, as an effort to prevent, eradicate or prosecute violations of the law.[3] One of the criminal acts that is the enemy of the entire nation is corruption, so eradicating corruption has become a government priority to be addressed. Paying attention to the Law on the Eradication of Corruption Crimes, in fact the actions of state and private officials regarding unlawful abuse of authority and position or actions of state and private officials which are detrimental to state finances are qualified as acts of corruption as stated in Article 2 paragraph (1) and Article (3 ) Law Number 20 of 2001 concerning the Eradication of Corruption Crimes.

Article 2 paragraph (1) Law Number 20 of 2001:

Any person who unlawfully commits an act of enriching himself or another person or a corporation which can harm the state's finances or the state's economy, shall be punished with life imprisonment or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years. years and a fine of at least Rp. 200,000,000.00 (two hundred million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah).

Furthermore, in Article 3 the formulation is as follows:

Any person who, with the aim of benefiting himself or another person or a corporation, abuses the authority, opportunity or means available to him because of his position or position which can harm state finances or the state economy, shall be punished with life imprisonment or a minimum imprisonment of 1 (one) year and a maximum of 20 (twenty) years and/or a fine of at least Rp. 50,000,000.00 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah).

In law enforcement, Article 2 and Article 3 give rise to several problems in implementation at the judicial level, often there are differences in interpretation and *differing opinions* regarding elements of unlawfulness and abuse of authority or position which result in differences in the criminal and punishment of corruption perpetrators who are suspected of violating Article 2 and Article 3. This is related to the definition of abuse of authority according to Jean Rivero and Waline, which is defined in 3 (three) forms, namely:[4]

1. Abuse of authority carries out actions that are contrary to the public interest or benefit personal interests or groups.
2. Abuse of authority in the sense that an official's actions are truly aimed at the public interest, but deviate from the aim of the authority granted by law or other regulations.
3. Abuse of authority in the sense of abusing it to achieve certain goals, but having used other procedures to achieve it.

Acts against the law are acts prohibited by law. Abuse of authority is an action carried out by a person or official who is given authority by law in a position and uses it for personal and group interests with the aim of enriching themselves and certain groups and harming the interests of many people or the public interest. The element of causing harm to state finances is used as the initial presumption to indict an official without first stating the form of the violation. A reverse thought. The element of causing harm to state finances is the result of an official's violation of the law. An official's use of state finances cannot be categorized as an act detrimental to state finances if he acts in accordance with applicable law .[5] The problem of abuse of authority and corruption is not an understanding of policy, but rather a problem of the relationship between authority and bribery . The authority of public officials relating to policy, whether bound or free authority, is not within the realm of criminal law, so corruption cases have recently occurred frequently in Indonesia related to allegations of abuse of authority and unlawful acts giving the impression of criminalization of policy.[6]

Basically, the concept of abusing authority is in the *gray area (* the existence of multiple interpretation perspectives on an object *)* .[7] There is a conflict between criminal law norms and administrative law norms. In the framework of state administrative law, the parameters that limit the free movement of authority of state apparatus ( *discretionary power* ) are *detournement de pouvouir* (abuse of authority) and *willekeur* (arbitrary action), in the area of criminal law there are also criteria for limiting the free movement of authority of state apparatus in the form of elements *wederrechtelijkheid* [8]. The problem is when state officials commit acts that are considered to be abusing authority and breaking the law, which means which will be used as a test for deviations from this state apparatus, state administrative law or criminal law, especially in corruption cases. Understanding regarding determining jurisdiction is still limited in the life of judicial practice.

The rise in officials stumbling into corruption cases is not only a worrying phenomenon, but also creates problems for the government administration process. Apart from allegations of personal enrichment, receiving gratuities and bribes, they were also assigned the status of corruption suspects because their policies were suspected of causing state losses. In the eyes of the public, the fact that many public officials have been named as corruption suspects could be interpreted as the success of anti-riswah institutions in fighting corruption. Meanwhile, for government officials, it is actually interpreted as a scourge because there is no

[3]Ratna Nurul Aflah, *Evidence in the Criminal Process*, Sinar Graphics, Jakarta, 2002, p. 6.

[4]Indriyanto Seno Adji, *Corruption and Law Enforcement* , Diadit Media, Jakarta, 2009, p. 13.

[5]Ridwan H. R, *State Administrative Law* , Raja Grafindo Persada, Jakarta, 2010, p. 376.

[6]Abdul Latif, *Administrative Law in Corruption Crime Practices* , Prenada Media , Group , Jakarta, 2014, p. 41.

[7] *Ibid* , p. 41.

[8] *Wederrechtelijkheid* is an action/non-action that is contrary to

the law/legislation of other people's rights, the legal obligations of the perpetrator, decency, careful attitude, as is appropriate in the traffic of social life towards oneself or other people's property. JTC Simorangkir, *Legal Dictionary* , Sinar Graphic, Jakarta, 2000, p. 187.

guarantee that in their turn they will experience the same thing, becoming sick because they are caught in the legal trap of criminal acts of corruption. Apart from dragging minister-level officials, quite a few regional heads are caught in corruption cases because of policies issued. On the one hand, government officials are representatives of the state whose decisions are part of a protected legal product, on the other hand, there is no or no administrative standardization of government actions or activities, making them trapped when faced with a gray policy area. That abuse of authority is also the domain of criminal law so that the presence or absence of elements of abuse of authority can be examined in general court. Other groups believe that abuse of authority by state officials must be tested using the principle of specialization ( *specialialiteit beginsel* ), because deviation from this principle gives rise to abuse of authority. In this context, allegations of abuse of authority are the domain of administrative law, so that the authority to examine the presence or absence of elements of abuse of authority is the absolute competence of administrative justice (State Administrative Court).

The application of this mechanism is in line with the principle of *ultimum remedium* in the application of criminal law, the existence of criminal sanctions regulations is positioned as the final sanction after civil and administrative sanctions, allegations of abuse of authority have so far been immediately drawn into the realm of criminal law even though a policy cannot be criminalized. According to Hans Kelsen, the concept of legal obligations is the concept of legal responsibility. A person is legally responsible for a certain act or bears legal responsibility.[9] The theory of legal responsibility explains the relationship between policy-making officials regarding policies that cause state financial losses. State financial losses are associated with a criminal act of corruption. Because policy-making officials have free will for their actions, they must be held criminally accountable.

Criminal threats are a logical consequence of criminal acts that are against the law, relate to mistakes and are carried out by people capable of being responsible. Corruption law enforcement is currently also considered very immeasurable. This is related to the criminalization of law enforcement against stakeholder state officials. Many corruption cases turn out to be maladministration even though it is the beginning of corruption. Law enforcement is carried out wisely. If state officials are afraid in making policies, it can be said that negligence or omission creates a dilemma for policy holders. Every action must be seen from the mental attitude *(mens rea),* regarding the element of fault or responsibility of the person, the relationship between intention and action *(dolus/culpa)* and also the absence of excuses. This is because in the Indonesian Criminal Code, the element of error is a mental element of a crime, if policy making is carried out without malicious intent, it is actually not appropriate to be punished because there is no crime without error ( *geestraf zonder schuld* ) .

Criminal law as a part of law does not show any differences with other laws, namely that all of these laws contain a number of provisions to ensure that the norms recognized in the law will truly be obeyed by everyone. This is because basically all laws aim to create a situation in social life in society, both in small environments and in larger environments, so that there is harmony, order, legal certainty, and so on. It cannot be denied that more than 1 (one) person is involved in every criminal act where each perpetrator has a different role . In committing criminal acts of inclusion ( *deelneming* ) the methods used are very diverse, some work behind the scenes, there are also those who provide assistance, there are those who order them, there are even those who do it directly. All of these things are done to gain benefits from each actor.

