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# Criminal Participation in the Form of Complicity

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ABSTRACT: The plurality of criminals over time has evolved, so that today we have a natural plurality, constituted plurality, occasional plurality or criminal participation. Thus, within the criminal participation, the accomplices carry out a secondary activity in the sense of facilitating, helping or promising the perpetrator (co-perpetrators) who commit the act directly. This activity of the accomplice takes place before or at the same time as the commission of the criminal act. In judicial practice, the modalities of complicity (previous, concomitant, moral, and material, negative) in which a person intentionally facilitates or helps the perpetrator to commit a criminal act have been shown.

KEYWORDS: plurality, criminal participation, complicity, authors, co-authors, Criminal Code

The issue of criminal participation, as well as complicity over time, has raised some issues regarding the relationship between the perpetrator of a criminal act and those who have a mediated participation in the commission of the criminal act.

Thus, complicity was considered an eminently accessory form of criminal participation. Compared to the old Criminal Code of 1968, where participation was provided in art. 23-31, the current Criminal Code refers to the author and the participants in art. 46-52. The explanatory memorandum of the current Criminal Code sought to correct the mistake in the previous Criminal Code in which the perpetrator was listed along with instigators and accomplices as a participant in the crime, although there was a qualitative difference between them; the perpetrator directly commits the deed provided by the criminal law, and the instigators and accomplices commit the deed through the perpetrator. Thus, in paragraph 2 of art. 46 was also regulated the situation of co-authorship required by doctrine and practice, being maintained the institution of improper participation, which became traditional in our law and proved to be functional without difficulties in practice, but being supplemented by the provisions on co-authorship.

To begin with, however, we should make some assessments of the plurality of offenders (when an offense is committed by the contribution of two or more persons in terms of the objective side having a common will in terms of the subjective side for committing the act) in order to later develop criminal participation in the form of complicity.

If in Chapter VI of the current Criminal Code, references are made to the author and the participants, it would result that the author could never be part of the participants and that the latter would be only co-authors, instigators and accomplices. From the analysis of Article 46, however, it follows that both in paragraph 1 when talking about the perpetrator and in paragraph 2 when talking about co-perpetrators, they are the persons who directly commit an act provided by criminal law.

From the point of view of the plurality of offenders, we can have a natural plurality, a constituted plurality and an occasional plurality of offenders or a criminal participation. For the natural plurality we have a plurality of criminals in the sense that the respective crimes can be committed only by the contribution of at least two natural persons. We can give as an example here the crime of bigamy by concluding a new marriage by a married person or the crime of incest provided in art. 377 C. pen. regarding consensual sexual intercourse between direct relatives or between brothers and sisters. However, there are also crimes in which the criminal action is necessary, such as the fight provided in art. 198 - participation in a fight between several persons or actions against the constitutional order provided by art. 397 - the

armed action undertaken in order to change the constitutional order or to hinder or impede the exercise of state power.

With regard to complicity in these types of crimes, we can show that, for example, in the crime of incest or bigamy, complicity is unique in the sense of help given for the crime by both active subjects (only in the case of co-authorship when both man and woman are people married at the time of bigamy and both know this).

Regarding complicity, several opinions have been expressed in the literature regarding the crimes of taking and bribery. Thus, the idea that the granting of aid by the accomplice is made to both perpetrators of the two crimes was credited, there may be complicity only in one of the two crimes or in another opinion that we would have dissociated bilateral crimes in which the acts of assistance directly for one of the authors would indirectly be an aid to the other (Pascu et al. 2015, 46).

We also consider together with the quoted author who revealed those opinions in the sense that there can be only one complicity regarding one of the two crimes, and if the evidence shows that acts of facilitation or assistance were performed for both active subjects of to the two crimes, we could have double complicity in those crimes.

Given that we would have a plurality with a larger number of people, also called collective plurality, here we consider that the minimum number of people must be at least three and we would give as an example here the crime of brawl with the phrase "brawl between several persons" as well as to art. 397 para. (1) "armed action" and para. (2) "committed by several persons together", as the legislator did not specify the minimum number of persons for any of these offenses by the natural plurality of offenders.

From the point of view of the constituted plurality, things are simpler here because the form of the plurality of criminals is made by associating or grouping several persons to commit crimes, eloquently in this case being the provisions of art. 367 C. pen. regarding the establishment of an organized criminal group, art. 409 C. pen. regarding the establishment of illegal information structures, and art. 35 para. (1) of Law no. 535/2004 on preventing and combating terrorism (published in Official Gazette of Romania, Part I no. 1161 of December 8, 2004) - *the act of associating or initiating the establishment of an association for the purpose of committing acts of terrorism or joining or supporting, in any form, such an association.*

In such forms of plurality, there must be a multi-person group, structured, acting in a coordinated manner over a period of time in order to commit a crime.

