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The Continued Form of Some Crimes Against Property. Theoretical and Practical Aspects Through the New Criminal Code

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Abstract: In the present study I undertake an analysis of legal regulations and solutions delivered by the courts for crimes against property, who were committed in a continued form. The starting point in developing the study was the definition of the continued offense, contained in the Criminal Code in force and to which some changes have been made in the new Criminal Code, and the opinions existing in the criminal literature regarding this concept. Using case study, I have analyzed the solutions delivered by the courts of different levels and I found out that there were given different solutions to situations alike because of the lack of one important item from the definition of the continued offense, item that has been introduced in the new Criminal Code. This paper is of interest both for theorists and for practitioners in criminal law because it is a useful tool in the analysis of the regulations contained in the new Criminal Code relative to the continued offense.

Keywords: repeated acts; offences in contest; passive subject

1. Introduction

The new Criminal Code contains several provisions some of which represent a novelty, such as defining the crime committed by omission, according to Art. 17, while others are designed to improve the way in which institutions established in the Romanian criminal law are regulated in the law in question. Illustrative in this respect is the definition of the continued offense, provided in Art. 35. Paragraph (1) of the new Criminal Code.

In the existing Criminal Code it is found the definition of the continued offense in Art. 41 paragraph (1), but based on this definition the courts of various degrees have offered distinct solutions to similar situations because of currently missing from the definition of a very important element whose presence would clarify the situation.

Thus, the legislator of the new Criminal Code took into account of the issues raised over time in theory and in legal practice and completed the definition of the continued offense by adding a provision relative to the uniqueness of the passive subject.

2. The Analysis of the Continued Form of Some Offenses Against Property

2.1. The Definition of the Continued Offense

The continued offense, along with the complex offense, the progressive offense and the offense committed by habit is a form of the legal unit of crime. As stipulated in Art. 41 para. (1) of the Criminal Code in force “in the case of the continued offense and of the complex offense we can not talk about the existence of crime plurality”.

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Under paragraph. (2) of Art. 41 of the Criminal Code in force, the offense is continued when a person commits, at different time intervals, but having the same criminal resolution, acts or omissions which present individually the content of the same offense”.

2.2. Conditions for the Existence of the Continued Offense

Therefore, out of the definition that the legislator has given in the Criminal Code in force, we draw the conditions that have to be met in order to be in the presence of the continued offense.

Thus the first condition is that of the unit of active subject, in the sense that the acts must be committed by the same person. The unity of the active subject is not equivalent to its uniqueness. I say this because two or more people together can also commit a crime in a continued form as co-authors.¹ An example would be stealing repeatedly by three persons with the same criminal resolution, at different time intervals, a quantity of grain from a storage of a company.

A second condition derived from the definition given by the legislator in the Criminal Code in force is relative to the fact that the acts that compose the continued offense must be committed at different time intervals. The legislator did not specify exactly how spaced in time these intervals should be. But if the acts that are committed are too close to each other from the time interval point of view, the offense will not be considered to be a continued one because in this situation all the acts will be part of a single offense. So, for example, this is the case of somebody stealing several goods having the same owner in the same circumstances.² On the other hand, if the intervals between the acts are too apart in time, it is again questionable the continued form of the offense because it would be difficult to prove that there has been kept the same criminal resolution.

A third condition to be satisfied for the existence of the continued crime is the unity of criminal resolution.

The last condition, according to the Criminal Code in force, is relative to the idea that acts or omissions committed individually have the content of the same offense. Given these circumstances, it is interesting to see how the provisions of the Criminal Code in force have been translated into legal practice by applying them to various specific causes.

It is a very important element missing from the definition of the continued offense, as it is provided in the Criminal Code in force, which has generated over time several situations in which there have been given different solutions to similar cases. This element refers to the uniqueness of the passive subject, meaning that there will be a continued offense of theft, for instance, if the act committed by a person at different time intervals, with the same criminal resolution, will affect the property of one person, be it physical or legal. Otherwise, the impairment of more people by harming each and one of their property by different actions by the same person, the same active subject, means that the offenses will be withheld in contest. Thus there will no longer be a legal unit of the offense but instead we will talk about a multitude of crimes.

¹ The defendants A.C. and C.M. have been charged with the commission of the crime of aggravated theft in a continued form because on the night of July 20, 1995, based on collusion and having a single criminal resolution they stole various goods from a car by burglary and tried to acquire goods from four other cars. Supreme Court of Justice., Criminal Division, decision no. 403 of February 19, 1997, „Problems of Law” in the Supreme Court jurisprudence in criminal matters, 1990-2000 (cited in Dobrinou, V. & Conea, N. & Romișan, C.P. & Dobrinou, M., 2003).

