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**The Sanctioning Treatment of
Criminal Participation by Inactivity**

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Abstract: The objective of the present research consist of analyzing the depositions governing the institution of criminal participation by inactivity in terms of the regulations contained in the current Criminal Code, with some references to doctrine and jurisprudence. The research also refers to some aspects of comparative law regarding the institution of the mediated perpetrator adopted by some European countries. The essential contribution of the research is a critical examination of the current legal provisions, presenting different views of the doctrine and cases of the actual legal practice. Also, there are highlighted some proposals for amending and supplementing the law, in line with the general tendency of development of the criminal law science. The paper may be useful to both theorists and practitioners in the field, presenting interest for those that wish to improve their knowledge in this field.

Keywords: crime; negligence; lack of guilt; mediated perpetrator

1. Introduction

In the specialized doctrine it shows that most of the crimes are committed by one person. In other words, the criminal acts are most often the result of the action or inaction of a single active subject. However, experience shows that there can be situations where a human activity may be the result of the combined efforts of several people, thus taking place in the case of complex criminal acts. Thus, the participants hope to commit the offense easier, dividing rigorously the different tasks or operations, in this way it could easily remove any obstacles or it could find the best solutions to avoid the legal consequences of the act. (Dungan, 2002, p. 67)

The participation by inactivity is the form of criminal participation to which the people who commit a common offense provided by the criminal law, not all of them have the same mental attitude, not acting with the same form of guilt, the instigator and accomplice always acting with intent, and the perpetrator acting out of guilt or even without guilt.

The Romanian legislator accepted as contrary conception to that of the mediated or indirect perpetrator (of distance perpetrator or the perpetrator of far-reaching hand - *longa manus*), according to which the instigator or accomplice that has acted intentionally is considered committer of the offense and who actually committed the action or inaction (the direct perpetrator) would be a simple tool. Therefore the offender under the criminal law is and remains as the perpetrator, even if subjectively speaking it is not criminally liable and the one who intentionally caused or helped is and remains the instigator or accomplice, because it did not directly commit the criminal action (inaction) (Basarab, 1997, pp. 458-459).

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According to article 31, the current Criminal Code governs two ways in which it can occur the participation by inactivity.

2. The Method with Intent and Out of Guilt

It consists of determining, facilitating or helping in any way intentionally to commit an action out of guilt to another person of an offense under the criminal law (article 31 paragraph 1, Criminal Code).

Specific to this method of the participation by inactivity is that the instigator and accomplice commit the act intentionally, and the perpetrator out of guilt. The contributions of the participants that act with intent - acts of determination (specific to instigation) or adjusting or helping in any way (specific to complicity) – as for another person (the direct perpetrator) to commit an act out of guilt under the criminal law it is achieved, usually by treacherous, cunning means, so that the person on which this process occurs does not even know the real purpose. (Dungan, 2000, p. 107)

For example, it is in such situation the one that, joking with the victim saying that he would shoot, receives from the accomplice, who planned to kill the victim, a loaded gun, an unverified fact by negligence by the performer, who shoots the person with whom he joked, killing the person; or the policeman that holds a person from a false accusation, without checking in advance the legality and validity of the allegations from the contents of the denunciation; or the physician that, taking advantage of the pharmacist's negligence, procures a quantity of narcotics. (Antony, 1995, pp. 45-46)

For this reason, in the specialized legal literature (Basarab, 1997, pp. 459-460) it is mentioned the stated situation, the perpetrator acts out of guilt under the form of negligence (unpredicted).

3. The Method with Intent and Lack of Guilt

The method with intent and lack of guilt consists in determining, facilitating or helping in any way, intentionally, to commit an offense under the criminal law, by a person who commits that act without being guilty (article 31, paragraph 2, the Criminal Code).