With regard to complicity, in the case of the plurality constituted, the perpetrators will be liable in this form of criminal participation, provided that they intentionally facilitate or help in any way to commit a criminal act by the group constituted for the purpose of committing crimes. However, if they will help the group in the form of moral complicity through the promise of favoritism or concealment, we will be in the situation of *supporting the criminal group in any form (advice or help) or if it supports it materially, being similar to material complicity.*

The occasional plurality *of perpetrators or criminal* participation is when a greater number of persons participate in the commission of an act provided by the criminal law than is necessary for its commission.

In the Romanian Criminal Code, criminal participation refers to *"committing an act provided by the criminal law",* considering that this term has a much wider scope and does not refer only to those who contributed to the criminal commission of a crime but also when the perpetrator commits the act without guilt because in both situations criminal participation exists.

If we were to refer to some European countries, such as France, for example, the perpetrator is the perpetrator of the crime; tries to commit a crime or, in the cases provided by law, a crime (art. 121-4), and the accomplice of a crime or a crime is the person who,

knowingly, through help or assistance, facilitated its preparation or consumption (art. 121-7). Also, in Italy, art. 110 refer to the punishment for those who participate in the crime, and in Sweden Chapter 23, art. 4 refer to complicity in the crime (*will be criminally liable… not only the person who committed the act, but also another person who facilitated it with advice or gestures*). In Germany in art. 25 shows similarly as in our country who is the perpetrator and co-perpetrators of a criminal act, without explaining, however, that they commit the act directly, and the accomplices according to art. 27 is the person who intentionally helped another person to intentionally commit an illegal act (excludes guilt).

This criminal participation is made only when the deed is provided by the criminal law (art. 15 para. 1 Criminal Code - the crime is the deed provided by the criminal law, committed with guilt, unjustified and imputable to the person who committed it), at the commission of the deed several people participate depending on the contribution of each and there is an intrinsic connection from a psychic point of view between the participants to commit an act provided by criminal law. It goes without saying that this participation through a psychic connection must exist either before the commission of the act or even at the time of the act. It is not necessarily obligatory to conclude an agreement prior to the commission of the deed, it can also be spontaneous, but it can also result from a tacit agreement.

There is criminal participation in all types of crimes (intentional or outdated - pre-intentional) where for their commission a single active subject is required as well as those that have a plurality of active subjects. It exists even when we have simple or complex, continuous, continuous, instantaneous crimes that admit participation. As an exception, we could present here the usual offenses in which we would mention art. 214 C. pen. - exploitation of begging, sexual harassment from art. 223 C. pen. (repeatedly claiming sexual favors) and art. 351 C. pen. usury (giving money with interest as an occupation by an unauthorized person) in which the participant must contribute a number of repeated actions that may give the character of habit or occupation.

From the point of view of the psychic attitude of the participants in Chapter VI regarding the author and the participants in the Criminal Code, we can speak of our own participation when everyone acts with the guilt of intention, or we have an improper participation provided in art. 52 C. pen. when the deed provided by the criminal law is committed with intent to which, however, another person at fault or without guilt contributes with acts of execution.

It is important for this criminal participation that the one who has an accessory participation, such as the accomplice, be prior or concomitant with the commission of the criminal act.

If we were to mention from a historical point of view, in the Criminal Code of 1864, complicity was provided in the provisions of art. 47 (*Provocative agents are those who, through gifts, promises, threats, abuse of authority or power, guilty plots, will be provoked to a crime or will be given instructions to commit it.*

*Such provocative agents are those who, by any of the means listed in art. 294, will be directly provoked to commit a crime or an offense provided by the criminal code.*

*These agents are punished just like the perpetrator*), and in the judicial practice of the time it was established that *"the innocence of the accomplice does not immediately attract that of the main perpetrator, because the crime of complicity consists in incidental deeds meant to prepare or facilitate the commission of a crime, and not in deeds that directly and immediately committing the crime and therefore, if the fact imputed to the accomplice does not meet the constitutive elements of the crime of complicity, lacking for example the fraudulent intention this circumstance cannot have any rooting on the main fact. "* (Cas. II no. 1485/916)

Also, in the same period, the judicial practice showed that the aggravating circumstances of the main author did not concern the accomplices, and the real circumstances

regarding the deed such as the place, time affected the accomplice only if they were known to him. In situations where there were several co-perpetrators when the crime was committed, it was shown that a co-perpetrator can never be an accomplice, as it is impossible for the same fact to constitute at the same time a main participation and an ancillary participation. In this sense was the French jurisprudence and doctrine - Grraud, II, 246 (Pastion and Popadopolu 1922, 26). The problem of the accomplice's liability was raised when the perpetrator of the criminal act was acquitted for lack of guilty will or fraudulent intent and when if there was no other alleged main perpetrator, the accomplice was also acquitted.

