Journal of Law and Criminal Justice
March 2014, Vol. 2, No. 1, pp. 167-195
ISSN: 2374-2674 (Print) 2374-2682 (Online)

Published by American Research Institute for Policy Development

The Twilight Zone – Guidelines for the Characteristics of the Solicitor and the Perpetrator by Means of Another

Mohammed Saif-Alden Wattad[1]

I. Introduction

How does Israeli criminal law distinguish between the various parties to a criminal offense, in the particular context of criminal solicitation, as distinguished from the criminal perpetration by means of another? This is the question discussed by this article. I shall analyze the distinct characteristics of the solicitor and the perpetrator by means, particularly in light of Israel's Penal Act of 1977 (hereinafter: **the** Penal Act), as amended in 1994 (hereinafter: Amendment No. 39 or the Amendment).

More than two decades ago, Israeli criminal law underwent a transformation. In 1995, the Penal Act (Amendment No. 39) (Preliminary Part and General Part) Law of 1994, entered into force, thus establishing, *inter alia*, the principle of legality.[2] In addition, modifications were made to the rules relating to criminal liability, which, prior to the Amendment, had been based on principles of English common law.[3]

As required by the principle of legality, arrangements were put in place, distinguishing between the various forms of criminal complicity and determining the scope of liability for criminal conspiracies.

---

[1]Assistant Professor, Law School of Zefat Academic College, and Adjunct Proffessort, Law Faculty of Tel-Aviv University. Expert in Comparative Constitutional Law, Comparative Criminal Law and International Criminal Law. I would like to thank Dr. Khalid Ghanayim of the Law Faculty of Haifa University and Prof. Ruth Kannai of the Law Faculty of Bar-Ilan University. Sincere thanks to the Law School Faculty Seminar Members of the Carmel Academic Center, led by Dr. Meital Pinto, for their comments on an earlier version of this article. My gratitude is due to Mr. Yehuda Levy, for his editorial work on the article. The opinions set out in this article are the author's only. I would like to dedicate this article to my very beloved newborn baby Lorraine.

[2] Article 1 of the Penal Act of 1977 (hereinafter: **the Penal Act**).

[3] KENNY, CRIMINAL LAW (Cambridge University Press, 1952).

Further, the Amendment demanded a new interpretive approach to criminal law whereby, if, in view of its purpose, a criminal provision could be interpreted in varying reasonable ways, the interpretation leading to the most lenient result for the accused should be preferred.[4]

A generation passed, and the Israeli legal system sought to create an enlightened constitutional regime. Granting constitutional status to human rights in Basic Law: Human Dignity and Liberty in 1992 (hereinafter: **the Basic Law** and/or **the Constitutional Revolution**) affected all areas of the law. It also had an impact on issues of substantive criminal law, such as the principle of legality, methods of punishment and criminal negligence. Countering these rights, public safety was positioned as a fundamental value that required a certain social price to be paid.[5] If this value was not defended, neither human rights in general, nor the rights of victims in particular, could be safeguarded. Accordingly, when the anticipated harm to public safety was substantial, clear priority would be accorded to public safety. Yet, this did not negate the status of the fundamental constitutional rights. The social price was reflected, therefore, in the Limitation Clause of the Basic Law: Human Dignity and Liberty,[6] and in the commitment of all governmental branches, including the judiciary, to respect the rights enshrined in the Basic Law.[7] This commitment no longer left the legislature, or the judiciary, free as in the past to choose the point of balance between the rights of suspects and defendants and the interest of public safety, but from then on decisions had to be based solely on standards as set out in the Basic Law.

Today, Amendment No. 39, which too is permeated by the spirit of "the Constitutional Revolution," regulates the liability of the parties to a criminal offense.[8] Prior to the Amendment, the criminal law did not distinguish between the various forms of criminal complicity and, as a corollary, failed to distinguish between the penalties imposed in respect of the various ways in which criminal offenses could be committed.[9] All forms of complicity were subject to one law.

---

4 Article 34U of the Penal Act.

5 F. Cr. H. 2316/95 Ghanimat v. State of Israel, 49(4) P.D. 589, at pp. 589-645.

6 Article 8 of Basic Law: Human Dignity and Liberty (hereinafter: **the Basic Law**).

7 Article 11 of the Basic Law.

8 F. Cr. H. 1294/96 Meshulam v. State of Israel, 52(5) P.D. 1.

9 See para. 3 of Justice Dorner's judgment in the Meshulam case, id.; see also Cr. App. 158/58 Abu Amram v. The Attorney General, 13(3) P.D. 1965; Cr. App. 418/77 Bardrian v. State of Israel, 32(3) P.D. 3.

However, this state of affairs, which was incompatible with the principle of legality, was rectified by the provisions of Amendment 39, which prescribed arrangements distinguishing between the various forms of criminal complicity – both with regard to criminal liability and with regard to punishment. The criminal law's commitment to the distinction between the various forms of complicity is based on a number of factors, including, first, the different types of anti-social conduct underlying the various forms of criminal complicity;[10] second, the society's perception of a clear distinction between the direct perpetrator, on the one hand, and the "aider and abettor," as well as the solicitor of the offense, on the other hand. Given that substantive criminal laws are the rules of society, the criminal law must give concrete expression to such rules of society.

Accordingly, the rationale behind the distinction between the direct commission of an offense[11] and the indirect commission of an offense[12] is one which also leads to a conclusion regarding the need for a clear distinction between "perpetration by means of another," on the one hand, and "solicitation," on the other hand. While, under Israel's criminal law, the punishment for both forms of criminal commission is identical, the language of the Penal Act demonstrates that "perpetration by means of another" is a more serious form of criminal commission than solicitation. This is because the main role of the offender acting through another person is the use of that other as an instrument.[13] Put differently, the criminal potential inherent in the perpetration by means of another is particularly severe, and even more acute than that embodied in the direct commission of the crime. In contrast, even though the solicitor is the spiritual father of the criminal commission, the anti-social aspect of the act of solicitation, including the guilt of the solicitor, is lesser than that entailed in direct performance of the act.

---

10 The anti-social aspect of the criminal offense is what makes the act invalid in the broad sense; The social harm caused – according to the Anglo-American legal system and the harm to the protecte social value, according to the Continental and Israeli systems of law.

11 The direct participants in the offense take the greatest part in the commission of the offense; they are the co-perpetrators or the perpetrators by means of others; see Article 29 of the Penal Act, and Cr. App.2796/95 *Anon.* v. *State of Israel*, 51(3) 388.

12 The indirect participants in the offense take indirect part in the commission of the offense; they are the solicitors or the aiders and abettors; see Articles 29 and 30-31 of the Penal Act, and the *Anon.* case, *id.* See also S. Z. Feller, ELEMENTS OF CRIMINAL LAW 179, 186 (Vol. 2, Jerusalem: Sacher Institute, 1987) (in Heb.).

13 Use of a person as an instrument impairs that person's constitutional right to dignity, see Cr. F.H. 7048/97 *Anon.* v. *Minister of Defense,* 54(1) P.D. 721.

This is mainly because the procurer does not have the courage and the criminal potential to perform the criminal act by himself. However, there may certainly be cases in which the solicitor deserves more severe punishment than the main actor.

