

CHAPTER II

LITERATURE REVIEW

A. OVERVIEW OF *DEELNEMING*

1. *Deelneming* Terminology

Translation of the term "*deelneming*" according to scholars' views shows that there is no conformity in using *deelneming* terminology. Satochid Kertanegara for example, uses the term *deelneming* as "*participating*", Schravendijk as "*complicity*", Tresna: "*involving*", Karni: "*taking part*", Utrecht "*participate*", Wirjono Prodjodikoro: "*participant*", while Moeljatno: "*complicity*". The absence of similar view to the use of the term "*deelneming*" is a consequence of the absence of official translation by the maker of Indonesian Penal Code. Similarly, Indonesian Penal Code does not formulate a definition of "*deelneming* or *complicity*".¹¹

In this *deelneming* studies, it is determined about the conditions set forth in the Indonesian Penal Code, which must be fulfilled so that the accomplice of the criminal or the participants of the criminal can be imprisoned. If in a criminal case, few people are considered to be involved, the responsibility of each criminal participant will not be the same, but will vary, depending on the relation of the criminal case. For example, there is a criminal act committed by several people together, so that the relationship between them and the events are the same, but there

¹¹ Rasyid Ariman, Fahmi Raghil, 2015, *Hukum Pidana*, Malang, Setara Press, page. 118.

are also cases where a person committed a crime, while others only help, or there is someone who plan to commit a criminal act simply by asking someone else to do it, or etc. Thus it is understandable that every relationship in criminal act is not always the same. Therefore, the criminal liability of each participant of criminal act is not always the same in determining the liability of each person who is a participant in a criminal act committed. In other words, the rules on *deelneming* will only be used if there is more than one person who committing the crime.¹²

In doctrine, *deelneming* can be divided into two groups, namely:¹³

- a. Stand independently (*zelfstandige deelneming*) in which each participant was asked to be responsible for their own action
- b. Those who does not stand independently (*onzelfstandig deelneming or accessoire deelneming*), where the responsibility of the participants are depend on the other participants.

In the past, the *deelneming* studies was not so important, because criminal law at the time did not question who should be convicted, what is important for the society is the "compensation" or "punishment" itself. Roman penal law was the first to pay attention. It can be seen from the term "*minister*" besides "*actor*", each of which can be imprisoned.¹⁴

¹² *Ibid*

¹³ *Ibid*, page. 119

¹⁴ *Ibid*

Furthermore, *deelneming* studies originally an idea of Von Veurbach. He divides the "participants" in two parts:¹⁵

- a. Those who immediately tried to commit crime which is referred as "*Auctores*" or "*Urheber*".
- b. Those who only help the act of crime mentioned in point (1) above and referred as "*Gehilfe*".

2. Definition of *Deelneming*

Incident or criminal act, or better known a criminal offence in certain things can be done by everyone and at the same time or other times can also be done by several people simultaneously. In other words, a criminal action can be done by several persons involved in the commission of that act of crime. Some people who commit this criminal act, commonly known as complicity or *deelneming*.¹⁶

Deelneming is an important issue in criminal law, particularly regarding to the severity of the criminal liability of each person against a criminal act. The position of each person involved in a criminal offense is not always the same, so that the severity of criminal liability is not the same either. In *deelneming* case, maybe there is only one or more persons who shall be burdened full criminal liability, while other people are only partially burdened by the criminal liability.¹⁷

¹⁵ *Ibid*

¹⁶ Rasyid Ariman, Fahmi Raghil, 2015, *Op.Cit.*, page. 117.

¹⁷ Roni Wiyanto, 2012, *Asas-asas Hukum Pidana Indonesia*, Bandung, Mandar Maju, page. 248.

This *deelneming* issue is essentially to determine the criminal liability of each person against a criminal act, so it must be able to prove the relationship of each person involved in the criminal act in, as follows:¹⁸

- a. Some people jointly commit a criminal offence;
- b. Perhaps only one man who has the will and plan the criminal offence, but the action is not done alone, yet he uses other people to carry out such crime;
- c. It can also occur when there is only one person who committed the crime, while the others assist the person in carrying out the crime.

Deelneming by its nature, the science of criminal law or doctrine distinguishes kinds of *deelneming* which are divided into two groups, as follows:¹⁹

- a. *Deelneming* which stand independently, namely the responsibility of each participant valued separately;
- b. *Deelneming* that does not stand independently (*acceeoire deelneming*), namely the liability of participants those are hung on the actions of other participants. It means, if other participants performed a deed that punishable, the other participants can also be punished.

¹⁸ *Ibid*

¹⁹ *Ibid*, page. 249.