In relation to what was stated above, the legal justification using the doctrine of "participating" or *"deelneming"* really has a strong reason that the criminal act was committed and known by several people who participated in committing the criminal act. However, in practice, it turns out that implementing the teaching of participating or *"deelneming"* is not easy, because apart from positioning the main actor *(dader)* , there are also several supporting actors *(mededader)* . To determine whether or not the perpetrators can be held accountable, it is necessary to look for the relationship between the main perpetrator *(dader)* and the supporting perpetrators *(mededader)* , both before and when the crime was committed . This is a manifestation of the Indonesian Criminal Justice System , which is based on Law no. 8 of 1981 concerning the Criminal Procedure Code which contains several principles, such as the principle of equal treatment in the law, the principle of presumption of innocence, the right to obtain compensation and the obligation of the court to control the implementation of its decisions, this in the Indonesian criminal justice system leads to *Due Process of law* ". It is a fair and proper legal process , which applies in connection with a more honest legal process based on the law. This principle can provide insight into whether the existing legal process is in accordance with existing laws and regulations and there are no irregularities in the legal process. Where the target to be achieved in this case is the smooth running of the criminal justice process from the stages of investigation, prosecution, decision or judge's sentence to the execution stage.

other laws in general such as civil law, constitutional law and state administrative law. One of the differences is that in criminal law there is recognition of participation ( *deelneming* ), namely when in a criminal act not only one person is involved, but more than one person as stated in Articles 55 and 56 of the Criminal Code. Every person involved in a criminal act is called a maker, but makers in the Criminal Code have several naming qualifications. Each qualification for naming the maker has certain requirements. For example, in *medeplegen* /participation, not every maker is called a *medepleger* , and not all maker qualifications can be punished because in the doctrine of participation there are certain maker qualifications that are not penalized.

According to criminal law doctrine, the doctrine of participation or *deelneming* is one of the doctrines of criminal law regarding determining the perpetrator in a criminal act if there are several perpetrators, while the perpetrator himself is a person or what is formulated in the Criminal Code as "whoever" or what is referred to as *"daders"* or makers are those who carry out all the elements of a criminal act as these elements are formulated in the law. If we understand what is meant above, it is assumed that what is meant by perpetrators according to the doctrine of participation are those who commit a criminal act together.

[9]Hans Kelsen (Translated by Soemardi), *General Theory of Law and State, General Theory of Law and State, Basics of Normative Legal Science as Descriptive-Empirical Legal Science*, BEE Media Indonesia, Jakarta, 2007, p. 81.

Furthermore, if you look at the formulation in article 55 of the Criminal Code, several other criminal law experts state that there are 4 (four) perpetrators, namely :

1. Those who commit a criminal act themselves *(zij die het feitplegen; )*
2. Those who order them together to commit a criminal act *(zij die het feit medeplegena);*
3. Those who together commit a criminal act *(zij die het feitmedeplegen);*
4. Those who deliberately encourage other people to commit a criminal act *(zij die het feitopzettelijkuitlokking).*

Determining the perpetrator as regulated in Article 55 of the Criminal Code is important, considering that abuse of authority as a criminal act of corruption is not always carried out individually, but there are also those who do it together. Therefore, the problem is how to determine and punish the perpetrators according to the classification above in accordance with their authority. This is said to be so because if we refer to the authority as mentioned above, the government, through its officials, can exercise discretion as regulated in the AP Law. Discretion according to Article 1 paragraph (9) of the AP Law, is defined as decisions and/or actions determined and/or carried out by government officials to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, do not complete or unclear, and/or there is government stagnation. Furthermore, discretion is regulated in Chapter VI, Article 22 to Article 32 of the AP Law. According to Article 22 paragraph (1) of the AP Law and its explanation, it is stated that discretion can only be exercised by authorized government officials, with the aim of:

a. Carrying out government administration:
b. Filling legal gaps; And
c. Overcoming government stagnation in certain circumstances for the benefit and public interest.

Meanwhile, the provisions in Article 23 of the AP Law stipulate that the Discretion of Government Officials includes:

a. Making decisions and/or actions based on the provisions of laws and regulations which provide a choice of decisions and/or actions;
b. Making decisions and/or actions due to laws and regulations that do not regulate,
c. Making decisions and/or actions because the provisions of statutory regulations are incomplete or unclear, and
d. Decision making and/or action due to government stagnation and broader interests

The provisions in Article 24 of the AP Law state that government officials who use discretion must fulfill the requirements in accordance with the purpose of the discretion, namely:

a. Does not conflict with statutory provisions;
b. In accordance with the general principles of good governance;
c. Based on objective reasons;
d. Does not create a conflict of interest; And
e. Done in good faith.

The provisions in Article 25 of the AP Law regarding the use, approval and notification of discretion stipulate:

(1) Use of discretion that has the potential to change budget allocations must obtain approval from superior officials.
(2) Approval as intended in paragraph (1) is carried out if the use of discretion based on Article 23 letters a, b and c results in legal consequences that have the potential to burden state finances.
(3) In the event that the use of discretion causes public unrest, is an emergency, is urgent and/or a natural disaster occurs, government officials are obliged to notify the superior officer before using the discretion and report to the superior officer after the use of the discretion.
(4) Notification before the use of discretion as intended in paragraph (3) is carried out if the use of discretion is based on the provisions of Article 23 letter a which has the potential to cause public unrest.
(5) Reporting after the use of discretion as intended in paragraph (3) is carried out if the use of discretion based on the provisions in Article 23 letter d occurs in an emergency, urgent situation and/or a natural disaster occurs.

Meanwhile, the procedures for using discretion are regulated in Articles 26 to 29 of the AP Law. Meanwhile, the legal consequences of discretion are regulated in Articles 30 to 32 of the AP Law. However, according to Laica Marzuki, the use of discretion in the AP Law negates the essence of freedom.[10] Almost the entire article regarding the regulation of discretion has the potential to limit, or even strip away, the essence of freedom that is inherent in discretion .[11] Furthermore, according to Laica Marzuki, what is actually the testing stone ( *toetsteen* ) of the use of discretion is the extent to which the discretion corresponds to or exceeds the authority *(de bevoegdheden)* inherent in the position of the official concerned. When there is an excess of the authority of a position , the matter in question is no longer a matter of discretion but a violation of the law ( *onrechtmatig* ) or against the law ( *wederrechtelijk* ) [12].

In another section, Laica Marzuki states that the requirement for superior approval in certain cases is not at all related to matters of discretion but is related to the relationship between superiors and subordinates in *administrative rechtelijk terms.* The requirement for approval from superiors is not commonly known, even in relation to the implementation of *gebonden bestuur.* When discretion requires approval *(by consent)* from superiors, discretion is shackled. This means that discretion loses its free essence. When an Official's discretion is annulled by the Official's Superior then the matter in question must be interpreted as an

[10] Laica Marzaki, *Questioning the Disbrest that is being held back (Criticizing Law Number 30 of 2014 concerning Government Administration),* paper "Scientific Work Team in the Commemoration of the 26th Paratum Anniversary", Jakarta, 2017.

[11] *Ibid*

[12] *Ibid*

order from the Official's Superior, solely relating to the relationship between the Subordinate Official and the Superior Official. Eliminating the essence of freedom means eliminating the existence of discretion. Discretion without the essence of freedom means discretion without discretion. A *contradictio in adjecto* . Moreover, the relationship between officials using discretion and superiors who give approval for the discretion of subordinate officials must be clear. Is it related to delegation *of authority* or delegation based on mandate? Giving a delegation causes the delegatee (superior) to lose authority, whereas in the case of delegation based on a mandate, the mandatary acts for and on behalf of the mandate. Superiors are also responsible, including in terms of implementing policy regulations *(beleidsregel, policy rule)*, such as circulars , announcements and so on in relation to mandates. Apart from the notes regarding several weaknesses as mentioned above, discretion is in fact needed by government administrators to overcome limited regulatory capacity or legislation which is unable to respond to rapid changes in society so that sometimes existing regulations are no longer relevant to changing times. Although the authority of government officials to exercise discretion in the concept of administrative law is always accompanied by the aims and purposes of granting that authority, the application of that authority must be in accordance with the aims and purposes of granting the authority itself. In the event that a government official uses authority that is not in accordance with the aim and purpose of granting that authority, then such government official has committed an abuse of authority *(detournement de pouvoir)* and *freis ermessen* (discretion).

As in the case of abuse of authority committed by the former Head of the Tanimbar Islands Regency (KKT) PUPR Service, Adrianus Sihasale was sentenced to six years in prison, because he was proven to have committed corruption in the Tanimbar Islands Regency (KKT) city park [13]development project, Maluku Province for the 2017 fiscal year . In this case, Adrianus Sihasale , as the former Head of the Tanimbar Islands Regency PUPR Service, only continued the work of the two previous PUPR service heads. Apart from Adrianus Sihasale, three other people were also defendants in the case with state losses amounting to IDR 1.38 billion . Wilma Fenanlampir as PPTK ( Activity Technical Implementation Officer ) and Frans Yulianus Pelamonia as field supervisor. In the demands of the public prosecutor, Fenanlampir, Pelamonia and Sihasale, the defendants were sentenced to 8.6 years in prison and charged to pay a fine of IDR 500 million, subsidiary to 6 months in prison because the three defendants were found guilty of violating article 2 paragraph (1) in conjunction with article 18 Republic of Indonesia Law number 20 of 2001 concerning Corruption Crimes (Tipikor). And the judge declared the defendant guilty of committing a criminal act of corruption and sentenced the defendant to prison for 6 years, minus the time the defendant was in detention.[14]

State administrators and civil servants who are prosecuted and tried under Article 3 UUPTPK 1999, are generally strongly suspected and accused of committing abuse of authority ( *misbruik van bevoegdheid* ) because of their position or status. Abuse of authority itself is contained in Article 3 UUPTPK 1999, Article 12 letter e UUPTPK 1999 jo . Article I number 2 UUPPTPK 2001 and others as the core part of the offense ( *bestandeel* ) and also an element ( *element* ).