During that period, for the existence of complicity, *four conditions* had to be met (*Ibidem,* 101): a) to have a crime, because the punishment of this deed was lent to the accomplice (the existence of the crime was necessary and was not followed); b) the crime constituted a crime or misdemeanor, because there was no complicity in the matter of the contravention; c) the aid was given by accomplices with intent (it could not have been complicity on the part of the one who helped without knowing the guilty action of the offender). It was necessary for the crime to be intentional because, as Tanoviceanu pointed out there can be no complicity in unintentional crimes, whether they be crimes provided for in the Criminal Code or crimes under special laws. From then on, there was talk of negative complicity by not preventing the crime or not reporting it, but it was not allowed. It was provided only in art. 157 of the existence of complicity by omission in the case of a senior official who tolerated offenses - any senior official who, by deception, causes his subordinates to commit a crime or offense in the performance of their duties, or who, knowing such crimes or offenses on the part of his subordinates, tolerates them, shall be punished by the punishment applicable to those crimes or those crimes); d) for the existence of complicity, the instruction had to prove what kind of complicity it is (unfortunately it is not provided today in the legal provisions, and the courts refer only to the term of complicity).

In the case of continuous crimes, it was found that there was no complicity when, for example, the theft was committed when the accomplice did not take part.

The judicial practice of the time showed in some situations that it was necessary for the accomplice to have been aware of the criminal nature of the main fact, to have a criminal intent being necessary to be punished for complicity. In other cases, it was decided that the complicit intent of the accomplice had to be proved in the knowledge that the agent has to commit the constitutive acts of complicity, knowing that he is associated with a criminal act that provokes or favors this crime, actually working to commit the crime. And then, as now, complicity was an accessory fact that had to be attached to a main fact provided and punished by law.

In the Criminal Code of 1936 (published in the Official Gazette of Romania no. 65 of March 18, 1936) the complicity was provided in the provisions of art. 121 the accomplice being the one who intentionally: *1. Facilitates, facilitates or helps, the commission of a crime or an offense; 2. agrees with the perpetrators and their accomplices, before or during the execution of the crime, to conceal the proceeds of the crime, or to ensure the benefit realized, or to give them accommodation, escape or meeting, so as not to be discover or escape pursuit; 3. determines another to any of the acts provided in par. 1 and 2, if those acts were committed.*

At that time, the theory of the single crime was taken into account, which represented a classical and traditional theory in which all participants are responsible for the fact that they all wanted this and each did something to commit it. For this reason, most European legislations distinguished between participants who committed the important acts of the act and those who committed only secondary acts, who helped by deciding that the entire punishment should be given to the first category, and the others (accomplices, auxiliaries) to - a more severe punishment is given. The exception was French law which considered participation as a single crime but with equality for all participants as accomplices or

auxiliaries borrow the criminality of the main perpetrator, but are punished with an equal punishment. Here, too, complicity is a category or a form of *criminal participation*, providing as a first condition in paragraph 1 of art. 121 intention, being the general condition of all categories of participation. The other conditions were the act of complicity and a principal criminal act. Complicity could be material (consisting of an act of aiding or abetting the offense) or *moral* (of a nature to assist, facilitate or promote the commission of the offense) (Pop, et al.1937, 292).

The accomplice was the person who helps to commit the crime he neither determines the criminal resolution of the perpetrator nor took part in the execution of the crime. The forms or modalities of complicity were presented in the three paragraphs of art. 121, and it could be antecedent or concomitant. Complicity could be subsequent only if it was promised prior to or during the commission of the offense.

It is worth mentioning art. 122 in which the personal circumstances of one of the participants did not affect the other participants, and the real circumstances affected only if they were not known or predicted by them. The circumstances inherent in the act were real or part of it, as constitutive elements or as aggravating legal circumstances, or excluded the crime, as justifying facts.

In the Criminal Code of 1968 the complicity was provided in the provisions of art. 26 (an accomplice is a person who, intentionally, facilitates or helps in any way to commit an act provided by criminal law; the person who promises, before or during the commission of the act, that he will conceal the goods derived from it or that he will favor the perpetrator, even if after the commission of the act the promise is not fulfilled) having the same content as the provisions regarding complicity in art. 48 of the current Criminal Code.