To get an idea of what is meant by *deelneming* and its relationship to the Indonesian Penal Code today, it is necessary to look at the provisions set out in Section 55 and 56 of the Indonesian Penal Code as follows:²⁰

a. Section 55 of the Indonesian Penal Code state:

1) Sentenced as the offender of criminal offence:

- a) Those who perpetrate, cause others to perpetrate, or take a direct part in the execution of the act.
- b) Those who intentionally provoke the execution of the act by gifts, promises, abuse of power or of respect, force, threat or deception or by providing an opportunity, means or information.

2) In respect to the provoker only those acts which have been deliberately provoked and their consequences shall be considered.

b. Section 56 of the Indonesian Penal Code state:

1) As an accomplices to a crime shall be punished:

- a) Those who intentionally gave assistance at the time the crime was committed;
- b) Those who intentionally provide the opportunity, means or information to commit a crime.

Under the provisions outlined in Section 55 and Section 56 of the Indonesian Penal Code, what is called criminal liability in Section 56 of

²⁰ *Ibid*

the Indonesian Penal Code, what is known as the person who is liable for the act of crime is detailed into five types, as follows:²¹

- a. People who commit (*pleger* or *dader*);
- b. People who told to commit (*doenpleger*);
- c. People who participate to commit (*medepleger*);
- d. People who advise others to commit (*uitlokker*);
- e. The people who assist to commit (*medeplichters*).

Thus, the provisions elaborated in section 55 and section 56 of the Indonesian Penal Code does not differentiate *deelneming* according to its nature, but only holds details on two things, as follows:²²

- a. Offenders (*dader* or *pleger*);
- b. Participations or complicity (*deelneming*), which consists of four types of offender, namely: *doenpleger*, *medepleger*, and *uitlokker*.

3. Forms of *Deelneming*

The forms of *deelneming* or participation (complicity) existing under the criminal provisions of Section 55 and 56 of the Indonesian Penal Code are:

- a. *Doen Plegen* (Telling to Commit)

Doenplegen is a form of *deelneming* the first under section 55 of the Indonesian Penal Code, the person who orders others to commit criminal acts. In this case, it is required that there are minimum two

²¹ *Ibid*, page. 250.

²² *Ibid*

persons, namely those who ordered (*manusi domina*) and others who are told to commit (*manusi ministra*). So, *doenpleger* is criminally liable of a crime, but the person does not commit the criminal act himself but rather use the mediation of others.²³

In the criminal jurisprudence, the issue of *doenpleger* is called as *middelijke daderschap* doctrine, which is a criminal act that uses the mediation or indirect criminal acts. In this case *pleger* or *dader*, who has the will but not the main perpetrator, because he himself does not commit a crime, but tell others to commit criminal act. However, *doenpleger* is the person who must take the criminal liability, meaning that the position *doenpleger* is not the main perpetrator but he is equated as an actor, which is why he can be sentenced.

However, to determine a person as *doenpleger*, it must meet the conditions so that he can be sentenced, that is, those who are told to commit a criminal act should be people who could not be criminally liable, therefore could not be sentenced. If the person who is told to commit may have the ability to take liability, that person is not *doenpleger* but more as *uitlokker* or someone who is persuaded by others to commit a crime.²⁴

Before, it should be noted that the Indonesian Penal Code has been formulated for someone who committed a crime because of

²³ *Ibid*, page. 253.

²⁴ *Ibid*, page. 254.

some circumstances so that he is considered to be unable to criminally liable, it can be explained as follows:²⁵

- 1) A person who is asked to commit a crime has a state of the soul as determined in section 44 of the Indonesian Penal Code, namely the growth of mental disability or impaired due to illness.
- 2) A person who is asked to commit a crime does not mean to commit or it is caused by a force, and the person has no power to avoid (overmatch), as it is referred in section 48 of the Indonesian Penal Code, namely a person who acts under the influence of forced power, and it is not convicted.
- 3) A person who is asked to commit a crime has no place or quality (*hoedeningheid en qualitet*) as required in section 50 of the Indonesian Penal Code.
- 4) A person who runs an invalid state command, position, or task (*onbevoegd gegeven ambtelijk bevel*) as required in section 51 paragraph (2) of the Indonesian Penal Code, as follows:
 - a) The order is executed in good faith (*ter goeder trouw*) and assumes that the order was a lawful command that must be implemented;
 - b) Unauthorized commands must be implemented within the working or power circles.

²⁵ *Ibid*

- 5) A person who is asked to commit a criminal act that could not be blamed for misunderstandings or errors of one of the elements of the crime.
- 6) A person who is asked to commit a criminal act could not be blamed for not having the element of intent (*oogmerk*)..