Such situations can lead to injustice in law enforcement. This is because there is often a fair disregard for legal interests, which include: the legal interests of the state, the legal interests of society and the legal interests of individuals. In fact, a just relationship between these legal interests must be created first in the provisions of Article 3 UUPTPK 1999, Article 12 letter e UUPTPK 1999 jo. Article I number 2 UUPPTPK 2001 and others in order to realize broader legal objectives, namely: improving general welfare as written by Pompe, as follows:[15]

> …, *the criminal offense is one of the standard violations. This brings the criminal offense into some connection with the interests whose care constitutes the purpose of the law. After all, the aim of law is to promote the general well-being, which includes the interests of legal partners, with due observance of the correct, and therefore especially just, relationship between these interests. The relationship between these interests depends to a large extent on actual existing valuations in a particular people and at a particular time ....* (Terjemahan bebas : …, tindak pidana termasuk dalam pelanggaran-pelanggaran norma. Hal ini yang membawa tindak pidana berhubungan dengan kepentingan-kepentingan, yang pemeliharaan kepentingan-kepentingan tersebut membentuk tujuan hukum. Hukum selalu memiliki tujuan memperhatikan kesejahteraan umum yang mengandung kepentingan-kepentingan masyarakat hukum, dengan mewujudkan hubungan yang serasi, terutama yang adil antara kepentingan-kepentingan ini. Hubungan antara kepentingan-kepentingan ini adalah untuk sebagian yang penting bergantung pada penilaian-penilaian yang berlaku secara nyata dalam suatu masyarakat tertentu dan suatu waktu tertentu….)
>
> Bagir Manan also had an opinion almost the same as Pompe, who stated, among other things:[16]

Fair or equitable law enforcement will be achieved if the law to be enforced – as well as the law that regulates methods of law enforcement – is true and fair. A legal rule will be correct and fair if it is made in the correct manner and its content is in accordance with the legal awareness of society and provides the maximum benefit for the interests of individuals and society in general. A legal rule will be incorrect and unfair if it is only made for the sake of power and contains arbitrariness.

In the decision on criminal acts of state loss based on the audit results of the BPKP RI Representative of Maluku Province, it was found that state losses amounting to Rp. 1.035 billion. Where there were 3 (three) perpetrators as mentioned above who were charged with the same charges by the public prosecutor and even the verdict was the same as that handed down by the Ambon district court judge. Even though Articles 55 - 56 of the Criminal Code have divided perpetrators of criminal acts into four categories and of course each perpetrator has a source of authority, whether in the form of attribution, delegation or mandate, what is interesting to study is that the Criminal Code does not explain the magnitude and severity of the punishment. for

[13]https://ambon.tribunnews.com/2021/12/02/divonis-6-tahun-adrianus-sihasale-ajukan-banding

[14]https://matamaluku.com/3-terjiwa-koruptor-jek-pembangunan-taman-kota-kkt-di- Hukum-enam-tahun-penjara/

[15]WPJ Pompe, *Handboek van Het Nederlandse Strafrecht* , Zwolle : NV Uitgevers-Maatschappij, WEJ Tjeenk Willink, 1950, p.42

[16]Bagir Manan, *"Just Law Enforcement," Varia Judicial* , Year XX, No. 241, November 2005, p. 8

each perpetrator based on article 55 of the Criminal Code, meaning that the Criminal Code itself, especially in article 55 of the Criminal Code, does not qualify each perpetrator of abuse of authority based on their role.

Even though Article 55 of the Criminal Code is a form of criminal responsibility where the perpetrator is more than one person and of course in this case each perpetrator has the authority to act so that Article 55 of the Criminal Code is the basis for classifying criminal perpetrators based on the size of the role and authority they play so that the occurrence of criminal acts of corruption, this can be proven that Article 55 of the Criminal Code or the teachings are always used by law enforcement officials to ensnare other perpetrators who are related to criminal acts of corruption, but in reality it is not easy to reveal this because most of them are abuses of authority. What is done today is always played by intellectual actors, of course in this case they have the authority, so the saying appears that the Court is only for small perpetrators, but intellectuals cannot be arrested, they cannot be processed in court. This expression is a strong threat to law enforcement officials in carrying out law enforcement and providing fair punishment for each perpetrator of a criminal act of corruption to achieve a sense of justice for their respective roles based on the source of authority received and based on the consequences arising from that act. Starting from the background stated above, the formulation of the problem to be studied is: What is the essence of the teaching of participating in a criminal act? Research **Objectives :** Analyze and discover the essence of the teachings of participating in a criminal act. **Usefulness of Research,** Theoretically : This research is expected to be useful for the development of legal science, especially regarding the nature of participating in the abuse of authority in criminal acts of corruption. In practice: As a form of contribution of thought and used as input for the government and law enforcement officials to prioritize the principles contained in criminal law, criminal procedural law, to realize legal justice, legal certainty and legal benefits in implementing the teachings of participation.

## 2. RESEARCH METHODS

### Types of research

The definition of legal research according to Peter Mahmud Marzuki is a process of discovering legal rules, legal principles and legal doctrines in order to answer the legal issues faced.[17] Moving on from the definition, this type of research is *normative juridical research* . Normative juridical research is a legal research method carried out by examining library materials or secondary materials.[18]

## 3. RESULTS AND DISCUSSION

### The Essence of the Teaching of Participation

Generally a criminal act is formulated for a single author, only some of them are designed to cover events involving many people. To expand the reach of the legal formulation regarding an offense *designed* for the sole author, provisions regarding "inclusion" *(deelneming) were made.* Judging from the restrictive maker theory, provisions regarding absolute participation exist, which can make people other than the perpetrator *(pleger)* of a crime, be seen as also committing a prohibited act *(strafbaar).* The law thus limits punishment for people who participate in a crime as long as they meet the criteria as participants in criminal acts in the "principle of participation"

In the last 200 years there have been no significant changes to the provisions of the law regarding inclusion, even though Law Number 1 of 2023 concerning the Criminal Code has been promulgated, the conception of inclusion in it still follows the provisions of the Criminal Code. This causes the complexity of the offense of participation that occurs in reality that cannot always be explained by the relationship pattern of the perpetrator and participant (in ordering to do *(doenplegen)* ), participating in doing *(medeplegen),* advocating *(uitlokken)* and *assisting (medeplichtige)* specified in the Criminal Code, legal practice and legal science.

Compared with other forms of inclusion, the doctrine of taking part in doing[19] *(medeplegen)* has different characteristics because it requires a joint action *(meedoet)* between the material actor ( *pleger* ) and the actor who participates in it ( *medepleger* ). Ordering to carry out ( *doenplegen* ) and advocacy ( *uitlokken* ), the implementation of criminal acts is only carried out by perpetrators of material crimes, while messengers and advocates only give orders to carry out criminal acts. In assisting, there are differences between participating and carrying out activities, which are characterized by close cooperation in participating in carrying out activities so that criminal acts will occur without this cooperation. On the other hand, assistance is not based on close cooperation because criminal acts can occur without such cooperation. A more striking difference can be seen in the division of roles. For some criminal law experts, participating requires the perpetrator to participate in carrying out some of the elements of the offense, whereas in assistance the role of the assistant is not directly related to the implementation of the elements of the offense.