From this perspective, we could give some aspects of the judicial practice of the former Supreme Court, which complicity involved the existence of acts of execution of a crime - committed by another person - to which a contribution was made by acts external to the incriminated action. The fact that the defendant did not know the value of the stolen goods and that he transported them in this case was irrelevant for the complicity; what was relevant from a subjective point of view, was the fact that the accomplice knew what the perpetrators were after and wanted to help them, thus also following the result of the crimes to which he contributed (Supreme Court, Penal Section, dec. no. 174/1980, 62). In another decision it is shown that, accomplice as provided by art. 26 was only the person who intentionally facilitated or helped in any way to commit an act provided by the criminal law, but also the person who promises, before or during the commission of the act that he will conceal the goods derived from it or that he will favor the perpetrator. In the latter way, the complicity was achieved at the date of the agreement between the author and the accomplice, since he was placed before or at the same time as committing the criminal act - and not at the date of fulfillment of the promise by the accomplice. (Supreme Court, Penal Section, dec. No. 244/1979, 69) Also, according to the principles contained in the former article 28 par. 2 of the Penal Code, the circumstances regarding the deed affected the participants only if they knew or foresaw them, or - in the case of premeditated crimes - if they could foresee them (Supreme Court, Penal Section, dec. No. 1641/1976, 67). Also in practice it was shown that there is no complicity if the defendant, without a previous or concomitant agreement, helped him on the perpetrator, after consuming the theft, to remove the goods from the unit (Supreme Court, Penal Section, dec. No. 2873/1983, Papadopol and Daneș, Repertoire of judicial practice in criminal matters for the years 1981 - 1985, 1988, 125). Also, if the defendant belonging to the group of aggressors was near the victims while they were beaten and dispossessed of their property, there is a moral complicity in the crime of robbery (Bucharest Municipal Court, Second Criminal Section, decision No. 197/1982, Papadopol and Daneș 1988, 46).

In another decision (TS criminal section, criminal decision no. 1789 of 1974 – Papadopol and Popovici 1977, 81) it was shown that the psychic position of the accomplice

was characterized by the will to commit the act of facilitating the author knowing the activity he will carry out and providing his socially dangerous result. In this decision, it should be noted that the accomplice in his volitional activity did not consider only his own deed, as he wanted to help the author, but also the deed of the author who seeks to achieve a certain result, he realizing the nature of the activity carried out by the author. For these reasons and according to the former art. 28 para. 2, there is the impossibility of holding the accomplice accountable for the deeds committed by the author insofar as he did not know them or did not foresee them.

Given that the provisions on complicity were not amended after 1990 by the Superior Court of Justice through the Criminal Section, Decision 1021 of 19 September 1990 allowed an appeal declared by the prosecutor on the grounds that for the accomplice who died during the trial, the acquittal the perpetrator for the non-existence of the deed, and for the accomplice the criminal trial was terminated. The Supreme Court considered this decision wrong because as soon as it was established that the deed did not exist and the acquittal was ordered on this basis, it was necessary that the acquittal be ordered on the same legal basis as the accomplice.

According to art. 48 of the current Criminal Code (Law no. 286/2009 on the Criminal Code published in the Official Gazette of Romania, Part I no. 510 of July 24, 2009 implemented by Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code, with subsequent amendments) states in paragraph 1: "An accomplice is a person who, intentionally, facilitates or helps in any way to commit an act provided by criminal law", and in paragraph 2: "an accomplice is also a person which promises, before or during the commission of the deed, that it will conceal the goods derived from it or that it will favor the perpetrator, even if after the commission of the deed the promise is not fulfilled", a legal provision that was the same in art. 26 of the Criminal Code of 1968, being similar to art. 121 of the Criminal Code of 1936.

In older criminal doctrine, complicity was defined as knowingly aiding and abetting an offense in one of the ways provided by law (Tanoviceanu 1912, 3).

From the legal norm provided in the Criminal Code and from the provisions regarding the perpetrator, who is the person who directly commits an act provided by the criminal law, *complicity is a secondary way of criminal participation*.

The participation of the accomplice will always have a mediated, indirect character, of facilitating the accomplishment of the deed by the author. We can show here that compared to the old regulations of both Article 47 of the Criminal Code of 1865 or art. 121 of the Criminal Code of 1936, where accomplices were punished to a lesser degree than the main perpetrator, later by the Criminal Code of 1968 and the current one, the punishment in the case of participants, including accomplices to a crime committed intentionally is as punishment provided by law for the author.

This complicity may precede the perpetration of the act by the perpetrator, when he in various ways materially helps the perpetrator (support, assistance, procurement of tools, making the necessary means to commit the crime) or when from a moral point of view, by advice or encouragement, helps the perpetrator to commit the act (moral complicity). It should be mentioned here that in order to be a moral complicity in this situation, the perpetrator must have previously decided to commit the act, because otherwise we no longer have a moral complicity that had the role of strengthening the author's resolution, but not we would find out in the situation of the instigator, who intentionally determines a person to commit an act provided by the criminal law.