It is noteworthy, for the existence of *doenpleger*, it does not have that a *dader* send or give orders directly to the people who are told to commit a criminal action or *materiel dader* (main perpetrator), but the order can also be granted through the intercession of others.²⁶

Departing from the above description, it should be reiterated that when a crime is *doenplegen* within the meaning of Section 55 paragraph (1) of the Indonesian Penal Code where several things are required, as follows:²⁷

- 1) The person who commands (*manus domina*) or *middelijke dader*, namely someone who has the will to a criminal act, but to carry out his will he ordered others to commit the crime (*manus ministra*). In other words, a person who committed the crime does not have to commit the crime himself, but he can use the mediation of others (*manus ministra*) or other means of

²⁶ *Ibid*, page. 257.

²⁷ *Ibid*

mediation. Therefore, he is as the one who take the criminal liability of a crime which is committed.

2) *Manus ministra* or people who are told to commit a criminal act are required to be a person who could not be criminally accountable; therefore he is not sentenced or could not be criminally liable.

b. *Medeplegen* (Participating)

Medeplegen, a form of *deelneming*, where there is someone or more people who participate to commit a criminal act committed by the perpetrator. If someone wants a criminal act and to manifest his will, he sent someone else to commit it, then the people who tell others to commit a criminal act is referred as *doenpleger*. While a criminal offense in a state of *medeplegen*, each person is directly involved as participants of criminal act, so that each person is seen as *mededader* of other participants or those who participate commit a crime.²⁸

This *medeplegen* form is to show that each participant has the same position or the same degree. According to Van Hattum, it means looking the action and degree as the same. According to Van Hattum looking at the deeds in section 55 of the Indonesian Penal Code should be interpreted as an *opzettelijk medeplegen* or intentional action for participating in a criminal offense committed

²⁸ *Ibid*, page. 258.

by another person. It means that intentionality to deliberately participating in a *culpoos delict* can be punished, and the other way around, unintentionally for participating in a *culpoos delict* can't be punished.²⁹

If it is observed, the formulation of section 55 of the Indonesian Penal Code is not clear what is actually called *medepleger*. Even in practice, the element of intent is not enough to call that in a criminal offense is *medeplegen*. Therefore, in the science of criminal law determines the conditions in which a criminal offense is *medeplegen* or not.

The terms in which a criminal offense is *medeplegen* as determined by the science of criminal law, as follows:³⁰

- 1) The existence of a few or more people who jointly committed a criminal act with the power of his own body;
- 2) The presence of consciousness to cooperate among the participants to commit a crime.

What is meant by consciousness in *medepleger* is usually when some of the participants before committing a crime in advance previously discuss the agreement to commit a crime. The words "in general" above does not mean as an absolute requirement, meaning that before the participants committed a crime, they must first conduct an agreement among them, but it is enough when they are

²⁹ *Ibid*

³⁰ *Ibid*, page. 259.

quite aware or "realized to work together" when committing a crime.³¹

c. *Uitlokking*

A *deelneming* is called *uitlokking* if a criminal action committed by perpetrators who deliberately driven or persuaded by others. People who deliberately drive the others in case of *deelneming* called *uitlokker*, and the perpetrators are required to be someone who could be accounted for. Someone *uitlokker* in case *deelneming* includes people who can be criminally liable on persuasion or advise others to commit a crime.³²

The involvement of other people as the perpetrators in the case of *uitlokking* have in common with other people involvement in the case of *doenplegen* (tell others to commit a crime). So, between *uitlokking* with *doenplegen* equally involving other people as perpetrators or serve as the mediation to achieve an act of crime, while the *uitlokker* and the *doenpleger* does not commit itself to an act of crime that is desired. Another similarity, both the *uitlokker* and the *doenpleger* can be equally burdened criminal liability of a crime committed by the perpetrators.³³

The difference, others who were persuaded to commit a criminal action in *uitlokking* should be someone who can be held as liable for

³¹ *Ibid*

³² *Ibid*, page. 260.