Thus, the discussion in this article will focus primarily on an examination of the severe potential criminality and anti-social aspect of the perpetration by means of another, compared to the solicitation phenomena. This discussion, accompanied by the constitutional analysis, is demanded in light of the impact of the "Constitutional Revolution" on substantive criminal law, and requires an examination of the characteristics of the solicitor and of the "perpetrator by means of another." In addition, it requires an examination of the overlapping twilight zone between the two forms of criminal commission (perpetration by means of another and solicitation), as well as an examination of the standards to be used in making such distinctions, as required by the fundamental principles of substantive criminal law. In this analysis, I shall consider the above introduced substantive issues, and refer to what is "self-evident," which the reader may come to conclude is less than "self-evident."

In Part II, I shall provide the framework of the discussion, as learnt from the Penal Act. In Part III, I shall present the criminal phenomenon of solicitation, whereas in Part IV I shall discuss the criminal phenomenon of perpetration by means of another. Later on, in Part V, I shall tangle with the possible distinctive features of the solicitation and the perpetration by means of another, as presented, discussed and proposed both by the Penal Act and rulings of the Supreme Court of Israel. In the same Part, I explore scholarly approaches, as introduced in Israeli literature, as well as the Anglo-American and the Continental perspectives on the discussed topic. And finally, in Part VI, I shall provide my theory concerning the article's query, thus proposing two exams for distinguishing between the perpetrator by means of another and the solicitor: (1) the hierarchical ranking, and (2) the nature of the "other." Underlying both exams is measuring the scope of the remaining autonomy for the "other," in both phenomena – the solicitation and the perpetration by means of another.

II. The Framework of the Discussion

The commission of a criminal offense may involve the complicity of a number of people acting in different roles. This reality requires assigning definitions to the roles of each participant. Such definitions are needed in order to determine the new and extended scope of the criminal phenomenon entailing multiple participants, as required by the principle of legality.

Following Amendment No. 39, the Penal Act emphasizes the principle of guilt. This is particularly evident in the changes made to the derivative guilt of the parties to the offense. The arrangements set out in the Penal Act strengthen the principle of guilt by reducing the possibility of convicting defendants of offenses where the requisite *mens rea* or *actus reus* are absent.[14]

Distinguishing between the various forms of criminal activity is, therefore, of the utmost fundamental and practical importance. Among the diverse forms of criminal commission, one may find solicitation and "perpetration by means of another." While solicitation takes a form of indirect complicity, perpetration by means of another is a form of direct complicity.[15] These two forms of criminal commission are governed by Article 30 of the Penal Act, in relation to solicitation, and Article 29(c) of the Penal Act, which deals with perpetration by means of another.

III. The Characteristics of the Solicitor

If a person causes another to commit an offense by means of persuasion, encouragement, demand, cajolery, or by means of anything else, that constitutes the application of pressure, then he solicits an offense.[16]

Solicitation, by definition and purpose, is examined on the basis of the stages preceding the criminal act; as otherwise, its elements would more aptly describe criminal aiding and abetting than solicitation.

---

[14] R. Kannai, "Criminal Law: Development and Directions," 23 Eyoni Mishpat 717, 732 (2000) (in Heb.).

[15] See supra notes 11 and 12.

[16] Article 30 of the Penal Act. See also B. Sangero, "*Solicitation by Omission – Is It Indeed Impossible?*" 16 Mishpatim 482 (1987) (in Heb.).

Classification of solicitation as a criminal phenomenon is required by society's aspiration to defend itself not only against the perpetrator of an offense – whether as a lone perpetrator or a joint perpetrator – but also against a wider circle of people who solicit others to commit offenses.[17]

Solicitation is a form of indirect complicity; the person soliciting the offense does not take an active part in its commission. Indirect complicity derives its criminality from the principal perpetrator, and, in absence of the latter, the former does not exist either. Put differently, in absence of the commission of the main offense, there is also no solicitation, albeit the offense of attempted solicitation might be committed. The values protected by the offense of solicitation are the same as those protected by the commission of the main offense. Nonetheless, scholars disagree in fact as to whether the public interest in protecting all persons against adverse influences, which may introduce or encourage them to enter the criminal sphere, is a value protected by indirect complicity. In any event, the social value protected by solicitation is only harmed when the direct perpetrator (hereinafter: **the solicitee**) is criminally liable;[18] otherwise, the circumstances can only be said to give rise to attempted solicitation.

The solicitor is, therefore, an indirect partner in the commission of the criminal offense, and his contribution to the commission of the offense is purely external. At the same time, whereas the solicitor's contribution, like the joint perpetrator, is material to the commission and materialization of the offense, he is a principal partner to the commission of the criminal offense. His contribution is manifested by actually causing the direct perpetrator – namely, the solicitee – to decide to carry out the offense; the solicitor is the one who influences the perpetrator and leads him to crystallize the decision to commit the offense.[19]

---

[17] Cr. App.4389/93 *Mordechai* v. *State of Israel,* 40(3) P.D. 239, at p.255.

[18] This is the position according to Israeli legal literature. Nonetheless, the approach prevailing in the Continental legal system – a position adopted by Aharon Enker, in contrast to that of Gur-Arye, Kremnizer and Feller – is that the protected social value will also be harmed when the direct perpetrator, *i.e.*, the solicitee, is without criminal guilt. It should also be noted that "guilt" reflects condemnation of the perpetrator for his anti-social act and its function is to justify the imposition of criminal liability upon the perpetrator.

[19] It should be emphasized that according to Article 30 of the Penal Act, among the various forms of *actus reus* relating to solicitation, one may find *solicitation through another* as well as solicitation through threats – even though the latter has greater substantive similarity to perpetration by means of another than to solicitation. See also Y. Kedmi, ON CRIMINAL LAW 66 (Part A, Tel-Aviv University, 1996) (in Heb.) – Kedmi's approach necessarily leads to the perception of solicitation as a consequential crime**.** That is, in order for the offense of solicitation to arise, at minimum, the

The proximity of the solicitor to the direct perpetrator is, therefore, reflected by the fact that the former is the one who plants the seed of the decision to commit the offense, and has accordingly been dubbed the "intellectual perpetrator" or the "spiritual father of the offense."[20] These labels indicate that in cases where the direct perpetrator is uncertain as to whether to proceed, the solicitor is the one who plants the idea or tips the balance towards the commission of the crime. Thus, the contribution of the solicitor lies in procuring the *mens rea* of the direct perpetrator.[21]

The criminal status of the procurer is circumscribed by the intensity of the solicitation or by the scope of his activities. Thus, the more intense the solicitation, and the more the solicitor engages in activities falling outside the boundaries of the psychological arena, the closer his status to that of a joint perpetrator.

Though in all cases the final decision regarding the commission of the offense is made by the direct perpetrator, the solicitor, whose criminal liability is derivative, is characterized by the fact that he is the intellectual perpetrator of the criminal offense. The direct perpetrator – the solicitee – is perceived as a person requiring psychological spurring. In other words, he assimilates an idea, which has originated elsewhere, though he is not necessarily aware that he has been solicited to commit a crime; it suffices in such cases that the direct perpetrator is legally competent to commit a crime. In such cases, he may also take on the role of the "other" – through whom the offense is perpetrated, *i.e.*, in terms of the set of circumstances falling within the description of "perpetration by means of another."[22] Either way, as solicitation is a causative crime, it is important for a causal link to exist between the act of solicitation[23] and the decision to engage in the criminal act, and the solicitor will be liable for the offense which has been committed even if it is not the same as the one he solicited, provided that it was the probable result of the solicitation.

