

New Arguments Related to Including the Crime of Violation of Domicile among Theft and Mugging

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Abstract: The doctrine has different points of view when it comes to discussing about violation of domicile as a form of grand theft committed by efracation or by using a genuine or a false key without consent or if we talk about more than one crime. The natural complexity of the grand theft comes when the crime has been committed in a house, and for this it is compulsory to enter the house to commit the crime. In this situation, the breaking in represents the material element of the theft, illicit or not. As a consequence, if the breaking in was illicit, the constitutive elements of the crime of violation of domicile have been met, and it will naturally be absorbed by the crime of theft.

Thus, it is considered¹ that in this situation we talk about several crimes because the crime of violation of domicile is a way through which the offender meets its target, that is, misappropriation of goods. Article 33, letter a), Criminal Code, stipulates clearly that “there is more than one crime even if one of the crimes was committed to help committing or hiding other crime”. It is also argued that the causality link between violation of domicile and theft is not necessary but circumstantial because efracation or using a key may be done to unlock a wardrobe, a safety box or a car, which is not a crime. To include violation of domicile in the crime of grand theft, this link has to be necessary and repeated in all the cases that come under incrimination.

Another opinion² which dominates the judicial practice and the criminal doctrine states that the crime of violation of domicile includes the crime of grand theft stipulated in article 209, par. 1, letter i), Criminal Code. They say it is about a natural absorption because the constitutive elements of the violation of domicile are implicitly included in the crime of grand theft committed by efracation, escalading or by using a genuine or a false key without consent.

The crime of grand theft may exist without the constitutive elements of violation of domicile, but this does not exclude the complex and natural character of the crime of grand theft (homicide, another complex crime may exist through the constitutive elements of battery, grievous bodily harm, which are absorbed when the final result has been reached, the death of the victim, or, the homicide may be committed directly, having all the characteristics of a simple crime).

In conclusion, the natural complexity of the grand theft comes when the crime has been committed in a house, and for this it is compulsory to enter the house to commit the crime. In this situation, the breaking in represents the material element of the theft, illicit or not. As a

¹ A. Boroi, *Criminal Law. Specific Aspects*, CH Beck P.H., 2008, p. 227; C. Mitrache, *Theft and Violation of Domicile*, in RDP no. 1/1995, p. 124; C. Butiuc, *Theft by efracation. Violation of Domicile*, RDP no. 1/1997, p. 46; Simona Cristea, *Theft by efracation and violation of domicile* in RD/1997, no. 4, p. 92; C. Duvac, *Violation of domicile and theft*, RDP no. 4/1998, p. 85.

² V. Papadopol, *Legal practice in criminal related matters at the Bucharest Appellate Court, 1998*, All Beck P.H., Bucharest, 1999, p. 140; Cristina Vladescu, *Theft and violation of domicile*, in RDP no. 4/1997, p. 88; C. Turianu, Fr. Garbaci, *Theft and violation of domicile*, Law no. 1/1997, p. 96; Simona Cristea, *Theft and violation of domicile*, RDP no. 2/1998; Constanta Appellate Court, dec. Pen. No. 136/1994 in RDP no. 1/1995, p. 133.

consequence, if the breaking in was illicit, the constitutive elements of the crime of violation of domicile have been met, and it will naturally be absorbed by the crime of theft.³

The same problems appeared in the case of committing a crime of mugging in a house or its whereabouts. The question was if the violation of domicile is absorbed by the mugging or if we are talking about more than one crime. Some argue⁴ that it is more than one crime between the mugging and the violation of domicile under article 33, letter a⁵ and invoking the impossibility of natural or legal absorption in this situation.⁶

It is also mentioned that it is hard to believe that the law maker has situated on the same level and gives the same legal treatment to the person who illicitly enters a house in comparison with what he accomplished by committing violation of domicile, which is associated with mugging in aggravated circumstances.⁷

The specialists that agree with this theory also underline the fact that although mugging is generally associated with violation of domicile, the theft stipulated in article 209, letter i, absorbs this crime, so that if the mugging is committed by tampering with the locks of the house, by escalating or by using a genuine or a false key without consent, the crime of violation of domicile will be absorbed by the crime of mugging.⁸

According to another opinion⁹, the crime of mugging includes violation of domicile because of the unity of resolution, which generates the complexity of the crime¹⁰, or the legal complexity.¹¹

In a more detailed opinion, if the offender breaks in the yard, which is surrounded by fence and is part of the victim's domicile, then breaks in the house and commits the mugging then he committed the crimes of violation of domicile and mugging because the place surrounded by the fence is part of the house or it whereabouts. In this situation the offender committed two distinct crimes. If the offender enters only the house and committed the mugging, then this is the only crime he will be prosecuted for.¹²

In the doctrine the dominant opinion about the criteria used to delimit the acts of preparation from the acts of execution is based on the formal criteria as accepted in unanimity.¹³ The formal theories propose as a differentiating criterion the formal identity between the committed act and the action as the material element of a crime. If the act corresponds to the *verbum regens* indicated action, then it is an act of execution. If not, it is only a preparation act. The act of

³ A. Boroï, V. Radu-Sultanescu, N. Neagu, *Criminal Law, cases for the use of students*, All Beck, Bucharest, 2002, p. 183-185.