Teleologically, the use of the term *medeplegen* refers to close cooperation between two or more people which is different from assistance. Previously, the term used was "intentionally participating in work to commit a criminal act ( *opzettelijk tot het plegen daarvan medewerken* ) which invited several criteria from *Tweede Kamer* and *de Vries* regarding the use of the words " *opzettelijk* and *medewerken tot het plegen* " use of the word "intentionally" *opzettelijk )* is considered to limit the scope of cooperation because it only applies to crimes, while violations are not included in the scope of cooperation to commit criminal

[17]Peter Mahmud Marzuki, *Legal Research* , cet.2, Kencana Prenada Media Group, Jakarta, 2006, p.35
[18]Soejono Soekanto and Sri Mamudji, *ibid* , p. 13.
[19]Moeljatno, *Law: Trial Offenses and Participation Offenses,* Jakarta. Publisher PT Bina Aksara, 1985, p. 27

acts. Meanwhile, the sentence " *medewerken tot het plegen"* is considered too broad so that the action can differentiate between participation and assistance because both are based on cooperation.[20] Therefore, Modderman made a suggestion to use the word *medeplegen* which is interpreted by *Memorie van Toelichting (MvT)* as "any person who deliberately *participates* in committing a criminal incident."

*Memorie van Toelichting (MvT)* does not explain participation in more depth, giving rise to discourse in determining criteria for participation. Van Hamel and Trapman stated that participating in committing requires everyone involved in participating in committing to fulfill all the formulas of the offense.[21] Therefore, participation is said to exist when everyone can realize creation *(daderschap)* perfectly. This opinion is very strange and ignores the usefulness of provisions regarding inclusion which aim, in a dualistic context, to expand the norms and rules contained in criminal acts, so that the characteristics of criminal acts formulated for single perpetrators are expanded so that they can be committed by several people. With the expansion of criminal acts, these people are deemed to have committed criminal acts even though they only fulfill part of the offense formula, so they can be held responsible for their actions and can be punished. Therefore, the requirements for perfect production in participation and participation have no meaning in criminal law, because without provisions regarding participation, a person who meets the formula for an offense can be punished.

It appears that van Hamel and Trapman equate *mededaderschap* with taking part in committing it, because for both of them perfect execution for each party involved in a criminal act is an absolute requirement for taking part in committing it. Viewed from an etymological perspective, Lamintang also uses the terms *mededaderschap* and participating in committing ( *medeplegen* ) interchangeably, but the meaning refers to participating in committing which only requires that the perpetrator and the perpetrator can share the implementation of the elements of the offense so that a complete offense is realized.[22] Meanwhile, Jonkers[23] who follow Noyon's opinion, have a different opinion by dividing the types of criminal acts together into three parts. *First, mededaderschap* which he calls a friend of action. *Second* , participating in committing ( *medeplegen* ) which requires dividing the implementation of the elements of the offense by several based on conscious cooperation. This form is the original form of participating in the activities regulated in Article 55 paragraph (1) 1 of the Criminal Code. *Third* , assistance is almost the same as taking part, except that assistance is not based on close cooperation and the manifestation of the offense is not directly related to the elements of a criminal act.

Rejection of van Hamel and Trapman's opinion was also expressed by Simon, who admitted that the perpetrators who took part were not required to fulfill the offense formula. Nevertheless, Simon requires that the participating perpetrator must have the same qualities as the perpetrator so that the participating perpetrator fulfills the requirements as a maker ( *dader* ) as stipulated in Article 55 of the Criminal Code, because someone cannot be convicted as a participating perpetrator if he does not have the same qualities. with the perpetrator. [24]Therefore, the actor participating must have the same *eigenschap* (regards, characteristics, qualities) as the perpetrator. This is based on the view that the participating perpetrator is the maker ( *dader* ) so that the participating perpetrator is also required to have all the qualities of a maker even though he does not meet the definition of the offense. In ordinary offenses, *eigenschap* can be realized in certain circumstances which show that the perpetrator can also carry out the offense as the perpetrator, while the division of roles that places him as a participating perpetrator is purely coincidental. Even though the perpetrator took part only in carrying out guarding, while the perpetrator took the goods which were included in the act of carrying out the elements of the offense under Article 362 of the Criminal Code, this division of roles was only a factual coincidence because the perpetrator took part in being able to take the role of taking the goods. In such circumstances, there is participation in committing the crime of theft. It is different when a friend who commits the act is unable to carry out the act of execution, then there is assistance in a criminal act. This picture shows that in order for the participating actor to be seen as having the same eigenschap *as* the perpetrator, the participating actor must be very close to the perpetrator's actions. This objective event is the measure of whether, in fact, the friend's actions can be seen as participating actors or only as mere helpers. To this extent, there is almost no difference between Simon's view, which requires the same eigenschap *as* the perpetrator, and the general opinion, which emphasizes close cooperation in realizing the offense. Because both of them are of the opinion that their participation in this hypothetical case was based on conscious close cooperation and the joint implementation of criminal acts.

However, the problem actually looks different when we talk about offenses that require qualitative elements. Because the participating perpetrator must have the same eigenschap *as* the perpetrator, then in embezzling his position the participating perpetrator must also have the same qualities as the perpetrator, so in embezzling his official position he is like the perpetrator. In other words , office crimes can only be committed by a few officials. A person who does not have a position cannot be a participant in the quality of the perpetrator because he does not have Article 374 of the Criminal Code [25], both the perpetrator and the perpetrator are the same as the perpetrator. In embezzlement of office, it is based on an official who has a work relationship or accepts based on his duties to control certain goods, even though the perpetrator participates does not fulfill all the formulas for the offense. Simon's opinion also contains objections related to the requirement for participating perpetrators to have the same qualitative elements as perpetrators of criminal acts. Similar to the opinion of van Hamel and Trapman, the requirement that there

[20]*Ibid.* matter. 110-111

[21] Utrecht, *op. cit,* p. 32-33; Lamintang, *Basics of Indonesian Criminal Law* , Bandung PT Citra Aditya Bhakti, 1997, p. 616-617.

[22] Lamintang *ibid,* p. 615

[23] Jonkers, *Dutch East Indies Criminal Law,* Jakarta. Bina Literacy, 1987, p. 176-180

[24] Simon as quoted in Utrecht, *Op. cit.,* p. 33-34

[25]Article 374 of the Criminal Code states "Embezzlement committed by a person whose control of goods is due to a work relationship or because of a search or because he received wages for it, is punishable by a maximum imprisonment of five years.

be a qualitative element in the perpetrator can also reduce the aim of the doctrine of participation so that criminal acts can be committed by people who do not fulfill the definition of an offense including the qualitative elements required by law.

In contrast to Simon, Noyon stated that participation requires the perpetrator to participate in fulfilling all the elements of the offense and although it does not have to have the same qualitative elements as the material perpetrator. [26]Noyon is of the opinion that the purpose of participation and participation is so that people involved in criminal acts can be considered as perpetrators of criminal acts even though those people do not have the same qualitative elements as the perpetrators of criminal acts. [27]Therefore, the most important issue in participation, according to Noyon, is how a friend who does not have the same qualities as the perpetrator can be considered a participant. Noyon further gave an example of participating in committing the criminal act of *overspel* based on Article 284 of the Criminal Code which places a party who does not have a qualitative element because he is not bound by marriage as a participating perpetrator.[28] Based on this, it can be said that taking part is "a separate and special form, namely that the person taking part does not have any of the qualities in himself that can make him a maker."[29] However, as in the mukah offense, the perpetrator must fulfill all the elements of the offense.

A different opinion was expressed by Langemeijer who stated that taking part does not require that the perpetrator has the same qualities as the perpetrator and is also not required to fulfill all the formulas for the offense. In fact, taking part in the crime is designed to catch people who do not fulfill the offense formula so that they can be considered as perpetrators of criminal acts. Langemeijer further [30]stated that it is possible that several perpetrators of criminal acts may have participated in the implementation of crimes that did not fulfill all the offense formulations. One of the perpetrators of the criminal act carries out an act of implementation according to the formulation of the offense, while the other author of the criminal act commits an act that plays a significant role in the occurrence of the criminal act even though the act is not an element of the offense. Thus, taking part in committing a crime in Langemeijer's view does not require *the eigenschap* of the perpetrator of a criminal act and every perpetrator of a criminal act is not required to fulfill all the formulas for the offense. It is sufficient if one of the creators carries out the implementation act which is supported by the perpetrator and participates with such close cooperation that the criminal act occurs.

The author himself agrees with the opinion that taking part does not require the perpetrators of criminal acts involved in an incident to fulfill all the offense formulations. This is important to underline because the aim of criminalization is, in a dualistic context, to expand the norms and rules contained in criminal acts, both the subject, the norms of the act which are the elements forming the criminal act or the unlawful nature inherent in the act, so that the construction Criminal acts are no longer formulated for a single perpetrator, but are expanded and can be committed by several people.

