PHD THESIS ABSTRACT

THE INDIRECT PERPETRATOR IN CRIMINAL LAW

Keywords: indirect perpetrator, organized power apparatus, control theory of perpetration, perpetrator behind the perpetrator, control over the will to act

This paper aims to elucidate the doctrinal configuration of the indirect perpetrator in criminal law, as it is a less mentioned and known legal institution of the local legal background, given that, traditionally, most of the theoreticians and the lawmaker have been hostile towards adopting it. As a result of the fact that, in general, it was previously estimated that embracing the legal institution of indirect perpetration would be of no interest at national level, it has not been the subject of an exhaustive analysis in the Romanian doctrine so far.

Starting from the guideline according to which the legal science is under continuous progress, and identifying the appropriate criteria for distinguishing between principal perpetration and participation is one of its everlasting concerns, we aim to address the topic of indirect perpetration in-depth. We firmly believe that any actual debate about the usefulness, pragmatism and viability of the implementation and use of the corresponding legal concept can be carried out only on the basis of a thorough examination of the concept, of the theoretical grounds underlying its construction and the legal consequences to which it leads.

Back in 1828 the legal concept of mediating perpetrator was firstly mentioned, and subsequently taken over, developed and used in doctrine. The *moral author* of the crime was extensively mentioned in the specialty literature, without having a clearly determined character and without distinguishing, here and there, between the instigator in a narrow meaning and the mediating perpetrator, as distinct ways of acting. Almost a century from first mediating perpetrator references, the legal concept corresponding to this notion came to light under the generic name of "*author behind the author*".

The current view on the notion of principal perpetrator, in the broader context of the topic of criminal participation, is the result of a long and complex progress of the general theory of crime, of the concept of crime and the standards that the incrimination rules must comply with, in close connection with the intended purpose of their application, namely the identification of the persons responsible for committing crimes and their criminal liability. The phase of criminal science development proves that the topic of the optimal formula for distinguishing between the principals and the participants, on the

one hand, and between the indirect perpetrator and the participants, on the other hand, is far from being closed. We do not need to look further than the Spanish legal system to get to the bottom of this.

According to the Spanish Criminal Code, principals are those who commit the act themselves, together or by means of another person they use as an instrument, namely, the direct instigators and necessary accomplices are considered authors of the crime. Although the lawmaker uses the system of penalties equalling, the issue of appropriate criteria for differentiating between them is the subject of a lively debate, both in the doctrine and within the jurisprudence.

Thus, although most of the Spanish doctrine favours the objective-formal theory, another part approaches the theory of control over the act, just for the consideration of fitting in the legal concept of the indirect perpetrator, whose existence is stated in law. Both theories are doctrinally and jurisprudentially embraced, coexisting, despite the fact that they are essentially incompatible.

The legal doctrine of states acquainted with the legal concept of the indirect perpetrator, deals with it as a concept of prelegal nature and represents, at times, even a scale for verifying the viability of potential theories applicable in the field of perpetration.

Also, the international criminal courts are continuously formulating and refining the theories of determining and assigning criminal liability to persons involved in criminal activity, taking over, analysing and organically developing theories and configuring their own legal concepts on principals and participants.

Finally, we cannot deny some primary intuitive nature of the indirect perpetrator, whose echoes are also displayed in the domestic legal area, whether we refer to the so-called way of committing the deed through the action of the victim, or whether we relate to certain situations of using of a person who does not have the consciousness of the illicit or to whom the deeds are not attributable.

An undeniable proof of the doctrine's concerns to elucidate the regime of principal and participants is the approach of the subject during the works in Athens at the 7th Congress of the International Association of Penal Law, held from 26 September up to 2 October 1957. On this occasion, both the special individuality of the indirect perpetrator and also the separation of the corresponding legal concept from any particular theory of determining the author were confirmed. From the resolutions adopted by the congress regarding theme I, entitled "*The modern orientation of the notions of committing the crime and participation* ", it results that *"The indirect perpetrator shall be deemed the one who determines a person which cannot be held criminally responsible, to commit an offence ".*

The interest in the approached topic was initially aroused by the extremely lacunar references identified in the Romanian doctrine, regarding the grounds and mechanisms underlying the indirect

perpetrator, respectively the solutions to which its use leads. On the one hand, we wanted to establish whether, indeed, the indirect perpetrator is nothing more than a legal fiction, as stated by a part of the Romanian doctrine. On the other hand, we aimed to verify whether the use of this legal concept really leads to absurd outcomes, contrary to the principle of legality, or whether it leaves uncovered entire categories of offenses, in which case the legal ground would thus be absent as to allow the criminal liability of some of the concerned individuals.

