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BOOK REVIEW ESSAY

BOUNDARIES OF CRIMINAL LIABILITY: PARTICIPATION IN CRIME, PREPARATORY OFFENCES AND OMISSIONS

Review Essay of *Core Concepts in Criminal Law and Criminal Justice: Anglo-German Dialogues* (edited by Kai Ambos and others, 2020)

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The book Core Concepts in Criminal Law and Criminal Justice: Anglo-German Dialogues *is the first volume of an Anglo-German project which aims 'to explore the foundational principles and concepts that underpin the different domestic systems and local rules'. It offers comparative perspectives on German and Anglo-American criminal law and criminal justice as 'examples of the civil law and the common law worlds'. The comparisons 'dig beneath the superficial similarities or differences between legal rules to identify and compare the underlying concepts, values, principles, and structures of thought'. The review essay focuses on the topics of omissions, preparatory offences, and participation in crime, all of which extend the typical criminal liability. It presents the comparative German and Anglo-American perspectives discussed in the book with regard to each topic and adds the perspective of Israeli criminal law. It points out the features common to all these topics as an extension of criminal liability and discusses the underlying considerations that justify the criminalisation of omissions, preparatory offences, and participation in crime. In evaluating whether extending criminal liability in these contexts is justified, the review essay suggests reliance on two main notions: that of 'control over the commission of the offence' and that of 'liberty (or personal freedom)'.*

Keywords: German, Anglo-American and Israeli criminal law, participation in crime, preparatory offences, criminal omissions

1. INTRODUCTION

The book *Core Concepts in Criminal Law and Criminal Justice: Anglo-German Dialogues*[1] is the first volume of an Anglo-German project which aims 'to explore the foundational principles and concepts that underpin the different domestic systems and local rules'.[2] It offers comparative perspectives on German and Anglo-American criminal law and criminal justice as 'examples of the civil law and the common law worlds'.[3] The comparisons 'dig beneath the superficial similarities or differences between legal rules to identify and compare the underlying concepts,

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[1] Kai Ambos, Antony Duff, Julian Roberts, Thomas Weigend and Alexander Heinze (eds), *Core Concepts in Criminal Law and Criminal Justice: Vol 1 Anglo-German Dialogues* (Cambridge University Press 2020).
[2] Kai Ambos and others, 'Introductory Remarks' in Ambos and others, ibid, 3, 5.
[3] ibid.

values, principles, and structures of thought'.[4] A project that attempts 'to see whether it is possible to articulate a common grammar or set of foundational concepts that could provide the basis for productive trans-jurisdictional discussion and progress'[5] is extremely important for both the internationalisation of criminal law and the development of domestic criminal law.

It would be impossible to do justice to the richness of the book and the variety of its topics by reviewing the book in its entirety. Therefore, in this review I will limit myself to the topics discussed in Chapters 2, 3 and 4 of the book – omissions, preparatory offences, and participation in crime – all of which extend typical criminal liability. I will present the comparative German and Anglo-American perspectives discussed in the book with regard to each topic and will add the perspective of Israeli criminal law. I will then evaluate the underlying considerations that justify the criminalisation of omissions, preparatory offences, and participation in crime. In doing so I will also point out the features common to all these topics as an extension of criminal liability and will offer some additional insights.

Before doing this, and in order to explain why the Israeli perspective might make an important contribution to a project aimed at exploring 'foundational principles and concepts that underpin the different domestic systems',[6] let me present, briefly, the origins of the Israeli Penal Law, which reflects the mixed influence of both common law and German law.

The Israeli Penal Law is based on the Criminal Law Ordinance, which was enacted in 1936, during the British Mandate over Palestine, by the British High Commissioner.[7] The Ordinance largely codified common law, as did other criminal codes enacted by the British Empire in its colonies.[8] The Criminal Law Ordinance remained in force after Israel declared its independence in 1948 and its official language continued to be English. The official language of the various amendments to the Ordinance enacted by the Israeli Parliament, on the other hand, is Hebrew. In 1977 the Criminal Law Ordinance was officially translated into Hebrew, and all the amendments that had been enacted by the Israeli Parliament were incorporated into it. This resulted in the Penal Law of 1977,[9] which is still in force.

Based as it was on common law, the General Part of the Penal Law of 1977 was very slim and did not include fundamental principles or definitions of basic concepts, whereas the specific offences defined in the Specific Part of the Penal Law were detailed. In 1994 a new General Part of the Penal Law was enacted.[10] The new General Part is based partly on common law and partly on German criminal law.

[4] ibid 6.
[5] ibid 3.
[6] ibid 5.
[7] *The Palestine Gazette*, 28 September 1936, 633, 973.
[8] For the exact sources of the Criminal Law Ordinance, see Norman Abrams, 'Interpreting the Criminal Code Ordinance, 1936: The Untapped Well' (1972) 7(1) *Israel Law Review* 25; Yoram Shachar, 'The Sources of the Criminal Code Ordinance 1936' (1979–80) 7 *Iyuney Mishpat* [*Tel Aviv University Law Review*] 75 (in Hebrew).
[9] *Laws of the State of Israel* (Special Volume, Penal Law) 5737-1977.
[10] Penal Law (Amendment No. 39) (Preliminary and General Part), 1994, *Laws of the State of Israel*, 1481, 348, 23 August 1994.

The influences of both common law and German law on the General Part of the Israeli Penal Law will be revealed below in my discussion of omissions, preparatory offences, and participation in crime. I will discuss these topics in reverse order for reasons that will become apparent during the discussion.