---

principal perpetrator must have performed the initial elements of the offense, as there can be no solicitation without the preliminary actions being taken in the principal crime. See the judgment given by Justice Gabriel Bach in Cr. App. 2457/93 *Nitzan* v. *State of Israel* (unpublished); see also Y. Nachmani, ISSUES IN CRIMINAL LAW 187 (Ethics Press, 1998) (in Heb.).

[20] M. Gur-Arye, "*The Penal Act (The Preliminary and General Part), Draft Bill, 1992*," 24 *Mishpatim* 9, 46 (1994) (in Heb.).

[21] *Per* Justice Dorner in the *Meshulam* case, *supra* note 8, at pp. 39-41.

[22] I shall elaborate further on this matter in the next chapter.

[23] The solicitor is the one who through speech or other communicative behavior causes the perpetrator to decide to commit the principal crime. This is the factual element of solicitation. See D. Bein, CRIMINAL LAW IN ISRAEL – GENERAL PART 24 (Third ed., University of Haifa, 1994) (in Heb.).

The *mens rea* of solicitation is the very intention of inducing the solicitee to commit an offense, and there is no solicitation unless the offense was committed with criminal intent.[24]

In the criminal relationship between the solicitor and the solicitee, the two are equal – one does not have a higher position on the criminal hierarchy than the other does; hierarchy denotes control which characterizes the commission of an offense by means of another. Certainly, the solicitor has an advantage over the solicitee, as the former is the one who instills the idea for the criminal act; nonetheless, the solicitee retains autonomy to make the final decision. Moreover, in this relationship between the solicitor and the solicitee – when the solicitor repents his original criminal plan and takes steps to discourage the direct perpetrator from committing the offense, prior to such commission but after the solicitation phase – he will not be criminally liable if, despite his recanting, the direct perpetrator proceeds to commit the offense.[25]

IV. The Characteristics of the Perpetrator by Means of Another

(c) A perpetrator of an offense by means of another is a person, who contributed to the commission of the act by another person who acted as his instrument, where the latter being in one of the following situations, within their meaning in this Act:

(1) minor-hood or insanity;
(2) lack of control;
(3) absence of *mens rea*;
(4) mistake of fact;
(5) duress or under the color of law.

---

[24] Cr. App. 4188/93 *Levy* v. *State of Israel*, 49(1) P.D. 539. See particularly, the judgment of Justice Eliezer Goldberg regarding the independent liability for negligent homicide during the course of another incident.

[25] D. Bein, "*Criminal Law*" **in** THE LAW OF ISRAEL: GENERAL SURVEYS 128, 168-169 (The Harry and Michael Sacher Institution for Legislative Research and Comparative Law, The Hebrew University of Jerusalem, 1995) (in Heb.): "A solicitor who withdraws from his original plan and, after having solicited another to commit the offense but before the commission thereof, has countermanded the commission, shall not be deemed to have committed the offense if it is subsequently committed."

(d) for the purposes of subsection (c), if the offense is conditional on a certain perpetrator, then the person in question shall be deemed to have committed that offense even if the condition is only met by the other person.[26]

The issue of perpetration by means of another revolves around the attribution of criminal liability. This embraces cases where the actor causes another person to perform the *actus reus* without that "other" having a criminal intent or where, for any other reason, the "other" is not criminally liable.[27] The cases, therefore, concern a person who commits a crime through another, where the latter is considered the long arm of the perpetrator, or, put differently, the "instrument" of the perpetrator. Underlying the above attribution of liability is the perception that it would also be right to impose criminal liability for a criminal act on the actor who caused the other to perform the *actus reus*, where that other has no criminal intent, or for any other reason is without criminal liability,[28] in accordance with the mental attitude of the actor. The contribution of the "perpetrator by means of another" arises only when he is aware that he contributes through the "other," whom he uses as an "instrument" to carry out the offense.

Ostensibly, the "perpetrator by means of another" is an indirect offender. Nonetheless, according to the law, he is regarded as a direct offender and a principal perpetrator. This is because of his "internal" contribution to the commission of the criminal act, his share in the criminal task itself, and the fact that the principal perpetrator is merely an "instrument" in his hands.[29]

---

[26] Article 29(c) of the Penal Act.

[27] M. Gur-Arye, "*Committing an Offense by Another*," **in** SUSSMAN BOOK 319 (Jerusalem 1984) (in Heb.).

[28] In this regard, there is a dispute as to whether perpetration by means of another can only arise in situations where the other is without criminal liability. The supporters of this view rely on the list set out in Article 29(c) of the Penal Act; this approach was adopted by the Supreme Court. Those rejecting this view, or at least those who doubt its accuracy, believe that the said list is merely illustrative, and that there may be cases, for example **economic pressure**, where, even if he bears criminal liability, the "other" may be regarded as an "instrument" in the hands of his principal. This situation could also aptly describe the commission of an offense through another. This approach was adopted in the legal literature by Miriam Gur-Arye and S. Z. Feller. The resolution of this question is dependent on the nature of the interpretation given to Article 29(c) of the Penal Act.

[29] The following tests have been established by the case law when examining the status of the perpetrator by means of another: in principle the test is one of control, and comprises two categories: (1) control of the will: (a) organizational control, or (b) control through duress (threats); and (2) control by virtue of an advantage in understanding. For the purposes of this article, it is unnecessary to elaborate further on this point.

His contribution to the criminal event stems from his mental attitude as the person generating the offense. He regards the commission of the offense as being in his own interest, and not in the interest of the "other."[30] In contrast, the "other" is the one who, in practice, participates in carrying out the criminal offense, while being activated by the principal perpetrator and subject to the conditions that have turned him into an "instrument" in the hands of his principal.[31] Therefore, unlike the joint perpetrator, the "perpetrator by means of another" does not actually take part in committing the offense. The "other" is the one who performs the *actus reus*, but he does so under conditions that usually negate his liability for the commission of the act, or where he lacks sufficient awareness to be ascribed criminal intent. The classic case, therefore, relates to a situation where the "other" is not criminally liable at all, for example, he is a minor or someone mentally incompetent, and the "perpetrator by means of another" does not physically take part in the criminal activity.

The need to develop a principle relating to the commission of an offense through another arose because in the classical case, as mentioned, a "perpetrator by means of another" did not physically take part in the commission of the crime, and therefore he could not be a joint perpetrator, aider and abettor or solicitor. This was because at the time, the prevailing view was that solicitation required a completed offense or attempted offense, and the direct perpetrator had to satisfy all the elements of the offense or attempted offense, including the element of guilt, which was absent in the case of a minor or mentally incompetent person. This approach was also favored by the learned scholars S. Z. Feller and Miriam Gur-Arye.

In my view, it is correct to argue that the "perpetrator by means of another" is a direct perpetrator. Nonetheless, it can be claimed that the form of commission of a crime by means of another is a more serious criminal undertaking than direct commission of a crime, because the use of the "other" in order to commit the criminal offense, is an act, which, under the Basic Law, severely compromises human dignity. Moreover, the criminal potential of the "perpetrator by means of another" is more severe than that of the direct perpetrator, precisely because of the ability to turn the "other" into an "instrument," and the implementation of the criminal plan through the "other."

---

30 *Cf.*, The *Mordechai* case, *supra* note 17.

31 The list set out in Article 29(c) of the Penal Act is open and illustrative, as it explicitly uses the term "such as."

V. Overlapping Zones: The Distinction between Solicitation and Perpetration by Means of Another – "A Very Narrow Bridge?"