Through the scientific approach undertaken we have first clarified the prototype of the indirect perpetrator, the defining coordinates of the concept respectively, and the specificity of the conducts attributable to them. Starting from the intrinsic content of the notion of indirect perpetration, we analysed whether this legal concept has its own, *sui-generis* identity in the wider system of crime theory and criminal liability, namely to what extent is it derived from and dependent on the other components of the criminal law system in which its viability is debated and verified.

The doctoral thesis is structured in twelve chapters, each of which is divided, in turn, into sections and subsections, in accordance with the need to systematize the analysed specific aspects.

The first chapter is dedicated to identifying the substantial significance of the legal concept of the indirect perpetrator, starting from the method of defining the more comprehensive concept related to the category itself, that of principal. In this chapter we have established that there is a legal concept of the indirect perpetrator, whose configuration is determined by doctrine, a normative expression of the analysed legal institution respectively, where the lawmaker decided for its legislative approval. In addition, we analysed the prelegal character of the notion and the dependence on the theoretical coordinates specific to the legal system within which it operates.

The second chapter of the paper is devoted to examining the viability of the indirect perpetrator within the various doctrinal systems existing in the field of perpetration and participation, in an attempt to establish what are the absolute doctrinal limits beyond which the analysed legal concept loses its meaning.

Without aiming to analyse in detail all the theories establishing the content of the notion of author of a crime, in terms of the mechanisms used, we emphasized the practical importance of anchoring the debate in a predetermined coordinate system. We started with a brief presentation of how the legal figure of the perpetrator in criminal law was dealt with and the different directions on which it was developed and circumscribed, focusing on some of the specific aspects on which basis the theories launched over time in the field were formulated, in order to finally focus on the central element of our research, namely the institution of the indirect perpetrator.

The third chapter of the thesis is dedicated to analysing from a practical perspective, the theoretical grounds of the indirect perpetrator and the specific legal ways these grounds operate. Thus, we firstly approached the significance of the idea of domination over the direct perpetrator's will to act, in order to continue, subsequently, with an analysis of each of the legal forms such domination operates – through coercion, error, or as a result of the irresponsibility of the person used as an instrument for committing the act.

In the fourth chapter of the paper, we approached the limits of the control exercised by the background person over the direct perpetrator committing the act, orienting our approach in three different directions. In a first section we referred to the hypothesis of the existence of an intellectual deficit regarding the agent, who either does not know that he has the possibility to control the commission of the act, or mistakenly believes that he has such a possibility, although in reality things are different. The second section is dedicated to examining the effects of the existence of a volitional deficit in respect of the agent, as not being able to control his own impulses or being the victim of coercion, and the last section addresses the assumptions of excess of the third party used as a tool in committing the act.

In chapters V – VII, each of the forms of indirect perpetration were examined, in order to reveal the actual mechanisms underlying the position the indirect perpetrator has within the criminal approach, capable of assigning him the role of principal.

The fifth chapter includes the detailed analysis of the mechanisms underlying dominance over the act in the case of using a person who is in a position to commit the act under the conditions of a justifying cause. The first section comprises a presentation of the theoretical basis of the mechanisms that ensure control over the act in such cases, each of the justifying causes being treated separately in the subsequent sections.

The sixth chapter was dedicated to the examination of indirect perpetration hypothesis in which the principal acts under the influence of a cause of non-imputability, each of which is dealt with in depth, within a dedicated section.

The seventh chapter of the paper includes the detailed presentation and analysis of the most controversial type of indirect perpetration, namely the indirect perpetration by using an organized structure of power. The topic was extensively approached, starting from the ground of domination over the act and the control mechanism specific to this form of indirect perpetration, going further with the manner in which it was received and contained within the jurisprudence. We also paid special attention to analysing the conditions for constituting a form of indirect perpetration in the case of using an

organized system of power, in order to establish both the actual content, as well as the necessity and conclusiveness of each of them.