² The defendant C.F. was charged because by night, along with others, entered by burglary inside a company from where he has stolen car repair tools, belonging to an injured party, which he carried to the car left down the road and then he returned to the room, where they took a battery belonging to another injured party. In this case, even if there are two injured parties, the conditions of real competition offenses were not covered according with Art. 33 point a) of the Criminal Code, nor the conditions of the continued offense under art. 41 para. (2) of the Criminal Code into force because the defendant has not repeated the acts based on separate criminal resolution, and on the other hand, the two concrete activities of stolen of goods took place in the same circumstances of place and time, in unbroken succession imposed by the way the execution of the offense as a whole was intended. Court of Appeal Craiova, Crim. Dec. no. 1232 of November 8, 2001, The Law Journal no. 9/2002 (cited in Dobrinou, V. & Conea, N. & Romișan, C.P. & Dobrinou, M., 2003).

The legal situation was remedied in the new Criminal Code, represented by Law no. 286/2009¹, as in Art. 35 para. (1) it is provided that “the offense is continued when a person commits at different time intervals, but having the same resolution and against the same passive subject, acts or omissions which have individually the content of the same offense”.

2.3. Aspects of Legal Practice. Assumptions

Analyzing the relevant case law in this area, I have identified several specific assumptions to which the provisions relating to the continued offense were applied or not.

A first hypothesis is that of the court who withheld the commission of a single crime, in a continued form, although the acts have affected the property of two or more persons. In a case there were established the following facts: in a period of ten months, repeatedly and having the same criminal resolution the defendant N.V. committed numerous thefts from individuals and companies, the total value of stolen goods being quite high. From the evidence, the court withheld the commission of one theft in a continued form as provided in the Art. 41 para. (2) of the Criminal Code in force, although there were several injured parties, given the way of action and the perseverance of the defendant in committing the acts and the short time between his actions, the means used, but also the facts that all his actions were committed at night, aspects that characterize the unique criminal resolution.²

In another case the court noted the commission of a single theft, in repeated acts, in the responsibility of a defendant who, for three years, entered into 57 residences by burglary, especially at night and by using drills and levers that power locks, and stole high-value goods. Although the court stated that every act of theft out of the home meets the elements of the offense of theft, yet it was in favor of the commission of one offense in a continued form in the detriment of the offenses withheld in contest, with the argument of the defendant’s unique criminal resolution inferred from the evidence contained in the file regarding the means of burglary used to commit the acts during the night and that the goods were valued afterwards by a company established for this purpose.³

Similarly, the court held in the charge of the defendant N.G. the offense of theft as it is referred to in Art. 208 para. (1) of the Criminal Code in force, having a continued form, because, being on vacation on the beach, he removed in several different days from tents placed in a camping a number of items belonging to persons occupying these tents.⁴

By the Decision no. 541 of February 5, 2003,⁵ the High Court of Cassation and Justice, Criminal Division, upheld the appeal and sentenced the defendant P.E. for committing the offense of aggravated theft, provided in the Art. 208 para. (1) related to Art. 209 para. (1) letter e) of the Criminal Code in force - act committed in public - because in the period May 4 to 15, 2001 he stole from the communal grazing two cattle and a horse belonging to injured parties.

A second hypothesis is that of the court who withheld offenses in contest instead of one criminal offense in a continued form, having in mind that there were several passive subjects.

An example is the decision no. 1477/1983 of the Criminal Section of the Supreme Court in which the court sentenced the defendant A.I. for committing 17 offenses of aggravated theft withheld in contest, facts provided by Art. 208 para. (1) related to Art. 209 of the Criminal Code in force, with the application of Art. 33 point a) and Art. 34 of the Criminal Code, because the defendant has stolen from various people in shops or in means of transportation wallets and identification papers and various

¹ Published in the Official Gazette of Romania no. 510 of July 24, 2009.

² Supreme Court of Justice, Criminal Division, Decision no. 2403 of May, 30, 2000, „Problems of Law” in the Supreme Court jurisprudence in criminal matters, 1990-2000, (cited in Dobrinoiu et al., 2003).

³ Supreme Court of Justice, Criminal Division, Decision no. 2305 of June, 8, 1999, „Problems of Law” in the Supreme Court jurisprudence in criminal matters, 1990-2000, (cited in Dobrinoiu et al., 2003).

⁴ Constanta County Tribunal, criminal decision no. 100/1991, The Law Journal no. 7-8/1991 (cited in Dobrinoiu et al., 2003).