In the definition of solicitation, the Israeli legislature refers, in Article 30 of the Penal Act, to "the application of pressure" as a form of criminal solicitation. Similarly, in Article 29(c)(5) of the Penal Act, the legislature includes "duress" in the list of situations which, when employed, means that a perpetrator has committed the offense by means of another. The *actus reus* in both situations presents one aspect of a possible overlap between the two forms of criminal commission. However, this is just one example that illustrates the need for an answer to the question which deals with the boundaries that separate the application of pressure for the purposes of solicitation, and its application for the purposes of perpetration by means of another.

This question joins hundreds more, underlying which is apparently the same idea as that under discussion here, in attempting to obscure the overlapping zone between the two forms of criminal commission. Another notable example is that which examines the nature of the "other" in each of the two forms: Who is he? What is he?[32] Whatever the reason may be, it is certain that there is an overlap area, a fuzzy area, a twilight zone, between the phenomenon of solicitation and that of perpetration by means of another. Furthermore, the fact that the penalty imposed in respect of the two derivative offenses is identical, cannot teach us about the purpose underlying either of them. This is because society's condemnation of each is different, and so, inevitably, is the moral guilt attached to each one.

A. De Lege Lata

(1) Israel's Penal Law

The language of the Penal Act, relating to both these forms of criminal commission, leaves no doubt as to the objective underlying each one. Thus, whereas the rationale underlying solicitation is that the solicitee retains discretion to decide whether – despite the intellectual coercion applied on him by the solicitor – he wishes to surrender to that coercion or not; in the case of perpetration by means of another, the "other," whether legally competent or not, must act as an "instrument" in the hands of his principal.

[32] I deal with this issue extensively in the next section, as it lies at the heart of this discussion.

In other words, in the latter form of criminal commission, the "other" does not commit the crime after having formulated a decision to do so following persuasion, but rather his act ensues from his inability to exercise his own discretion, which causes him to be regarded as an "instrument" in the hands of his principal. Accordingly, in the case of perpetration by means of another, as an "instrument" in the hands of his principal, no persuasive action is required, in any event, and all that is required is the transformation of the "other" into an "instrument" in the hands of the principal; it is immaterial whether any attempt at persuading him was made – the principle factor is his activity as an "instrument" lacking all ability to choose between different options.

Accordingly, when it comes to "duress" in relation to "perpetrating an offense through another," the intention is to absolutely negate the "other's" ability to choose. In contrast, when it comes to the "application of pressure" in relation to solicitation, the intention is to the application of pressure which does not negate the solicitee's ability to choose, albeit it affects his ability to choose – and the final choice rests with the solicitee. If he so wishes – he will be convinced, and if he does not so wish – he will refuse to be convinced. The test, therefore, both in terms of the clear language of the Penal Act and its purpose, is the "autonomy test." That is to say, insofar as the "other" lacks the ability to decide for himself by choosing from a range of possibilities, he becomes an "instrument," through whom the criminal offense is perpetrated, and is distanced from the classification of a solicitee.

Another touchstone for examining the twilight zone is the one that focuses on examining the nature of the "other." The "other" in solicitation – namely, the solicitee – is a person possessing criminal capacity; he is a man who may be convinced, encouraged, cajoled whether by way of pleading or in any other way involving the application of pressure. The list set out in Article 30 of the Penal Act is conclusive, and characterizes actions that can be directed, or at least may be directed, only at persons possessing criminal capacity. In contrast, the list in Article 29(c) of the Penal Act, introduces myriad examples of "others," who are not criminally liable for their actions: "minors or insane persons, those who lack control over their actions, situations of mistake of fact, and situations of duress or acting under the color of law." Nonetheless, this list is purely illustrative, and the question arises whether these examples necessitate a single interpretation that confines the boundaries of the "other" solely to "others" who are not criminally liable.

In referring to these two forms, the Penal Act emphasizes two aspects of the distinction between solicitation and perpetration by means of another, as I discussed above. In addition, one may also add the fact that the impact of the solicitor on the solicitee is psychological and emotional, whereas the effect of the "perpetrator by means of another" on the "other" is primarily at the level of the *actus reus.*

(2) The Supreme Court Israel and Its Rulings

In its rulings, the Supreme Court of Israel has often considered the different forms of criminal commission, including the standards for distinguishing between them. However, the Court has not yet been required to consider the fundamental distinction between solicitation and "perpetration by another." Although Justice Dalia Dorner believes that the distinction between these two forms is clear and sharp,[33] yet, such ruling has never been elaborate on. However, the position of the Supreme Court on this issue can be learned from its rulings regarding the distinction between direct and indirect commission of crimes, and from the fundamental discussion about the legal status of the so-called "Master criminals."

In the *Meshulam* case,[34] the Court unanimously adopted the traditional approach, whereby perpetration by means of another can only exist when the "other" is not criminally liable.[35] When considering the fundamental distinction, Justice Eliyahu Matza stated, in the *Meshulam* affair, that the "Master criminals" must be classified as a joint perpetrator and not as a solicitor. At the same time, Justice Matza adopted the "functional control test" as an ancillary test alongside the "combined test." In his view, the "Master criminals" must be regarded as a participant who has complete control[36] over the commission of the crime, and whose activities not only include solicitation and preparation, but also guidance and supervision of offenders, and as such, he is a joint perpetrator for all purposes.

---

[33] The *Meshulam* case, *supra* note 8.

[34] *Supra* note 8.

[35] See para. 14 of Justice Eliezer Goldberg's decision in the *Meshulam* case, *id*. See also Justice Mishael Cheshin's judgment in the *Anon.* case, *supra* note 11.

[36] The test of control was imported from German law by Mordechai Kremnitzer, as the decisive test for distinguishing between the perpetrator of the offense and the indirect participants in its commission. Justice Eliahu Matza adopted this test as an aid, in conjunction with the combined test, and not as the decisive test.

This approach, which emphasizes the degree of control of the principal over the "other," leads to the conclusion that solicitation is a less severe form of criminal commission than that according to the perpetration by means of another. This is because within the framework of the perpetration by means of another, the degree of control of the solicitor over the solicitee is less than that of the principal over the "other." In the latter case, the "other" is unable to choose between various alternatives and merely acts as an "instrument" in the hands of his principal.

This position was supported, in general, by Justice Mishael Cheshin, who stressed that the criminal liability of the "perpetrator by means of another" is more serious than that of the solicitor. This is because, in his view, given that the "other" is a person who is not criminally liable for his actions and is the long arm of his principal, the principal is perceived to be criminally liable for the offense as if he had committed it himself. Thus, Justice Cheshin too, perceived the distinction between the "perpetrator by means of another" and the "Master criminals," as the latter implements his criminal plans through others who are criminally liable for their actions. It is clear that this approach can lead to only one conclusion, namely, that solicitation is a less severe phenomenon than "perpetration by means of another," both in terms of criminal liability and in terms of the ancillary moral guilt.

This is the case in which, despite the fact that solicitation itself is a serious phenomenon, and, according to Justice Cheshin's approach, if it were not for the solicitor, conceivably, no offense at all would have been carried out; it was the solicitation which led to the commission of the offense, so that the description of the solicitor as one making an indirect contribution to the commission of the criminal act misses the point. In Justice Cheshin's view, the contribution made by the solicitor is equivalent to that of the primary offender and the legal consequences are the same.

In the *Anon.* case,[37] Justice Cheshin added that the "Master criminals" is very similar to a "perpetrator by means of another;" however, since perpetration by means of another is possible only when the "other" is not criminally liable, he referred to the "Master criminals" as a joint perpetrator and not as a solicitor.[38]

---

[37] Supra note11.