Based on this expansion, the implementation of some of the elements of the offense is considered sufficient as long as the implementation of some of the elements of the criminal act plays an important role in the realization of the criminal act. In other words, based on the expansion of criminal acts, handing over a pinch of grass as stated in the *HogeRaad decision* dated 29 October 1934, NJ 1934, 1673, W 12851 concerning burning warehouses *(wormerveers brandstichingsarrest)* , is not only seen as an ordinary act, but has become a complicit offense. depending on the burning.[31] Likewise, the act of pointing a gun in a murder case which was decided by the Supreme Court number 15 K/Kr/1970 dated 26 June 1971, [32]is an accomplice offense which depends on the murder of the victim. Thus, "... *complicity is not a crime in and of itself."*[33] Handing over a pinch of grass and brandishing a gun constitutes an offense of participating in a crime which refers to burning a warehouse and murder as the main crime.

Even though MvT states that participating in committing is taking part in a criminal incident, MVT does not explain further about the criteria that must be met in order to fulfill "participating in committing". In fact, it was *Hoge Raad* dated 29 October 1934, NJ 1934, 1673, W 12851 concerning the burning of warehouses *(wormerveers brandstichings arrest)* which completed this lack of explanation by establishing two important criteria for participation, namely conscious cooperation *(bewuste samenwerking)* and the commission of a criminal act. together *(gezamenlijke uitvoering).* [34]According to Jan Remmelink, conscious cooperation requires two intentional acts to be proven, namely deliberate intent to produce the consequences of the offense and deliberate intent to carry out the collaboration. In terms of conscious cooperation, according to Jan Remmelink, there is no need for a plan or agreement between the perpetrators of the crime, but it is sufficient to have mutual understanding to realize the offense in the form of cooperation to achieve certain goals.[35]

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[26] Noyon as quoted in Utrecht, Op. cit., p. 34-36.

[27]*Ibid*

[28]*Ibid,*

[29]*Ibid* , p . 34.

[30]Langmeijer as quoted in Andi Zaenal Abidin Farid and Andi Hamzah, *Special Forms of Manifestation of Offenses (Attempt, Participation and Combination of Criminal Acts) and Penalty Law,* Jakarta, Sumber Ilmu Jaya, 2002, p. 190.

[31]*Ibid* ., p. 191.

[32] In the murder case under Article 339 of the Criminal Code, the Supreme Court decided that a person who kills by hitting a piece of iron is the perpetrator, while the person who pointed a gun is a perpetrator who participated in the murder under Article 339 of the Criminal Code.

[33]George P. Fletcher, *Basic Concepts of Criminal Law.* New York: Oxford University Press, 1998, p. 194.

[34] Utrecht, *Op. cit* ., p. 37.

[35]Jan Remmelink, *Criminal Law: Comments on the Most Important Articles of the Dutch Criminal Code and Their Equivalents in the Indonesian Criminal Code* , Jakarta. PT Gramedia Pustaka Utama, 2003, p. 314. See Surastini Fitriasih, *Application of the Doctrine of Inclusion in Indonesian Criminal Justice* ... Op. cit., p. 115-116. According to Surastini Fitriasih, before the Hoge Raad decision in 1934, there was a tendency for the Hoge Raad to apply these two criteria in the

If we look at the concept of the Criminal Code which views inclusion as an extension of criminal liability, then the explanation of "conscious cooperation" as an intentional intention to cooperate does not encounter any conceptual obstacles. Deliberate cooperation is the basis for each person being accountable for other people. A perpetrator of a criminal act is responsible for the actions committed by other people and the consequences arising from those actions.[36] Thus, cooperation in participating in committing a crime is placed within the scope of the inner attitude of the perpetrator of the crime, therefore cooperation is only considered important when it is based on knowledge about the purpose of the cooperation and with whom the cooperation is carried out.

In contrast, the conception of the 2023 Criminal Code which adheres to the separation of criminal acts and criminal responsibility views this issue from a different perspective. As an extension of criminal acts, taking part in committing them is a manifestation of an offense which is only related to actions that were objectively carried out. As a consequence, the intention that is part of criminal responsibility cannot be constructed as a single unit with the (delict) involved. Therefore, the most possible construction is to place intent or intent within the scope of criminal acts as subjectively unlawful.[37] The aim or intention is directed at the unlawful nature of the act. In the context of participation, the intention or purpose is aimed at collaborating to commit a criminal act.

Thus, intentionality has a position that is independent of (the offense of) taking part. This is based on the distinction between legal events that are categorized as participation and intent which is the basis for the perpetrator being punished for participating. On the one hand, legal events that constitute participation refer to objective facts in the form of such close cooperation and the underlying intentions. At this stage, the determination of participation is based only on acts of cooperation which are separated from the subjective elements of criminal liability. On the other hand , intentionality does not affect the presence of participation. Deliberation serves as a measure in imposing criminal penalties on participating perpetrators; whether a person is deemed to want to cooperate in committing a criminal act and therefore can be punished as a participant.

Based on this conception, it is possible that in participating (as an offence), a person will not be punished because the person cannot be held responsible either because they are unable to take responsibility, there is no intention or mistake *(afwezigheid van alle schuld)* or because there is a reason for forgiveness.[38] In the event that the perpetrator who participated cannot be held accountable, then this will not reduce the offense of participation and does not prevent the perpetrator of the criminal act from being punished alone. Likewise, if in participating in committing a crime, a person who commits a criminal act cannot be held accountable either due to inability to take responsibility, lack of error due to a mistake about the facts, for example, or forgiving reasons, then this does not reduce the occurrence of the offense of participating in committing it and does not prevent the person from being punished. the perpetrator participated alone.

In this context, Roeslan Saleh's opinion can be understood to mean that in principle taking part is only related to criminal acts and actions. Roeslan Saleh said more firmly that:

> "The notion of participating in the act also results in the conclusion regarding the author that he did not do it alone. There must be another person who also carried out the act. Nor should the other person be prosecuted. There may be several participants, but only one person is charged. It must be proven that those who are charged with taking part in doing so occurred with one or more people. Nor does anyone have to know who it is. Those who took part in it therefore do not need to be those who took part as suspects."[39]

The occurrence of substantive participation does not have to be followed by a procedural process in determining the people involved in participating as suspects, defendants or even convicts, although it must be proven that participation occurred. Thus, the main issue in participating is the existence of certain legal events and the extent of involvement of certain people in these events. A person is only responsible for his or her own involvement in the event.

The deliberate act of participating serves as a measure of criminal punishment against the perpetrator who participated.[40] Therefore, intentional cooperation in participating must be distinguished from the offense of participation, because intentionality is related to the issue of criminal liability, whereas participation is related to the issue of a criminal offense. This gives rise to the consequence that procedurally the imposition of a crime against the perpetrator who participated in the crime does not have to wait for the imposition of a crime against the perpetrator of the criminal act first. In other words, criminal impositions on participating perpetrators can be carried out before the perpetrators of criminal acts as long as it is proven based on the inquiry and investigation process that participation occurred involving several people, although this does not have to be followed by the determination of the person involved in participating as a suspect. .

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teachings of participating in the arrest of 9 February 1914, NJ 1914, 648, W 9620 and the arrest of 9 June 1925, NJ 1925, 785 , W 11437. See Surastini Fitriasih, *Application of the Doctrine of Inclusion in Indonesian Criminal Justice* ... Op. cit., p. 115-116.

[36]*Ibid* ., p. 115.

[37]Moeljatno, *Criminal Law: Attempted Offenses and Complicit Offenses ... Op. cit* . ,matter . 116-117; Andi Zaenal Abidin Farid and Andi Hamzah, *Op. cit.*, p. 202.

[38] The excuse for forgiveness is a general condition that removes the guilt of the perpetrator of the crime. The dualistic theory is supported by forgiving reasons based on the teachings of unzumutbarkeit. See Moeljatno, *Criminal Acts and Accountability in Criminal Law*, Jakarta, Bina Aksara, 1983, p. 30-31; Albin Eser, Justification and Excuses, 24 The American Journal of Comparative Law 636-638 (1976).

[39]Roeslan Saleh, *Regarding Participation Offenses* , Pekanbaru. Riau University, 1989, p. 31.

[40] See Barbara Wootton's opinion which states that mens rea functions as a measure in imposing a crime. Barbara Wootton, *Crime and Criminal Law: Reflections of a Magistrate and Social Scientist* , London. Steven & Sons, 1981, 2d edition, p. 47-48.

