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THE AGGRAVATED THEFT. THE AGGRAVATION CIRCUMSTANTIAL ELEMENTS AS PROVIDED FOR IN THE PROVISIONS OF ARTICLE 229, PARAGRAPH (1) OF THE CRIMINAL CODE

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Abstract: In the present study we have examined the crime of aggravated theft, its aggravation elements as provided for in article 229, par. (1) of the Criminal Code. As a novelty, we note besides the examination itself, recent or old doctrine and judicial practice in the recent years at the level of the Romanian courts. Wealso mention the fact that,for purely didactic purposes, the aggravation circumstantial elements were divided into three groups, the subject of this paper being the analysis of the first group. We have highlighted and stressed at the same time the differentiating elements of the regulations contained in the two codes of criminal law, from the perspective of the more favorable criminal law enforcement, which in most cases it can be the new law. The academic work can be useful, especially to students oflaw faculty in the country, and practitioners in this field.

Keywords:crime subjects; constitutive content; the new law; the old law

1. Concept and Characterization

As argued in our recent or earlier doctrine, the aggravated theft is a variant of burglary, a "variant that the law regards it as presenting a generic higher degree of social danger. The law also provides the circumstances that particularize this variant"[1].

So aggravated theft will be when due to circumstances in which a theft offense is committed, the crime is considered more serious being adequately sanctioned.

These special circumstances in which it commits the crime of theft, "are not just general legal aggravating, but became, by the will of law, an element of content of the theft offense, an element which, by its nature preserves also the feature of the circumstances, hence the name which uses the criminal doctrine in this respect, a "circumstantial element" of aggravation of theft"[2].

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

The comparative examination of the provisions that regulated the aggravated theft of the two laws allows us to formulate opinions according to which there are both identity and distinction elements.

Among the elements of similarity we highlight, keeping the traditional solutions of incrimination separate, in a separate article of aggravated theft, maintaining the marginal title,

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structuring the methods in a logical order, starting with the facts less serious and continuing with the more serious ones, including differentiated sanctions by which it is highlighted the obvious severity of the crime.

Also we highlight the similarity between the first three groups of circumstantial aggravation elements, stating with the specification that the facts which are part of the last group of both laws are identical in terms of the retained circumstance.

Between the two regulations there are many distinguishing features, among which we mention:

- Renouncing in the new law at some circumstantial aggravation elements provided in the previous law, namely: committing theft by two or more persons together, the offense was committed against a person unable to express their will or to defend and committing the act during a calamity; the renunciation of the legislator to these items aggravation circumstantial elements is justified because they, in anidentical or similar formulation are provided in the provisions of art. 77, letters a), e) and g) of the Criminal Code, as aggravating circumstances; also the legislator of the new Criminal Code also renounced at incriminating the theft committed in a public place; if in the first three mentionedsituations,we can retain these aggravating circumstances, in the last instance (theft committed in a public place), the action will be of simple theft;

- compared to the provisions of the previous law, the new law introduces two new aggravation circumstantial elements, namely: committing theft by shutting down the alarm system or surveillance (par. (1), letter e) and committing theft by breaking and entering or professional office (par. (2), letter b);

- Another element of differentiation is the fact that in the new law in the structure of incrimination of the art 229 it is not retained the aggravated way of the aggravated theft that caused serious consequences (art. 229, par. (4) of the 1969 Criminal Code); however by the subsequent amendments this aggravated way was introduced by art. $256^1$of the Criminal Code;

- in the new law it was renounced at the depositionspar. (5), art. 229 that there were provided certain provisions referring to punishing the attempt and some express condition that incriminated the attempt;

- another important element of differentiation regards the possibility of reconciliation of the parties in the case of the acts provided in art. 229, par. (1) and par. (2)letters b) and c), a provision which is not in the old law;

- A final element of differentiation regards the sanctioning regime which in the old law was more severe, namely: imprisonment from 3 to 15 years in the case of par. (1) and par. (2), imprisonment from 4-18 years for par. (3) and imprisonment for 10 to 20 years and removal of rights for par. (4), art. 229 of the 1969 Criminal Code, compared to imprisonment from one to 5 years as in the case ofpar. (1), imprisonment for 2-7 years for par. (2), imprisonment from 3 to 10 years for par. (3) and increase by half the limits of punishment in the case where the theft has produced serious consequences.

