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THE OFFENSE OF THEFT ACCORDING TO THE NEW ROMANIAN CRIMINAL CODE

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Abstract: In this paper we have conducted a general examination of the theft offense as it is regulated in the new Criminal Code. Within the research we have considered the examination of theelements of differentiation and similarity between the two regulations, and the constitutive content of this crime. The innovations are represented by the examination of the constitutive content and of the preexistent elements of the offense with reference to Romanian doctrine and to an extensive legal practice. We have considered the presentation of some aspects of legal practice that relate perfectly to the provisions of the new Criminal Code. The paper may be useful to the academics and also to practitioners in the field of criminal law.

Keywords:crime subjects; preexistent elements; constitutive content

1. Concept and Characterization

The theft is the act of a person to take a movable asset from the possession or detention of another person without his consent in order to misappropriate that asset.

It will be noted as theft also if the property in question belongs entirely or in part to the perpetrator, even if at the time of the commission that asset was in another person's legitimate possession or detention.

According to the law, they are treated as movable assets also the records, electricity, and any other kind of energy that has economic value.

2. The Criminal Code in Force in Relation to the Previous Law

A comparative analysis of the two incriminations allows us to express our opinion that in the new Criminal Code the offense of theft of this type way (simple) has a content similar to that of the Criminal Code of 1969.

However there are some differences between the two regulations, namely:

– in the new Criminal Code sanctioning regime is different in that the minimum and maximum punishment are greatly reduced in comparison with those

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provided for in art. 208 of the Criminal Code of 1969 (imprisonment from 6 months to 3 years or a fine, to imprisonment from one to 12 years);

– the Legislator of the Criminal Code renounced at incriminating theft of use in the content of the modality type of theft, as shown in art. 208, par. (4) of the 1969 Criminal Code, incriminating distinctly this offense;

– Unlike the previous regulation, in the new Criminal Code, reconciliation removes criminal liability [art. 231, par. (2) Criminal Code].

3. Preexistent Elements

3.1. The Legal Object

Examining the crime of theft provided for in art. 524 of the Criminal Code of Carol II, Professor Traian Pop said that "In respect of the legal object of theft there is the controversy in the literature (see Angyal, op. cit., p. 20). According to some, the legal object is only the *legal right to ownership* according to others, *possession*, and after the third thesis, both *ownership* and *possession"*[1].

The majority opinion of the specialists of the time (a group of authors and others), was that "the judicial object of theft is *legal ownership*, which it usually externalizes through *possession* as the owner is usually the possessor; in this case it involves ownership and possession. By theft it will affect the possession and ownership.

But it is also the legal object only the possession, without title of property, and whether the possession is fair or unjust, in good or bad faith, corrupted or uncorrupted (...)

According to the text of art. 524 of the Criminal Code, it forms the juridical object of theft also *detention*. It is true and it should be noted that, *in essence notdetention* is the juridical object of the theft, but *the ownership or possession* of it, on behalf of which it exerts detention, or in other words, the owner of detention is the *economic exponent* of the owner or possessor. Yet the express sense of of the law, detention is *equivalent* to possession, in terms of protecting the law"[1].

Later, another author considers that the special legal object consists of "social relations of patrimony issues on their personal or private property, whose training, the deployment and development are conditional defenders of the facts of movable assets belonging to this asset" [2].

The same author states that "the facts of movable property, i.e. their physical position in the sphere patrimony of a person, which is a reality with social relevance (an attribute of private assets as a social value) and removal without the right of an asset in the patrimony sphere where it was located is a dangerous social action, against whom the defense by means of criminal law appears as necessary"[2].

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In another opinion it shall be deemed the special legal object "it consists of social relations on the patrimony rights and interests of legal and physical entities" [3].

Another author sustains that the special legal subject consists of "social relations on protection of property rights, possession or detention of a person of movable tangible assets" [4].