2. PARTICIPATION IN CRIME

Chapter 4, written by Antje du Bois-Pedain, discusses the topic of extending criminal liability beyond the liability of an offender who personally commits the offence to 'other persons who are complicit in [the commission of the offence] and therefore share responsibility for its commission'.[11]

While presenting the comparative perspective, the chapter emphasises that:[12]

> [t]he criminal law of England and Wales … only recognises the basic distinction between principals and secondary parties and channels the liability of everyone who is not a direct perpetrator through the accessorial route. The accessorial route … includes not just standard secondary parties (those who aid, encourage or instigate the principal's offence), but also those who acted with a common purpose but did not in their own person commit the *actus reus* of the offence in whole or in part.

The chapter further relates to the doctrine of common purpose, which makes it possible to attribute criminal liability for further offences committed by one of the participants in excess of the original plan. The common law approach is that liability for further offences is attributed to the other participants on the basis of foresight.[13] Since the 'key 2016 judgment in the conjoined cases of *Jogee* and *Ruddock*',[14] these cases are treated under standard secondary liability, according to which 'S's liability … depends on whether he at least conditionally intended to encourage or assist that further crime'.[15] The chapter notes that 'post-*Jogee* case law may further widen the already problematically loose notion of "participation by encouragement", with mere intentional participation in the base crime arguably sufficing as encouragement of the further crime'.[16]

While presenting the German perspective, the chapter shows that the notion of 'perpetrator' (the principal offender) is broader than that in common law and includes '(1) anyone who commits the offence himself or through another (direct and indirect perpetrators); and (2) anyone who commits the offence jointly with others (co-perpetrators)'.[17] The doctrine of co-perpetrators was developed for actors whose actions constitute a criminal offence only when taken together, 'whereas their respective individual actions viewed in isolation would not amount to that offence'.[18]

[11] Antje du Bois-Pedain, 'Participation in Crime' in Ambos and others (n 1) 94, 94.
[12] ibid 104.
[13] ibid 106.
[14] ibid 106; *R v Jogee*; *Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7.
[15] Du Bois-Pedain (n 11) 111.
[16] ibid.
[17] German Penal Code, s 25; Du Bois-Pedain (n 11) 112.
[18] Du Bois-Pedain (n 11) 115.

Unlike the common law approach, and because of the 'individualistic doctrine of co-perpetrators',[19] under German criminal law the co-perpetrator is not criminally liable for further offences committed by the other co-perpetrator in excess of the common plan. However, in cases of escalating violence the co-perpetrator could be held liable for reckless/negligent offences resulting from the basic offence in which she took part.[20]

The secondary parties to the offence, under German criminal law, include either the instigator, who intentionally induces the perpetrator to commit an intentional crime,[21] or the aider and abettor who intentionally helps the perpetrator to commit a crime of intention.[22] Unlike common law, where all parties to the offence – perpetrator, instigator and aider and abettor – are liable for the same punishment, under German criminal law '[i]nstigators are liable to the same punishment as principal offenders, whereas mere aiders and abettors benefit from a compulsory reduction of the penalty scale'.[23]

The Israeli Penal Law follows the German distinctions between modes of participation in crime. Like German criminal law, under the Israeli Penal Law the perpetrator[24] includes not only those who personally commit all the elements of the offence, but also those who commit the offence through another who serves as a tool in their hands for committing the offence,[25] as well as co-perpetrators who commit the offence jointly, whether or not each of them fulfils all the elements of the offence.[26] The secondary parties include the instigator[27] and the aider and abettor.[28] As in German criminal law, the instigator is liable for the same punishment as the perpetrator, whereas the aider and abettor is liable only for half of the punishment prescribed for the offence.[29]

Whereas the basic modes of participation in crime under the Israeli Penal Law follow German criminal law, the common law doctrine of 'common purpose' has found its way into Israeli law with regard to further offences that exceed the original plan. Under the Israeli Penal Law all parties to an offence will be held liable for further offences committed by the perpetrator provided that they could reasonably have foreseen the possibility that the offence would be committed. As in the traditional approach of common law, the co-perpetrator will be held liable for additional offences committed by the other co-perpetrator on the basis of reasonable foresight.[30] Both the

[19] ibid.
[20] ibid 115–16.
[21] German Penal Code, s 26.
[22] ibid s 27. For a discussion of the secondary party under German criminal law, see Du Bois-Pedain (n 11) 112–13.
[23] Du Bois-Pedain (n 11) 117.
[24] Defined in Israeli Penal Law, s 29.
[25] ibid s 29(c).
[26] ibid s 29(b).
[27] ibid s 30.
[28] ibid s 31.
[29] ibid s 32.
[30] ibid s 34A(a)(1). The section provides an exception, according to which 'had the … additional offence been committed with intent, the co-perpetrator shall bear liability for such as for an offence of indifference only'. In 2002 the Israeli Supreme Court was asked to review the constitutionality of this section on the ground that it infringes human dignity by enabling both the attaching of criminal liability that does not reflect the defendant's

instigator and the aider and abettor, on the other hand, will be held liable only for further offences of negligence, the *actus reus* of which was committed by the perpetrator (provided that there is such an offence).[31] The liability of the instigator and the aider and abettor for negligent offences in this context resembles the liability of the co-perpetrator for reckless/negligent offences in cases of escalating violence under German criminal law.