³³ *Ibid*

his actions (*toerekenbaar*). While others who committed a crime in *doenplegen* should be someone who can't be accounted for his action (*niettoerekenbaar*). In addition, methods used between *uitlokking* and *doenplegen* are also different, which means that case used in *uitlokking* has been determined in a limited way, specified in the legislation, while in the case of *doenplegen* is not determined by law.³⁴

In practice, there are many terms used to describe people who persuade others to commit an act of crime of which, namely: *an agent provocateur, de uitlokker, auctor intellectualis* or *int-uitlokking*, it is necessary to distinguish between persuading and agitating to committing a crime.³⁵

Where a criminal offense is the *uitlokking* (persuading) as defined in Section 55 paragraph (1) point 2 must meet the following requirements:³⁶

- 1) There must be a person who deliberately persuades (motivates) another person to commit a crime;
- 2) Intentionality to motivate others has to be done with the efforts that have been determined in a limited manner in section 55 paragraph (1) 2nd Indonesian Penal Code;
- 3) The efforts of persuading must consist of other people who are persuaded to commit a crime;

³⁴ *Ibid*

³⁵ *Ibid*

³⁶ *Ibid*, page. 262.

- 4) People who are persuaded must have committed a crime as desired by the persuader.

The terms described above in accordance with Section 55 paragraph (1) 2, which explains that:

"Those who give or promise anything to the abuse of power or dignity, by force, threat, or deception, or by providing the opportunity, means, or information, intentionally counts the opportunity, means or information, intentionally encourages others to do the deed".³⁷

Ways to persuade are determined in a *limitatief* way. According to the Dutch Minister of Justice, Moldderman, the nature of *limitatief* is for legal certainty. Thus it can be avoided if there is a person who is easily claimed to be persuaded by other people. But the other way around, it brings loss, namely several cunning ways which do not exist in the list of Section 55 to persuade as mocking or pretending to give advice, and so on, are not valid.³⁸

The kinds of efforts are:³⁹

- 1) Gift (*giften*)

This is not only money, but goods, or facilities as well.

- 2) Promise (*beloften*)

³⁷ *Indonesian Penal Code, section 55 article (1).*

³⁸ Rasyid Ariman, Fahmi Raghil, *Op.Cit.*, page. 134.

³⁹ *Ibid*

Promise encompasses all things that generate confidence in those who are induced and will benefit him, even if the belief was not based on strong reasons and convincing. Promise can be in a form of money, goods, work, rank, and so on.

3) Misuse of authority (*misbruik van gezag*)

Power (*gezag*) must have someone towards another person. *Gezag* includes: power of parents toward their children, employers toward their workers, or teachers toward students. Misuse of power means the use of power in the wrong way or exceeded the limit.

4) Misuse of glory, dignity, or honor (*misbruik van aanzien*), in German: (*Misbrauch des Ansehens*).

This kind of effort is not included in the Dutch Penal Code. This is specifically feudalistic Indonesia. Examples: Kyai-kyai (chaplain), chiefs of the tribes, chiefs of the village, and so on, is very influential in Indonesian because they are considered noble.

5) Violence (*geweld*)

Violence can be done by using human power or with tools. Only violence should not be so severe that cause *overmacht*.

6) Intimidation (*bedreiging*)

If power is a form of physical coercion, threat can be said as spiritual or psychological coercion. It can be in a form of words

that can raise dangerous feelings above someone. Concerning the terms, it is the same with the terms of powers (*gewel*) above.

7) Deception (*misleiding*)

Giving wrong description of a situation that raises the person is who persuaded the motive for committing crime.

8) Provide opportunities (*gelegenheid*), tools (*middelen*) or information (*inlichtingen*), for example:

- a) Provide opportunities, for example, a maid who did not lock the door of the master's house at night, so that other people can get into the house;
- b) Provide mediation, for example, lending a gun to someone else who wants to kill his friend;
- c) Provide information, for example, a bank employee provides the secret code to open the safe-deposit box to a thief.

Those are 8 ways to persuade. Those ways are called *limitatief* in the Indonesian Penal Code, which means can't be added.

d. *Medeplichtigheid*

The latest form of *deelneming* as the provisions set forth in Section 56 of the Indonesian Penal Code is *medeplichtigheid* or help to commit a crime. This form of *deelneming* is also often interpreted

as *medeschuldig* or liable, while the people who help or who serve as aide of a criminal offense are called as *medeplichters*.⁴⁰

What is a *medeplichtigheid*? To know the sense *medeplichtigheid*, note Simons opinion, as follows:⁴¹

"Medeplichtigheid is a onzelfstandige deelneming (a participation) that does not stand alone, that is to say whether or not medeplichtig is sentenced depends on the fact whether the dader has committed a criminal act or not."