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3. The Preexisting Elements

3.1. The Legal Object

The legal object of the crime of aggravated theft "is formed by the social relations of patrimony issues whose protection is conditioned by assuring the fact situation, the physical position of the movable assets they have in the patrimony of each person. Changing without right, through circumvention, the fact situation of an asset, empties by its material substance the right of the one who is de-possessed, an obviously dangerous consequence to the security and durability of patrimony relations"[1].

In a more recent opinion it is claimed that "the legal object of the crime of aggravated theft coincides in some respects with the juridical object of the simple theft offense, this object being the social relations of property issues, whose protection is conditioned on providing the factsituation a physical position that the movable assets have in the patrimony of every physical and legal entity. To this legal object of theft offense is added, in the case of aggravated theft, the social relations of patrimony specific to each circumstantial element of aggravation provided in art. 229 of the Criminal Code, relations whose protection is conditioned by ensuring the fact situation, physical position of assets in circumstances specific to each aggravating circumstantial element"(2).

3.2. Material Object

The material object of aggravated theft,as simple theft, can be any movable asset that lies within the patrimony sphere of the legal or physical entity which has a certain value.

Although in general we can say that between the material object in the case of aggravated theftand the material object of the simple theft there are no differences, a further examination of this topic leads to a contrary finding. Thus, it can never be a material object of the simple theft of assets specifically mentioned in par. (3), art. 229 or stolen assets in special conditions provided in par. (1) and (2).

3.3. Subjects of the Offense

The active subject of the crime of aggravated theft can be any natural or legal person who meets the general requirements set by law.

The plurality of active subjects is no longer a way of committing the crime of theft. When an offense is committed by three or more persons together it will be aggravating circumstance provided for in article 77, letter a) of the Criminal Code, and when it is committed by two individuals it will retain as simple theft.

Similarly to the simple theft, the aggravated theft committed between family members, by a minor against the tutor or by the person who lives with the injured party or hosted by it, is punishable only upon the complaint of the injured party.

Meanwhile, the active subject of the offense may be the person who is the owner, co-owner or holder of any real right, when the movable property in question is in possession or lawful detention of another person.

The *passive subject* may be legal or physical entity who had in his possession movable property stolen or detention in the special conditions described in the incrimination standard.

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The time and place of the offense is important for its existence in the ways provided for in art. 229, par. (1), letter b) and art. 229, par. (1), letter a) or art. 229, par. (2) letterb) of the Criminal Code.

4. Structure and Legal Content of the Offense

4.1. Premise Situation

In the case of aggravated theft the premise situation is the same as simple theft, "it consists in the physical position (status quo) that the movable asset had in the patrimony sphere of a person before committing the theft, the fact which provides to that person the possibility to dispose financially of his property"[1].

4.2. Constitutive Content

The constitutive content of the offense of aggravated theft is made up of the same elements as simple theft, the only extra element is the circumstantial aggravating element [1].

As for the ones mentioned in connection with the objective and subjective side, they are identical to those considered as being simple theft, that is why we will make no further explanations.

On the nameofcircumstantial element, in the doctrine it was held that "this element is called circumstantial because it is not part of the essential elements of theft, but comes from the conversion by the legislator of some circumstances that could accompany committing theft, the constituent element of the crime of aggravated theft. So circumstances that could have been aggravated circumstances of the simple theft became by the will of law an element of the offenses, an element which by its nature retain the circumstances character, hence the name of a "circumstantial element"[1].

Considering the provisions of art. 229 of the Criminal Code it results that the legislator hassystematized circumstantial elements of aggravated theft in three groups, in a natural order according to the implicit gravity of the facts and implicitly the sanction of the provided criminal law.

We will proceed in examining each aggravated theft provided in the first group in the order provided in the text of art. 229 of the Criminal Code.

4.2.1. AggravatingCircumstantial Elements Provided in the First Group [art. 229, par. (1) of the Criminal Code]

a) Theft is committed by means of transport [art. 229 par. (1), letter a) of the Criminal Code]

By means of transport we understand any vehicle designed to transport persons, respectively, buses, trams, trolley buses, trains, airplanes, boats, metro, shuttles, etc.

In order to retain committing a theft in a means of transport it is necessary for movable asset that was the material subject of the offense to be stolen from a passenger who was in the means of transport in question.

For the existence of the crime in this way it isirrelevant whether the perpetrator is a passenger of the means of transport or a person serving means of transport in question (e.g. the head of the train) or a person who has entered into a station which stopped the transport means in order to conceal assets from different people in that means of transport. It is irrelevant whether the means of transport was

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in motion or parked (e.g. train that stops in a railway station) or when committing the theft in the means of transport there were more people or only the perpetrator and the victim.