After presenting the comparative discussion, Du Bois-Pedain offers a model for distinguishing between the various modes of participation in crime. The model is based on the premise that the distinction between modes of participation in crime must capture the gravamen of each participant's unique wrong.[32] Accordingly, she offers three different participatory paradigms: 'the mediated action paradigm ("acting through another"), the concerted action paradigm ("acting with another") and the parallel action paradigm ("acting alongside another")'.[33]

The mediated action paradigm includes 'standard cases of "assisting and encouraging" as well as cases of innocent agency or what German law classifies as indirect perpetration'.[34] In all these cases '[t]he accessory's wrong is the combined wrong of leading or supporting P [the perpetrator] on the path to crime, and of thereby conducting an indirect attack (via P) on the interest protected by the principal offence in question'.[35] The concerted action paradigm relates to co-preparators, as defined by German criminal law. In cases of co-perpetrators 'the gravamen of the wrong lies in doing the criminal or harmful thing together. The paradigm allows us to treat the actions of each of the participants as an action performed by all'.[36] The parallel actions paradigm relates to 'spontaneously erupting violent fights'.[37] This paradigm includes 'group offending in the sense that offences are committed during an incident involving more than one participant'.[38] However, because of the lack of 'interwoven intentions'[39] such cases do not fall within the concerted action paradigm of co-perpetrators; nor do they fall within the mediated action paradigm because of the

fault and stigmatising a defendant as a murderer on the basis of negligence. The Court, nonetheless, approved the constitutionality of the section: see Crim A 4424/98 *Silgado v State of Israel* 2002 PD 56(5) 529. For criticism of the court ruling in this regard, see Miriam Gur-Arye and Thomas Weigend, 'Constitutional Review of Criminal Prohibitions Affecting Human Dignity and Liberty: German and Israeli Perspectives' (2011) 44 *Israel Law Review* 63, 86–88; Hadar Dancig-Rosenberg, 'Partnership Responsibility for an Unintended Crime: Thoughts Concerning Blame, Proportionality and an Alternate Balancing Test: A Deontological Analysis in Response to Cr. 442/98 *Silgado v. The State of Israel*' in Dror Arad-Ayalon, Yoram Rabin and Yaniv Vaki (eds), *David Weiner Book on Criminal Law and Ethics* (The Israel Bar Publishing House 2009) 693–766 (in Hebrew); Adiel Zimran, 'Trends in Israeli Constitutional-Criminal Law in Light of a Conceptual Analysis of "Human Dignity"' (2019) 49 *Mishpatim* [*The Hebrew University Law Review*] 383, 404–07 (in Hebrew). The *Silgado* ruling was overturned in 2019 with the reform of homicide offences enacted by Penal Law (Amendment No 137) 2019, *Laws of the State of Israel* 2779, 10 January 2019, 230. According to the Penal Law, s 301B(3), in cases where the further offence is murder the co-preparator will be liable for 'homicide in circumstances of mitigated responsibility'.

[31] Israeli Penal Law, s 34A(a)(2).

[32] Du Bois-Pedain (n 11) 122.

[33] ibid.

[34] ibid 123–24.

[35] ibid 126.

[36] ibid 127.

[37] ibid 128.

[38] ibid.

[39] ibid.

lack of influence on the direct offender.[40] In cases of parallel actions, liability should be imposed on everyone who was involved in the violence:[41]

> [according to his or her own] connection (including through his or her early-stage behaviour) to the harmful outcome. In situations where S [the secondary party] was not the one to strike the fatal blow, S's own acts are linked to this fatal outcome only to the extent that S's contribution created a risk that has manifested itself in [the victim's] death.

Let me just note that Du Bois-Pedain's claim that in cases of 'spontaneously erupting violent fights' everyone should be liable separately, according to her own connection with the harmful result, implies that the parallel actions paradigm ought not to be treated as a mode of participation in crime, as suggested by Du Bois-Pedain.

I share the basic premise of Du Bois-Pedain that the distinction between the various modes of participation in crime should reflect each participant's unique wrong. However, I believe that her suggested 'mediated action paradigm' is too wide and includes different kinds of wrong: that of committing an offence through another (the innocent agent), which is significantly different from that of the secondary parties (the instigator and the aider and abettor). To show why, I will offer below a brief general account of the perpetrator as a principal offender,[42] which is missing from Du Bois-Pedain's discussion; the account will also provide an additional explanation for classifying both the instigator and the aider and abettor as secondary parties.[43]

The perpetrator is the one who has control over commission of the offence. In the typical case, when the perpetrator personally commits the offence, her control over the commission is obvious: the decision whether to commit the offence and how to commit it is in the perpetrator's hands. In cases of co-perpetrators committing the offence together, control over its commission is in the hands of both perpetrators, who execute the common purpose to commit the offence together. In cases of committing an offence through an innocent agent,[44] control over commission of the offence is in the hands of the indirect perpetrator, who uses the innocent direct perpetrator as a tool for committing the offence. The indirect perpetrator in such cases manipulates the direct perpetrator into committing the offence either by coercing her to commit the offence through

[40] ibid 129.
[41] ibid.
[42] I have elaborated on the nature of the perpetrator elsewhere: see Miriam Gur-Arye, 'Commission of an Offence: Various Modes' (1990) 1 *Plilim* [*Israel Journal of Criminal Justice*] 29 (in Hebrew). See also Mordechai Kremnitzer, 'The Perpetrator in Criminal Law: A Profile" (1990) 1 *Plilim* [*Israel Journal of Criminal Justice*] 65 (in Hebrew).
[43] For elaboration on the nature of accessorial liability, see Miriam Gur-Arye, 'A Theory of Complicity – Comment' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford University Press 1987) 304–10; Hadar Dancig-Rosenberg, 'The Justifications of Criminalizing Secondary Parties: Towards Rationales-based Doctrine' (2017) 46(1) *Mishpatim* [*The Hebrew University Law Review*] 5 (in Hebrew).
[44] I have elaborated on the notion of committing an offence through an innocent agent elsewhere: see Miriam Gur-Arye, 'Committing an Offence through Another' in Aharon Barak and others (eds), *Festschrift in Memory of Judge Sussman* (Daf-Chen 1984) 319 (in Hebrew). See also Shachar Eldar, *Human Tools – Perpetrating Crime through Others and Heading Criminal Organizations* (Am-Oved 2009) 19–34 (in Hebrew).

threat (duress) or by taking advantage of her lack of understanding (irresponsible agent) or lack of knowledge (mistake). In cases of committing an offence through another, the direct perpetrator is innocent; she does not express any willingness to commit the offence and she is not the one who chooses to commit an offence (as opposed to doing the acts constituting that offence). The choice to commit an offence in such cases is in the hands of the indirect perpetrator. In cases of committing an offence by another it is indeed the indirect perpetrator who conducts 'an indirect attack (via P [the perpetrator]) on the interest protected by the principal offence in question',[45] as Du Bois-Pedain explains in characterising the mediated action paradigm. An attack on a protected interest requires control over the attack. Such control exists in cases of committing the attack through an innocent agent. However, such control is absent in cases of instigating and of aiding and abetting.