In this method of inactivity some participants act with intent (instigator and accomplice), providing the results and seeking or accepting its production, but the perpetrator commits the offense without guilt, due to irresponsibility (article 48, Criminal Code), or being minor it meets the legal condition to be criminally liable (article 50, the Criminal Code) or being in that moment in the error of the fact (article 51 Criminal Code) or under the control of physical or moral constraint (article 46 Criminal Code) or in a state of involuntary complete intoxication (article 49, paragraph 1, the Criminal Code). These conditions, situations or circumstances must exist at the perpetrator at the time of the commitment of the offense under the criminal law.

The feature of participation by inactivity provided by article 31 paragraph 2 Criminal Code, the instigated acts without guilt, where they do not know the criminal nature of the activity that they perform.¹

For instance, in one case, the court decided that the act of the defendant, during the month of April 2003, together with the perpetrator P.S., led the victim intentionally M.I., who acted without guilt (in terms of the error of fact) to take into possession the injured party C.J. a garage, it meets the constitutive elements of the offense of participation by inactivity to qualified theft, provided by article

¹ Bucharest Court - Criminal Division II, criminal sentence no. 903 of 04.08.2008, www.legenet.net.

31 paragraph 2 and article 208 paragraph 1, article 209 paragraph 1 letter a and e of the Criminal Code.¹

In another case, the act of the defendant, who, taking advantage of the friendship relationship with the minor of 13 years R.I.M. and its naivety, led her to steal in August to September 2008 several times, various sums of money from her parents' home, using money for personal purposes, an amount of 48,100 lei, it was considered that it met the constitutive elements of the offense of participation by inactivity in theft, provided by article 31 paragraph 2 and article 208 paragraph 1 of the Criminal Code with the application of article 41 paragraph 2 Criminal Code.²

Similarly, the acts of the defendant, who appeared before a public notary as being another person, i.e. the owner of the land included in a certificate of inheritance, and under this identity, he ruled out the truth as him being the only heir and owner of the land that he alienated, causing by its actions for the public notary to draw up an official document (affidavit) showing the inaccurate circumstances of the truth - consisting of enrolling the defendant as sole the owner of the land – it meets the constitutive elements of the offense of forgery on identity provided in article 293 paragraph (1) Criminal Code, of the offense of making false declarations provided for in article 292 of the Criminal Code and participation by inactivity in the crime of intellectual forgery referred to in article 31 paragraph (2) and article 289 of the Criminal Code.³

In the same way, it was decided also the commitment of aggression acts by the offender, followed by the acquirement of assets entrusted by the people, then stating that they belong to him, represents the robbery offense committed in the inadequate participation manner provided in article 31 paragraph 2 of the Criminal Code.⁴

4. Sanctioning the Participation by Inactivity

For starters, it should be noted that, in order to punish the participation for activity, the Romanian Criminal Code settled in its provisions of article 27 of the Criminal Code *the legal punishment system*, the participants being sanctioned within the same abstract limits of punishment. Thus, the instigator and accomplice to an offense under the criminal law committed with intent is punishable with the sanction provided by the law for the perpetrator. In determining the punishment it is taken into account the contribution of each participant in the commission of the crime, and also the general criteria for the individualization of punishment, under the provisions of article 72 of the Criminal Code. Considering the contribution of participants in the offense in determining the actual punishment by the court, it does not appear only as a consequence of individualizing the penalties, but as an express obligation of it.

The particularity of the institution of the participation by inactivity, an innovation of the Criminal Code of 1968, in the development of which it had a decisive role professor Vintilă Dongoroz, derived not only from its content, but also from its way of sanctioning. Since within the participation by inactivity the subjective position of the participants is always heterogeneous, asymmetric in terms of their criminal liability plan, it is imposed the system of penalties diversification (Alexandru, 2008, p. 280), the law itself providing different punishments for different perpetrators to the act provided by the criminal law.

¹ Braila Court, criminal sentence no. 809 of 2009, www.jurisprudenta.com.

² Rm. Sărat Court, criminal sentence no. 29 of 18.01.2011, www.legeaz.net.