Also, complicity can be concomitant when it helps the perpetrator to commit the act, complicity being also a secondary modality as he does not participate directly in the commission of the *act provided by the criminal law*.

If several persons directly participate in the commission of the act provided by the criminal law, they are *co-perpetrators* because they directly commit the act, even if they help in any way any of the other perpetrators to commit the crime.

**Conditions of complicity**

1. As provided in the criminal provisions, there must be an act provided by the criminal law committed by another person, directly, having the quality of perpetrator. It is necessary to commit a criminal act because without it there can be no complicity. As we showed at the beginning, criminal participation refers to "committing an act provided by criminal law" as there may be situations when the perpetrator commits the act without guilt, and the accomplice may be criminally liable.

There may be situations in which the perpetrator does not start the execution of the deed, and the attempt is not punishable for that crime, so that the accomplice will not be criminally liable unless in situations where his acts of facilitation would constitute a separate crime. Depending on the act committed by the perpetrator, the accomplice will be criminally liable for the act committed by him, but if a more serious act is committed he can only be liable for the intentional act by which he helped the perpetrator (this must be proved) and not provided for the commission of a more serious offense. Otherwise, he will be liable with the perpetrator even for an offense in which the intent is outdated.

2. Along with the author's activity in committing an act provided by the criminal law, there must be an effective contribution of the accomplice either through a material or moral contribution. It must be demonstrated whether the facilitation or assistance given was useful to the perpetrator. There may be situations in which if the help given was not useful to the perpetrator, we would be in the presence of a moral complicity that would have led to the strengthening of the criminal resolution of the perpetrator.

3. The legislator provided for an intrinsic connection from a psychic point of view between the participants to commit an act provided by the criminal law. Thus, in their own participation, all participants must act intentionally, as shown in the provisions of art. 47 - 49 Penal Code. If we are in the case of improper participation provided in art. 52, here the psychic attitude of the participants is different because the deed is committed with intent to which, however, another person through fault or innocence contributes with acts of execution. Complicity requires that the facilitation, help, or promise be made on purpose. Even if the criminogenic construct of the accomplice from the point of view of criminal responsibility is the same as the perpetrator (motivation, criminal intent, deliberation, criminal decision, act and violation of the criminal rule) there must be a common mental cohesion (conscience and will) with the author, even if the latter can act without guilt or fault. From the point of view of psychic cohesion, there is no legal provision stipulating that there must be an understanding between the author and the accomplice, there are sufficient acts of facilitation or effective help of the author's action, even if he (the author) does not know this. If there is no fraudulent intent on the part of the accomplice, he cannot answer in the form of complicity and there may be situations in which he may be a co-perpetrator, such as for crimes of guilt.

**Ways of committing complicity**

The provisions of art. 48 show in paragraph 1 the facilitation or aid that the accomplice intentionally gives when committing an act provided by the criminal law.

The acts of facilitation of the accomplice are those activities performed before the perpetrator by the perpetrator, being in the situation of previous complicity. These activities consist of procuring instruments or making them in order to commit the crime, giving sums of money in order to commit the crime or providing security during the commission of a crime,

being here in the form of material complicity or if the accomplice strengthens the criminal resolution of the author we are in the form of moral complicity.

In this sense, the judicial practice was pronounced when different crimes were committed, namely: Bucharest Court of Appeal, Criminal Section II, criminal decision no. 637/2016, where in the case of an offense of initiating, forming an organized criminal group, joining or supporting such a group showed that the act committed by the defendant by initiating the establishment of an organized criminal group (group formed for the purpose of committing smuggling offenses) also realized the constitutive elements of the offenses of complicity in smuggling by facilitation provided by the former art. 26 C. pen. rap. the art. 270 para. (2) lit. of Law no. 86/2006, since prior to the crime of smuggling committed various acts by involvement in taking over the shares in a company, made available to the group the hall where the cigarette maneuvers were performed, identified the business opportunity for the group and established the contact of the defendants with the authorized importers of tobacco. Also, the Bucharest Court of Appeal, Criminal Section I by criminal decision no. 395/2021, in a case regarding the illegal access to an information system provided by art. 360 of the Criminal Code showed that there is complicity in the crime of false material in official documents provided by art. 48 para. (1) C. pen. rap. the art. 320 para. (1) C. pen. against a defendant who provided an unknown person with an identity card for the purpose of obtaining a forged driving license, thus facilitating the forgery by counterfeiting, by an unknown person, of an official document (the driving license is officially registered in the sense provisions of Article 178 paragraph 2 of the Penal Code with reference to Article 176 of the Penal Code), a previous complicity being achieved. For the same defendant, a complicity in the crime of theft was also retained (art. 48 para. 1 C: pen. Rap. To art. 228 para. 1 C: pen. With application of art. 77 letter of the Penal Code) in the sense that it contributed to the crime of theft by prosecuting the injured person, accompanying the co-perpetrators to the crime and positioning the defendant next to the victim to allow the perpetrators to steal a wallet from the injured person's purse. In the same case, the respective defendant also committed the crime of illegal access to an information system provided by art. 360 of the Penal Code, being assisted by an accomplice who communicated to him the PIN codes mentioned in the documents identified in the stolen wallet (*material complicity*) and by accompanying him to the ATM to withdraw the sums of money (*moral complicity*).