Both the instigator and the aider and abettor leave the choice of whether to commit the offence and how to commit it in the hands of the principal offender. The instigator convinces the perpetrator to commit the offence, the aider and abettor assists her, but they subject themselves to the perpetrator's choice: had the perpetrator decided, for her own reasons, not to commit the offence, the offence would not have been committed and there would have been no attack on the protected interest. The instigator and the aider and abettor lead or support the perpetrator 'on the path to crime', as Du Bois-Pedain puts it, but at the same time they subordinate themselves to the choice of the perpetrator to commit the offence. Because of such subordination, the instigator and the aider and abettor are classified as secondary parties. The indirect perpetrator, who commits the offence by means of an innocent agent, on the other hand, does not subordinate herself to the innocent agent. On the contrary, as clarified above, the indirect perpetrator manipulates the innocent agent into commission of the offence. In the absence of such subordination the indirect perpetrator is justifiably classified as a principal offender.

To conclude, I share Du Bois-Pedain's conclusion that 'English law's strategy of extending standard principles of accessorial liability across the full range of the participatory paradigms must be rejected. German law fares better in this regard'.[46] However, I do not share her further conclusion that German law 'still misallocates indirect perpetration cases, which are properly placed with standard "assisting and encouraging" cases in the same participatory paradigm'.[47] I believe that the liability of the indirect perpetrator should be classified as principal liability rather than secondary liability, and should be included within the definition of perpetrator, as defined under both German and Israeli criminal law.

3. PREPARATORY OFFENCES

Chapter 3, written by Stefanie Bock and Findlay Stark, discusses the topic of preparatory offences which 'criminalise conduct perceived to carry the risk that, in the future, a "completed" crime will be committed'.[48] Preparatory offences extend criminal liability 'beyond the limits of the *actus reus*

[45] Du Bois-Pedain (n 11) 126.
[46] ibid 130.
[47] ibid.
[48] Stefanie Bock and Findlay Stark, 'Preparatory Offences' in Ambos and others (n 1) 54, 54.

of attempts'.[49] The basic premise of the chapter is that criminalisation of preparatory offences, which 'are further away from the commission of the completed offence',[50] requires special justification and are subject to constraints stemming from the proportionality principle. The proportionality principle 'prevents the state from excessive interventions into the personal freedoms of its citizens'[51] and 'reminds legislatures that the criminalisation of preparatory acts requires careful justification if illegitimate state intervention is to be avoided'.[52] In light of the proportionality principle, the chapter offers a thorough discussion of the 'legitimate boundaries of preparatory offences'.[53] The discussion relates mainly to the 'general offences of preparation'[54] as examples.

According to the chapter,[55] '[t]he general offences of preparation' relate in English law to 'encouraging or assisting crime[56]… and statutory conspiracy[57]'. Under German criminal law the general offences of preparation are narrower and include '(i) attempted instigation of a felony; (ii) declaring one's willingness to commit a felony; (iii) accepting another's offer that she will commit a felony; (iv) agreeing with another person to commit a felony or to induce the commission of a felony'.[58] The German criminal code criminalises an additional general preparatory offence, that of 'public incitement to commit a crime'.[59]

I would argue that the offences discussed in the chapter as 'general offences of preparation' do not belong to preparatory offences that extend criminal liability beyond an attempt. These offences belong rather to participation in crime, and they extend the liability of either the instigator ('attempted instigation of a felony' according to German criminal law) or the aider and abettor ('encouraging or assisting crime' according to English law) to the stage of an *attempt* to participate in the crime, rather than to preparation for such participation. Conspiracy does indeed extend the liability of co-perpetrators to the preparatory stage. The question whether criminalising conspiracy is justified, however, cannot be evaluated separately from the notion of participation in crime and without considering the unique nature of 'common purpose' that characterises the co-perpetrators.

The chapter does not totally ignore the fact that these offences relate to participation in crime. Thus, for example, in relating to the 'preparatory offence' of encouraging or assisting crime, the chapter clarifies that the offence 'covers situations of putative complicity. Were P to proceed to commit the encouraged/assisted offence, D [the defendant] would be liable as an accessory'.[60] In presenting the German perspective the chapter explicitly mentions that the 'preparatory offences' are defined in section 30 of the German Penal Code, the title of which is '*attempted*

[49] ibid.
[50] ibid 56.
[51] ibid.
[52] ibid 57.
[53] ibid 65–84.
[54] ibid 58.
[55] ibid 58.
[56] Defined in the Serious Crime Act 2007 (UK).
[57] Defined in s. 1 Criminal Law Act 1977 (UK).
[58] The offences are defined in s 30 German Penal Code, and discussed in Bock and Stark (n 48) 60.
[59] Defined in s 111 German Penal Code, and discussed in Bock and Stark (n 48) 60.
[60] Bock and Stark (n 48) 59.

participation'![61] While presenting the comparative perspective, the chapter further explains that 'German law is again more restrictive [than English law]. As a general rule, it does not criminalise *attempted* aiding and abetting. §30(2) StGB [German Penal Code] applies only to agreements to commit crimes jointly, criminalising putative liability as joint principals under §25(2) StGB'.[62] Why, then, is it appropriate to classify attempted instigation and attempted aiding and abetting as general offences of preparation?