Meanwhile, the second condition for participating in the implementation as stipulated in the *Hoge Raad decision* dated 29 October 1934, NJ 1934, 1673, W 12851 is joint implementation *(gezamenlijke uitvoering).*[41] It is said that participation occurs when a criminal act is committed jointly based on the division of roles between the perpetrator of the crime and the participating perpetrator. The main issue in this second requirement is determining to what extent an act can meet the criteria for joint implementation. Therefore, often the determination of joint performance in participation refers to the use of "acts of implementation" in the trial.[42] This gives rise to its own problems. If it is based on a subjective theory which views the "beginning of implementation" based on the intention or intention of the perpetrator of the criminal act, [43]then "joint implementation" depends on the intention of the perpetrator of the criminal act to commit the criminal act together. "Joint implementation" is deemed to exist when there is a subjective intention to carry out an action. From this point of view, joint implementation is no different from the subjective unlawfulness that underlies the inner attitude of criminals who are directed towards cooperation to commit criminal acts.[44]

This stage does not fulfill the requirements of "joint implementation" which tends to be interpreted as the actual and factual implementation of a criminal act together. The use of the subjective theory of "act of implementation" to determine the criteria for "joint implementation" has the potential to obscure the distinctive character of participation and blur the boundaries of other forms of participation, because joint implementation is reduced to the form of intention or purpose. Different from other forms of participation, participation requires the implementation of a criminal act together based on the division of roles of each perpetrator of the criminal act. Other forms of participation hand over the implementation of the criminal act to the perpetrator (material) of the criminal act. The proponent and perpetrator of the action only have the initiative and then hand over the implementation of the criminal act to someone else.[45] If the character of these forms of participation is linked to a subjective theory in determining the act of implementation, then joint implementation is reduced to the form of intention without the need to translate it into action. Intention, intent, and initiative are classified as inner attitudes. [46]Consequently, the criterion of "joint implementation" is equated with an inner attitude. In such circumstances, taking part is no different from being told to do it and advocating which positions the perpetrator of the order to do it and the proponent as taking the initiative, while the criminal act is carried out by the perpetrator of the criminal act.

From an objective theory perspective, "joint implementation" depends on how close the action is to the goal. It is said that there is "joint execution" when the act carried out is very close to the crime in question. Based on this perspective, "joint implementation" must be realized in the form of actions that are objectively very close to criminal acts. Legal practice confirms this in the *Hoge Raad decision* dated March 29 1920, NJ 1920 which states that the implementation of violence in theft is qualified under Article 365 paragraph (1) of the Criminal Code,[47] seen as committing a crime. In this decision, the actions of one of the perpetrators of the criminal act who committed violence were considered to have committed an offense based on Article 365 paragraph (1) of the Criminal Code, even though the perpetrator of the criminal act did not take the item and therefore the perpetrator of the criminal act was qualified as a perpetrator who participated in committing qualified theft. based on Article 365 paragraph (1) of the Criminal Code jo . Article 55 paragraph (1) 1st of the Criminal Code. Based on this perspective, "joint implementation" in participation refers to the implementation of some elements of a criminal act or at least actions that contribute to the realization of the offense.[48]

This view is also followed in Indonesian criminal law. This can be concluded from the Supreme Court decision dated 26 June 1971 Number 15 K/Kr/1970.[49] In its decision, the Supreme Court considered that the perpetrator of the crime was defendant I who hit the victim with an iron bar which resulted in the victim's death, while the perpetrator was defendant II who pointed a gun at the victim. In its consideration, the Supreme Court stated that:

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[41] Remmelink, *Loc. cit* .

[42]Utrecht, Op. Cit., p. 38-39.

[43]For a discourse on subjective theory and subjective theory in trials, see RA Duff, Criminal Attempt, Oxford: Clarendon Press, 1996, p. 145 etc

[44]See Andi Zaenal Abidin Farid & Andi Hamzah, *Ibid* ., p. 202. Both professors of criminal law view the inner attitude that underlies cooperation and the commission of offenses as subjectively unlawful.

[45]Roeslan Saleh, Regarding Participation Offenses, Op. cit., p. 19. Organizers and messengers are usually behind the scenes and provide the initiative for other people to carry out.

[46]Roeslan Saleh, *Criminal Acts and Criminal Responsibility: Two Basic Understandings in Criminal Law,* Jakarta. New Aksara Publishers, 1983, p. 115. According to Roeslan Saleh, if intention is defined as knowledge of the relationship between the defendant's thoughts and actions, then intention as an intention should be excluded from the pattern of intent. Intention is the nature of subjective unlawfulness.

[47]Article 365 paragraph (1) of the Criminal Code states that "Perishable with a maximum imprisonment of nine years for theft which is preceded, accompanied or followed by violence or threats of violence, against a person with the intention of preparing or facilitating theft, or in the case of being caught red-handed, to enable escape yourself or another participant, or to retain control of the stolen property."

[48] Look again at the warehouse burning case in the Hoge Raad decision of October 29, 1934, NJ 1934, 1673, W 12851.

[49] This decision relates to a murder case based on Article 339 of the Criminal Code. It is stated in Article 339 of the Criminal Code that "Murder is followed, accompanied or preceded by a criminal act, which is carried out with the intention of preparing or facilitating its implementation, or to free oneself or other participants from the crime in the event of being caught red-handed, or to ensure control of property obtained unlawfully, is punishable by imprisonment for life or for a certain period, a maximum of twenty years."

"Defendant II's actions in threatening with a gun did not fulfill all the elements in Article 339 of the Criminal Code, defendant I was the one who hit the victim with an iron bar which resulted in the victim's death. Therefore for defendant II the appropriate qualification is "participating in committing" a criminal act (medeplegen ), while the material maker is defendant I.[50]

In both jurisprudence in the Netherlands and Indonesia, it appears that the practical trend is towards physical acts (handing over grass and holding things) as a condition for fulfilling "joint execution" which is manifested in acts that are elements of an offense or acts outside the elements of a crime that play an important role in the realization of a criminal act. In the context of "acts of implementation" in attempted offenses, "joint implementation" in participation is interpreted based on objective theory which requires that there be actions based on close and complete cooperation between the perpetrators of the criminal act. In *a contrario* , joint execution which is based on the mental attitude or intention of the perpetrator of the criminal act is not sufficient to fulfill the requirement of "carrying out the act."

In the author's opinion, to get the essence of participation, it needs to be combined to determine participation. The use of subjective theory aims to prevent people who have no intention of committing the offense from participating. However, intention alone is not enough. It requires the manifestation of intentions in the form of actions which play an important role in the realization of the offense. Thus, participation requires such close cooperation that is based on the intention to carry out a criminal act.

The change from a monistic conception (KUHP) to a dualistic one (KUHP 2023) has not affected the conceptual changes to some of the principles stated in the new Criminal Code. This can be seen in the provisions for participation and inclusion in the new Criminal Code which still emphasizes expanding criminal liability because it simply takes over the formulation in the Criminal Code. In fact, this conceptual change must pay attention to the differentiation between the offense of participating and the punishment for the perpetrator.

On the one hand, participation is a form of participation that expands the norms and rules contained in the offense, so that the problem lies in the position of participation as an offense that is subject to the principle of legality. On the other hand , the punishment for participating perpetrators refers to certain circumstances which become the basis for people being denounced as participating perpetrators and therefore can be punished (KUHP). Based on the perspective of the Criminal Code, the problem of participation lies in certain circumstances which expand the responsibility of other people as participating perpetrators. This differentiation between the conception of the Criminal Code and the 2023 Criminal Code is important to identify the conception of acts which is the basis for expanding the doctrine of participation. The development of participation based on the concept of action is only possible when participation is based on the separation of criminal acts and criminal liability which views participation as a form of participation that expands the offense.

In line with the basic principles of the Criminal Code which views guilt [51]and criminal responsibility[52] as a subjective element of a criminal act, participation is seen as a form of participation that expands the person's punishment. Based on this perspective, the perpetrator taking part cannot be said to have committed a criminal act because his actions do not fulfill all the elements of a crime, however, the perpetrator took part and the participant remains accountable because it enabled the criminal act to occur. Utrecht describes the ratio of the doctrine of inclusion (and participation) in Article 55 of the Criminal Code which focuses on expanding criminal liability, as follows:

"This general lesson of participation (participation) is actually created to punish those who did not do it - were not the creators.... This general lesson of participation is actually created to hold accountable those who enable the creators to carry out criminal events, even though their actions themselves do not contain all the elements of the criminal event. Even though they were not the creators, that is, their actions did not contain all the elements of the criminal event - they are still (partly) responsible or can be held accountable for the commission of the criminal event... " .[53]

It is recognized in the monistic view that a criminal act can only be committed by fulfilling all the elements of a crime, so that the basis for punishing other people is based on expanding the perpetrator's responsibility for the criminal act committed by the perpetrator. The expansion of responsibility in the doctrine of participation and inclusion can also be seen from the formulation of the Criminal Code which emphasizes "the punishment of perpetrators of criminal acts" [54]. *(geen straf zonder schuld).*

The existence of participation is determined by the presence of intentional cooperation and criminal acts. This intention is also the basis for convicting the person as a participant. Without intention, there is no participation and a person cannot be punished as a perpetrator of participation.