Given the views expressed in the Romanian doctrine,old or current, and also the changes of the incrimination of the offense of theft, we consider that the *Special Legal Object*consists of social relations concerning the protection of property rights, the protection of possession and detention of movable assets of physical or legal entity.

3.2. The Material Object

The material object is (as required by law) the movable asset that was taken from the possession or detention of a person without their consent, in order to appropriate it unjustly.

According to the doctrine, the concept of "movable asset" corresponds "to that of civil law and it is characterized in that it can be moved, transported, transferred from one place to another without changing its value.

The movable asset can be animated or non-animated. Animated assets are animals, poultry and other creatures living in their natural state and which are found in the possession of a person. There are not animated other assets, not being important their physical state (solid, gas etc.). Also there are considered movable assets also the money, debt securities and any other assets, equating in money"[3].

In another opinion it states that "the buildings cannot be the material object, but the materials of which it is built, for example, a house (tin or tiles on the roof, windows, doors, pipes, various plants, etc.) once they have been removed from the building structure, they are movable and their ownership is theft. If, through the deployment and ownership of such asset, there was caused the damage of that building, next to the crime of theft is destruction, and that the two facts were to be considered concurrent offenses. The real contest of crime is so when the perpetrator intentionally and directly commits a degradation, in order to be appropriate it, the asset separated from the real estate, and the case where intending to steal an asset, he foresaw and accepted the possibility asset's degradation (indirect intent).

Crops, trees, fruits, once they are cut or picked and so detached from soil or strains are movable assets and they can be so material object of theft"(5).

We should note however, that not all movables taken as provided in art. 228, par. (1)of the Criminal Code may be material object of the theft offense.

Also, according to the doctrine, "if the perpetrator steals a corpse or ash resulting from the incineration thereof, the act shall constitute the crime of desecration of corpses and graves set in art. 383, par. (1) of the New Criminal Code [4].

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If for the existence of the crime the value of the stolen property is irrelevant to the legal classification and thus individualizing the criminal sanction to be imposed to the defendant for the specific committed offense, if the value exceeds 2,000,000 lei it will apply the provisions of art. $256^1$of the Criminal Code (the facts causing extremely serious consequences), in which case, special limits of the penalty shall be increased by half. [6]

For the existence of the offense it is necessary for the asset taken by the author not to be abandoned by the owner.

Thus, in the judicial practice it was decided that "taking the path of a domestic animal does not constitute the crime of misappropriation of the found asset, but that of robbery as the asset itself has not been lost by its owner and, as such, he did not come out of its possession"[7].

According to the law, there are assimilated the movable assets as movable the records, electricity, and any other kind of energy that has economic value.

The act will convene the constituent elements of theft even if the property belongs entirely or in part of the perpetrator, but when committing the act of that offense itwas in thelegitimate possession or detention of another person.

3.3. The Subjects of the Offense

Active subject can be any physical or legal entity who meets the general requirements required by law to have this quality.

According to the doctrine and constant jurisprudence, it can be active subject of the crime examined even the owner of the asset, assuming that it takes that asset from its legitimate possessor or holder; in the doctrine it was exemplified the hypothesis of taking a car leased financially, stealing sheep by the owner, from thecommunal cattle, being detained there because they had been found grazing on the land of a farm units which would be compensated or removal of an asset in detention of the other co-owner [4], [3].

The act will be typical and if the asset is stolen from the person whohad it originally (in particular, from the thief) by another person, other than owner, occupiers/asset holder; we consider that the act will not be typical if the asset is stolen from a thief by landowners, the occupiers / owner of the asset.

The criminal participation is possible in all its forms, respectively, co-authorship, incitement and complicity.

In the judicial practice prior to the entry into force of the Criminal Code, theft was mentioned as "*evasion from a crowd, the wallet from the pocket of the victim and sending it, without delay, to the second perpetrator in order to ensure the appropriation of the thing without the risk of being discovered, and for the latter, as accomplice to the crime of theft, not complicity to it (8) or the deed of which determines the other to commit an offense under the criminal law and buysfrom the author the asset derived from the offense, it only constitutes incitement and instigation which is not in competition with concealment* [9].