In what follows I will argue that the considerations needed to justify the extension of criminal liability to preparatory actions beyond an attempt are significantly different from those needed to justify the extension of criminal liability for participation in a crime to earlier stages, such as attempted instigation, attempted aiding and abetting, and conspiracy.

When an actor considers committing a crime by herself, control over the commission of the crime, as well as over its preliminary stages, is in the hands of the perpetrator. Her decision to commit the offence will be firmer, and more determined, as she proceeds through the different stages leading towards commission of that offence. Preparatory actions, especially when they are in and of themselves legitimate – such as purchasing a tool or gathering information – are usually performed while still deliberating the pros and cons of committing the offence with such a tool or on the basis of the gathered information. At times, preparatory actions permit the expression of anger and frustration and make any further action based on these feelings redundant. Whenever the preparatory actions as such do not pose a danger (purchasing tools, gathering information), the proportionality principle – which 'prevents the state from excessive interventions into the personal freedoms of its citizens',[63] as emphasised in the chapter – requires the state not to intervene and thus leave individuals who are deliberating whether or not to commit the offence the chance to abandon their preliminary plans of their own free will.

An attempt to commit an offence, on the other hand, belongs to the stage of commission of the offence and reflects the determination to commit it and a willingness to harm the interest protected by the prohibition of that offence. As described in the chapter, the perpetrator of an attempt who begins committing the offence poses 'a sufficiently concrete danger to a legally protected interest'; by beginning to commit the offence the perpetrator 'has shown clearly his hostile attitude towards the law' and towards the interest protected by the prohibition of the offence.[64] It follows that, generally speaking, criminalisation of preparatory actions will be justified only when the actions themselves pose enough danger to the protected interest (such as preparing an explosive device intended to be planted in a crowded place in order to kill as many victims as possible). Being involved in this kind of preparatory act also reflects a firmer decision to commit the offence and reveals hostility towards the protected interest.

As already mentioned,[65] in cases of participation in crime, on the other hand, control over committing the crime is in the hands of the principal offender, and secondary parties subordinate

[61] ibid 60 and the clarification at footnote 42 (emphasis added).
[62] ibid 67 (emphasis added).
[63] ibid.
[64] ibid 55.
[65] See the text following n 43.

themselves to her. Even when the instigator does all in her power to convince the perpetrator to commit the offence, and the aider and abettor supplies all the help needed for commission of the offence, whether or not the offence will be committed is up to the principal offender. When the principal offender commits the offence (or attempts to commit it), both the instigator and the aider and abettor will be held liable as secondary parties to that offence. When the principal offender refrains from committing the offence, the question of whether the instigator and the aider and abettor should be liable either for *attempted* instigating or *attempted* aiding and abetting does not depend on the progress of their own actions or on the firmness of their decision to participate in the crime; both the instigator and the aider and abettor have already completed all the acts required from them in order to contribute to the offence. As opposed to preparatory offences – with regard to which a special justification for their criminalisation is needed in order to prevent excessive intervention in personal freedom – in cases of attempted instigation and attempted aiding and abetting, the need for such justification is not that obvious. After all, both the instigator and the aider and abettor intended that the offence should be committed by the principal offender, and did all in their power either to convince her to commit the offence or to supply the help needed for the commission.

The need to justify the criminalisation of either attempted instigating or attempted aiding and abetting cannot be based on the constraint against 'excessive interventions into the personal freedoms' (the basic premise of the discussion in Chapter 3). Criminalising the various modes of participation in crime already restricts the freedom of the instigator and the aider and abettor by prohibiting them from either instigating the principal offender or assisting her. Criminalising attempted instigation or attempted aiding and abetting does not impose, *ex ante*, further restrictions on the freedom of the attempted instigator and the attempted aider and abettor, who have already completed all the acts required from them in order to either instigate or aid and abet the principal offender. The need for a special justification for either attempted instigation or attempted aiding and abetting stems from the unique nature of participation in crime.

The threshold of criminal liability requires sufficient danger to the interest protected by the prohibition of the offence. Such a danger is posed by the commission of the offence, either the complete offence or an attempt to commit it (and in rare cases the danger might be posed by preparatory actions). The nature of accessorial liability implies that, when the threshold of criminality is crossed and the offence is committed, all parties who contributed to the commission of the offence should be liable for its commission, according to their individual contribution to the offence and to their own degree of culpability. When the offence has not been committed by the principal offenders, the prima facie conclusion is that the protected interest has not been endangered and therefore the threshold of criminality has not been crossed. The mere fact that both the attempted instigator and the attempted aider and abettor did all in their power to contribute to the potential offence per se is not enough to cross the threshold of criminality. Imposing criminal liability for attempted instigation or attempted aiding and abetting requires a special justification showing the unique criminal wrong involved in these attempts.

Bock and Stark – who, in Chapter 3, relate to attempted instigation and attempted aiding and abetting as preparatory offences – do not ignore the significance of the principal offender's

control over commission of the offence, alongside other considerations that are relevant for justifying the criminalisation of preparatory actions. According to the authors, when 'preparatory offences … rely on D's interaction with others'[66] one needs to consider the significance of the principal offender's choice to commit the offence. They reject the 'extreme argument … that actions like planning, attempted instigating etc. of crime do not themselves endanger the protected legal good, because of P's [the principal offender's] freedom of choice. Thus, they are *never* criminalizable wrongs'.[67] They offer a 'reason for punishing the (attempted) instigator (as compared with the attempted aider or abettor)'[68] which is based on the fact that:[69]

> [the instigator] cannot fully control how the other person will act in the future. A risk is unleashed by the communication itself, and one with which the instigator has allied himself sufficiently, through seeking to create a crime that otherwise would not have been created.