According to the definition of *medeplichtigheid* which Simons has given above, it means that in *medeplichtigheid* one can be blamed and punished who do not stand independently but rather depends on the fact to the act of crime committed by the perpetrator. Thus, whether a person can be blamed and punished or not, will depend on the fact whether the main perpetrator committed a criminal act or not. Basically, the role of the *medeplichters* in *medeplichtigheid* is to facilitate the realization of a criminal offense committed by the perpetrator either before or at the time the criminal act was committed.⁴²

When observed, the formulation of section 56 of the Indonesian Penal Code, what is called as accomplice of criminal acts can be divided into two types, it can be seen as follows:⁴³

⁴⁰ Roni Wiyanto, *Op.Cit.*, page. 271.

⁴¹ *Ibid*

⁴² *Ibid*

⁴³ *Ibid*

- 1) Someone who intentionally provide assistance when the criminal act are committed;
- 2) Someone who intentionally provide the opportunity, means or information to commit a crime.

The requirements that must be met if a person can be considered to give assistance or help at the time the act of crime are committed, is elaborated as follows:⁴⁴

- 1) Someone must have the element of intent (*opzet*), which means the person help the act of crime intentionally.
- 2) The assistance which is given must be done at the time the criminal act is committed by another person;
- 3) Forms of assistance can be given in any condition that is both material and morality.

The requirements that must be met if a person can be considered to give opportunity, means or information at the time the act of crime are committed, is elaborated as follows:⁴⁵

- 1) Someone must have the element of intent (*opzet*), which means the person help the act of crime intentionally.
- 2) The assistance which is given must be done before the criminal act is committed by another person;
- 3) Forms of assistance provided in the form of: opportunity (*gelegenheid*), means (*middelen*) or information (*inlichtingen*).

⁴⁴ *Ibid*, page. 272.

⁴⁵ *Ibid*

From the requirement that must be met by each type of the accomplice of criminal acts mentioned above, it can be seen also differences, as follows:⁴⁶

- 1) The criminal accomplice at the time the crime is committed, as follows;
 - a) Assistance is provided at the time the crime was committed;
 - b) Forms of assistance provided are not determined in limited manner prescribed by the Indonesian Penal Code and the assistance which is provided can be anything, both material and moral assistance.
- 2) A person who intentionally provides the opportunity, means or information to commit a crime.
 - a) Assistance which is provided before the crime is committed;
 - b) Forms of assistance provided in a limited manner prescribed by the Indonesian Penal Code in the form: opportunity (*gelegenheid*), means (*middelen*) or information (*inlictingen*).

It should be noted, that a criminal act in a state of *medeplichtigheid* intended section 56 of the Indonesian Penal Code required the element *opzettelijk*. However, there is another view which states that a *medeplichtigheid* criminal act is not covered by

⁴⁶ *Ibid*

opzettelijk element. To get an idea of whether or not there is *opzettelijk* element, the following provisions of section 86 of the Indonesian Penal Code is cited below, as it stated:⁴⁷

"If a crime, both in terms of crime in general and in terms of a particular crime, include assistance and attempt, unless being specified otherwise by the rule."

According to the provisions of section 86 of the Indonesian Penal Code mentioned above, it seems that the provision of what is meant by crime is including assistance (*medeplichtigheid*) and attempt (*poging*), unless being specified otherwise by the rule. Therefore, it is necessary to know in advance what is intended in the formulation of Section 86 of the Indonesian Penal Code. According to Satochid Kartanegara, that what is meant by section 86 of the Indonesian Penal Code are all of the conditions which is prescribed by the Indonesian Penal Code for the crime, also are applied to "assistance" and "poging/attempt" for evil deeds. However, it is not the intention of the Indonesian Penal Code to consider *medeplichtigheid* and *poging* as similar matter in case of crime (*misdrif*), but only the conditions prescribed for the types of certain act of crime; it shall also apply to both forms.⁴⁸

As how *uitlokking* is, then *medeplichtigheid* is also a form of *deelneming* that does not stand independently, it means that the

⁴⁷ *Ibid*, page. 273.

⁴⁸ *Ibid*

medeplichetrs act can't be separated from the main perpetrator acts or *dader*. So, according to section 56 of the Indonesian Penal Code and is connected with the provisions of section 86 of the Indonesian Penal Code, then the *medeplichters* with its *dader*, it is required to have the element of *opzettelijk*.⁴⁹

What is meant by the conditions to the existence of the *opzettelijk* element for *medeplichters* and its *dader*, can be elaborated as follows:⁵⁰

- 1) The element of *opzet* for the criminal accomplice (*medeplichters*), is an intentionality which is done by someone to provide assistance to others who committed a crime, whether the aid was given at the time of a criminal act is committed or before a criminal act is committed. If the aid was merely a coincidence and the fact that the accomplice did not know that he has given an aid, means, or information to others to commit a crime, then he is not punishable. Forms of assistance should be done at the time of a criminal act was committed, or before a criminal act is committed, because if assistance was granted after the completion of a criminal act, it will have the different meaning and purpose, for example, that person is called to abet (Section 221 of the Indonesian Penal Code) or as buyer (Section 489 of the Indonesian Penal Code).