⁵ (Supreme Court of Justice, 2003).

other goods carried by persons. The court decision, made at the expense of retaining a single crime of theft committed in repeated acts, was based on the evidence in question regarding the fact that the theft was committed with the harm of different people's property in different places and at considerable intervals of time, taking advantage of every given favorable condition, without having from the beginning the concrete representation of the facts that he performed¹, situation that brings us to mind the lack of a single criminal resolution.

A third hypothesis is that of the court who withheld the commission of a single crime, in a continued form, with a single passive subject, respectively a single property affected.

The defendants I.N. and V.M. were prosecuted for the commission of the crime of breaking the seals in competition with the aggravated theft, in the continued form, as they, knowing that in the railway wagons are certain goods, went several times during the night at those wagons and, by removing the seals, stole things. The single criminal resolution characterizing the continued offense according to Art. 41 para. (2) of the Criminal Code was proven in this case by the evidence relative to the large number of thefts committed by using similar methods and prior knowledge of the material object of the facts.²

We believe that the court may withheld in contest two or more crimes on the assumption that, although we have one passive subject, so a single property affected, the actions of the active subject, repeated at different intervals of time, have individually the content of the same offense, but we do not have a single criminal resolution.

By the Decision no. 2745 of May 20, 2004,³ the High Court of Cassation and Justice, Criminal Division, held that the action of the defendant who, having the same criminal resolution, instigated the theft of petroleum products and then he himself stole such products, meets the elements of the offense of aggravated theft in the continued form, the quality of instigator of the crime of theft being absorbed by that of author.

A fourth hypothesis is that of the court who withheld the commission of two crimes in contest and not of a crime in a continued form, because there were two passive subjects.

By the Decision no. 3389 of June 18, 2004,⁴ the High Court of Cassation and Justice, Criminal Division, addressing to the prosecutor's appeal, held that the violent theft of goods from two injured parties, even if all assets acquired belonged to one of them, in different contexts, at a different interval of time, in different ways and in different places, are two offenses of robbery, withheld in real contest, not a crime of robbery in a continued form because the perpetrator has acted on the basis of different resolutions, renewed every time when the opportunity to commit a new criminal offense arose, not having an overall representation of the future criminal activity from the beginning.

3. Conclusions

A unified point of view of the High Court of Cassation and Justice has been outlined in the sense of believing that there have been withheld more crimes in contest whenever the assets that have been affected belonged to more people and there has been withheld a single crime in continued form whenever the acts or omissions were repeated at different intervals of time and having the same criminal resolution, acts or omissions which represent individually the content of the same offense and being only one passive subject.

¹ Decision no. 1477/1983 of the Criminal Section of the Supreme Court ((cited in Dobrinoiu et al., 2003).

² Supreme Court, Criminal Division, decision no. 447/1981, *The Romanian Journal of Law* no. 3/1982 (cited in Dobrinoiu et al., 2003).

³ (Supreme Court of Justice, 2004).

⁴ (Supreme Court of Justice, 2004).

The entry into force of the new Criminal Code will lead to proper legal classification of facts that are repeated whether as a single offense committed in a continued form, whether as two or more offenses withheld in contest.

This is also important from another perspective, namely through the sanction to be applied.

According with Art. 42 of the Criminal Code in force, the continued offense is punishable with the sanction prescribed by law for the offense, to which a requested bonus can be added, in accordance with Art. 34 (our note - the main sentence in case of crimes withheld in contest committed by individuals) or, where applicable, Art. 401 para. (1) (our note - the penalty in case of the withheld of offenses in contest that have been committed by a legal person) “.

According with Art. 36 of the new Criminal Code “the continued offense is punishable with the penalty provided by the law for the offense that has been committed, whose maximum may be increased by up to three years if imprisonment, respectively with more than one third if the fine “.

The main penalty in case of offenses withheld in contest when there were established only penalties of imprisonment is represented, according to Art. 39 para. (1) letter b) of the new Criminal Code, by the worst punishment, plus a bonus of one third of all other penalties set”. When there have been settled only fines, according to Art. 39 para. (1) letter c) of the new Criminal Code, the heaviest penalty will be applied, plus a bonus of one third of all other penalties set “.

Comparing the new Criminal Code provisions relating to the punishment applicable to the continued offense in the case of concurrent offenses, it is easy to see that the offenses withheld in contest are more severely punished, given the greater social danger they pose to society. So it is very important to apply a punishment proportionate to the offense committed, thus respecting the principle of criminal law, ie the principle of individualization of criminal sanctions so that they fulfill their purpose to prevent commission of new crimes.¹

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¹ The principle of individualization of criminal sanctions (Bulai & Bulai, 2007).