⁴ C. Niculanu, *The crime of mugging committed in a house or its whereabouts and the violation of domicile*, in Law Magazine no. 2/1998, p. 60-63; I.P. Cernat, *About the crime of mugging committed in a house or its whereabouts and violation of domicile*, Law Magazine no. 4/1999, p. 96-97; Cluj Appellate Court, dec. no. 18/January 17 1998; Court of Bucharest, sent. No. 260/November 11, 1997, in Textbook on legal practice, 1994-1997, All Beck, p. 154-155.

⁵ C. Niculeanu, p. 62.

⁶ I.P. Cernat, p. 97.

⁷ The High Court of Casation and Justice, Criminal Department, dec. No. 2554/2006 in The Bulletin of Jurisprudence, 2006, C.H Beck P.H, p. 652.

⁸ C. Niculeanu, p. 63.

⁹ D. Ciuncan, *About the crime of mugging committed in a house or its whereabouts and violation of domicile*, Law Magazine no. 4/1999, p. 95-96; I. Mirea, *The crime of mugging committed in a house or its whereabouts*, Law, no. 8/1999; Bacau Appellate Court, dec. no. 351/November 24/1998; Bacau Appellate Court, dec. no. 219/August 11/1998.

¹⁰ D. Ciuncan, p. 95-96.

¹¹ The High Court of Casation and Justice, Criminal Department, dec. No. 3146/2006 in The Bulletin of Jurisprudence, 2006, C.H Beck P.H, p. 650.

¹² I. Mitrea, p. 104-105.

¹³ V. Dongoroz, *Criminal Law*, Tempus Society, Bucharest, 2000, p. 215-216; G. Antoniu, *The Attempt*, Tempus Society, Bucharest, 1996, p. 71; A. Boroï, p. 228.

execution is the act of committing the unlawful action, while the preparation act only prepares physically or morally the other one.¹⁴

Analyzing the theft through the formal criterion, one can conclude that we deal with acts of committing this crime from the moment it began, by taking the item from the owner.¹⁵ Thus, in the case of a simple theft committed in a house, the breaking in represents the preparation of the theft. In this situation we can bring into discussion the crime of violation of domicile as a means to accomplish the theft (article 33, letter a, Criminal Code).

The situation is completely different when it comes to theft under article 209, letter i). The law maker stipulates that the crime of grand theft is committed when we have efracation, escalading or using a genuine or a false key without consent. Thus, the law maker considers that the material element of the crime begins with the efracation, escalading or using the key. If the efracation, escalading or the use of a key represents the means to enter a house, then the activity of illegal entering is considered an act of execution. In the situation of illegal breaking into a house without using the means mentioned above (for instance the door which was opened), followed by the tampering of the locks from a safety deposit situated in the house, the violation of domicile is not absorbed in the crime of grand larceny.

Using the same rationale, the acts of execution in the case of mugging begin either while taking the item followed by the acts of violence, or during the violent or threatening action prior to the theft. In the aggravated form of mugging the acts of execution begin, according to the lawmaker, when the offender enters the building and include the activity of breaking in.

If the breaking in is illicit, the crime of mugging with aggravated circumstances will be a complex crime, including the crime of violation of domicile. The surrounded place which belongs to a house or its whereabouts is not included in the content of the crime of mugging under par. 2(1) letter c), so that in the situation of illegal entering the yard of a person with the purpose to commit a crime we talk about two crimes: violation of domicile and mugging.

We are of the opinion that the interpretation of the execution acts in the crimes of theft and mugging, using the formal criterion can explain why the judicial practice and the doctrine choose to include the violation of domicile or to consider a unit of crimes in these situations.

We consider the grand theft under letter i) and mugging committed under par. 2(1) letter c), are considered by the law maker complex crimes, but the complexity of the facts is not always accomplished. At the same time, these aggravated circumstances are taken into consideration only in the case of unlawful breaking in.

If there is an unbalanced situation generated by applying the same legal treatment to the one who illegally enters a house and to the one who illicitly commits this act, we consider that this issue can be solved through the judicial individuality of the punishment. The special circumstances of punishment by prison in the case of grand theft and mugging with aggravated circumstances are permissive, sine we cannot justify the transformation of the legal unit of crimes into crimes related to unequal legal treatment.

¹⁴ Al. Boroi, p. 229.

¹⁵ M. Zolyneak, *Criminal Law. General Aspects*, 2nd vol. Iasi, 1992, p. 290; G. Mateut, *Theoretical and practical synthesis on the constitutive element of theft*, Law no. 12/1996, p. 98.