Complicity in the form of aid can exist only during the execution of the deed by the perpetrator and we are in the form of concomitant complicity. The assistance can be given in several forms, namely by handing over objects for the commission of the crime, removing alarm systems or by assisting in the commission of the crime. In this sense, the Bucharest Court of Appeal, Criminal Section II, in the criminal decision no. 767/2020 regarding a crime of robbery provided by art. 233 of the Criminal Code, the court showed that one defendant helped the other co-accused by the manner of moral complicity as he witnessed a crime of robbery considering that there was a subjective connection between the perpetrator and the moral accomplice, the perpetrator being more reckless in his activities, having the psychic comfort that he is supported by the accomplices who assist in committing the deed. In this case, it was considered that the activity carried out by the accomplice should serve the perpetrator in committing the typical act.

However, in another older criminal case, the former Supreme Court of Justice, by unpublished Criminal Decision 1101/1993, considered that for the existence of moral complicity it is necessary to establish through evidence that the alleged accomplice knew the author's resolution to commit the crime. In that case, the presence of the appellant defendant with his brother or the perpetrator of the murder cannot be considered as moral aid, so a conscious contribution to the crime, because he followed the victim under the influence of alcohol and the impulse of a previous incident, without knowing that the brother he will hit him with a fork and without using the knife he was carrying.

In the situations in which a person helps the perpetrator of the criminal act after the consummation of the deed, we are no longer in the situation of a concomitant complicity of aid and we can be in the situation of the crime of concealment provided by art. 270 of the Criminal Code or favoring the perpetrator provided by art. 269 of the Criminal Code.

Also, in the form of concomitant complicity we are in the situation where a guard of a unit that lets several people steal goods from a unit, is complicit in the crime of aggravated theft and not in favor of the perpetrator provided by art. 269 of the Criminal Code.

In the provisions of art. 48 para. 2 we have both a previous complicity and a concomitant complicity, in which the accomplice promises before or during the deed, that he will conceal the goods derived from them or will favor the perpetrator even if after the deed, the promise is not fulfilled. The same provision was included in art. 121 para. 2 of the Criminal Code of 1936, as well as art. 26 of the Criminal Code of 1968.

The legislator imposed the condition that the person be an accomplice, to promise before or during the commission of the deed, because if he does so after consuming the facts, we can have two independent crimes, respectively: favoring the perpetrator provided by art. 269 of the Criminal Code and the concealment provided by art. 270 of the Criminal Code. In order for the person to answer in the form of criminal participation of complicity, no matter the form in which he promises the help given to the author for concealment or favoritism, he will be criminally liable even if the perpetrator does not fulfill the promise.

A similar provision was in the old Criminal Code of 1865 in provided art. 56 in which a person was an accomplice in the conditions in which before or during the commission of the crime or offense, he would have had an agreement to hide the hidden things that will come from the crime, excluding complicity in favor.

This promise of concealment or favor was maintained, considering that we also have a form of moral complicity, as this strengthened the author's criminal resolution, because he was sure that after the deed, he would be able to capitalize his goods or be favored by accomplices.

We could mention here an example from the judicial practice, where several people agreed with the manager to buy the goods stolen from him from management (pre-promised concealment), these people having the quality of accomplices in relation to the goods stolen from the manager (Supreme Court - Criminal Section, Decision No 1703/1983) (Ionescu in Antoniu 2006, 437).

In the current judicial practice, the Iași Court of Appeal, the criminal section and for cases with minors, by Decision no. 207/2020, in a crime of concealment provided by art. 270 of the Criminal Code ordered the termination of the criminal trial due to the intervention of the defendant's accomplice in a theft committed by two co-perpetrators both for the crime of concealment which was committed in the form of recidivism and for the crime of complicity in aggravated theft provided by art. 48 reported to art. 228 paragraph 1 - art. 229 para. 1 lit. b) and d) and paragraph 2 letter. b) of the Criminal Code with the application of art. 41 para. 1 of the Criminal Code, considering that in some stolen goods he helped to commit the deeds, and in others he concealed them without having a promise that he would conceal the goods from the theft.