[38] Cf., Mordechai Kremnitzer, "The Perpetrator in Criminal Law – A Profile," 1 Plilim 65, 72 (1990) (in Heb.).

In contrast to this principled position, Justice Dorner set out her own positions in the two incarnations of the *Meshulam* case,[39] whereby the "Master criminals" should be regarded as a solicitor only and not as a "perpetrator by means of another." In her view, the distinction between solicitation and the joint perpetration of a crime is sharp and clear, and consequently so is the distinction between solicitation and perpetration by means of another too. This is mainly because, in her view, the contribution of the solicitor lies in generating the *mens rea* of the principal perpetrator, whereas the contribution of the perpetrator by means of another, as well as the joint perpetrator, is found on the behavioral level. A significant element of her approach is that where the solicitor has control over the solicitee; from a moral point of view, his control transforms him into the person primarily liable for the offense, even though technically he is only an indirect partner. The solicitor's increased liability is expressed in the law itself, as the degree of criminal liability attributed to the solicitor is identical to that of the principal perpetrator, and the same is true of the punishment that may be imposed on each. The increased liability may be reflected in the sentencing, so that the solicitor's punishment will be more severe than that of the principal perpetrator.[40]

Underlying Justice Dorner's perception is the notion that an interpretation should be given that prevents the distinctions between the different forms of criminal complicity from being obscured, as Amendment No. 39 defines the forms of complicity in such a way that an interpretation that blurs the distinctions between them may violate the principle of legality, and is not required.

Justice Cheshin, who remained alone in his dissenting opinion, like a lone desolate voice in the wilderness, held in the *Anon.* case,[41] that the test for the distinction between direct and indirect commission of an offense, is that of the punishment, which Justice Chestin considered an issue of values and not a test to be applied literally. On the contrary, this test is based on the degree of severity, which we attribute to the defendant's behavior in respect of the specific criminal offense, and the degree of moral impairment in his behavior.

---

[39] See the Further Hearing, supra note 8, and Cr. App. 1632/95 Meshulam v. State of Israel, 49(5) P.D. 72.

[40] Cf., App. 283/58 Ofer v. Chief Military Prosecutor, 44 Psakim (Judgments of the District Courts of Israel) 363, at pp. 401, 404, 418.

[41] *Supra* note 11.

The sentence expresses, therefore, the degree of social condemnation. The more negative the criminal act, the greater the tendency to classify the perpetrator as a joint perpetrator.[42]

Therefore, the fundamental – and forced – approach of the Supreme Court holds it advisable to treat the "Master criminals" more harshly, and therefore likens him to joint perpetrator as opposed to solicitor. In contrast with this fundamental approach, Justice Dorner takes the principled approach that the "Master criminals" is a solicitor,[43] and not a "perpetrator by means of another." Nonetheless, given the serious criminal liability attached to him, more severe punishment may be imposed on a solicitor than would be appropriate in the case of a "perpetrator by means of another."[44] In addition, the Supreme Court maintained the traditional position, whereby the test of perpetration by means of another would only be met if the "other" was fully without criminal liability. As mentioned, this position contradicts the modern approach whereby a person may be said to have committed an offense through another even when the other bears full criminal liability.

B. Criticism from Home: Israeli Literature

Israeli professional legal literature expresses a variety of opinions, some of which criticize the fundamental approach adopted by the Supreme Court. Among the main proponents of these views are Mordechai Kremenitzer, Feller and Gur-Arye.

In her article, "*Committing an Offense by Another,*"[45] Gur-Arye creates a dichotomy, distinguishing between "perpetration by means of another" and solicitation. In her view, the clear language of Article 29(c) of the Penal Act requires the conclusion that the circumstances of "perpetration by means of another" will only exist when the other is without criminal liability, and that this conclusion is necessitated by the background of the concept of "perpetration by means of another."

---

42 This approach was subjected to sharp criticism on the basis that first one shoots and then one asks questions.

43 Feller, *supra* note 12, at pp. 275-276.

44 Justice Dorner's approach to punishment contradicts that found in a number of legal systems around the world, including the Continental legal system that provided the basis of the Israel's Penal Act.

45 *Supra* note 27.

The concept was intended to complete the criminal complicity laws and, within the framework of these laws, it was assumed that the liability of indirect partners, solicitors or aiders and abettors, was derived from the principal criminal act and, accordingly, was dependent on the commission of the offense by the perpetrator.[46]

Accordingly, in cases where the person who commits the *actus reus* does not bear criminal liability for his act, no liability can be imposed on partners in respect of their indirect participation. In order to allow liability to be imposed in these cases as well, it is necessary to adopt a further principle that allows the "partners" to be regarded as perpetrators of the offense; in effect, "perpetration by means of another." In Gur-Arye's view, in contrast, when it comes to solicitation, the criminal liability of the solicitor is conditional upon the solicitee who performed the *actus reus,* being criminally liable for the commission of the offense.

In her article, Gur-Arye proposes that the principle of "perpetrating an offense by means of another" should be regarded as one that defines the commission of the offense without regard to the laws of complicity. Accordingly, criminal liability created by virtue of the principle of "perpetration by means of another" in accordance with the proposed thesis, will be broader than the liability generally imposed under that principle. This will apply in a number of contexts: the liability will not be limited to cases in which the actor intended the "other" to commit the *actus reus* under circumstances where he would be without liability. It will be possible to impose liability by virtue of this principle even when the other party negligently performed the *actus reus*, as under those circumstances he might be liable for the offense of negligence; there would be no impediment to imposing liability by virtue of the principle of "perpetration by means of another" for offenses contingent upon personal characteristics, even though the actor does not possess these characteristics.

In Gur Arye's view, which sees the "perpetrator by means of another" as a perpetrator and not as an indirect partner, the distinction between the solicitor and the "perpetrator by means of another" is plain.

---

[46] This, therefore, is the premise of the common law, including Israeli law. In contrast, the premise in most Continental legal systems is that there is no difference between the situation where the perpetrator himself performs the factual element of the offense and the situation where he uses an innocent agent as an "instrument" to perform the act. Accordingly, the perpetrator of the act must be regarded as the one performing the *actus reus* of the offense directly or through an innocent agent.

This is due to the distinct contributions of the indirect partners to the commission of the offense, compared to the scope of their liability for the commission of the offense. Indeed, she shows the difficulty in distinguishing between these two forms of criminal activity – the difficulty is found in the fact that the solicitor is the one who generated the *mens rea* required for the formation of the offense in the mind of the solicitee, and without that contribution the solicitee would not have proceeded to commit the concrete offense he was solicited to perform; so that it may be said, that like a "perpetrator by means of another," the solicitor too is one who ultimately causes the offense to be committed by the "other," *i.e.*, the solicitee. Nonetheless, in Gur-Arye's view, it is plain that at "the end of the day" the solicitee is the master of the decision to commit the offense, and it is up to him to choose whether or not he will actually carry it out. In contrast, according to her, in cases of perpetration by means of another, the assumption is that the "other" committed the offense without having any criminal intent or, for some other reason, without bearing criminal liability.

In another article,[47] Gur-Arye stated the position that, despite the clear distinction that she has introduced between solicitation and perpetration by means of another, it is doubtful whether the wording chosen by the legislature to characterize the solicitation, compared to perpetration by means of another, is indeed successful. As within the framework of perpetration by means of another, there may be situations where the other can be criminally liable for the act.[48] In any event, Gur-Arye agrees with the traditional position set out by the case law, according to which the language of the Penal Act necessitates the conclusion that perpetrating an offense by means of another cannot exist whenever the "other" demonstrates criminal intent.