Thus, the conception of the Criminal Code views participation as a form of expansion of criminal responsibility which is realized in the division of responsibility *(shared responsibility)* so that, as expressed by Sanford Kadish, *"an attempt to account for the doctrine of complicity must begin with the concept of blame. " Often this concept is referred to as* [55]*derivative* liability which places the responsibility of the participating perpetrators and participants on the responsibility of the perpetrators of criminal acts, *"...without a principle who is criminally liable there can be no accomplice, for there is no criminal liability in which*

[50] Lamintang, Op. cit., p. 622.

[51]Komariah Emong Sapardjaja, *The Teaching of the Unlawful Nature of Materials in Indonesian Criminal Law: Case Study of its Application and Development in Jurisprudence* , Bandung. Alumni Publishers, 2002, p. 22.

[52]Indriyanto Seno Adji, *Corruption and Criminal Law*, Jakarta Office of Lawyers and Legal Consultants Oemar Seno Adji & Partners, 2001, p. 155.

[53]*Ibid*

[54] Utrecht, Op. cit., p. 9.

[55]Sanford Kadish, *A Theory of Complicity, in Ruth Gavison, Issues in Contemporary Legal Philosophy: The Influence of HLA Hart* , Oxford: Clarendon Press, 1987, p. 288.

*he can share. "*[56] Without criminal responsibility from the perpetrator, it is not possible to share or expand criminal responsibility. If the perpetrator of a criminal act cannot be held accountable either because of inability to take responsibility, there is no mistake or there is a reason for forgiveness, then the perpetrator or participant cannot be held accountable and therefore participation is deemed not to have occurred.

However, the monistic view provides exceptions that allow the perpetrator to be held accountable alone. This can happen if the perpetrator of a criminal act is unable to take responsibility under Article 44 of the Criminal Code. The inability to take responsibility is seen as a personal condition *(personlijke)* which is only directed at the perpetrator and does not eliminate the responsibility of the participating perpetrator. Based on this view, eliminating the responsibility of perpetrators does not prevent inclusion.[57]

If participation is linked to the conception of criminal responsibility as a mechanism for judges to determine certain circumstances that form the basis for the perpetrators of criminal acts being held accountable, [58]then the doctrine of participation is interpreted as a form of this mechanism. As an expansion of criminal responsibility, the doctrine of participation places greater emphasis on the subjective aspect of the perpetrator of a criminal act as a basis for determining whether the perpetrator of a criminal act can be held accountable and punished as a co-perpetrator. In this framework, actions are not the most important issue in participating because the relevance of actions in participating is determined by the underlying inner attitude. Moreover, the formulation of Article 55 paragraph (2) 1 of the Criminal Code does not explain objective acts that are classified as participation, so it can be concluded that the meaning, form and limits of participation are left to the judge's interpretation to formulate them. The expansion of criminal liability also allows judges to play an important role in interpreting and developing the doctrine of participation. In this context, the main problem does not lie in objectively determining which actions constitute a participating offense, but rather in determining whether a person can be blamed and punished as a participating perpetrator. Thus, the doctrine of participation is a matter of interpretation for judges in the framework of formulating the responsibility of participating perpetrators.

However, procedurally, the formulation of Article 55 of the Criminal Code has the potential to reduce the protection of the rights of suspects and defendants. Because participation and participation are extensions of criminal liability, determining the form of participation in the indictment is not a matter of principle, although the judge is still obliged in his considerations to state the fault of the perpetrator of the criminal act regarding one form of participation. This tendency can be seen in several public prosecutor's indictments which do not include one of the several forms of participation formulated in Article 55 of the Criminal Code because the form of participation is only determined after the evidentiary process.[59]

In line with that, Andrew Ashworth provided his views on the formulation of *the Accessories and Abusers Act 1861 "... shall aid, abet, counsel or procure the commission of any indictable offense... shall be liable to be tried, indicated and punished as a principle offender "*, stated that in practical terms, the prosecution letter does not have to state whether the perpetrator of the criminal act committed incitement *(abet),* provided advice *(counsel),* provided facilities *(procure)* or provided assistance *(aid),* [60]because the issue lies in the basis on which he was tried, prosecuted and sentenced a person involved in a criminal act as the perpetrator of the criminal act *(principal).* Even though the above opinion is related to *the Accessories and Bettors Act 1861* , this opinion is relevant to apply to Article 55 of the Criminal Code for several reasons. ***First* , the** *common law* conception has similarities with the monistic conception which combines objective elements *(actus reus )* and subjective elements *(mens rea)* in the definition of criminal acts. Based on this conception, the doctrine of complicity *is* also an issue of criminal liability because the existence of the doctrine of inclusion does not affect the existence and position of the act.

According to this view, a criminal act requires the fulfillment of all the elements of a crime, so that other people's actions which are related to a criminal act but do not fulfill the definition of a crime cannot be considered as perpetrators of a criminal act. Therefore, the most possible construction based on *a common law* and monistic perspective is to expand the scope of people who can be punished (criminal responsibility). The two teachings above do not discuss matters that are objectively related to the act of participation but rather emphasize certain circumstances which are the basis for expanding the responsibility of people who are related to criminal acts but do not fulfill the entire formula of the offense. The procedural consequence is that the indictment or prosecution only describes the basics of responsibility of the people involved in a criminal act, because the description of the act alone is considered not to touch the doctrine of inclusion under Article 55 of the Criminal Code.

***Second*** , the formulation of Article 55 of the Criminal Code focuses its attention on "convicting people as perpetrators of criminal acts" and does not explain in depth the actions that are objectively included in forms of participation. Likewise, the provisions of *the Accessories and Abettors Act 1861* emphasize the basis on which people can be charged and sentenced in

[56]Sanford Kadish Ibid., p. 293.

[57] Compare this with the dualistic view which generally allows one of the perpetrators of a criminal act to be irresponsible because the requirements for criminal responsibility are not fulfilled, namely not being able to take responsibility, there is no fault and there is a reason for forgiveness. On the other hand, monists view that the irresponsibility of one of the makers is based solely on personal reasons, namely the inability to take responsibility. For the monist, this situation is an exception.

[58]Surastini Fitriasih, *Application of the Doctrine of Inclusion in Indonesian Criminal Justice (Case Study of Corruption Crimes, Serious Human Rights Violations and Terrorism),* Dissertation dated 9 August 2006, p. 78-82. According to Surastini Fitriasih, people who do not directly commit criminal acts, such as giving orders or working behind a desk, can be considered as participating perpetrators if they are deemed to be responsible for the occurrence of a criminal act.

[59]See the indictment contained in decision no. 2068/Pid.B/2005/PN.Jak.Sel jo. Supreme Court Decision No.1144 K/Pid/2006 (ECW Neloe).

[60]Andrew Ashworth, *Principles of Criminal Law* , Oxford. Clarendon Press, 1991, p. 364-365.

connection with criminal acts as perpetrators of criminal acts *(principal)*, because acts of assistance, instigation, provision of facilities and advice are not clearly formulated in these provisions. Based on this, the form of participation in Article 55 paragraph (1) of the Criminal Code is included in the responsibility and punishment of people as perpetrators of criminal acts. The formulation of Article 55 of the Criminal Code does not specifically regulate material acts from the forms of participation so that the indictment is not obliged to include a description of the facts about the act because, once again, the important issue lies in the responsibility and punishment of the person as the perpetrator of a criminal act.

With this conception, the protection of the defendant's rights has the potential to be reduced because the indictment is not obliged to determine the form of participation alleged and does not describe the material actions of the forms of participation. The lack of protection for defendants is very likely to occur because the Criminal Code does not regulate material acts from forms of inclusion rigidly *based* on *lex certa, lex scripta* and *lex stricta.*

On the other hand, in the expanded conception of criminal acts, the indictment is required to describe the material acts that constitute the criminal act and determine the quality of the perpetrator. Similar to offenses in general, the indictment must describe the actions and determine the offense charged. This is related to the organizational dimension of the principle of legality, "... the principle of legality is linked to criminal justice, expecting more than just protecting citizens from government arbitrariness". [61]In this framework, the description of the act and the determination of one form of offense Inclusion in the indictment aims to provide protection for suspects and defendants from the arbitrariness of the authorities. The fundamental change from monistic (KUHP) to dualistic (new Criminal Code) raises fundamental questions regarding the takeover of the formulation of participation and the inclusion of the Criminal Code in the new Criminal Code The formulation of the inclusion of the Criminal Code into the new Criminal Code is incorrect because it does not take into account conceptual changes that are very contradictory to each other .