⁴⁹ *Ibid*

⁵⁰ *Ibid*, page. 274.

2) The element of *opzet* for a person, who committed a crime, means that the *opzettelijk* elements which are required must come from a *dader* or a person who committed a crime. If *opzettelijk* element comes from a *medeplichters*, then that person is not as *medepplickers*, but as *uitlokker* or persuader towards others to commit a crime. As it has been explained above, that element of *opzettelijk* for *medeplichters* is intended to assist the existence of a criminal act committed by the *dader*.

The burden of a criminal threat that should be charged to *medeplichters* has been outlined in section 57 of the Indonesian Penal Code, which stated:⁵¹

- 1) In terms of assistance, the maximum of principal punishment of the crime will be reduced one-third.
- 2) If a crime is punishable by death or lifetime imprisonment, it is imposed a maximum imprisonment of fifteen years.
- 3) Additional penalty for the assistance is the same as the crime itself.
- 4) In determining the punishment for the accomplice, who accounted for the acts which is intentionally made easy by it, along with its consequences.

As it is well known that *medeplichtigheid* is a form of *deelneming* that does not stand independently. It means the action of

⁵¹ *Ibid*, page. 275.

a *medeplichters* is associated with deeds committed by the culprit. The definition of *medeplichtigheid* is meant as the act of a person who gives assistance or help with the effort defined in section 56 of the Indonesian Penal Code, so the person who helped (*medeplichters*) has contributed to be criminally liable. This criminal threats is not heavy as the criminal penalty that imposed to the main perpetrators (*dader*), as it has been outlined in section 57 of the Indonesian Penal Code mentioned above.⁵²

The criminal responsibility by a *medeplichters* basically the same as the criminal responsibility by a *uitlokker*, which is not only limited to his actions, but also the consequences of the acts committed by the culprit. The difference lies in the magnitude of criminal threats between *medeplichters* with *uitlokker*. So in *medeplichtigheid*, there are provisions that restrict and expand criminal liability as defined in section 57 paragraph (4) of the Indonesian Penal Code.⁵³

As what is meant as the criminal liability is restricted and expanded as it is explained in the following elaboration:⁵⁴

- 1) The criminal liability for *medeplichters* which is limitative is that *medeplichters* only liable for his actions which help against the criminal act. The act of assistance was required to contain the elements of *opzettelijk*, which is assistance in the form of

⁵² *Ibid*, page. 276.

⁵³ *Ibid*

⁵⁴ *Ibid*

endeavor as determined in a limited manner in section 56 of the Indonesian Penal Code. The initiative has been accepted by the culprit and used to commit a crime.

- 2) The criminal liability for *medeplichters* is not only in the action to provide assistance to perpetrators of criminal acts, but *medeplichters* is also accountable for the consequences arising due to such assistance.
- e. The Relation of Deelneming to Section 58 of the Indonesian Penal Code.

Some people involved in the case of *deelneming* can't always be subject to criminal liability due to personal circumstances (*persoonlijk omstandigheden*), both personal circumstances inside a *medeplichters* and personal circumstances of a culprit (*dader*). Personal circumstances meant here are the circumstances within a *medeplichters* and a *dader* as a reason that can remove, reduce, or aggravate the criminal punishment.⁵⁵ The issue about personal circumstances that may remove, reduce, or burdensome penalty as outlined in section 58 of the Indonesian Penal Code, which stated:⁵⁶

"In using the criminal rules, one's personal circumstances, which eliminate, reduce or burdensome imposition of criminal, are only assessed against the criminal perpetrator or the accomplice concerned themselves."

⁵⁵ *Ibid*, page. 277.

⁵⁶ *Ibid*, page. 278.

Under the provisions outlined in section 58 of the Indonesian Penal Code mentioned above, in *deelneming* three types of personal circumstances are known, it is elaborated as follows:⁵⁷

1) Personal Circumstances which Deleting A Sentence

General provisions in the Indonesian Penal Code Chapter I provide several reasons why a person who is accused of being a perpetrator of a crime, can't be imposed the sentence as follows:⁵⁸

- a) Insanity/incapability (Section 44 of the Indonesian Penal Code);
- b) Minority (Section 45 of the Indonesian Penal Code);
- c) *Overmatch* (Section 48 of the Indonesian Penal Code);
- d) *Noodweer excess* (Section 49 of the Indonesian Penal Code);
- e) Law Commands (Section 50 of the Indonesian Penal Code);
and
- f) Authority Commands (Section 51 of the Indonesian Penal Code).