If so far there have been examples of previous or concomitant complicity committed by the facilitation or assistance given by the accomplice we can also have a complicity by inaction, for example, when the porter of a company fails to close the front door at a time when he was obliged to perform this task. It is necessary to see complicity by omission in order to be able to distinguish it from *negative complicity* (Pascu 2015, 553-554).

In the Criminal Code there are two offenses provided by art. 266 of the Criminal Code regarding non-denunciation, when a person becomes aware of a deed provided by the criminal law against life or which resulted in the death of a person, does not immediately notify the authorities and art. 410 of the Criminal Code regarding the non-reporting of crimes against

national security, where only for these crimes there is an obligation provided by law to notify the authorities. Here we are in a situation of negative complicity when a person has become aware of the preparation or commission of some of those acts and does not notify the authorities.

In judicial practice in a drug trafficking offense, (Law no. 143/2002, art. 2), Bucharest Court of Appeal, criminal section I, by Decision no. 1568/2019 considered that the wife of the defendant who was sent to trial for moral complicity by inaction, an act of complicity that takes the form of an omission, can speak of this complicity by omission only when the accomplice was required to perform the omitted action. The act of the defendant not to stop the activity of the defendant by denouncing him for drug trafficking is not equivalent to an act of participation in the respective crime, provided that she did not have the obligation to act to stop the activity of the husband. The court found that complicity could not be qualified as mere approval of the deed in the absence of a psychic influence that could be proven, for example, by removing the last doubts or restraints of the author. The mere tolerance of the existence of drugs in the common home of the two cannot be qualified as an act of strengthening or maintaining the author's resolution to commit drug trafficking acts, and not denouncing the deed does not constitute acts of assistance (in fact, there is no obligation law for denunciation, so that one cannot speak of complicity by omission).

In judicial practice, we can have situations in which a continuous crime and material complicity take this continued form, so the Bucharest Court of Appeal, by Decision 1382/2019 found that the deeds of a defendant who based on the same criminal resolution in a period of for a year, he repeatedly received sums of money, the advance payment of motor vehicles ordered by other persons within the intra-Community space, as well as the corresponding proforma invoices, which he handed over to two other defendants, instructed them to make external payments and draw up fictitious fiscal invoices prejudicing the state budget with a large amount of money, meet the constitutive elements of the crime of material complicity in tax evasion in aggravated form provided by art. 48 Criminal Code reported in art. 9 para. 1 lit. c), para. 2 of Law no. 241/2005 with the application of art. 35 para. 1 Criminal Code (20 material acts).

We can have a complicity in instigation in the situation where the accomplice offers goods or a sum of money to an instigator so that he can determine the perpetrator to commit the deed, a complicity in complicity when an accomplice helps another accomplice because the latter to assist the perpetrator in committing the act. There may also be instigation to complicity when the instigator determines a person who by acts of complicity to assist the perpetrator in committing a crime.

For the existence of complicity, the form of direct or indirect intention is mandatory in the sense that the action can constitute a material or moral support for the author or provides the result of his deed, although he does not pursue it, accepts the possibility of its production.

Given that the activity of a defendant is materialized in material acts of complicity concomitant with the crime of robbery committed with two other defendants, the fact that he accompanied one of them not to be alone when he recovers his debt, Bucharest Court of Appeal - criminal section I, Decision no. 755/2020 considered that the activities of the accomplice enhanced the confidence of the two defendants that their numerical superiority will create the necessary mental pressure for the injured person to give them goods and money on account of the alleged debt, so that the acts of material complicity were absorbed by the documents. of execution corresponding to the crime of robbery retained in the charge of the defendant through the form of participation of the co-author provided by art. 46 para. 2 of the Criminal Code for the crime of robbery.

As mentioned in art. 49 accomplices to an act provided for in the criminal law committed with intent are sanctioned with the punishment provided by law for the perpetrator, but there is an obligation that when establishing the sentence the judge takes into account the

contribution of each to the crime, as well as the provisions of art. 74 of the *Criminal Code* which shows the general criteria for individualization of punishment. There may be situations in which the punishment established by the judge for the accomplice, depending on the circumstances and the manner of committing the crime as well as on the other criteria provided by art. 74 to give a greater or lesser punishment to him than the punishment applied to the perpetrator.

Even if the system of equalization applies to us in the sense that there would be a parity of punishment between accomplices and the main perpetrators or the system of diversification in which the actual contribution of each participant would be made in a certain form of hierarchy in our legislation, it is preferable to equalize in the sense that all participants contribute to the commission of a criminal act. It is to be discussed here how to punish those who have a certain connection with the perpetrators of the acts of affinity or kinship, but the legislator left it to the judge's discretion, when applying art. 74 lit. g) of the Criminal Code which also refers to the family and social situation.