Nonetheless, she calls for the legislature to introduce changes in this regard. In her opinion, the "control test" is the main test that should decide the issue herein discussed, so that even when the "other" bears criminal liability, but concurrently has become an "instrument" in the hands of his operator, the situation will be one of perpetrating by means of another. The essence of the "control test" is the ability of the person controlling the criminal event to terminate the activity, and as such, he is considered the perpetrator of the offense.

---

[47] Gur-Arye, *supra* note 20, at p. 44.

[48] See examples: Gur-Arye, *id.*, pp. 44-46. See also Kremnitzer, *supra* note 38, at pp. 6-72. A clear example is Article 29(c)(3) of the Penal Act, relating to an "other" who acted negligently.

The control test weighs the objective contribution – the objective anti-social nature – of the act, as well as the mental element of the actor. This is a flexible test that takes many factors into account.

When referring to the issue of the "Master criminals," Gur-Arye expressed the position that the "Master criminals" can never be classified as perpetrators by means of others. This is because the "Master criminals" require joint decisions and action to be taken, where each partner is equal in terms of the commission of the offense.

In his article,[49] Kremnitzer joins Gur-Arye, and as a corollary adopts the "control test," which originated in German law, as the decisive test for distinguishing between direct and indirect commission of the offense. Kremnitzer regards the "Master criminals" as a joint perpetrator and not as a solicitor. As noted, Gur-Arye highlights the difficulties in the application of this concept.[50]

In his book,[51] Feller refers to the benefits of the "combined test," whereby the principal perpetrator is the one whose contribution to the multi-participant criminal event is expressed by behavior and a mental approach that vest him with the status of the master of the activity. Feller confines himself solely to the "combined test" and rejects the "control test" – even though his reasoning relating to the vagueness of the "control test" is insufficiently clear and obvious. According to Feller, the "Master criminals" – even though not an ordinary offender in unison – has a special status of "solicitor–aider and abettor" which is equivalent to the status of an offender in unison.

Thus, the apparent approach taken by the professional legal literature in Israel is that even when the "other" bears full criminal liability, it is still possible to convict his principal of perpetration by means of another.[52] This may be achieved by using the "functional control test" as the sole test.

---

[49] *Supra* note 38, at p. 73.

[50] M.Gur Arye, "*Modes of Commission of an Offense*," 1 *Plilim* 29, 38-41 (1990) (in Heb.).

[51] Supra note 12, at p. 197.

[52] The most prominent example in the professional legal literature is that of the head of an organization (gang) ordering the members of the gang to commit a certain criminal offense, while fully controlling them through the organizational hierarchy. From the point of view of the head of the organization, the direct perpetrator is nothing more than a "soldier" who can be replaced at any time. Thus, if the head of the organization wields control over the members of the organization, within the sense of the functional control test, then he will be considered a perpetrator through another.

C. The Israeli Law *versus* Comparative Legal Studies

(1) Anglo-American Law

The prevailing view in Anglo-American law[53] is that perpetration by means of another is intended to complete the laws of criminal complicity. It is assumed that the liability of the indirect partners is derived from the primary offense, thus, it is conditional upon the commission of the offense by the perpetrator. In cases where the person who committed the factual element of the offense does not bear criminal liability for its commission, no criminal liability can be imposed on partners for indirectly participating in its commission, and in order to allow the imposition of liability in these cases as well, it is necessary to adopt an additional principle that enables the "partners" to be seen as perpetrators of the offense, namely, the principle of perpetration by means of another.[54]

With regard to the identity of the "other" in relation to perpetration by means of another, Anglo-American law assumes that there may be situations in which the "other" bears criminal liability in respect of the commission of the offense.[55] Anglo-American law extends the concept of perpetration by means of another to every case where the indirect perpetrator caused the "other" to perform the factual element of the offense when the "other" is without liability or without criminal intent.[56]

---

[53] Cf., The American Law Institute, MODEL PENAL CODE, TENTATIVE DRAFT NO. 1 (May 1, 1953) 15-17, 43-44; G. Williams, CRIMINAL LAW, THE GENERAL PART 349-353 (London, 2nd ed., 1961); G. Williams, TEXTBOOK OF CRIMINAL LAW 315-321 (London, 1978).

[54] See G.P. Fletcher, RETHINKING CRIMINAL LAW 664-671 (Toronto, 1978).

[55] Cf., United States v. Azadian, 436 F. 2d 81 (9th Cir. 1971); State v. Haines, 51 La. Ann. 731, 25 So. 372 (1899).

[56] *Cf*., Title 18 Article 2(b) of the United States Penal Code, as amended in 1981, Article 2.06(2)(a) of the Model Penal Code (The American Tentative Draft, Law Institute, Proposed Official Code, 1962) No. 1, 1953, at pp. 17-18, R.M. Perkins, CRIMINAL LAW 644-664 (Mineola, New York, 2nd ed., 1969); A. Dashwood, *Logic and the Lords in Majewski*, CRIM. L. REV. (1977) 532, 544; S.C. Smith & B. Hogan, CRIMINAL LAW 113 (London, 4th ed., 1978); *Thornton* v. *Mitchell* [1940] 1 All E.R. 339, *Giles* v. *United States* 84 F 2d. 943 (1936); H. Silving, CONSTITUENT ELEMENTS OF CRIME 135-136, 153 (Springfield Illinois, 1967).

(2) Continental Law

The conventional approach in most Continental legal systems is that the perpetrator by means of another must be approached in the context of the rules pertaining to the perpetrator of the offense regardless of the laws of complicity. The premise is that there is no difference between the case where the actor performs the factual element of the offense himself and the case in which he uses an innocent agent as an "instrument" to commit the crime.[57] Thus, one must see the perpetrator of the offense as the one who committed the factual element of the offense directly or through an innocent agent. Continental legal systems limit the nature of the "other" person to one who does not bear criminal liability, for example, a minor or an insane person.[58]

In distinguishing between direct and indirect commission of an offense, most Continental legal systems offer the "control test" as the decisive test for the distinction; this test originated in German law. The "control test" was designed to be inclusive, giving expression both to the offender's mental attitude towards the offense and to his objective and factual contribution to the commission of the crime. The premise is that the term "perpetrator" carries the same significance in all forms of commission of the offense. The control, therefore, is functional in nature. Each of the perpetrators has, together with the others, control over the development of events, so that each can, by withdrawing from the joint venture – thwart the plan. The perception of control is not limited to cases in which the indirect perpetrator acted with actual intent; it also covers the area of criminal thought – which in the Continent does not include indifference.

VI. De Lege Ferenda

As has been seen so far, this article embraces a multitude of topics and sub-topics. Many relate to solicitation and very many more concern perpetration by means of another. However, this article is confined to reviewing the twilight zone only.

---

[57] *Cf.*, Article 25(1) of the Federal Republic of Germany of 2002, Article 111 of the Italian Penal Code of 1930; as well as Fletcher, *supra* note 54, at pp. 39-640, and 664-671.

[58] Fletcher, *id.*, at p. 639.

This is the area which is the subject of controversy, both in the case law and in the legal literature. There have been those who have presented it as a brightly lit area free of fallacies, whereas others have sensed the mines concealed within.

Before I begin the march through my own quandaries, it is appropriate – and deserving in light of the glorious new principles which have cloaked our law – to refer to some of the concepts that have provided a compass for me in time of need.