Starting from the fact that the legal institution of the indirect perpetrator was heavily criticized in the local doctrine, we approached, in the eighth chapter, the intrinsic limits of the indirect perpetrator's theory. In this regard, we have related to the specific peculiarities of crimes with special active subject, omissions, crimes that can be committed exclusively in person and unintentional ones, in order to be able to objectively and exhaustively assess both the merits and any shortcomings of the legal concept, object of our scientific approach.

The ninth chapter of the thesis is intended to the comparative examination of indirect perpetration and the legal institution of improper participation, with which the Romanian law operates, from a functional standpoint, as to assess the advantages and disadvantages presented by each of them.

In the tenth chapter, we focused on aspects that may be considered rather adjacent, but which are of real practical importance to the extent of a possible takeover or adaptation of the institution in our law, respectively the regime of criminal attempt in the case of indirect perpetration. We considered that this matter should be dealt with expressly and distinctly, by virtue of the fact that the legal regime of the criminal attempt of the indirect perpetrator has certain peculiarities that cannot be ignored. These, in the absence of an integrated and coherent approach, could raise problems in the implementation, against the background of the non-existence, in the Romanian legal literature, of papers dedicated to analysing the problems specific to the attempt in the case of indirect perpetration.

The eleventh chapter is dedicated to analysing the accessory particularity of participation in the case of indirect perpetration and to clarifying its actual effects. Once again, we chose to deal with the aforementioned issue, despite its adjoining nature to the main topic addressed, considering that it is necessary to emphasize some peculiarities specific to indirect perpetration, in this regard, in lack of doctrinal positions to have previously clarified the issues in question.

Finally, the twelfth chapter draws the conclusions of the scientific approach undertaken and of the entire research carried out. It is concluded that the legal concept of the indirect perpetrator is far from being fiction, as is spiritedly argued by a doctrinal sector in Romania.

Of course, in the case of assessing the specific role of the indirect perpetrator in the light of the objective – formal theory, according to which the principal is only the one who directly commits the act provided by the criminal law, performing typical enforcement acts, the indirect perpetrator would appear as a fiction. Within such a doctrinal configuration, the principal commits the crime directly, and any other agent in the criminal approach will be a participant. As a result, it is clear that the objective –

formal theory does not leave room for a third category, that of a principal without commission acts, as the latter is already included in the area corresponding to participation.

What those who make such an assessment do not understand, however, is that the principal has a primary character, which is established solely on the basis of the criterion for determining the employed perpetration, and not in relation to participation. In other words, the viability or reasoning of the legal concept of the indirect perpetrator must not and cannot be assessed in the light of a theory that expressly excludes it. On the contrary, it must be determined whether this legal figure captures a primary aspect of the abstract notion of principal, which requires the adoption of a theory that recognizes and establishes its existence.

During the research, we found that the existence of an unequivocal primordial prelegal substrate related to the concept of principal, distinct from the one attributed, by virtue of the conceptual autonomy of law, as a consequence of embracing a certain determined theory, cannot be denied. The principal who commits the act is, by essence, the central figure of the criminal action, in the sense that the principal decides on the outcome of the committed act, and it is, par excellence, dependant to the principal. So, although there are many possible ways to address this issue – in the sense that supremacy can be assessed in terms of facts, law, or even a combination of both – it is clear that, in a concise expression, the principal can only be the one who has control over the act.

The central determinant in identifying the perpetrator within the theory of control over the act is, as it results from the very name, the control over the criminal approach. This theory, in turn, has several possible ways of expression, depending on the actually assessed criterion to decide on the control exercised. Some of them are suitable for use only with regard to intentional acts, while others – such as the theory of factual affiliation or risk dominance – allow the use of unique criterion for establishing the perpetrator, both for intentional and culpable acts.

In a concise expression of the guiding idea of the dominance over the act, the primary character of the perpetrator is reflected in the way in which the lawmaker understood to regulate the general theory of crime and the constituent elements of the offence. Regardless of how this reality is expressed doctrinally, it is obvious that the constituent elements of the offense shape the concept of perpetrator and the content of the notion of domination over the act.