When an offense provides that we have a family member who has committed a complicity, for example, favoring the perpetrator provided by art. 269 of the Criminal Code and the crime of concealment provided by art. 270 of the Criminal Code, the accomplice is not punished if he is a family member, as provided by the provisions of art. 177 Criminal Code - regarding family members.

From the point of view of the personal circumstances concerning the person of the author or a participant, they do not affect the other participants in the commission of a criminal act (art. 50 paragraph 1 of the Criminal Code). According to art. 50 para. 2 of the Criminal Code, the circumstances regarding the deed affect the perpetrator and the participants in the commission of the deed only insofar as they knew or foresaw them.

The problem that arises in the situation of accomplices who participate in the commission of a criminal act through the means of facilitation, assistance, by promise is to prove whether they knew the circumstances of the act or provided for them. For example, the Bucharest Court of Appeal, criminal section I, by Decision no. 433/2017, showed that several defendants committed a crime of aggravated robbery followed by the death of the victim provided by art. 233 - 234 lit. d) and f), par. 1, and art. 236 of the Criminal Code, while other *defendants provided security*, being convicted for complicity in the attempted robbery provided by art. 48 para. 1 reported to art. 32 rap. 233-234 alin. 1 lit. d) and f) Criminal Code with the application of art. 77 lit. a) Criminal Code considering that there can be no complicity in the crime of aggravated murder given that the criminal decision taken by the defendants consisted in stealing property from the victim's home (which they knew was an elderly person unable to defend himself), were unaware that violence was to be inflicted on the victim, as they could not foresee that it could cause serious harm, including death; or according to art. 50 para. 2 of the Criminal Code, the circumstances regarding the deed affect the participants only insofar as they knew or foresaw them. Only on the basis of certain evidence in the accusation can the presumption of innocence established by art. 4 of the Code of Criminal Procedure, in favor of any person otherwise it operates fully by virtue of the principle in *dubio pro reo* (any doubt in the formation of the conviction of the judicial bodies is interpreted in favor of the suspect or defendant).

In another case solved this time by the High Court of Cassation and Justice, by the criminal Decision no. 239/A/2019, it sentenced a defendant to complicity in the crime of abuse of office provided by the old legislation, in art. 26 of the Criminal Code 1969 rap. art. 132 of Law 78/2000 combined with art. 248 and 2481 of the Criminal Code of 1969. Both the court of first instance and the supreme court, although they retained a complicity (probably concomitant) with the commission of the abuse of three other defendants, did not prove the aid, if there was an agreement between the accomplices and the other defendants and not even if there was a mental cohesion between the accomplices and the perpetrators and if the

accomplices without the authors' knowledge wanted to help them intentionally commit the acts of abuse. The appellate court did not hold all the defendants liable to cause damage, not even in terms of causing a significant disturbance to the smooth running of the institution as provided in the previous Criminal Code. Even the Supreme Court held in the decision that from the perspective of the requirements of objective complicity specific to abuse of office, an incorrect or incomplete documentary justification of some operations is not sufficient to contain the crime, it is necessary to verify at the same time whether those operations were carried out reality and what was their legal basis or content. This is because one of the requirements of the objective side of the crime of abuse of office is to cause damage which means a corresponding loss of assets - tab 147 of the Decision. For this reason, we consider that the supreme court erred in failing to demonstrate when the accomplice made the criminal resolution to assist the other co-accused in committing the crime of abuse of office, strangely enough that the complicity was retained even unknowingly where the appellant understood all the while that through his activities he does deeds permitted by law, he being convicted without proving the existence of the intention. We do not believe that the alleged crime of abuse can be lent to accomplices as to the existence of the criminal intent which should have been demonstrated and not presumed. In this sense, the court did not demonstrate as required by art. 28 para. 2 of the Criminal Code of 1969 (the same content has the same as art. 50 para. 2 of the current Criminal Code) that several cumulative conditions must be met, namely: the provision by the accomplice of the action or inaction to be executed by the perpetrator and the consequences them, the joining of the accomplice's act to the action or inaction performed by the perpetrator, the acceptance or pursuit of the accomplice of the foreseen consequences and the effective contribution of the accomplice to the commission of the deed - see Criminal Decision no. 2892/2006 and I.C.C.J. - Criminal section.

Also, the supreme court did not even clarify whether at the time of taking the criminal resolution of the accomplice, he knew of a state (the investigated issues were ordered by collective decisions of the County Council), *situations* (Directed by accomplices was subordinated to the County Council), or circumstances (exercising the function of director of the accomplice) and that he would have known the facts of the co-perpetrators of abuse of office in order not to apply the provisions of art. 30 para. 1 Penal Code.

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