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Also, by the existence of complicity in the crime of theft in the way of promising to conceal the stolen assets, it does not expressly require for that promise to be formulated.

In the case where, repeatedly, a person buys from the author of theft of cars many parts thereof, knowing that they are derived from theft, the act constitutes a moral aid given to the author of committing theft, knowing having secured the value of the stolen assets [10].

Following an appeal on points of law, the High Court of Cassation and Justice decided that under the situation of the first act of concealment, followed by another action of the same concealer, who promises to ensuring the use of stolen assets, there are constitutive elements of complicity the theft offense in its simple or continued form, as appropriate, in real competition with the offense of concealment, even if the anticipated promise of concealment of the assets was not fulfilled [11].

Although the presented examples of judicial practice regard cases settled before the entry into force of the new law, they are still current.

The passive subject can be any physical or legal entity, owned, held or whose detention was stolen moveable property; as noted above, the thief can be passive subject of the crime of theft, if the asset was not stolen by the owner, occupiers/owner, but by another person.

Typically, the plurality of passive subjects will determine to retain the contest of crimes. Thus, "in the case where a person takes under the same criminal resolution, at various time intervals assets from the patrimony of more passive subjects, it will retain committing a series of offenses of theft (real homogeneous contest); if the theft of assets from the patrimony of several persons takes place in the same circumstance, from a single owner and under the same criminal intention, it will retain committing a single offense of theft (natural unit of offense)" [4].

Meanwhile, if the same person evades repeatedly at different intervals, but in achieving same criminal resolution, the assets from the patrimony of the same physical or legal entity (for example, a worker takes from the unit where he is employed at various time intervals, various assetsfrom the patrimony of that legal entity) it will retain as a single crime of theft in continuous form [art. 35, par. (1) of the Criminal Code].

4. The Structure and Legal Content of the Offense

4.1. Premise Situation

In the case of the examined crime, the premise situation is the existence of an asset "that is actually in the possession (or custody) of a person other than the one that commits the theft" [2].

According to the author quoted above"this situation is a prerequisite, extrinsic to the constitutive content of the crime, but essential to its existence, hence the qualification*premise situation*.

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The activityconducted by a person to take falsely of a movable asset that does not exist in reality but only in the imagination of the perpetrator or any left property that is not in the possession of anyone, is not even an attempt to steal, this activity does not fall under theincidence of the criminal law, unless these acts would constitute another crime (e.g. hidden penetration in the home of a person to steal a compromising document, but actually there is not; the act is not attempted theft, but it constitutes trespassing"[2].

In the same context, it is not theft "the deed of onewho takes a movable asset, that actually was in his possession (e.g. a person takes a movable asset from his relative, not knowing that in the meantime that a relative had died and left him the entire fortune; there is therefore a putative deed and not the crime of theft as the asset wasvirtually in the possession of the perpetrator)"[2].

So, the prerequisite situation "conditioning the existence of the offense reflects upon its content, so that finding the achievement of thetheft offense content implies the premise situation, as conversely, the absence of facts implies the impossibility of achieving the contents of the offense"[2].

4.2. The Constitutive Content

4.2.1. The Objective Side

The material element of the objective side consists of making a movable asset from the possession or detention of a natural or legal person without their consent.

According to the doctrine, "*taking* means removing the asset from the scope of the person's possession or detention of which it was supposed to be found, so that person will cease to have available the taken asset. Taking is therefore a theft action by which the premise situation changes, that is the situation of the asset in terms of its position within the possession sphere where it wasprior to the commission of the taken action.

The action of taking it done by changing the situation prior to the asset, itisno longer available to the person who owns it or previously owned it, but to the person who committed the theft"[2].

Regarding the action itself, of taking it, it may be "committed in any way (by gripping, hiding, posting, griping, drifting, consuming, etc.) and by any other means (with his own hand, by using trained animals by attracting birds or animals, through connections to energy sources etc.)"[2].

