

Holding the Puppet Masters of Terror Accountable

President

Trump recently reported on the elimination of arch terrorist, Abu Bakr Baghdadi, the leader of ISIS, and the world responded with a sigh of relief. Although Baghdadi was guilty of murder, torture and assorted depravities, he was targeted in his capacity of leadership-responsible for untold cruelty and murder on a mass level. Here we will explore the underlying question of whether a funder and financier of terror can be held *halachically* liable for the actions of its proxies and agents. In modern Western law, an instigator or plotter can be held civilly and criminally liable under the general categories of **aiding and abetting** and **participating in a conspiracy**, as well as the more specific statute against providing material support to terrorists:[1] in *halachah*, we have two possible theoretical frameworks to consider: agency (*shlichus*) and indirect causation (*garmi*).[2]

Shlichus

Generally,

the rule that “there is no agent for a sinful matter” forecloses both criminal and civil liability for a principal for the transgressive action of his agent. One who orders his agent to commit murder is therefore not criminally liable (under terrestrial law, although it is taken for granted that he will be held responsible by Heaven),[3] and one who instigates and plans (but does not directly participate in) a burglary is therefore not civilly liable.[4]

Some

authorities, however, assert a major exception to this principle in the case of an agent who has an established history (“*muchzak be’kach*”) of engaging in such activity. The Talmudic rationale for the inapplicability of

agency to sinful behavior is: “the words of the Master and the words of the student, to whose words shall we listen?”,[5]

which these authorities apparently understand to mean that the principal can claim that he did not really believe that the agent would obey him.[6]

This does not apply in the case of an agent with a demonstrated disregard for the “words of the Master”. [7]

Others,

however, strongly disagree, maintaining that the inapplicability of agency to sinful conduct is simply a Divine decree, and therefore absolute and independent of any expectations of the principal.[8]

It

follows that one who incites a novice terrorist to perpetrate an act of terrorism would definitely not be liable under the theory of agency, whereas the liability of one who conspires with a veteran, professional terrorist would depend on the aforementioned dispute.

Garmi

There

is generally no criminal or civil liability for a crime or tort perpetrated indirectly (*grama*). A major

exception is civil liability for the subcategory of indirect causation the Talmud terms *garmi*, but there is

much dispute over the definition and parameters of this class. Some posit conceptual criteria, that what distinguishes *garmi* is that the damage

caused is “certain”, “immediate” and “perpetrated by [the tortfeasor] himself”, [9]

while others explain the distinction pragmatically, that the liability for *garmi* is

simply a rabbinic penalty imposed in situations that were particularly “common” and “frequent”. [10]

The *Terumas Ha'Deshen* therefore rules that in the case of a

conspiracy to commit theft, a non-participating conspirator is not liable under the rubric of *garmi* as none of the

above criteria are satisfied: the injury (in the case of a Jewish actor) is

uncertain, as the would-be criminal, even if he has an established criminal history, may nevertheless repent and refrain from perpetrating the crime; it does not immediately follow the conspiracy, but occurs later; and it is not a common occurrence.[11]

All of these considerations seem to apply equally to terrorist conspiracies, except for the first, with respect to non-Jewish terrorists.

[1] 18 U.S. Code § 2339A – Providing material support to terrorists.

[2] Our discussion will be limited to the basic, native *halachic* rules that govern such situations, and we do not enter into consideration of *dina de'malchusa dina*, *minhag* and other mechanisms by which *halachah* may incorporate secular law or custom, or possible distinctions between nation states and private actors.

[3] *Kidushin* 43a.

[4] Rema *choshen mishpat* end of *siman* 348. Cf. *Bava Metzia* 8a
“*amar le'shlucho tzei u'genov li ve'ganav patur*”.

[5] *Kidushin* 42b.

[6] See *Sema siman* 182 s.k. 2.

[7] *Shut. Tashbatz 1:156;*

Rema 388:15. The context is *mesirah*, a particularly egregious infraction, and the *Tashbatz's* argument includes the assertion that such transgressors are "inferior to idolaters". The *Shach ibid. s.k. 67* does indeed seem to understand that the idea that an established *moser* is not fully Jewish is an essential aspect of the *Tashbatz's* position (although it should be noted that this is within the context of the *Shach's* general disapproval of the *Tashbatz's* position, and consequent attempts to limit its scope), but others seem to understand that the main argument of the *Tashbatz* is the one given in the main text, that the principal may not believe that the agent would obey him, and it would seem, then, that the *Tashbatz's* basic holding is not limited to this particular sin, but applies in any context of an agent who is *muchzak* to violate the relevant transgression. Cf. *Imrei Binah, Kuntres Ha'Kinyanim* at the end of *siman 19;* *Miluei Choshen* (Dzimitrovsky) to *Ketzos Ha'Choshen* cited below.

[8] *Shach ibid.; Ketzos Ha'Choshen ibid.*

s.k. 12. Cf. Shut. Divrei Chaim chelek 2 choshen mishpat end of *siman 46.*

Proponents of the basic view that the principle of *ein shliach ledevar aveirah* applies regardless of the expectations of the principal include *Chidushei Ha'Ritva Kidushin 42b s.v. sha'ani hasam; Penei Yehoshua ibid. s.v. gemara ve'ha'de'tanya.*

[9] Rabbeinu Yitzchak in *Tosafos Bava Basra 22b*

s.v. zos omeres; Rosh ibid. perek 2 siman 17 and *Bava Kama perek 9 siman 13. Cf. Mordechai Bava Kama remazim 114-16; Sha'ar Mishpat* beginning of *siman 386.*

[10] *Ritzba in Tosafos ibid.; Shach*

beginning of *siman* 386 (and cf. s.k. 24).

[11] *Terumas Ha'deshen* 1:315.

Note that the *Darkei*

Moshe at

the end of *siman* 348

(reflected in the Rema cited in n. 5) seems to understand that the principle of

ein shliach ledevar aveirah forecloses any liability even under the

theory of *garmi*, but this is difficult to understand, as pointed out by

the *Shach* *ibid.* s.k. 5. Cf. *Machane*

Efraim, *hilchos nizkei mamon siman* 7.