Since the Israeli legislature has considered the principle of legality, and done so faithfully, it has affected us in many revolutionary ways. It has given rise to new principles and compelled major changes with regard to the theory of substantive criminal law. The principle of legality was a major touchstone in Amendment No. 39 of the Penal Act. It necessitated, *inter alia*, changes in the rules of criminal liability, which were founded before the amendment on English common law, and arrangements were made, distinguishing between forms of complicity and the scope of liability for conspiracy. In addition, a new interpretive approach to criminal law was developed, so that if varying reasonable interpretations could be given to the criminal law, based on its purpose, the interpretation offering the greatest leniency to the accused had to be adopted. Israeli law had already, in 1992, been imbued with this spirit, which benefits the defendant with the adoption of Basic Law:

Human Dignity and Liberty, which will, in due course, form one of the key pillars of the future constitution of the State of Israel. The year 1992 was therefore a glorious year, which established the new cornerstone of the Israeli legal system, namely, Basic Law: Human Dignity and Liberty, which subsequently achieved pre-eminent status at home, in its environment and in the country. All celebrated it, and united in praise of the theory of respect for human rights and the importance of protecting the precious constitutionality of which only an enlightened democracy can boast. So, likewise, in relation to the variety of layers, substantive and procedural, of the criminal law with its potential for harming the person, his liberty and rights with differing degrees of intensity. Even the Supreme Court – subject, like every governmental authority, to the Basic Law: Human Dignity and Liberty[59] and, pursuant to it, obliged to respect the rights under the Basic Law – marched, hand in hand, with the constitutional procession by ruling that there was an obligation to interpret the statutes enacted prior to the adoption of the Basic Law:

---

59 Article 11 of the Basic Law.

Human Dignity and Liberty in accordance with the constitutional spirit of the Basic Law.[60] This trend requires, therefore, a constitutional review of issues relating to the criminal law, the law of evidence and criminal procedure.

Against these constitutional rights, the criminal law has placed the interest of public safety and the interest of the discovery of the truth through the criminal process, which too is a fundamental and major value in a constitutional democratic regime. Clearly then, fundamental rights have a social price, expressed in the Limitation Clause set out in the Basic Law.[61] Therefore, the legislature is no longer free to determine for itself the point of balance between the rights of the suspect or defendant and the interest in public safety, or the interest in the discovery of truth through the criminal process. The court is bound to comply with the constitutional standards charted in the Basic Law, including the Limitation Clause. The latter is founded, *inter alia*, on the principle of proportionality,[62] as an important instrument for safeguarding the fundamental rights protected by the Basic Law, and as an instrument for determining the ideal point of balance in the "clash" between fundamental rights and the interests under consideration.

Amendment No. 39 of the Penal Act formed the wings of the revolution transforming complicity in the criminal law, and created a distinction between the various forms of criminal complicity. This revolution leaves no doubt as to the need for said distinction. Thus, the question that remains to be asked is if by drafting the provisions relevant to our discussion, did the legislature succeed in imposing order and logic in the twilight zone relating to solicitation and the commission of offenses through another?

As noted, it is a fundamental principle of criminal law that one must adhere to a literal interpretation of the law, one derived from the clear language of the law, and one that provides the greatest benefit to the defendant.

---

60 See Cr. Applic. 537/95 *Ghanimat* v. *State of Israel*, 49(3) P.D. 355, at p. 414. Even though the court did not make an unequivocal determination in this regard, the majority agreed that the Basic Law influences the interpretation of laws preceding it. See also HCJ 4541/94 *Miller* v. *Minister of Defense,* 49(4) P.D. 94, at p. 138.

61 Article 8 of the Basic Law.

62 See D. Dorner, "Proportionality," **in** A. Barak and H. Berenzon, THE BERENZON BOOK 281 (vol. 2, Nevo Press, Jerusalem, 2000) (in Heb.).

As this is the theory that has taken root in our law, I shall abide by the spirit of that theory and use it to illuminate the clear principles requiring clear distinctions to be drawn between solicitation and perpetration by means of another. As noted, this distinction is required by the key differences between direct and indirect criminal complicity.

First, the hierarchical ranking, imposing one's will and freedom of choice: commission of an offense through another entails a clear hierarchy between the principal, *i.e.*, the perpetrator by means of another, and the "other." This hierarchy is reflected in the principal's advantage in understanding, compared to the "other," or by the imposition of the principal's will on the "other." Either way, control is exercised by denying the "other's" ability to choose between alternatives, so that the transformation of the "other" into an instrument wielded by the principal describes (with a rhetorical flourish) a state of mind or fact, whereby the "other" is devoid of any autonomy or ability to make decisions, or at minimum the ability to weigh, negotiate and formulate a position. In contrast, the activities of the solicitor – vis-à-vis the solicitee – take place, primarily, in the external sphere. For, the solicitor and the solicitee are equal, and one has no advantage over the other, apart from the fact that the solicitor acts to urge or encourage the solicitee to perform a criminal offense.

This does not accord the solicitor a hierarchical status that is superior to the solicitee's, nor any other advantage; since the decision remains in the hands of the solicitee, who will be persuaded or encouraged if he so wishes, or conversely remain unmoved, if so he decides. The solicitee is, therefore, the master of himself. It should be noted, that in contrast to the terminology "instrument in the hands," acts of "persuasion and encouragement" require that the "other," *i.e.*, the solicitee, should not be an instrument in the hands of the solicitor, but rather someone with the ability to form an autonomous opinion. Accordingly, and this must be emphasized, the activities of the solicitor are limited to the mental plane only and do not encompass physical influence, in the sense of the *actus reus*. In contrast, the essence of perpetration by means of another is the transformation of the "other" into an instrument in the hands of the principal, and it is immaterial on which plane he becomes an "instrument" of the principal.[63]

[63] This is my view. I shall refer to this point more extensively below.

Thus, it is the imposition of the will that distinguishes the commission of an offense by means of another, and alongside, the hierarchy between the "perpetrator" and the "other." This is distinct from the position of the solicitor and the solicitee, where the will of the solicitee may be affected by the thoughts of the solicitor, but nonetheless he retains his own will, so that he and the solicitor are equal in terms of hierarchy. While the solicitee enjoys freedom of choice regarding the criminal act, the "other," in the context of commission of an offense through another, does not enjoy this freedom.

Second, the nature of the "other": there is no doubt that the solicitee, *i.e.*, the direct perpetrator, must be a person with the capacity to be criminally liable, as otherwise he will express the classic case of the "other" who forms an "instrument" in the hands of the principal, and who may be classified as the "other" for the purpose of perpetrating an offense by means of another. This conclusion also follows from the language of Article 30 of the Penal Act, as well as from its purpose, as it seems likely that the phrase "persuasion and encouragement" characterizes a person capable of being criminally liable, and not otherwise, such as a minor or an insane person. In contrast, the definition of "other" operating within the framework of perpetrating an offense by means of another is not clear or sharp, so that both the language and the purpose of Article 29(c) of the Penal Act require a position to be taken on this matter.

Therefore, it is clear that the list appearing in Article 29(c) of the Penal Act is illustrative only, as the legislature employed the words "such as." At the same time, one may question whether this list indicates that the unlisted statuses that could have been added, should relate only to cases in which the "other" does not bear criminal liability.

Thus, we must recall that one of the main compasses for distinguishing between solicitation and perpetration by means of another is that "other," or more precisely, the situation in which he finds himself. Indeed, the legal literature reflects varying views. There have been those who have suggested that there may be cases in which even a person who bears criminal liability will fall into the rubric of the "other," in terms of perpetration by means of another, whereas others have argued that the illustrative list exclude such a possibility; save that I cannot agree with this last postulation.