³ I.C.C.J., Criminal Division, criminal decision no. 541 of 17 February 2009, www.scj.ro.

⁴ I.C.C.J., Criminal Division, criminal decision no. 2180 of 24 April 2002, www.scj.ro.

Thus, in the case of participation by inactivity the intentional and by fault manner (article 31 paragraph 1 Criminal Code), the instigator and the accomplice, helping with intent to committing the offense, it shall be sanctioned with the punishment provided by law for the offense committed with intent, just as for the participation by activity, and the perpetrator, committing the offense by fault will be sanctioned with the punishment provided by the law for the act committed by fault. For example, if an act of murder, as provided in article 178 Criminal Code, under the provisions of article 174 of the Criminal Code was committed by three persons of participation by inactivity, those who committed the act intentionally (the instigator and the accomplice) will be punished within the limits provided by the law for the offense committed intentionally, i.e. murder, and the perpetrator, who committed the act by fault will be punished within the limits prescribed by law for the offense of manslaughter under article 178 of the Criminal Code.

In the situation where the offense under the criminal law is not incriminated when it is committed by fault, the perpetrator will not be punished, it will be cleared. For example, in the case where several persons have committed the offense by the participation by inactivity for trespassing, the persons who have acted intentionally will be sanctioned under the limits of punishment provided by law for the offense of trespassing committed with intent, and the perpetrator, who committed the crime at fault will not be punished because trespassing by fault is not punishable by the criminal law. (Dongoroz, 1969, p. 242)

As for the participation by inactivity the method with intent and lack of guilt (article 31, paragraph 2 Criminal Code), the instigator and accomplice who acted intentionally, shall be punished as for the participation by activity with the punishment provided by the criminal law committed with intent, having the same sanctioning treatment as if the perpetrator had committed the offense with guilt. (Dongoroz, 1969, p. 244)

For example, the act of the defendant, at the beginning of April 2008, with intent had caused the minor SPD using threats of violence in order to steal for the home of ED, during the night, a cellphone and the amount of 200 lei, considering that the minor had not attained the age of 14 years, he meets the constitutive elements of the offense of “participation by inactivity in the robbery” provided and sanctioned under article 31 paragraph 2, related to article 208 paragraph 1 - article 209 paragraph 1 letter g of the Criminal Code. Thus, the convict was sentenced, inter alia, to a sentence of 3 years and 8 months of imprisonment for the offense of participation by inactivity in theft, provided and punishable under article 31 Criminal Code, related to article 208-209 1 letter g of the Criminal Code.¹

Similarly, the defendant's deed to determine the witnesses EG, LJ, EB to elaborate without guilt minutes with fictitious data meets the constitutive elements of the offense of participation by inactivity in the offense of false documents under private signature provided by article 31 paragraph 2 and article 290 of the Criminal Code. Under these circumstances, the defendant was convicted, inter alia, to two months prison for the offense of participation by inactivity in the crime of forgery of documents under private signature, provided by article 31 paragraph 2, related to article 290 of the Criminal Code, by applying article 74 letter a) with article 76 letter e of the Criminal Code.²

The court also established that the defendant act of arranging the introduction in Romania of the amount of 99.6 grams of cannabis through a transport company meets the elements of the offense of the participation by inactivity (complicity) to the introduction into the country of the risk drugs provided by article 26 of the Criminal Code related to the article 3, paragraph 1 of Law no. 143/2000,

¹ Science Court, criminal sentence no. 178/05.03.2009, www.legenet.net.