Will not be able to hold the offense in this way when the means of transport in which the theft was committedwas in the garage, depot etc.

In the judicial practice it was established that "these provisions do not operate in the event of theft committed in taxis, as they are not considered means of public transport, designed primarily to carry a small number of people, including generally, there is a mutual trust relationship and also there are under increased surveillance of movable assets carried by the passengers" [3].

The act of committing a theft during the night is a *real circumstance* that reflects on all participants to the extent that they knew or foresaw it.

Under art. 231, par. (2) of the Criminal Code, the reconciliation of the parties removes criminal liability.

b) The theft was committed at night [art. 229, par. (1), letter b) of the Criminal Code]

According to the doctrine, the phrase "overnight" means "Night in the real sense of the moment where the darkness took place of the light until the moment the light will take the place of darkness. Twilight is not yet dark and it not part of the night; on the contrary, dawn is not light and it is still part of the night.

In determining the aggravated circumstance wewill not consider any astronomical criteria (sunset and sunrise and no formal criteria (working during the day and at night), but the reality in relation to the season, month and day, with the position of terrain of the locality, weather conditions from the date of the offense" [1].

We also appreciate that the term "overnight" has nothing to do with art. 159, par. (3) of the Criminal Procedure Code, that the house searches are carried out between 6^{00} and 20^{00}.

It is not necessary for the entire criminal activity to take place during the night for retaining the offense, being sufficient only a part of the criminal activity to be executed at night.

In all circumstances, the timing of theft is at the discretion of the court, which will consider all circumstances of committing every act, respectively calendar day, the season, the time when the offense was committed, weather conditions etc.

In this respect, by a Guidance Decision, former Supreme Court ruled that the crime of theft is aggravated according to art. 209, letter e) of the Criminal Code whenever it is determined that the offense was committed at night. The aggravated feature of this crime and therefore the aggravated criminal liability compared to the theft committed during the day drift by the will of the law, solely from the fact circumstance, that the offender stole at night so that the courts cannot modify the express provisions of the law, conditioning their implementation and proving other circumstances [4].

Also, in the judicial practice it was decided that for determining the state of "night"it must be taken into account the calendar time and date, the topographic position of the locality and the atmospheric conditions from the time of the offense (5), or the theft committed into enlightened housing, in a day in February, around 19^{00}, when it was dark outside, it is considered to be theft "overnight" in the sense of art. 208-209 par. (1), letter e) of the Criminal Code[6].

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There will not be met the constitutive elements of the offense under the conditions where the act is committed in daylight, under cover of darkness intervened temporarily, as a result of the means of transport entering a tunnel or temporary interruption of electricity. In this regard, the judicial practice was decided that if the theft was committed in daylight, under the cover of darkness which occurred temporarily (train running through the tunnel, turning lights off in a room in the basement, interruption to subway) it cannot be held the legal text provided by art. 209, par. (1), letter g) of the Criminal Code, the term "overnight" used in this text not allowing it (7).

In the doctrine it was expressed the opinion according to which this aggravated circumstance will not be "operant in the case when the theft was committed between spouses, between close relatives of a minor to aguardian, when they live together or any other person living with the person injured or hosted by it, the facts are the same both at night and day. The qualification is, on the contrary, applicable to spouses, close relatives, the minor towards the guardian when they are not living together" [1].

We note that the act of committing a theft during the night is a *real circumstance* that reflects on all the participants to the extent that they knew it or predicted it.

Under art. 231, par. (2)of theCriminal Code, the reconciliation of the parties removes the criminal liability.

c) The theft was committed by a person masked, disguised or transvestite [art. 229, par. (1), letter c) of the Criminal Code.]

Masked person is the person who covered his face with a mask so as not to be recognized by others in whose presence he is.

Disguised person is the person who dresses or changeshisfeatures so as not to be recognized by the people whom he contacts (he puts a wig, mustache and dressed in an outfit that would allow concealing his real identity).

The transvestite person is the person who arranges clothing, physical appearance, so as to conceal the gender, wanting to give the impression that is of the opposite sex (i.e. a woman disguised as a man or vice versa).

To being in the presence of an offense committed under the mentioned circumstances it is necessary for the mask, disguise or transvestite to be carried out so as to achieve the desired effect by the perpetrator (to deceive the victim, so as not to be recognized).

The theft committed by a person masked, disguised or transvestite is a real circumstance that reflects upon the participants to the extent that they knew or foresaw it.