In contrast to the monistic view which combines objective elements and subjective elements in criminal acts, the dualistic theory actually separates criminal acts which only contain actions, are unlawful in nature and have no justification, from criminal responsibility. This conceptual change not only affects views about criminal acts and criminal responsibility, but also affects the position of participation and inclusion. The great influence of the two teachings, monistic and dualistic, has given rise to different perspectives in viewing criminal law, especially those related to criminal acts, criminal responsibility and punishment. Because the new Criminal Code adheres to the theory of separation of criminal acts and criminal responsibility, participation is seen as a form of participation that "expands the norms concluded in the formulation of the law..." [62]Participants are seen as creators of criminal acts when they violate the expanded norms. That. With this expansion, not only actions that are formulated as elements of the offense are prohibited, but the prohibition is also directed at actions outside the formulation of the offense that play an important role in the realization of the offense. In the context of participation, handing over a pinch of grass is not a form of offense that is prohibited by law until handing over a pinch of grass is associated with burning a warehouse.[63]

Handing over a pinch of grass is a prohibited act because it is closely related to the burning of warehouses. In other cases , pointing a weapon alone is not a prohibited act because under no circumstances can pointing a weapon cause the death of a person. However, mugging becomes a prohibited act when it is associated with beatings that cause the person's death.[64] The connection between acts outside the definition of an offense with burning a warehouse and murder justifies the prohibition of the act of handing over a pinch of grass and mugging because both of them play a major role in realizing the offense of arson and murder, as stated by Roeslan Saleh that "the unlawful nature of their actions only arises if their actions are connected with other participants."[65] The unlawful nature of participating has meaning in criminal law when it is connected to the subject of the offense, regardless of whether the subject of the offense can or cannot be held responsible.[66] Thus, the expanded norm becomes a separate offense that depends on the main criminal act, so that based on the relationship between criminal acts (murder) and participation (mugging), both must be seen as prohibited acts.

This conception places participation within the scope of criminal acts which are subject to the principle of legality. The main problem with participation and inclusion does not lie in "people being able to be convicted as perpetrators of criminal acts", but rather in "participation being prohibited". Consequently, the formulation of participation must specify certain criteria and circumstances that are the basis for a particular act to be called an offense of participation. The formulation of participation is not enough to simply emphasize "being convicted as the perpetrator of a criminal act: the person who participated in committing it" as in the new Criminal Code, because it focuses more on the person being punished as a participant in the crime. The new Criminal Code also does not formulate participation as an offense so that it is in line with the function of criminal acts as a behavioral guide for society by emphasizing simplicity and clear formulation. The formulation of the new Criminal Code which emphasizes criminal responsibility shows that the new Criminal Code has not consistently implemented the separation of criminal acts and criminal responsibility. This is different from the regulations regarding attempted offenses, the theory *of locus* and *tempus delictie* and the nature of unlawfulness which is included in the scope of criminal acts which are clearly formulated in the new Criminal Code. The concept of participating as an extension of the offense gives rise to procedural consequences. On the one hand, the

[61]Roeslan Saleh, *Several Principles of Criminal Law in Perspective*, Jakarta. New Literacy, 1981, p. 35.

[62]Roeslan Saleh, *Criminal Acts and Criminal Responsibility: Two Basic Understandings in Criminal Law*, Jakarta Aksara Baru, 1983, p. 155.

[63] See Hoge Raad of 29 October 1934, NJ 1934, 1673, W 12851.

[64] See Supreme Court decision Number 15 K/Kr/1970 dated 26 June 1971.

[65]Roeslan Saleh, *Criminal Acts and Criminal Liability* , Op. cit., p. 156.

[66] The dualistic theory distinguishes between the subject of the offense which is included in the criminal act ( *normaddress saat* ), and the person who is responsible. This last thing is included in criminal liability. See Moeljatno, Criminal Acts...Op. cit., p. 11.

dualistic conception allows the perpetrator to be punished and does not have to wait for the criminal to be sentenced. On the other hand, the dualistic conception which places participation as an offense requires the indictment to describe the material facts and actions that constitute the offense of participation. In the case of criminalization of participating perpetrators, this procedural effect is based on the dependent nature of participation which is only limited to the scope of the criminal act; that participation becomes an offense as long as it is related to the main offense. Dependence on the offense of participation is not related to the intention of the perpetrator of the criminal act and the perpetrator of the crime, because the intention of both is independent and is only directed at the act committed by the perpetrator of the crime, so that according to the dualistic theory, it is not possible to share criminal responsibility *(shared criminal responsibility)* .

On the other hand, dependency is only limited to the criminal act stage, because without the main criminal act it is impossible for an offense to occur. Criminal acts and offenses are part of a unity. Because the sequential dependence is limited to the criminal act, the determination of the offense of participation does not necessarily require the perpetrators of the criminal act to jointly become suspects or defendants. Within the framework of an investigation, the determination of a complicit offense is related to determining based on evidence whether a particular event is classified as an accomplice offense as regulated by law. Within the framework of an investigation, determining a suspect is related to determining a certain person as the intended subject of the offense (participating perpetrator) based on the person's relationship with the incident that occurred. Dependence in a criminal act does not continue to depend on criminal responsibility and punishment, so that the perpetrator being convicted does not have to wait for the perpetrator of the criminal act to be sentenced as long as it can be proven at the inquiry and inquiry stage that a participant offense occurred involving several perpetrators of the criminal act.

However, the author feels it necessary to note that the theoretical justification for the punishment of participating perpetrators which can take precedence over the punishment of criminal perpetrators is only related to the argument that the punishment of criminal perpetrators and participating perpetrators sequentially is not absolute, so that the punishment of participating perpetrators can take precedence. Both perpetrators of criminal acts who have committed criminal acts and participating offenses still have the same obligation to be held accountable and punished. Another implication is the necessity for the indictment to describe the material facts and actions in the indictment. This is a theoretical consequence of the dualistic view which views participation as an offense, so that a description of the facts and actions that constitute the offense of participation must be explained in the indictment. However, the elaboration of the indictment regarding the offense of participation must be preceded by the formulation of a clear law regarding the offense of participation so that it can serve as a reference for the public prosecutor in explaining the offense of participation in the indictment.

However, in reality the formulation of the doctrine of participation and inclusion in the new Criminal Code does not represent a dualistic view. The indictment describes the facts and actions as a requirement for criminal responsibility, not as a complicit offense. This description is based on the Public Prosecutor's interpretation which refers to criminal law doctrine. This is very different if viewed from a dualistic perspective which views the offense of participation as a form that expands criminal acts so that participation should be formulated as "anyone who participates in committing a criminal act is threatened with the same punishment as the person who commits the criminal act." Without changes to the formulation of the doctrine of participation and inclusion in the new Criminal Code, substantively and procedurally participation and inclusion in the new Criminal Code does not refer to the separation of criminal acts and criminal liability. Based on the explanation above, participation is no longer seen as an expansion of criminal liability as currently adopted, but is placed within the scope of an expansion of criminal acts. A person is considered to have committed a criminal act when he or she violates these extended norms and rules, respectively at the time and place when they do or do not do something.[67]

## 4. CONCLUSION

The essence of the doctrine of participation or involvement in criminal acts is to expand the perpetrators of criminal acts, which means that anyone can be held criminally responsible based on the qualifications of the act carried out so that a criminal act is realized, because in a criminal act where more than one person is the perpetrator then must be seen based on the quality of each perpetrator's actions, including their role in the actions that led to a criminal act. The perpetrator who acts as the main perpetrator (the person who orders it to be committed), the person who commits, helps commits and participates in committing a criminal act so that this (role) becomes the basis for imposing a crime against them, (the main perpetrator and participating perpetrators) in the crime criminal corruption, so that the essence of participation in criminal acts is to expand the perpetrators of criminal acts, including criminal acts of corruption.

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[67]Andi Zaenal Abidin and Andi Hamzah, *Special Forms of Manifestation of Offenses (Attempt, Participation and Combination of Criminal Acts) and Penalty Law*, Jakarta. Sumber Ilmu Jaya, 2002, p. 146

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