I agree. Let me just add that attempted instigation creates an additional wrong, that of planting criminal ideas in the minds of others, and thereby attempting to turn them into 'criminals'. Similar reasoning might justify criminalisation of public incitement to commit a crime, as is the case in German criminal law. The inciter spreads criminal ideas among the public and thereby unleashes the risk that at least some of her audience will adopt the idea and commit the crime.[70] I further share the view of Bock and Stark that, as opposed to attempted instigation, the criminalisation of attempted aiding and abetting (or of merely encouraging or assisting, as in English law) is not justified. According to Bock and Stark, criminalisation is justified when 'D has contributed meaningfully to P's potential decision to commit a completed crime'.[71] The aider and abettor does not influence the decision of the principal offender to commit the crime; rather, she is willing to help her, if and when the principal offender decides to commit the crime.

Conspiracy is indeed a preparatory offence, which extends the liability of co-perpetrators beyond the joint commission of the offence, and beyond the attempt to commit it together, to the planning stage: it criminalises the co-perpetrators' agreement to commit the offence together. To justify the criminalisation of conspiracy one should combine the considerations relating to the justification of offences of preparation with the considerations relating to those justifying the various modes of participation in crime. Let me begin with the latter.

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[66] Bock and Stark (n 48) 71.
[67] ibid.
[68] ibid 74.
[69] ibid.
[70] For an elaboration of the nature of public incitement and its relation to attempted instigating, see Mordechai Kremnitzer and Khaled Ghannyim, 'Incitement not Sedition' in David Kretzner and Francine Kershman Hazan (eds), *Freedom of Speech and Incitement against Democracy* (Kluwer Law International 2000) 177; Miriam Gur-Arye, 'Can Freedom of Expression Survive Social Trauma: The Israeli Experience' (2003) 13(1) *Duke Journal of Comparative and International Law* 155, 192–202.
[71] Bock and Stark (n 48) 87.

Co-perpetrators, who commit the offence together, have joint control over commission of the offence. This joint control accompanies them from the very beginning: they agree to commit the offence together, they decide on the common plan, they carry out their common plan together and commit the offence jointly. This joint control also creates mutual commitment. The mutual commitment throughout all the stages fulfils the requirements that justify criminalisation of preparatory offences. It implies that as early as the preparatory stage of agreeing to commit the offence together and planning how to carry it out the co-perpetrators are determined to commit the crime together. The mutual commitment increases the risk that the completed offence will be jointly committed; such a commitment might even result in further offences being committed by one of the co-perpetrators in order to ensure the success of the 'common plan'.[72]

To conclude, the various modes of participation in a crime, as discussed in relation to the chapter by Du Bois-Pedain (Section 2 above), justify a different extension of criminal liability for the preliminary stages of each participant. The liability of the co-preparators who jointly commit the offence is justifiably extended to the preparatory stage, in which the two of them agree and plan how to commit the offence together. The liability of the instigator, who influences the perpetrator's decision to commit the offence, is justifiably extended to either an attempted instigation or to public incitement. The liability of the aider and abettor, who is willing to help the preparator in committing the offence, should be restricted to cases in which the principal offence (either the complete offence or the attempt) has been committed.

The Israeli Penal Law follows these principles. It criminalises attempted instigation[73] but not attempted aiding and abetting. The exceptional nature of attempted instigation is further reflected in the punishment. The punishment for attempting the commission of the offence is the same as the punishment prescribed for the offence;[74] the punishment for attempted instigation is half of the punishment prescribed for the offence.[75] In addition, the specific offence of conspiracy[76] permits extension of the liability of the co-perpetrators to the preparatory stage, which is when they agree to commit the offence together.

The approach of Israeli law in this regard is more or less parallel with the approach of German law, with one significant exception. Under German criminal law the extension of liability of the various parties to a crime is limited to 'felony' crimes; under the Israeli Penal Law, the extension applies also to misdemeanours. Moreover, conspiracy, as defined in the Specific Part of the Israeli Penal Law, is based on the wide common law notion of conspiracy, and includes not only a common agreement to commit an offence (whether a felony or a misdemeanour) but also an agreement to achieve a legitimate purpose by illegitimate means.[77]

[72] In the same spirit see Mordechai Kremnitzer, 'Justified Deviations from the Requirement of *Mens Rea*' (1996) 13(1) *Bar-Ilan Law Studies* 109, 120–25.
[73] Israeli Penal Law, s 33.
[74] ibid s 34c; s 27 provides that compulsory punishments are not applied to attempt.
[75] ibid s 33.
[76] Defined in the Israeli Penal Law, s 499.
[77] ibid s 500(8).

4. OMISSIONS

Chapter 2, written by Kai Ambos, discusses criminal liability for omissions. Following the German experience, the chapter distinguishes between two kinds of criminal omission:[78]

> [A] proper (genuine, authentic or separate) offence of a pure omission … [such as] the classical failure to rescue offence … [and] a commission by omission … [where] a general (part) provision defines the requirements under which crimes of active conduct can be committed by an omission causing a result – that is, by omitting to prevent a result ('improper' or 'inauthentic' offence of omission).

The moral difference between causing a harmful result and failure to prevent such a result 'is the reason why [in cases of commission by omission] omission liability always depends on a legal duty to act'.[79] German criminal law distinguishes between two kinds of duty to act: duties of (i) 'supervisor guarantors' imposed upon those who have a special responsibility over the source of the danger (such as those who own a dangerous product), and (ii) 'protector guarantors' imposed on those who have a 'special protective position with regard to certain legal interests' (such as parents with regard to their children).[80] In common law jurisdictions the focus is on the sources of the duty to act. Old common law doctrines could be invoked as sources for this duty.[81] Modern English criminal law reflects a more formalistic approach to the duty to act, the sources of which have to rely on either statute or contract; in the United States the sources of the duty to act include, in addition to statute and contract, special relationships and the assumption of care.[82]