Under the depositions of art. 231, par. (2)of theCriminal Code the reconciliation of the parties removes the criminal liability.

d) The theft was committed by breaking and entering, escalation or unlawful use of true or false keys [art. 229 par. (1), letter d) of the Criminal Code]

For the purposes of those provisions, the term "breaking and entering" means "violent removing of any objects or devices that are interposed between the perpetrator and the good that is

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sought to be evaded (e.g.tearing, breaking, removing devices that are capable of ensuring the security of the objectives regarded by perpetrator)[8].

There is "breaking and entering""not only when the perpetrator breaks, for example, the window and door, tear the lock, the locking bar up, etc., but also in the case where, without damaging or breaking the lock or the locking device, so without degradation of the object, simply removing the object or locking device, e.g.get the door out of its hinges or remove aside the metal or wooden object that closes the window" [2].

Regarding the action of breaking a seal affixed legally followed by theft of assets inside the secured sealed area, in judicial practice there were two different interpretations.

In the first one it was considered that breaking the seal is a way of burglary, and consequently, the act followed by subsequent theft of goods within the space provided with the seal that meets the constitutive elements of the crime of aggravated theft in the examined manner.

A second opinion points out the fact that the action of breaking the seals legally applied is a stand-alone offense, which complemented with the action of theft of property, enter into a real competition with the offense of aggravated theft.

And we also appreciate that the latter view is correct, referring to the thefts of freight wagons running on railway, cases where they are provided with seals by the shipper and carrier and fasteningsystems. In these cases, the perpetrator that first breaks the seal, then proceeds to forcing and opening the door of the freight wagon, two actions followed by the theft of movable property of the wagon, committing offenses of breaking seals and theft, both in real contest [art. 229, par. (1), letter d), art. 260 of the Criminal Code, applying art. 38,par. (1) of the Criminal Code].

The doctrine held that "the same solution does not impose also in the case of breaking a seal affixed on electricity meters as, by special regulations in force on how to supply and use electricity, to these seals there were granted the feature of closure meter which means that theft of electricity by removing fillings that apply to the terminal ends of the electric meter is theft through burglary" [2].

In the judicial practice it was decided that "it cannot be held the existence of burglary if the perpetrator stole a stereo from a car which he unlocked by opening the contact wires (9), or if he appropriated an object from a vehicle by inserting the hand through the open window and in doing so he activated thedoor opener (10) or entered in the garage of which has acquired the property by removing the object endorsing the door" (11).

In the judicial practice it has proved that most of the intrusion results in the destruction or degradation of the device acted upon (lock, door, window, glass, etc.).

In the above conditions, and in the others of the same type, not to be retained also the offense of destruction, but only the crime of aggravated theft in the considered manner.

The*escalation* in the sense desired by the legislator means crossing an obstacle encountered by the perpetrator and separates it from movable property which he pursues to take. So escalation - a means of overcoming the obstacle - involves crossing a fence or wall, climbing the wall of a block to enter into the apartment through a balcony or window" [8].

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Also, "the escalation means any entry in homes, buildings or fences committed by going over walls, doors, roofing, grooves or other closed restrictions and any entry on windows, through stacks (chimneys), through the windows of the cellar or any other holes in the ground that are not intended to serve for entrance" (2).

In order to retain this way of committing a crime, "it is enough to get into the closed places thus granting access to the author. For such enteringto the offender is required to make an effort, an effort by tensing his physical power or use his ability, and by no means simply removing a simple locking device or lock. Without any effort (the gate open, the wall torn down), there can be no theft by escalation. Also, there can be no escalation if, for example, the wall or fencing or is so low that it could be passed on foot (a small and rare bush)" [2].

In another opinion it is sustained that the escalation means "the action by which a person exceeds,on other way, other than the natural one, an obstacle by climbing and passing over it; it is withheld only if the escalation was used to get into a space in order to steal an asset, and not to leave the place of the offense; escalation will not be retained if overcoming the obstacledid not require the obstacle of not depositing an extra effort" (12).

In judicial practice it was ruled that the defendant climbed the stairs located on pylons of high voltage and removed the aluminum conductors supported by them. In this case, the act cannot be held as an offense by escalating because in such a case it is the normal way in which the defendant can get to the asset whose theft was intended (13).

By *lying keys*we understand"not only imitating key, counterfeited, altered, but any tool that is not intended by the owner or instead opening regularly of the lock (e.g. hook, skeleton key); or by the will of the law or by force of the circumstances (was lost), he no longer had such treatment or no longer uses in this purpose, but even the real key that the defendant has purchased" (2).