According to the same author, "taking it can be achieved through inaction (i.e. one who teaches a mass of assets, fails to give back some assets that it holds for himself)" [2].

To take"can be achieved by any means (action or omission) except violence, threat or coercion, when the act will constitute robbery" [4].

In the recent jurisprudence, it was decided that the agreement between two people to take an asset out on one of them, but belonging to another by simulating an assault on it and

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taking the asset by the second person, is theft, and not that of robbery, acquiring this feature as it was not committed by real aggression on the injured person [12], or the theft of assets from a car and being surprised by the police of the perpetrator near the car with stolen assets over, constitutes consumed theft and not attempt to this offense [13], or performing calls by connecting illegally to the telephone circuit to another person constitutes theft of electricity within the meaning of art. 208, par. (2) of the Criminal Code. [14].

Also, the alienation of the worker of an asset that has been entrusted to use at work is theft and not that of breach of trust because the perpetrator does not possess or owns alienated property under a title, the owner keeping legally, the possession and detention of the assets [15] or stripping away the injured party of the hat he wears, by pulling it out of his head, without exercising any aggressive actions likely to defeat opposition, it is theft and not robbery as there is no requirement for the use of violence [16] and the deed of the guard to participate in theft of the goods in his guard was following the acceptance of the promise that he would receive some of the money to be achieved by valuing stolen goods, constitute the theft crime, not the bribery, since the money was promised for his act of theft, not for the action or inaction regarding his duties at work. [17]

In order to achieve the objective side of the examined offense, it is necessary to meet cumulatively three key requirements, namely: the taken asset to be a movable, the asset before being stolen to be in the possession or detention of another person and taking the movable asset to be achieved without the consent of the person in whose the possession or detention the assetwas [2].

We do not insist on the first essential requirement (the asset taken to be a movable asset) since we made the necessary specifications when examining the material object that represents a movable asset nor the last essential requirement (the taking ofthe movable assetto be achieved without the consent of person in whose possession or detention the asset is) because this does not raise particular issues of understanding or interpretation.

As regards the second essential requirement (the asset to be in possession or detention of another person), the doctrine held that "From the criminal law point of view, which protects by theft incrimination the factsituation of the movable asset, terms as *possession* and *detention* have the meaning of simple current state. It is not interested if the one who had actually the assetof which he was stripped if he was or not the owner or holder of any right to possess or hold. There is therefore achieved the requirement with which we are dealing if the victim is in his current state in the possession of the asset.

The asset must be in the possession or detention of *another*. This requirement is satisfied even when the asset would occasionally be in the hands of the perpetrator, the mere material contact, a simple manipulation of the assetdid not confer nor possession or detention of that asset. For example, the master called to the home of a person to perform his job is not the owner or holder of the material made available to him by the client to perform the work;

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also the maid working in the house of a person only has contact with the material things inside that dwelling and handling them. Theft of materials or taking them in such situations will therefore be theft and not abuse of trust"[2].

The immediate result is achieved when the movable asset is taken without the consent of the person in whose possession or detention is, that is at the moment when the possessor or holder is stripped of movable asset, and it came into the possession of another person, so when the property has been removed from the scope of the mastery of the dispossessed and was replaced by the possession of the offender.

The causation connection requires that "changing the facts, by removing the asset from the scope of mastery of the dispossessed and making it unable to dispose of that good must be a direct consequence of the taking action, of extracting, this action is the cause and the immediate effect is the consequence"[2].

Moreover, the causal connection resulting from the materiality of the act is not required to be proven by the judicial bodies.

4.2.2. The Subjective Side

In the case of theft, the subjective side is composed of a subjective element and an *essential requirement* that regards the *purpose* of the perpetrator.

The subjective element (psychological, moral) is, "according to art. 19, par. 1 from the will and intent of the action of taking from the possession or detention of another without his consent, i.e. to achieve the material side of the offense.