Thus, in order to be a perpetrator, the person concerned must meet the requirements expressly imposed by the incrimination rule, and in order to dominate the act, it must have control over the form of materialization of the offense. *Prima facie*, the person who commits the act directly has control over the act of execution, and to the extent that the law exonerates him for his intervention, the background

person, who acts in a legally efficient manner, in the sense of fulfilling the criteria necessary to be criminally liable – has control over the first and, implicitly, over the act.

We have identified an essentially three-way structure of the potential means of domination exercised by the background person over the act, in the sense that control over its commission can be acquired through coercion, error or the use of an organized apparatus of power that ensures the fulfilment of orders in a quasi-automatic manner.

When talking about coercion, the control over the act will be assessed according to the normative limit beyond which the law considers that the adoption by the victim of coercion of a conduct in accordance with the legal order is no longer required.

However, in case of error, its factual effectiveness shall prevail, whether it is vincible or invincible. The reason is that a person who does not understand the actual significance of his deeds does not, in fact, dominate the concrete form of manifestation of the offense, but only that perceived, even if the error under which he operates can be held against him. The essential nature of the error depends, within these theoretical coordinates, on the influence it has on the concrete form of manifestation of the offense – if the latter corresponds to the perception of the one in error, in terms of the guiding motivation of his typical behaviour, then the error is non-essential, and otherwise, it plays an essential and configurative role of indirect perpetration.

Expressed otherwise, this idea reflects the fact that the fundamental difference between participation and indirect perpetration consists in the free assumption of the criminal resolution materialized or, on the contrary, as a result of coercion or error. If the principal acts knowingly, having represented the actual form of materialization of the deed and freely accepting to commit it in conjunction with the third party, then his actions shall be deemed acts of participation. If, on the other hand, the principal does not freely and knowingly assimilate the criminal resolution, either acting against his will or not knowing that he actually fulfils the background person's plan, whose true implications he does not understand, then we shall have the hypothesis of indirect perpetration.

In the case of committing the act through an organized power apparatus, control over the act is conferred by the characteristics of the apparatus, which, based on strict hierarchical subordination, a large number of substitutable potential actors and dissociation from the legal order, provides those in charge with a quasi-automatic mechanism for fulfilling the criminal demands, removing the actual relevance of the conduct adopted at individual level by one or other of the potential actors.

Based on these findings, we have punctually assessed each way of committing the act in the form of indirect perpetration, noting that this legal concept offers adequate solutions for several hypotheses that are simply unapproachable, outside the coordinate system related to the indirect

perpetration's theory. Thus, we have seen how the legal institution of the indirect perpetrator allows the judicious assignment of criminal liability to the person who determines or assists a third party in committing an act that, in relation to it, is atypical.

We also found that in our literature, which vigorously rejects the theory of the indirect perpetrator, a legal fiction was doctrinally built to cover, at least in part, the legislative vacuum created by the use of improper participation - the theory of committing murder by the victim’s act.

Another hypothesis to which improper participation does not provide any resolution is that in which the deed is committed by placing a third party in a position to act under the conditions of a justifying cause. In our legal system, the one who orchestrates the commission of the act under the conditions of a justifying cause, in his capacity as a participant in an act that is justified, is not criminally liable, benefiting from the justifying effects of the cause by virtue of which the perpetrator acted. Using the theory of control over the act, such a person is liable as an indirect perpetrator of the act committed under the conditions of the justifying cause orchestrated by him/her.

The investigation carried out led us to the same conclusion in the case of committing by placing a third party in a position to commit the act under the conditions of a fortuitous case, or of those committed by capitalizing on the fortuitous case under which the third-party acts. And in this case, which constitutes a clear hypothesis of indirect perpetration, the former would remain unpunished, in case of using the institution of improper participation. Although part of the doctrine claims the opposite, by virtue of the provisions of Article 23 (2) of the Criminal Code, it is clear that the participant in an act committed under the conditions of a fortuitous case shall not be criminally liable for his conduct, as its principal.