2) Personal Circumstances which Decreasing A Sentence

⁵⁷ *Ibid*

⁵⁸ *Ibid*

Personal circumstances that allow criminal punishment threats to be reduced, such as criminal act which is outlined in Section 308 of the Penal Code, which stated:⁵⁹

"If a mother because of fearing the birth of her baby to be known about, shortly after giving birth, she places her child to be discovered or leave the baby with the intention to break away from the baby, then the maximum punishment under section 305 and 306 cut in a half."

Personal circumstances as stipulated in Section 308 of the Indonesian Penal Code above are reasons that can reduce the threat of criminal punishment, where the maximum punishment that threatened to Section 305 and 306 of the Penal Code is reduced in a half.⁶⁰

3) Personal Circumstances that Aggravating Sentence

Personal circumstances which became the reason for the judge to convict the perpetrators or criminal accomplice by weighting them as follows:⁶¹

- a) Recidivate or repetition of criminal acts (Section 486 of the Indonesian Penal Code);
- b) State Employee who uses his position (Section 52 of the Indonesian Penal Code);

⁵⁹ *Ibid*, page. 280.

⁶⁰ *Ibid*, page. 281.

⁶¹ *Ibid*.

- c) Persecution towards father or mother, husband or wife, or children (Section 356 of the Penal Code).

B. OVERVIEW ABOUT THE CRIME OF TREASON (*MAKAR*)

1. Definition of Treason (*Makar*)

Treason is derived from the word "*aanslag*" (Dutch), which means an attack or "*aanval*" meaning an attack with the bad intention (*Misdadige Aanranding*). According to Indonesian Dictionary (KBBI) and Andi Hamzah Law Dictionary, treason is: deception, deceit, actions (effort) with the intention to attack/kill people, or act/effort to overthrow the legitimate government.⁶²

The act of treason is regulated in Section 104 to Section 129 of Indonesian Penal Code. In other definition, it can also be classified as crime against the president and vice president, against the legitimate government or government agencies, to spy for the enemy, resistance to government employees, rebellion, and other acts that harm the interests of the state. The act of treason is also often interpreted as an attack directed at the government (head of state and his deputy). The main motive is to make the subject is not competent to rule, deprive independency, overthrow the government, change the system of government in a way that is not legitimate, undermine the country's

⁶² Velanti Anggunsuri, "Pemerintahan yang Sah", <http://www.komisikepolisianindonesia.com/umum/read/10935/bedanya-kudeta-makar-html>, accessed on October 2nd, 2015 at 11 pm.

sovereignty to conquer or to separate some of the countries to be submitted to other government or used as a liberate state.⁶³ So it can be concluded that the rebellion under the Indonesian Penal Code means "Crimes against State Security".

What is called as "the act of treason" absolutely needs a beginning of the action implementation, as referred to Section 53 of Indonesian Penal Code. In the act of treason, the penal itself is an act of execution as it was intended in Section 53 paragraph (1) of the Indonesian Penal Code, it is unlikely that there is an attempt to commit an assault. Required necessity about the beginning of the implementation of the criminal act of treason, as it is not enough of an offender, it is not only the preparatory acts thus it must be embodied in an onset of an execution action.⁶⁴

The emergence of the act of treason in Indonesia can't be separated from any contradictions or social upheavals, law, and even politics in the country. The reason why someone would do the act of treason could be caused of many factors, but generally there is a sense of dissatisfaction with the ongoing power.⁶⁵

⁶³ Aldp Papua, "68 Tahun Indonesia Merdeka", <http://www.aldp-papua.com/68-tahun-indonesia-merdeka-makar-masih-ada-di-papua>, accessed on October 2nd, 2015 at 8.10 pm.

⁶⁴ Law Community, "Delik-delik Khusus", <https://wonkdermayu.wordpress.com/kuliah-hukum/delik-delik-khusus>, accessed on October 1st, 2015 at 9.40 pm.

⁶⁵ Abdurisa Adzan Trahjurendra, "Politik Hukum Pengaturan Tindak Pidana Makar di Indonesia", <http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/583/573>, accessed on October 4th, 2015 at 11 pm.

2. Forms of Treason in the Indonesian Penal Code.

The kinds of treason in the Indonesian Penal Code can be grouped into 3 forms, namely:

- a. Treason against the Head of State (Section 104 Indonesian Penal Code).

