

# THE COMPARATIVE STUDY OF THE INSTITUTION OF THE PENAL PARTICIPATION IN THE ROMANIAN LEGISLATION AND THE ONE OF THE MOLDOVAN REPUBLIC

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## **Abstract:**

*The institution of the penal participation has and still arouses ample doctrinarian and jurisprudential discussions in Romania as well as in the Moldovan Republic.*

*It is characterized by ample theories of different authors from the two countries.*

*Thus it is emphasized the accessory theory of participation and the theory of the self sustaining character of participation.*

*Also, the two law systems dwell this matter similarly but not identically, there are many similarities and differences that I wish to state and emphasize in the present paper.*

**Key words:** penal participation, organized crime, comparasion , Moldovan Republic, Romania.

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Historically, the evolution of the notion is symmetric starting from the Roman Dacia, going to the Middle Ages and the modern period.

Nowadays the Penal Code of the Moldovan Republic refers to this matter in Chapter IV articles 41-49.

The Romanian Penal Code dedicates to this matter Chapter III articles 23-31.

This theme of scientific research was and is a present day issue starting with the theoretic importance, but especially the practice one of this notion in the two states.

The cooperation of many persons in achieving penal acts is labeled as a form of antisocial behavior because:

- the operation and distribution of the executing roles and tasks often ensures the success of the unfolded action;
- the participation of many persons at achieving the same act strengthens their will to achieve the proposed action, diminishing the possibility of giving up the punishable idea or of ceasing it during the unfolding of the action;
- the cooperation of many perpetrators at achieving a felony usually leads to more serious consequences for the general public, as well as for the victims, normal or judicial persons.

In order to emphasize the consequences, sometimes disastrous that may come out of the cooperation of many perpetrators when committing a penal act, lately at a global level it is noticed an increase of the threat of the organized crime, in this sense stand out the illegal narcotics and psychotropic substances traffic, money laundry, the illegal arms traffic, nuclear materials and explosive components, of luxurious automobiles and art works, the control over the labor power, of gambling and, non the least, terrorism.

In spite of the efforts to eradicate it, the continuous development of the organized crime phenomena, makes it to achieve a more serious character, by the multiple cooperation of some perpetrators networks, jeopardizing even the national security of some states.

The organized crime has a power and expansion that seriously threatens the legit interests of the states, because it triggers an uncommon violence, that intimidates the population, and by illegally attaining fortunes, concretized in money, real estates and values, it undermines the political equilibrium, the economical wealth and the psychological state of the nations and countries.

In its last stages, the organized crime attacks the legislative system and the legit power, creating a parallel economy, subterraneous and perverse, that leads to the people's loss of faith in the authorities.

The democratization process has implied a series of major transformations in Romania as well as in the Moldovan Republic, which is the opening of the borders and the creation of the free market, with benefic consequences, facilitating the movement of persons and goods, but also a negative impact by creating opportunities for the criminals.

Taking advantage of the economical situation in this part of Europe, where the inflation has registered extraordinary increases and the black market has spread its tentacles over the economical-social life, the criminals organized themselves in much more organized and endowed groups than the organisms for the public order.

Using huge financial resources, these criminal organizations have corrupted some government officials involving in subterranean activities people belonging to the forces of public order, administration, justice and even military.

Here is a brief description of the present criminal phenomena, whose recrudescence has become a problem that especially preoccupies the all the states of the world and the international organisms, a situation that is due to a complex of social and economical causes, of which the specialization and the professionalism of the criminal groups stand out, that is the plurality of the criminals.

The penal participation as a scientific research theme has drawn the attention of the penal law authors from the Moldovan Republic as well as from Romania.

Great Romanian penal law professors have broadly approached this theme in their papers.

Thus, professor university doctor Constantin Mitrache in his paper "Romanian penal law, the general part" broadly approaches the problem of the penal participation from the criminals' plurality perspective.

There are also Costica Bulai, Traian Pop, Vintila Dongorez, Traian Dima, Teodor Vasiliu, George Antoniu, V. Boroi, who, in their papers, have talked about the problem of the penal participation from a theoretic-practical perspective.

A special mention deserves the professor Traian Pop who in his paper "Compared penal law" from 1923 speaks about the matter of the participation from the perspective of the compared penal law.

On this subject many studies, articles, comments were also written.

Beyond Prut, the Moldovan authors have also discussed about this matter.

I have to mention the collective of authors Marin Gherman, Nicusor Maldea, Corina Titiana Aldea, Mona Mirela Costa, Viviana Stiuj lead by the professor Alexandru Borodac. In order to achieve the proposed objective, the authors have consulted a rich specialized judicial bibliography appeared in the Moldovan Republic, Romania and the Russian Federation.

Another collective of authors made of Stela Botnaru, Alina Savga, Vladimir Grosu and Mariana Grama have talked about in the paper "Penal law, the general part" the same problem of the penal participation.

The penal participation has many forms, in report to the nature of the contribution that different participants have when committing an act. So these ways correspond to the different ways of cooperation when committing a felony.

The forms of the participation have an absorbent character, which is the most serious, as the ones committed in collaboration, absorb the ones less serious (the ones of instigating and complicity).

So one person's participation at committing the same felony cannot be seen as both author and instigator, it is only collaboration, due to the unity of the felony, even if the coauthor has first determined the committing of the felony after participating with execution acts at its committing. Of course, the same felon cannot be coauthor and accomplice or instigator and accomplice to the same felony, because the first act absorbs the latter one.

When the instance establishes the punishment it will take into consideration this circumstance of the participation with multiple acts, susceptible of being qualified in a different way.

We propose that the instigator to be sanctioned according to the punishment foreseen for the currently committed felony (attempt) referring to a perfect instigation followed by execution. The felons participated in committing the same felony, one of the conditions for the existence of participation.