At the same time, we turned our attention to the criticisms against the institution of the indirect perpetrator in the Romanian legal doctrine, which categorically rejected the theory, claiming that it would lead to absolute absurd solutions. Checking the grounds of these statements, we found that the solution adopted in the systems operating with the figure of the indirect perpetrator is not nearly as absurd as it is made to seem by the opponents of the adoption of the analysed theory. On the contrary, the approach to the hypothesis of crimes with a special active subject is as simple as it is elegant and coherent. Any such offenses, where the law establishes particular determinants of a conduct as criminal, are considered offenses of violation of specific extracriminal obligations. Consequently, the issue of principals and participation is easily solved, in accordance with the reasoning used by the lawmaker when criminalizing the conduct, according to the criterion of obligation attachment – when an *intraneus* and an *extraneus* are involved in the commission of the act, the principal is the one who

violates the special extracriminal obligation in the consideration of which the deed has offence character.

Also, by closely examining the situation of crimes that can only be committed in person, we came to the conclusion that even in the case of operating with the indirect perpetrator's theory, the manner of solving the situations where acts *de propria mano* are committed is, in fact, identical to that to which the use of the institution of improper participation leads, without creating a blockage in the consistent application of the criminal law.

Finally, we found that the indirect perpetration's theory, as an expression of the theory of control over the crime, provides a non-existent legal instrument outside of it, original and of paramount importance in combating mass crime – the possibility of acknowledging having committed the act by using an organized system of power. Indeed, the specificity of mass crime, such as crimes of genocide, crimes against humanity or war crimes, for example, proves the operational insufficiency of classical forms of the principal and participation, unable to reflect the reality of the underlying dynamics of the criminal approach in such cases.

The theoretical reliability and undeniable practical usefulness of this *sui generis* form of indirect perpetration is attested by the jurisprudential success it enjoys worldwide. The theory came into prominence by the solid theoretical foundations and the elegance of the constitutive mechanisms, which embody the defining essence of mass crimes committed by leaders acting from the office, by virtue of holding the avatars of power within such an organization. Consequently, it currently occupies the central role in any proceedings regarding such acts, being the main form of perpetration used by the International Criminal Court in The Hague in determining and assigning liability to the leaders for the acts committed through the state apparatus.

The result of our research is, undoubtedly, that the theory of indirect perpetration is not only a viable alternative for the institution of improper participation used at national level, but much more than that. Apart from the fact that this does not lead, not nearly, to legal deviant solutions, nor does it leave unpunished behaviours that are clearly criminal in nature. On the contrary, as we have shown, only the improper participation can be reproached for these shortcomings, as a result of the functional insufficiency of the subsidiary criterion used, an expression of its accessory character, which inextricably links the participation to the commission of a typical and unjustified act.

In addition, the theory of indirect perpetration has the advantage of organically integrating clear assumptions of crime committing, without the need to resort to legal fictions that contradict even the primary criteria for determining the principal used or the express regulation in force, violating the principle of legality.

The only real barrier currently existing to the domestic adoption of the indirect perpetrator's theory is the provisions of Article 46 of the Criminal Code, which enshrines the objective – formal theory, hostile to the legal concept corresponding to the commission of the act indirectly, by means of another person. In the absence of this text of law or as a result of its amendment, there are no substantial obstacles to the takeover and adaptation of the theory to the domestic legal system.

Regarding the doctrinal barriers, based on the specialized literature's predisposition to fasten upon the usual theoretical coordinates used, becoming thus traditional in the national legal landscape, they do not represent a real obstacle to the adoption of the analysed legal figure.

As to adopt the legal figure of the indirect perpetrator, it is enough to waive the provisions of Article 46 and those of Article 52 of the Criminal Code. Nevertheless, in order not to leave room for new and effervescent doctrinal debates about the perpetrator model embraced by the lawmaker, it would be preferable, *de lege ferenda*, to have it configured within norm, in its primordial formulation – *the principals are those who commit the act themselves, together, or through another person they use as a tool.*

Of course, both doctrine and jurisprudence could still opt for the institution of improper participation, to the detriment of the indirect perpetrator, which is an expression of legal liberalism. However, we intend to ensure that any future theoretical debates related to this topic will be based on a complete and correct perspective on the defining characteristics of the other existing version, that of the indirect perpetrator. Only in this way could the possible option expressed in favour of improper participation, by virtue of an affinity for this institution that has already become traditional in our law, be understood and assumed as such, and not on the basis of an imaginary functional superiority, in fact non-existent, or of allegedly fundamental methodological shortcomings of the theory of indirect perpetration.

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