Section 104 Book II Indonesian Penal Code contains criminal acts such as treason committed with a view to taking the life or liberty of the President or Vice President of the Republic of Indonesia, or with a view to making them unable to run the government in appropriate way. The punishment is maximum twenty years imprisonment. The penalty was increased to the death penalty or imprisonment for life or for twenty years, referred to the president determination No. 5 of 1959.⁶⁶

Section 104 Indonesian Penal Code has the following elements:⁶⁷

- 1) Subjective elements: *met het oogmerk* or with intention
- 2) Objective elements:
 - a) *Aanslag* or treason
 - b) *Ondernemen* or which is done
 - c) *Om van het leven te beroven* or to take the life
 - d) *Om te van de vrijheid beroven* or for seizing independence
 - e) *Om te maken ongeschikt regeren tot* or not able to rule

⁶⁶ Wirjono Prodjodikoro. 2003, "Tindak-tindak Pidana Tertentu di Indonesia", Bandung, PT. Refika Aditama.

⁶⁷ P.A.F. Lamintang, Theo Lamintang, 2010, "Kejahatan Terhadap Kepentingan Hukum Negara", Jakarta, Sinar Grafika, page. 6.

- f) *Den President* or President
 - g) *Den Vice President* or Vice President.
- b. Treason against Territory of State (Section 106 Indonesian Penal Code).

Criminal acts of treason committed with intent to bring the part or the whole country under foreign rules or to separate parts of the country, by the legislators, have been set in section 106 Indonesian Penal Code.⁶⁸ The criminal threat is lifetime imprisonment or temporary imprisonment for the maximum of twenty years.

In this case (the article), what will be protected is the territorial integrity of the country. No qualification (name) for this criminal case. But it can be called "rebellion carried out with the intention of all or part of the country falling into the hands of the enemy or to separate regions of the country."⁶⁹

From the formulation of Section 106 in Indonesian Penal Code, people can know that the elements of the crime of treason regulated in Section 106 Indonesian Penal Code are as follows:⁷⁰

- 1) Subjective Elements: *met het oogmerk* or with intention
- 2) Objective Elements:
 - a) *Aanslag* or treason
 - b) *Onder Omen* or which is done

⁶⁸ *Ibid*, page. 40.

⁶⁹ Andi Hamzah, 2015, "*Delik-Delik Tertentu Di Dalam KUHP*", Jakarta, Sinar Grafika, page. 218.

⁷⁰ P.A.F. Lamintang, Theo Lamintang, *Op.Cit.*, page. 41.

- c) *Onder vreemde heerschappij brengen* or bring down foreign rule
- d) *Grondgebied Het staat van den* or territory
- e) *Geheel of gedeeltelijk* wholly or partly
- f) *Afscheiden* or separate
- g) *Een deel daarvan* or part of the country.

The word "treason" or *aanslag* does not always have to be interpreted as an act of violence, because what is meant by the word treason in the formulation of criminal action under Section 106 Indonesian Penal Code actually is action taken to harm the interests of the law of the country in the form of the territorial integrity of the country.⁷¹

- c. Treason to Overthrow Government (Section 107 Indonesian Penal Code).

Criminal acts of treason committed with the intention to bring down the government by the legislators have been set in section 107 Indonesian Penal Code, and it was formulated as follows:⁷²

- 1) Treason conducted with the intention to knock down the government, shall be punished with imprisonment for at least fifteen years.

⁷¹ *Ibid*, page. 42.

⁷² *Ibid*, page. 51.

- 2) Leaders and planners of treason as referred to in paragraph (1) shall be punished with imprisonment for life or with temporary imprisonment for at least twenty years.

Section 107 Indonesian Penal Code has the following elements:⁷³

- 1) Subjective element: *met het oogmerk* or with intention
- 2) Objective element:
 - a) *Aanslag* or treason
 - b) *Onder Omen* or conducted
 - c) *Omwenteling teweg brengen* or to knock down the government

If the criminal provisions set out in Section 107 Indonesian Penal Code we associate with the authentic interpretation of the legislators about the word *omwenteling* in Section 88 in Indonesian Penal Code above, it can be known or understood that which is prohibited under Section 107 paragraph (1) Indonesian Penal Code actually is treason conducted with intent to cause:⁷⁴

- 1) Destruction or alteration of the form of government under the Constitution in a way that is unauthorized by law;
- 2) The destruction or changes in the procedures for the replacement of the throne according to the Constitution in a way that is unauthorized by law; and

⁷³ *Ibid*

⁷⁴ *Ibid*, page. 52.

- 3) Undermined or transformed the procedures in the form of the Indonesian government under the Constitution in a way that is unauthorized by law.