If the punishment for the crime committed by the author until the moment of ceasing or impeding the producing of the result is more shallow than the deed to which he instigated, reduced according to article 29, alignment 1, Penal code, the instigator will be punished for the currently instigation felony. Thus, if X has instigated to simple homicide, which is sanctioned with prison from 10 to 20 years, for which the prison from 15 days to 10 years punishment should be applied, but until the moment of ceasing the victim was caused body damages, foreseen in article 181 Penal code, which is sanctioned with prison from 6 months to 5 years, this punishment will be applied to the instigate as well as to the instigator.

For it to be sanctioned the instigation not followed by execution as well as the one followed by execution but it took place the ceasing or impeding of the producing of the result, the punishment foreseen by the law for the felony to which he was instigated must be greater than 2 years, otherwise the instigator will not be sanctioned. It was thought that the danger degree of the felony and of the instigator when the legal punishment of prison is of 2 years or less does not necessitate its sanctioning.

In the situation of the instigation followed by the stopping of the instigator, he will not be punished, but he will be sanctioned for attempt at the respective felony, but not for the currently committed felony until the moment of stopping the author. Thus, it is contravened to the dispositions of article 22 Penal code.

It is also possible that the instigation deeds which did not have an effect, without having their own penal character, to fall under the incidence of the penal law due to the circumstance that, in order to make the author to commit the deed foreseen by the penal law, there were used means that, by themselves, are felonies: threat, blackmail, etc.

After the comparative analysis it resulted that while the Penal code of the Moldovan Republic offers a concrete definition of the penal participation (article 41), the Romanian Penal code restricts to an indirect definition by the concrete definition of the notion of participants (article 23).

Thus I consider that it should be imposed “by a legislative law”, in a future regulation that also the Romania legislative will expressly define this notion in the penal code, maybe with the following expression “the penal participation represents the cooperation of two or more guilty persons at committing a deed foreseen by the penal law”.

The Romanian Penal code considers that the activity of the participants does not have a distinct judicial individuality, but it is integrated in the unique deed, which gives penal signification to all the participation deeds. I also think that this is the correct solution “absolute” and “in fact”.

We also bear in mind that in the penal doctrine from the two states the plurality of felons is known in three forms that are the natural, constituted and occasional plurality.

From the point of view of the penal participation’s conditions, the doctrine from the two states has each retained a number of four, which are more or less congruent.

Reading them I have come to the conclusion that the penal participation must fulfill the following conditions:

-to have committed a *deed foreseen by the penal law*, deed which can be consummated or remained in the punishable attempt phase;

-when committing the deed *more than one persons participated than it was necessary according to the nature of the deed*;

-*the subjective link between the participants* – it is necessary that all the participants be animated by the same common will to commit the penal deed;

-*qualifying the committed deed by the joint contribution as a felony*;

-*the plurality of subjects* implies the participation of two or more persons when committing the deed;

-*the joint activity of the participants at the felony*;

-*the unity of the intention* is a subjective condition of the penal participation, the presence of the intent being mandatory.

Unlike the Romanian Penal code, the Penal code of the Moldovan Republic foresees the condition of the participation at an intended deed, not recognizing the existence of the improper participation.

I consider that in the future some modifications must intervene in the regulations from the Moldovan Republic in order to adjust the legislation corresponding to the acknowledgement of the improper participation.

We have to keep in mind that in the matter of differentiating the categories of participants three theories were drafted: objective, subjective and mixed.

The doctrine and the practice from Romania as well as from the Moldovan Republic acknowledge two criteria in report to which the types of participants at the felony are established: the character of the participation, the participation degree.

The legislation from the Moldovan Republic (article 42 alignments 2-5 Penal code) emphasizes the following categories: the author, the organizer, the instigator and the accomplice.

The Romanian Penal code acknowledges as participants: the author (coauthor), the instigator, the accomplice.

We can thus observe that the Romanian legislation does not insert among the participants the organizer, who thus is not penal punishable.

But, for instance, in the Romanian Penal code in the Special Section there are felonies such as conspiracy (article 167) which penal sanctions the initiation or constitution of an association or group in order to commit certain felonies or the adhesion or support under any form of such an association or group.

Also considering, among other facts, that the Romanian penal legislation is inspired by the French one, I recommend that a future modification of the penal code will introduce the instigator among the other participants.

When approaching the matter of the “organizer” the penal legislation from the Moldovan Republic, it also regulates other notions such as the creation of an organized criminal group or a criminal organization as forms of the penal

participation considering the social-political current context from the country and the region.

Analyzing the law texts we notice that the instigation matter has similar regulations in the two law systems.

In the complicity matter, starting with the analysis of the legal regulations we have noticed pretty important differences, which imposed the differential approach of the matter.

The organized criminal group and the criminal organization have received direct legal regulations only in the Penal code from the Moldovan Republic.

In conclusion, in Romania this matter does not have a regulation in the penal code, but in special laws such as the Law no. 39/2003 regarding the prevention and combat against the organized crime.

If the modification, the completion of the penal code and the insert of these participation forms should be imposed or not is a matter opened for discussion. The Romanian doctrinarians of the penal law are divided in two groups, manifesting themselves pro or against these regulations. I think that nowadays, considering the social-political evolution of the country such a modification is not mandatory.

The grounds and limitations of the participants' responsibility in both law systems lays in the punishments parity system in accordance with which all the participants must be sanctioned with the same punishment, and it will be differentiated on a judicial individualizing path.

This system better corresponds to the concrete sanctioning necessities of the participants when committing a felony and that is why all of those who participated at its committing must be seen as perpetrators susceptible to be sanctioned with the punishment foreseen by the law for the author.