Like modern English law, the Israeli Penal Law defines the duty to act in cases of commission by omission according to its sources – either a statute or a contract.[83] However, the Specific Part of the Israeli Penal Law includes additional duties to act in order to prevent danger to life or bodily integrity, duties that codified the common law doctrines in this regard. It is interesting to note that although these duties stem from common law doctrines, in essence they are similar to the duties imposed by German criminal law. The duties to act, according to the Specific Part of the Israeli Penal Law, are imposed either on those who have special responsibility towards the person whose life or bodily integrity is endangered (and are in parallel with the German 'protector guarantors')[84] or on those who are responsible for dangerous products or dangerous activity (and are in parallel with the German 'supervisor guarantors').[85] This last point supports the claim of Ambos that:[86]

[78] Kai Ambos, 'Omissions' in Ambos and others (n 1) 17, 21.
[79] ibid 27.
[80] ibid 28.
[81] ibid 32–33.
[82] ibid 33.
[83] Israeli Penal Law, s 18(c).
[84] ibid ss 322–323.
[85] ibid ss 325–326.
[86] Ambos (n 78) 34.

> [a] closer look at the duties to act which form the basis of omission liability in both civil and common law jurisdictions reveals great similarities both in terms of the rationale of the guarantor's responsibility and in terms of the individual duties recognized.

According to Ambos, the rationale of criminalising commission by omission in cases where the omission violates the duty to act rests on the notion of control. In civil law jurisdictions the assumption is that the 'omitting guarantor exercises, in principle *sufficient control* … over matters to prevent any harm caused by the respective source of the danger, or inflicted upon his object of protection'.[87] The notion of control, Ambos points out, is not ignored by common law jurisdictions where the requirement of control as a basis for criminal liability is acknowledged in general with regard to both actions and omissions.[88]

The difference between civil law and common law jurisdictions is more significant with regard to the general offence of pure omission, which imposes on a bystander a duty to rescue those who are in danger (Good Samaritan laws). The general failure-to-rescue offences, which are 'the paradigmatic form of a proper omission, are generally rejected in common law jurisdictions, but well entrenched in modern day civil law jurisdictions'.[89] The reluctance of common law jurisdictions to impose on a bystander a general duty to rescue 'is rooted in a liberal, rights-focused view';[90] imposing such duty within civil law jurisdictions has been based traditionally on the notion of 'solidarity'.[91] Looking at the Israeli experience, it is interesting to note that although social solidarity plays a significant role in Israel,[92] for many years the perception had been that Israel does not need to enact Good Samaritan laws: Israelis will always do all in their power to rescue people in danger.[93] When a Good Samaritan law was eventually enacted in 1998[94] the motivation was not that the criminal law was required to solve a social problem. Rather, it was enacted as a symbolic law with only a fine as its maximum punishment.[95]

In order to justify criminalisation of the general failure-to-rescue offence, according to Ambos:[96]

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[87] ibid (emphasis in original).
[88] ibid 35.
[89] ibid 39.
[90] ibid 41.
[91] ibid 44.
[92] Oz Almog, *The Sabra: A Profile* (Am Oved 1997) (in Hebrew); Danny Kaplan, 'Commemorating a Suspended Death: Missing Soldiers and National Solidarity in Israel' (2008) 35 *American Ethnologist* 413; Miriam Gur-Arye, 'The Impact of Moral Panic on the Criminal Justice System: Hit-and-Run Traffic Offenses as a Case Study' (2017) 20 *New Criminal Law Review* 309.
[93] See Maya Nestelbaum, 'Why Did Passers-by Not Jump into the Yarkon River to Rescue Yasmin Fingold?' *Globes*, 9 May 2009, http://www.globes.co.il/news/article.aspx?did¼1000447417.
[94] Thou Shalt Not Stand Idly by the Blood of Thy Neighbour Act 1998, s 4.
[95] When the bill was presented in the Knesset by MK Hanan Porat, he emphasised that '[w]e witness, *fortunately enough not in Israel,* that in New York and other cities in the world, those who see a person bleeding to death and pass by, indifferent, without giving him any help' (emphasis added) (from the Israeli Parliament discussion of the proposed Act, 'Thou Shalt Not Stand Idly by The Blood of Thy Neighbour', 1995 (first reading)).
[96] Ambos (n 78) 44.

> On the basis of solidarity, such a concept must be compatible with autonomy and liberty as the building blocks of any liberal society. The key issue then is how to resolve the tension between solidarity and liberty, inherent to any failure to rescue offence. While a formal concept of liberty does not tolerate any infringement upon one's liberty caused by duties to act in a certain way, a material concept of liberty (effective liberty) focuses on the actual (material) conditions of the exercise of one's liberty in a liberal society and conceives the duty to assist in certain, exceptional emergency situations, as a prerequisite for the fulfilment of this liberty … On that basis, a limited failure to rescue offence – limiting the duty to assist to dangers to life and limb – can be justified in general terms.

In what follows I would like to suggest that the considerations of whether it is justified to criminalise 'the classical failure to rescue offence' be extended to all cases of omission, including those of 'commission by omission'.

Criminalisation of omissions extends criminal liability, which typically is imposed upon actions that cause harm, to the failure to intervene in order to prevent that harm. The extension of criminal liability to omissions adds significant restrictions on liberty. Roughly speaking, criminalising acts that cause harm leaves individuals with the broad freedom to do almost anything except the specific acts that might cause harm. Criminalising omissions, on the other hand, leaves no such freedom: individuals who are required to intervene in order to prevent an imminent danger have to abandon their other activities in order to be able to act and prevent the danger, without any control over when and where they might be required to intervene. The need for intervention might come upon them at the worst possible time. Therefore, under the proportionality principle (discussed in Chapter 3 of the book in analysing preparatory offences), in order to prevent 'the state from excessive interventions into the personal freedoms of its citizens'[97] a special justification is required for criminalising omissions, including those which are classified as 'commission by omission'.