² Buhuși Court, the criminal sentence no 146 of 25.07.2007, www.legenet.ro.

amended by Law no. 522/2004 referring to article 31, paragraph 2 of the Criminal Code. It was also found that the bus driver, who has committed in a direct and immediate way the material action to introduce in the country risk drugs, acted without fault given the fact that he did not know the content of the cargo. However, the court found that the defendant's act consisted in arranging the transport details, giving the name of the witness as the addressee of the package received the package, knowing that it contained risk drugs, it legally represents the helping materials in achieving the material element of the offense of introducing into the country the risk drugs being prescribed by article 3 paragraph 1 of Law no. 143/2000, amended by Law no. 522/2004, the defendant acting with the direct intention. In these circumstances, he was sentenced, inter alia, to 6 (six) years of imprisonment and complementary punishment of prohibiting the rights provided by article 64 letter a, second thesis, b of the Criminal Code, for a period of 4 years for the offense of "conspiracy to introducing into the country the risk drugs" – participation by inactivity, offense provided and punishable under article 26 of the Criminal Code and article 31 paragraph 2 of the Criminal Code. with reference to article 3 paragraph 1 of Law no 143/2000, with the application of article 74 paragraph 2 of the Criminal Code.¹

5. Conclusions and Proposals de *Lege Ferenda*

In terms of crime, the participation by inactivity is a form of particularly dangerous illicit criminal. In order to commit crimes, the intentional use of poor, disabled, reckless or irresponsible people makes these activities to be facilitated and thus greatly reducing the risks. This explains why the participation by inactivity is less common in the legal practice, but not because of the rarity of cases, but especially because this form of participation is treacherous, occult, insidious, hidden, which in most cases, remains vaguely known. In general, the participants acting with intent are very clever people who, choosing very carefully the people who will have the role of perpetrators, they know how to work efficiently while remaining in the shadows, so when researching the deeds committed by the visible participants, which acted by fault or without guilt, the mix of those remaining in the shadow cannot be proven or credibly asserted. (Dongoroz, 1969, pp. 238-239)

Since most modern criminal laws operate in these assumptions with the institution of the mediated perpetrator we also propose, as it has been mentioned in the specialized doctrine (see Soare, 2004, p. 157), *de lege ferenda*, that the one determining, facilitating or helping in any way, intentionally, to commit an offense under the criminal law, by a person who commits that act without guilt, should be treated and punished exactly as the perpetrator of that act. To strengthen the above claims, we chose to analyze in the following different European criminal laws which adopted the solution of the mediated perpetrator.

Thus, the German Criminal Code, in its general part, Chapter 2 called "The offense", Title 3 – "Perpetrators and participants", defines in paragraph § 25 the perpetrator as "a person who commits the act himself or the person who commits the offense through another person".

The Spanish Criminal Code, in force since May 1996, in Book I – "General provisions on crimes and misdemeanors, the liable persons, penalties, security measures and other consequences of the criminal offense" Title II – "Those legally criminally liable for crimes and offenses", mentions in the provisions of article 28 that "*there are perpetrators the persons who achieve an act personally, or together or through another person that they use as a tool.*"

¹ Iasi Court, criminal sentence no. 585/13.10.2009, www.legenet.net.

The Portuguese Criminal Code, in Book I, dedicated to the General Part, Title I called “The act”, Chapter II – “forms of crime” establishes in the depositions of article 26, reserved to the authorship that “it is punishable as the person who performs an act, by himself or through another person, or taking direct part in the execution, in common agreement with another person or others, and the one who, intentionally determines another person to commit a crime, before or during its execution.”

Finnish Criminal Code, in force since 19.12.1889, with many additions and changes until 2008, specified in Chapter 5, entitled “On the tentative and participation” (515/2003), Section 4 – “The commission of an offense through an agent” a “person is sanctioned as perpetrator of a crime if he committed a crime intentionally using as agent another person that cannot be punished for the offense due to the lack of discernment or intention or due to other reasons relating to the conditions on the criminal liability”.

The Criminal Code of the Republic of Moldova, adopted on April 18, 2002, as amended and supplemented, defines the perpetrator in Chapter IV of the General Part, entitled “The Participation” as “the person who directly commits the offense under the criminal law, and the person who committed the crime through persons who are not criminally liable because of the age, irresponsibility or other considerations provided by this code.”

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