In another opinion it is appreciated that by *lying keys* means false keys, counterfeit, unauthorized multiplication or any device that can be used to operate on a closing mechanism without destroying it, damaging or bring in a state of disuse (for example, lock pick, cleft palate); it is necessary the use of the actual lying key to commit theft or an attempt thereto" (12).

The real key in the sense of criminal law is the key thatentitled person uses frequently to enter in a space, a place which it uses under the law.

The real key may come into the possession of the perpetrator, "through a circumstance that does not confer him the right to use it, namely: either by cheating or stealing it, whether he found it, whether detained it unfairly or received it from the owner for storage times, or knowing where it is kept, take it, uses it, then putting it in the same place, but it was used by him for committing theft" (2).

Using a real key means unlawful use of the key that opens the locking mechanism that allows entering into a space, place, area etc.

In the judicial practice it was decided that the theft was committed by unlawful use of a real key or a lying key, in the case where the owner, using a real key, enters the rented house and takes a telephone and a fax machine belonging to the tenant (14); or whether, in order to enter into the

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apartment of the injured person, the author of the theft used the key as he was entrusted to take some things from there (15).

In another case it was decided that the lying key does not necessarily mean a key similar to true one, as the legislator intended to punish harshly the theft committed by using a lying key, taking into consideration not the skill of the offender to manufacture the untrue key or its similarity with the real key, but the fact that he violated the lock, designed to ensure a greater protection for the locked assets; as rudimentary as the key was used, the aggravation exists. Therefore, if for committing theft, the perpetrator opened a lock using a bent wire there are applicable the provisions relating to theft by using false keys [16].

Burglary, escalation or unlawful use of a real or false key is a *real circumstance* and it reflects on all participants to the extent that they knew or foresaw it.

Under art. 231, par. (2) Criminal Code, the reconciliation of the parties removes the criminal liability.

e) Theft committed by shutting down the alarm or surveillance system [art. 229, par. (1), letter e)]

The legislator of the new Criminal Code introduced this circumstantial aggravating element of the committed theft in these circumstances, motivated by the conditions imposed by the new regulations on insuring property with security systems, something which causes some people to resort to annihilate them in order to achieve the purpose of stealing movable assets.

We do not insist on examining the current laws obliging some legal or physical entities to install security and alarm systems, considering that it requires only an indication of the concerned legislative act, i.e. Law no. 333/2003 on the protection of objectives, goods, values and persons (17).

In order to retain the offense in this way it is necessary to determine that the location of the property that was stolen (or there was an attempt) is secured with an alarm or surveillance system still in operation, and this system was deactivated, the aim being of not being able to identify the perpetrator.

If the perpetrator deactivates the alarm or surveillance system (e.g. by interruption of electricity), but the system does not work, even if the perpetrator did not know this, the act cannot be integrated in article 229, par. (1), letter e) of the Criminal Code.

For the existence of the crime it shows no relevance to the methods used by the perpetrator which led to disabling the alarm system or surveillance or interruptions of electricity, removing the camera or alarm system, etc. coverage of the camcorder, it is important that at the time of the offense it does not operate at normal parameters.

It is not necessary to be out of function totally, the offense existing given that there is partial or temporal disconnection in its operation, respectively only part of filming inside the premises (not entirely) or shooting only for a certain period of time.

Under art. 231, par. (2)of theCriminal Code, the reconciliation of the parties removes criminal liability.

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Conclusion

As highlighted in this paper, the way of regulating the crime of theft in the new Criminal Code has many distinguishing features compared to the old law.

A first element of differentiation that we point out is a more accurate and logical systematization of the circumstantial aggravating elements, which, in purely didactic purpose, we have divided them into three groups.

In this paper we showed only the first group, provided in article 229, par. (1) of the Criminal Code.

Other elements of differentiation relate to the minimum and maximum punishment, which in the new law are lower.

Highlighting them has a major importance from the perspective of applying the more favorable criminal law enforcement, which in many cases it will be the new law.

As one general conclusion we appreciate that the new regulation is superior to the previous one, responding in an appropriate manner the criminal policy of the Romanian state.

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[15) Bucharest Court, Section II Criminal, Decision no. 671/1981 in R3, p. 114, apudIliePascu, in George Antoniu, TudorelToader (coord.), *op. cit.*, (vol. III, 2015), p. 338.
[16] Supreme Court Criminal Division, Decision no. 3229/1979, in the ECR 1969-1975, p. 182, apudMihailUdroiu, *op. cit.*, pp. 206-207;
[17] Republished in the Official Monitor of Romania, Part I, no. 189 of 18 March 2014.