The immediate result is a physical result natural for the course of action of taking, one who commits without right (without the consent of the owner or registered keeper) such action provides always the result, the outcome, so the intent for the crime of theft is always and inevitably *a direct intent* (a determined deceit)"[2].

However, "exceptionally, there may be beside the direct intent also the*indirect intention*(an eventual deceit)when the thing stolen contained in it another asset, whose eventual presence perpetratorcould have foreseen it, and he accepted the eventual result of his action (e.g. taking an overcoat that held values) [2].

The essential requirement. According to the doctrine, "The subjective aspect of theft offense contains as an essential requirement the conditioning of the subjective element on the purpose of the perpetrator. So in order to achieve the subjective side is not sufficient the intent to commit the act of taking an asset, without the consent of the person in whose possession or detention is that asset, but it also requires for that intention to have the purpose of *misappropriation* of the stolen asset (art. 208, par. 1 of the Criminal Code). The law therefore requires an intent so characterized by the pursued purpose (a qualified deceit).

The intention to take the good will be directed towards the purpose of acquiring unjustly, whenever by hisoffense the perpetrator seeks to affect the right of possessing or owningthe stolen asset, depriving him of that asset.

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Assimilation does not regard, therefore, ownership but the right to possess. The perpetrator is not allowed to acquire assets if his right to possess is at the time of committing the offense gained by the current right of the person in whose possession or detention is the asset. So there is misappropriation feature of the owner thatwould take his asset left as security to a lender or leased, or taken by a higher authority, etc. (art. 208, par. 3 of the Criminal Code).

The condition of "misappropriation"should not be performed in fact, it is only required as the purpose of the perpetrator; so for the existence of theft offense it is sufficient to prove that the perpetrator has pursued this goal, being able or not to achieve it. There is therefore the crime of theft, even if the perpetrator soon after taking the asset he was stripped of the asset or abandoned it"[2].

5. Forms,Ways, Sanctions

5.1. Forms

The preparatory acts in order to the commit the act are not incriminated by the law, not being a punishable form of theft offense, regardless of their nature, frequency or destination.

In the event that after the acts of preparation, the perpetrator goes to the acts of execution, "the preparatory acts acquires criminal legal relevance, they enclosed it in the author's contribution, when they were made by him, or an act of earlier complicity when they were made by other participants"[2].

The attempt is punished according to art. 232 of the Criminal Code.

According to the doctrine, it "is attempted theft whenever the action of taking an asset in possession or detention of another person has not resulted in the dispossession of that person, the taking action being interrupted against the will of the perpetrator before the facts of the asset have been changed as a result of theft (the perpetrator was caught when he performed the act of taking or he was discovered before leaving the room, inside the district etc. wherethe asset was, so before the taking to become a theft; or the perpetrator has abandoned the taking action making noises that inspired him fear or inevitable difficulties, etc.)"[2].

In the judicial practice it was decided that the act of the defendant to open the bag of the victim and to introduce his hand in the bag, without being able to take something, following the complaint of the injured party, is attempted aggravated theft and not consumed offense [18], or the fact that the perpetrators were surprised stealing oil from the pipeline, having filled several barrels of the product,escaped, abandoningthem and fled the scene, it does not assign its character of attempted crime of theft; the amount stolen from the pipeline and put into containers has been removed from the victim's possession, theft thereof being thus consumed [19].

Consumption. According to the doctrine, "the act of theft is consumed since the action of taking the asset from the possession or detention of a person in whose possession that asset was, was carried through, so that the asset has been removed from the sphere where it was

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available to the passive subject, in other words the passive subject was stripped by changing the facts on which that asset had previously"[2].