In the competition between language and purpose, I have first chosen the language, partly because there is no material contradiction between the two, and both lead to the same conclusion. First, the wording of Article 29(c) of the Penal Act, including the illustrative list therein, does not, in any way, negate the possibility whereby the "other" will bear criminal liability.[64] The principal point of the wording of the Article is to transform the "other" into an "instrument" of his principal. This language provides a number of examples whereby the "other" is an "instrument" in the hands of his principal, even though he bears criminal liability.[65] Moreover, the purpose underlying the principle of perpetration by means of another – a purpose I have described above – requires only the possibility of a situation whereby the "other" is a person capable of bearing criminal liability, and at the same time comprises an "instrument" in the hands of his principal. This is my theory and I shall give some examples:

Take for example the case where even though the "other" bears criminal liability, he still comprises an "instrument" in the hands of his principal – such as where "economic pressure" is exerted – and, consequently, this state of affairs can be classified as perpetration by means of another. Can it not be said that economic pressure has, under certain circumstances, the power to transform the "other" into an "instrument" in the hands of his principal, or at least is it not possible to conceive of such a situation in today's reality?! Should one say otherwise – can one really claim that this is only a case of "psychological stress" which falls within the confines of solicitation? Given that this is not likely; can one really assert that this is a case of "duress" falling within the alternative ambit of Article 29(5) of the Penal Act? Either way, there is no doubt, if only in light of contemporary reality, that the "other" may become, by virtue of economic pressure, an "instrument" in the hands of the principal, although though it does not meet the classic definition of "duress," and therefore he will bear criminal liability.

---

[64] *Cf.*, article 25(3)(a) of the Rome Statute of the International Criminal Court on International Individual Criminal Responsibility of 1998 (hereinafter: **the Rome Statute**). Although it might be argued that while it is an understandable position for the Rome Statute, as it seeks to enlarge the scope of criminal responsibility for criminals who commits international crimes; it should not be the position for national criminal law systems; which ought to narrow the scope of criminalizing actions, including derivative criminal responsibility.

[65] I shall suggest some examples below.

Another example is illustrated in the following question: what is the legal status of Reuben, who is a member of a criminal organization, and as such is but a "soldier" obeying every order given by the supreme "commander?" On the other hand, one can ask, what is the legal status of a soldier who obeys any illegal order? What is the status of a soldier who carries out a manifestly illegal order? Even more; what is the status of a "policeman," such as Eichmann, who served in this capacity in the shadow of the Nazi German regime, when being subject to Nazi law - given that it is a valid law? In general, this, therefore, is the situation describing the case of the "Master criminals."

Taking the example of the soldier and the illegal order, if the order is simply illegal, then, according to prevailing Israeli law, the soldier must obey the command and, in turn, enjoy the protection of the justifying defense for acting under the color of law; which is set out in the illustrative list presented in Article 29(c) of the Penal Act. However, when the order is, in principle, manifestly illegal, the same soldier must disobey the order; he retains the ability to make the final decision as to whether to obey the prohibited order and, as a corollary, be held criminally liable, or refuse to obey. This situation is indeed similar in nature to solicitation, but solicitation requires an act of persuasion or encouragement, and both of these are absent in this situation. Accordingly, given that the soldier obeyed the manifestly illegal order, and given that it is not a case of solicitation, it is still not a case of perpetration by means of another, precisely because of these problematic cases, where the soldier cannot readily identify whether the command should be characterized as being merely illegal or manifestly illegal.

These questions and these doubts draw us back to the same concerns regarding the issue of the status of the "Master criminals." This form of commission is characterized by two main characteristics that imbue the issue with greater complexity, particularly when compared to the above discussion on the question of the illegal command. In this context, first, the "other" bears full criminal liability; second, the "other" is a "soldier" who does not refuse the orders of the "supreme commander," asks no questions and is merely an "instrument" in the hands of the "supreme commander." In my opinion, the case of the "Master criminals" cannot be one of solicitation, as the *actus reus* of solicitation, *i.e.* persuasion or encouragement, is absent. Yet, the "other" is a person criminally liable, and concurrently, he is an "instrument" in the hands of the "supreme commander."

In my view, the purpose of perpetration by means of another, leads to only one conclusion, and that is that the "Master criminals" is a perpetrator by means of another. At the same time, this classification requires us to address the position of the "other" in the following context: should he really be exempted from criminal liability, by virtue of being an "instrument" in the hands of the "supreme commander?" Should this fact really be considered with respect to punishment? Or, what should the legal system do? The legislature has not yet given answers to these questions, and the legal situation as reflected in the statutory language provides a laconic picture of a major statutory arrangement originating from Amendment No. 39 of the Penal Act. Therefore, the final decision is in the hands of the legislature which should clarify its position.

Indeed, in the current legal state of affairs, there are situations, as mentioned, in which even a person, who is criminally liable, can be the "other" in the context of perpetration by means of another. The legislature has not yet considered this possibility. Certainly, there may be situations which the legislature does not wish to embrace within a statutory arrangement, including its purpose, the situation of "economic pressure," or perhaps it may prefer to institute a special arrangement for the case of the "Master criminals." Nonetheless, the principle of legality requires a clear answer to be given, and this has not yet been done. In doing so, the legislature will position the principle of legality as its path, and Basic Law: Human Dignity and Liberty, which prohibits the use of man as an instrument, as the torch to light the way. The contemporary language of Article 29(c) of the Penal Act contradicts the fundamental principles of criminal law – the principle of certainty and the principle of legal clarity. For my part, and given that there is doubt or multiple reasonable interpretations, the basic rule requires that we follow a path that most benefits the defendant, namely, the interpretation offering him the greatest leniency. This approach is also necessitated by the fundamental principles of criminal law and, of course, Basic Law: Human Dignity and Liberty.

VII. Conclusion

According to the language of the Penal Act, the distinction between solicitation and perpetration by means of another is clear, but the language of the law does not preclude the existence of other cases; cases which fall within the twilight zone.

The twilight zone, in its current form and characteristics, can be subject to different interpretations, and consequently the work of the legislature has not yet ended. When discussing the problematic situations and establishing a more successful order, the legislature should bear in mind the fundamental principles I have discussed above. Additionally, the legislature should bear in mind that the solicitor is the spiritual father of the commission of the offense; he is the intellectual perpetrator. At the same time, the anti-social element of solicitation and the associated guilt are inferior to those of the direct perpetrator; as the solicitor does not have the courage and the potential criminality to commit the offense himself. Given that perpetration by means of another is more serious than direct commission of the offense, it is necessarily more severe than solicitation. The punitive leniency shown to the solicitor is therefore facultative leniency (by permission). In view of those cases in which the solicitor deserves more serious punishment than the principal offender, he judge is not required to show leniency towards the solicitor. But this is a subject that is worth its own fundamental discussion, when the need arises in accordance with the maxim: let sleeping dogs lie. In this context, the remarks of Fyodor Dostoyevsky are apt:

But that is the beginning of a new story – the story of the gradual renewal of a man, the story of his gradual regeneration, of his passing from one world into another, of his initiation into a new unknown life. That might be the subject of a new story, but our present story is ended.[66]

[66] F. Dostoyevsky, CRIME AND PUNISHMENT 608 (*Yediot Ahronot* Pub., 2001) (in Heb.).