Ambos suggests that the justification for criminalising commission by omission (as expressed in the duties imposed by German law on the supervisor or the protector guarantor) be based on the notion of 'sufficient control'. I would suggest that sufficient control is not enough to justify criminalisation of omissions. On the one hand, as Ambos himself mentions with regard to common law, control is a prerequisite of criminal liability with regard to both actions and omissions. On the other, as explained above, control over omissions is looser than control over actions: one has no control over where and when one will be required to intervene in order to prevent a harmful result. What we need in order to justify the restriction of liberty involved in criminalising omissions is a criterion for selecting which people, among those who are able to intervene and prevent the harm, can justifiably be obliged to do so, and to what extent.

To clarify this point, let me use the example of a child who is about to drown in shallow seawater in order to spell out who should be legally obliged to rescue the child. The person who is clearly under a justified legal duty to rescue the child is the lifeguard on duty: she has taken upon herself the duty to rescue those who are about to drown at sea and has no freedom to avoid

[97] Bock and Stark (n 48) 56.

fulfilling that duty. When the lifeguard is not on duty, the child's parent is legally obliged to rescue the child: being a parent imposes a responsibility of care which by its nature restricts freedom, and a parent cannot free herself from this responsibility. The justified restriction of liberty/freedom of both the lifeguard and the parent justifies making their failure to intervene and rescue the child result in criminal liability for homicide (according to their mental attitude) in the event that the child drowns.

When neither the lifeguard nor the parent is there, should a bystander who happens to be at the beach be similarly obliged to stop whatever she is doing and rescue the child? The bystander did not take upon herself a duty (as did the lifeguard) or a status (as did the parent) that limits her freedom; nor was she involved in creating the danger to the child (such as by accidentally pushing the child into the water). In the case of bystanders there is a 'tension between solidarity and liberty, inherent to any failure to rescue offence', as Ambos points out. Various legal systems resolve this tension differently. Even in systems that are willing to impose criminal liability on bystanders for failure to rescue (civil law jurisdictions and Israeli law), liability is restricted: as opposed to the lifeguard and the parent, the bystander will not be held liable for the harmful result she has not prevented (the child's death within various homicide offences); the bystander will rather be liable for a specific offence of failure to rescue, the punishment for which is relatively lenient: maximum imprisonment of one year under section 323c of the German Criminal Code, or a fine under Israeli law.

The above analysis shows that the general offence of failure to rescue, which Ambos considers as 'the paradigmatic form of a proper omission',[98] is not substantively different from offences of commission by omission (when death or harm to bodily integrity is involved). Criminal liability for all these offences is imposed for failure to intervene in order to prevent harm and to rescue those whose life or bodily integrity is imminently endangered. The difference between the offences reflects the balance between the restriction of liberty involved in imposing a duty to intervene, on the one hand, and the need to save human life or bodily integrity, on the other. Those who have special responsibility either for the source of the danger or for the person endangered will be held liable for the result they have failed to prevent (commission by omission); bystanders who have failed to intervene, on the other hand, will be held liable only for the specific offence of failure to rescue.

As opposed to the general offence of failure to rescue, pure omission offences that are different in kind are those that impose a duty to 'contribute' to the public good, such as the duty to pay taxes or the duty to serve in the army of jurisdictions in which military service is compulsory.

5. CONCLUSION

The book *Core Concepts in Criminal Law and Criminal Justice: Anglo-German Dialogues* provides us with an opportunity to look at the boundaries of criminal liability from comparative

[98] Ambos (n 78) 39.

perspectives, and to evaluate the considerations that justify the extension of criminal liability, in three different contexts: (i) participation in crime, which extends criminal liability beyond the liability of an offender who personally commits the offence to additional modes of participation in crime; (ii) preparatory offences, which extend criminal liability beyond the limits of the *actus reus* of attempts; and (iii) omissions, which extend criminal liability beyond actions that cause harm to failure to intervene in order to prevent that harm.

In this review I have suggested relying on two main notions – that of 'control over the commission of the offence' and that of 'liberty (or personal freedom)' – in order to evaluate whether extending criminal liability in these contexts is justified.

In the context of participation in crime, discussed in Chapter 4 of the book, the notion of control over the commission of the offence enables us to distinguish between perpetrators as principal offenders, and instigator and aider and abettor as secondary offenders. The perpetrator who personally commits the offence, either alone or jointly, as well as the indirect perpetrator who commits the offence through another, are those who choose to commit the offence and have control over its commission. The instigator and the aider and abettor, on the other hand, leave the final decision to commit the offence, as well as how to commit it, in the hands of the perpetrator: they subordinate themselves to the choice of the perpetrator to commit the offence.

The above distinction is relevant to a further distinction between 'preparatory offences', on the one hand, and attempted instigating and attempted aiding and abetting, on the other. At the preparatory stage, the perpetrator, who has control over the various stages leading towards commission of the offence, is still deliberating whether to commit the offence. As a rule, at this stage the perpetrator should be given the chance to abandon her preliminary plans of her own free will. In instances of attempted instigating and attempted aiding and abetting, on the other hand, both the attempted instigator and the attempted aider and abettor did all in their power either to convince the principal offender to commit the offence or to supply the help needed for its commission. Whether or not the offence will be committed is up to the principal offender. Imposing criminal liability for attempted instigation or attempted aiding and abetting requires a special justification showing the unique criminal wrong involved in these attempts.

Control over omissions is looser than that over actions: one has no control over where and when one will be required to intervene in order to prevent a harmful result. To justify the extension of criminal liability to omissions requires focusing on the extent to which liberty is restricted and choosing a criterion for selecting which people, among those who are able to intervene and prevent the harm, can justifiably be obliged to do so, and to what extent. The criterion is expressed by the duty to act as a prerequisite for criminal liability for failure to prevent harm; the duty is imposed on those who have special responsibility either for the source of the danger or for the person endangered.