In the judicial practice it was decided that it is the offender of the consumed offense by theft, and not of attempt to this offense, the defendant caught at the scene after taking some of the assets from the place where there were and put them in his containers made for their transportation [20] or the act of the defendant to have taken from a car a flashlight, an alarm system and eight video tapes, being caught by the owner, before being out of the car, it is a consumed offense of theft, and not just an attempt; consumed theft is when the defendant took the mentioned assets in his possession, the fact that he had no material time to exit the vehicle is irrelevant under the form of committing the crime [21] or making the decision to steal copper from inside a commercial company, the defendant climbed a fence and then climbed through a window, entered the shed where he got more cover plates of copper that he has loaded in three bags; after getting the bags out through the same window, he carried one of them to the fence of the unit, but failed to get over the fence, as he was surprised by the police. By loading the bags the crime of theft was consumed, since by this action it was done by stripping the victim and passing the material object of the offense under the disposition of the defendant. The fact that, after consumption, the defendant was caught at the scene, with assets taken over, is irrelevant in terms of the forms of crime which, once consumed, cannot convert into animperfect form, on grounds that the defendant could not keep the possession of the stolen goods [22].

Weariness. The action of taking a movable asset may take in certain situations the form of a continuous activity (such as theft of electricity) or continuing operations (as in the case of repeated taking of assets from the workplace by an employee or repeated theft at various intervals, but achieving the same criminal intentions of the some assetsof the same household by the same active subject).

In the circumstances mentioned above, the action of taking extends time after moment consumption, the time to weariness identifying with the moment of cessation of extending the documents of the illegal activities achieved by the perpetrator.

In this regard, in judicial practice it was decided that the act of the defendant to take at the same night, assetsfrom two cars and attempting to commit theft from other two, all in one place, it represents a single continuousoffense, aggravated theft, the feature ofconsumed offense of some of the facts and the tempted crime of others being irrelevant from the access point [23] or the defendant went at night, at the headquarters of a workstation, where he took five Sulinar grade, which he transported on the cart with which he came, and here he went to his home; he therefore achieved one action - made up of a plurality of material acts –a characteristic to the theft offense, having only one action. However, the plurality of similar material acts committed in the same execution process, does not achieve a continued offense - but a natural unit of crime [24].

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5.2. Ways

The examined offense presents the way in which the offense has a normative type, which is provided in article 228, par. (1) of the Criminal Code. That consists of taking a movable asset from the possession or detention of another, without his consent, in order to illegally appropriate and an assimilated way of the type way (single) provided in the provisions of art. 228, par. (2) of the Criminal Code which consists in retaining this deed and when the property belongs entirely or in part to the perpetrator, but at the time of the commission, that asset was in the legitimate possession or detention of another person.

As in the case of type way, and also for the assimilated way, there will be considered movable assets also the records, electricity and any kind of energy that has economic value.

Also the examined offense presents an aggravated normative way, to be withheld when the value of the caused prejudice exceeds 2,000,000 lei, according to art. 256^1 of the Criminal Code.

Regarding the factual ways, they are numerous in relation to the circumstances of committing every act and material subject.

5.3. Sanctions

In the case of normative simple ways and to the assimilated ones, the penalty prescribed by law is imprisonment from 6 months to 3 years or a fine, and if in the case of the aggravated normative ways, the provided sanction is of imprisonment from 9 months to 4 years and 6 months or fine (special limits of the sentence provided by law shall be increased by half according to art. 256^1 of the Criminal Code).

6. Conclusion

Although the legal content is similar to that of the previous law, between the two regulations there are some fundamental differences, which in their essence express the new criminal policy of the Romanian state.

The fundamental difference between the two regulations is the possibility of providing to the active subject of the crime to come to terms with the victim, in which case the criminal liability is removed, according to art. 231, par. (2) of the Criminal Code.

These provisions, criticized by some authors and appreciated by others, provide a disposition right of the theft offense victim, which in our opinion is a good thing.

Another modification of the legislator of the new Criminal Code regards the minimum and maximum penalty limits which are greatly reduced, compared to the old law.

The effectiveness of these new provisions will only be seen over time, with criminological analysis covering the overall situation of criminality in this area.

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